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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of :  
 : Docket No. A-PAPO-00  
U.S. DEPARTMENT OF ENERGY :  
 : ASLBP  
No.08-861-01-PAPO-BD01 FINAL VERSION  
(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

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

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9:00 a.m.

16

>> CHAIRMAN MOORE: Please be seated.

17

Good morning. I'm Judge Thomas Moore. On my right is

18

Judge Paul Bollwerk; on my left is Judge Paul Ryerson.

19

The Board was saddened to learn of the death of

20

Joseph Egan, and we would like to express our

21

condolences to Mr. Malsch and Mr. Fitzpatrick over the

22

loss of their partner. And we greatly appreciate you

23

being here today.

24

>> MR. FITZPATRICK: Thank you very much.

25

>> CHAIRMAN MOORE: At this time I ask that

1 all participants identify themselves for the record,  
2 beginning with the NRC staff and proceeding around the  
3 well, and then at the end those participating by video  
4 conference from Rockville, if they would identify  
5 themselves, please.

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

10 >> MR. BINZER: Chris Binzer with the Nuclear  
11 Energy Institute.

12 >> MR. BAUSER: Mike Bauser, Nuclear Energy  
13 Institute.

14 >> CHAIRMAN MOORE: Probably better if you  
15 don't stand up -- excuse me. Excuse me. These  
16 microphones need to be activated by pressing the button  
17 on the base of the microphone. Please speak directly  
18 into the microphone, and then when you're through  
19 speaking, if you would turn it off so it doesn't stay  
20 live.

21 Please continue.

22 >> MR. SILVERMAN: I'm Don Silverman  
23 representing the Department of Energy.

24 >> MR. SHEBELSKIE: Michael Shebelskie with  
25 Hunton & Williams, also representing the Department of

1 Energy.

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

4 >> MR. BELL: Kevin Bell with the California  
5 Energy Commission.

6 >> MR. SULLIVAN: Tim Sullivan, California  
7 Attorney General's Office.

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

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

14 >> MR. MURPHY: Malachy Murphy from Nye  
15 County, and also Jeffrey VanNiel representing Nye  
16 County.

17 >> CHAIRMAN MOORE: Thank you. The Advisory  
18 Pre-License Application Presiding Officer Board has  
19 convened this conference this morning to address, among  
20 other things -- I'm sorry.

21 Would those participating from Rockville please  
22 identify yourself.

23 >> MS. CURRAN: This is Diane Curran  
24 representing Eureka County.

25 >> MR. NEUMAN: And this is Barry Neuman on

1 behalf of Lincoln County.

2 >> CHAIRMAN MOORE: Thank you. We've  
3 convened this conference this morning to, among other  
4 things, address the issues that were identified in our  
5 May 2nd order and those in our earlier order of  
6 April 4th.

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

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

22 We had planned to proceed by working through the  
23 questions in our May 2nd order, and then as we worked  
24 through those address questions we have concerning your  
25 earlier filings. In that way we thought we would be



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

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

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

23 Again, I would remind you, please, to speak into  
24 the microphones, first activating it at the base, and  
25 then turn it off so that it doesn't remain live so that

1 we don't hear what we're not supposed to hear.

2 And is there a spokesman from the conference that  
3 you had that would like to tell us what you might have  
4 agreed on or what areas we might want to emphasize  
5 today?

6 >> MR. LIST: Thank you, Mr. Chairman, Judge.  
7 Robert List on behalf of the four counties, as  
8 mentioned earlier.

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

14 We had Lincoln, we had the NRC staff, Nye County,  
15 DOE, the State, NEI, and Clark County all on the call.  
16 And the matters that we addressed were those which were  
17 directed to all of the participants. We did not  
18 address, for example, in your memorandum, the items  
19 under Paragraph A. We started, in fact, with B6, which  
20 was the first one that was addressed to everyone.

21 On many of them we reached general concurrence; on  
22 some, rather specific concurrence. There are a number  
23 of the parties that are -- potential parties who will  
24 have comments and qualifications concerning their  
25 concurrence. But I think that we, at least from a

1 50,000-foot elevation, reached a meeting of the minds  
2 in several respects. And it was a -- I would report it  
3 was a very cordial and, we think, productive meeting.  
4 And we'll present our views as you wish here today.

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

11 >> MR. LIST: That would be fine. That is  
12 how we -- I'll be prepared to give a general comment as  
13 to our observations or -- or agreement on each of the  
14 items, and then others, of course, will give their  
15 specific views or dissent, if it were, but -- if that's  
16 the case.

17 >> CHAIRMAN MOORE: All right. Then let's  
18 begin this morning starting with our questions for DOE  
19 from the May 2nd order. We'll take them in order.  
20 Question A1: What is DOE's current best good faith  
21 estimate on the date on which DOE expects to file its  
22 license application?

23 >> MR. SILVERMAN: Good morning, Your Honor.  
24 Don Silverman again.

25 Our best estimate for the submittal of the license

1 application is early June. It could be as early as the  
2 first week in June. That does depend upon certain  
3 logistical issues. We do not have a firm date, but we  
4 anticipate within the first half of June. And that  
5 would include the license application as well as the  
6 2002 Final EIS.

7 >> JUDGE BOLLWERK: I take it the expectation  
8 is -- there's a meeting set for June 19th in  
9 Rockville -- that you're going to make a presentation  
10 to the NRC staff? Is that -- so, in theory, the  
11 application will be out before then, correct?

12 >> MR. SILVERMAN: I'm not aware of the  
13 specifics of that particular meeting. But I do know  
14 that there is no firm date at this point for the day  
15 the application will be submitted to the NRC. However,  
16 the expectation is within the first couple of weeks of  
17 June we hope and expect.

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

22 >> MR. SILVERMAN: Yeah.

23 >> JUDGE BOLLWERK: Okay, thank you.

24 >> CHAIRMAN MOORE: In what form -- for  
25 example, three-ring notebooks -- will DOE file paper

1 copies of the application?

2 >> MR. SILVERMAN: Three-ring binders, Your  
3 Honor.

4 >> CHAIRMAN MOORE: So, they will be able to  
5 be supplemented? Is that the -- the goal with this?

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

8 >> CHAIRMAN MOORE: What kind of optical  
9 storage media will DOE use for filing the application,  
10 including any nonpublic portions of the application?

11 >> MR. SILVERMAN: We will be submitting it  
12 in DVD format. It's a searchable, fully text  
13 searchable format.

14 And that will include both the public and nonpublic  
15 versions. Of course, the nonpublic version will have  
16 the OUO information, appendix, and the public version  
17 will have that excluded, but DVD will be the format.

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

1 matters.

2 And that will all be done, I assume?

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

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

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

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

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

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

24 >> MR. SILVERMAN: One DVD.

25 >> CHAIRMAN MOORE: A5: Will DOE's optical

1 storage media contain hyperlinks to such application  
2 reference material, and if so, how will they function.

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

7 >> CHAIRMAN MOORE: As I understand it, the  
8 application is going to be thousands of pages long, if  
9 it were printed.

10 >> MR. SILVERMAN: Yes.

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

13 >> MR. SILVERMAN: Yes.

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

16 >> MR. SILVERMAN: No. My understanding, and  
17 I -- is that the DVD is pretty user-friendly; that  
18 there are categories -- and I will maybe have to verify  
19 this with one of our technical experts, who is behind  
20 me here. But it is fully word searchable, that -- let  
21 me just verify that I think that each of the documents  
22 will be independent -- each of these references will be  
23 independently identified in the DVD. Bear with me one  
24 second.

25 In addition to that, we've expressed a

1 willingness, even though the references are on the LSN  
2 now, among all the other LSN references -- we've  
3 expressed a willingness to provide a separate list to  
4 the prospective parties of the approximately 200  
5 references with the accession number for each one, so  
6 they'll know exactly which documents are those  
7 references that we'll be submitting.

8 >> CHAIRMAN MOORE: There will be a table of  
9 contents?

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

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

16 >> MR. SILVERMAN: Let me check on that. May  
17 I take a moment?

18 >> CHAIRMAN MOORE: Okay.

19 >> MR. SILVERMAN: Thank you.

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

22 (Laughter)

23 >> MR. SILVERMAN: I couldn't begin to repeat  
24 it all, anyway, Your Honor. But my understanding is  
25 that you could -- first of all, the documents will be



1 on the DVD in the order that they're presented in the  
2 LA. They'll be numbered. And it should only take a  
3 few moments to get to any particular document that you  
4 want to get to. That's what our technical experts tell  
5 us.

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

8 >> MR. SILVERMAN: Yes.

9 >> CHAIRMAN MOORE: Okay. A6: In addition  
10 to the paper and optical storage media copies filed in  
11 accordance with 10 CFR Section 63.22, does DOE intend  
12 to provide the NRC staff with the application and/or  
13 reference materials or any portion thereof in any other  
14 format.

15 >> MR. SILVERMAN: We do not.

16 >> CHAIRMAN MOORE: Do you intend to generate  
17 the application or reference materials in another  
18 format for your own use?

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

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

24 >> MR. SILVERMAN: I believe they will be  
25 probably less user-friendly. They're things like a

1 FrameMaker file, which is like a Word file, a word  
2 processing system and a TIF format. These are just for  
3 internal purposes; for example, to accommodate the  
4 requirements of DOE's internal record-keeping systems  
5 and that sort of thing.

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

9 >> MR. SILVERMAN: It is my understanding  
10 that the formats that we're providing it in, the DVD in  
11 particular, is probably the best and easiest format for  
12 the prospective parties.

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

15 Question B1: Does the staff intend to place the  
16 DOE application in ADAMS?

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

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

21 >> MR. LENEHAN: Approximately one week, Your  
22 Honor.

23 >> CHAIRMAN MOORE: What is the staff's  
24 current best good faith estimate of how long it will  
25 take the staff to comply with the docketing

1 requirements of 10 CFR Section 2.101(e)?

2 >> MR. LENEHAN: Approximately 90 days.

3 >> CHAIRMAN MOORE: Now, (e) contains a great  
4 number -- I think seven or eight steps, and I know that  
5 one of those steps obviously is the application has to  
6 be reviewed for completeness, and whether you think  
7 that there's enough there to begin your technical  
8 review. But 101(e) deals with a lot of other steps.  
9 And that -- and you'll do all of those steps within 90  
10 days?

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

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

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

1 our very best effort to do it.

2 Again, the only thing we can really rely on is how  
3 long it has taken in other areas of publication, and  
4 that's been the 30- to 45-day range.

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

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

9 >> JUDGE BOLLWERK: And, of course, the  
10 Appendix D schedule doesn't kick off until the notice  
11 of hearing is issued?

12 >> MR. LENEHAN: Is published.

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

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

23 >> MR. LENEHAN: Your Honor, this is a  
24 two-part answer. The staff's position on the adoption  
25 of the EIS will be known at the time of docketing. So,

1 it's not going to have any impact in that area.

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

9 >> JUDGE BOLLWERK: What impact does the 2009  
10 budget have?

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

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

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

22 >> CHAIRMAN MOORE: Question B6: If DOE  
23 supplements the license application as described in 10  
24 CFR Section 2.101, what impact would this have on the  
25 filing of contentions?

1           And that is a question that we'd like to hear all  
2 of your answers on. Mr. List, do you have a consensus  
3 view?

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

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

12           >> MR. SILVERMAN: Your Honor, we don't think  
13 there should be or is any impact associated with any  
14 such amendment or supplement in terms of the filing of  
15 the contentions.

16           >> CHAIRMAN MOORE: One of your filings  
17 indicated that your present intention was not to have  
18 any supplements filed in the period from filing to  
19 docketing. Is that still your present intention?

20           >> MR. SILVERMAN: Absolutely.

21           >> CHAIRMAN MOORE: But if you were to file  
22 supplements -- and it's frankly because we're all human  
23 and someone will discover that something was in there  
24 that shouldn't have been or something that should have  
25 been wasn't included and you have to make a supplement,

1 what impact is that going to have or will this fall  
2 into the realm of non-timely contentions at that point?

3 >> MR. SILVERMAN: We don't think it should  
4 have any or will have any impact on the time for the  
5 filing of contentions since it is triggered by the  
6 notice of hearing, which comes after the docketing.  
7 And let me briefly explain.

8 We have no present intention of amending or  
9 supplementing, as I've indicated. If as a result of  
10 the review of the application for completeness the NRC  
11 staff identifies a problem that does require some sort  
12 of an amendment or supplementation before it is  
13 docketed, DOE would have to go through the process of  
14 providing that additional information.

15 That will probably take some time. That will  
16 likely -- very likely extend the time that the staff  
17 will have before they make the final decision on  
18 docketing.

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

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

23 >> MR. MALSCH: Well, technically under the  
24 rules, the time for filing contentions is triggered by  
25 the notice of hearing. And it's set in the rules.

1           As you know, there's a motion pending before the  
2 Commission that we filed to set a more reasonable time  
3 scale for the filing of contentions, and there have  
4 been various responses to that, including one in which  
5 the time for filing contentions might depend upon the  
6 nature of amendments made to the application during the  
7 docket review.

8           So, it's a little hard to tell. DOE is correct.  
9 It would be normal practice for the staff to ask  
10 questions pointing out possible inadequacies in a  
11 tendered application. And that would result in  
12 amendments to the tendered application, which could be  
13 quite substantial. But it's difficult to predict now  
14 what those might be.

15                   >> CHAIRMAN MOORE: NRC staff?

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

19                   >> CHAIRMAN MOORE: All right. NEI?

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

21                   >> CHAIRMAN MOORE: Nye County?

22                   >> MR. MURPHY: We agree that it's unlikely  
23 to have any substantial impact on filing contentions,  
24 Your Honor. But we need to preserve our -- what we  
25 want is for any significant, substantive amendment or



1 supplementation of the LA by DOE, that Nye County and  
2 the rest of the parties would not lose any of the time  
3 allotted to us under the rules for filing contentions.

4 For example -- and this may be an extreme  
5 hypothetical, but what would happen if, pursuant to a  
6 request for additional information from the staff, DOE  
7 files a supplementation to the LA that would -- that to  
8 us would appear to be significant on the 85th day?

9 And the NRC staff accepts it and docketing it. We  
10 then have 35 days to respond to that rather than the 90  
11 days or 120 days we would have had since the filing of  
12 the LA.

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

21 >> CHAIRMAN MOORE: I would think that any  
22 request for additional information will come during  
23 substantive review, not during docketing review. And  
24 so the problem's going to be with -- if the staff were  
25 to perceive the application in some way inadequate, to

1 allow them to initiate technical review.

2 So, I think those are probably apples and oranges.  
3 Clark County, do you have anything to add?

4 >> MS. VIBERT: I have nothing to add, Your  
5 Honor.

6 >> CHAIRMAN MOORE: Mr. List?

7 >> MR. LIST: Nothing further to add.  
8 Nothing further to add from our perspective.

9 >> CHAIRMAN MOORE: California Department of  
10 Justice, anything to add on this?

11 >> MR. SULLIVAN: Nothing else.

12 >> CHAIRMAN MOORE: Back in Rockville, Eureka  
13 County?

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

18 >> CHAIRMAN MOORE: And Lincoln County?

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

23 >> CHAIRMAN MOORE: All right. Let's move  
24 on, then, to more substantive matters where we're  
25 really going to get into why we're here today.

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

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

8 >> MR. LIST: If I may?

9 >> CHAIRMAN MOORE: Yes, Mr. List.

10 >> MR. LIST: Your Honor, I think there was  
11 general agreement. And if I might lay a bit of  
12 groundwork for some of the questions that follow.

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

21 And we ultimately felt that one approach might be  
22 to have three adjudicatory boards and one sort of  
23 umbrella coordinating board that might be responsible  
24 for multiple matters of administrative proceedings.

25 For example, compliance with the LSN or standing

1 or the allocation of the contentions themselves among  
2 those boards.

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

10 >> MR. LIST: Exactly.

11 >> CHAIRMAN MOORE: Does anyone else have  
12 anything they would like to add to what Mr. List has  
13 said? Nevada?

14 >> MR. MALSCH: Just one comment, and that is  
15 that we have assumed all along that there would be as  
16 many as three licensing boards hearing sets of  
17 contentions.

18 We just offer the qualification that if there were  
19 to be more than three, I think the burden would really  
20 be unbearable on the parties, including Nevada. And so  
21 we did express a qualification that really there should  
22 be no more than three.

23 We did agree in principle with the concept of a  
24 coordinating board that could serve the function of,  
25 among other things, dividing up the contentions among

1 the other boards. And we would not object in that  
2 respect to consultation among the various boards or  
3 Board members to sort of work things out so there was  
4 no or limited potential for overlap.

5 >> CHAIRMAN MOORE: No tablets have been cast  
6 and the carving on the stone is not done, obviously.  
7 But it is -- I think I can speak for the panel at this  
8 point to say that it is our current intention and  
9 thinking that unless ordered by the Commission, there  
10 would not be, certainly in the normal course, any  
11 simultaneous hearings. They would always be running  
12 consecutively, as if it were one Board. Which should,  
13 in large measure, alleviate Nevada's concern.

14 Because we also recognize that you can't be in  
15 more than one place at one time. There may be  
16 instances where there have to be parallel matters going  
17 on. But I believe it's everyone's thinking that they  
18 will be kept to the barest of minimum, if possible.  
19 Unless, of course, the Commission were to order  
20 otherwise.

21 >> MR. MALSCH: Thank you very much. That's  
22 obviously would present a real problem for us and any  
23 of the other parties.

24 I just wanted the Board to recognize, in addition  
25 to bare presence in the hearings, there's also a

1 substantial burden associated with case preparation and  
2 the witnesses and the like. So, the mere fact that  
3 there are not overlapping actual evidentiary hearings  
4 doesn't mean on our side that you can have four, five,  
5 six, ten presiding licensing boards. I think we were  
6 planning on three and no more, really.

7 >> CHAIRMAN MOORE: Does anyone else want to  
8 be heard on this subject? Then let's move on.

9 >> MR. SILVERMAN: Your Honor, DOE. Just  
10 very briefly, and I know we'll get into it later as we  
11 talk about exactly how you would divide up the  
12 jurisdiction of the boards as a recommendation of the  
13 Commission.

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

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

22 >> MR. SILVERMAN: Understood.

23 >> CHAIRMAN MOORE: Three boards would  
24 stretch the panel to the breaking point.

25 Let's look at C2: If contentions are allocated

1 among multiple boards, how would it be most efficient  
2 to do so? And, specifically, would it be possible to  
3 identify scientific phenomena or modeling techniques  
4 that are common to contentions addressing various  
5 portions of those applications so that the same Board  
6 would hear all of the challenges that involve that  
7 scientific phenomena or modeling technique? DOE?

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

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

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

25 >> CHAIRMAN MOORE: Mr. List, I'm sorry, I

1 should have started with you and probably saved us all  
2 a few moments.

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

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

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

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

22 >> MR. MALSCH: Judge Moore, we generally  
23 agreed with the outline, but we did have some  
24 qualifications. It seems to us that there is usually a  
25 pretty clear distinction between -- or will be in this



1 case between pre-closure safety issues and post-closure  
2 safety issues.

3 We were concerned that really the best way to  
4 segregate out NEPA questions would be to confine  
5 ourselves to NEPA non-radiological impact questions.

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

12 So, there is a potential for an overlap if one  
13 were to litigate before separate boards two related and  
14 somewhat similar TSPAs with the potential for  
15 conflicting Board rulings.

16 So, we were thinking at least at the outset that  
17 the cleaner distinction was pre-closure, post-closure,  
18 and then non-radiological NEPA issues. Obviously, that  
19 would depend upon the nature of the contentions.

20 On QA, our initial impression would be that should  
21 be allocated to the pre-closure or post-closure boards,  
22 as necessary, not treated as a separate issue. But  
23 maybe that should depend upon the nature of the  
24 contentions.

25 >> CHAIRMAN MOORE: Mr. Malsch, it is likely

1 that Nevada will have the lion's share of the  
2 contentions filed, from what you've previously  
3 indicated. My guess -- strictly a guess, total  
4 speculation -- is that as a matter of sheer numbers,  
5 because of the total system performance assessment,  
6 Nevada will likely have many more contentions aimed at  
7 post-closure than any other portion. Is that accurate?  
8 Or a reasonable guess?

9 >> MR. MALSCH: I think that's a reasonable  
10 guess.

11 >> CHAIRMAN MOORE: If that is the case, if  
12 you allocate to three boards using the scheme such as  
13 DOE has suggested with pre-closure, post-closure and  
14 all others, it is, I would guess, highly likely that  
15 there will be a very large misallocation of workload  
16 among those three boards.

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

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

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

1           And from what I know about the total system  
2 performance assessment, it's one of these things in  
3 which you change one thing and it changes almost  
4 everything else.

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

10          I agree that could be a problem. I guess my only  
11 suggestion would be that we'll just have to wait and  
12 see what the contentions are that are filed and  
13 admitted and then make some sensible judgments at that  
14 time. But I agree it could be a problem.

15                   >> CHAIRMAN MOORE:   DOE?

16                   >> MR. SILVERMAN:   Thank you, Your Honor. We  
17 have one suggestion that might help alleviate the  
18 problem.

19          When you think about the post-closure issues in  
20 the TSPA, it seems to us it may be possible to  
21 differentiate between issues related to the subsurface  
22 facility design and the waste package. Essentially  
23 issues regarding, you know, corrosion, fabrication,  
24 procurement of the metallic components, the waste  
25 package, et cetera, versus what I'll loosely refer to

1 as the "ologies" -- the hydrology, the geology, et  
2 cetera -- of the overall repository, natural barriers,  
3 et cetera.

4 So, we thought it might be possible to do that  
5 sort of a split. You'll have, I think, different  
6 experts dealing with issues, like corrosion versus  
7 hydrology, et cetera. So, it's one thought we had.

8 >> CHAIRMAN MOORE: Mr. Malsch?

9 >> MR. MALSCH: Judge Moore, that's an  
10 interesting idea, but again, this is a total system  
11 performance assessment and slight changes in nuances in  
12 the conclusions regarding the engineered barriers, for  
13 example, could have a dramatic effect on the total  
14 assessment.

15 And I'm just not sure that that would work.  
16 Perhaps it would work. I'm just not positive. I have  
17 my doubts.

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

23 Just one thing that comes to mind immediately is,  
24 if there are three boards, one concept that we have  
25 been working with -- because, as you're all aware, the

1 panel has accumulated a lengthy and diverse list of  
2 expertise, part-time expertise, in areas that are  
3 likely to arise in the proceeding, especially the total  
4 system performance assessment: Volcanology,  
5 seismology, hydrology, geohydrology, hydrogeology,  
6 geochemistry, geophysics, and the list goes on and on,  
7 some that are expert in modeling.

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

18         For example, obviously, when you're hearing  
19 seismological issues, having the seismologist on the  
20 board has a great deal of appeal to those of us who  
21 have to wrestle with these issues; whereas having that  
22 seismologist on the board when you're dealing with  
23 something totally and completely out of the field of  
24 seismology, it has no advantage.

25         Using that construct, then, does this breakdown

1 between pre-closure and post-closure and other issues  
2 become as important? 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 there was  
8 some overlap among the Board members, but I don't think  
9 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 that  
19 it's definitely worth consideration.

20 Another approach the Board may want to take is, if  
21 there is a Board established to allocate contentions --  
22 if the Board is established to allocate contentions,  
23 before that, you establish the boards the way has just  
24 been suggested. But after the allocation Board is  
25 established, the contentions are in, the Board has had

1 an opportunity to look at what's actually filed. At  
2 that point there may be some benefit to revisiting the  
3 issue and deciding exactly how these sub-boards would  
4 be constituted.

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

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

18 But for the initial admission of contentions, is  
19 it really a critical factor that those same boards be  
20 the boards that are going to hear this substantively  
21 downstream? DOE?

22 >> MR. SILVERMAN: DOE. We don't think so,  
23 Your Honor. We had thought about proposing that very  
24 thing; that it is not necessarily the case that you  
25 need to have the same number of boards or the same

1 boards for the admissibility determinations as for the  
2 evidentiary proceeding.

3           You may have a different number, even if it's --  
4 if you can't have more than three, that's one thing.  
5 But you may find in -- in evidentiary space you need  
6 more and you need less when it comes to the  
7 admissibility determinations.

8           >> CHAIRMAN MOORE: Mr. Murphy?

9           >> MR. MURPHY: I agree with DOE, Your Honor.  
10 I think that's an ideal assignment for a coordinating  
11 Board. There's no reason to parcel the contentions out  
12 among the various panels.

13           Are we through with the earlier question, Your  
14 Honor, on the --

15           >> CHAIRMAN MOORE: No. Please.

16           >> MR. MURPHY: Because I not only agree that  
17 it is a -- that it's advisable to consider the -- the  
18 use -- the use of expert -- expertise, technical  
19 expertise on the panels. I have always assumed that  
20 that would be the case, naturally.

21           And if that, through some hyper technical  
22 definition means that because one person or geologist  
23 or whoever would serve on more -- we -- we -- you know,  
24 to me it wouldn't mean there would be -- there wouldn't  
25 be more than three panels.



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

3           >> CHAIRMAN MOORE: I think practically we  
4 should all look at it as that --

5           >> MR. MURPHY: Sure.

6           >> CHAIRMAN MOORE: -- this was done as three  
7 panels. But the reality is each time the Board would  
8 be reconstituted with two of the same members and there  
9 were a third one, when that one moved -- the third  
10 member moved off, it would be reconstituted, putting  
11 back on.

12           >> MR. MURPHY: Sure.

13           >> CHAIRMAN MOORE: Technically,  
14 unfortunately, under the way --

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

16           >> MR. MURPHY: Yeah. I mean, the  
17 desirability of having that technical expertise, seems  
18 to me, greatly over- -- outweighs all of the  
19 administrative stuff.

20           As a matter of fact, I think what you ought  
21 to work on, Judge Moore, is a way to get geologists and  
22 seismologists to serve on panels of the Circuit Courts  
23 of Appeal.

24           (Laughter)

25           >> CHAIRMAN MOORE: Be careful what you wish for.

1 (Laughter)

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

5 >> MR. NEUMAN: No, Your Honor. I think we  
6 both agree that it would not be critical for the Board  
7 that reviews contentions to be the one that hears the  
8 evidence subsequently.

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

12 Should contentions be allocated on the basis of  
13 legal requirement that allegedly has not been  
14 satisfied, assigned, all of such contentions assigned  
15 to one Board? Mr. List?

16 >> MR. LIST: The only concern that I think  
17 was expressed on this matter was a concern, especially,  
18 I think, from Mr. Malsch, to the effect that any  
19 challenge or any contention ought not to have to refer  
20 to every single legal requirement or every single  
21 portion of the LA, because it would be extremely  
22 burdensome to have to do so.

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

1 >> CHAIRMAN MOORE: Does anyone else wish to  
2 be heard on this?

3 Then moving on to Question 2 -- I'm sorry, 3A:  
4 Relative to the DOE suggestion that issues be allocated  
5 based on pre-closure, post-closure and NEPA  
6 programmatic groupings, why did DOE structure groupings  
7 in this manner?

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

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

20 We presumed there would be multiple boards, we  
21 presumed that there would be a limited number of  
22 multiple boards, and we felt we did not want the  
23 jurisdictional issues to be cut too finely; in other  
24 words, that you'd have such narrow jurisdiction for  
25 each Board that you would need a very large number. We

1 really were basically tracking the major components of  
2 the license application organization.

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

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

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

1 another Board, that they really belong to that Board,  
2 and the dynamic of -- fluid way as this goes along, be  
3 moved over to be heard by that Board, it wouldn't  
4 change anyone's preparation, other than the board's  
5 preparation. But as far as the parties are concerned,  
6 who would hear it, to me, wouldn't be impacted.

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

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

20       And arguably, as well, perhaps a -- a  
21 clearinghouse worth looking at things that should be  
22 referred to the Commission to resolve these sorts of  
23 questions.

24       >> MR. SILVERMAN: Yeah. I hope I understand  
25 your question and I'm answering it; if I'm not, I know

1 you'll let me know.

2 We agree with the coordinating board concept. We  
3 agree -- I think it's a very reasonable approach that  
4 you have just laid out in terms of the traffic cop  
5 function. I think it would allow us, perhaps, to stay  
6 with the three-Board concept, with the understanding  
7 that perhaps one Board member shifts.

8 We're not overly concerned about jurisdiction  
9 either. What we were simply trying to do was group the  
10 right number of issues before any particular Board.

11 >> CHAIRMAN MOORE: Now, if the coordinating  
12 committee or Board -- in keeping track of all of this,  
13 they will still never have the same grasp of the  
14 information as those that are most intimately involved.

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

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

23 It may be admissible in front of one Board. It  
24 may very reasonably not be admissible in front of  
25 another. However, both boards should be aware that the

1 identical evidence is being presented to them. And  
2 that should go into the calculus of admissibility so  
3 that they may want to rethink their position if the  
4 evidence is already in before another board on another  
5 contention.

6 Just keeping track of those things is  
7 mind-boggling. Issues that are involved in contentions  
8 that are similar may not appear to those of us who are  
9 viewing it from one perspective would have as those of  
10 you who are more intimately involved with the evidence  
11 that's going to be presented on those issues.

12 And there has to be some way in which there's  
13 communication by the boards -- sorry -- by the  
14 participants and the parties to the boards about those  
15 things so that a traffic cop knows where the traffic  
16 tie-ups are. How can that function work?

17 >> MR. SILVERMAN: Well, I would say, if our  
18 conference call that we had on Monday is any  
19 indication, that I think the prospective -- the  
20 parties, once we have admitted contentions, can get  
21 together on an informal basis and do very much like we  
22 did fairly successfully, I think, on Monday, which is  
23 try to reach agreements among ourselves to inform and  
24 recommend to the coordinating board or the substantive  
25 boards which issues ought to be heard by which panels

1 and provide that input.

2 >> CHAIRMAN MOORE: Do any of you see any  
3 legal problems, legal objections, to proceeding in the  
4 way that has been discussed this morning? Staff?

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

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

11 >> CHAIRMAN MOORE: Sure.

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

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

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

25 And I think what the scheme or the process we're



1 talking about here envisions that division would come  
2 afterward; not necessarily file your contention before  
3 this Board, but file your contention into the  
4 proceeding and then it would be allocated to the proper  
5 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 giddy-up  
12 may occur at that point, but --

13 >> JUDGE BOLLWERK: Something to think about.

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

21 But filings wouldn't be with individual boards.  
22 They would still be through the EIE and there would be  
23 that allocation process in every instance, as if it  
24 were one board. So, I don't think it's a problem.

25 >> JUDGE BOLLWERK: I would think once the

1 allocation is made, obviously, then the contentions,  
2 the filings are going to go to the particular boards.

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

9 >> CHAIRMAN MOORE: Just knowing the size and  
10 magnitude of the problem before us, I am quite sure  
11 that there will be mistakes made probably fairly  
12 regularly.

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

17 So -- and certainly putting the wrong three names  
18 of the Board on the filing does not disqualify the  
19 filing. If it did, an awful lot of filings would have  
20 been tossed out in the past.

21 >> JUDGE BOLLWERK: From time to time now,  
22 things get filed before the Commission that should be  
23 for a Board or before a Board that should be for the  
24 Commission and we just refer them to where they should  
25 go. So it's -- you know, I think it's not

1 insurmountable.

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

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

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

11 And that is the overriding issue of single issue  
12 contentions. I think it was certainly our impression  
13 from the parties' filings, the potential parties'  
14 filings, that there was a consensus or near consensus  
15 that single issue contentions made a lot of sense,  
16 subject to one important reservation. And that is,  
17 what do we mean by "single issue contentions"? A fair  
18 point.

19 And I think we've talked about this among  
20 ourselves on the Advisory Board. And I think we're  
21 confident or reasonably confident we know it when we  
22 see it. But it would probably be helpful to have a  
23 more precise way, if we can, of framing what single  
24 issue contentions are.

25 So, I'd like to come back at the end of the series

1 of questions dealing with contentions to see if there  
2 are views from any of the parties about how we might  
3 try to express that.

4 >> MR. LIST: Judge Ryerson, if I may? We  
5 struggled with that very topic yesterday among  
6 ourselves, and I think there are a number of  
7 observations that you'll find made by the parties.

8 >> JUDGE RYERSON: Should we save that for  
9 the end?

10 >> MR. LIST: I think that would be  
11 appropriate, yes, sir.

12 >> JUDGE RYERSON: Okay.

13 D1: Should all contentions and not only contentions of  
14 omission clearly identify the legal requirement that  
15 allegedly has not been satisfied? Mr. List?

16 >> MR. LIST: The consensus, I think, was  
17 generally yes. However, once again, there was the  
18 concern that it would be burdensome to require a  
19 contention to refer to every related provision in the  
20 application or in the regulations.

21 >> CHAIRMAN MOORE: If I may, simply because  
22 I've been around too long and I guess know or can make  
23 too good a guess of how the staff and often how an  
24 applicant are going to respond in just about every  
25 instance.

1           If there is a contention, if we recommend to the  
2 Commission that contentions should always clearly  
3 identify the legal requirement that has not been met,  
4 obviously there's always one overriding legal  
5 requirement in the -- and, I'm sorry, I don't have a  
6 cite at hand -- but there's one that they didn't meet  
7 the overall standard of -- whatever the language of the  
8 health and safety requirement is for Yucca Mountain.

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

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

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

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

22                   >> CHAIRMAN MOORE: As the chief objector, go  
23 ahead, Mr. Silverman.

24                   >> MR. SILVERMAN: Thank you. The objector  
25 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 by  
8 2.309 to the extent that you have to identify issues  
9 that are material to the findings that have to be made.

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

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

22                   >> CHAIRMAN MOORE: On that point, if a  
23 contention is admitted that identifies a portion of the  
24 application that is in some way erroneous, and that  
25 same alleged error would apply to 15 other parts of the

1 application, would a contention that merely said --  
2 highly specific contention, now -- that pointed out  
3 this part of the application was in error, for whatever  
4 reason, and among -- and that there were similar  
5 mistakes throughout the application, would that fairly  
6 bring in that same mistake that appeared 14 other  
7 places for a total of 15, or do all 15 have to be  
8 ferreted out?

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

11 >> CHAIRMAN MOORE: Would a "for example"  
12 work?

13 >> MR. SILVERMAN: Go ahead. What my  
14 co-counsel suggested to me here and I think it makes  
15 some sense is that perhaps for admissibility purposes  
16 it would be sufficient to identify the representative,  
17 the most important, the primary reference.

18 But if, in fact, the evidentiary case that the  
19 party's going to put on in that contention is going to  
20 provide evidence of experts that we fail to comply  
21 with -- or there are multiple portions of our license  
22 application --

23 >> CHAIRMAN MOORE: You'd find all that out  
24 in discovery, in theory.

25 >> JUDGE BOLLWERK: Sure. An interrogatory

1 of something directed to them would solve that problem,  
2 you would think.

3 >> CHAIRMAN MOORE: Is the staff listening  
4 over there and conjuring how you would be objecting to  
5 such a thing? Because I can't fathom that many of the  
6 contentions aimed at the license application that that  
7 same objection will likely apply to many other sections  
8 of the application.

9 And do they have to, in an 8,000-page document,  
10 which is not going to be easily looked at in a  
11 computer-searchable manner, I guess, have to identify  
12 all of them? Or is a -- for example, in one or two  
13 given with the recognition that the contention covers  
14 all of those in the applications that fall within this  
15 umbrella?

16 >> MR. LENEHAN: Your Honor, the staff's  
17 position all the way through this is that we want to  
18 focus the issues -- focus the boards' times on the  
19 substantive issues. I think what's implied in the  
20 situation we've got here is some kind of a rule of  
21 reason and a rule of good faith.

22 If a contention lists 10 sections and misses the  
23 11th section inadvertently, that's something that  
24 should be able to be addressed and corrected.

25 >> CHAIRMAN MOORE: That's an easy example.



1 But how about if you give one and there are 10 more?

2 >> MR. LENEHAN: That gets into the good  
3 faith. Like the concept of good faith, that they have  
4 to do their best effort to identify all the sections  
5 that apply as best that can be done.

6 >> CHAIRMAN MOORE: DOE?

7 >> MR. SILVERMAN: Your Honor, I was going to  
8 say, if there's -- I don't believe that the Department  
9 of Energy would object to the admissibility of a  
10 contention because it cited one or two sections and  
11 failed to cite others.

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

17 The simplest example, of course, is that the  
18 contention says the license application section blank  
19 fails to address; contention of omission, a subject.  
20 And, in fact, it is addressed in another appropriate  
21 section of the application. The failure to cite that  
22 other section isn't why we would be arguing it's  
23 inadmissible.

24 >> MR. LENEHAN: Your Honor, I think I quote  
25 our concern is that the legal requirement that's being

1 cited is cited. If every section of the application,  
2 the example that was just used, is not cited, that does  
3 not seem to be the major sticking point. We do want  
4 the legal citation, what provision of law or regulation  
5 is not being complied with.

6 >> JUDGE RYERSON: Mr. Malsch?

7 >> MR. MALSCH: I don't disagree with most of  
8 what's said. Let me just point out two problems we  
9 anticipated.

10 One was in citing to the regulations. And we have  
11 no difficulty with the concept that our contention,  
12 each contention should cite to the provision of the  
13 regulation which we think is violated or not satisfied.

14 Our only comment was that Part 63 is kind of  
15 peculiar. And, for example, the need to comply with  
16 the individual protection standard as a result of a  
17 performance assessment appears three or four different  
18 places using slightly different wording.

19 And we just wanted to be clear that as long as we  
20 were reasonable and that the parties were on reasonable  
21 notice as to what provision was at issue here, that no  
22 one should be penalized for failing to mention some  
23 particular subsection or sentence in some other  
24 regulation. That was our first point.

25 The second point about reference to the license

1 application I think is illustrated by -- by some  
2 information that -- let me give you. We've not seen  
3 the license application, so we can't tell you what it  
4 looks like.

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

13 The term "drip shield" appears and is discussed at  
14 least to some extent in that particular addendum at the  
15 second and third level of granularity 19 times, at the  
16 fourth level of granularity 44 times, at the fifth  
17 level of granularity, 16 times.

18 Now, clearly it would be unreasonable to ask for  
19 there to be 60 or so separate contentions each  
20 addressed to every single time the term "drip shield"  
21 was mentioned.

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

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

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

10 >> JUDGE BOLLWERK: How would you interpret  
11 the staff's idea of good faith effort? In other words,  
12 you have to make -- what do you see as good faith on  
13 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 rule  
21 of reason is a more -- granted, that's a bit slightly  
22 subjective, but it's a lot less subjective than good  
23 faith. I think a rule of reason would be a better way  
24 to formulate the standard.

25 >> JUDGE RYERSON: Any additional comments on

1 this question? Rockville?

2 >> MR. NEUMAN: Barry Neuman on behalf of  
3 Lincoln County.

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

11 >> JUDGE RYERSON: Moving along --

12 >> MS. CURRAN: This is Diane Curran. I  
13 would agree with that.

14 >> JUDGE RYERSON: Moving on to D2: Should  
15 answers to contentions track the format for  
16 contentions? Mr. List?

17 >> MR. LIST: Yes, I think there was  
18 consensus that generally that they should.

19 >> JUDGE RYERSON: Any other comments on that?  
20 D3.

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

24 >> JUDGE RYERSON: And the question is, just  
25 for those in the audience: Should answers to

1 contentions be limited to addressing only those  
2 specific requirements with which the proponent  
3 allegedly has not complied? Mr. Lenehan?

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

9 Your Honor, may we have just one moment, please?

10 >> JUDGE RYERSON: Pardon? Yes.

11 >> MR. LENEHAN: Your Honor, the question is  
12 whether we have to address each of the 301  
13 requirements, 2.301 requirements. As far as --

14 >> JUDGE RYERSON: This would be in the -- in  
15 the answer to the contention. In other words, the  
16 contention presumably addresses all six because that's  
17 what the regulation require. But if the challenge is  
18 only to two parts -- let's say one part, say scope of  
19 the proceeding, is there any reason why the answer to  
20 the contention should deal with more than the challenge  
21 to scope of the proceeding?

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

23 >> JUDGE RYERSON: D4: Should replies in  
24 support of contentions be limited to responding only to  
25 those issues that were raised in the answer? Mr. List?

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

2 >> JUDGE RYERSON: Anyone else want to be  
3 heard on that question?

4 D5: Is it possible to proffer admissible  
5 contention supporting the application? Mr. List?

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

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

20 And it happened as well, and maybe improperly,  
21 come to think of it -- I'm not sure -- in private fuel  
22 storage where the Native American Tribe wanted to put a  
23 contention in based that way and we admitted it. I'm  
24 not sure if that was appropriate or not. I haven't  
25 given it additional thought at this point. Although,

1 that's water way over the dam.

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

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

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

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

22 >> MR. BAUSER: Well, again, not necessarily,  
23 because I think questions of harm are within the  
24 context of standing.

25 >> CHAIRMAN MOORE: Put standing aside.



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

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

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

10 So, how do you file an admissible contention in  
11 support of DOE's application?

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

17 But I suppose a party could contend that the  
18 Safety Evaluation Report is inadequate to the extent it  
19 under predicts repository performance and therefore is  
20 not an accurate representation of -- in this case, I  
21 guess it would be fact.

22 >> JUDGE BOLLWERK: So, essentially you're  
23 saying you would try to bolster the basis for the  
24 application as opposed to say there's something  
25 inadequate?

1 >> MR. BAUSER: I guess that's a fair  
2 characterization. I'm not sure if that was what was in  
3 the board's mind when they talked to a supporting  
4 contention. That's, I guess, the difficulty I'm  
5 having. But again --

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

8 >> CHAIRMAN MOORE: I have trouble when you  
9 get to dispute when DOE says, "You're absolutely  
10 right."

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

12 >> JUDGE RYERSON: Mr. Malsch?

13 >> MR. MALSCH: I think that the principal  
14 difficulty which organizations supporting the  
15 application would encounter is actually the requirement  
16 for contentions in 2.309 (d)(2) -- I think it's -- it's  
17 -- I'm sorry -- (f)(1)(vii), which says that each  
18 contention in the detailed basis part has to refer to  
19 specific portions of the application that the  
20 petitioner disputes and the supporting reasons for each  
21 dispute.

22 Now, I suppose in theory one might dispute a part  
23 of the application as being too safe or too  
24 conservative. But then that would implicate another  
25 provision of the contention which would says you have

1 to cite to a requirement in the regulations which the  
2 application violates.

3 And I'm not aware of any provision of the NRC's  
4 regulations, nor do I think there could be one, that  
5 would prohibit excess safety or too much conservatism.  
6 So, I think on both scores I see great difficulty in  
7 admitting a contention that would support the  
8 application.

9 >> MR. BAUSER: If I might respond. We're  
10 not building hypotheticals on hypotheticals, but  
11 difficulty in terms of, quote, overdesign, unquote, is,  
12 I guess, how I would characterize the issue that I've  
13 suggested could have unintended circumstances in other  
14 areas.

15 But I'm not really prepared to debate specific  
16 contentions and argue legally on those today.

17 >> JUDGE RYERSON: It sounds to me like D6  
18 may be moot, unless someone is arguing in favor of the  
19 admissibility of contention supporting the application.

20 Let's move to D7: If contentions in support of  
21 the application are not permitted, should a participant  
22 that wants to support the application be permitted to  
23 participate in a proceeding, and, if so, how?

24 Mr. List?

25 >> MR. LIST: We did not address this -- we

1 did not address this one in detail, Your Honor. It  
2 sort of fell into the same heading, I think, as the two  
3 preceding questions. So, I suppose we did not reach a  
4 specific consensus.

5 >> JUDGE RYERSON: Is there anyone else who  
6 wants to address that issue now? Yes, Mr. Malsch.

7 >> MR. MALSCH: Thank you, Judge Ryerson.  
8 I would just suggest that there are other means whereby  
9 parties can participate. For example, especially  
10 important questions where we could invite NEI to  
11 participate or other supporters of the application to  
12 participate in an amicus capacity.

13 So, just because a person is not a party does not  
14 mean that one is completely frozen out of the  
15 proceeding. Participation in an amicus capacity, I  
16 think, would be a very viable option for those  
17 petitioners.

18 >> JUDGE RYERSON: Mr. Murphy, did you have a  
19 comment.

20 >> MR. MURPHY: Yes. That falls short in one  
21 significant respect, it seems to me, Your Honor. And  
22 that is that except for the defense waste it's  
23 Mr. Bauser's client's money that we're spending here  
24 today. And amicus does not give them a right to appeal  
25 if they disagree with the decision of the Board or the

1 staff or the Commission. Seems to me fundamental  
2 fairness.

3 And I don't know technically how we -- I think I  
4 have the same sort of problem that Judge Bollwerk has,  
5 that it seems to me they worked it out in the PFS  
6 proceeding and gotta be able to work it out here.

7 Seems to me fundamental fairness dictates that the  
8 nuclear utilities and others -- Nye County may find  
9 portions of the DOE application we want to support.

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

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

21 >> MR. MURPHY: I agree with that. I just  
22 think NEI shouldn't have to beg to participate in this  
23 process. I think they should be able to participate.  
24 The rate payers of the utilities in the United States  
25 should be able to participate as a matter of absolute

1 right and there ought to be a way for us to figure out  
2 how to do that, seems to me.

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

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

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

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

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

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

25 >> CHAIRMAN MOORE: Please be seated. Please

1 come to order.

2 >> JUDGE BOLLWERK: If we could go back on  
3 the record, please.

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

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

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

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

1 Does anybody want to address that again? Because,  
2 to some degree, from the judges' perspective, we would  
3 like to see the more specific. That's what tells us  
4 what the nub of the contention is. And I'll open that  
5 up. Is that the right --

6 >> CHAIRMAN MOORE: And I would add just good  
7 lawyering, would seem to me, would indicate that you  
8 would always use the broadest statutory provision,  
9 and -- but it's most helpful because, obviously, the  
10 more specific is already encompassed within the broader  
11 one.

12 But it -- the more specific in addition to the  
13 broad regulatory or statutory requirement that you  
14 claim is -- is being violated, the more specif- --  
15 you've -- you've covered yourself by doing that.

16 And then getting down as far into the weeds each  
17 time with the specific regulatory provisions is  
18 something -- certainly a goal that I think all  
19 contentions in being drafted should -- should strive  
20 for.

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

24 >> JUDGE RYERSON: Well, let's get back,  
25 then, to the question of what is a single issue



1 contention. Mr. List, are you prepared to address  
2 that?

3 >> MR. LIST: We really did not reach a --  
4 any kind of concurrence on it. We struggled with it.  
5 We realized that it's a matter of great import, but  
6 frankly, did not come up with our own definition.

7 >> JUDGE RYERSON: Is there anyone else who  
8 is prepared to address that today? DOE? Mr.  
9 Silverman?

10 >> MR. SILVERMAN: I would, but I think --  
11 does the staff want to go first on this, since you had  
12 some recommendation during the telecon? Or I'd be  
13 happy to step in.

14 >> MR. LENEHAN: If we could go first.  
15 We'd like to address part of it to the extent that we  
16 feel very, very strongly that each contention should  
17 cite a single legal basis.

18 Now, that gets to the point of whether there are  
19 multiple sections of the LA that supposedly violate  
20 that single legal basis.

21 Each section of the LA that they claim violates  
22 that particular law of that particular provision should  
23 be as a separate contention.

24 The issue that arises is how detailed a degree of  
25 granularity you get in the LA as far as that assertion

1 is concerned.

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

6           >> JUDGE RYERSON: You know, one -- one  
7 possibility, unless there are others who would like to  
8 speak to this today, and I'd hope that -- to get a  
9 discussion, their views, but one possibility would be  
10 to take a -- take a week or so and if -- if any of the  
11 potential parties want to submit individually or in  
12 consultation with others some suggestions as to a way  
13 to define what -- what a single issue contention should  
14 be, I think that might make sense. Yes?

15           >> MR. MALSCH: I think that might make  
16 sense. Let me just go through at least preliminarily  
17 the list of possibilities, some of which we would  
18 object to.

19           For example, one possibility would be that every  
20 section of the application, even to the finest level of  
21 granularity, has to be the subject of a separate attack  
22 and a separate contention.

23           And the reason for that on our part is that --  
24 just taking up my example of the earlier drip shield,  
25 if the license application looks like the analysis

1 model report, we're going to have 60 contentions that  
2 basically say the same thing.

3         So, I think that's a problem. In concept, I don't  
4 disagree with the idea that each contention ought to be  
5 focused on a single regulatory violation. I think that  
6 makes sense.

7         My only small qualification was that, as I pointed  
8 out before, Part 63 is somewhat diffuse, and I would  
9 hope that if a party cites what it believes is the key  
10 section, the fact that it didn't cite virtually  
11 identical to other sections wouldn't be fatal to the  
12 admission of the contention.

13         Another possibility is that --

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

25                 >> MR. MALSCH: I think the difficulty there

1 would be the temptation on the part of contention  
2 drafters to always say in all other related parts of  
3 the application just to protect themselves.

4 >> JUDGE BOLLWERK: To keep their options  
5 open, if you will.

6 >> MR. MALSCH: That's the thing; I don't  
7 know. It's hard -- this is a difficult discussion in  
8 the abstract, I think. I think, as has been suggested,  
9 we're talking about a rule of reason and fair notice  
10 here.

11 I mean, it would be our intention to -- in  
12 drafting contentions to cite to precisely to the  
13 regulation which we think is placed at issue and to  
14 cite precisely to what we believe and our experts  
15 believe is the most pertinent part of the application  
16 where the matter is discussed.

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

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

22 >> JUDGE RYERSON: One or more of the parties  
23 raised the issue about losing the interrelatedness  
24 among contentions by reducing them to too small, too  
25 tiny a level, too low a level. I think Lincoln County

1 may have been one of those.

2           Is this a problem? Or is there a way to deal with  
3 it? In fact, Lincoln County gave some examples, so  
4 maybe we can look at those as well. That might be  
5 something useful.

6           >> CHAIRMAN MOORE: Mr. Neuman, do you have  
7 comments on that?

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

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

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

22           >> MR. NEUMAN: This is Barry Neuman on  
23 behalf of Lincoln County. The Board is correct. We  
24 also raised this issue and have the -- have the same  
25 concern and did give several examples.

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

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

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

16           But, again, geared to discrete, understood  
17 requirements of NEPA.

18           >> CHAIRMAN MOORE: Isn't the approach,  
19 though, that having single issue contentions, and  
20 using, Mr. Neuman, the ones you're just positing as an  
21 example, it might be slightly more burdensome for you  
22 to break them out as individual contentions. But  
23 frankly, since everyone here is working off of a  
24 computer that has a copy-and-paste feature on it, how  
25 burdensome is it, really?

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

7           And it seems to me that it might ultimately be a  
8 better approach to have the boards' combining  
9 contentions after admission than to have parties having  
10 multiple-part contentions.

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

19                   >> JUDGE BOLLWERK: Particularly if those  
20 alternatives are discussed in very different parts of  
21 the application or the NEPA statement where they're  
22 brought from one part and another part and another  
23 part.

24           Again, that's looking at -- again, if you're  
25 looking at the subdivisions or the portions of the

1 application of the NEPA documents that involve, that  
2 goes back to a question we raised about labeling and  
3 other things. How specific are we going to be?

4 >> MR. NEUMAN: I would agree that the  
5 incremental burden on the party filing the contention  
6 may not be that great in light of technology that's  
7 currently available.

8 Frankly, our thought had more to do with the  
9 burdens that would be imposed just by virtue of the  
10 paper; burdens imposed on the Board and others in  
11 reviewing it. We thought it made more sense to  
12 streamline in one consolidated contention.

13 But if that's not the board's view, I certainly  
14 would defer to that in terms of I would use what's most  
15 convenient for itself.

16 >> CHAIRMAN MOORE: This ties in, Mr. Malsch,  
17 with a point you raised about the possible overlap  
18 between NEPA contentions and the same type of thing  
19 being a safety contention. If they're broken out very  
20 specifically as NEPA contentions, does that not make it  
21 easier to keep a brighter line, if you will, between  
22 safety and environment?

23 And then if you are litigating the NEPA  
24 contentions before Board A, because the standard to  
25 which -- the legal standard that is being applied is



1 different than the safety standard, don't you -- you  
2 certainly, I would think, eliminate the res judicata  
3 problem. And to some extent, if not entirely, you  
4 eliminate the collateral estoppel problem.

5 >> MR. MALSCH: I think --

6 >> CHAIRMAN MOORE: Between safety and  
7 environment.

8 >> MR. MALSCH: I understand that. There  
9 are -- clearly, there are some distinctions between the  
10 kind of evaluation that you would see under NEPA, for  
11 example, and the kind of evaluation you would see under  
12 the Atomic Energy Act, even assuming we're talking  
13 about radiological safety, for example.

14 Let's say hypothetically a contention by Nevada  
15 addressed to the quality assurance compliance of some  
16 aspect of the performance assessment, would certainly  
17 be within the scope of a challenge on the Atomic Energy  
18 Act, but would not be terribly relevant -- or maybe not  
19 be, but not obviously relevant under NEPA.

20 My concern is that the distinction could end up  
21 being, at least for some kinds of contentions, very  
22 artificial. For example, what would happen if we  
23 had -- even with or without, let's say -- let's say we  
24 had a contention on the drip shield addressed to both  
25 the NEPA performance assessment and the Atomic Energy

1 Act performance assessment.

2 And the results were that for reasons that were  
3 well established it was decided that the safety  
4 assessment could not take any credit for the drip  
5 shields.

6 It seems to me that has an obvious spill-over into  
7 the total system performance assessment done under  
8 NEPA, because then logically it shouldn't take credit  
9 for drip shields either.

10 So, while I think there are some aspects of the  
11 NEPA versus Atomic Energy Act distinction that are  
12 pretty clear and where you can draw a line and where  
13 saying NEPA contention, Atomic Energy Act contention  
14 makes sense and is understood, I'm concerned that in  
15 some other aspects that distinction is going to turn  
16 out to be rather artificial.

17 >> CHAIRMAN MOORE: The concern that I have  
18 always seen in this problem in Yucca Mountain is the  
19 collateral estoppel-res judicata problem, because  
20 they're going to be in all probability litigated at  
21 different points in time; that is, the NEPA contentions  
22 are more likely than not to precede the litigation of  
23 the so-called safety contentions.

24 How do you wrestle with that problem? Or is the  
25 only way to avoid the collateral estoppel-res judicata

1 problem by ensuring that the same Board at essentially  
2 the same time is hearing the safety and environmental  
3 issue that would be the left and right foot of the  
4 issue as you put it?

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

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

20 >> CHAIRMAN MOORE: DOE, and let's hear from  
21 the staff.

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

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

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

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

14           >> CHAIRMAN MOORE: Well, why don't we get to  
15 timing later. DOE, you wanted to speak to this NEPA  
16 safety dichotomy problem that's on the floor.

17           >> MR. SILVERMAN: Just briefly, Your Honor.  
18 I agree, this is a complicated issue. I just wanted to  
19 underscore something I think you said, which we  
20 wholeheartedly agree.

21           I think we should be breaking out NEPA-based  
22 contentions from safety-based contentions because the  
23 legal standard for certainly admissibility and I think  
24 for the ultimate determination is different.

25           And so we wholeheartedly endorse that. It is

1 conceivable you could have a contention with very  
2 similar factual basis that's not admissible in NEPA  
3 space that is admissible in safety space.

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

6 >> MR. SILVERMAN: Absolutely true.

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

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

18 >> CHAIRMAN MOORE: As opposed to safety --  
19 if it was the situation, essentially an identical  
20 contention but for the legal standard that's applied;  
21 one under NEPA, one under the Atomic Energy Act. Would  
22 that change your view that it should be two different  
23 rulings from two different boards or the same boards?

24 >> MR. SILVERMAN: I don't think I said that.  
25 I think it would be fine if it was the same Board.

1 It's just critical that --

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

5 >> MR. SILVERMAN: Sure, absolutely. And we  
6 could confer as we have this past week and then  
7 recommendations or opinions could be provided on the  
8 record to the panel.

9 >> CHAIRMAN MOORE: Because then we could  
10 have essentially -- I hate to use the word "safety" in  
11 these contexts, but safety contentions with a dovetail  
12 NEPA contention or a NEPA contention with a dovetail  
13 safety contention that would more or less through the  
14 process go together. That would be one way that we  
15 could consider doing this. Does that make sense?

16 >> JUDGE BOLLWERK: Would you still have the  
17 contentions filed as separate contentions and then  
18 they're put back together? Or would you have them  
19 identified as a joint contention, potentially?

20 >> CHAIRMAN MOORE: It's just a thought, but  
21 it would seem to me that it may be most efficient if  
22 it's essentially the same issue with different  
23 standards, because the same facts are going to have to  
24 be examined, that the same Board is examining the facts  
25 only once, not twice.

1 >> MR. SILVERMAN: Well, I think we feel that  
2 if there is a set of facts that supports a NEPA-based  
3 contention or a concern under NEPA and the same set of  
4 facts that supports a safety concern, we would like to  
5 see those as separate contentions. We're going to need  
6 to --

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

11 I was thinking that that might be one approach we  
12 could try to use, which it would seem to me also makes  
13 sense on why we want contentions as narrowly drawn in  
14 more of them than broadly drawn with less contentions,  
15 because it will make, I would think, it easier  
16 administratively to deal with them. Just thinking out  
17 loud on that.

18 >> JUDGE BOLLWERK: To some degree I think  
19 the same idea would apply. We've talked before about  
20 the concern about a contention that has many parts in  
21 that its whole also raises an issue. In theory you can  
22 file the separate contentions, and then you can file  
23 another contention that creates an "oh, by the way, for  
24 this reason, this reason, this reason, there's a  
25 generic problem here."

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

3 >> CHAIRMAN MOORE: How do we deal with  
4 contentions that challenge models? For example, I'm  
5 assuming that the total systems performance assessment  
6 in last analysis is a model that has many, many  
7 subparts which, in fact, are sub models. And all  
8 models are somewhat akin to an onion: You just keep  
9 peeling the layers and you get to the sub models.

10 If you have contentions challenging the same  
11 aspect of models and sub models, what's the granularity  
12 for the specificity of the contentions? Do you  
13 challenge the overall model which subsumes the sub  
14 models that are in it? Or do you break it down and  
15 challenge the sub models, recognizing that at any sub  
16 model level there could be, for example, three problems  
17 with the sub model?

18 Would each of those be a contention or is it the  
19 challenge to the sub model one contention? Mr. Malsch?

20 >> MR. MALSCH: Speaking on Nevada's part, I  
21 think there are two related issues. I think our  
22 intention would be that where we have a difficulty with  
23 a model, we would be as specific as possible, which  
24 would, assuming it were appropriate and not a generic  
25 attack on some aspect of the overall model -- that we



1 would actually go down to the sub model level.

2 >> CHAIRMAN MOORE: The problem is, if I'm  
3 remembering the filings correctly, DOE indicated that  
4 they felt or it felt that the contention needed to  
5 address whether this would invalidate the grant of the  
6 license. Whereas, no one of those errors or alleged  
7 errors in the sub model would do that, but in  
8 combination it may.

9 And you would not necessarily know that until,  
10 one, the issue was decided, and, two, a sensitivity  
11 analysis is then run, which is a secondary component of  
12 every model challenge.

13 And then the sensitivity analysis in relation to  
14 the entire model and all the other problems that have  
15 been highlighted or litigated and at what point then  
16 can you resolve these issues?

17 >> MR. MALSCH: That was the second aspect of  
18 my answer. I think what you've suggested is the only  
19 way to deal with that. I mean, if we are going to have  
20 very specific contentions addressed to the sub model  
21 aspects, then we can't be in a situation in which just  
22 because we, as a matter of to be helpful and to have  
23 specific contentions, draft contentions at the trees  
24 level; we're then accused of forgetting the forest.

25 I think our view would be that if we are drafting

1 very specific single issue contentions, let's say at  
2 the sub model level, then those would be admissible,  
3 assuming they satisfy other requirements of 2.309.

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

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

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

23 >> MR. SILVERMAN: If I understand Mr. Malsch  
24 correctly, he is saying that the State would endeavor  
25 to identify as specifically as reasonable possible

1 errors, alleged errors in models or sub models as  
2 individual contentions. We agree with that.

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

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

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

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

17 >> MR. SILVERMAN: Yes.

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

21 >> JUDGE BOLLWERK: We're at the contention  
22 admission stage right here or are we moving -- that's  
23 the other thing I'm hearing back and forth.

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

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

2 >> JUDGE BOLLWERK: Materiality is clearly  
3 the standard in play here.

4 >> MR. SILVERMAN: My view is if there are  
5 three independent errors in the model, that's three  
6 contentions.

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

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

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

19 >> JUDGE RYERSON: It seems almost like a  
20 very mechanical pleading requirement. Presumably, if  
21 the contention -- if three contentions each say this  
22 alleged defect is material, presumably some combination  
23 of them would also be material. I mean, it would have  
24 to be the case.

25 I guess the question is, do you lose that? Do you

1 lose that fourth contention somehow by splitting it up?  
2 Obviously, you shouldn't.

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

8 It seems to me that if you have a contention  
9 that's drafted sufficiently to show with the requisite  
10 minimal factual showing that a particular NRC  
11 regulation is not satisfied, that means the contention  
12 is admissible and nothing further is required.

13 A further argument that says that, oh, but if one  
14 did some further evaluation and did some different  
15 assessment than the one in the application, we would  
16 show that we still comply, it seems to me that goes to  
17 the merits of the contention and we're in possibly some  
18 sort of rebuttal case.

19 But even from the standpoint of contention  
20 drafting, that imposes a nearly impossible burden on  
21 parties to show that. It seems to me, as I said  
22 before, a contention which says that the application  
23 doesn't satisfy a particular part of the application  
24 raises a material issue.

25 And the remedy could be the application is denied.

1 The remedy could be that the application is conditioned  
2 or the remedy could be DOE has to go back and redo the  
3 performance assessment to comply with the regulations.  
4 At which point it would be up to DOE to prove that it  
5 still complies.

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

12 >> JUDGE RYERSON: Let me phrase my issue a  
13 little differently. Suppose you have ten related  
14 contentions and at the contention admissibility stage  
15 it is your position, and say a Board agrees, that each  
16 of those ten is an admissible contention.

17 But then you get to the next phase. You get to a  
18 hearing. And you prevail on three of the ten in terms  
19 of being wrong, in terms of there being some sort of  
20 error, but the question of materiality only arises when  
21 you look at all three together, but you don't have at  
22 that point technically a contention that deals with all  
23 three.

24 You know, is that a problem at the hearing stage  
25 if you don't have a contention that aggregates those

1 ten related problems in some way?

2 >> MR. MALSCH: I don't think it's a problem  
3 for the hearing. As I see it, a contention alleging  
4 that the app- -- let's say a sub model of the  
5 application is not in compliance with some particular  
6 provision in Part 63, and let's say we offer the  
7 necessary factual support, that is admissible. Seems  
8 to me we go to hearing on that particular question.

9 If we prevail and the sub model is invalidated as  
10 lacking sufficient support or being in violation of  
11 some requirement, then the ball passes to DOE.

12 Now, they have a choice. And I suppose this is  
13 maybe their rebuttal case. That their choice is to  
14 abandon the application because there's no plausible  
15 way they can do the model in a compliant way, or to  
16 present a new analysis which corrects the model defect.

17 But I think that's down the road. I think in the  
18 initial round of litigation, all that should be done is  
19 to look at the individual contentions and to litigate  
20 them one by one, granted that they ought to be  
21 organized and aggregated before boards so that there's  
22 some sense of how they're related to each other.

23 >> CHAIRMAN MOORE: DOE, do you agree with  
24 Mr. Malsch that at the contention pleading and  
25 admissibility stage that the contention does not need

1 to do more than allege that this error is material and  
2 will preclude the model and, hence, the application  
3 from meeting the health and safety standards that it  
4 has to meet?

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

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

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

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

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



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

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

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

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

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

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

24 Mr. Malsch, I would suggest -- I would like to  
25 hear what the staff has to say. Although, the staff

1 may not want to say a thing.

2 >> MR. MALSCH: I think at this point we  
3 would prefer not to say anything, Your Honor.

4 >> JUDGE BOLLWERK: Keeping their options  
5 open.

6 >> MR. MALSCH: To make the debate even more  
7 interesting, let's suppose we have a contention which  
8 challenges a sub model as lacking sufficient support,  
9 and let us suppose our expert tells us -- expert tells  
10 us that in drafting the contention that in his or her  
11 view there is insufficient scientific basis to develop  
12 any model.

13 How can we possibly be required to analyze the  
14 overall effects on the performance assessment in a  
15 situation in which we think no scientifically valid  
16 performance assessment can be done?

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

22 >> CHAIRMAN MOORE: Let me step out of  
23 contention admissibility just a moment for purposes of  
24 my own analysis and thinking downstream.

25 Mr. Malsch has said that the way in which the

1 contention's now admitted, challenging a model, is --  
2 can be addressed is -- after trial and it's found to be  
3 a valid challenge, DOE can obviously appeal and try to  
4 get that overturned.

5 But assuming that that doesn't happen, they can  
6 amend the application to bring in a new model plugged  
7 into the total systems -- sub model plugged into the  
8 total systems performance assessment. They can -- or  
9 it could be conditioned that certain steps would have  
10 to be taken. Is that correct, Mr. Malsch?

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

12 >> CHAIRMAN MOORE: Now, if it were so  
13 conditioned, would one of those conditions always have  
14 to be that when all was said and done, after all the  
15 litigation is over, that there is a sensitivity  
16 analysis run that shows that this error that's now been  
17 demonstrated in combination with all the other errors  
18 that were demonstrated, assuming there were any, you  
19 come out with a new result and that new result is fine  
20 and there would then be an opportunity to challenge  
21 that anew? Is that the way this would all work?

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

25 >> CHAIRMAN MOORE: And probably all our

1 lives' expectancies, I might add. Mr. Malsch, though,  
2 is that your view of how that would work?

3 >> MR. MALSCH: That's one way it could work.  
4 I guess my difficulty is I think we're using the term  
5 "materiality" kind of loosely. In our view, if a  
6 contention with adequate support alleges that a  
7 regulation is not satisfied, then that makes the  
8 contention admissible.

9 There is no further requirement that we show that  
10 that violation has some independent safety  
11 significance.

12 >> CHAIRMAN MOORE: I understand your  
13 position. But take it to the point that now you've had  
14 your hearing and you prevail on that challenge to the  
15 sub model. You condition -- either the applicant has  
16 to fix it with a new analysis or a licensed condition  
17 that it has to be fixed. I mean, the applicant either  
18 agrees to do it or he has a condition that he has to do  
19 it before he can get a license.

20 Is part of any license condition in this  
21 proceeding challenging the models necessarily going to  
22 have to include something that deals with, when all is  
23 said and done, a sensitivity analysis showing that it  
24 doesn't make any difference?

25 All these mistakes have been corrected under the

1 new sensitivity analysis.

2 >> MR. MALSCH: It seems to me that that's  
3 really DOE's option. I mean, in our hypothetical, a  
4 sub model has been found to be in noncompliance with  
5 Part 63. It seems to me at that point it's DOE's call.

6 >> CHAIRMAN MOORE: Okay.

7 >> MR. MALSCH: If they want to try again  
8 with a compliance model, that's fine. They could maybe  
9 try to get an exemption from that particular part of  
10 the regulations and proceed on that basis.

11 That's a possibility, I suppose. This is really  
12 all their call. But it seems to me -- that's hard to  
13 plan for at this point.

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

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

21 >> CHAIRMAN MOORE: On single issue  
22 contentions, I have a couple of questions and comments.  
23 These are basically aimed at language in the filings  
24 from the staff and DOE.

25 And that language predates the very substantial

1 contention admissibility requirements prior to 1989.  
2 And when you talk about "basis" and "basis statement,"  
3 that is no longer really a part of the lexicon of  
4 309(f)(1). The word "basis" only appears in  
5 309(f)(1)(ii).

6 And that -- the gist of that provision is a brief  
7 explanation of the basis of the contention, which I  
8 believe we probably can have general consensus means  
9 very briefly describe what's this contention all about.  
10 Is this about baseball or is it about football? Brief  
11 explanation: One, two, three sentences.

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

17 But I see tossed around in the filings "basis  
18 statement", "inadequate basis". It wouldn't be an  
19 adequate basis. The contention should only have one  
20 basis.

21 Well, staff and DOE, correct me where I'm wrong  
22 now under 309. What part does that kind of language  
23 play in the admissibility of a contention? And if I'm  
24 correct, then I think we all need to jettison that  
25 pre-1989 language which was applicable when the

1 contention we were under noticed pleading standards  
2 which only required to set forth the reasonable basis  
3 for the contention, and there's legions of case law and  
4 what was the reasonable basis 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 toss  
10 out "inadequate basis". Where is that to be found in  
11 the 309(f)(1) other than in (f)(1)(ii)?

12 >> MS. BUPP: I think the basis requirement  
13 is 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 issue  
16 contention to have a single basis, if your brief  
17 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 --

23 >> CHAIRMAN MOORE: -- with me that the

24 support for that contention, the things that are

25 required by 309(f)(1)(v) and (vi) are not what you're

1 talking about when you're saying "basis statement"?

2 >> MS. BUPP: When we're saying "basis  
3 statement" in our pleadings that we filed before the  
4 Advisory PAPO Board or in past meetings?

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

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

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

19 >> MS. BUPP: Well, I don't think --  
20 we certainly haven't said -- there are no contentions  
21 before the Board right now where we would say that  
22 something had an inadequate basis.

23 If we were to argue that something had inadequate  
24 factual or expert opinion support for it to be  
25 admissible --



1 >> CHAIRMAN MOORE: Okay. That is the point  
2 I guess I'm trying to get at the long way around.  
3 It would seem to me that if the requirements for  
4 admissibility of a contention are set forth in  
5 309(f)(1), subparts (i) through subpart (vi), that an  
6 objection to a contention on the basis that it has an  
7 inadequate basis is not a proper objection and should  
8 never appear in an answer opposing a contention.

9 >> MS. BUPP: I don't think that it would  
10 never be an improper objection. I think that the basis  
11 statement is related to having a sufficient statement  
12 of what your contention is.

13 If your contention is so confusing that you cannot  
14 clearly identify from reading the contention what  
15 exactly is at issue, then in that case the basis  
16 statement might be insufficient. I don't want to say  
17 that it would never be something that we would object  
18 to. But the main objection --

19 >> CHAIRMAN MOORE: Is the staff of the  
20 opinion that if we were to recommend to the Commission  
21 that the six contention admissibility requirements set  
22 forth in 309(f)(1), and the second requirement, a brief  
23 explanation of the basis, if it's one, two, or three  
24 sentences that make sense, that -- and a proper  
25 objection is not an inadequate basis for that

1 contention, and you've got to be -- if you're  
2 challenging the support, it's got to be something that  
3 you're complaining about in 309(f)(1)(v) or (vi)?

4 >> MS. BUPP: I would say that in most cases  
5 that that would be correct. As a lawyer, I want to  
6 keep my options open, but in most cases that would be  
7 correct.

8 >> JUDGE RYERSON: I think Nevada in its  
9 filing suggested that normally (i) would be a  
10 one-sentence response, (ii) would be a one-sentence  
11 response. And I take it, staff, you don't disagree  
12 with that; you disagree with their notion that you  
13 really can compress 3 and 4 and 5 and 6, but as to  
14 their description of (i) and (ii), that would be the  
15 same. Normally, one sentence or so.

16 >> MS. BUPP: One sentence, maybe up to three  
17 or four sentences if you want to get fancy. But we  
18 would really expect it to be a brief statement that  
19 clearly identifies what is at issue.

20 >> CHAIRMAN MOORE: And you would agree that  
21 in that brief explanation you don't have to set forth  
22 the support.

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

25 >> CHAIRMAN MOORE: You're all looking at me

1 like I'm either an outcast or I've been around too  
2 long. But the changes in '89 really changed that and  
3 the pre-1989 case law, unfortunately, has worked its  
4 way into the lexicon and it has no place today. And it  
5 is misused by the Commission, by the boards and by the  
6 parties all the time. And this is the proceeding where  
7 we don't have time to sort it out.

8         So, I would hope that if you agree that that is  
9 what 309(f)(1) means, that we approach it that way in  
10 our answers and our replies, and it will make life  
11 easier.

12         And I would agree with what the staff has said,  
13 that it would be a rare occasion that you would have an  
14 inadequate brief explanation of what the contention's  
15 all about. Certainly possible. But -- so that we  
16 shouldn't be seen as an objection to a contention  
17 language that says it's -- and it's an inadequate  
18 basis.

19         And this is the point when we say should the  
20 answers that is raising the objections to a contention  
21 track this -- the requirements of 309(f)(1), if you  
22 have a specific objection, for example, through the  
23 scope, which is 309(f)(1)(iii), that it's probably this  
24 is not the proceeding to then as a throw-away line end  
25 up at an inadequate basis.

1           Because that should not be even -- a moment should  
2 be spent by a Board in determining then or in anybody  
3 filing a reply why that's inadequate. Yes, Staff?

4           >> MR. LENEHAN: Yes, Your Honor, in drafting  
5 the written submissions we submitted here to this  
6 Board, there was no intention to drag in the pre-1989  
7 lexicon.

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

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

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

18           >> CHAIRMAN MOORE: Ms. Curran, you had  
19 indicated in your filing that you felt breaking the  
20 contention down into those six requirements was  
21 burdensome.

22           We cannot hear you, Ms. Curran. Can you hear us?

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

25           It seems to me that there was overlap and that it

1 was -- if you look at the different provisions that are  
2 related and addressing them separately, in my  
3 experience, you wind up repeating yourself. But honest  
4 to goodness, I had never really thought about what you  
5 just said.

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

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

18 Sometimes I find that doing it separately gets  
19 really duplicative.

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

1 That's the idea here, I think, is that 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 support  
9 for that contention and which is the pre-1989 concept  
10 of a reasonable basis for the contention and all that  
11 case law that has subsequently been refined in  
12 309(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 compliance  
22 within NRC safety requirement, then do you really need  
23 a separate statement that this is within the scope of  
24 the proceeding?

25 >> CHAIRMAN MOORE: The answer is, what's the

1 harm?

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

4 >> CHAIRMAN MOORE: Staff?

5 >> MR. LENEHAN: Your Honor, it may well be  
6 duplicative. The staff's position is that you have to  
7 address all of the six subparts, among other things.

8 Yes, it may be duplicative, but if you're  
9 allocating contentions among different boards,  
10 different attorneys and so on, it's just a price that  
11 we have to pay.

12 We'll try to minimize as much as possible, but at  
13 some points if a Board wants to look at contentions,  
14 it's much easier to have them separately laid out all  
15 to different bases.

16 >> MR. SILVERMAN: Your Honor --

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

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

25 I guess I have a question in my mind, is how much

1 do you have to go into it again?

2 >> CHAIRMAN MOORE: DOE?

3 >> MR. SILVERMAN: It's DOE's strongly held  
4 position that the commission has established these  
5 regulations. They've identified six separate criteria.  
6 They believe they are six separate criteria. We  
7 shouldn't be rewriting them in this proceeding.

8 If we try to start now to try to combine them in  
9 some artificial fashion, we're going to have motions  
10 and disagreements about what these criteria mean and  
11 where the lines are drawn.

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

18 >> CHAIRMAN MOORE: Would you agree, DOE,  
19 that almost of necessity, the six criteria, though,  
20 demand some repetition?

21 >> MR. SILVERMAN: I think some repetition is  
22 very likely.

23 >> CHAIRMAN MOORE: Just the nature of the  
24 beast?

25 >> JUDGE RYERSON: Mr. Malsch?



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

3 When we return, in addition to the matters of  
4 joint -- starting with the matters of joint contention  
5 and contention adoption, we'd like to briefly address  
6 the, for lack of a better word, quagmire that's been  
7 created by the litigation and the regulations over  
8 challenges to the DOE environmental documents and the  
9 staff's suggestion in its filings that clarification as  
10 to which of the reopening criteria are applicable.

11 We would like very much to get all your views on  
12 how that matter plays out and see if there's a general  
13 consensus of to what it means and which of those  
14 standards are applicable.

15 So, while you're having lunch, you can contemplate  
16 that. If you have any questions for us about that  
17 issue now as to what we're -- what the problem is, you  
18 all --

19 >> JUDGE BOLLWERK: I think also after lunch  
20 we may deal briefly, after we deal with that subject,  
21 before we get into E, F, G, and moving along, the  
22 question of labeling, which I think we've discussed  
23 somewhat. But we may need to at least visit that  
24 briefly.

25 >> MR. SILVERMAN: Your Honor, if I may ask

1 when you referred to litigation that helped create this  
2 quagmire, what are you referring to?

3 >> CHAIRMAN MOORE: The 2004 challenge to the  
4 DOE EIS by, among others, the State of Nevada in which  
5 the Court found that they would not address the merits  
6 of the Nevada challenge and that the substantive  
7 challenges would be -- upon representation of both DOE  
8 and NRC counsel -- would be able to be raised in the  
9 administrative adjudication.

10 And the Commission's more recent denial of  
11 Nevada's rule-making petition in which they reiterated  
12 that those substantive challenges would be able to be  
13 raised in the administrative litigation, but denying  
14 the rule-making, leaving the question of the  
15 regulations in 10 CFR 51.109, which state that -- among  
16 other things, that in challenges -- in raising  
17 challenges to the staff's supplementation decision of  
18 the EIS, the boards are to apply the standards for a  
19 reopening motion to the extent possible.

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

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

23 >> CHAIRMAN MOORE: Please be seated. Let's  
24 start with the staff on the issue that we left -- we  
25 said we'd pick up with. If the staff would be so kind

1 as to turn to page 6 of its May 6th filing.

2 You state, in starting with your second sentence:

3 "While petitioners may raise substantive challenges  
4 against the DOE EIS, they must still raise such  
5 challenges within the context of 10 CFR Section 51.109,  
6 which frames the challenge in terms of the  
7 practicability of adopting the DOE EIS."

8 By that statement, do you mean that all  
9 contentions in the staff's view challenging the DOE  
10 EIS, or EISes, must be framed in the context of the  
11 staff's supplementation decision to be admissible?

12 >> MS. BUPP: Do you mean the staff's  
13 adoption decision? Yes, that's correct.

14 >> CHAIRMAN MOORE: But then you go on to  
15 state: "However, the staff also believes that the NRC  
16 staff position" -- I'm sorry.

17 "For these types of contentions, the staff  
18 believes it would be more useful to label the  
19 contention with the EIS section being challenged."

20 I assume the word "label" is the whole key to what  
21 that means.

22 >> MS. BUPP: Yes. Just the label.

23 Otherwise we could have 20, 30 contentions that all  
24 were labeled, you know, Nevada Environmental Contention  
25 1 through 20, Staff Adoption Decision. And it wouldn't

1 really tell you much about what exactly the contention  
2 was about.

3 >> CHAIRMAN MOORE: Now, moving on to the  
4 last sentence on that page that runs over to the next  
5 page, you say: "To the extent that DOE's suggestion  
6 invites the Board to recommend which of the motion to  
7 reopen criteria and the procedures listed in 10 CFR  
8 Section 2.326 are applicable in the proceedings, the  
9 staff's believes such articulation would be  
10 beneficial."

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

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

21 Without any elaboration on what "to the extent  
22 possible" means, it appears that based on a reading of  
23 the regulations that all three of those criteria should  
24 be used.

25 >> CHAIRMAN MOORE: If that is true, turn to

1 the third criteria in Section 2.326(a)(3), please.

2 >> MS. BUPP: Yes.

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

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

11 >> CHAIRMAN MOORE: But you can't get to that  
12 decision without the challenge to the underlying EIS  
13 document, which both in the court case and in the  
14 Commission's denial of Nevada's petition for  
15 rule-making said that Nevada, among others, had a right  
16 to raise those substantive challenges to the 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: Well, you would say that  
22 because something in the EIS was wrong or inadequate or  
23 not substantially complete, that therefore the staff  
24 should have come to a different decision on its  
25 adoption review.

1           So, you would challenge the underlying EIS on  
2 which the staff based its adoption review, but the  
3 reason why it is material is that it goes to whether or  
4 not the staff was correct in adopting it.

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

14           If those are two of the purposes of NEPA, how can  
15 you ever say that would or -- would be or would not  
16 have been likely had the newly proffered evidence been  
17 considered initially when the accuracy of the  
18 information that appears in NEPA are two of the  
19 purposes that are served by NEPA? And if the  
20 information is not accurate, those two purposes of  
21 NEPA, of which there are others, can never be met.

22           >> MS. BUPP: I don't know that I would  
23 disagree with you. I don't know that we really have a  
24 disagreement on that. But if the EIS is not adequate  
25 if it does not have adequate information for a

1 decision-maker to make a decision, and if it does not  
2 have adequate information for the public to be well  
3 informed, then one could argue that it would not be  
4 practicable for the staff to adopt it.

5 But the issue really is, what is the NRC's role  
6 with regard to this EIS, and our role is the adoption  
7 decision.

8 We can't make a decision that it is practicable to  
9 adopt if the EIS isn't adequate. But that's the final  
10 decision.

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

14 >> MS. BUPP: It's really just -- we're not  
15 saying you can't challenge the EIS. We're saying that  
16 you have to as -- as a nicety of pleading you have to  
17 tie it back into the staff's adoption decision. The  
18 entire point of the EIS is the staff's adoption  
19 decision.

20 >> JUDGE BOLLWERK: So, the staff is wrong  
21 equals materiality, essentially. The magic words: If  
22 the staff is wrong equals materiality.

23 >> CHAIRMAN MOORE: Anyone else wish to  
24 comment?

25 >> MR. SILVERMAN: We don't agree with that

1 prescription that any alleged error in the staff's  
2 conclusions is material.

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

5 I think the fundamental intention here of 51.109  
6 and the reference to the reopening standard is not to  
7 revisit -- the Commission believes it's not appropriate  
8 to revisit de novo decisions that have been made by the  
9 Department of Energy.

10 That does not mean that some of those decisions  
11 are not appropriate for litigation in this proceeding  
12 by virtue of a judgment as to whether it was  
13 practicable or not to adopt the EISes.

14 In that regard, the agency is acting almost like  
15 an appellate court. The Court in the earlier decision  
16 held that any issues -- the issues that Nevada or  
17 others may raise with respect to the Repository  
18 Environmental Impact Statements that were not raised --  
19 that were not ripe at that time and can be raised as  
20 new considerations in this proceeding.

21 That's as far as they went in our view. You then  
22 have to go to the regulation to understand what the  
23 standard is for litigating those in this administrative  
24 proceeding.

25 And under 51.109 the determination is was it



1 practical to adopt. How do you decide that? You look  
2 to the further standards of 51.109 which says you have  
3 to have, first, significant substantial new information  
4 or new considerations that's satisfied by virtue of the  
5 Court's earlier decision. That rendered the  
6 Environmental Impact Statement inadequate. That  
7 doesn't mean any small mistake, error, omission;  
8 renders it inadequate.

9 How do you interpret inadequate? I believe you go  
10 to the reopening standards, which are referenced in  
11 51.109, which say that it must -- this information  
12 that's raised in this contention must essentially  
13 demonstrate that a materially different result would  
14 obtain as a result of that information. Either the  
15 error or the omission.

16 That does not mean the mere absence of some small  
17 piece of information or incorrect analysis in the NEPA  
18 documentation. The idea was not to duplicate the  
19 review and analysis that the department has done.

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

23 >> CHAIRMAN MOORE: Does Nevada wish to  
24 comment on this?

25 >> MR. MALSCH: Yeah, we have a view on both

1 what the staff said and what DOE said. I think the  
2 staff is engaging in the kind of silly formalism.

3 If we may challenge the staff's adoption decision  
4 on the basis that the DOE statement is wrong or  
5 inadequate, then basically a challenge to the DOE  
6 statement by itself is equal to a challenge of the  
7 staff's adoption decision.

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

11 That's why we had suggested that we should simply  
12 file contentions directed against the DOE NEPA  
13 documents and it would be understood that by doing so  
14 we were necessarily then challenging the staff's  
15 adoption decision, because I think that's the way it  
16 comes out.

17 On DOE's formulation, I think they are overlooking  
18 the actual impact of the Court's decision in NEI NEPA.  
19 The reason why the Commission agreed or adopted this  
20 reopening standard in the first place was that the  
21 assumption was that by the time the license application  
22 was filed, there would be a body of environmental  
23 documents, Environmental Impact Statements, that would  
24 be essentially off limits because there would have been  
25 a full opportunity to challenge them on their merits on

1 judicial review.

2       So, that's why it made sense to limit the  
3 challenge to situations where the proposed action had  
4 changed in some significant way or to new information.  
5 Because in either of those circumstances you couldn't  
6 apply principles of res judicata or collateral  
7 estoppel.

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

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

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

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

25             >> MR. MALSCH: Well, they said that, but the

1 regulation says apply those procedures to the extent  
2 possible. And I think --

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

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

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

15 Significant environmental issue. I'm not sure  
16 what that means as opposed to the third criteria, which  
17 is a materially different result might have been  
18 achieved.

19 And I think on that one the staff was correct,  
20 that if we challenge some aspect of the NEPA document  
21 as being insufficient or inadequate under NEPA law,  
22 then by definition we will be submitting a contention  
23 that if true would have a different result.

24 >> CHAIRMAN MOORE: In your view, DOE's  
25 position is essentially that the Commission did not

1 intend by its representations to the Court previously  
2 to be in any way suggesting that what they would be  
3 giving with the right hand, they would be taking away  
4 with the left through procedure?

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

6 >> CHAIRMAN MOORE: And under DOE's view and  
7 Nevada's view, that's precisely what would be  
8 happening.

9 >> MR. MALSCH: I think that's right. I  
10 think under the court case, NEPA contentions should be  
11 treated essentially the same as any other environmental  
12 contentions, any other safety contentions.

13 >> CHAIRMAN MOORE: So, then we do not have  
14 agreement that the third criteria, to the extent  
15 possible, that's not possible to apply it, so the  
16 future boards will have to wrestle with this, I take  
17 it.

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

20 >> MS. BUPP: I would just like to very  
21 briefly dispute Mr. Malsch's assertion that NEPA  
22 contentions should be treated like any other  
23 contentions.

24 As the Board just noted, the Commission did deny  
25 Nevada's petition for rule-making and in the denial for

1 that petition for rule-making the Commission reasserted  
2 its plan to use this very particular NEPA contention  
3 procedures in 51.109(a)(2), wherein contentions filed  
4 regarding the EIS would have to be related to the  
5 criteria in 51.109(c).

6 >> CHAIRMAN MOORE: But it also unreservedly  
7 said that Nevada would have the right to raise  
8 substantive challenges to the DOE EIS.

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

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

15 >> JUDGE RYERSON: Mr. Silverman, a question  
16 for you, and I think you wanted to say something.  
17 Just so I'm clear, does DOE agree with the staff's  
18 position that in 2.326(a)(3), materiality refers to  
19 being material to the staff's decision to adopt as  
20 opposed to being material to the ultimate licensing  
21 decision?

22 >> MR. SILVERMAN: That is a difficult  
23 question, and I'm not sure whether I know there's a  
24 difference or not.

25 In our view, a materially different result means

1 that based upon that new information, essentially the  
2 ultimate conclusion of the NEPA documentation would  
3 change.

4 And therefore, if that were the case, then I think  
5 if the staff had adopted that NEPA documentation  
6 without any supplementation, it would be a challenge to  
7 the staff's practicability determination.

8 I think I'm answering your question, but I might  
9 not be.

10 >> CHAIRMAN MOORE: The problem I have with  
11 your configuration of that is that because NEPA's a  
12 procedural statute. And there's a couple of cases that  
13 essentially say that you just have to follow the  
14 procedures and lay out all the information.

15 NEPA was never designed to keep the decision-maker  
16 from making a stupid decision. And that sums it up in  
17 the sense that as long as you stay out of the realm of  
18 arbitrary and capricious of your decision under the  
19 APA, you can make what many people would consider a  
20 wrong-headed decision or it can be a very right  
21 decision based on a lot of other factors than just the  
22 environmental issues.

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

1 >> MR. SILVERMAN: Well, it ultimately is --  
2 you're absolutely right as to it being a procedural  
3 statute, but at the end of the day it is the basis for  
4 an agency to determine whether to take a particular  
5 proposed action or not to take that proposed action or  
6 to modify it in some respect.

7 The Department of Energy has made those decisions  
8 and we think that --

9 >> CHAIRMAN MOORE: But really those  
10 decisions are in the record of decision, not in the EIS  
11 document, technically, are they not?

12 >> MR. SILVERMAN: Correct. They're  
13 ultimately documented --

14 >> CHAIRMAN MOORE: That materially different  
15 decision doesn't talk about the record of decision,  
16 it's talking about the NEPA documents.

17 >> MR. SILVERMAN: Well, it is a difficult  
18 issue. I think I endorse the notion that this is an  
19 issue that may need to be addressed by either this  
20 Board through additional briefs or other boards, but I  
21 think there are two points I wanted to make.

22 One is there's distinction to be made between what  
23 the Court said, which is you have a right to raise  
24 these issues in the administrative litigation. And,  
25 two, what the legal standard is, which we think is laid



1 out in the regulations for how those issues are  
2 litigated. That's one point.

3 Then just I think a minor procedural -- that  
4 distinction needs to be kept in mind. The Court didn't  
5 speak to what the legal standards should be.

6 The second point is with respect to the staff's  
7 statement -- I think this is a minor item, but maybe we  
8 could clear it up and I hope I'm not misrepresenting  
9 what staff is saying.

10 This notion of do you label according to the EIS  
11 or label according to the practicability determination  
12 by the staff. I don't know what the practicability  
13 determination is going to look like, whether it's going  
14 to be a short document with a lengthy analysis or not.

15 But what I do know is that the Environmental  
16 Impact Statements will have form and substance to them  
17 and they will have sections and so it's not  
18 inconsistent for me to say that Nevada and other  
19 parties may challenge the practicability decision, but  
20 that they should label their challenges in accordance  
21 with the Environmental Impact Statement issue that  
22 they're raising.

23 Because there's something you can cite to it to  
24 the alternatives analysis or the cost-benefit analysis  
25 or the description of the environment or whatever.

1 It's a labeling issue.

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

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

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

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

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

19 >> JUDGE BOLLWERK: You said this Board or  
20 some other mechanism should be used to raise this  
21 issue. Given we're an advisory board, is there any  
22 reason for us to do it and does that change any if the  
23 Commission, as we've requested, gives us authority to  
24 issue orders in some way? Is there something this  
25 advisory board can do on this issue?

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

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

12           >> CHAIRMAN MOORE: Also, would it make sense  
13 to recommend that Mr. Malsch's objection appears to be  
14 one of that the staff's view is one of form over  
15 substance.

16           If you're really labeling -- and DOE says the same  
17 thing, really. If you need to label what the part of  
18 the EIS is that you're challenging, but you have to do  
19 it in the context of the staff's adoption decision, he  
20 says that's form over substance, you're really going  
21 right to the EIS. Why do you need the interim step?

22           But if it is only -- if it will avoid fights as to  
23 the contention admissibility stage, does it make sense  
24 to just recommend that you do it the way the staff is  
25 recommending and, yes, it may be form over substance,

1 but this would certainly not be the first time in the  
2 history of the Commission that form over substance  
3 played a role. And just be done with it in that  
4 context for contention admissibility.

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

10 And if, say, hypothetically the staff's adoption  
11 decision were a 150-page document, what is the purpose  
12 of having us scour through the 150-page document when  
13 really the focus of contentions is on the DOE document?  
14 Perhaps that would depend on what the nature of the  
15 adoption decision actually is.

16 >> CHAIRMAN MOORE: Or the other side of that  
17 coin is that if it's a two-page document, which just  
18 emphasizes why you really do need to be pointing to the  
19 EIS and maybe form over substance, but a nod to the  
20 staff's adoption decision, at least as far as the  
21 pleading requirements of the contention is taken care  
22 of.

23 >> MR. MALSCH: I guess we couldn't object to  
24 that.

25 >> CHAIRMAN MOORE: All right.

1           >> JUDGE BOLLWERK: Okay. Anything else we  
2 need to do with that? I think we've pretty much  
3 exhausted that.

4           I did mention that we'd like to talk for a second  
5 about labeling and this is a good segue into that  
6 subject. The one thing I think we've heard is when you  
7 looked at the original ground of responses that we got  
8 on labeling, there seems to be sort of a split between  
9 those that were interested in having a label somehow  
10 reflect to some degree of granularity at least the  
11 license application, or potentially as we've heard the  
12 NEPA document that's involved, and those that simply  
13 thought that it would be better to use a more generic  
14 label, safety perhaps and NEPA environment or  
15 miscellaneous, and number them in some way  
16 sequentially, and then have potentially, within the  
17 contention itself, the basis. Who knows where you  
18 would put it exactly. Some reference to the  
19 application rather than having it in the title or the  
20 label of the contention.

21           And particularly with respect to talking about  
22 single issue contentions and what we've heard today.  
23 Obviously, there may be some difficulty depending on  
24 how the contention is framed and what level of  
25 granularity you go into, how exactly you label it.

1           Is there any additional thoughts based on what  
2 you've talked about in terms of single issue  
3 contentions and your thoughts about labeling in terms  
4 of labeling the contention using something that  
5 specifically directs you to the license application or  
6 the NEPA documents as opposed to a generic label of  
7 some kind? And maybe we'll just go through the list  
8 like we've done in the past and see if there's any --

9           >> MR. LIST: There was a brief conversation  
10 on that on Monday. And as I recall, if I can sum it  
11 up, I think there was a consensus that the reference to  
12 the table of contents and the application or the EIS  
13 section of specificity would be preferable to the  
14 generic.

15           >> JUDGE BOLLWERK: All right. Anyone else,  
16 given what we've talked about today, have anything  
17 further they want to say on that subject? Mr. Malsch?

18           >> MR. MALSCH: We had suggested in our  
19 pleading that the third level would be sufficient. And  
20 I guess it would depend on what the license application  
21 looks like. But I actually do believe that going to  
22 the third level would turn out to be more than  
23 sufficient for purposes of organizing the contentions.

24           Although, as I said, when it gets to actually  
25 drafting the contentions, we will probably be going

1 more specific than that. But at least for purposes of  
2 organization, I suspect it will turn out to be a lot  
3 easier to go no further than the third level.

4 >> JUDGE BOLLWERK: All right. I think the  
5 DOE recommendation is in the fourth level, if I  
6 remember correctly.

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

11 >> MR. MALSCH: I think the difficulty is  
12 that if some of the model report documents are any  
13 guide, each level will have its own discussion, at  
14 least third level and going down. And so, it will not  
15 be a matter of saying the fourth level is sort of  
16 self-contained.

17 It may be that the fourth level is actually not  
18 self-contained and the fourth level can't be understood  
19 unless you also include stuff from the third level.

20 >> CHAIRMAN MOORE: A number of the filings  
21 suggested that the page number or numbers always be  
22 included along with the granularity level. How does  
23 that play into this?

24 >> MR. MALSCH: We thought we might have a  
25 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 to  
4 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 in 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. The image of the  
17 page will be the same. You'll see that page number at  
18 the 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  
23 how -- some specific -- add some specificity to the  
24 contention at that point. Even though it's labeled up  
25 here, you're looking at this very specific, these



1 pages.

2 >> CHAIRMAN MOORE: By the same token it can  
3 work the other way.

4 >> JUDGE BOLLWERK: That's true.

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

8 >> JUDGE BOLLWERK: That's exactly right.  
9 That's true.

10 Anyone in Rockville have anything they wanted to  
11 say about this? Because I know some of the counties  
12 were concerned about this at one point, anyway.

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

18 >> JUDGE BOLLWERK: All right. Anyone else  
19 want to say anything further about labeling, then?

20 All right. I think at this point, then, we'll  
21 go -- sort of go back into our May 2nd memorandum. I  
22 think we were on Subsection E. I'm going to sort of  
23 take us through the balance of the subdivisions, I  
24 think.

25 The E deals with joint contentions and contention

1 adoption, which is 10 Code of Federal Regulations  
2 Section 2.309(f)(3).

3 And just by way of perhaps a little background  
4 explanation. I'd invite the other Board members if I  
5 say something they don't agree with to certainly  
6 interject and clarify or give their own views.

7 But contention, joint contentions, and contention  
8 adoption are maybe a little bit -- what's the word I'm  
9 looking for -- not the clearest thing. I guess the  
10 rules have made them clearer, but this is something  
11 that's been going on for a number of years.

12 The idea with joint contentions is that parties  
13 would get together before the contentions are filed  
14 generally -- in fact, that's the idea of a joint  
15 contention -- have some discussion, decide who the  
16 representative is going to be. And when the contention  
17 comes in, it's then a joint contention, but there's  
18 always one party under the rules that is responsible  
19 for the contention to the degree that the Board would  
20 go to them and direct any questions they had.

21 In theory, the other parties in dealing with that  
22 contention, if it were admitted, they would then know  
23 the representative who they have to deal with, with  
24 discovery or any other questions about that contention.

25 And so joint contentions subsumes a level of

1 interaction by the parties before the petition is filed  
2 and a willingness to agree on a representative.

3 Adoption is a little bit different. Although it  
4 has, to some degree, an impact in that you have two  
5 parties that somehow are interested in supporting a  
6 contention, the adoption process comes generally after  
7 the petition is filed.

8 Other parties see -- having chosen for whatever  
9 reason not to talk with one another about contentions,  
10 see the contention of a particular party that they  
11 like. There's generally a period the Board provides  
12 for adoption of contentions. If they feel they want to  
13 adopt a contention they would then file something with  
14 the Board indicating they've adopted X party's  
15 contention.

16 They would have to indicate in that, under the  
17 rules, that they agree the party that originally  
18 sponsored the contention will be the representative, or  
19 they have to indicate that there was some discussion  
20 and there was an agreement about who the representative  
21 would be.

22 My assumption being that generally if they decided  
23 the party that adopted the contention was going to be  
24 the representative, that would have to be reflected in  
25 that filing with the Board. So, that's the basic idea.

1           And the contentions that are joint or that are  
2 adopted, in theory, if one of the parties drops out, in  
3 theory, the party may be there then to continue the  
4 fight, as it were, with respect to that contention.

5           And that can have implications down the road and  
6 parties do from time to time decide for whatever reason  
7 that their concerns have been addressed or for lack of  
8 resources they can no longer participate. People do  
9 drop out in contentions.

10           If they haven't been adopted, they go by the  
11 wayside or they're subject to timeliness concerns in  
12 terms of late adoption, for instance. So, that's the  
13 basic background on joint contentions and adoptions.

14           Any questions about that or comments? Yes, DOE?

15           >> MR. SILVERMAN: A question, Your Honor.  
16 When you indicated that adoption is a process that  
17 comes after contentions have been admitted --

18           >> JUDGE BOLLWERK: After they've been filed.  
19 Not after -- if I said admitted, that was a mistake.  
20 After they've been filed.

21           >> MR. SILVERMAN: It may have been my error.  
22 I apologize. Thank you.

23           >> JUDGE BOLLWERK: At least the general  
24 process is when the petition comes in, then the Board  
25 under the rules, would issue some kind of an order

1 saying -- again, it has to be a proceeding where you  
2 have multiple parties, so you don't have to be  
3 concerned about that. But there obviously will be  
4 multiple parties in this case.

5 Let's go through the questions, then. These were  
6 all -- so, Mr. List, I guess I'll be looking to you  
7 first.

8 E1: Should the potential parties confer prior to  
9 filing contentions with the goal of submitting, where  
10 practicable, joint contentions rather than duplicative  
11 contentions, and if so, what procedural structure, if  
12 any, should be established to enable the consultation  
13 process?

14 Anything you'd like to say about that one, sir?

15 >> MR. LIST: Well, first, I guess I should  
16 say that informal consultation among the local  
17 governments on potentially joining together with joint  
18 contentions has actually begun.

19 It's been going on for some time, particularly at  
20 least among the -- some of the AULG members.  
21 And obviously they share common interests. They also  
22 have some cost constraints. And so, the ability to  
23 join together in contentions is one that we appreciate  
24 having.

25 That's particularly been the case with the four

1 counties that I represent who have considered very  
2 carefully the potential for conflicts among ourselves  
3 and all that's been resolved and it may be that we'll  
4 join with others.

5 We, in fact, as recently as over lunch today  
6 talked with a couple other counties about how we might  
7 come together.

8 As far as a procedural structure, we didn't talk  
9 much about that. Certainly, there's been no formal  
10 structure that we have recommended or agreed upon. I  
11 think it would be difficult to mandate advanced  
12 consultation among parties, among all the parties.  
13 Because obviously there could be some serious  
14 objections or conflicts among the parties over what  
15 positions they intend to take.

16 So, I don't think that that would be appropriate.  
17 But certainly the opportunity to confer on an informal  
18 basis is one that might be recognized in some fashion.

19 >> JUDGE BOLLWERK: All right. Is there  
20 anything a Board like this one or any other -- a body  
21 that you're aware of the Commission currently has with  
22 the PAPO Board, someone else that could help the  
23 parties in terms of that consultation process?

24 I mean, obviously we can't hold settlement  
25 conferences when we don't have anything to settle at

1 this point. But just basically leave it up to you, I  
2 think, is what I'm hearing.

3 >> MR. LIST: I think so. One matter that  
4 you touched upon a few moments ago was the issue of  
5 what happens after the contention has been accepted and  
6 the matter of who is going to be the lead party on it.

7 And one of the questions that we have thought  
8 about is, in that circumstance, suppose there's a  
9 negotiation that takes place. Do all the other joint  
10 sponsors of that -- of that contention or even in the  
11 context of an adopted contention -- do those who have  
12 adopted it have an opportunity to participate and  
13 perhaps be a part of the decision on how it's resolved?

14 There's been some concern about that. And I think  
15 that perhaps is something that has to be worked out  
16 among the joint sponsors as well.

17 >> JUDGE BOLLWERK: The only thing I could  
18 say about that is, let me see -- in private fuel  
19 storage, we had a similar situation. And I think it  
20 was pretty clear from the orders that we issued the  
21 Board looked to the representative, whoever it was that  
22 had been designated as the lead party, to basically be  
23 the representative for the other parties.

24 But the Board also created a process whereby if  
25 someone had a real problem with what the lead party was

1 doing or for whatever reason there wasn't an  
2 opportunity to come to the Board and express those  
3 concerns, we made it clear we thought that should be  
4 the exception rather than the rule, because by agreeing  
5 to adopt or file a joint contention, there's some  
6 expectation that the parties are going to work  
7 together.

8 But having said that, there was a safety valve, as  
9 it were. That's, again, one instance. I don't know  
10 that that's necessarily is the process here, but that  
11 was certainly used in the past.

12 >> MR. LIST: I think that would be a good  
13 precedent.

14 On the issue of one individual or one party being  
15 designated as the lead, in the case of our four  
16 counties, we haven't reached any such arrangement.  
17 They've all basically delegated to one counsel, myself  
18 being that person, the lead role for each of us on an  
19 equal basis.

20 >> JUDGE BOLLWERK: All right. Department of  
21 Energy?

22 >> MR. SILVERMAN: Thank you, Your Honor.  
23 Just one point. DOE's position is we ought -- the  
24 Board ought to maximize the degree to which the parties  
25 get together in advance before the filing of



1 contentions to jointly sponsor contentions in  
2 accordance with the procedure that you laid out.

3         The critical point there is that will avoid a  
4 certain number of duplicative contentions that we will  
5 have to respond to that the staff will have to respond  
6 to.

7         We think there is time for that to occur and we  
8 would encourage that that process be used to the  
9 maximum extent possible. And just one of the things  
10 that the Board asked is what's the procedural approach  
11 for doing that. And you've got the State of Nevada  
12 that's indicated they may have 600 or more contentions.

13         One way to do that -- and most of the other  
14 prospective parties have said they have somewhere in  
15 the range of 10, 20, 30 contentions.

16         At an appropriate time, as it gets close to filing  
17 time for those contentions, it doesn't seem to us to be  
18 a huge burden to ask the prospective parties to share  
19 the counties or other parties their smaller numbers of  
20 contentions with the State to see where there's overlap  
21 and duplication.

22         The State can look at those, because there's not a  
23 huge -- not expected to be a huge number of those. And  
24 it would be a fairly short process, I would think, for  
25 the parties to get together and say, you know, we're

1 saying the same thing here. Why can't we consolidate  
2 and jointly sponsor one contention instead of filing  
3 two, three, or four.

4 So, we think it's a doable process.

5 >> CHAIRMAN MOORE: In light of the tightness  
6 of the schedule for the contention filers, I recognize  
7 you have the same kind of tight problem in filing  
8 answers. But isn't that something that in the scheme  
9 of things is best left to after contention  
10 admissibility?

11 In more fullness of time, we have the opportunity  
12 to take a sober look at all of them and combine them  
13 and join them and do those things, as opposed to this  
14 very compact -- where people are going to be very  
15 pressed for time?

16 I recognize it would lessen your burden, but it  
17 would increase theirs.

18 >> MR. SILVERMAN: Understood. Our view is  
19 there is ample time with the minimum expected 90 days  
20 of staff docketing review, the 30 days right now for  
21 the contention preparation in addition to the 90 plus  
22 the time that the number the parties have been  
23 preparing to date.

24 And of course that is not mutually exclusive with  
25 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: This is Barry Neuman.

6 >> JUDGE BOLLWERK: Yes, Mr. Neuman.

7 >> MR. NEUMAN: If I may, Your Honor made  
8 the point that I was about to make in response to DOE.  
9 I think that it's a bit cavalier for DOE to assume that  
10 the burden on the AULG to draft contentions in the  
11 short time that we will have. It is short. And then  
12 to confer among ourselves, including the State of  
13 Nevada, to work out agreements on joint contentions.

14 It puts a burden on the counties that is far  
15 greater, far greater, than the burden that would be  
16 placed on DOE to greater than the AULG's to review  
17 potentially duplicative contentions at a later date.

18 I can say with respect to Lincoln County, based  
19 upon what we heard earlier in terms of how single issue  
20 contentions will be defined, although our filing some  
21 time ago indicated perhaps 25 to 50 contentions based  
22 on what we've heard today, that number will  
23 substantially increase.

24 The State itself, we know, will have many, many  
25 contentions. And I think that it is a relatively small

1 burden to place on DOE given its enormous resources  
2 relative to the great burden that we've placed on the  
3 AULGs to sit down in advance, try to work out agreement  
4 on contentions, which isn't just a matter of saying,  
5 "Oh, yes, we like your contention. We'll adopt it".

6       It may take negotiation on wording and the like.  
7 To impose that burden on AULGs while they're also  
8 trying to draft the contentions I think is unfair and  
9 inappropriate and the burden ought to be placed on DOE.

10           >> JUDGE BOLLWERK: Mr. Murphy?

11           >> MR. MURPHY: I generally agree with that  
12 statement. I think that a burden on the smaller  
13 counties particularly that is unnecessary.

14       But there is another -- I would suggest to the  
15 panel that there are principles of comity involved  
16 here, also. This does not apply to NEI or the  
17 environmental organizations or some other potential  
18 interveners, but the AULGs are sister counties of the  
19 Sovereign State of Nevada. And our clients have been  
20 used to conferring on a number of matters since  
21 statehood.

22       And I just think it's not -- it's inappropriate at  
23 this early stage of the proceedings for the panel to  
24 try to impose on the counties in Nevada a system, a  
25 methodology or system or requirements or deadlines for

1 conferring when we confer all the time about a whole  
2 number of things totally unrelated to Yucca Mountain.

3 And there are considerations which the counties  
4 take and have and the State of Nevada has that have  
5 absolutely nothing whatsoever to do with Yucca Mountain  
6 or legal or tactical things that sometimes prompt  
7 cooperation among local governments and sometimes  
8 require decisions in another way.

9 There are other considerations which these small  
10 local governments in Nevada have to take into account.  
11 And I just don't think it's appropriate for the panel  
12 to try to figure that out at this early stage in the  
13 process.

14 We're going to confer. We have. We're going to  
15 continue to. As Bob List indicated, that will happen  
16 and it will happen in our own way.

17 >> JUDGE BOLLWERK: Mr. Malsch?

18 >> MR. MALSCH: I just wanted to say that I  
19 agree with the comments by Mr. Neuman and Mr. Murphy  
20 and also the concerns expressed by Judge Moore.

21 It seems to me that it's asking too much to insist  
22 on this and the benefits can be achieved just as well  
23 and a lot more easily, with less burden, later on after  
24 the contentions are admitted.

25 >> JUDGE BOLLWERK: All right. Anyone else

1 want to say anything about the question of  
2 consultation? Yes?

3 >> MS. VIBERT: I'd like to also add that for  
4 a number of the counties there appear to be issues of  
5 the delegated authority given and whether some of the  
6 counties will have authority to do that without  
7 returning to their Board for authorization to join.

8 So, all of these time frame issues also play out  
9 in the context of we're representing public bodies as  
10 well.

11 >> JUDGE BOLLWERK: Okay. All right.  
12 Let me move on to the next question, then. This was  
13 E2. This is sort of a procedural question. If a joint  
14 contention is proposed -- I'm not sure given what we  
15 just heard whether there will be any, but nonetheless  
16 let's assume for argument purposes there are.

17 If a joint contention is proposed, what additional  
18 information should be included in the hearing petitions  
19 of one or more of the joint contention sponsors to  
20 designate or label or support that contention?

21 For instance, statements indicating the contention  
22 is jointly sponsored, a list of all the participants  
23 that are sponsoring the contention, designation of the  
24 specific participant who has authority to act with  
25 respect to the contention.

1           The basic idea here is how would you label a  
2 contention that is jointly filed to make it clear to  
3 the Board, to the other parties, that this is a joint  
4 contention and it meets the general requirements that  
5 are in the rules in terms of joint contentions?

6 Mr. List?

7           >> MR. LIST: I think we felt that each of  
8 those suggested examples are valid and good and  
9 reasonable. We did not have any additions to those,  
10 but I doubt there will be much difficulty in satisfying  
11 requirements along those lines.

12           >> JUDGE BOLLWERK: All right. Anyone have  
13 any other comments on that? Okay. Any comments from  
14 Rockville? All right.

15           Then let's move on to E3: Should there be a fixed  
16 time period in which to adopt the contentions of other  
17 parties?

18           We turn now from joint contentions to contention  
19 adoption. We can do four at the same time. If there  
20 should be a fixed time for adoption contention, what  
21 should such a time period be?

22           Mr. List, I'll ask you to respond first, please.

23           >> MR. LIST: Thank you, Your Honor.

24 I think we all agree that there should be a specific  
25 time frame. We did not come up with a number of days.

1     However, if I may, on behalf of at least one of the  
2     participants, the concern was that in at least one  
3     county the Commissioners only meet once a month.

4             And they have to approve any contentions that  
5     might be filed. And so any time frame that's adopted  
6     should take into account the schedule of the county  
7     Commissioners to include as much as a 30-day lapse  
8     between meetings.

9             >> JUDGE BOLLWERK: So, we're talking about  
10    30 days plus, then? In other words, maybe give them up  
11    to 60 days?

12            >> CHAIRMAN MOORE: 45 days would always  
13    capture it.

14            >> MR. LIST: That should do it, yes, Your  
15    Honor.

16            >> CHAIRMAN MOORE: Are there any periods  
17    where they don't meet?

18            >> MR. LIST: Pardon me?

19            >> CHAIRMAN MOORE: Are there any months when  
20    they don't meet?

21            >> MR. LIST: No, there are not.

22            >> JUDGE BOLLWERK: From Rockville, I think.

23            >> MR. NEUMAN: Yes, Your Honor. Barry

24    Neuman on behalf of Lincoln County. I was the party  
25    that raised this concern. I would think that 45 days



1 would be sufficient.

2 Just to be clear, it's not just a matter of when  
3 the Commission meets, but also the need to deliberate  
4 on the contentions and get these on the agenda  
5 sufficiently in advance of meetings. But I would think  
6 that 45 days ought to do it.

7 >> JUDGE BOLLWERK: All right. Department of  
8 Energy?

9 >> MR. SILVERMAN: I don't think we have a  
10 comment on the timing, but just one clarification as  
11 I'm thinking ahead a little bit about avoiding  
12 problems.

13 To the extent there is a decision to jointly  
14 sponsor contentions -- or this may be more appropriate  
15 for adopting a contention -- I think it's very  
16 important that it be clear that if that's going to --  
17 that that adoption decision is -- it's a notice. It's  
18 we're adopting this contention; for example, the State  
19 of Nevada.

20 It is not an opportunity to add new information to  
21 that contention in some way that would create the  
22 potential for DOE to now ask for an opportunity to  
23 respond, et cetera.

24 So, we just ask that all the parties keep that in  
25 mind when it comes time to make that adoption decision

1 and deliver it to the board and the parties.

2 >> JUDGE BOLLWERK: Well, again, generally,  
3 the past practice, it's as simple as filing a list of  
4 the contentions you adopted. I mean, that's generally  
5 the way it's done.

6 All right. Number E5. Let me stop. Any other  
7 points on timing from anyone? All right.

8 E5: Again, this is a procedural question: If  
9 contention adoption is proposed, what information  
10 should be included in the pleading regarding adoption?

11 For example, an adopter statement declaring  
12 whether or not it has contacted the originator of the  
13 contention regarding the adoption and whether there's  
14 an agreement on which participant will have authority  
15 to act regarding the contention.

16 Again, this is a procedural matter to make it  
17 clear that the -- when you're putting in your  
18 contention adoption information, what do you need to  
19 say to make it clear that you follow the procedural  
20 requirements that are in the rules. Mr. List?

21 >> MR. LIST: I think the consensus was that  
22 there should be consultation among the parties in  
23 advance of the adoption and concurrence reached if  
24 possible on what the adopter includes in that adoption  
25 document.

1           The examples that are set forth in your question,  
2 I think, again, seemed reasonable and fair.

3           >> JUDGE BOLLWERK: All right. Any comments  
4 anyone has on that proposal? All right.

5           >> CHAIRMAN MOORE: If we make any  
6 recommendations concerning adoption, one thing I'd want  
7 to point out is if there's a period post contention  
8 admission for adoption, there's no preclusion or in my  
9 view there shouldn't be preclusion from adopting early  
10 because that then would -- arguably would give someone  
11 appeal rights.

12           If they adopted contention that wasn't admitted,  
13 they then arguably would have appeal rights on that  
14 contention that wasn't admitted, whereas they would be  
15 forfeiting any such rights if they waited post adoption  
16 or post admission, especially in a 45-day period.

17           So, you should all be aware that it carries for  
18 adoption and joint contentions as well appeal rights on  
19 non-admissibility of the contention.

20           >> JUDGE BOLLWERK: I think that's a point  
21 well made. All right. Anything else on that point?  
22 Anything else then on joint contention or adoption  
23 contentions that anybody wants to bring to the Advisory  
24 Board's attention or any discussion? No? All right.

25           Then let's move on to letter F: non-timely, new,

1 or amended contentions. And this really goes to the  
2 question of some reaction when the initial petition is  
3 filed and other matters arise; what's the ability of  
4 the parties or what are the procedural avenues for  
5 getting in other contentions and what those contentions  
6 would need to specify in terms of any requirement --  
7 not requirements, but itemization of the requirements  
8 for admission of contentions.

9 F1: Should any proffered contentions filed  
10 subsequent to the submission of the initial hearing  
11 petitions, whether they were non-timely, new, or  
12 amended contentions, be subject to the same kind of  
13 formatting requirements as initial contentions?

14 Again, looking to 10 CFR Section 2.309(c) as well  
15 as Section (f)(2). Mr. List?

16 >> MR. LIST: I think the feeling was that  
17 the logic here is that such contentions ought to meet  
18 the same standards in terms of format. I think NRC  
19 staff also noted during this discussion that there is  
20 -- that there are time frames allowing for extension of  
21 time.

22 But otherwise the form of the contentions  
23 themselves and their content ought to track the  
24 submission of the initial contentions that would be  
25 timely filed.

1 >> JUDGE BOLLWERK: All right. Although with  
2 each of these, whether it's non-timely or new or  
3 amended, there are additional procedural requirements,  
4 hurdles, or hoops that have to be jumped through.

5 And I take it there was no problem, if there was  
6 a -- that those would be specified or they would be a  
7 requirement they be set out specifically as well.

8 >> MR. LIST: At least if there were any  
9 concerns about that, they were not addressed on Monday.

10 >> JUDGE BOLLWERK: All right. Anybody want  
11 to say anything about that? Yes?

12 >> MS. CURRAN: Judge Bollwerk, I don't  
13 believe there's anything in the regulation that says  
14 what is considered timely with respect to filing a new  
15 contention after the original deadline, and I'd just  
16 like to request that the Advisory PAPO Board give us  
17 some guidance as to whether -- many boards say 30 days,  
18 whether that would be a reasonable period.

19 >> JUDGE BOLLWERK: Okay. Any thoughts  
20 about -- Ms. Curran has stated correctly that  
21 generally -- the rules don't say anything about it  
22 specifically, but the Board's -- the practice has been,  
23 I think, generally 30 days for a new or amended  
24 contention when the information that would trigger that  
25 contention would be filed.

1           Anybody want to say anything about that? Staff,  
2 please?

3                   >> MR. LENEHAN: Yes, Your Honor. We believe  
4 30 days is the correct time. As you say, that's what's  
5 been used before and it seems like it's the time that  
6 should be done.

7                   >> CHAIRMAN MOORE: I would comment that that  
8 is something that's been a rule of thumb, but there's  
9 never been a case quite like this. And therefore, I  
10 think we may be dealing with a different thumb.

11                  And at least my take on this is it would be highly  
12 dependent on the circumstances. And I can envision  
13 situations in which 30 days would be completely  
14 inadequate to analyze and digest the material,  
15 especially when you're dealing with complex models and  
16 things like that. And a rule of thumb may be totally  
17 inappropriate.

18                  And my take on it would be that in each instance  
19 the timeliness is something that the person filing  
20 needs to have built a record and lay forth all its  
21 reasons why the time period in which they're now filing  
22 is adequate and those opposing it can point out why  
23 it's inadequate.

24                  But what I see happening, because we used a 30-day  
25 rule of thumb in just run of the mill cases or compared

1 to this case run of the mill proceedings. It could be  
2 work -- quite an injustice if it were just rotely  
3 applied here.

4 And so, just speaking for myself, I see no problem  
5 in making people justify whatever period of time it is  
6 and having built a record for that time. Historically  
7 what's going to happen, the responses are going to be  
8 that in that 36 million pages of material in the LSN  
9 that there's scrolled away somewhere in there a  
10 paragraph and so they've had two and a half years'  
11 notice to this if they could have connected the dots,  
12 and so, therefore, it's not good cause.

13 As sure as I live and breathe, I expect to see  
14 those arguments. And that's why I think a party needs  
15 to make the case as to what's reasonable in the  
16 circumstances, depending on the complexity of the issue  
17 and what material they were aware of and let the  
18 opponent point out that there was squirreled away in  
19 this 36 million pages some hint that should have keyed  
20 them to this.

21 So, I would be loathe to recommend anything  
22 suggesting an automatic 30-day period. It's  
23 convenient, it's nice and it has historical precedence,  
24 but where I'm coming from in this case I don't see it  
25 applicable here.

1 >> MS. CURRAN: Judge Moore --

2 >> CHAIRMAN MOORE: Yes, Ms. Curran, I  
3 suspect for once you're going to agree with me,  
4 Ms. Curran?

5 >> MS. CURRAN: I think your point is very  
6 well taken. And I would just like to request, if it  
7 was possible, to sort of set a threshold. It does help  
8 the parties to know, for instance, if I come in 30  
9 days, is somebody going to argue, well, really after 15  
10 days you're late, in general.

11 I think it would be helpful to -- I think it's a  
12 really good idea to allow case-by-case determinations,  
13 but it would be helpful to have a threshold.

14 >> JUDGE BOLLWERK: Let's start with the  
15 staff, then we'll work our way around the room.  
16 Anything else, Ms. Curran?

17 >> MS. CURRAN: No.

18 >> JUDGE BOLLWERK: All right. Staff has a  
19 comment?

20 >> MR. LENEHAN: Yes, Your Honor. We do not  
21 disagree with Judge Moore's comments. But in order to  
22 have a certain degree of closure to this, though, what  
23 we'd suggest maybe is within 30 days, if a party feels  
24 they may have a contention and they don't have enough  
25 time, at that point for them to notify the Board, go



1 through whatever procedures the Board chooses to get an  
2 extension of that or to get a -- not so much an  
3 extension, but to get a time certain for when they must  
4 file the contentions, but that they make the request  
5 within the 30 days.

6 >> CHAIRMAN MOORE: That kind of a procedure  
7 would also allow it to be essentially thrashed out at  
8 that point as to the time frame and everyone could be  
9 essentially heard and perhaps agreement as to what  
10 would be a reasonable time frame.

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

12 >> JUDGE BOLLWERK: So, what I'm hearing is a  
13 proposal 30 days at a minimum, but anything beyond 30  
14 days --

15 >> CHAIRMAN MOORE: We're going to have to be  
16 careful here. We all may be getting reasonable.

17 (Laughter)

18 >> JUDGE BOLLWERK: But anybody saw something  
19 that needed to go beyond 30 days they could come in and  
20 ask for some kind of an extension or a definitive  
21 ruling by the Board as to how much time they should  
22 have without having to face lateness requirements.  
23 NEI?

24 >> MR. BAUSER: Yes, I agree this is a  
25 proceeding like no other, but that might actually cut

1 two ways. It's a proceeding like no other in the  
2 situation that it is on a very tight time schedule,  
3 too.

4 And it seems to me that an appropriate time to  
5 raise a new contention, if you will, based on new  
6 information, may be a week. It may come up during  
7 hearing, very clearly and so on, so forth. So, I just  
8 throw that factor into the mix.

9 >> JUDGE BOLLWERK: All right. Department of  
10 Energy?

11 >> MR. SILVERMAN: I was going to say I also  
12 understand Judge Moore's points. One option would be  
13 to say that 30 days is the standard. But if a party  
14 believes they need more time, then within the 30-day  
15 period they can request an extension to file the new  
16 event petition contention.

17 >> JUDGE BOLLWERK: All right.

18 >> CHAIRMAN MOORE: Is presumptively good  
19 cause within 30 days?

20 >> MR. SILVERMAN: Yes.

21 >> MS. CURRAN: But -- this is Diane Curran.  
22 I think Judge Moore raised the hypothetical that an  
23 avalanche of new material comes in and that one doesn't  
24 discover the new issue until after 30 days. And I  
25 think that has to be taken into account, too.

1           >> JUDGE BOLLWERK: Although, in theory that  
2 may have come into the mix, if you really didn't  
3 discover it, then the question is what was the trigger  
4 for you to file the contention if you didn't know about  
5 it? That can get into questions about what the  
6 triggering mechanism is for the contention. But, yes.  
7 Anyone else? State of Nevada?

8           >> MR. MALSCH: I think the suggestion is a  
9 good one, that, as I understand it, if a contention is  
10 filed within the 30 days, it is considered per force to  
11 be timely because it's within 30 days.

12           But if the party thinks they need more than 30  
13 days they should, within the 30-day period, ask for  
14 more time.

15           The only slight glitch is that there would need to  
16 be an understanding that if that request were denied,  
17 that they were afforded some small opportunity to catch  
18 up and file in a timely basis.

19           >> JUDGE BOLLWERK: All right. Or there  
20 needs to be a requirement they file, say, a week or ten  
21 days beforehand so they then have that if there's a  
22 timely denial.

23           >> MR. MALSCH: Something like that.

24           >> JUDGE BOLLWERK: Right. All right.

25           Anyone else want to make a comment on this particular

1 process? All right. Thank you.

2 Let's then move to G, which talked about  
3 additional submission format matters. Couple of items  
4 that we thought we would bring to the potential  
5 parties' attention and get your comments on.

6 G1: Can the parties agree on three-letter  
7 designations for identifying themselves and their  
8 filings in the evidentiary exhibits?

9 I'm told we have a technical difficulty and we  
10 need to take a brief break.

11 >> CHAIRMAN MOORE: The closed captioning, as  
12 we're still working out the bugs on the DDMS system, is  
13 now down. And since we're also on the learning curve,  
14 I'm trying to get the DDMS system debugged.

15 Although I'd planned to take a brief 15-minute  
16 break at 3:00, we'll now take it and we'll come back  
17 into session at 2:50, 15 minutes from now. Thank you.

18 (Recess taken at 2:36 p.m.)

19 >> CHAIRMAN MOORE: We apologize for the  
20 technical glitch. We're now proceeding.

21 >> JUDGE BOLLWERK: I have a technical  
22 glitch. I have to find the piece of paper I was  
23 reading from.

24 I think what we were about to do is to get into  
25 letter G, additional formatting matters.

1           G1: Can the parties agree on three-letter  
2 designations identifying themselves in their filings  
3 and any evidentiary exhibits? Mr. List, if you would,  
4 sir?

5           >> MR. LIST: Yes. There was no question  
6 about that. I would note that NRC staff noted that  
7 they would identify a three-letter designation other  
8 than NRC in order to distinguish themselves from the  
9 Commission.

10          >> JUDGE BOLLWERK: All right. So, that  
11 would be something we would -- if someone set a  
12 deadline, say, at some point, that you all would be  
13 able to generate a list, or would we ask you to --  
14 something we should have you do on an individual basis?  
15 How is that?

16          >> CHAIRMAN MOORE: By way of background,  
17 this is driven by the DDMS. That in turn was driven by  
18 DOE's record keeping system for the LSN. So, too much  
19 water has passed over the dam and under the bridge to  
20 be able to do anything. It has to be a three-letter  
21 designation.

22          >> JUDGE BOLLWERK: And one thing we talked  
23 about -- actually, we touched on this, and maybe it's  
24 something we should -- the parties should anticipate  
25 with respect to exhibits that their exhibits will have

1 individual exhibit numbers that will have the  
2 designation for the party that sponsors the exhibit.

3 Now, that raises a number of interesting questions  
4 that we've been thinking about, and you should think  
5 about as well, how do we designate those if they're,  
6 for instance, before different boards?

7 We talked a little bit this morning about  
8 potential admission of an issue -- or, I'm sorry, an  
9 exhibit for one Board and not another.

10 We also, frankly, would prefer to have exhibits  
11 only designated once to some degree. So, there may be  
12 a need to keep a master list of exhibits among the  
13 parties. So, that's one of the things procedurally you  
14 all should be thinking about, as are we already.

15 >> CHAIRMAN MOORE: In that regard, I would  
16 speak to Nevada and DOE and to the staff. If you would  
17 be contemplating the method in which you could always  
18 notify boards if an exhibit had been previously  
19 admitted or offered and admitted or not admitted before  
20 another Board.

21 That is a housekeeping matter that probably will  
22 be important as the case is tried so that boards will  
23 be aware of what other boards have done with the same  
24 evidence.

25 >> JUDGE BOLLWERK: I think I may have

1 misspoke. We would be interested in having an exhibit  
2 only identified once. Generally, you would identify  
3 it. It may well be admitted before some boards and not  
4 admitted before others, but it would be identified  
5 once. It would have a unique number.

6 That also raises questions, again, thinking  
7 sometimes parts of an application are put in and we  
8 need to pay attention to that. Somebody may put in  
9 three pages here, four pages there.

10 There may be overlaps; all that's sort of things  
11 we need to be thinking about. These are all sort of  
12 procedural matters, but they're going to become very  
13 important in the context of a case this large with this  
14 number of parties and the number of exhibits we're  
15 looking at.

16 So, that's something that the boards will be  
17 dealing with and hopefully with the parties. But start  
18 thinking about that as well.

19 I suspect at some point, then, we will be looking  
20 forward to a three-letter designation from each of the  
21 parties; something they can live with.

22 On G2: Can the parties consistently label  
23 supporting materials as attachments so as to  
24 distinguish them from evidentiary exhibits for the  
25 purposes of electronic filings?

1           This needs a little background probably and then  
2 I'll turn to Mr. List.

3           The background, I think if you read the PAPO  
4 Board's fourth order, fourth case management order, I  
5 think that was the one where you actually laid this out  
6 for the first time that there was a concern that an  
7 exhibit, an evidentiary hearing exhibit, one where  
8 you're at an evidentiary hearing with witnesses and  
9 exhibits are being identified for the purposes of  
10 electronic hearing docket and for the DDMS system,  
11 those need to be put into the Electronic Information  
12 Exchange System as individual documents so that they  
13 can be electronically marked as individual documents.

14           If, on the other hand, you're simply using  
15 something as an attachment -- and when you put a  
16 document included with a pleading -- it could be called  
17 an attachment, an enclosure, an exhibit, pick a name --  
18 those really do need to be not put in actually as  
19 separate documents. It's not necessary and it simply  
20 causes problems for the system.

21           So, this is the basic idea that we're trying to  
22 achieve, and it's actually reflected now on the NRC's  
23 rules that deal with the EIE submission of documents  
24 for non high-level waste proceedings. It's actually in  
25 the rules.



1           Although the fourth case management Board that  
2 Judge Moore's PAPO's Board put together actually also  
3 indicates it's supposed to be followed there.

4           Mr. List, I've said too much. I'll turn to you,  
5 sir.

6                   >> CHAIRMAN MOORE: The reason this happens,  
7 as Judge Bollwerk mentioned, that evidentiary exhibits  
8 need to be individually manipulated in the electronic  
9 system, the DDMS.

10           Attachments to motions and things like that are  
11 filed as a single document, and then if they're going  
12 to be used in the system, you need to be aware that the  
13 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 quickly  
19 that way.

20           And that's the distinction between attachments  
21 or --

22                   >> JUDGE BOLLWERK: Exhibits.

23                   >> CHAIRMAN MOORE: -- and exhibits or -- we  
24 would like some consistent labeling so that you know  
25 it's that going to be one document or anything that's

1 labeled exhibits is going to be separate document in  
2 the Electronic Information Exchange filing system of  
3 the agency.

4 >> JUDGE BOLLWERK: All right. And, Mr.  
5 List, we've --

6 >> MR. LIST: There were no -- no concerns  
7 expressed about that at all.

8 >> JUDGE BOLLWERK: All right. Again, it's a  
9 procedural matter, but it is important. And one of the  
10 real time savings or efficiencies in this process,  
11 hopefully, the ability of the Digital Data Management  
12 System to mark exhibits electronically.

13 Those of you that have been part of NRC practice  
14 for year know we get a lot of paper, a lot of stamping,  
15 a lot of marking. All that can be done by the clerk  
16 over at that station simply marking the electronic  
17 exhibit, and that's all that needs to be done.  
18 So, that will save us a tremendous amount of time and,  
19 frankly, paper as well. So, that's the idea.

20 Let's go to H1, then, if there's nothing else on G  
21 that anyone has.

22 I'm sorry. Before we do that, actually, I've got  
23 a note here. We did have a discussion in our earlier  
24 order about the use of documents and how they should be  
25 referenced. And we wanted to go over that briefly

1 again.

2 The distinction between using a Universal Resource  
3 Locator, or URL, to reference a document, attaching the  
4 document physically to an electronic filing or using  
5 the LSN number for the document.

6 And I think there was some consensus, at least --  
7 and I don't know if you all talked about this at all,  
8 Mr. List, anything you want to say about it -- about  
9 using URLs. That seemed to be, in most people's  
10 estimation, a bad idea.

11 But let me see if you have anything to say.

12 >> MR. LIST: Yes, Your Honor. As a matter  
13 of fact, after we finished going through the May memo  
14 from the Board, we turned our attention to the  
15 April 4th memo that specifically did address that, and  
16 we hit on three or four significant matters where we  
17 thought you might want to hear back from us, and this  
18 was one of them.

19 And the consensus was that the URLs are generally  
20 unreliable. They're often changed or removed or  
21 modified, and, therefore, that that particular  
22 reference ought not to be allowed.

23 >> JUDGE BOLLWERK: All right. So URLs,  
24 then, are not a good idea in the parties' estimation.

25 I take it -- I know the Department of Energy has

1 been suggesting fairly vigorously that they wanted to  
2 see all documents attached to a pleading. Others, I  
3 think, did have the feeling that they could live with  
4 an LSN number and perhaps a document title and date so  
5 that if there was any problems with the number they at  
6 least could try to reference a document or identify it  
7 in that way.

8           Anyone want to say anything on anything  
9 differently than what you said or any other additional  
10 thoughts on attachment of documents versus using the  
11 LSN number? Yes, Mr. Malsch.

12           >> MR. MALSCH: I just wanted to add a small  
13 point. It would seem to me it would be sufficient to  
14 either cite to the LSN accession number or an ADAMS  
15 accession number. In either case it's pretty clear  
16 what it is you're referring to. And ADAMS is the  
17 official document room. So, it struck us that that  
18 should be sufficient as well.

19           >> CHAIRMAN MOORE: If they're in the LSN,  
20 you would recommend that still would be acceptable to  
21 have an ADAMS number as opposed to LSN?

22           >> MR. MALSCH: I hadn't thought about one as  
23 opposed to the other. I was thinking that either one  
24 would be sufficient.

25           >> JUDGE BOLLWERK: Let me interpose

1 something else, then I'll get to you, Mr. Murphy.  
2 I think there is a contemplation or has been for some  
3 time, particularly when we get to evidentiary exhibits  
4 and those are filed in the Electronic Information  
5 Exchange process, there will be a box that's there to  
6 put in the LSN number for each exhibit and that would  
7 be -- obviously, there's been a lot of work that's been  
8 put into this. Everyone should have identified all  
9 these documents.

10 If it doesn't have an LSN number, I think the  
11 Board's going to want to know about that and the other  
12 parties. So, that will be part of the process as well.

13 Nothing pejorative about the lack of an LSN  
14 number, but if it's not there, I think there's going to  
15 be some questions raised.

16 So, let me go to Mr. Murphy, and then I'll go back  
17 to Mr. Malsch.

18 >> MR. MURPHY: You took the words out of my  
19 mouth, Judge Bollwerk. We've been talking about that  
20 for years, as you well remember.

21 Particularly, the smaller counties and potential  
22 participants who aren't even here in the room yet have  
23 familiarized themselves with the LSN and they don't  
24 know what ADAMS is about and have never been required  
25 to figure out ADAMS.

1           ADAMS, years ago at least, used to be very  
2 user-unfriendly. So, it would be our position clearly  
3 that the LSN -- that's what we negotiated the LSN for,  
4 that's what the LSN is for is to provide that kind of  
5 capability to the hearing.

6           And our position is LSN number rather than ADAMS  
7 number. If the document is not in the LSN and you  
8 don't want to attach it to your contention or to  
9 whatever else, then put it in the LSN. I mean, it  
10 takes a matter of -- overnight is the longest period of  
11 time.

12           So, we're LSN fans here in Nye County. Let's do  
13 everything through the LSN.

14           >> JUDGE BOLLWERK: All right. Let's go to  
15 Mr. Malsch and if DOE has something to say.

16           >> MR. MALSCH: I just want to point out that  
17 as we said in one of our submissions, it's sometimes  
18 very difficult to find documents on the LSN. And the  
19 other problem is that there's no way just using LSN to  
20 be sure when you find a document that it's not been  
21 superseded.

22           So, we had suggested if we're going to be using  
23 LSN numbers as a means for reference, there ought to be  
24 a way in which one can clearly find out whether what  
25 you're citing is the latest draft, a second draft or

1 whatever it is. And there may be various ways to do  
2 that.

3 One way would be to have, let's say, DOE, which I  
4 think would have the most documents at issue here, put  
5 together some kind of a program or spreadsheet that  
6 would enable it to tell you on a fairly timely basis  
7 when particular LSN documents have been superseded.

8 But that is a problem, finding documents on the  
9 LSN, and then when you find them, being sure you've got  
10 the one that's the latest.

11 >> JUDGE BOLLWERK: All right.

12 >> CHAIRMAN MOORE: I believe the  
13 contemplation of the LSNA is that there will be that  
14 information available. I believe also it entails  
15 cooperation with DOE and the LSNA is in contact and  
16 discussions with DOE as I understand it to largely  
17 resolve that problem.

18 The problem will never go away completely, but it  
19 should be ameliorated considerably.

20 On the LSN numbers, citing those in your  
21 contentions, that's I believe a 12-space alphanumeric  
22 compilation. There's a lot of room for transposition  
23 of numbers and letters.

24 Was there consensus on having something more than  
25 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, too.  
17 Get the terms and citations. It goes to the same  
18 point. The more specific you are any time you give us  
19 a citation, the better we are.

20 >> MR. SILVERMAN: It might also help to have  
21 the document type such as e-mail, report, et cetera.

22 >> JUDGE BOLLWERK: Let me make a slight  
23 divergence. We were going to wait till the end to do  
24 this, but since we've talked about LSN and we've talked  
25 about electronic filing a little bit, this may be a



1 good time to do this.

2 I may be talking to the converted here, but we  
3 wanted to give you a little sense of what we are about  
4 with respect to electronic filing and electronic docket  
5 and the Digital Data Management System and to sort of  
6 put in a little pitch for getting with the program. I  
7 think a number of people are in terms of training.

8 If you could turn on the overhead, please. All  
9 right.

10 This is a schematic, very general one, that  
11 illustrates the -- what's called the Meta-System, the  
12 electronic hearing environment that's been created. It  
13 was actually created for the high-level waste  
14 proceedings. It's now being used for all NRC  
15 proceedings, including the new combined operating  
16 proceeding. It's the standard operating practice for  
17 the NRC now.

18 You can see the LSN, which is the source of  
19 discovery material for the high-level waste proceeding.  
20 That is a source of information to be put into the  
21 parties' pleadings as well as potentially issuances  
22 from the boards. Those then go into the Electronic  
23 Information Exchange. I think most folks here are  
24 already using it.

25 There's e-mail service from that that goes to all

1 the parties that are on the e-mail list for the  
2 particular proceeding. And if we do begin to establish  
3 multiple boards, in theory, each of those boards would  
4 have a separate service list and folks will be served  
5 in terms of the pleadings that go to that particular  
6 Board.

7 From the Electronic Information Exchange, the  
8 documents go into our ADAMS system which we've been  
9 talking about. If you wonder what ADAM stands for,  
10 there's what the acronym means.

11 Then it's electronic hearing document, which is  
12 available at the NRC's public website. From the  
13 electronic hearing docket, we then duplicate what's in  
14 the electronic hearing document and put it into the  
15 Digital Data Management System.

16 The DDMS actually has two aspects to it. One is  
17 the audiovisual system that you see here and in  
18 Rockville. Our ability to display documents as well as  
19 to do videoconferencing and teleconferencing, as well  
20 as what we're seeing in terms of the closed captioning  
21 that we're using.

22 Also, we have -- there's a database that stands  
23 behind the DDMS that includes all the documents that  
24 are in the electronic hearing docket. They're  
25 accessible to you all. If you have taken DDMS training

1 on the road, web accessible, as well as accessible in  
2 this hearing room.

3 As we go forward with the high-level waste  
4 proceeding, hopefully you'll be able to sit at the  
5 monitors you have in front of you and call up the  
6 documents that you need to use to display them in this  
7 room.

8 With respect to the evidentiary hearings that we  
9 hold, those documents will also be scheduled on a  
10 regular basis and those will be the way that we are  
11 able to admit the documentary material into evidence  
12 using the Digital Data Management System. So, that's  
13 all part of it.

14 You can see also the clerk of the court, he or she can  
15 mark the exhibits that are there. There's also the  
16 possibility, although we don't encourage it, to take ad  
17 hoc exhibits, things that you might bring into this  
18 room for the first time in electronic format. We can  
19 put those into the system as well. Using the document  
20 camera over there, we can capture digital pictures of  
21 physical exhibits.

22 We can also take things that can be shown on a  
23 computer, like these slides or a computer program, that  
24 can be run and displayed in this room and captured  
25 digitally. All that will be available to us through

1 the use of the DDMS.

2 I just want to go through briefly -- you all know  
3 the LSN. That's what the home page looks like.

4 Hopefully, everyone here has had LSN training that  
5 needs to have it. We would encourage you we'll talk  
6 about that at the end to take that LSN training now.

7 We are coming to the point where, you heard the  
8 Department of Energy say, they're going to be filing  
9 this application potentially within the next month.  
10 And things are going to proceed from there.

11 If you haven't had LSN training, if you know  
12 someone that hasn't had LSN training up to this point,  
13 now is the time to get it and we'll be glad to help you  
14 with that. So, I would encourage you to do so.

15 This is the e-filing submission form. I think  
16 most of the folks here have actually seen this and used  
17 it. This is the way in which you would put a document  
18 into the electronic hearing docket into our electronic  
19 system.

20 It is also the way that you would take the  
21 documents out. It has a little box there that says  
22 "view" and that's how when you get an e-mail it says  
23 there's a document available, you push the view box.  
24 And then you're able to see it or you can also download  
25 it.

1 I should mention that this form will be superseded  
2 probably by the fall by an updated form.

3 One of the things that doesn't work on this form  
4 is the bundling process. We talked about 50 MG or  
5 higher filings; right now that really doesn't work very  
6 well. Hopefully, by the fall that will be the changed  
7 and will be working better.

8 Also, with the new system that we're hoping to put  
9 in place right now you have to download a viewer. You  
10 will no longer have to do it to make it simpler to use.  
11 So, there are some improvements coming in EIE hopefully  
12 by the fall.

13 And one of the things you do need to have to use  
14 the EIE system is a digital certificate, and there are  
15 ways to get that if you don't have one. But it's  
16 important to become part of that system.

17 This is the actual e-mail that you would receive  
18 for an e-filing service. You click on the link, that  
19 it will take you right to that form, and then the form  
20 will give you access to the document. But, again, you  
21 need a digital certificate to be able to do that.

22 And there are ways to do that and we can help you  
23 with that as well.

24 This is the electronic hearing docket, which is  
25 the public face of the high-level -- for the high-level

1 waste docket. That's available through the NRC's  
2 website and it can be accessed 24 hours a day. It's  
3 there. It has all the documents on it for both this  
4 Board; right now the Advisory PAPO Board as well as the  
5 PAPO Board.

6 This is something you may not have seen before.  
7 There's actually a page also for the protective order  
8 file. Again, this would be the sensitive documents  
9 proprietary, something less than safeguards that might  
10 be filed in the proceeding that only certain  
11 individuals under a protective order would have access  
12 to. You would need a digital certificate to be able to  
13 access these documents through the electronic hearing  
14 docket or through the DDMS, either way.

15 And they are -- the security on those is actually  
16 controlled at the document level. So, you'll have to  
17 be covered by the protective order and have put in an  
18 affidavit indicating that you're going to follow that  
19 protective order in order to be -- to have those  
20 documents made available to you there through the  
21 protective order file or to see them on the DDMS.

22 This is a digital data management system. This is  
23 sort of the front page. It has a lot of different  
24 capabilities that I've already mentioned and you do  
25 need to be trained on it and have a password and a user

1 name in order to be able to have access to the system,  
2 which brings me to the final slide.

3 We are more than willing to arrange LSN or DDMS  
4 training for anyone that needs it, whether it's the  
5 representatives themselves or their support staffs.  
6 The contact is LSNwebmaster@NRC.gov.

7 I mentioned before the June 19th meeting that's  
8 going to be held between the Department of Energy and  
9 NRC staff. That's being held at Rockville. We will  
10 have this room open, I believe, as a web-conferencing  
11 site. Folks can come and watch it.

12 And in conjunction with that meeting, we'd be more  
13 than glad to train anybody on the LSN or DDMS that  
14 would like to have it. All you need to do is let us  
15 know.

16 We'll make our IT folks who are very good  
17 available to you to train you on both the DDMS and the  
18 LSN if you just let us know. So, please, if you  
19 haven't had the training, now is the time.

20 I know Judge Moore and I have been living with  
21 this proceeding for a number of years. But it is  
22 coming to fruition in one way or another, at least with  
23 the filing of the application. And it would be time to  
24 start now if you haven't at this point to participate  
25 with both the LSN and DDMS.

1           So, I would urge you to get the training because  
2 it's necessary to be able to use the system, both the  
3 systems to their maximum usability of the functionality  
4 that it will give you. All right. Any questions?

5           That's just sort of a really exhortation. Now is  
6 the time if you haven't done it already.

7           >> CHAIRMAN MOORE: On the subject of  
8 protective orders, the staff and DOE both suggested in  
9 their filings that protective orders need to be issued  
10 to cover the OUO information in the license  
11 application.

12           In light of the PAPO Board's April 29th, 2008,  
13 order, the staff and DOE satisfied that those  
14 protective orders are fully applicable and will cover  
15 the situation?

16           >> MR. SILVERMAN: We have reviewed the --  
17 you're referring to the third case management order, I  
18 believe?

19           >> CHAIRMAN MOORE: I'm sorry?

20           >> MR. SILVERMAN: Are you referring to the  
21 third case management order?

22           >> CHAIRMAN MOORE: Yes. Maybe it's the  
23 fourth.

24           >> MR. SILVERMAN: I believe it's the third.

25           >> CHAIRMAN MOORE: Whatever. One or the



1 other.

2 >> MR. SILVERMAN: Our view of that is that's  
3 a good starting point for a protective order for this  
4 proceeding. But as you look at it, it seems to apply  
5 to the pre-docketing phase. It refers to the PAPO  
6 Board and there may be -- there's probably a need for  
7 some modifications, probably not terribly substantial.

8 >> CHAIRMAN MOORE: But those orders were  
9 written looking to the long-term and require -- and  
10 then stay in effect. Of course, that board's  
11 jurisdiction doesn't cease until after docketing or at  
12 docketing, around that time.

13 And those protective orders were all written at  
14 the suggestion of the parties that they stay in effect  
15 until replaced by another presiding officer or the  
16 Commission.

17 So, I believe that that would take care of the  
18 problem since it is LSN pre-docketing information that  
19 we're now talking about. The license application is  
20 the license --

21 >> MR. SILVERMAN: Yeah, it would remain --

22 >> CHAIRMAN MOORE -- with the LSN, fell  
23 within the jurisdiction of the PAPO Board and those  
24 protective orders that are in effect now should clearly  
25 cover --

1 >> MR. SILVERMAN: They are fine up through  
2 the docketing and through the period of time when the  
3 jurisdiction --

4 >> CHAIRMAN MOORE: If you or the staff or  
5 Nevada or any other party feels those are not adequate,  
6 I would urge you to file something with the PAPO Board  
7 suggesting those modifications, because that's the only  
8 Board in existence at this point that can act on  
9 anything.

10 >> MR. SILVERMAN: If I may, an alternative  
11 might be to recommend changes to this advisory board  
12 for the post docketing period for recommendation to the  
13 Commission.

14 Again, I don't think we think that major changes  
15 are required.

16 >> CHAIRMAN MOORE: From your lips to the  
17 Commission's ears is, I think, is the way that goes.

18 >> MR. SILVERMAN: May I add something on LSN  
19 before we move off of that? I just wanted to reiterate  
20 an offer that the Department's made and then couple it  
21 with a request.

22 The offer was that the department would be willing  
23 to provide to the prospective parties, Nevada and the  
24 counties, et cetera, the reference -- the LSN accession  
25 numbers in identification information for those

1 references that we spoke of earlier for the LA.

2 By the same token -- and they'll have months to  
3 look at those documents, and they are on LSN now,  
4 unless they're excluded.

5 We would ask that the Board consider that at some  
6 time shortly before the submission of petitions with  
7 the contentions that we be provided with the LSN  
8 accession number information for the attachments; i.e.,  
9 references in support of those contentions.

10 That doesn't mean that there can't be changes to  
11 those and the parties can't make final changes, but for  
12 the 25-day period that we have to respond it would  
13 certainly help us a great deal if we had at least those  
14 document numbers and identifying information perhaps 10  
15 days before the filing of the petitions.

16 >> CHAIRMAN MOORE: Mr. Neuman, you raised an  
17 objection previously to a similar suggestion. Do you  
18 wish to comment on this?

19 >> MS. CURRAN: This is Diane Curran. I  
20 think I'll jump in here and say that Eureka County, at  
21 least, would be concerned that given all our  
22 responsibilities in such a short time frame, we're not  
23 going to be able to provide a list of the attachments  
24 until we submit the contentions.

25 And they're documents that are going to be known

1 to the applicant anyway. It's not like we're coming up  
2 with something they've never seen before.

3 >> CHAIRMAN MOORE: Ms. Curran, I think this  
4 is a housekeeping matter from DOE's standpoint. They  
5 believe, I think, that they will have need to be able  
6 to reproduce those materials and have them ready to  
7 their various teams so that they can file answers  
8 within 25 days. And this is a corollary to the  
9 attaching the documents question that was raised  
10 previously.

11 It's in that context that they are looking for the  
12 ability to have a couple of days' advance notice so  
13 that they can physically reproduce the materials and  
14 have them ready to go so that after the contentions are  
15 filed, they don't have to spend several days trying to  
16 do that.

17 Does anyone else -- yes, Ms. Curran.

18 >> MS. CURRAN: Well, we could make an effort  
19 to do that. I guess we'll probably err on the side of  
20 identifying so many and then ask not to be penalized if  
21 we couldn't identify one.

22 >> CHAIRMAN MOORE: I don't believe there's  
23 any question about penalties or being bound by it.

24 This is essentially cooperation among counsel  
25 recognizing the tightness of the time frames that

1 everyone is working with.

2           What's the general -- is there a consensus view  
3 whether this would be possible in -- some days in  
4 advance of the contention filing deadline that parties  
5 be able to produce as many as reasonably possible of  
6 the LSN document numbers that they're going to be using  
7 so that others will have an opportunity to reproduce  
8 those in advance? Mr. Malsch?

9           >> MR. MALSCH: You know, it sounds  
10 reasonable, but it depends on the time we have for  
11 drafting contentions.

12           If we're facing a 30-day deadline, after the  
13 notice of hearing, it's just one additional thing we're  
14 going to be having to do.

15           So, as the regulations stand now, I would say we  
16 couldn't agree to do that.

17           I think if DOE has a problem, then they can ask  
18 for more time to file their answer.

19           >> CHAIRMAN MOORE: Well, that might be the  
20 obvious solution, but I suspect they're in a -- well,  
21 let's leave the characterization out. They're going to  
22 meet this deadline come hell or high water.

23           >> MR. MALSCH: Well, it seems to me if they  
24 can answer a thousand contentions in 25 days they have  
25 immense resources. And the mere fact that they don't

1 actually have the LSN numbers a few days in advance  
2 will have no effect one way or the other.

3 >> CHAIRMAN MOORE: Mr. List, was this  
4 something that your group tackled?

5 >> MR. LIST: It's not something that the  
6 group tackled. I would just say for the parties that I  
7 represent that we would be -- we'd be willing to reach  
8 out and make that effort.

9 >> CHAIRMAN MOORE: This sounds like  
10 something that as time progresses over the next 30, 60,  
11 90 days will be better able to be addressed and when we  
12 see how all of this is more likely to shake out.

13 Voluntarily I would urge -- I think we could all  
14 agree that if you're willing to do that to provide this  
15 to DOE. It appears DOE would be appreciative of your  
16 efforts. And we could address this at a later time  
17 depending on what schedules look like, and at that  
18 point we can see if we can have more complete voluntary  
19 cooperation.

20 The Board is facing much the same problem. And we  
21 will have to figure out how to deal with it one way or  
22 another.

23 >> MR. SILVERMAN: And, of course, it would  
24 be the same benefit to the Board.

25 >> JUDGE BOLLWERK: Let me just also -- it

1 occurred to me to mention one other thing about the  
2 DDMS that may give some folks an incentive to do the  
3 training. I've been watching this proceeding. It's a  
4 little delayed, but there's actually a way that you can  
5 see. There's a live video within the DDMS that's  
6 available to you if you sign up and take the training,  
7 and you can watch it right from your office.

8       So, Ms. Curran, you've expressed concerns about  
9 web streaming. We would really like the web streaming.  
10 We probably will start that sometime in the near  
11 future, hopefully. But right now DDMS actually does  
12 have that capability to some degree.

13       Obviously, within your office where you have web  
14 access, but it's something, again, you take the  
15 training and you'll be able to see these proceedings if  
16 you can't show up. So, again, that's another reason to  
17 do it.

18       Enough DDMS promo here.

19       In terms of the number H, let's move on to that  
20 one. That was dealing with standing interested  
21 governmental entity status. This may be one where  
22 maybe we characterize it as fools walk in where angels  
23 fear to tread. I'm not sure. But we're going to talk  
24 a little bit about this.

25       Should a petition that establishes -- this is H1:

1 Should a petition that establishes -- that seeks to  
2 establish, excuse me, standing as of right for  
3 individuals or nongovernmental organizations contain  
4 specific labeled sections addressing the required  
5 elements?

6 And, again, those elements -- for instance, injury  
7 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. Mr. List?

14 >> MR. LIST: We started talking about this,  
15 and it became apparent very quickly that some of the  
16 persons on the call were in disagreement about who had  
17 automatic standing as parties.

18 And we kind of digressed into that. I do want to  
19 make the Board aware of that discussion because we  
20 believe it's something that ought to be sorted out and  
21 acted and ruled upon as quickly as possible.

22 Specifically, I think it was generally agreed that  
23 the State of Nevada and Nye County are automatically  
24 included as parties.

25 But whether the other AULG members, and there are



1 nine of them, have automatic standing or not became a  
2 matter of contention.

3 The DOE's initial position was that these AULGs do  
4 not have statutory or regulatory standing. NRC staff  
5 took the position to the contrary that we do have such  
6 standing, and DOE, at the conclusion of this  
7 discussion, agreed to review its position.

8 I should state that the AULGs feel very strongly,  
9 passionately about that issue and that it was generally  
10 agreed there that an early determination is really  
11 essential. And that the matter should probably be  
12 briefed and decided promptly because it will affect our  
13 whole preparation of contentions and the role in which  
14 we find ourselves.

15 There was concern expressed by Mr. Neuman, which  
16 I'm sure he can elaborate upon here, about the time and  
17 the costs that might be incurred in addressing that,  
18 where we ought to be also dealing with contentions.

19 So I'll let him step forward on that point. But  
20 clearly this is something that's of great interest and  
21 great concern to each of us.

22 >> CHAIRMAN MOORE: Before hearing from  
23 Mr. -- who is going to speak to this?

24 >> MR. LIST: Mr. Neuman.

25 >> CHAIRMAN MOORE: Before Mr. Neuman speaks,

1 DOE, what is the basis for your contention that -- bad  
2 choice of words, for your argument that effective units  
3 of local government as set forth in Section 2 of the  
4 Waste Policy Act and as defined in Section 10 CFR  
5 2.101, definition of party, do not have automatic  
6 standing? What's your argument?

7 >> MR. SILVERMAN: Your Honor, I'll be happy  
8 to respond to that. Let me just back up one step to  
9 clarify one thing. I think there was general  
10 agreement -- first, the basic point that the Board  
11 asked was, should a petitioner seek to establish  
12 standing as a rights for individuals or nongovernmental  
13 entities contain specific labeled sections regarding  
14 the standing requirements.

15 I think there's general consensus on that that  
16 is --

17 >> MR. LIST: That's correct.

18 >> MR. SILVERMAN: Thank you. Having said that, with  
19 respect to the AULGs, before briefly explaining our  
20 legal position, I want to underscore it is the  
21 Department's interest simply that all the parties and  
22 prospective parties follow the requirements and the  
23 regulations.

24 We are not looking to overly stringently restrict  
25 the participation of any entity, including the AULGs,

1 and we are mindful of some language in the relevant  
2 statements of consideration, which I'll mention to you  
3 in a moment, that does anticipate the very likely  
4 standing of the AULGs.

5 Having said that, our view is that in fact  
6 automatic standing really only has been conferred upon  
7 the State of Nevada and Nye County.

8 The Nuclear Waste Policy Act defines AULGs. The  
9 statutory provisions relate primarily, if not  
10 exclusively, actually exclusively to coordination and  
11 cooperation with those entities and financial grants.  
12 It does not confer automatic standing on those  
13 entities.

14 The 2.309 standards with respect to standing only  
15 confer standing again on the local governments and  
16 affected Indian tribes and states that have the  
17 repository within their borders.

18 You are correct that Subpart J, and I believe it's  
19 2.1000, does define a party to include AULGs. But the  
20 standards in Subpart J, if you look at the very  
21 beginning of that -- and I believe it's 2.1000 -- I can  
22 find the precise reference for you -- indicates that  
23 Subpart J is superseded by certain other provisions,  
24 including 2.309 and 2.315, which is the standing  
25 contention and interested state requirements.

1           So, we think that those take priority over the  
2           definitional language in Subpart J.

3           And, finally, in the 2004 NRC rule-making,  
4           changing Part 2, and if I may refer you to 69 Federal  
5           Register, page 2221, and the right-hand column, and if  
6           I may briefly read an excerpt.

7           It says: "There's been a significant change  
8           relative to the former requirement that Section  
9           2.714 -- in 2.714 that a state and local governmental  
10          body or affected federally recognized Indian tribe who  
11          wishes to be a party in a proceeding for a facility  
12          which is located within its boundary are explicitly  
13          relieved of the obligation to demonstrate standing in  
14          order to be admitted as a party."

15          Again, entities with facilities within their  
16          borders.

17          "A state, local governmental body or federally  
18          recognized Indian tribe who wishes to be a party in a  
19          proceeding for a facility which is not located within  
20          its boundary must address standing."

21          However, and this is the language we are mindful  
22          of "a state, local governmental body, or federally  
23          recognized Indian tribe which is adjacent to a facility  
24          or, for example, has responsibilities as an off-site  
25          government for purposes of emergency preparedness and

1 presents such information in its request petition would  
2 ordinarily be accorded standing."

3       So, we're simply making the point that there is a  
4 showing there that needs to be made, and we're not  
5 trying to overly restrict access to this proceeding by  
6 these entities. But we do not believe it is an  
7 automatic standing.

8               >> JUDGE BOLLWERK: Let me just ask one  
9 clarifying question. Recognizing the Timbisha  
10 Shoshones are not represented here, do they fall within  
11 the category with the AULGs? I don't know what their  
12 status is in terms of the borders of their tribal  
13 lands. They're the only affected Indian tribe out  
14 there, if I'm correct in that.

15               >> MR. SILVERMAN: My understanding is they  
16 are the one tribe that has been identified by the  
17 Department of Interior as an affected Indian tribe.

18       I'm not positive about this, but I don't think the  
19 repository is within the borders of the tribal lands,  
20 which would put them in the category of what we think  
21 the AULGs ought to do, which is they need to make that  
22 demonstration.

23               >> JUDGE BOLLWERK: All right. Does the  
24 staff want to say anything at this point?

25               >> MS. BUPP: The staff, obviously, takes a

1 different view than DOE. And our view is based both on  
2 the definition of party in 2.1001, and also in the  
3 rule-making in November 2001, which was prior to the  
4 2004 Part 2 rule-making.

5 But at this point in time the Commission did  
6 specifically speak to AULGs as opposed to adjacent  
7 government organizations which we think is an important  
8 distinction and, therefore, the 2001 rule-making is  
9 more specific.

10 In the 2001 rule-making, the Commission stated  
11 that the regulations relieve the state, tribes and  
12 affected units of local-- excuse me; the state affected  
13 Indian tribes and affected units of local government  
14 from the need to meet standing requirements in order to  
15 be admitted to the proceeding.

16 The rule-making went on to state that the state  
17 affected units of local government and affected Indian  
18 tribes must still meet the contention of admissibility  
19 requirements.

20 But I think it's clear that this supports the  
21 staff's position that the AULGs do not need to  
22 demonstrate standing in order to intervene. They need  
23 only submit at least one admissible contention.

24 >> JUDGE BOLLWERK: All right. If he wants  
25 to say something, I have no problem with that.

1 >> CHAIRMAN MOORE: Mr. Neuman, do you wish  
2 to address this?

3 >> MR. NEUMAN: Your Honor, Mr. List has done  
4 a terrific job of collating the parties' position. In  
5 this instance I think there was a misunderstanding. I  
6 have no caveat or concern with respect to this matter.

7 We do believe that AULGs do have standing under  
8 the regs, but whatever briefing or other approach the  
9 Board may want to take to resolve this is fine with  
10 Lincoln County.

11 >> JUDGE BOLLWERK: All right. Anything else  
12 anyone else wants to say on this subject, then? I  
13 think we've actually taken care of H6 in the context of  
14 this one.

15 So, let me move on, then, to H2: What identifying  
16 supporting information should be included in petitions  
17 and supporting affidavits relative to attempts to  
18 establish standing for individuals, organizations and  
19 organizations seeking to establish representative  
20 standing?

21 And recognizing that probably these groups and  
22 individuals are not represented here, I don't know if  
23 there's anything you all wanted to say about that.  
24 Mr. List?

25 >> MR. LIST: Not really. I would just

1 simply note that the examples cited in your question  
2 under H1 would certainly be appropriate.

3 >> JUDGE BOLLWERK: All right. I mean, there  
4 is a general, certainly, practice -- I don't know the  
5 best way to describe it -- that the individuals,  
6 particularly individuals that are supporting an  
7 organization in terms of representing them in a  
8 proceeding, do need to provide certain information in  
9 some form to the Board so that we will know what their  
10 address is, who they are, whether they have the  
11 authority -- the organization has authority to  
12 represent them.

13 But obviously those aren't things that would  
14 affect anyone here, necessarily. Anything that the  
15 staff wants to say on this subject?

16 >> MR. LENEHAN: No, Your Honor, you've  
17 covered it all.

18 >> JUDGE BOLLWERK: All right. I'm not sure  
19 how relevant this is going to become for anyone here,  
20 but let me ask. We'll go to the question anyway.

21 H3: If distance is relevant in establishing  
22 standing, should tools such as Google, Google Earth or  
23 Map Quest be used to provide an "as the crow flies"  
24 estimate?

25 And this is basically a particular tool that may



1 give you some fairly certain sense, at least in terms  
2 of the program, of exactly where an individual or party  
3 is located, vis-a-vis the mountain, and any questions  
4 about distance that might apply to standing.

5 Anything, Mr. List, you want to say?

6 >> MR. LIST: We in our discussion recognize  
7 that that could be a criteria; distance could be one of  
8 the criteria. We did note, however, that the criteria  
9 in terms of the length of the distance ought to be very  
10 narrowly established in order to avoid a massive logjam  
11 of possible participants.

12 >> JUDGE BOLLWERK: What did you mean by  
13 "narrowly"?

14 >> MR. LIST: In terms of miles. I think  
15 that the greater length -- we did not agree on a  
16 number. But, clearly, if you went out several hundred  
17 miles, you would enable potentially millions of people  
18 to come forward and seek to become participants.

19 >> JUDGE BOLLWERK: Did staff want to say  
20 something? Any else, Mr. List?

21 >> MR. LIST: Nothing further.

22 >> MR. LENEHAN: Yes, Your Honor. The staff  
23 does not want to concede that geographic distance is in  
24 fact a criteria. To say that somebody automatically  
25 within a certain geographic area is included or outside

1 of a certain geographic distance is excluded, the staff  
2 does not want to take that position at all. We oppose  
3 that.

4       There are other considerations to be involved,  
5 distance, per se, is not one of them.

6               >> JUDGE BOLLWERK: So, you would not see a  
7 Board or the Commission applying what has been done in  
8 reactive cases for a number of years at least for  
9 operating reactor, for instance, the 50-mile rule?

10               >> MR. LENEHAN: No, Your Honor. Not an  
11 automatic 50-mile or any other mileage rule, no, not  
12 automatically. There's too many other considerations;  
13 the groundwater flows, things like that that may have a  
14 longer distance in one direction and a shorter distance  
15 in another.

16               >> CHAIRMAN MOORE: What do you deal with,  
17 remote and speculative, in all of this? Staff?

18               Just traditional standing, injury in fact,  
19 causation, redressability, are the three fundamental  
20 steps in establishing standing that have to be shown.

21               We're talking periods of time of 10,000 years or  
22 longer for impacts. No people currently alive, I would  
23 suggest, are impacted. So, how would anyone -- how  
24 would an individual establish standing? No matter  
25 where they live.

1 >> MR. LENEHAN: The staff would suggest that  
2 that's a difficult question, but our position here is  
3 that mileage alone, per se, in and of itself, is not a  
4 criteria.

5 >> CHAIRMAN MOORE: Mr. Murphy?

6 >> MR. MURPHY: Generally, I think you're  
7 correct, Judge Moore, but that ignores the potential  
8 socioeconomic impacts that are going to -- that may  
9 immediately fall on particularly on residents close --  
10 in close proximity -- that is, Nye County residents --  
11 to Yucca Mountain.

12 Whether or not true is immaterial to some people  
13 out there, there is a perceived disadvantage to being  
14 located that close to a repository. And that is an  
15 impact to some people.

16 I'm not suggesting that that gives them standing,  
17 but it's not quite accurate to say that no one alive is  
18 going to be impacted. You need to talk to the owner of  
19 the Ponderosa.

20 >> CHAIRMAN MOORE: It's like living next to  
21 an attractive nuisance or a distance from attractive  
22 nuisance.

23 >> MR. MURPHY: If you're a dairy owner in  
24 the middle of the Amargosa Valley and you sell your  
25 milk to Los Angeles, and the people in Los Angeles

1 think that there might be some potential for  
2 contamination and they quit buying your milk, you're  
3 impacted. Correct? Rightly or wrongly, you're  
4 impacted.

5 >> CHAIRMAN MOORE: Did your group discuss at  
6 all recommending that the Commission may just want to  
7 draw some arbitrary lines and not rely on judicial  
8 concepts of standing?

9 Because they certainly have the right under the  
10 Atomic Energy Act to determine who is adversely  
11 affected and hence has an interest.

12 Did your group discuss that at all as a way to  
13 deal with this?

14 >> MR. MURPHY: I was in the airplane during  
15 that conference call, Your Honor and Mr. VanNiel  
16 represented Nye County. But I think we would agree  
17 with the NRC staff on that, that each -- the folks in  
18 this room all have standing, and I include specifically  
19 my friends from the Nuclear Energy Institute in that  
20 regard.

21 But anybody else is going to have to demonstrate  
22 that they have standing. But to arbitrarily pick a  
23 number, I think, is -- I don't know how you would do  
24 that at this point in time.

25 Like the staff says, if you're down gradient, the

1 further -- if you're one side or the other of the  
2 mountain, closest, far away.

3 That's a can of worms that you're going to have to  
4 open some day because you won't be able to avoid it.  
5 But I wouldn't do it yet.

6 >> CHAIRMAN MOORE: Mr. Malsch?

7 >> MR. MALSCH: It seems to me that this is  
8 going to be a can of worms you'll have to open, but  
9 there might be some benefit in making the can of worms  
10 at least a bit smaller, if one, as a convenience,  
11 established a distance within which someone had  
12 standing. Making it clear that outside that distance  
13 you'd have to make the full demonstration.

14 But as to what that would be, I think that would  
15 take some more thought than the group here was able to  
16 give to it.

17 >> CHAIRMAN MOORE: Mr. List, you had  
18 noted --

19 >> MR. LIST: I simply wanted to suggest that  
20 it could be a subject of consideration for standing.  
21 That is, someone who lives 5 miles away and runs a  
22 dairy might be able to make a stronger case than  
23 somebody who lives -- runs a dairy 200 miles away.

24 And it just seems to me that distance could be a  
25 factor, but 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 is  
3 that anyone that lives, crosses or will be next to the  
4 transportation routes when fuel is en route to Yucca  
5 Mountain arguably will receive a dose, even though it  
6 may be a small dose, and even a small dose can  
7 establish an injury and be the basis for standing.

8 But traditionally in NRC adjudication, as NEI  
9 mentioned earlier, there was never the requirement in  
10 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 and  
14 admissible contention and all your other contentions,  
15 you don't have to establish your standing for that  
16 particular contention.

17 In large measure, though, the person withstanding  
18 was in reasonable proximity to the facility and that  
19 may have been part of how it developed that way.

20 But to someone living in Missouri next to the  
21 railroad tracks at a railroad hub, for example, would  
22 clearly have standing from the transportation of fuel  
23 because they would be receiving a dose, have standing  
24 to raise a problem with something substantive about  
25 Yucca Mountain.

1 I mean, it is a can of worms that portends an  
2 awful lot of litigation downstream that may make sense  
3 to try to find a way to cut that off perhaps with the  
4 recommendation to the Commission that they take this  
5 out of the traditional standing realm and define  
6 interest under the Atomic Energy Act in some other way  
7 for this proceeding, however they wish to draw the  
8 line. Does that make sense?

9 >> MR. SILVERMAN: Your Honor, I think it  
10 would make sense for the Commission to consider a  
11 distance beyond which one could not show standing.

12 But within that distance would provide the  
13 opportunity for a party to demonstrate standing without  
14 that distance per se demonstrating standing. And I'd  
15 like to just indicate that we're not sure we entirely  
16 agree with your expression of the fact that an  
17 individual that may be living near a rail line would  
18 automatically have standing.

19 >> CHAIRMAN MOORE: I didn't suggest  
20 automatically. They would have an injury that from a  
21 dose. Now, they would still have to show causation and  
22 redressability. Presumably they could probably do  
23 that.

24 We have cases that have been decided that way on  
25 the standing issue. I believe the Mox case was one of

1 them.

2 >> MR. SILVERMAN: I believe. And I believe  
3 there's other cases to the contrary, if I remember  
4 correctly.

5 >> CHAIRMAN MOORE: I'm sorry.

6 >> MR. SILVERMAN: I believe there's cases to  
7 the contrary as well, although I cannot cite them for  
8 you today.

9 >> CHAIRMAN MOORE: I don't recall those to  
10 the contrary. I think all the ones you cited were  
11 rather significantly distinguished.

12 Be that as it may, this is a morass. What I see  
13 as the problem if you have multiple boards deciding  
14 contentions, deciding standing, this is an area where  
15 it would seem to me is ripe for significant  
16 disagreements among boards on standing.

17 And that only delays things. If it's appealed,  
18 ultimately resolves, comes back with or without  
19 standing, and that's something that presents a picture  
20 that I think should be avoided.

21 That's why I tossed out the notion of is there  
22 another way to deal with standing on a case like this.

23 >> JUDGE BOLLWERK: Is there anything that  
24 speaks also to having a standing Board as opposed to a  
25 -- I don't know if that's something that --



1 >> MR. SILVERMAN: I was going to say I think  
2 we're very amenable to at least a couple of ideas. One  
3 of which you threw out which was to ask the Commission  
4 perhaps to look at this question and rule on it in  
5 advance of contentions having to be submitted.

6 And the other alternative would be that the  
7 coordinating Board that a lot of us have talked about,  
8 and we mentioned earlier, might very well, not only  
9 just apportion contentions, but might also rule on the  
10 standing of all the parties as well as the related  
11 issue of have people substantially complied with their  
12 LSN obligations to enable them to be parties.

13 So, one Board could handle all those issues.

14 >> CHAIRMAN MOORE: But if you separate  
15 standing from contentions, since it's a two-part  
16 process to become a party, a minimum of two-part  
17 process, you have to have standing and at least one  
18 admissible contention.

19 If a party doesn't have admissible contentions and  
20 someone spent a lot of time determining whether they  
21 had standing, that would be a rather wasteful effort.  
22 When you separate contentions from standing that, of  
23 course, it what may happen.

24 >> MR. SILVERMAN: Well, they do have to be  
25 decided independently, regardless of whether it's one

1 Board or two.

2 >> CHAIRMAN MOORE: I'm sorry?

3 >> MR. SILVERMAN: They do have to be decided  
4 independently, regardless of whether it's one Board  
5 making the standing determination on the contention --

6 >> CHAIRMAN MOORE: Well, but if a party  
7 doesn't have a admissible contention, nobody is  
8 going to waste their time deciding whether they have  
9 standing. Not in a case like this when there's more  
10 important things to do.

11 Well, we'll have to wrestle with this.

12 >> JUDGE BOLLWERK: I should make one point.  
13 Mr. Murphy pointed out -- I said there was really no  
14 one affected in the room by this, but actually NEI is.  
15 They're an organization, not a governmental entity.

16 So, in theory, they will have to some compliance  
17 with standing requirements in some way. So, there is  
18 someone here that's affected.

19 Number 4, this is H4: Should a petition that  
20 seeks discretionary standing for individuals or  
21 nongovernmental organizations contain specific labeled  
22 sections addressing the elements that must be waived,  
23 such as the developing sound record, interest in the  
24 proceeding, affect on those interests, availability of  
25 other meetings, representation by existing parties,

1 broaden issues or delay the proceeding which are  
2 standards that are set forth in Section 2.309(e) of the  
3 regulation? Mr. List?

4 >> MR. LIST: Our thinking on this was that  
5 petitioners seeking discretionary standing should have  
6 to follow an established format and meet advanced  
7 announced criteria.

8 >> JUDGE BOLLWERK: All right. Anyone want  
9 to comment on this?

10 >> CHAIRMAN MOORE: Is discretionary standing  
11 as a practical matter the way parties will avoid, if  
12 they have a difficult time establishing a standing  
13 they'll seek discretionary standing?

14 And if that's the case, I would ask the staff and  
15 DOE under the criteria that are applied, normally the  
16 staff and an applicant will argue that the addition of  
17 these contentions would broaden the proceeding and  
18 lengthen or delay the proceeding.

19 In this proceeding, how could that argument be,  
20 when there's hundreds and hundreds of contentions,  
21 you're talking about a match in a forest fire. I don't  
22 think those are arguments could be made with a straight  
23 face.

24 So, what's the meaning of discretionary standing  
25 for this case? DOE?

1 >> MR. SILVERMAN: Well, your Honor, with all  
2 due respect, the notion that whether a party could  
3 contribute to developing a sound record, depending upon  
4 who the party is, they may have expertise, they may not  
5 have expertise. They may be a single individual. That  
6 may very well weigh against this discretionary standing  
7 of that individual.

8 The interests -- it's not just a matter of whether  
9 it broadens or delays the proceeding. That is one  
10 factor to be taken into account but it's not the only  
11 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 be there somebody else  
19 that is already taking care of this concern.

20 You won't know that in a case such as this unless  
21 you hold off ruling on discretionary standing until all  
22 parties are identified and contentions are admitted and  
23 then deal with discretionary standing.

24 >> MR. SILVERMAN: That's probably right.

25 >> CHAIRMAN MOORE: Is it permissible to do

1 it under the rules? Historically, we've always had to  
2 deal with that right up front.

3 >> MR. SILVERMAN: If I remember correctly,  
4 the way it would typically occur in a particular  
5 proceeding, it would be that a party, prospective party  
6 would argue that they have standing as a right.

7 >> CHAIRMAN MOORE: They plead in the  
8 alternative that if they don't they seek  
9 discretionary --

10 >> MR. SILVERMAN: Exactly. So, it's dealt  
11 with at that time.

12 >> CHAIRMAN MOORE: My question was simply  
13 how do you know whether there's an existing party that  
14 takes care of the -- represents their interest.

15 >> MR. SILVERMAN: Well, they've all filed  
16 their contentions and petitions at the same time. So,  
17 we'll have all that information available to them.

18 Albeit, there's a lot of information in petitions.  
19 But we have the same -- it's the same process as any  
20 other proceeding as I see it. It's just there's a lot  
21 more information and parties to sort through.

22 >> JUDGE BOLLWERK: All right. Anything else  
23 anybody wants to say on discretionary standing format,  
24 then?

25 Let me then move on to H5: What identifying

1 supporting information should a petition provide  
2 relative to an assertion that a federal, state or local  
3 governmental entity or Native American Tribe has  
4 standing as of right?

5 And this again would look to Section 2.309(b)(2)  
6 in the requirements that are there. Mr. List?

7 >> MR. LIST: I think the feeling was just  
8 simply a matter of turning to the statutes and the  
9 regulations and their interpretation. And obviously,  
10 there can be different readings of those same  
11 provisions and their effectiveness as illustrated in  
12 our discussion earlier this afternoon.

13 But clearly that's where it must turn is on the  
14 provisions of those statutes and regulations.

15 >> JUDGE BOLLWERK: All right. Anything  
16 anyone else wants to say on this question about the  
17 showing -- necessity to show a governmental entity has  
18 standing as a right. All right.

19 I think H6, as you made reference to, we've  
20 already really dealt with in terms of the affected  
21 units, local governments, affected Indian tribes, and  
22 their potential standing.

23 For H7: Relative to obtaining interested  
24 governmental entity status -- we've moved to a slightly  
25 different concept -- what identifying supporting

1 information should be provided in a hearing petition?

2 Mr. List?

3 >> MR. LIST: Again, I think the regulations  
4 and the statutes set forth the qualifications for  
5 parties seeking such status.

6 >> JUDGE BOLLWERK: They'd have to comply  
7 with those requirements.

8 Again, interested governmental entry status. It's  
9 different than standing of right to the degree that the  
10 interests of a governmental entity does not have  
11 contentions in the case. They do not have issues, but  
12 they do have the right to participate, to introduce  
13 evidence, to examine witnesses and actually can take an  
14 appeal as well from the initial decision.

15 So, an interested governmental entity does have a  
16 different status than a party having standing as a  
17 right or discretionary standing.

18 Anyone else on interested governmental entity  
19 status in terms of the showing?

20 Let's move on to H7 relative to obtaining  
21 interested governmental; I'm sorry.

22 H8: For each potential party and interested  
23 governmental entity what information should be provided  
24 in a petition in connection with 10 CFR Section 2.1003  
25 regarding the availability of LSN material?

1 For instance, the date of filing of certification and  
2 the status of any challenges to that certification or a  
3 declaration that no LSN certification was submitted and  
4 an explanation as to why no certification -- an  
5 explanation as to why no certification was needed.

6 Again, this relates to a provision in the rules  
7 that indicates that parties need to give the status of  
8 their LSN certification or potential parties when they  
9 file their petition. Mr. List?

10 >> MR. LIST: Yes, Your Honor. The general  
11 understanding here, I think, was that each potential  
12 party and interested governmental entity should  
13 demonstrate compliance with the provisions of that  
14 section of 10 CFR, and the examples that you cited in  
15 the question are apt.

16 >> JUDGE BOLLWERK: All right. Staff have a  
17 comment?

18 >> MR. LENEHAN: Yes, Your Honor. In the  
19 situation -- hypothetical situation where a party has  
20 not made -- a petitioner has not made material  
21 available on the LSN and they believe the reason they  
22 have not made it available is because they don't have  
23 any information, staff believes they should file a  
24 certification to the effect that they didn't have any  
25 as opposed to just ignoring it.



1 >> JUDGE BOLLWERK: All right. Anyone have  
2 any additional comments? The Department of Energy?

3 >> MR. SILVERMAN: Your Honor, I'm going to  
4 start this, but if the questions get too deep, I'll ask  
5 you to indulge me and let Mr. Shebelskie fill in  
6 because of his experience with the LSN.

7 We think it's important that potential party  
8 identify at a minimum the date of their LSN  
9 certification; that it complies with the regulations  
10 that it was certified within 90 days of the  
11 Department's certification; that they've continued to  
12 supplement their document production with documentary  
13 material in accordance with the regulations; that  
14 they're in substantial and timely compliance with the  
15 PAPO Board orders pursuant to the regulations; and they  
16 really ought to identify that they have had procedures  
17 in place to search for and produce documentary material  
18 in accordance with the requirements.

19 The critical issue essentially is they need to  
20 demonstrate that they've met the obligation that is a  
21 prerequisite to becoming a participating party in the  
22 proceeding.

23 >> JUDGE BOLLWERK: All right. Anyone have  
24 any comments on that? Yes, Mr. Malsch?

25 >> CHAIRMAN MOORE: Yes, Mr. Neuman?

1 >> MR. NEUMAN: Mr. Neuman on behalf of  
2 Lincoln County.

3 >> JUDGE BOLLWERK: Yes, go ahead, sir.

4 >> MR. NEUMAN: Thinking about this issue, I  
5 guess I have a question as to what demonstration in  
6 this context means. I understand the appropriateness  
7 of certifying that these requirements permit, but I  
8 guess it's not clear to me what showing is contemplated  
9 in terms of a demonstration.

10 In one extreme, for example, we would have to  
11 attach copies of every certification and supplemental  
12 certification we filed since day one. I'm not sure  
13 that that makes sense.

14 It's certainly unnecessarily burdensome. So,  
15 beyond certifying compliance with specific reference to  
16 the requirements, I'm not clear as to what the  
17 demonstration of compliance means.

18 >> JUDGE BOLLWERK: All right. Mr. Malsch?

19 >> MR. MALSCH: Just two comments. One is,  
20 generally speaking, I agree with what Mr. Neuman said.  
21 It isn't clear exactly what a party is supposed to say  
22 in this respect.

23 Assuming some sort of demonstration is required,  
24 and I'll get to that in a minute for Nevada, it struck  
25 me that maybe the best way to deal with this would be

1 to treat it as a matter that comes up as a kind of  
2 affirmative defense by DOE.

3 So, that if they thought there was a problem with  
4 LSN compliance or LSN participation, they would raise  
5 that specifically in their answer, and then the  
6 responding petitioner could then answer.

7 That way there would be no need to certify vaguely  
8 or to anticipate what challenges DOE might make. You'd  
9 be dealing with a concrete controversy.

10 I do want to say, though, that it is our view that  
11 at least for Nevada and the other states referenced in  
12 309, that we are a mandatory party regardless of the  
13 status of our LSN compliance. I mean, we have every  
14 intention to fully comply.

15 I just wanted to point out the way we read the  
16 regulations, the provision in 2.1012 does not apply to  
17 mandatory parties like the State of Nevada.

18 And we can discuss that in some detail if you  
19 wish, but I just want to make it clear that that's our  
20 position.

21 >> JUDGE BOLLWERK: All right. Mr. Murphy,  
22 then we'll go to the Department of Energy.

23 >> MR. MURPHY: I generally agree with  
24 Mr. Malsch on that, but I think that overlooks one  
25 thing that goes all the way back to the beginning of

1 this process, and that is that before the Department of  
2 Energy even has an obligation to respond -- this was  
3 what the original negotiated rule-making envisioned,  
4 that before the Department of Energy even had the  
5 obligation to respond to a petition in intervening and  
6 contentions, the party had to make some sort of  
7 showing.

8         And I don't think I would necessarily have chosen  
9 the word "demonstrate", but the party had to at least  
10 say we have complied with the licensing support system  
11 or not a licensing support network requirements,  
12 because if they didn't, it was the intention of the  
13 negotiated rule-making, if they were unwilling to  
14 comply with the documentary requirements, the NRC, they  
15 weren't going to get through the door.

16         Their petition was not even going to be accepted.  
17 It wasn't even going to have a file stamp put on it.  
18 No obligation on the part of DOE or the State of Nevada  
19 or NEI or anybody else would arise unless you showed,  
20 number one, we have no documents whatsoever or we have  
21 documents and we have put them on the LSN.

22         If you don't make that showing, there is no  
23 obligation on the part of DOE to even respond to your  
24 petition.

25         That's the intent, the original intent of the

1 negotiated rule-making, is I think you might recall.

2 But that said, to me "demonstrate" means write it  
3 down. Saying we have complied with, we certify on such  
4 and such a date we did such and such and so and so and  
5 then as Mr. Malsch says DOE doesn't agree with that, in  
6 the nature of an affirmative defense they can dispute  
7 it.

8 >> JUDGE BOLLWERK: All right, sir.  
9 Department of Energy?

10 >> MR. SILVERMAN: I think I'll just  
11 generally say that we would strongly object to the  
12 notion that the State of Nevada does not have to comply  
13 with its LSN obligations and still may participate as a  
14 party in this proceeding.

15 I think the regulations are clear that all the  
16 prospective parties and parties as a prerequisite to  
17 participating must have met those obligations and I'm  
18 referring in particular to section 2.1003 probably  
19 among others. That is one of the fundamental purposes  
20 of the LSN as I understand it.

21 >> JUDGE BOLLWERK: All right. Mr. Malsch,  
22 anything further?

23 >> Mr. Malsch: I could respond -- let me  
24 just respond briefly to indicate the basis for our  
25 position. There's actually two regulations that

1 address this precise issue 2.1012, which is in Subpart  
2 J, says that a party won't be granted party status  
3 under 2.309 unless they can demonstrate substantial  
4 compliance with LSN requirements.

5 But then, though, there's another provision that  
6 mirrors that is in 2.309(a) which says to similar  
7 effect that in addition to the other considerations  
8 favoring or disfavoring intervention, the Commission  
9 will consider the party's participation under Subpart J  
10 in the pre-licensing phase and that's in 2.309(a).  
11 The difficulty is that in 2.309 also says that the  
12 state, the Commission shall permit intervention by the  
13 state in certain other entities. And then it says that  
14 all other petitions for intervention must be judged  
15 under the revisions of Subsections A through F  
16 indicating clearly to us that subsections A -- that  
17 these particular -- these dealing with standing do not  
18 apply to the state of Nevada.

19 So, we have a conflict between 2.309 and 2.1012, but  
20 then as Mr. Silverman pointed out correctly, there is a  
21 rule about how to resolve those conflicts. It's in the  
22 opening section of Subpart J 2. -- I think it's 1000,  
23 which says that the provisions of Subpart J take  
24 precedence over other provisions with the following  
25 exceptions and 2.309 is one of those exceptions.

1 >> JUDGE BOLLWERK: All right.

2 >> MR. MALSCH: I would also just add that  
3 there is legislative history on this. The precise  
4 issue was discussed within the one of the LSN or LSS  
5 advisory committee meetings and the resolution was,  
6 just as I suggested, inconsistent with the Nevada  
7 position. And I can give you ADAMS number. It's MLO  
8 --ML012050076 at page 15.

9 >> JUDGE Bollwerk: All right. Anything  
10 further? Department of Energy? Staff?

11 >> Mr. Shebelskie: Yes, Your Honor. As  
12 someone who has been involved in the last four years in  
13 the pre-license application board proceedings that  
14 concentrated almost exclusively on LSN matter, over the  
15 course of that entire four year history, Nevada has  
16 never suggested that they were required to comply with  
17 the LSN production obligations and the certification  
18 obligations.

19 And the provisions they are discussing now on this  
20 standing intervention positions requirements to  
21 override the LSN production obligations. Every party  
22 to the proceeding, whether it's one granted by  
23 statutory right or those that have established standing  
24 through more conventional means will have to comply  
25 with all the manner of procedural requirements in this

1 proceeding; deadlines for submitting contention,  
2 deadlines for filing exhibits. You can go all the  
3 course of the proceeding.

4 Nevada does not get a pass with meeting all the  
5 obligations requirements that the Commission has  
6 established and that the licensing boards will  
7 establish to regulate the proceeding. It can thumb its  
8 nose at those proceeding simply -- those requirements  
9 and simply say its a statutory party, it can't be  
10 excluded because of its procedural faults.

11 >> JUDGE BOLLWERK: All right. Mr. Malsch?

12 >> MR. MALSCH: Since I'm the fortunate  
13 person who dealt with Mr. Shebelskie on many of those,  
14 it sounds suspiciously to me like DOE wants two bites  
15 of the apple at questioning people's LSN  
16 certifications.

17 There was a deadline of January 17 for outside  
18 parties wishing to become participants in this  
19 proceeding to file LSN certifications and many did so.  
20 Some were challenged. And there was a ten day  
21 requirement within which to challenge them.

22 And DOE is now suggesting that the fact that at  
23 the time of filing petition contentions, among the  
24 laundry list of check marks is LSN compliance; that  
25 that gives them whole new opportunities if you check



1 that check mark to say, a-ha, we disagree with LSN  
2 compliance as if they hadn't had the opportunity to  
3 fully test that before.

4 So, it's a second bite of the apple, but it's  
5 worse than that, given the amount of the time that the  
6 respective boards take to schedule a hearing and then  
7 the Commission to decide appeals on those issues.

8 A party could be deprived of an opportunity to  
9 file contentions for an inordinately long time. I  
10 mean, any party. I'm not talking about Nevada. I mean  
11 anyone who was supposed to file a certification January  
12 17 could be effectively be challenged a second time,  
13 months after the ten day deadline.

14 >> JUDGE BOLLWERK: All right. Mr. Murphy?

15 >> MR. MURPHY: That's -- I think this whole  
16 discussion doesn't apply to Nevada or Nye or Clark  
17 County or anything else, Your Honor.

18 And you might recall back in the 80's when we were  
19 trying to construct this process, there were lengthy  
20 discussions about how to handle what we refer to as the  
21 unknown intervener. The person who comes in on  
22 deadline; the entity, the environmental organization  
23 from Atlanta that comes in on the 30th day and files a  
24 petition to intervene.

25 And how do you handle that entity's or that

1 individual's compliance or non-compliance with the LSN  
2 requirements? It never was -- the state of Nevada has  
3 done what the LSN rule required it to do and that is to  
4 certify that it is complying with the rule.

5 Whether or not that certification is adequate or  
6 accurate or correct or whatever it is, it is currently  
7 in the process of being challenged. But that's not  
8 what we are talking about here.

9 What we're talking about is whether the unknown  
10 intervener -- how does the unknown intervener indicate  
11 and use the word "demonstrate" that they have complied  
12 with the LSN requirement.

13 Mr. Malsch's problem is simple and my problem is  
14 simple. I just say Nye County certified its LSN on  
15 January 17. That's true. It was unchallenged.

16 Mr. Malsch just has to say the State of Nevada  
17 certified its LSN on January 17. That's true. It  
18 can't be challenged.

19 What was challenged is whether or not that  
20 certification was complete, but whether or not he  
21 certified the LSN on the part of the State of Nevada is  
22 indisputable.

23 So, what -- the problem we're dealing with here  
24 are what do we do with people that none of us even know  
25 about yet?

1 >> JUDGE BOLLWERK: They're not going to be  
2 occupying these other tables potentially or wanting to  
3 anyway.

4 >> MR. MURPHY: Well, no, the State of  
5 California has no problem. They're an interested  
6 governmental party. I'm talking about the --

7 >> JUDGE BOLLWERK: The empty tables over  
8 here.

9 >> MR. MURPHY: Right. What do we do with  
10 the empty tables?

11 >> JUDGE BOLLWERK: DOE, please?

12 >> MR. SHEBELSKIE: Your Honor, Nye County is  
13 certainly correct that persons or entities who did not  
14 certify 90 days after DOE certification will have  
15 procedural problems because of that failure.

16 But I don't believe that that's the only obstacle  
17 the parties would face because the phrase as we  
18 understand it is substantial and timely compliance  
19 imparts more than just a procedural formality of having  
20 certified to be in substantial and certainly timely  
21 compliance requires the completion of the good faith  
22 production of the party's documentary material.

23 This is particularly going to pressing because of  
24 the ruling we got on DOE's motion to strike Nevada's  
25 certification where the PAPO Board had ruled that

1 Nevada as a matter of law and presumably other entities  
2 don't have to make a production of their supporting or  
3 non-supporting information in the pre-license period  
4 and can wait until they finalize their contentions.

5         And so, we in Nevada and any other intervener  
6 files their petitions, DOE is going to be expecting  
7 that they have made at that point at the latest, if the  
8 PAPO Board ruling is upheld, a substantial good faith  
9 production of all their supporting and non-supporting  
10 material.

11         This is not a second bite at the apple, but rather  
12 the continued fulfillment of the ongoing obligations of  
13 the interveners to make their documentary material as  
14 their positions become solidified.

15                 >> JUDGE BOLLWERK: All right.

16                 >> CHAIRMAN MOORE: Is it DOE's position in  
17 response specifically to this question, H8, that there  
18 is some affirmative showing that should be included in  
19 hearing petitions for potential parties that they've  
20 complied? Is that DOE's position?

21                 >> MR. SILVERMAN: Yes, sir.

22                 >> CHAIRMAN MOORE: Okay. And what -- why I  
23 ask that is because the language of 309 says that the  
24 licensing board shall also consider any failure of the  
25 petitioner to participate as a potential party in the

1 pre-license application phase under Subpart J.

2 Now, that suggests as Mr. Malsch suggested that  
3 that's something that DOE would bring up in opposing  
4 party status that they don't have to make affirmative  
5 demonstration that they've complied with anything, but  
6 that you need bring up their failure to comply and then  
7 they can respond. Where am I misreading the  
8 regulation?

9 >> MR. SHEBELSKIE: Well, I wouldn't view  
10 that statement in 309(a) -- I would not view that  
11 statement in 309(a) as addressing one way or the other  
12 the procedural obligation of whether the intervener has  
13 to make an affirmative demonstration; rather, it's a  
14 substantive requirement that a board making this  
15 decision will consider that factor.

16 I think to get to the procedural question of what  
17 must be shown and who must make the showing you look at  
18 Subpart J. There the procedures require the intervener  
19 to be able to demonstrate substantial and timely  
20 compliance.

21 And for example, if you had an intervener who had  
22 made no LSN certification on January 17 and their  
23 petition for intervention was silent as to why they  
24 made no certification then, and then otherwise address  
25 the fact that they had procedures et cetera, then that

1 would be a facial deficiency. They hadn't made the  
2 showing of substantial and timely compliance on its  
3 face.

4 >> CHAIRMAN MOORE: What regulatory language  
5 are you pointing to in Subpart J that requires such an  
6 affirmative showing?

7 >> MR. SHEBELSKIE: Well, I think it follows  
8 from 1012(b)(1) and it requires -- it provides a person  
9 given access to the LSN may not be granted party status  
10 if it cannot demonstrate substantial and timely  
11 compliance with the requirements of 2.1003 at the time  
12 it requests participation. So, that's when it files  
13 its petition.

14 >> JUDGE BOLLWERK: Let me see. Mr. Malsch?

15 >> MR. MALSCH: Just to make clear our  
16 position. It is not our position that we do not have  
17 to comply with Subpart J. We are only addressing the  
18 possible sanctions or consequences should someone find  
19 we are in non-compliance.

20 All we are suggesting is that a number of remedies  
21 might be available under the circumstances, but one  
22 remedy that is not available is to disallow our status  
23 as a party.

24 >> JUDGE BOLLWERK: Mr. Murphy?

25 >> MR. MURPHY: I agree with that and I think

1 I need to say that Nye County does not agree with the  
2 rationale of the majority of the PAPO Board with  
3 respect to the Department of Energy's challenge or  
4 motion to strike the State of Nevada's LSN, but more on  
5 that later under appropriate circumstances.

6 But, be that as it may, Mr. Malsch very accurately  
7 points out that the appropriate sanction -- and we take  
8 no position on whether or not the state of Nevada has  
9 documents that they should have put up but didn't. Our  
10 problem is simply with the rationale.

11 But be that as it may, it is very clear to me in  
12 my mind at least, that disallowance of party status is  
13 not an appropriate sanction. There are other -- plenty  
14 of other sanctions available to the Board. I just  
15 wanted to make that this clear at this point in time.

16 >> MR. SHEBELSKIE: And Your Honor, from  
17 DOE's perspective, we do view that disallowance of  
18 party status or suspension of party participation is an  
19 appropriate remedy and indeed contemplated in Subpart J  
20 and 1012(b)(2) that we read that as allowing the  
21 presiding officer boards to suspend participation until  
22 there has been showing of subsequent compliance and at  
23 that point the person can come back in as a party to  
24 take the proceedings as they find it at the time.

25 >> JUDGE BOLLWERK: All right. Let me see if

1 there's any other comments about the question of  
2 certification of the showing that needs to be made?

3 >> MR. NEUMAN: In Rockville, Mr. Neuman on  
4 behalf of Lincoln County. Just one point. I think  
5 that Section 2.1012(b), the language that DOE just read  
6 actually suggests that LSN compliance is an affirmative  
7 stance because the language says -- it is phrased in  
8 terms of whether or not the party -- potential party  
9 can or cannot demonstrate substantial compliance.

10 It suggests to me the language does not say if the  
11 party fails to tender evidence at the time of its  
12 application. It says "if it cannot demonstrate", which  
13 suggests to me that the burden is indeed on DOE to  
14 argue that demonstration cannot be made.

15 I don't think that that language supports the  
16 notion that the burden is on the potential party to  
17 make a demonstration at the time of the application.  
18 To the contrary, I think it supports the opposite  
19 conclusion.

20 >> JUDGE BOLLWERK: All right. Staff?

21 >> Mr. LENEHAN: Yes, Your Honor. Citing  
22 that same paragraph, we think it does require  
23 certification. It doesn't require them to actually  
24 offer elements of proof, but you just certify that they  
25 have complied.



1 >> JUDGE BOLLWERK: So, it's certification  
2 alone in your estimation then?

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

4 >> JUDGE BOLLWERK: All right. Anything else  
5 from Rockville or Las Vegas? I think we've exhausted  
6 this subject. I appreciate the efforts you put in to  
7 thinking this through and giving us your views on it.

8 >> CHAIRMAN MOORE: Let's turn to the last  
9 question. In the event the Commission does not give  
10 this advisory PAPO board the authority to order uniform  
11 format for contentions, answers and replies, are you  
12 all willing to be prepared to act voluntarily with what  
13 we hope will be -- all of you will conclude will be  
14 reasonable recommendations that we send up to the  
15 Commission if they don't deal with this in a timely  
16 fashion, so that we can have some semblance of order in  
17 all of this?

18 That may be wishful thinking, but there is every  
19 possibility that the Commission will not act in a way  
20 in which it will do you a lot of good for your long  
21 term planning. That's just a fact of life.

22 And so it seems that there's a great number of  
23 things that there's consensus on today. We will be  
24 taking that consensus in large measure and translating  
25 it into recommendations to the Commission.

1           Obviously, there will be some things in which  
2 there was not complete uniform agreement. But I don't  
3 think it will be anything that you would be violently  
4 opposed to. We have not heard such opposition today on  
5 the kinds of things that we'll be recommending.

6           And is there general agreement that -- and you  
7 will in all probability be given an opportunity, I  
8 would guess, to comment on our recommendations.  
9 Whether we give you that opportunity or whether it  
10 would come later from the Commission, I don't know.

11           But assume that none of you have violent  
12 objections. Is there likelihood that you would  
13 voluntarily comply? For example, you're going to get  
14 together and provide us hopefully a definition of  
15 single issue contentions.

16           Now, we recognize that there's an aspect of -- we  
17 all know it when we see it, but it's going to be  
18 devilishly difficult to define, that a definition that  
19 would be applicable 100% of the time.

20           And I don't think any of us expect that kind of  
21 result, but if there's general agreement as to what  
22 single issue contention is and everyone seeks to comply  
23 with that goal, it will go a long way toward making  
24 this a much more efficient and productive process for  
25 meeting the scheduled deadlines.

1           >> MR. LIST: Mr. Chairman, we did discuss  
2 this at some length. There was, I think, some  
3 reluctance to agree to standards not presently known.  
4 I guess the key is the word, the definition of the word  
5 "reasonable." I think you've given a little more  
6 context to it in your prefaced remarks here.

7           I would note that all of us felt, uniformly, that  
8 we wanted to see the Commission act swiftly and  
9 promptly insofar as possible to give authority to the  
10 Board to adopt a uniform format for the contentions and  
11 answers and replies and also to act quickly regarding  
12 the Board's recommendation.

13           I must say that in light of what you anticipate  
14 may be a delay in that, I would hope that speaking for  
15 ourselves at least that we can reach a concurrence on  
16 acceptability of reasonable standards.

17           >> CHAIRMAN MOORE: Let's address how long  
18 you think you'll need to come up with a consensus  
19 definition of a single issue contention.

20           I don't know if "definition" is the right word. I  
21 really do think that this is going to be a Potter  
22 Stewart exercise of the definition of pornography. I  
23 know it when I see it. Other than that, I'm at a loss  
24 to know how to define it.

25           >> MR. MALSCH: Judge Moore, I just want to

1 get back just briefly to the prior discussion, and that  
2 is that in our conversation we expressed real  
3 reluctance to agreeing to procedural requirements prior  
4 to Commission action. And there are really two reasons  
5 for that.

6 One was that we would love to be able to do that,  
7 but the Commission is in no way bound to accept your  
8 recommendations or even to accept the parties'  
9 agreements. And we were really reluctant to commit to  
10 go forward and expend the resources in drafting  
11 contentions following one format. The Commission is  
12 going to end up with a different format.

13 And then, secondly, frankly, we're concerned that  
14 if the Commission gets your recommendations and there  
15 are circumstances in which you indicate the parties are  
16 going forward anyway, the heat will be off the  
17 Commission.

18 I really think the Commission ought to be on the  
19 critical path on this one. If they're as interested as  
20 they say they are in an expeditious proceeding, then,  
21 by gosh, they ought to be willing to act expeditiously  
22 on your recommendations.

23 I think that's the way it ought to stand. I think  
24 the Commission should be aware that until they act not  
25 much is going to happen.

1 >> CHAIRMAN MOORE: Is that the consensus  
2 view?

3 >> MR. SILVERMAN: DOE is anxious for the  
4 Commission to act as quickly as possible as well.

5 However, I think we feel that we're going to  
6 proceed to plan our work effort and our case based upon  
7 our best judgments as to what your recommendations will  
8 be. We feel that's necessary for us to be able to meet  
9 our obligations and the time deadlines that we all  
10 have.

11 >> CHAIRMAN MOORE: Let's get back to how  
12 long do you think you need to get together and see if  
13 you can't craft a workable construct for what we mean  
14 by single issue contention? Something that you can all  
15 live with and shoot for when you're drafting  
16 contentions and responding to contentions.

17 We had started with a week and the staff had  
18 suggested that wasn't long enough.

19 >> MR. LENEHAN: Your Honor, at this point  
20 I'm not really sure -- I will still agree that a week  
21 is not long enough, if for no other reason the review  
22 process within the Commission.

23 I think this probably could be addressed much  
24 better in a letter to the Board probably tomorrow after  
25 a couple of the attorneys specifically, particularly

1 DOE, the staff, Nevada and anybody else that wishes to  
2 participate were all here, can talk for a little while  
3 and then respond to the Board at that time.

4 I think that might be a more productive way to  
5 handle this, if that would be useful for you.

6 >> JUDGE RYERSON: One further issue that  
7 this filing might address is the question that several  
8 parties have raised about the interrelatedness of  
9 contentions.

10 And I'm still not sure, Mr. Malsch, I fully  
11 understood your answer on that point this morning. But  
12 to re-ask the question, to give a hypothetical.  
13 Suppose you file a contention on the -- eight  
14 contentions on the EIS and you say it's deficient in  
15 eight -- in not considering eight separate matters.

16 And in your contention you say each of those  
17 matters is material, whatever that means within the  
18 regulations, and your position is that that's good  
19 enough to be admitted. And say you're right on that;  
20 eight contentions are admitted on NEPA issues.

21 But then those contentions go to hearing and four  
22 of them are knocked out completely for whatever reason.  
23 So, the Board that handles it says, "No, that didn't  
24 have to be considered." Four are found to have been,  
25 they should have been considered, but in each of those

1 four instances the Board says, "Well, should have been  
2 considered, but not material."

3 Don't you need -- don't you want another  
4 contention that says something like "individually" or  
5 "in some combination" these deficiencies that you're  
6 alleging are material? You didn't seem to think that  
7 was a problem this morning and I'm not quite sure why.

8 >> MR. MALSCH: I think that there are two  
9 aspects of materiality. I think at the contention  
10 stage, if you allege with sufficient support that some  
11 regulation has not been satisfied, it follows the  
12 contention is admitted because the finding cannot be  
13 made that the application complies with the NRC's  
14 requirements.

15 And the finding cannot be made as a prerequisite  
16 to issuing the construction authorization that the  
17 requirements have been met. So, that's enough for  
18 admission of a contention.

19 I think if those contentions are proven, it also  
20 follows that the applications simply cannot be granted.  
21 I don't think there's any additional requirement that  
22 we have to make over and above that.

23 Now, I grant you NEPA might be a little different  
24 in the sense that there's not such an elaborate  
25 collection of specific requirements that apply to a

1 NEPA statement.

2 But even there, I think, for example, if we were  
3 to say that the NEPA statement is inadequate because it  
4 fails to consider reasonable alternative A, and it's  
5 turned out that in fact, yes, it did not consider  
6 alternative A and we prevail in proving that it was  
7 reasonable, I think at that point the NEPA statement is  
8 simply inadequate and there's no further showing that  
9 we have to make.

10 >> JUDGE RYERSON: Well, that would be your  
11 position. I understand that. But isn't it possible  
12 that a Board would find, well, it should have been  
13 considered, but each one of them individually is not  
14 material, but collectively they might be?

15 Isn't that a realistic possibility you would want  
16 to protect against in terms of framing the single issue  
17 contentions in some fashion?

18 >> MR. MALSCH: Yeah, I think as a matter of  
19 contention drafting, I think from our standpoint that  
20 would be a really nice thing to do. My difficulty is I  
21 just am having concerns figuring out that we would  
22 actually be able to do it, especially in the context of  
23 the Total System Performance Assessment.

24 Let me just also point out that if we were to  
25 prevail in showing that, let's say one particular piece



1 of DOE's performance assessment didn't comply with one  
2 particular regulation, as I said, I think that prevents  
3 the license application from being granted.

4 If one were to impose some additional requirement  
5 in establishing the significance of that violation,  
6 that's really in effect sua sponte giving DOE an  
7 exemption from that regulation.

8 I mean, there is a provision in the Commission's  
9 rules that say that you can be exempted from the  
10 regulation if certain findings can be made, but we  
11 shouldn't presume that such exemptions will be applied  
12 for or will be granted.

13 But if there is a problem, if the argument is  
14 going to be that, okay, Nevada, you proved a violation,  
15 but it's such a small violation it really shouldn't  
16 make any difference, I really think at that point the  
17 burden is on DOE, either to show compliance or to file  
18 for an exemption from that regulation and then we can  
19 carry forward things from there.

20 >> JUDGE RYERSON: Okay. Are you saying that  
21 materiality is not really -- that every omission or  
22 violation is material? That materiality is not a  
23 concern as to --

24 >> MR. MALSCH: I'm saying that every  
25 supported violation of an NRC regulatory requirement is

1 per se material that prevents the granting of the  
2 license application, absent some further steps along  
3 the lines of what I've suggested.

4 >> JUDGE RYERSON: Are other potential  
5 parties likely to file contentions that disagree with  
6 that view? Anyone want to speak to that?

7 >> MR. MURPHY: Nye County disagrees with  
8 that view. We can envision technical contentions which  
9 we could demonstrate that the Department of Energy's  
10 approach in a certain scientific area is incorrect, but  
11 that it doesn't change the outcome with respect to  
12 compliance with the -- with the DOE's requirements in  
13 10 CFR 63 or what we anticipate, I suppose, will come  
14 from the EPA sometime in this century.

15 So, no, I think we have to -- we think materiality  
16 means that it has to affect the outcome, but the  
17 outcome has to be measured by the compliance  
18 requirements, not just every single little Nuclear  
19 Regulatory Commission regulation.

20 If the repository meets the safety standards  
21 imposed by 10 CFR 63 and by the EPA standards, and we  
22 show that it meets the safety standards by a factor or  
23 somebody shows that it meets the safety standards by a  
24 factor of only eight rather than ten. We don't think  
25 that's material. So, we have a different approach on

1 materiality.

2 >> CHAIRMAN MOORE: In closing, are there any  
3 matters that you wish to bring to our attention at this  
4 point?

5 >> MR. SILVERMAN: Yes, Your Honor. Just a  
6 recommendation for consideration by the Board and all  
7 the parties. Given the fairly urgent time frames that  
8 we all have, it's DOE's view that there are probably  
9 some issues, substantive legal issues, some of which  
10 have come up today, some of which have not, that would  
11 benefit from an early resolution by the Commission,  
12 such that when the Commission issues a hearing order  
13 they may rule on those issues at that time -- no later  
14 than that time and not wait for some of these  
15 significant generic issues to be addressed via the  
16 contention process.

17 Some of them have to do with some of the NEPA-type  
18 scope issues that we've talked about today, perhaps the  
19 51.109 issue.

20 In the pleadings, there is some disagreement over  
21 the extent to which and whether, for example, the EIS  
22 and supplemental EIS for the rail corridor and rail  
23 alignment, whether the adequacy of those documents are  
24 within the scope of the proceeding.

25 We would just like to suggest that the possibility

1 that this Board would entertain some suggestions from  
2 the parties in the very near term, perhaps by a week  
3 from Friday, as to those issues that they think,  
4 without necessarily expressing a view on them, but  
5 those issues that we think would benefit from an early  
6 Commission resolution.

7 And you could then decide which of those you would  
8 want to recommend to the Commission that they address  
9 in a Commission order. And there is some precedent for  
10 that in the enrichment facility notices of hearing.

11 >> MR. LIST: Your Honor, we would, if I may,  
12 we would join in that suggestion.

13 The two areas of specificity that were discussed  
14 yesterday have now been touched upon. One was the  
15 standing, automatic standing of the AULGs. The other  
16 is this rail line issue, both of which we think need  
17 early rulings.

18 The rail line issue, again, there's strong  
19 difference of opinion on it and it's very, very  
20 critical to the development of contentions with respect  
21 to the AULG's planning and development of their  
22 contentions. So, those are two at least.

23 >> CHAIRMAN MOORE: How -- DOE, are you  
24 suggesting that the issues would then be fully briefed  
25 before the Commission and you would hope that they

1 would get these issues decided?

2 >> MR. SILVERMAN: Yes, Your Honor.

3 >> CHAIRMAN MOORE: Ab initio?

4 >> MR. SILVERMAN: Yes. I think there's a  
5 limited number of them. But I think that they, at  
6 least the ones we generally have in mind, would, if  
7 you'll pardon the expression, cover a multitude of  
8 sins, cover an awful lot of ground on some of the  
9 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?

16 The contentions are filed on those issues and  
17 objected to if there's purely legal issues, then  
18 they're set aside for briefing and decided in early  
19 resolution in essentially contention space?

20 Or you admit the contention as a legal issue and  
21 decided then there's going to be automatic appeal to  
22 the Commission as opposed to trying to do it -- in a  
23 perfect world, I would agree with you. It would be  
24 very nice if all of this legislated and taken off the  
25 table.

1           But since we're all aware it's not a perfect  
2 world, under the existing demands that are on the  
3 potential participants' time at this particular time,  
4 taking time out to brief these issues now, is that  
5 something that the parties want to do at this time?

6           I raise it because I think we probably could come  
7 to agreement on six, eight or ten issues that need such  
8 resolution, and many of them, though, could be dealt  
9 with and have been dealt with in the past in contention  
10 space and then wouldn't distract parties from the  
11 issues at hand and getting a grasp on this information  
12 getting contentions filed.

13           >> MR. SILVERMAN: Yeah, I think we're not --  
14 certainly, we're not angling to distract the parties,  
15 and I would say that the issue group ought to be as  
16 limited as appropriate, and perhaps ten would be too  
17 high. But I think if not now -- I mean, I think this  
18 is as good a time as any. It will only get more  
19 difficult for everyone.

20           >> CHAIRMAN MOORE: Post contention  
21 admission, you will all be consumed with discovery.

22           >> MR. SILVERMAN: Yes.

23           >> CHAIRMAN MOORE: And there will be an  
24 enormous number of administrative matters and case  
25 conferences that have to be dealt with starting to

1 schedule, not only discovery, but ultimate hearing.

2 But there is, under the staff's view that they're  
3 going to meet Schedule D, at least that's what they're  
4 propounding. There's some 700 days before the -- which  
5 is almost two years before the SCR is issued. If  
6 budgetary constraints come into play, it's going to be  
7 a lot longer than that.

8 And it strikes me that there's more likely to be  
9 time to address those issues fully without distracting  
10 parties at this point who have limited resources from  
11 mastering your license application and trying to file  
12 contentions.

13 Because I would suggest it's easier to file a  
14 contention raising these issues as a legal question  
15 that needs to be addressed and then it can be addressed  
16 with full appeal to the Commission.

17 That just strikes me as a more efficient way to  
18 deal with these than hoping we can get these matters  
19 fully briefed and decided out at Commission in the next  
20 ensuing months.

21 >> MR. SILVERMAN: I think in one sense  
22 that's true. In another sense, obviously to the extent  
23 the Commission does rule, it will either obviate a  
24 number of contentions or obviate a number of answers  
25 that we would file in opposition to the contentions.

1 >> JUDGE BOLLWERK: Is there any reason to  
2 look towards this approach if --

3 >> CHAIRMAN MOORE: Mr. List?

4 >> MR. LIST: Mr. Chairman, I would suggest  
5 that if we went the route that you're suggesting, that  
6 it would put many of the AULGs affected by the rail  
7 line in a very untenable position of spending tens or  
8 hundreds of thousands of dollars to develop  
9 contentions, for example, relating to the rail EIS and  
10 putting our eggs in that basket, if you will, using our  
11 resources and our focus in that direction, filing our  
12 contentions on that and then finding out in the end  
13 that it's determined not to be within the scope of the  
14 Commission's jurisdiction, we're kind of left out in  
15 the cold.

16 So, it would seem to us very critical, since that  
17 is in several instances the closest-to-home matter that  
18 would get our first and obvious attention and focus.  
19 That's where we'd want to put our attention to some  
20 extent on this rail line, put us in a difficult  
21 position.

22 On the other hand, if we knew up front that we  
23 were not -- that we could not put our efforts into that  
24 area and that our contentions on that matter would not  
25 be accepted, we need the time to work on the other



1 matters.

2 >> MR. NEUMAN: Mr. Chairman, Barry Neuman on  
3 behalf of Lincoln County.

4 >> CHAIRMAN MOORE: Yes, Mr. Neuman.

5 >> MR. NEUMAN: As a preliminary matter,  
6 Lincoln County, perhaps more than any AULG, is directly  
7 and substantially affected by this issue as the DOE's  
8 designated preferred rail corridor and rail alignment  
9 would be built and run through a portion of the county.  
10 So, we're particularly interested in this issue.

11 I would agree with Mr. List that there would be  
12 utility to having this issue briefed and decided at the  
13 outset if it were clear that the issue were briefed and  
14 decided sufficiently expeditiously to obviate the need  
15 on the part of the AULGs to prepare contention, draft  
16 contentions and get their experts in order.

17 I guess I have some question that, as a practical  
18 matter, that issue will be briefed and decided in a  
19 manner that obviates the need for AULGs to proceed down  
20 this road and prepare contentions in any event.

21 At the same time, I think that there may be some  
22 benefit -- I'm actually of two minds on this issue, not  
23 that that particularly helps the Commission. But there  
24 may be some benefit to deferring resolution of this  
25 issue until contentions are filed. And I say that for

1 this reason.

2       We have a site repository EIS that devotes 6- or  
3 700 pages to examining transportation-related  
4 environmental impacts. And I understand the DOE's  
5 position to be that those issues, as part of the site  
6 repository EIS, even though they deal with  
7 transportation, are properly part of this proceeding.

8       Then we have, on the other hand, a more  
9 site-specific, if you will, EIS that's addressed to  
10 rail alignment and the rail corridor where the actual  
11 specific impacts of the DOE's preferred choices are  
12 examined in some detail.

13       And so, if it is the DOE's position that, as I  
14 understand it to be, that the rail alignment EIS and  
15 the rail corridor EIS somehow are not proper probably  
16 before the Commission, but the SEIS -- the EIS on the  
17 site is, then it could raise questions as to where the  
18 line is to be drawn assuming that the Commission agrees  
19 with the DOE's position, would raise questions as to  
20 where the line is to be drawn on permissible scope of  
21 transportation-related commissions.

22       Something which may better be dealt with when the  
23 Commission has in front of it the specific  
24 transportation-related contentions that are being  
25 proffered by the parties.

1           Just as a final observation, this issue is  
2 additionally complicated by the DOE's own choice having  
3 decided to prepare a separate rail alignment EIS and  
4 supplemental rail corridor EIS which it says were not  
5 properly part of this proceeding, it is then decided to  
6 incorporate by reference those EISes back into the site  
7 repository EIS.

8           So, it's not clear to me that, number one, this  
9 issue can and will be decided by the Commission  
10 sufficiently quickly to really have the desired effect  
11 of alleviating the AULG's burden of preparing the  
12 contentions.

13           And it's not clear to me, number two, that these  
14 issues are best decided in the abstract as opposed to  
15 having contentions before the Commission within which  
16 to consider the legal issue.

17           >> CHAIRMAN MOORE: In that regard, Mr. List,  
18 what time frame are you suggesting the affected units  
19 of local government would need an answer?

20           >> MR. LIST: I would think, recognizing that  
21 we learned this morning, that we will get an  
22 additional, basically, 45 days from the time the  
23 docketing takes place until it's published in the  
24 Federal Register, which is some kind of a bonus for us.  
25 We hadn't realized that we had.

1 >> CHAIRMAN MOORE: You may get an additional  
2 30 days.

3 >> MR. LIST: I understand. 30 to 45 days  
4 that we could get. Recognizing that, I would think  
5 that if we could have an expedited schedule, brief this  
6 issue and get a ruling within, say, maybe this is  
7 unrealistic, within 45 to 60 days after the filing of  
8 the LA, that we could -- that's something we could work  
9 with, a schedule we could work with.

10 >> JUDGE BOLLWERK: Well, it strikes me --  
11 again, I've heard concerns about resources back and  
12 forth, which I think is very, very relevant.

13 If you really have some issues that you feel you  
14 need to go to the Commission with and there's agreement  
15 among all the parties that these issues do need to be  
16 decided, then maybe the response should be given the  
17 current status of this Board, go to the Commission and  
18 ask them to decide.

19 They're there. You know where they live. File a  
20 pleading with them. It's not like you can't -- I don't  
21 know if that's -- that way you're there before them  
22 directly and you don't have to pass it through us.

23 I'm not trying to be -- not trying to shift the  
24 burden here. But especially under that time frame,  
25 you're probably looking at actually dealing with the

1 Commission directly.

2 >> CHAIRMAN MOORE: Without in any way  
3 casting aspersions on schedules and ability to meet  
4 schedules, I just think the reality is that it's highly  
5 unlikely because of the structure that that kind of  
6 schedule could likely be met.

7 And if you get it 90, 120, or 150 days, that may  
8 put you in a worse position than not getting it at all.

9 >> MR. LIST: That's probably correct. We're  
10 going to have to make some assumptions, and we may very  
11 well have to take the avenue that was suggested by  
12 Mr. Neuman in order to address the transportation  
13 issues, coming in through the SEIS, repository SEIS to  
14 address these matters.

15 >> CHAIRMAN MOORE: I would also suggest that  
16 -- I have no idea what pending -- what the Commission  
17 will be doing with pending matters before them, but  
18 those could impact both on a schedule as to what should  
19 be done. And that, I suspect, will be clarified in the  
20 not too distant future. We think a matter of several  
21 weeks.

22 And if it becomes clear, then taking things to the  
23 Commission may make, be cast in a different light.

24 Are there any other matters that anyone wishes to  
25 bring before us? Mr. Malsch?

1 >> MR. MALSCH: Yeah, Judge Moore, I just  
2 wanted to bring up a matter that was discussed this  
3 morning. And that is the staff's indication that there  
4 will be a 30- to 45-day gap between the docketing of  
5 the application, the issuance of the notice of hearing.

6 I was concerned that, since under case law within  
7 the Commission the notice of hearing has a substantial  
8 bearing on the admission of contentions. The notice of  
9 hearing serves as basically a kind of adjudicatory  
10 matter or decision, and I would hope that during that  
11 period there are not off-the-record communications  
12 between the staff and the Commission about the contents  
13 of the notice of hearing.

14 I should think that the notice of hearing is, A,  
15 basically a Commission decision to make, because it is  
16 the Commission that controls the scope of proceedings.

17 But -- so, therefore, I don't know exactly what  
18 the basis would be for the staff's decision that there  
19 would be this 30- to 45-day gap.

20 I don't know exactly what the staff would be doing  
21 between docketing and issues of the notice of hearing.  
22 And perhaps we could hear from the staff what  
23 activities they thought would be underway during that  
24 period.

25 >> CHAIRMAN MOORE: Does staff wish to

1 respond to that?

2 >> MR. LENEHAN: Yes, Your Honor. The staff  
3 is going to do -- take the steps it's supposed to take  
4 making the docketing decision.

5 The Commission itself is used to notice of  
6 hearing. There is a clear separation between staff and  
7 Commission functions. The staff is well aware of it.  
8 The staff will not be communicating with the Commission  
9 in any inappropriate way.

10 The 30 to 45 days was, more than anything, an  
11 estimate based on how long it has taken the Commission  
12 to issue notices of hearing in other areas. It is just  
13 our estimate of how long the Commission may take.

14 And we made it very clear, I believe, that that  
15 was strictly an estimate. I think we specifically said  
16 we could not give a realistic estimate at this point.

17 >> CHAIRMAN MOORE: In many instances, the  
18 notice of hearing -- notice of opportunity of hearing  
19 is issued by the director of the division that's  
20 involved for the Commission.

21 And I have no independent knowledge -- I did not  
22 know what Mr. Malsch just recited. I had always been  
23 under the impression that they were issued by staff in  
24 the name of the Commission; that they were not in fact  
25 issued by the Commission.

1 >> MR. LENEHAN: May I have a moment, Your  
2 Honor?

3 Your Honor, the situation you're describing is the  
4 case for most -- for many proceedings. In this  
5 particular one, it's specifically provided that the  
6 notice of hearing will be issued by the Secretary of  
7 the Commission.

8 >> CHAIRMAN MOORE: This morning I mentioned  
9 that it was the current contemplation in planning for  
10 this proceeding that we would strive to avoid  
11 simultaneous hearings. And that is, I believe,  
12 accurate.

13 And I qualify that by saying there may be some  
14 instances when there may be some activities that we  
15 would try to minimize occurring in simultaneous venues.

16 I don't want to leave you with the impression that  
17 some things like oral arguments or some case management  
18 conference with the Board and the parties might not  
19 have to happen simultaneously.

20 That will be something that will be attempted to  
21 be studiously avoided, but there may be instances when  
22 it doesn't.

23 We will always have uppermost in mind the fact  
24 that it's very difficult for parties, especially  
25 parties with limited resources and limited counsel, or



1 counsel few in number, to be in more than one place at  
2 one time.

3       So, we are well aware of that. But I did not want  
4 to leave -- if I left an impression this morning that  
5 it could never happen, it's that we're aware of the  
6 difficulties it presents and it will be our goal to try  
7 to avoid and minimize those.

8       Finally --

9               >> JUDGE BOLLWERK: This goes back to the  
10 same thing --

11              >> CHAIRMAN MOORE: -- Mr. Bollwerk has a few  
12 housekeeping matters in terms of an admonition that the  
13 train is going to be leaving the station shortly and  
14 what that means.

15              >> JUDGE BOLLWERK: Right. And this is in  
16 the realm of maybe not wanting to create false  
17 expectations as well.

18       Given the nature of this conference, which was  
19 really intended to collect information from as many of  
20 the potential high-level waste proceeding parties as  
21 wish to participate, the PAPO Board, the Advisory PAPO  
22 Board really went out of its way to have licensing  
23 Board panel contact -- licensing Board panel staff  
24 contact and remind the parties about the various  
25 administrative matters that were associated with

1 participation here today at the Las Vegas facility as  
2 well as our facility in Rockville, including such  
3 things as how tables -- getting tables of assignments  
4 in the hearing room taken care of in the well area, as  
5 well as conference room space and the availability of  
6 reserved parking in the front of the building.

7 We want to make it so there's no false  
8 expectations. They shouldn't necessarily anticipate  
9 that this is going to continue if the proceeding moves  
10 forward.

11 The licensing boards that are convened to conduct  
12 the various prehearing conferences and evidentiary  
13 sessions will certainly provide the potential parties  
14 for each session with contact information that will  
15 allow them to make arrangements for seating in the  
16 well, for conference space and for parking.

17 We created this facility to try to meet as many of  
18 the needs of the parties that we could in terms of  
19 litigation support that we felt were reasonable and  
20 part of what we do in our Rockville facility as well.

21 You should be aware, however, that if you fail to  
22 respond timely when we send out these notices, that you  
23 shouldn't anticipate finding yourselves with access to  
24 these items at the facility.

25 Basically, the message here is we really did try

1 to remind people several times about these things.  
2 Please don't expect that you would hear that from us in  
3 the future.

4 You probably will receive one notice and that  
5 would be the one you would need to respond to.

6 You all are very busy people. We understand that.  
7 But this is the sort of thing, maybe on a regular basis  
8 as we begin to use the facility more, if there's  
9 someone on your administrative staff that needs to deal  
10 with these matters, please give them the e-mail we send  
11 you or notice we send you all and have them respond to  
12 us. Let us know what you need.

13 We don't want to have someone show up here and not  
14 have a parking space if they really need one. On the  
15 other hand, if we don't hear anything from you in the  
16 future, we're not going to be pulsing you to find out  
17 where you're at.

18 That's the bottom line, I think. We do want you  
19 to use it.

20 >> CHAIRMAN MOORE: Finally, we do need to  
21 know how much time you need to get back to, with  
22 something in writing that hopefully a consensus view.  
23 And, staff, you are being out front on this. So, how  
24 much time do you need?

25 >> MR. LENEHAN: Two weeks, Your Honor.

1 >> CHAIRMAN MOORE: Two weeks?

2 >> MR. LENEHAN: Two weeks.

3 >> JUDGE BOLLWERK: If that's what it is,  
4 that's what it is.

5 >> CHAIRMAN MOORE: Okay, then we would  
6 greatly appreciate it if you could all get together and  
7 see if you can hammer out a consensus view that you can  
8 all live with and set as the admirable goal for filing  
9 contentions. If you could file it with us within two  
10 weeks from today, we'd appreciate it.

11 >> JUDGE BOLLWERK: I have one caveat to  
12 that. If we hear from the Commission that they want  
13 something from us earlier, we may have to come back to  
14 you. And I hope not.

15 >> CHAIRMAN MOORE: If we hear from the  
16 Commission.

17 >> JUDGE BOLLWERK: Well --

18 >> CHAIRMAN MOORE: That said, I would like  
19 to thank all of you for your participation. Your  
20 comments on these matters which, as you can see, are  
21 going to play a part in how efficiently we can deal  
22 with the case in the initial stages.

23 And we will await your filing on contentions,  
24 single issue contention, and we will attempt to get  
25 recommendations pulled together from all of your

1 filings and what's gone on here today for forwarding to  
2 the Commission in the very, very near future.

3 Mr. List?

4 >> MR. LIST: Mr. Chairman, let me just take  
5 the liberty, if I may, on behalf of all of us express  
6 our appreciation to this Board for this procedure and  
7 this process of inviting our participation and allowing  
8 us to take part in this important process of developing  
9 the format and the procedures that we're all going to  
10 be living with.

11 It's unusual and unique, and we're very grateful  
12 for this opportunity.

13 >> CHAIRMAN MOORE: Mr. List, I speak for all  
14 of us when I say that it is an unusual proceeding.  
15 Needless to say, unique in many respects, and I only  
16 hope that the cooperation and comity that you've all  
17 shown one another will continue throughout. Because if  
18 it does, it will make it much easier for all of us to  
19 deal with this matter.

20 And looking downstream, there will be -- if there  
21 are contentions on the order that have been suggested,  
22 and we suspect that this proceeding will be different  
23 from most in that a very, very high percentage of the  
24 contentions will probably be admissible, unlike in many  
25 proceedings.

1           If that turns out to be the case, then there are  
2 going to be enormous amounts of work and there will be  
3 many, many scheduling conferences where your  
4 cooperation will be absolutely vital so that things can  
5 be scheduled precisely for very long periods in advance  
6 and requiring things that you file, pre-file direct  
7 testimony, for example.

8           Instead of the typical 30 or 45 days before you go  
9 to hearing, something on the order of probably 90 or  
10 120 days or even longer in advance, so that once a  
11 trial schedule from start to finish is set, it can be  
12 met.

13           And your cooperation is vital in accomplishing  
14 those kinds of things. So, again, we thank all of you  
15 and look forward to getting your filing in two weeks  
16 from today.

17           If there's nothing else, we'll stand adjourned.  
18 Thank you.

19                       (Whereupon, the foregoing matter was  
20 concluded at 5:02 p.m.)

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

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"This is to certify that the attached proceedings  
before the United States Nuclear Regulatory Commission  
in the matter of:

Oral Argument for A-PAPO proceeding

A-PAPO-00

Las Vegas, NV

were held as herein appears, and that this is the  
original transcript thereof for the file of the United  
States Nuclear Regulatory Commission taken and,  
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and accurate record of the foregoing proceedings.

/S/

(Denise Phipps)

Official Reporter

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