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NUCLEAR REGULATORY COMMISSION

Title: Shaw AREVA MOX Services, LLC

Docket Number: 70-3098-MLA

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 + + + + +
4 ATOMIC SAFETY AND LICENSING BOARD PANEL
5 + + + + +
6 PRE-HEARING TELECONFERENCE

15 | Wednesday, February 4, 2009

17 | Teleconference

19 The above-entitled matter came on for
20 prehearing conference, pursuant to notice, at 1:30
21 p.m.

22 BEFORE:

23 MICHAEL C. FARRAR Administrative Judge

24 NICHOLAS G. TRIKOUROS Administrative Judge

25 | LAWRENCE G. McDADE Administrative Judge

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21 TOM CLEMENTS

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1 ALSO PARTICIPATING:

2 CATINA GIBBS, NRC
3 SAM GLENN, NNSA
4 MARGIE KOTZALAS, NRC
5 KATHY MARTIN, DOE
6 OM MENDRIATTA, AREVA MOX
7 GREG OBERSON, NRC
8 SOLY SOTO, NRC
9 DAVID TIKTINSKY, NRC

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PROCEEDINGS

1:35 P.M.

CHAIR FARRAR: Let's go on the record.

4 It's 1:35 on Wednesday, February 4th. We are here for
5 a conference call in the MOX proceeding. This is Mike
6 Farrar, I'm the Chairman of the Board, Licensing
7 Board. With me is my brother Judge Nick Trikouros.
8 We're expecting Judge McDade momentarily, apparently
9 he was in a minor car accident, but is on his way back
10 here. So he will join us when he can.

For the Interveners, who do we have?

12 MS. CURRAN: This is Diane Curran, Judge
13 Farrar, representing the Interveners and some of the
14 Interne representatives are also on the line.

CHAIR FARRAR: All right.

16 MS. CURRAN: Shall I have them introduce
17 themselves?

18 CHAIR FARRAR: Yes, have them do that.

19 || Ms. Carroll.

20 MS. CARROLL: Glenn Carroll, Nuclear Watch
21 South.

22 CHAIR FARRAR: Okay. Mr. Zeller.

23 MR. ZELLER: Yes, this is Lou Zeller with
24 the Blue Ridge Environmental Defense League.

25 CHAIR FARRAR: And Mary Olson is not on?

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1 All right, no response there.

2 And Mr. Clements?

3 MR. CLEMENTS: Yes, Your Honor, this is
4 Tom Clements, consultant with the Interveners with
5 Friends of the Earth in Columbia, South Carolina.

6 CHAIR FARRAR: All right, and for the
7 Applicant?

8 MR. MATTHEWS: Judge, this is Tim Matthews
9 on behalf of the Applicant. With me are Kathy Martin,
10 Anna Vinson from my firm. At another location are Sam
11 Glenn from the Department of Energy and Om Mendriatta
12 from MOX Services.

13 CHAIR FARRAR: All right, just like with
14 the Interveners, we're glad to have all of you here.

15 For the staff?

16 MR. KLUKAN: Your Honor, this is Brett
17 Klukan from the Office of General Counsel. I have
18 with me Catherine Marco from the Office of General
19 Counsel; Kimberly Sexton from the Office of General
20 Counsel, Christine Jochim Boote from the Office of
21 General Counsel, and I will let the staff here
22 introduce themselves.

23 CHAIR FARRAR: All right.

24 MS. KOTZALAS: Margie Kotzalas from the
25 Office of Nuclear Materials Safety and Safeguards.

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1 CHAIR FARRAR: All right.

2 MR. TIKTINSKY: David Tiktinsky from the
3 Office of Nuclear Materials Safety and Safeguards.

4 CHAIR FARRAR: All right.

5 MS. GIBBS: Catina Gibbs from the Office
6 of Nuclear Materials Safety and Safeguards.

7 CHAIR FARRAR: I missed your name.

8 MS. GIBBS: Catina Gibbs.

9 CHAIR FARRAR: All right.

10 MR. OBERSON: Greg Oberson, Office of
11 Nuclear Materials Safety and Safeguards.

12 CHAIR FARRAR: Okay, anyone else?

13 MS. SOTO: Soly Soto, Office of Nuclear
14 Materials Safety and Safeguards.

15 CHAIR FARRAR: Okay.

16 MR. KLUKAN: That's it, Your Honor.

17 CHAIR FARRAR: All right, thank you and
18 I'm pleased to have -- Judge McDade has joined us
19 looking not too much the worse for wear.

20 Our ground rules are, of course, while
21 we're happy to have all of the non-lawyers listen in,
22 you are listening in as spectators, as it were, and
23 should not speak unless specifically addressed by the
24 Board or if your counsel asks you to say something.

25 So we'll go ahead. Mr. Matthews, you had

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1 filed this proposed procedures which we appreciated
2 getting. I would criticize only one word in it, page
3 two, when you said "the Board proposed the use of
4 Subpart N." We mentioned it as one of the series of
5 questions and I just wanted to point out to the other
6 parties that we asked that question, whether this
7 would be a good way to proceed and that did not
8 include in it any suggestion that we believed in that.

9 Before I ask you to go through your
10 proposal, let me take a quick straw vote so we know
11 the context here.

12 Ms. Curran, can you tell me in ten seconds
13 or so whether you generally favor or generally oppose
14 the proposal?

15 MS. CURRAN: We think aspects of it are
16 premature, especially the proposal and what procedures
17 to use.

18 CHAIR FARRAR: You mean to use the N?

19 MS. CURRAN: Right.

20 CHAIR FARRAR: And Mr. Klukan, what about
21 the staff?

22 MR. KLUKAN: The position of the staff,
23 Your Honor, is that we will consent to the use of
24 Subpart N if the other parties consent to it as well,
25 meaning if Ms. Curran were to consent to Subpart N, we

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1 would also consent to Subpart N.

2 Absent such consensus, we leave it or
3 defer to the Board's judgment on best to handle this
4 proceeding.

5 CHAIR FARRAR: Okay. Thank you. That
6 helps us know how to proceed.

7 Let me ask you this before we turn the
8 floor over to Mr. Matthews.

9 Mr. Klukan, there was an element of Mr.
10 Matthews' proposal where they would file something
11 additional that's not before us now and then you would
12 have -- staff would have several months to do let's
13 call for purposes of this discussion a min-SER dealing
14 just with this subject, forgetting whether we use L or
15 N or G or whatever subpart we use, does that notion
16 sit well with the staff that you would have several
17 months to prepare and file a min-SER?

18 MR. KLUKAN: That idea, Your Honor, is
19 definitely amenable to the staff. The Applicant
20 actually consulted with the staff in developing of
21 that schedule for the staff to prospectively review
22 the additional information submitted by the Applicant.

23 The staff -- of that 120 days, the staff
24 was in the first 30 would notify the Board of any
25 additional time, given more information was needed, we

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1 would let the Board know that and then the next 90
2 days, as Your Honor indicated, to prepare a min-SER so
3 to speak.

4 CHAIR FARRAR: All right, Ms. Curran, is
5 there anything up to that point, this notion that the
6 Applicant will prepare something and the staff will do
7 a mini-SER, does that sit all right with you?
8 Forgetting where we go after that. Do you have any
9 problem with that being a general way to proceed?

10 MS. CURRAN: Yes, I guess we would still
11 urge the Board to hold off on this disposition of
12 contention four until later in the proceeding for
13 reasons that we've already given, that we think that
14 there's -- I think Judge Trikouros said in our last
15 conversation that there's a lot of things that could
16 happen. This is the case in any licensing case and I
17 was thinking today it's actually, this case is a
18 little different many licensing cases because it is
19 international events do bear on what is going to
20 happen to the plutonium inventory in this country, and
21 for the same reasons we discussed last time, we think
22 it would a better use of the parties' time to put this
23 off until at least spring of 2010 when the staff plans
24 to do its draft SER.

25 CHAIR FARRAR: Okay. There's a doctrine,

1 as you know, in the annals of our jurisprudence where
2 if an Applicant doesn't have a state water permit or
3 something, we don't hold up our decisions waiting for
4 the Applicant to get all those other permits because
5 if he doesn't get the other permits, what he gets from
6 us is of no use and that's their problem.

7 That analogy comes to mind when you say
8 wait for international events. My first reaction to
9 that could be we now have a new administration, who
10 knows what they're going to do. Who knows what will
11 happen internationally with us and the agreement with
12 the Russians, but if we buy into that theory why
13 wouldn't we have to wait forever because whatever DOE
14 does is always subject to the political branches,
15 nationally and internationally, saying well, we've
16 changed our mind.

17 If we wait, isn't that an endless slippery
18 slope?

19 MS. CURRAN: I don't think so. Not any
20 more than the staff, the staff does have a schedule
21 for doing the SER and the operating license
22 applications, a draft in the spring of 2010 and a
23 final later in the year. It seems -- this whole
24 process is going on at a pretty stately pace except
25 for the hearing which is going a lot faster. And I

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1 would just like to see those put in sync a little bit
2 more in order to allow for the unfolding of events
3 that may happen. And this whole project is the result
4 of efforts to deal with the problem of plutonium
5 disposition, so that is a national and international
6 problem, so the whole focus of this project has to do
7 with trying to solve a pretty big kind of a policy
8 problem that we've got a new administration. They may
9 change their approach. I'm not saying to wait
10 forever. I'm actually just asking to put this in sync
11 with the staff's current schedule for its safety
12 review.

13 CHAIR FARRAR: Okay, if I remember right,
14 there are kind of two purposes for having -- or the
15 staff say the timing of the staff safety review comes
16 into play in a couple of ways. One, the reg says you
17 don't want to force the staff into a hearing taking
18 the people off preparation of the SER to come testify
19 in front of us. So to that extent it's kind of a
20 protection of the staff resources. There's another
21 aspect that the Boards have always been interested in,
22 even though we treat the staff the same as any other
23 party in terms of evaluating their evidence when
24 they're in front of us in the hearing, many Boards
25 through the years and I believe the old Appeal Board

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1 said we like to have the benefit of the staff's
2 thinking when we take on a safety issue. We may not
3 accept their thinking at the end of the hearing, but
4 we like the benefit of their thinking.

5 So instead of me taking that, throw it at
6 Mr. Klukan, how do you respond to Ms. Curran in terms
7 of would be moving along on the Applicant's schedule?
8 And forget for now this Subpart N. But moving along
9 on their general approach, does that -- how does that
10 sit with the staff in terms of the overall SER?

11 MR. KLUKAN: Your Honor, this is Mr.
12 Klukan. The staff is fully prepared and having
13 reviewed the Applicant's proposal to move forward with
14 the hearing as outlined by the Applicant's schedule
15 before the issuance of the draft SER.

16 We see no reason, given the contention at
17 play here why we would have to wait until the issuance
18 of the SER to go forward with the hearing. The staff
19 is fully prepared to move forward with the hearing on
20 the contention before the issuance of the draft or
21 final SER and see no reason to wait.

22 CHAIR FARRAR: With this as backdrop,
23 without deciding anything, Mr. Matthews, let's turn to
24 your proposal.

25 MR. MATTHEWS: Judge Farrar, thank you.

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1 Before turning to it, may the Applicant have an
2 opportunity to address?

3 CHAIR FARRAR: Oh, sure.

4 MR. MATTHEWS: The Board noted back in
5 June of '08 astutely that the --

6 CHAIR FARRAR: I thought so.

7 MR. MATTHEWS: The proceedings before this
8 Panel are on this application. It has nothing to do
9 with future amendments and the Commission has also
10 astutely put in a process to deal with future
11 amendments and opportunities for hearing then.

12 But the reality is the issues that the
13 Intervenors have suggested as obstacles to moving
14 forward with the hearing have absolutely nothing to do
15 with this application or this design. They're all
16 very interesting, national policy issues that will be
17 resolved by elected leaders in due time, but they have
18 nothing to do with this application before this Board.

19 And the suggestion that somehow this
20 application is moving at some rocket pace, faster than
21 the rest of the project, isn't connected to the facts.
22 There are people working today in South Carolina,
23 pouring concrete and rebar. There are the tanks that
24 we're talking about in this issue are in various
25 phases of fabrication. Some are completed. This is

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1 a process that is moving forward and the idea that
2 somehow this is a rush job, shoving it down the
3 Intervenors' throat is just disconnected from reality.
4 So that was the rebuttal point I wanted to have.

5 CHAIR FARRAR: All right, we will come
6 back to that.

7 Let's take a look at your proposal, and
8 again I commend you for doing what we said in coming
9 up with an approach.

10 In discussing Subpart N, there are parts
11 of it that are just a little bit confusing or lacking
12 in clarity. The one thing that seems clear is that
13 Subpart N was adopted so as to take an admitted
14 contention and move it through not just a rapid
15 hearing in terms of how long, how many hours or days
16 you spend in the hearing, but to establish a rapid
17 process including pre-hearing, hearing, and post-
18 hearing.

19 So first question, Mr. Matthews, the Board
20 would have for you is in this case you with our
21 permission have gone back to the drawing board and
22 spent a lot of time coming up with a proposal or maybe
23 some changes that we or some explanations that we will
24 eventually see, but that seems like the antithesis of
25 what the foundation of Subpart N is. So haven't we

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1 already in a sense by the fact that this is taking so
2 long, have we already said by definition then that
3 Subpart N is not the way to go? Subpart N says we
4 have to have a pre-hearing conference 40 days after
5 the order allowing the contention in. Well,
6 obviously, I understand you saying we'll do it 40 days
7 after some other date and I've always been willing to
8 read regulations in a way that makes sense in the
9 circumstances, but aren't we really saying here these
10 circumstances don't fit in?

11 MR. MATTHEWS: I don't think that's the
12 way we see it, Judge.

13 CHAIR FARRAR: Walk me through that then.

14 MR. MATTHEWS: The reason this does fit in
15 except for the 40 days from admission of the
16 contention, as you point out, and I think we address
17 in our piece, everything else about Subpart N fits
18 precisely with the interest of the parties and the
19 Board in this proceeding.

20 The Board has repeatedly focused on not
21 wasting the Intervenors' resources or Intervenors'
22 time. The Applicant in this case is mindful of not
23 wasting either its own or the taxpayers' resources in
24 unnecessary administrative court pieces to get to the
25 decision on what is at its core a very simple issue.

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1 The ruling, the criteria for Subpart N are
2 interesting in that it's not solely by the consensus
3 of all the parties, but it's if the Board concludes
4 that the hearing would take no longer than two days
5 and this seems a very simple issue that we would
6 probably stretch to fill two days to resolve.

7 CHAIR FARRAR: Let me ask you this, if we
8 were to follow this procedure where the Applicant
9 submits let's call it for now a report, and then the
10 staff submits an evaluation of that, would you see
11 yourselves as having any oral or written testimony or
12 would you just make the people, you and the staff make
13 the people who had prepared those documents available
14 for questioning by the Board? The reason I ask is at
15 one point and I think it's 2.1404(b) talks about a
16 written summary of the oral and written testimony of
17 each proposed witness that never talks again about
18 prefilled testimony.

19 At some point you have to explain that to
20 me, but --

21 MR. MATTHEWS: We have discussed that,
22 Your Honor. In our view, the Applicant's view of what
23 would be most expeditious for resolution of this case
24 and efficient for Interveners as well as the
25 taxpayers' resources, would be for each party to file

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1 simultaneously their pre-filed written testimony in
2 reference to the 1404(c) that you cite, we would do a
3 summary of the prefilled testimony and the expected
4 oral testimony. But the oral testimony, as we see it,
5 would be introduction of the pre-filled testimony
6 summarizing it, and then being available for
7 questioning by the Board.

8 CHAIR FARRAR: Why do we need -- I'm not
9 saying this is the way we go, but if we were to buy
10 into this, why do we need -- and if we were to buy
11 into this because of the alleged utter simplicity of
12 it, why would we need any testimony from you? We
13 would just take this document you're going to prepare
14 and the staff is going to analyze and that would stand
15 as your -- that's your position.

16 MR. MATTHEWS: Well, Judge, you raise a
17 very interesting point and it's interesting for -- we
18 agree that -- we the Applicant agree that this issue
19 is one that may very easily resolve itself to
20 resolution on paper submittal, that you would not need
21 oral testimony at all.

22 CHAIR FARRAR: I'm saying you wouldn't
23 even need pre-filed written testimony. Whatever this
24 -- give me a catch phrase to refer to?

25 MR. MATTHEWS: We've been calling ours our

1 safety analysis.

2 CHAIR FARRAR: Okay, so you send in the
3 safety analysis. Why is that not sufficient to state
4 your position?

5 MR. MATTHEWS: I guess the safety analysis
6 could be structured as a pre-filed expert report. For
7 example, I think a term I have used, but substantively
8 the document would be the same and a panel would be
9 available to answer questions that the Judges may
10 have. The witness panel would be available to answer
11 questions that the Board Panel may have about that
12 written safety analysis.

13 But we agree with you that the issues are
14 very simple and if we were in Subpart L --

15 CHAIR FARRAR: Wait, I didn't --

16 MR. MATTHEWS: -- That's exactly how we
17 would probably seek to resolve it.

18 CHAIR FARRAR: Wait, don't agree with me
19 on something I didn't say yet, the issues are simple.
20 We're operating on the assumption -- well, I guess
21 we're operating on the assumption that after you file
22 your safety analysis and the staff files its safety
23 evaluation, the issues would be simpler than they are
24 right now. Maybe they would, maybe they wouldn't, but
25 that's kind of the hope in moving forward. But let me

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1 ask you a question here. Under your proposal, you
2 write your safety analysis. I think you were going to
3 give the staff four months to do a safety evaluation
4 and then you were going to have a pre-hearing
5 conference 40 days later. That means Ms. Curran with
6 all the resources available to her, compared to you
7 all, gets 40 days compared to your 4 months, to come
8 up with her side of the story.

9 MR. MATTHEWS: She would have the same
10 time period that everyone had. The Intervenors would
11 have the same time period that the staff had.

12 CHAIR FARRAR: Oh wait, she would do it
13 simultaneously?

14 MR. MATTHEWS: The Intervenors would get
15 our safety analysis through the mandatory discovery
16 process, mandatory disclosure process, contemporaneous
17 with giving it to the staff.

18 So this isn't a hide the ball and then --

19 CHAIR FARRAR: Okay.

20 MR. MATTHEWS: It would be completely
21 open. When the safety analysis is complete it would
22 be provided to the staff and to the Intervenors. They
23 will have four months.

24 Judge, there's nothing I can do to address
25 the lack of resources, the Intervenors' lack of

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1 resources and perhaps that has to do with public
2 support on the Intervenors' position.

3 CHAIR FARRAR: Let me clarify why I said
4 that.

5 MR. MATTHEWS: The Applicant doesn't have
6 unlimited resources, Judge.

7 CHAIR FARRAR: Pardon me?

8 MR. MATTHEWS: The Applicants here do not
9 have unlimited resources either.

10 CHAIR FARRAR: What -- the reason I said
11 that is I was under the misapprehension that you were
12 going to have four months, the staff was going to have
13 four months and she was going to have 40 days.

14 MR. MATTHEWS: Judge, the underlying
15 documents upon which the safety analysis is being
16 prepared even today as we speak have been available to
17 the Intervenors for months. We negotiated over many
18 months a document that would make them available. We
19 entered into that agreement and as of yet, none of the
20 documents that support that analysis have even been
21 requested by the Intervenors.

22 CHAIR FARRAR: Let me ask you --

23 MR. MATTHEWS: Now on top of that --

24 CHAIR FARRAR: Wait, wait, let me ask you
25 a question about that. We asked a couple of times at

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1 previous pre-hearing conferences what approach the
2 Applicant was going to take, were you going to amend
3 your license application, were you going to change
4 your plant -- how were you going to deal with this
5 concern that had been raised?

6 Are you dealing with it by changing the
7 hardware at the facility or are you dealing with it by
8 explaining better how it will work by adding
9 conditions to what you do or a combination of both?
10 Up to now the Board has nothing in front of it other
11 than the proposal that was in front of us back when we
12 issued our decision.

13 MR. MATTHEWS: Judge, as we indicated on
14 page five of our submittal, based on our review, it's
15 our conclusion that what is necessary to address this
16 contention does not rise to an amendment to the
17 license application.

18 CHAIR FARRAR: I saw that.

19 MR. MATTHEWS: Or an amendment to the ISA
20 summary.

21 CHAIR FARRAR: Okay.

22 MR. MATTHEWS: Our approach, it may help
23 clarify it for everyone, our approach to addressing
24 this contention is looking at how at a core level, if
25 the facility is unable to discharge high alpha waste,

1 doesn't have the ability to safely shut down, and
2 cannot store the high alpha waste for an indefinite
3 period, can it manage that high alpha waste in situ?
4 We look at that against our ISA summary and conclude
5 that there are no changes that are necessary to the
6 facility, therefore no changes to the ISA summary or
7 the license application that are necessary to address
8 this contention.

9 The issues, the consequences of the
10 inability to discharge high alpha waste are addressed
11 by the existing processes, the existing IROFS, the
12 existing procedure, the anticipated operating
13 procedures that will be developed and those that have
14 the necessary controls associated with how they will
15 be developed.

16 So we don't see anything that rises under
17 70.62 to require an amendment to the ISA summary.
18 That is not to say that the Applicant for its own
19 convenience or the convenience of the parties may
20 elect to add clarifying language to it, the ISA
21 summary, to address this particular contention.
22 Applicant has not yet made a decision on whether it
23 will make some voluntary adjustment to the ISA
24 summary. But it is not required.

25 And in answer to your specific question

1 about is the facility changing, as I indicated at the
2 last conference, the design for this facility is
3 fixed. There are relatively minor design
4 modifications, one of which is to concentrate some
5 drains, a drain line to reduce the total volume, but
6 it is a relatively minor modification that is in
7 process and does not make changes to the hardware
8 configuration of the high alpha waste tanks.

9 CHAIR FARRAR: Okay. All right,

10 MR. MATTHEWS: This system, this aqueous
11 polishing system is comprised of multiple units each
12 of which operates on a batch process, so it's the
13 ability to shut down those units farther upstream to
14 ensure sufficient capacity in the high alpha waste
15 tanks to safely shut down the upstream units. The
16 safety analysis addresses that question.

17 CHAIR FARRAR: All right, you had
18 indicated a moment ago that your anticipation is that
19 the Intervenors and the staff would be doing their
20 analyses at the same time. Is there some benefit in
21 terms of overall efficiency of having given the
22 Intervenors a little more time than the staff so that
23 they have the opportunity to see what the staff
24 conclusions are and work that into their position? I
25 understand why you think they should go at the same

1 time and you're right. Everyone gets the same time,
2 the relative amount of resources may not matter. But
3 is there a chance --

4 MR. MATTHEWS: I guess it depends, Judge,
5 on what the hearing is about. If it's a hearing to
6 try and obstruct or develop the MOX facility, then
7 additional time is probably to the benefit of the
8 Intervenors. But if the hearing is to address an
9 issue raised by the Intervenors, let them have their
10 say, and then give the Applicant a chance to address
11 the problem, then I don't see how the additional time
12 serves the Applicants or the interest of NRC
13 stakeholders.

14 CHAIR FARRAR: All right, so --

15 MR. MATTHEWS: It comes down to what is
16 the hearing about.

17 CHAIR FARRAR: Right, and then let's
18 follow this through. You file your analysis. Staff
19 and Intervenors file their evaluations. Then that
20 would mean at the hearing and assume for the purposes
21 that the Intervenors don't have some problems with
22 your analysis, if they don't have any problems, then
23 we don't have a hearing, case closed.

24 So assume they have some problems. Would
25 that be something your witnesses would address in pre-

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1 filed testimony or address orally?

2 MR. MATTHEWS: I expect, Judge, in answer
3 to your question, if anyone was going to be ambushed
4 in this process, it would be the Applicant, because
5 under this process we have, the Applicant would have
6 made its position formally documented it, by April,
7 and we're talking about a hearing starting in the
8 fourth quarter. The Applicant's position would have
9 been available for the Interveners to dissect and
10 analyze all that time, and then the Interveners would
11 have had 40 days to consider any new implications of
12 the staff's review and then the Applicant would have
13 that same period of time to consider the staff's
14 questions, the staff's issues and the Applicant
15 wouldn't know Interveners' position until it filed its
16 summary of the prefilled testimony.

17 CHAIR FARRAR: Okay --

18 MR. MATTHEWS: So I think the deck is
19 already stacked in the Interveners' favor.

20 CHAIR FARRAR: So what you're saying is
21 you file your analysis, staff and Interveners file
22 their evaluations at the same time and then you go to
23 -- you --

24 MR. MATTHEWS: Judge, I think we're
25 talking past you. I'm not thinking filing as filing

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1 a pleading with the Board.

2 CHAIR FARRAR: The staff --

3 MR. MATTHEWS: Applicant's safety analysis
4 would be a project document, essentially, that would

5 --

6 CHAIR FARRAR: Right.

7 MR. MATTHEWS: Made available to the staff
8 and made available to the Interveners through
9 discovery. I have no problem with sharing it with the
10 Board or filing it if that's the Board's desire and
11 the staff would issue its safety evaluation, its
12 evaluation of Applicant's safety analysis, presumably
13 in writing and whether the staff chose to file that
14 would be file it on this docket would be the staff's
15 choice, but again, Applicant wouldn't have any
16 heartache with that. But I just wanted -- that's a
17 little -- filing those documents as if they are expert
18 pre-filed testimony is a little different than the
19 schedule that Applicant is proposing.

20 CHAIR FARRAR: I guess I maybe mistakenly
21 read that into your proposal, not that these documents
22 would be available for -- by a discovery, but these
23 are the documents in essence on which we're going to
24 be holding a hearing, yours and the staff's are
25 fundamental to the hearing.

1 MR. MATTHEWS: I think they are, Judge,
2 but I think they are probably more detailed than what
3 I would expect would be an expert's pre-filed report.

4 CHAIR FARRAR: Okay.

5 MR. MATTHEWS: An expert's pre-filed
6 report might rely on Applicant's safety analysis.

7 CHAIR FARRAR: Okay, okay. Thank you for
8 clarifying that. I had envisioned that they were
9 shorter, that's very helpful.

10 MR. MATTHEWS: It's not a multi-volume
11 set. I'm anticipating the safety analysis to be
12 fairly short, Judge. It has multiple parts and
13 references, referencing to portions of the ISA
14 summary.

15 ADMIN. JUDGE TRIKOUROS: Mr. Matthews,
16 this is Judge Trikouros, are you -- do I understand
17 you're preparing that right now?

18 MR. MATTHEWS: The Applicant's technical
19 staff are preparing that now.

20 ADMIN. JUDGE TRIKOUROS: Right, and is
21 there a specific format that's being followed?

22 MR. MATTHEWS: They are following their
23 internal procedures for safety analyses, multi-
24 disciplinary review to be formally approved by the
25 project management.

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1 ADMIN. JUDGE TRIKOUROS: Would there be
2 any benefit that you could see or that anyone there
3 could see regarding identifying in advance of the
4 issuance of the safety analysis what the detailed
5 outline would be, what it would look like in terms of
6 outline form?

7 MR. MATTHEWS: I guess I'd have to confer
8 with my client and think about that and understand --
9 I don't know the answer to that, Judge. I understand
10 the benefit of having the Panel know where we're
11 coming from or having the parties know where we're
12 coming from and that's basically the approach I was
13 telling you. We're analyzing whether we can shut down
14 the multiple units of the aqueous processing system,
15 aqueous polishing system and whether we can store high
16 alpha waste.

17 ADMIN. JUDGE TRIKOUROS: Right, but that's
18 too high a level. I think that if I look at it from
19 the point of view, if I were running an engineering
20 organization and you told me you were going to prepare
21 a safety analysis, the first thing I would do is ask
22 you to provide an outline for me of what's going to be
23 contained in that safety analysis and what the format
24 would look like if this specific procedure and then
25 that's fine.

1 I'm trying to avoid a situation where you
2 issue a safety analysis and it's unacceptable or
3 insufficient to satisfy either the Board or the staff
4 and then we have to go back into an iterative process.
5 Well, the staff will have during its 120 days the
6 opportunity to issue requests for additional
7 information or in-office reviews of the document or
8 whatever ways of gathering additional information the
9 staff may feel are necessary.

10 I think what we're talking about, Judge
11 Trikouros, is extra procedure beyond the process for
12 applicants to deal with technical issues before the
13 staff.

14 ADMIN. JUDGE TRIKOUROS: Well, this is
15 what I don't understand. We have a contention that
16 we're trying to deal with. It is a separate process.
17 You've got a process that you have with the staff with
18 respect to normal MOX documents and, you know, project
19 documents.

20 Are you saying that basically our
21 contention process is put it in abeyance and the
22 normal way that you interact with the staff on this
23 project is what would take precedence, and then we
24 would be looking over your shoulder, so to speak?

25 MR. MATTHEWS: I'm not saying that at all.

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1 I guess what I'm saying is the process, whether it is
2 N or L, has built into it, when these documents become
3 part of the hearing, and what we're talking about now,
4 even the Applicant's safety analysis is not something
5 that would become part of the hearing until we
6 actually got to the hearing, when the Applicant filed
7 its prefiled testimony. And then safety analysis
8 would normally be an exhibit to the testimony.

9 And I'm not discounting your suggestion.
10 There may be benefit if for some odd reason the panel
11 thought that the Applicant's analysis was completely
12 off the mark, there would be benefit to getting to the
13 finish line with that.

14 But, so I'm not suggesting that the Panel
15 sit back and just wait. But we are, in this pre-
16 hearing process, well before the introduction of
17 evidence.

18 ADMIN. JUDGE TRIKOUROS: Well, this
19 process starts at X in your time table, right?

20 MR. MATTHEWS: That's correct.

21 ADMIN. JUDGE TRIKOUROS: X is staff
22 completes their review.

23 MR. MATTHEWS: Correct.

24 ADMIN. JUDGE TRIKOUROS: And everything
25 that I am asking, right now, is pre-X.

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1 MR. MATTHEWS: Correct. I follow you.

2 ADMIN. JUDGE TRIKOUROS: And what I'm
3 asking at a very high level is simply is there a pre-X
4 for us, for this Board, for this case that we're --

5 MR. MATTHEWS: Well, under L or M, I don't
6 think there is, Judge Trikouros. Or G, for that
7 matter. I don't think there is a process that the
8 Board would receive technical information or evidence,
9 but we have no problem making, putting in April, by
10 April, putting that safety analysis on the docket, or
11 making it available to the Panel or whatever way the
12 Panel wants it. We don't have an objection to that.

13 ADMIN. JUDGE TRIKOUROS: I mean, right
14 now, we're, the normal procedure would be that we
15 would wait for at least the draft SER.

16 MR. MATTHEWS: Well, that's not
17 necessarily the procedure contemplated by the rules.
18 I agree, that is the typical process where the hearing
19 waits, and the staff wants to wait until completion of
20 the SER.

21 CHAIR FARRAR: Mr. Matthews, it is Mike
22 Farrar again. The whole premise of L is that we let
23 a contention in, and we're going right to hearing.
24 You know, nothing in the way, you go right to hearing.
25 I'm sorry, N. The premise of N is that you got right

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1 to hearing.

2 Judge Trikouros says you have this great,
3 big pre-X procedure that seems, as you described, it
4 seems to me the antithesis of what N was set up to do
5 unless you want the Intervene at the end of pre-X, to
6 file an amended contention, freely file an amended
7 contention, and then go right into an N proceeding.
8 I mean, you've got a lot of complications here for a
9 subpart didn't seem to envision.

10 MR. MATTHEWS: Judge, we say the only
11 complication is the 40-day start clock. Otherwise, it
12 seemed to fit well with the interest of the
13 Intervenors in a not very resource-intensive hearing
14 and the Board's clear preference not for, preference
15 against a dispositive motion. It seemed to fit pretty
16 well with that.

17 In terms of the timing --

18 CHAIR FARRAR: You're saying ignore the
19 timing and just look at the substance of what this is
20 trying, what N is trying to accomplish?

21 MR. MATTHEWS: Well, they go back to what
22 the Commission was trying to achieve. I agree with
23 your characterization, that it seems to have been set
24 up for 40 days from the entrance of the contention,
25 you're in a pre-hearing conference and 20 days later

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1 you're in a hearing. I understand that the Commission
2 set that up in order to, you know, their term, fast
3 track it.

4 But clearly, they made clear in the
5 Statement of Considerations that they're trying to
6 have a simple process with oral presentations,
7 reduces, or eliminates written motions, all of which
8 would be part of Subpart L, including dispositive
9 motions.

10 So if anything, Subpart N guarantees the
11 Intervener a day at a hearing.

12 ADMIN. JUDGE TRIKOUROS: Well, I agree
13 with you. Your suggestion regarding the safety
14 analysis I think provides significantly more
15 information, in fact, to all parties than would
16 normally be provided because I assume that safety
17 analysis would be rather detailed.

18 And the concern that I have is that if
19 there is going to be a safety analysis, that that
20 safety analysis be a -- the probability is that that
21 safety analysis be an adequate document and since it
22 is part of our contention, it just seems to me that it
23 might be worth while having some upfront information
24 regarding what's in that -- what the outcome of that
25 safety analysis would be so that once that document is

1 done, reviewed by the Commission, we go right to
2 hearing on it and we're done.

3 When did you envision completing that
4 document?

5 MR. MATTHEWS: By April, Judge Trikouros.
6 The approach, and maybe at the next level down, the
7 ISA summary as I expect you have had an opportunity to
8 glance at, looks at events. It's got event analyses
9 and hazards analyses. And the analysis being prepared
10 now looks at the high level, inability to discharge
11 high alpha waste and walks through each of those
12 analyses and says could this be affected, does it
13 create a different kind of event or different kind of
14 consequences of an event and is the ISA summary for
15 this portion sufficient and explains why or what needs
16 to be considered or why particular issues, say, for
17 example, criticality control, why that's not an issue
18 because you're able to -- I'm not saying it's not an
19 issue. The ISA summary addresses it adequately in the
20 upstream unit of the aqueous polishing system that
21 you're able to full process and rinse.

22 So at that level that is the approach
23 taken. It relies on many of the NSEs, nuclear safety
24 evaluations, and hazards analyses that make up the
25 ISA. It sort of relies on them, references them.

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1 ADMIN. JUDGE TRIKOUROS: Will this safety
2 analysis refer to procedures that will be written in
3 the future or will it refer to procedures that are
4 already in place?

5 MR. MATTHEWS: The procedures aren't yet
6 written, Judge Trikouros, so it describes factors that
7 will be considered in the development of operating
8 procedures and identifies the controls that ensure
9 that at the time these procedures are written, those
10 considerations are adequately addressed in the
11 procedures.

12 ADMIN. JUDGE TRIKOUROS: Okay.

13 MR. MATTHEWS: There will be a specific
14 calculation as to how much margin must be maintained
15 in the high alpha waste tanks. I referred to it last
16 time, it's the KWD system. The high alpha waste
17 portion of the KWD system, how much operating volume
18 reserve margin needs to be maintained. I think we're
19 harkening back to the idea of a set point. That's
20 probably the trigger there.

21 ADMIN. JUDGE TRIKOUROS: The document
22 that you indicated earlier that's the basis for the
23 safety analysis, I guess it's a project document for
24 how to prepare a safety analysis, that's an internal
25 document, correct?

1 MR. MATTHEWS: That's correct, Judge.

2 CHAIR FARRAR: Mr. Matthews, it's Mike
3 Farrar again.

4 Listening to you, it sounds like what
5 you're asking us to do is really an amalgam of L and
6 N or maybe you're asking us to design a procedure that
7 draws on L and N and other parts of the regulation,
8 design and procedure that makes sense in the
9 circumstances of this contention and where we find
10 ourselves.

11 I know the regs call for saying it's
12 subpart this or subpart that, but you're almost saying
13 let's put our heads together, design an efficient and
14 effective and fair process that lets us get through
15 this issue.

16 MR. MATTHEWS: I'm not sure the
17 regulations give us that luxury, Judge Farrar. I
18 understand your approach because we are not -- the
19 hearing would have been over were we in clear,
20 unaltered Subpart N, but Subpart N does include the
21 ability for the Panel to make minor schedule
22 adjustments in some areas to make Subpart N fit. And
23 it includes an escape from Subpart N if, once in it,
24 the Panel concludes it doesn't fit. But Applicant is
25 not suggesting that -- or agreeing to the idea that we

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1 can cobble together the best of various hearing
2 procedures and let's us just go forth with them. I
3 think there is a problem with that and I think we do
4 have to be in one hearing process or the other.

5 CHAIR FARRAR: Mr. Matthews, let me give
6 you a rest here for a minute and --

7 MR. MATTHEWS: Thank you, Judge.

8 CHAIR FARRAR: Thank you for your views.
9 Mr. Klukan, you've heard all this conversation. Do
10 you have anything that might help us get through this?

11 MR. KLUKAN: The one thing I would add,
12 Your Honor, that Mr. Matthews hinted at is that if the
13 Board after the staff puts on the docket its review at
14 Day X, the Board could find, given the complexity of
15 the report or for other reasons involved therein you
16 could switch it to Subpart L, finding that Subpart N
17 is simply not fit to deal with the complexity. But I
18 don't think that should stop us from moving --
19 granted, the staff doesn't take any position, but if
20 the Board were to choose to start at Subpart N, I
21 don't see why that fear of complexity would have to
22 stop the process when you could switch it out at
23 really any point like moving towards the hearing.

24 CHAIR FARRAR: Could we switch it to G?

25 Mr. Klukan? Is staff still there? Maybe

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they hit the mute button and they disconnected. Let's wait for them to come back.

3 || (Off the record.)

4 MR. KLUKAN: Hello, this is Mr. Klukan, I
5 accidentally in pushing the mute button when we were
6 done talking accidentally hit the speaker button as
7 well which disconnected us. I apologize for my
8 fumbling fingers.

9 CHAIR FARRAR: That's all right, and we've
10 settled the case while you were away.

11 MR. KLUKAN: Fantastic. Your Honor.

12 CHAIR FARRAR: I think the last question
13 I had asked was if things were complicated enough
14 could we switch to G, assuming that we were convinced
15 of all the things that it takes to be a G?

16 MR. KLUKAN: That -- I admit, Your Honor,
17 that is completely within the Board's power whether to
18 choose to do that. I would hope that -- and don't
19 expect that this hearing rises to that level of
20 complexity to necessitate the formalities of Subpart
21 G, but I will concede it's within the Board's power.
22 Do I think we would ever come to that point were such
23 was necessary, no.

24 CHAIR FARRAR: Okay. And do you share Mr.
25 Matthews' view that it would be inappropriate,

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1 unauthorized and otherwise illegal for all of us to
2 sit down and say let's design a procedure that makes
3 sense for this case, that that would be a bad move?

4 MR. KLUKAN: I think it depends on how you
5 frame it. As Mr. Matthews hinted at, there is room
6 within Subpart N to make it fit the specifics of this
7 proceeding. And I think within that wiggle room, so
8 to speak, we could craft something -- and again, I'm
9 not really sure what the Board is grappling with in
10 making it more -- to a certain extent without having
11 to bridge into Subpart L, but simply stay within
12 Subpart N. Again, this is a caveat that staff doesn't
13 take a formal position on Subpart N and ask the
14 parties' consensus on it.

15 CHAIR FARRAR: Mr. Klukan, hold on a
16 second, we heard a weird electronic noise.

17 James, are you still there?

18 COURT REPORTER: I am still here, so I
19 lost Mr. Klukan's statement through that noise.

20 CHAIR FARRAR: Okay. Let's -- rather than
21 try to reconstruct it, it was a brief enough period.
22 The context will probably make it clear.

23 Mr. Matthews, are you still there?

24 MR. MATTHEWS: We are, Judge.

25 CHAIR FARRAR: Ms. Curran?

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1 MS. CURRAN: Yes.

2 CHAIR FARRAR: Okay. Ms. Curran, why
3 don't you address this and since you last spoke, I've
4 been thinking about your thoughts about the delay and
5 the political and international ramifications and I
6 seem to remember the private fuel storage case at the
7 very end, the Board wrote something that said in
8 effect, what we've done over these many years is pass
9 on the safety and environmental issues that have come
10 before us.

11 What the nation's nuclear waste disposal
12 policy ought to be is for the political branches of
13 government and not for the Boards. Boards pass on
14 questions that come before us, so along those same
15 lines I don't think you could find two votes or any
16 votes on this Board to delay things because the
17 international scenery might change. So I think in
18 addressing what's been said so far you ought to
19 address here's a contention that's before us; here's
20 a proposal for how to address it, what appears to be
21 a workmanlike orderly fashion and so if you could
22 address what's in front of us on those -- on that
23 notion that we have a contention in front of us, our
24 job is to pass on the merits of contentions that are
25 in front of us and that we would intend to do that.

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1 The question is how best to do that.

2 MS. CURRAN: Okay.

3 CHAIR FARRAR: So if you would confine
4 yourself to that.

5 MS. CURRAN: Yes, and just to clarify what
6 we were asking for was putting this hearing on a
7 schedule that was consistent with the staff's schedule
8 for its safety analysis rather than essentially
9 accelerating it and having asking the staff to deal
10 with this issue up front, but just to clarify that,
11 that was what we were looking for.

12 CHAIR FARRAR: Okay.

13 MS. CURRAN: First of all, I just want to
14 say that the Interveners don't operate by ambush. We
15 haven't so far in this proceeding. We don't intend to
16 do that in the future and I have no experienced that
17 Applicant has done that either. So I just would like
18 to clarify that we are on the up and up here and I
19 think everybody is doing the same.

20 We don't --

21 CHAIR FARRAR: Wait, I just heard a noise.
22 James, are you still here?

23 COURT REPORTER: I am still here.

24 CHAIR FARRAR: Mr. Matthews?

25 MR. MATTHEWS: We're here, Judge.

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1 CHAIR FARRAR: Mr. Klukan?

2 MR. KLUKAN: I'm still here, Your Honor.

3 CHAIR FARRAR: Okay, Ms. Curran.

4 CHAIR FARRAR: We don't have a problem
5 with the Applicant's proposal to do some kind of an
6 analysis that would be shared with us in the discovery
7 process followed by the staff's evaluation, four
8 months later. That, to us, seems like a good plan.

9 Our modification would be to at that point
10 when the staff completes its evaluation to at that
11 point hold a prehearing conference at which the Board
12 would decide what procedures were appropriate. It
13 seems to me that until we see what the Applicant's
14 analysis is going to be, how complicated it is, and
15 until we see what the staff is going to say in
16 response, it's very abstract and kind of academic to
17 talk about whether Subpart N or Subpart L is
18 appropriate.

19 I also think that it is a false choice to
20 say that if the Board goes with Subpart L that it has
21 to accept summary disposition as a right that parties
22 have. I do not read the rules that way. I don't read
23 the Commission's policy statement that way. What is
24 it 98-12, 48 NRC 18 --

25 CHAIR FARRAR: Are you referring to L?

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1 MS. CURRAN: Yes, and L.

2 CHAIR FARRAR: Let me make clear what the
3 Board feels. In a G proceeding, there may be a role
4 for motions for summary disposition and we've seen
5 lots of those.

6 In a proceeding where the Board is asking
7 the questions, I think most Board Members have
8 generally come to the conclusion that why agonize
9 whether there's a lingering issue of material fact
10 when by asking a few questions you can get the merits
11 of the case in front of you and decide the facts. So
12 I think we issued an order earlier saying we frowned
13 on summary dispositions and it's in that context. If
14 we're going to be asking the questions in an
15 abbreviated hearing, it's a lot faster to go to that
16 hearing, ask the questions and write a decision or
17 under Subpart N and state a decision than it is to
18 agonize for what sometimes is an unduly long period
19 over an arcane issue and then perhaps end up in the
20 hearing anyhow.

21 ADMIN. JUDGE McDADE: This is Judge
22 Lawrence McDade.

23 Ms. Curran, what you're suggesting is one,
24 let the Applicant prepare its safety analysis; two,
25 let the staff make the review; three, at that point

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1 the Board sets the schedules of prehearing conference.
2 At that time we will have a good understanding of what
3 the complexity of the issues are, what those issues
4 are, and at that time it would be appropriate after
5 hearing from the parties for the Board to make a
6 determination as to scheduling and as to the
7 appropriate procedure, whether it be L or N. That's
8 your position, is that correct?

9 MS. CURRAN: Yes, that's right.

10 ADMIN. JUDGE McDADE: Mr. Klukan, from the
11 staff's position, do you see problems with proceeding
12 that way?

13 MR. KLUKAN: If you could give us one
14 moment, Your Honor, to confer.

15 (Pause.)

16 This is Mr. Klukan, Your Honor. The staff
17 doesn't have any problem -- doesn't foresee any
18 problems Ms. Curran's suggestion.

19 CHAIR FARRAR: Mr. Matthews?

20 MR. MATTHEWS: Judge McDade,
21 fundamentally, we don't have a concern with that
22 approach, but we recognize it's our view that summary
23 disposition in our disfavor is on the table until that
24 decision is made to go in a hearing procedure that
25 prohibits it.

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1 So we don't have a problem with the
2 Board's deferring a decision. We were asked for a
3 recommendation. We made it.

4 ADMIN. JUDGE McDADE: Thank you.

5 CHAIR FARRAR: Ms. Curran, let me ask
6 about your proposal. You say we go to that prehearing
7 conference and then we know if the case is complex or
8 not and we could pick a subpart.

9 How would we know if it's complex or not
10 if we don't what your position is? In other words,
11 the outcome of these evaluations and until we know how
12 hard you're going to push back against those, we
13 don't know if it's a complicated case or not.

14 MS. CURRAN: I guess we could give you our
15 reading of the situation because then perhaps the
16 parties should share the Applicant's could share its
17 analysis; the staff could share its evaluation with
18 the Board. We could write a letter to the Board
19 giving an assessment, our assessment of the complexity
20 of the issue and go from there.

21 CHAIR FARRAR: But that's where Mr.
22 Matthews said some minutes ago that he thought you
23 should show up with something at the same time the
24 staff does. And wouldn't that fit in better with your
25 notion that then we sit down to prehearing conference

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1 and say okay, now we know what is in front of us.
2 We've been waiting to find out the difficult issue or
3 what is going on here? And wouldn't we know better if
4 we followed his suggestion that you and the staff work
5 up something contemporaneously?

6 MS. CURRAN: Sometimes knowing what the
7 staff is going to say helped us to evaluate what our
8 position might be, but maybe in this situation it
9 makes sense. We would both respond at the same time
10 with some kind of preliminary position.

11 ADMIN. JUDGE McDADE: Mr. Matthews, this
12 is Judge McDade again. If an additional period of
13 time, a relatively short additional period of time
14 were given to the Applicant after the staff completed
15 its safety review -- to the Interveners, rather --
16 would that pose any problems? And again, we're
17 talking about a relatively short period of time, but
18 at least enough to allow the Interveners to digest the
19 staff's review and then perhaps tailor its comments to
20 the safety analysis based on what the staff has done
21 as well.

22 There may well be that there will be no
23 disagreement between the Interveners and the staff
24 after they've had an opportunity to review the staff's
25 safety review. Would that pose problems if we gave a

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1 relatively short period of time? I mean we're not
2 talking about several months. We're talking about a
3 few weeks.

4 MR. MATTHEWS: Judge McDade, this is Tim
5 Matthews. I guess fundamentally, the purpose for that
6 delay seems off or maybe it's just lost on me. The
7 hearing, the issue, is about a disagreement between
8 the Applicant and the Interve and the Interve having
9 problems wit the Applicant's license application and
10 ISA summary and presumably after four months of study,
11 our safety analysis.

12 It is not about Interve's disagreement
13 with the staff. So while the staff's view is helpful
14 for all the parties and certainly helpful for the
15 Board, I don't see a benefit to resolution of this
16 hearing by giving the Interve extra opportunity to
17 piggyback on the staff evaluation. That said, the way
18 you've phrased the question determines the answer, no,
19 a couple days' delay probably doesn't affect the
20 hearing.

21 ADMIN. JUDGE McDADE: Thank you.

22 CHAIR FARRAR: Mr. Matthews, that was one
23 of the best answers I've ever heard.

24 (Laughter.)

25 MS. CURRAN: This is Diane Curran, could

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1 I just comment on that?

2 ADMIN. JUDGE McDADE: Certainly.

3 MS. CURRAN: I think Mr. Matthews said a
4 couple of days. I don't think a couple of days would
5 quite do it for us, maybe two weeks. But also, I just
6 want to point out that the position that Intervenors
7 are often in in a case like this is we do not have the
8 resources of the federal government to completely, in
9 many cases, resolve or address issues as thoroughly as
10 the government goes. We depend on the government's
11 analysis. We do our part. We do as much as we can to
12 develop our own view of the issues, but to some extent
13 we are looking to the government for that -- for the
14 analysis which we don't have the resources to do as
15 thoroughly as the government does.

16 So this would be important to us and
17 important piece of information to have before we went
18 forward.

19 CHAIR FARRAR: Ms. Curran, I understand
20 that, but facetiously number one, the government may
21 not have as many resources as it used to have; but
22 two, Mr. Matthews makes the point -- I mean I think
23 this is one of these cases that the staff could have
24 decided not to participate. I think 15 days after
25 something happened, they elected to participate. They

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1 could elect not to participate and then you'd be --
2 then its burden is on you to challenge the Applicant's
3 proposal. So that's kind of a backdrop.

4 MS. CURRAN: Judge Farrar, if the staff
5 elects not to participate, doesn't the Board then have
6 to wait for the SER for the hearing? Am I wrong about
7 that?

8 CHAIR FARRAR: I don't know. Mr. Klukan?
9 We've always said we'd like to have and I think if the
10 staff elects not to participate, I think that same
11 section says we can say it's really important to us
12 and direct them to participate. But I don't have that
13 right in front of me.

14 Mr. Klukan, can you help us?

15 MR. KLUKAN: I concur with what you just
16 said, Your Honor. I think your reading of the
17 regulation was correct. The Board could, because it
18 is important, direct the staff as said.

19 I concur with Mr. Matthews completely.
20 This disagreement is between Applicant and the
21 Intererve. Our analysis and our participation is to
22 help the Board to facilitate its review in this
23 matter. The disagreement is not between us and the
24 Intererve. And quite frankly, I don't think the staff
25 -- well, I understand Ms. Curran's concerns and how

1 she does use the staff analysis. I don't think -- and
2 again, we could simply just drop out of it. I don't
3 think our analysis -- she necessarily should get the
4 advantage of our analysis to build her own. I don't
5 think that's built into the rules or necessarily how
6 the Commission envisions the proceeding to take place.

7 MR. MATTHEWS: Judge, this is Tim
8 Matthews, just if I may?

9 CHAIR FARRAR: Yes.

10 MR. MATTHEWS: I don't understand anything
11 in L or N that presupposes issuance of the SER prior
12 to the hearing. My understanding is that it was -- if
13 the staff wanted to participate, it could be at the
14 staff's request, delayed until issuance -- until it
15 completes its work on the SER, as you characterized
16 earlier. But it is not a prerequisite for the
17 hearing.

18 CHAIR FARRAR: On the environmental side,
19 it's a prerequisite to have the EIS, I think.

20 MR. MATTHEWS: I think that's correct,
21 Judge.

22 CHAIR FARRAR: I think one Board once
23 tried to move ahead before the EIS and the Commission
24 said not to, but you're saying the same rule does not
25 follow on the safety side.

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1 MR. MATTHEWS: That's my understanding of
2 the rules, Judge.

8 MR. MATTHEWS: This is Tim Matthews.
9 That's consistent with our understanding of why we're
10 here, Judge.

11 Interveners had a problem with the
12 Applicant's application and ISA summary.

22 MR. MATTHEWS: Judge McDade, this is Tim
23 Matthews again and again, the way you've phrased the
24 question certainly presupposes more information is
25 certainly better. We don't feel it's necessary, but

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1 regardless, in the proposal we have put forward, the
2 Applicant and the Board will have the benefit both of
3 the Applicant's safety analysis and the staff's
4 evaluation of the same.

5 ADMIN. JUDGE McDADE: I understand. Thank
6 you.

7 CHAIR FARRAR: We'll go on mute here.
8 Don't anybody go away and the Board wants to confer.

9 (Off the record.)

10 CHAIR FARRAR: All right, thank you. Back
11 on the record. The Board has conferred. I don't want
12 to say we have consensus among the parties, but a
13 solution seems to have emerged to us and Mr. Matthews,
14 we thank you for a very thoughtful proposal and we're
15 not going to accept all of it. And we thank the other
16 parties for their thoughtful comments.

17 What we want to do is take the first part
18 of the Applicant's proposal. They will file their
19 analysis. Staff and the Interve will then start to do
20 their analysis.

21 Mr. Klukan, I think you said you wanted
22 within the first 30 days to tell us if 120 days was
23 going to be enough?

24 MR. KLUKAN: The remaining 90 days would
25 be enough, yes, correct, Your Honor.

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1 CHAIR FARRAR: Right, you tell us that and
2 then the Interve will have whatever time you have plus
3 two more weeks to get -- you'll file an analysis.
4 They will file an analysis two weeks after yours and
5 we will have a prehearing conference. We'll target
6 having a prehearing conference within 10 days. That
7 will depend, of course, on our workload and other
8 assignments and availability, but we'll say shoot for
9 between 10 days, maximum, three weeks just as a matter
10 of logistics and we would have the prehearing
11 conference at which we would decide -- at which point
12 we would have enough information in front of us to say
13 is this -- what kind of case is this and could pick a
14 subpart which would -- and at the same time suppose we
15 picked Subpart L, we would then state whether we
16 wanted prefilled written testimony, oral testimony, and
17 so forth and we could go ahead on that basis. And
18 that conference, rather than today, would also tell us
19 what the other ramifications of N versus L are in
20 terms of discovery, hearing record, and so forth, kind
21 of the details, but in essence, we would be ready to
22 go if, in fact, at that point the case looks simple
23 and we could go with N, Subpart N. Then that would
24 become day X. That would be the prehearing
25 conference.

1 So that would be actually day X, plus 40
2 for N. And we could go right ahead. So I know that
3 doesn't satisfy, this ruling does not satisfy each of
4 you on exactly what you wanted, but I think it
5 accommodates much of what each of you had asked for.
6 Let me amend that what I just said by saying we would
7 also want you to come to that prehearing conference --
8 well, everyone take a look at 2.1404(b). It says you
9 come to the prehearing conference with a statement
10 identifying each witness and a written summary.

11 Our view on reading that section the other
12 day was you should to submit that to us even though
13 the regulation says bring it to the conference. It
14 seems to us you would want to file that some time
15 before the conference, even as little as five days
16 before because otherwise we're going to get to the
17 conference and say let's take a two-hour break while
18 we read these documents.

19 Mr. Matthews, would you have any problem
20 with that modification?

21 MR. MATTHEWS: I just want to make sure I
22 understand it, Judge. Would we be operating under L
23 until we got to that conference and having these
24 prefilled and the possibility that the Panel was
25 switching to N?

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1 CHAIR FARRAR: That's a good question.

2 MR. MATTHEWS: If that is the case, we
3 would not have a problem with that approach,
4 submitting five days earlier.

5 CHAIR FARRAR: You say on the assumption

6 --

7 MR. MATTHEWS: On the assumption we
8 continue as we are now under L and at the prehearing
9 conference where we would file our -- identify our
10 witnesses five days earlier and summary of the oral
11 and written testimony. We wouldn't have a problem
12 doing that five days before this prehearing conference
13 which remains under L that the Panel could then shift
14 to N.

15 ADMIN. JUDGE TRIKOUROS: Mr. Matthews, how
16 does that affect you whether we say yes or no to that
17 question? Would you be doing something different if
18 we said we were under Subpart L right now until we
19 decide to go Subpart L?

20 MR. MATTHEWS: The Applicant has different
21 rights under N and L.

22 CHAIR FARRAR: So you are saying we have
23 to say now whether at this moment we're proceeding
24 under N or L?

25 MR. MATTHEWS: We understood from the very

1 beginning, Judge, that we were under Subpart L.

2 CHAIR FARRAR: Okay.

3 MR. MATTHEWS: And I haven't seen -- if
4 there's been something to change that, I confess I've
5 missed it.

6 CHAIR FARRAR: No, no. What's changed is
7 we were talking during much of this conference today
8 as though we were headed, we were trying to see:
9 could we get to N? So I may have slipped into kind of
10 assuming we were quasi in N already.

11 MR. MATTHEWS: We saw it the other way,
12 that we could put ourselves into N, with the loss of
13 rights to the Applicant that would entail, and then
14 the Panel still has an escape valve if it chooses to
15 if matters truly are, when we get to the hearing, when
16 we actually get to the hearing, if the issues have not
17 been simplified to the point we can't resolve them in
18 two days, then the Panel would have the ability to
19 shift back to L. I'm not sure that I agree that G
20 would be an option at that point, Judge. I think
21 2.700 has its criteria for application of G.

22 ADMIN. JUDGE McDADE: This is Judge
23 McDade. Would you agree that at this point we're at
24 Subpart L with the understanding that, when we get to
25 the prehearing conference that Judge Farrar referred

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1 to, there would be an option at that point based on
2 the issues currently before us to either go forward
3 with the hearing under Subpart L or to change to N.
4 Is that the understanding of --

5 MR. MATTHEWS: I haven't looked at L to
6 see that closely -- I've looked at it, but I haven't
7 looked at it specifically to see whether it contains
8 an explicit escape valve the way that Subpart N that
9 allows you to jump over to N. It certainly allows
10 some leeway of the Panel to adjust -- to tailor those
11 proceedings, but not unlimited leeway.

12 ADMIN. JUDGE McDADE: If we proceeded that
13 way do you envision any problems, any issues that
14 would raise or difficulties it would raise from the
15 standpoint of the Applicant that it would put your
16 client in a bad position?

17 MR. MATTHEWS: At this point, Judge
18 McDade, I don't see that. Subpart N does have the
19 ability for parties to jump into it if it's
20 unanimously agreed whether or not. There's a two-day
21 requirement, so if at that prehearing conference we
22 all, Applicant agree that Subpart N made sense then,
23 but as I sit here today in February, I don't see a
24 specific problem with it.

25 ADMIN. JUDGE McDADE: Mr. Klukan, do you?

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1 MR. KLUKAN: No, Your Honor. If I may ask
2 one clarifying question. The Board said two weeks
3 after the staff submits its analysis, the Intervenors
4 will submit theirs, correct?

5 CHAIR FARRAR: Right.

6 MR. KLUKAN: And ten days after that two
7 weeks we will have the prehearing conference?

8 CHAIR FARRAR: Well, I said that, but I
9 had forgotten at the time that one of the things you
10 do under an N conference is you have statements,
11 summaries of witness testimony, so we have to figure
12 out how that would come in.

13 MR. KLUKAN: The only other thing that I
14 would add, Your Honor, is I'm getting married on July
15 11th, so while I am bound to your rulings, Your Honor,
16 I would fear the wrath of my fiance greatly. So I
17 would ask if we could then structure it to avoid me
18 having to do something that weekend of July 11th.
19 With that, no problem.

20 CHAIR FARRAR: You could delegate upwards
21 to Ms. Marco?

22 MR. KLUKAN: I could, Your Honor, I could.

23 ADMIN. JUDGE McDADE: Mr. Klukan, you want
24 to take the whole weekend off?

25 (Laughter.)

1 MR. KLUKAN: At least Saturday, Your
2 Honor, for the wedding itself. The rehearsal dinner
3 I think I could probably work through.

4 CHAIR FARRAR: I think we're all right
5 under the schedule, I think we'll be all right.

6 Ms. Curran?

7 MS. CURRAN: Yes, I just wanted to make a
8 comment that it seems to me that in this prehearing
9 conference and Subpart N has quite a bit to it,
10 including discussing results of the settlement
11 efforts. I'd like to divorce two things. Earlier,
12 I'd like to have a discussion about which procedures
13 are appropriate to follow, L or N. And then if we go
14 with N, give us a little time to prepare this
15 statement identifying the witnesses and what they're
16 going to say.

17 I just think there's an awful lot to do
18 here with reviewing the staff's position, coming up
19 with some kind of distillation of what the issues are
20 and are they complex, discussing that and figuring out
21 what the appropriate procedures are. Could we do that
22 in advance of going into a sub -- if we decide to do
23 a Subpart N proceeding, going into that prehearing
24 conference. We could do a telephone conference call
25 to figure out the procedures.

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1 CHAIR FARRAR: I think you are right, Ms.
2 Curran. Under the general rules, the Board is always
3 free to have prehearing conferences, so let's -- the
4 best way to move this case along would be to have
5 what's called a stand alone prehearing conference
6 within the days, two weeks and the -- and at that
7 conference we would evaluate together what do we have
8 in front of us, how complicated is this, make our
9 choice of procedures and go from there. And then yes,
10 there would have to be another conference, but at
11 least we would quickly know where we're headed and how
12 we're going to get there and can set the times.

13 I think that we will write this up and
14 after we write it, there's something -- I don't want
15 to hear from you if you don't like it, but if there's
16 something that you think doesn't reflect accurately
17 what we said here today, or that causes some real
18 problem or is inherently illegal, let us know.
19 Otherwise, we'll go with that. I think we've reached
20 the best accommodation we can of everyone's interest
21 and more equally important with the case on a time
22 frame and approach that makes sense.

23 So again, Mr. Matthews, we thank you for
24 that.

25 I understand the Commission had an

1 affirmation session today in this very proceeding and
2 I understand that they upheld our rejection of
3 contention 7, but reversed the conditions we put on
4 it, but didn't say anything else about any other
5 aspect of the case. I think that was the only thing
6 they had in front of them on direct appeal.

7 Does anyone have any different information
8 than that?

9 MR. MATTHEWS: The Applicant, Your Honor,
10 we have no additional information.

11 CHAIR FARRAR: Ms. Marco or Mr. Klukan?

12 MR. KLUKAN: I don't have any additional
13 information, Your Honor.

14 CHAIR FARRAR: All that by way of saying
15 that has no -- if I understand their decision, it has
16 no impact of what we did today, so we will go ahead.

17 Is there anything else we need to take up?

18 MR. MATTHEWS: Mr. Farrar, this is Tim
19 Matthews. I did have one question on the outline. I
20 understand you're going to put it into a written
21 order, so I'm not -- I just wanted to understand one
22 piece of it. You had described that the Applicant
23 would file its analysis and I wanted to check on that.
24 Is that something the Panel wants submitted on the
25 docket? Is that something that we are -- for this

1 hearing or is it something we are -- we certainly
2 anticipated providing it to the staff and giving it to
3 the Interveners through our mandatory disclosure
4 obligation. We have no objection to providing it to
5 the Board. I just wanted to make sure we understood
6 the process under which the Board would like to
7 receive it.

8 CHAIR FARRAR: Hold on, let me get you --
9 let me talk to my colleagues and get you an answer to
10 that.

11 (Off the record.)

12 CHAIR FARRAR: Mr. Matthews, I think we
13 have an answer which is when you make that document --
14 when you send it to the staff in the ordinary course
15 and make it available to Ms. Curran, you just simply
16 send a courtesy copy to the Board.

17 Our point being, we want to come to that -
18 - what I called before the stand-alone prehearing
19 conference, having some idea what each of you, each
20 party has done, so we don't need a filing, but we --
21 a formal filing, but we need to have all three
22 documents in our hands.

23 MR. MATTHEWS: Thank you for that
24 clarification, Judge.

25 CHAIR FARRAR: Mr. Klukan, you will do

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1 that with your mini-SER and Ms. Curran, you would do
2 that with whatever analysis you prepare?

3 MS. CURRAN: Yes.

4 CHAIR FARRAR: I think we're fine. Any
5 other questions?

6 Well, thank you. We promised you this
7 would take no more than an hour and we're an hour and
8 a half, so thank you all and we will get an order out
9 in -- as quickly as we can. Hold on one second.

10 You all can -- why don't you all stay. We
11 will ring off and James, if you all would stay on and
12 give James a chance to ask you any questions he has
13 about spellings or anything, then you can ring off.

14 Thank you. The Board is now leaving.

15 (Whereupon, at 3:07 p.m., the prehearing
16 conference was concluded.)

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in the matter of: Shaw AREVA MOX Services, LLC

Name of Proceeding: Pre-hearing Conference

Docket Number: (n/a)

Location: Teleconference

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