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Title: Areva Enrichment Services
Eagle Rock Enrichment Facility
Pre-Hearing Conference

Docket Number: 70-7015-ML
ASLBP Number: 10-899-02-ML-BD01

Location: (telephone conference)

Date: Tuesday, May 4, 2010

Work Order No.: NRC-228

Pages 1-89

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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PRE-HEARING CONFERENCE

IN THE MATTER OF:

AREVA ENRICHMENT

Docket No.

SERVICES, LLC

70-7015-ML

(License for Eagle Rock
Enrichment Facility)

ASLBP No.

10-899-02-ML-BD01

Tuesday, May 4, 2010

TELEPHONE CONFERENCE

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

BEFORE:

ALEX S. KARLIN, Administrative Judge

KAYE D. LATHROP, Administrative Judge

CRAIG M. WHITE, Administrative Judge

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APPEARANCES:

On Behalf of ASLBP:

MARI LEMONCELLI, ESQ.

KATHY SCOTT, ESQ.

CARRIE SAFFORD, ESQ.

MARCIA SIMON, ESQ.

Office of the General Counsel

Mail Stop - O-15 D21

U.S. Nuclear Regulatory Commission

Washington, D.C. 20555-001

On Behalf of Areva Enrichment Services, LLC:

JIM CURTIS, ESQ.

TYSON SMITH, ESQ.

Of: Winston & Strawn, LLP

1700 K Street, N.W.

Washington, D.C. 20006

202-282-5000

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

2:00 p.m.

JUDGE KARLIN: Good afternoon. My name is Alex Karlin. I'm one of the Judges on this conference call. We are now on the record, and for the record, I will reflect that this is the -- in the matter of Areva Enrichment Services, LLC, application for a license for the Eagle Rock Enrichment Facility.

The Docket No. is 70-7015-ML. The ASLBP No. is 10-899-02-ML-BD01.

This is an uncontested mandatory hearing, being held -- that will be held, pursuant to Atomic Energy Act, Section 193, and this conference call, pre-hearing conference call is being held, pursuant to an order that this Board issued on April 12, 2010. Today's date is May 4, 2010.

This call is being conducted telephonically. We had originally scheduled there to be telephone lines for speaking roles, that is, the representatives of the parties, and for a non-speaking telephone lines for any members of the public or media that might be interested in listening in.

This is our normal procedure. As I understand it, no one is using the public line. The one line was being used early by our secretary, just

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1 to double-check, to see if things were working
2 correctly.

3 So, with that, I'd like to have the
4 introductions. Here in the Rockville Offices of the
5 ASLBP, I'm sitting here in our conference room with
6 Megan Wright, our lawyer, and the Law Clerk to this
7 Board.

8 I believe that Dr. Kaye Lathrop is on the
9 telephone line, calling in from Colorado, right, Dr.
10 Lathrop?

11 JUDGE LATHROP: That is correct.

12 JUDGE KARLIN: Very good, and Dr. Craig
13 White, the other member of the Board, is calling in,
14 as well as. Dr. White?

15 JUDGE WHITE: Yes, I'm here.

16 JUDGE KARLIN: Great, okay. So, the Board
17 is here. Now, I would perhaps, ask the parties to
18 identify themselves.

19 Could the lead attorney for Areva, please
20 identify himself or herself, and identify the other
21 members of your firm and/or clients who are on the
22 line, please?

23 MR. CURTIS: Yes, Judge Karlin, this is Jim
24 Curtis, C-U-R-T-I-S, Counsel to Areva.

25 JUDGE KARLIN: Welcome.

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MR. CURTIS: Thank you, and I'm here with Tyson Smith, who is an attorney with Winston and Strawn.

As well, we have Sam Shakir, who is the President and CEO of AES, George Harper, who is the Vice President of Engineering and Licensing, and Jim Kay, who is the Licensing Manager for the Eagle Rock Facility.

JUDGE KARLIN: Okay, thank you, Mr. Curtis. Welcome to you and your client, organization.

MR. CURTIS: Thank you.

JUDGE KARLIN: For the staff, could you introduce yourselves and who is on the line, please?

MS. LEMONCELLI: Good afternoon, Your Honor. This is Mauri Lemoncelli, calling in for the NRC staff. I'm here with my colleagues, and I'll ask them to go around the room and please, introduce yourselves and your title.

JUDGE KARLIN: Okay.

MS. SCOTT: Hi, I'm Kathy Scott, Assistant General Counsel.

MS. SAFFORD: Carrie Safford, in the Office of General Counsel.

MS. SIMON: Marcia Simon, Office of General Counsel.

1 MR. LAMONT: Steven Lamont, Senior Project
2 Manager.

3 MS. RILEY: Breeda Riley, Senior Project
4 Manager for Licensing.

5 MR. FELSHER: Harry Felsher, SFME/DWMEP.

6 MS. LEMONCELLI: That's all for the NRC
7 staff, Your Honor.

8 JUDGE KARLIN: Okay, thank you, Ms.
9 Lemoncelli. Is that how you pronounce it, Lemoncelli?

10 MS. LEMONCELLI: Lemoncelli, Your Honor.

11 JUDGE KARLIN: Lemoncelli, okay, I'm sorry.

12 MS. LEMONCELLI: Thank you.

13 JUDGE KARLIN: You're welcome. Okay, is
14 there anyone else on the line? I didn't think so.
15 Okay, great, thank you for that.

16 As I think is reflected in our April 12th
17 order, setting up this call, the purpose of this call
18 is to help the Board set up a fair, efficient and
19 expeditious schedule, we hope, for conducting this
20 mandatory hearing process for the application.

21 As everyone on the line knows, the
22 Commission issued an order in July 30, 2009,
23 indicating the mandatory hearing would be held and
24 providing for the opportunity for anyone who wanted
25 to, to file contentions or challenges, by September.

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28, 2009.

No one did that and so, this is an uncontested, as it were, hearing, as was prescribed by that order. Particularly Section V of that order, V.d, lays out some of the things we have to do and the schedule we need to proceed on, based upon, you know, the uncontested proceedings.

This Board has directed -- I'm sorry, the Commission has directed us towards the goal of issuing our initial decision in 28 1/2 months, from September -- I'm sorry, July 30, 2009, and we are going to make every effort to meet that goal.

That's 100 -- 855 days, I think they calculated out, and the Commission has instructed us to use the tools available, specifically 10 CFR 2.332 and 333 and 334, and other regulatory and other tools, to try to manage this thing efficiently.

I think this should work reasonably well. We have -- it was not a contested proceeding and so, presumably, it will be an opportunity to work on this thing efficiently.

From an agenda today, here is what the Board and the other Judges and I have sort of, thought through.

First item is -- and this is an overview

1 of the agenda, we'll review the staff's good faith
2 estimate, just double-check what's been reported
3 there.

4 The second item on the agenda will be to
5 go through the 12 questions that we posed in our
6 initial scheduling order, and to ask your thoughts and
7 -- on those points, those 12 questions.

8 The third item on the agenda will be to
9 identify or talk about, I guess, three or four
10 additional things that I've thought of, that we've
11 thought of, subsequently. You know, one of them,
12 perhaps, is the possibility of bifurcation of the
13 hearing, another point about the hearing logistics.

14 So, those are really the three things we
15 want to cover. One is the good faith estimate, two is
16 the 12 questions and three are a couple of other
17 points.

18 Is there anything else that the parties
19 believe ought to be, or could profitably be discussed?
20 Mr. Curtis, do you all have any thoughts on that?

21 MR. CURTIS: No, Your Honor, I think that
22 covers the topics that we believe would be helpful to
23 address today.

24 JUDGE KARLIN: And Ms. Lemoncelli?

25 MS. LEMONCELLI: Nothing else from the

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1 staff, Your Honor. Thank you.

2 JUDGE KARLIN: Okay, great, and just as a
3 little background, I thought I would say that, you
4 know, we have studied the issue of mandatory hearings.
5 There's been a number of mandatory hearings that have
6 occurred in the last six years, since I've been on the
7 Board, ESP, early site permit mandatory hearings,
8 enrichment cases, of course, and I think there's been
9 a learning curve, and I've tried to study those and
10 understand what's going on.

11 I would note that the one mandatory
12 hearing that I have been involved in is the North Anna
13 Early Site Permit.

14 We issued an initial decision in that case
15 on June 29, 2007. It's 65 NRC 539, and I would
16 commend that to your study and even though it's an
17 ESP, I think some of the process that we used in the
18 approach we used, may apply, at least, I think I'm
19 going to have some of those things in a similar way,
20 and I guess the gist of it is, we take mandatory
21 hearings seriously, statutorily mandated, and we're
22 going to do our best to make it a worth while thing
23 and an efficient thing.

24 The second point is, I would commend to
25 your reading the scheduling order that I've put out,

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1 we put out, in the North Anna case on July 4, 2007 --
2 I'm sorry, January 4, 2007.

3 It's an unpublished order in the North
4 Anna case, but that was our approach there -- my
5 approach there.

6 This is a different Board, of course, and
7 a different type of proceeding and it's an enrichment
8 case, but some things, I think, remain the same.

9 It seems to me that in a typical mandatory
10 hearing, the staff has to complete its job, critical
11 and very important work on the FEIS and the FSCR, and
12 once those are done, we need to study them and read
13 them and understand them and think about them, I
14 guess, and then, probe the logic and ask questions and
15 think about, do we have any questions, and if we do,
16 then we have to figure out what's the best way to kind
17 of get them resolved.

18 One typical approach is to issue some
19 written questions first, to the parties, to the staff
20 and the Applicant, to help us answer them, and then
21 have an oral hearing. The written questions sometimes
22 allow us to boil it down to some specific topics at
23 the oral hearing. We might then ask questions during
24 the oral hearing.

25 So, that's, I think, a general scope of

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1 how things, we think, might proceed.

2 With that in mind, let's go to the first
3 agenda item, which is review of the staff's schedule,
4 the estimate.

5 You all submitted a letter to us on April
6 21st, I guess it was, and Areva also submitted
7 something on that date. Thank you for that.

8 The staff, your estimate, you indicate the
9 FSCR is going to be issued, estimated as August 2010,
10 is that still a pretty good date?

11 MS. SAFFORD: Yes, Your Honor, it is. This
12 is Carrie Safford.

13 JUDGE KARLIN: Okay, Ms. Safford, yes,
14 okay, that's quite soon, actually. So, that's
15 valuable, and then the FEIS is about six months later,
16 I see, estimated to be February of 2011?

17 MS. SAFFORD: Yes, that's correct.

18 JUDGE KARLIN: And that's still your best
19 estimate?

20 MS. SAFFORD: Yes, that's still our current
21 estimate for issuance of the FEIS.

22 JUDGE KARLIN: Okay, that's helpful. I
23 mean, I think what we'll probably do is, when we issue
24 a scheduling order, as I think we're if not required
25 to do, want to do.

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1 Certainly, scheduling orders are required
2 in the normal contested cases, and I think they're
3 appropriate here too. We will ask, among other thing,
4 for the staff to update us, you know, on a monthly
5 basis, as your best estimate, so, that if something
6 changes, we can all learn about it, or at least, the
7 Board can learn about it as quickly as possible, and
8 adjust our schedule accordingly.

9 As to Areva, Mr. Curtis, I know you've
10 expressed in your letter, a level of some confidence
11 that you don't see anything changing with the
12 application at this point, that might require
13 alteration in the schedule?

14 MR. CURTIS: Yes, Your Honor, that's
15 correct, and the filing that we submitted on April
16 21st, on that topic --

17 JUDGE KARLIN: Right.

18 MR. CURTIS: -- as we know it -- we
19 consulted with the staff as well, to confirm that
20 nothing that we have planned would have any impact on
21 the schedule that the staff has addressed in its
22 filing of April 21st.

23 JUDGE KARLIN: Good, yes, that's a good
24 move, because, you know, they might be asking requests
25 for additional information, which might entail some

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1 time or effort by everyone.

2 All right, fine. Let's turn to the next
3 item, which is review of the questions, the 12 items
4 that we listed in our order of April 12th.

5 We're obviously, focusing on the 28 ½
6 month goal. I'm not sure whether it's goal or it's a
7 requirement, but it's certainly something we're
8 shooting for, and shooting for hard.

9 Our first question, however, raises some
10 issue, which is, in the order, I'll call it CLI, in
11 the CLI, by the Commission, they set out some
12 milestones on page 38056 of the Federal Register.

13 There is this chart that begins there and
14 as I see it, it says, "If this is a contested
15 proceeding, the Licensing Board should adopt the
16 following milestones."

17 Could you give us your thoughts on whether
18 -- do those milestones apply in this non-contested
19 case? Mr. Curtis, your thoughts?

20 MR. CURTIS: Well, I'll offer a couple of
21 thoughts on that, Your Honor, and certainly, on many
22 of these issues, we would look to the staff for its
23 opinion, as well.

24 But since you have asked, I think it is
25 our view that in the order of July 30th, that there is

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1 much in there that provides guidance on the conduct of
2 the mandatory hearing. We agree with you, that it's
3 an important part of the process.

4 Perhaps not uniquely, but notably, as you
5 indicated, this is an uncontested hearing that we have
6 here, unlike the recently LES case, where I also
7 served as Counsel, and so, in that respect, the
8 process that we're talking about here today, the
9 mandatory hearing process, will be the critical path
10 to issuance of the license. I'll defer to others
11 here, as well as the NRC, to talk about that aspect.

12 I think it is our view, Your Honor, that
13 this order of July 30th, which really was an out-
14 growth of an order that was issued in the LES case,
15 that had similar milestones, really does contemplate
16 that we would have a contested hearing and in deed,
17 the milestones here, I think, as you have referred to
18 them, really do specify the schedule that should have
19 been -- the 28 ½ month schedule, in the event that we
20 have a contested hearing.

21 JUDGE KARLIN: Okay.

22 MR. CURTIS: I will offer the view that as
23 the Board considers its schedule, that the Commission,
24 actually, prior to this order, but subsequent to the
25 LES order, in CLI06-20, express the view and the

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1 expectation, as they called it, that in uncontested
2 cases, it is their expectation that the Board issue
3 its decision within four, and at the most, six months
4 of the staff's SER and FEIS. They go on to say that
5 in most cases, we expect that time would be
6 significantly shorter.

7 So, I think our view here is twofold.
8 Number one, the 28 ½ month schedule here, in the
9 order, should not be viewed as the time frame for
10 reaching the decision on a case that only involves the
11 uncontested issues that we have here, and two, that
12 the guidance that the Commission has provided,
13 explicitly on uncontested cases like this in CLI06-20,
14 should be the operative schedule guidance.

15 JUDGE KARLIN: All right, yes, that's
16 helpful. Ms. Lemoncelli, any -- you're the staff's
17 position on question number one.

18 MS. SAFFORD: Your Honor, Carrie Safford,
19 I was going to handle question one, and I just want to
20 reiterate what was said, just a few moments ago, that
21 yes, it appears that the schedule that's set forth in
22 the notice and order, does primarily contain
23 milestones that would be applicable to a contested
24 hearing, and as we've all recognized, we don't have a
25 contested hearing.

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1 I would just want to point out that we
2 view the 28 ½ month schedule as a guide, and a time
3 frame within which the mandatory hearing should take
4 place and we don't necessarily see it as having to go
5 that long, if it doesn't have to. But again, it's
6 sort of the outer limit of the time frame for
7 conducting the mandatory hearing.

8 And with respect to the Commission's
9 guidance in CLI06-20, it's staff's position that it is
10 Commission guidance and it should be taken on a case-
11 by-case basis.

12 As Mr. Curtis pointed out, the four to six
13 month objective of wrapping up a hearing and getting
14 a Board issued decision out, after issuance of the
15 final SER and final EIS, to the extent that's
16 feasible, we don't -- certainly don't object to that,
17 but we don't think that the Board should feel
18 constrained by that. It will be within the Board's
19 discretion, how quickly they can -- you know, the
20 issue -- the decision can be issued.

21 JUDGE KARLIN: Okay, thank you. Let's turn
22 to the second question then, and I believe this kind
23 of relates to -- obviously, this relates to the same
24 issue.

25 In reading the schedule for the contested

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1 proceeding and the 28 ½ month goal, it is clear to us,
2 that that goal is founded upon the proposition that
3 the FEIS and the SER will be issued 248 days -- 245
4 days before the Board issues its final -- its initial
5 decision. This is what we're trying to express.

6 Do you agree, and I'll ask this of the
7 staff first, that by implication, the Commission order
8 anticipates that the staff will issue the final SER
9 and EIS no later than March 2011?

10 MS. SAFFORD: Yes, this is Carrie Safford.
11 Yes, that's correct, we agree.

12 JUDGE KARLIN: And Mr. Curtis, do you agree
13 that that is the interpolated -- you know, the basis
14 upon which the Commission order was issued?

15 MR. CURTIS: With the caveat, Your Honor,
16 that I think it is our view that the schedule in that
17 order, as the staff and, I think, we concur, really
18 contemplated a contested hearing.

19 So, I think the question that you've
20 raised is, is that a reasonable interpellation about
21 the point, beyond which the staff documents, if they
22 came out, would cause a delay in that schedule?

23 I think our view is, and you may have
24 alluded to this in an earlier comment that you made,
25 that with the SER coming out in August of this year,

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1 and with the FEIS coming out seven months later, we
2 think consistent with the footnote three in the July
3 30th order, that the Commission has, in that
4 circumstance, expressed an expectation or a desire
5 that where there is a substantial time frame or a
6 delay between the two documents, that it would make
7 sense to proceed with the earliest of the documents
8 coming out.

9 We think, and perhaps, this is the point
10 to offer this topic for discussion, we think, and in
11 consultation with the staff, believe that with the SER
12 coming out in August of this year, just around the
13 corner, if you will, and the FEIS not coming out for
14 seven months after that, we believe that the SER, as
15 a free-standing document, could be the subject of the
16 Board review, upon your receipt of it in August, and
17 to begin and conclude the process of evaluating the
18 sufficiency of the staff's review, in its SER, and
19 actually, reach a partial, initial decision on those
20 SER issues, let's say, by the end of the year.

21 I think that time frame would be
22 consistent --

23 JUDGE KARLIN: Mr. Curtis, I think you're
24 raising some very good points, and we will -- the
25 bifurcation issue, which I alluded to, I think you're

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1 getting right on point there.

2 Can we just hold off on that a little bit?
3 I think these are good ideas, but I'd like to focus on
4 number two, question number two, for the moment, okay?

5 MR. CURTIS: Yes.

6 JUDGE KARLIN: Okay. So, I think we're
7 thinking along some similar lines. We are aware of
8 the four to six months, you know, guidance that the
9 Commission has issued to Boards in other enrichment
10 cases for issuing their initial decision, and I think
11 that's valuable and useful, you know, time frame to
12 think about.

13 We're going to do -- this Board is going
14 to do whatever it can, to manage and expedite this
15 process and do its work, as you all are doing your
16 work now, to try to get this -- our decision done, as
17 fairly, efficiently and as promptly as possible.

18 We can beat the 28 ½ month deadline, we
19 certainly will, and we'll try to do that.

20 What this question number two focuses on,
21 however, is another situation, I think, which is -- I
22 think we're agreed that the Commission order in
23 Section V.d4, the schedule that was laid out there for
24 a contested proceeding, assumes that the FSCR and FEIS
25 will be issued in March 2011. I think that's what I

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1 heard you all say.

2 Now, that's great, and it sounds like the
3 staff is going to beat those dates, some. That's
4 great.

5 Our next question is, what if the staff
6 doesn't? What if the staff isn't able to -- there's
7 delay? None of these things I've seen involve delays.
8 Not so much in enrichment cases, because I know the
9 staff works very hard in those, but if there is a
10 delay of let's say, six months, and instead of March
11 2011, it's September or November -- October 2011?

12 Would anyone in this room suggest that we
13 still are going to be able to meet the 28 ½ month
14 deadline for issuing the initial decision? Mr.
15 Curtis, what do we do if there's a six month delay by
16 the staff?

17 MR. CURTIS: Your Honor, I think it's
18 important that the Board have the opportunity to
19 conduct the review with the time necessary to do that,
20 and I think if the delay in the issuance of the staff
21 documents, which based upon our interactions with
22 them, we do not believe will come to pass, but I think
23 if it delays it to the point where you are right up
24 against the deadline, assuming that the 28 ½ month is
25 the outer time frame, we wouldn't argue that that

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1 delay, particularly if it's substantial, ought to
2 truncate that's available for the Board.

3 If it leaves you with two days to conduct
4 your review, we're not going to suggest that your
5 review ought to be conducted in two days. We think it
6 warrants a robust review by you.

7 But I will say that everything that we're
8 doing on our end, and we think with the good support
9 of the staff and the hard work that the staff is
10 doing, will result in the issuance of those documents
11 on the schedule that they set forth in their filing.

12 If they are substantially delayed,
13 obviously, you would need to reflect upon the time
14 that you would need to conduct your end of the
15 process, in view of that delay.

16 JUDGE KARLIN: Right, okay, thank you.
17 Staff, please?

18 MS. SAFFORD: It's Carrie Safford again,
19 Your Honor. I'm not certain that our staff really has
20 too much more to add to that.

21 Obviously, you mentioned earlier, that
22 when the scheduling order comes out, it will probably
23 contain a provision for staff providing the Board with
24 monthly updates.

25 So, to the extent an issue would arrive,

1 and this point, we're not anticipating it, but should
2 it arrive, that would certainly be the first
3 notification that we would provide and in response to
4 your question, for example, should the final EIS be
5 delayed six months, arguably, that could be down to
6 like, September 2011.

7 Again, and repeating what Mr. Curtis was
8 stating, we certainly wouldn't advocate that the Board
9 take any less time than was necessary, in order to
10 accept their review.

11 JUDGE KARLIN: So, you would agree that a
12 six month delay in the staff's issuance of the SER EIS
13 would justify some delay in the Board's 28 ½ month
14 deadline for issuing its initial decision?

15 MS. SAFFORD: Yes, I agree, I could
16 possibly --

17 JUDGE KARLIN: All right, okay. Well, I
18 just think that's good to be one the same wavelength.
19 I might refer you to page 38056, Section V.d1, where
20 it talks about the -- directs the Board to set a
21 schedule with the goal of the issuance two-and-a-half
22 years, 30 months and then it goes onto say,
23 "Accordingly, the Licensing Board should issue its
24 decision on either the contested or mandatory hearing,
25 or both, held in this matter, not later than 28 ½

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1 months, 855 days from the date of this order."

2 So, it seems the Commission was
3 contemplating the 28 ½ months, whether it's contested
4 or not. But again, if we can beat that date, we will.
5 If we, for other reasons beyond our control, such as
6 the staff's -- some delay there, we might not be able
7 to. That's the gist of question number two.

8 Question number three, this gets us to
9 Attachment A. Mr. Curtis, what we did in Attachment
10 A was attempt to summarize, from page 38054 of the
11 Commission's order, the questions that we must answer,
12 the determinations we must -- we believe they're
13 instructing us to make.

14 Do you believe that's an accurate synopsis
15 of the determinations that we are obliged to make in
16 this mandatory hearing?

17 MR. CURTIS: Yes, I do, Your Honor. You've
18 done an excellent job of capturing what I think the
19 key determinations would be, and we don't have any
20 suggested deletions or additions.

21 So, we concur in the issues addressed in
22 Attachment A.

23 JUDGE KARLIN: Okay, great. Ms. Safford,
24 do you agree with this?

25 MS. SAFFORD: Yes, we also agree, Your

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1 Honor.

2 JUDGE KARLIN: Okay, great, that's then how
3 we'll try to approach it. I mean, it may mean, we see
4 something that needs adjustment, if so, we will let
5 everyone know and we'll talk about it, but that was
6 our best shot, at this point, and I think it's almost
7 verbatim from the order on page 38054.

8 Question number four, what does it mean
9 when the -- how do we conduct and adjudicatory hearing
10 on a mandatory context?

11 Mr. Curtis, I know you're a student of
12 these issues. What do you think?

13 MR. CURTIS: I think you have some
14 flexibility here, in how you approach this, Your
15 Honor, and it is going to be, I think, ultimately up
16 to the Board to decide what sort of review to conduct.

17 I do believe that consistent with the
18 statutory provision on this subject in the Atomic
19 Energy Act, that -- and that you have referenced here,
20 that we're required to have an on-record proceeding
21 and certainly, a Sub-Part G proceeding would conform
22 to that.

23 That's in the LES case, the procedure that
24 then Chairman Paul Bollwerk used in that case as well.

25 So, we agree that an on-the-record

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1 proceeding is required. I will say, and perhaps,
2 we'll get to this issue in a moment, that the nature
3 of the filings in a proceeding like this, again, are
4 really in the Board's discretion.

5 I believe it is consistent with the
6 requirement to conduct an on-the-record hearing for
7 the submittals by the parties on issues of interest or
8 areas of additional testimony that the Board
9 identifies, to submit the style of presentations that
10 the Board most recently, in the Vogel ESP case, used.

11 I don't know that you have an opportunity
12 to examine that, but we think that's consistent with
13 the requirement of an on-the-record hearing.

14 So, if it's the Board's desire to conduct
15 that on-the-record hearing under Sub-Part G, we would
16 concur with that.

17 JUDGE KARLIN: Right. Well, let's just
18 continue on that with Mr. Curtis for a moment, because
19 the next question deals with the Sub-Part G issue, you
20 know, as you've noted.

21 So, perhaps, they go together, but they're
22 not necessarily. Here is a point, with question
23 number four, adjudicatory hearing, the statute uses
24 that word. It does not use the word adjudicatory for
25 COL hearings that are mandatory. It doesn't use them

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1 for ESP hearings, that are mandatory.

2 For example, the Commission has got the
3 internal memo of procedures. Those are for COLs.
4 They don't have the adjudicatory requirement.

5 A lot of these slop over into what looks
6 like a "Legislative hearing". Does the adjudicatory
7 language mean that we -- there is something different
8 going on here, as opposed to other types of mandatory
9 hearings?

10 MR. CURTIS: If you're asking me, Your
11 Honor, I would say no. I think consistent with the
12 requirements of the statute, you could choose to
13 conduct this hearing under Sub-Part G or Sub-Part L,
14 and that would be consistent with the statutory
15 requirement.

16 JUDGE KARLIN: Well, but don't we have --
17 you mean -- you might suggest it's consistent with the
18 statutory requirement, but it would not be consistent
19 with the Commission's order in this case, which says
20 it's going to be a G hearing, nor would it be
21 consistent with what 10 CFR 70.23A, which says it's
22 going to be a G hearing.

23 MR. CURTIS: I think the most direct
24 guidance from the Commission on this topic is
25 contained in CLI05-17, and the reference is on pages

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1 23 and 24 of the copy that I have. Perhaps, I could
2 just take a moment to read it, if you don't have that
3 reference before you.

4 JUDGE KARLIN: Well, tell me what page it
5 is. I do have it before me.

6 MR. CURTIS: It's on page 23 of CLI05-17.

7 JUDGE KARLIN: Okay, what -- that's in what
8 NRC site, 62 NRC 5, what page?

9 MR. CURTIS: Well, I don't have that copy
10 with me, Your Honor.

11 JUDGE KARLIN: Okay, go ahead and read it,
12 and I'll probably know what you're talking about.

13 MR. CURTIS: It's in Section C, and if you
14 look at Section D, it is the last paragraph before
15 Section D (Delta) begins.

16 JUDGE KARLIN: Okay, D, Scope of review for
17 three baseline NEPA issues?

18 MR. CURTIS: Yes, and if you look just
19 before that, in the paragraph that begins, "As for the
20 actual procedure."

21 JUDGE KARLIN: Yes.

22 MR. CURTIS: I think that -- so, I won't
23 read it, since you have that reference. But I think
24 that is the most direct statement by the Commission,
25 in the five cases that went up to the Commission from

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1 the Board, seeking guidance on various issues, as to
2 the procedures to be employed and in this discussion,
3 you will note that they reference both 189(a), which
4 is the statutory basis for the mandatory hearings for
5 ESPs and COLs, as well as 193(b)1, which is the
6 statutory provision for enrichment facilities and the
7 mandatory hearing that's required there.

8 Then, it goes on to describe, I think, the
9 flexibility that you, as a Board, have in how to style
10 these procedures for, among other things, an
11 enrichment facility proceeding.

12 JUDGE KARLIN: Okay, that's helpful. For
13 the record, that is 62 NRC 5, page 42.

14 I actually have some trouble with some of
15 that language because among other things, that -- I'm
16 glad that the Commission says we have considerable
17 flexibility. Judges always love that, of course, and
18 there is sort of, a list of different approaches we
19 can use, paper hearings, paper hearings accompanied by
20 oral arguments, blah, blah, and legislative hearings,
21 period.

22 That may be a problem if you're got this
23 adjudicatory hearing language from 193 of the Atomic
24 Energy Act.

25 But we have to -- that's just something we

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1 wanted your thoughts on. I don't think we're going to
2 answer it here, certainly. Do you have anything else,
3 Mr. Curtis, or should I ask the staff's thoughts?

4 MR. CURTIS: I'd defer to the staff for
5 discussion of this.

6 JUDGE KARLIN: Okay, staff, your thoughts
7 on question number four. What do we make of the word
8 'adjudicatory hearing' in the statute?

9 MS. LEMONCELLI: Your Honor, we agree, in
10 large measure, with Mr. Curtis' comments on the nature
11 of the conduct of the hearing.

12 We would submit, it's our view that the
13 Board may be guided by the prevailing Commission
14 decision that we have on the nature, the content and
15 the scope of the Board's findings, including CLI05-17
16 and as we've referenced in the past, CLI06-20.

17 In addition, as you noted earlier, Your
18 Honor, we have, perhaps, the benefit of guidance from
19 prior Board, who have conducted similar mandatory
20 hearings, both in USAC and LES, in the private ESPs,
21 including your North Anna Board and in the recent
22 Vogel ESP proceeding.

23 JUDGE KARLIN: Right, well, let me ask
24 again, the case CLI05-17 says we could do a
25 legislative hearing. I don't see how that can be

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1 possible, if the statute says adjudicatory hearing.
2 How can you reconcile those two?

3 MS. LEMONCELLI: I'm not sure, Your Honor,
4 what the Commission necessarily had in mind, in
5 writing 05-17, but --

6 JUDGE KARLIN: Does 05-17 trump the
7 statutory language of adjudicatory proceedings?

8 MS. LEMONCELLI: Your Honor, I believe it's
9 consistent with the statutory language and I believe
10 it mentions compliance with the language.

11 JUDGE KARLIN: You're saying the
12 adjudicatory hearing is consistent with -- legislative
13 hearing is consistent with an adjudicatory hearing?

14 I mean, generally cite this case and this
15 guidance is fine, but when you get down to brass-
16 tacks, there's some things that just don't compute
17 here, and I was asking you to confront that, with
18 regard to the word 'adjudicatory hearing', and I think
19 you just sort of glossed over it.

20 How about the Sub-Part G hearing? Now,
21 Sub-Part G hearing is characterized, as I understand
22 it, by cross-examination, discovery by the parties.
23 How are we going to make that work in this context and
24 in mandatory hearing? How does that apply?

25 MS. LEMONCELLI: With staff, Your Honor?

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1 JUDGE KARLIN: Yes, and put yours -- Ms.
2 Lemoncelli?

3 MS. LEMONCELLI: Yes, Your Honor.

4 JUDGE KARLIN: Okay, how does -- how are we
5 going to do discovery and cross-examination in a
6 mandatory hearing here?

7 MS. LEMONCELLI: We agree, Your Honor, that
8 there is perhaps, some modicum of ambiguity, in the
9 sense that the Sub-Part G proceedings to lend
10 themselves more toward a contested proceeding.

11 Your Honor, I would point to -- perhaps,
12 to give us some guidance or to shed some light on the
13 subject, the Areva order itself, that the Commission
14 ordered on July 30, 2009, specifically at page 8054,
15 in which the Commission order indicated that a
16 contested proceeding would be conducted under Sub-
17 Parts B and G.

18 I think to the extent that we might get a
19 late filed contention, Sub-Part G would apply and as
20 you say, then we would engage in formal discovery,
21 depositions, etcetera, but not so, if the case would
22 be uncontested proceeding.

23 JUDGE KARLIN: Well, what do we do with 10
24 CFR 70.23A, which says, hearing required for uranium
25 enrichment facility, "The Commission will hold a

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1 hearing under 10 CFR Part 2 Sub-Parts A, C, G and I on
2 each application, for issuance of a license for
3 construction operation in uranium enrichment
4 facility." "Shall hold, will hold," under G. It
5 doesn't say 'contested'. It doesn't say
6 'uncontested'. It just says, that's the type of
7 hearing we're going to have.

8 MS. LEMONCELLI: Your Honor, this is Mauri
9 Lemoncelli again, for the staff, and we would agree,
10 but I think that we would utilize the Sub-Part G
11 proceedings, to the extent that someone requested, in
12 the form of, of course, a petition to intervene a Sub-
13 Part G contested proceeding.

14 JUDGE KARLIN: But that's not what the
15 regulation says. It doesn't say 'contested'
16 proceeding. That's not what the notice even says.

17 Okay, we're getting nowhere with that one.
18 Let's move onto Sub-Part -- so, question number six,
19 Atomic Energy Act, 42 USC 20 -- Section 20 -- 21L or
20 Atomic Energy Act 274L, you know, talks about the
21 state has the right to participate and interrogate and
22 ask questions, even if it does not file contentions or
23 take a position.

24 Mr. Curtis, what do you -- how should we
25 implement the statutory right in this case?

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1 MR. CURTIS: Well, I would say three
2 things, Your Honor. First, the opportunity of a
3 state, a local government, an Indian tribe, the
4 category of participants that you have referenced in
5 this question, if the question is, "Should they have
6 a formal right to participate as a party in the
7 proceeding," on that point, I would say that the order
8 of July 30th extended an opportunity for any
9 interested member of the public, including those that
10 are referenced in this question, to intervene in the
11 proceeding as a full party, right?

12 And provided any interested person 60
13 days, or until September 28, 2009, to file a petition
14 to intervene and to establish their standing.

15 So, that's the first point. No one has
16 sought to intervene in this case, including states,
17 local governments, Indian tribes or others.

18 That, then, in my mind, leaves the
19 question that I think you have asked in this -- in the
20 next question, which is, short of participation by a
21 state, local government or an Indian tribe, as a full
22 party, where the opportunity has been provided and
23 now, expired, then the question is, "Should they be
24 able to participate in this mandatory hearing, as
25 something short of a party, under 2.315C," and I would

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1 say, on that score, I read 2.315C, in particular, the
2 last sentence, which says, "The representative shall
3 identify those contentions on which it will
4 participate in advance of any hearing held," as very
5 clearly stating that the right of a state, local
6 government or an Indian tribe to participate under
7 2.315C, is the right to participate in a contested
8 hearing.

9 Then, I would also say that in CLI05-17,
10 the Commission said, "Intervenors are barred from
11 participating in the uncontested portion of the
12 hearing. Any other result would contravene the
13 objectives or our contention requirements."

14 Finally, I would say that under the
15 Commission's internal procedures for the conduct of
16 the mandatory hearings that the Commission may hold at
17 the Commission level, and in particular, in the
18 December 1, 2009 version of that document, which I
19 think is the most recent on page IV-3 --

20 JUDGE KARLIN: Could you read -- give me
21 that again?

22 MR. CURTIS: It is in the internal
23 Commission procedures.

24 JUDGE KARLIN: All right.

25 MR. CURTIS: The latest version I have is

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1 dated December 1, 2009, from the Secretary of the
2 Commission to various recipients.

3 JUDGE KARLIN: Right.

4 MR. CURTIS: And in the procedures -- that
5 document included procedures for a wide range of
6 things, including the normal garden variety Commission
7 meetings, as well as the procedures for the conduct of
8 the mandatory hearings.

9 JUDGE KARLIN: Right.

10 MR. CURTIS: And I think there are two
11 points that are note worthy there.

12 First, in the section on the hearing --
13 and I'm looking at VI page 12, it is clear, from the
14 Commission's articulation of the procedure to be
15 followed, that the Applicant and the staff are the
16 only participants in Commission level proceedings, and
17 I think that's worthy of consideration here.

18 I would note parenthetically, that
19 elsewhere in the document, for the conduct of normal
20 Commission meetings of the type that we're not talking
21 about here, and here, I'm looking at VI page three,
22 for your reference, the Commission identified in that
23 context, that effective parties, including states,
24 Indian tribes and local governments might be invited
25 to participate in Commission meetings.

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1 So, I think the fact that they have
2 explicitly referenced the staff and the Applicant as
3 the only parties in the mandatory hearing, and
4 elsewhere in the document, for other Commission
5 meetings, specifically referenced those parties they
6 have noted here, those points, in my mind, from 2.315C
7 to the language in CLI05-17 and the internal
8 Commission procedures on mandatory hearings all, in my
9 view, sum up to the conclusion that states, Indian
10 tribes, local governments or other interveners do not
11 have a right to participate in the mandatory hearing.

12 I would, parenthetically, just note that
13 there is an ample record here and I don't believe it's
14 been submitted yet, but from our experience in this
15 proceeding, I think the staff will concur with this,
16 the state and local governments and in fact, the
17 Federal representatives have been actively involved in
18 commenting on various issues, very supportive of the
19 facility and the fact that they have not sought to
20 intervene or sought non-party status under 2.315C, I
21 think is note worthy.

22 They've had a number of opportunities and
23 will continue to, for example, commenting on the draft
24 EIS, as just one example, to participate.

25 So, I believe that as a legal matter, that

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1 the states, Indian tribes or local governments neither
2 have an opportunity now, with the time period expired,
3 to intervene as a party, nor are they allowed to
4 participate as a non-party under 2.315C.

5 JUDGE KARLIN: Okay, that's very
6 articulate. I appreciate that input.

7 But what about the statute, you know, of
8 Atomic Energy Act, Section 274L, you know, says that
9 states have this special right to participate, not as
10 parties.

11 Certainly, you were in the LES case and
12 the LES case established the proposition that if a
13 state drops its guard and files a contention, then it
14 is immediately vitiated and not able to participate as
15 an interested governmental entity, is it?

16 MR. CURTIS: That's correct.

17 JUDGE KARLIN: So, here, they didn't file
18 any contentions. If they file a contention, they
19 can't participate as an interested state.

20 But if they don't file a contention, they
21 can't participate as a non-party?

22 MR. CURTIS: Well, that's the way I read
23 2.315C, and in particular, the last sentence of that,
24 where that section describes the non-party
25 participation of the entities that you've referenced,

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1 and explicitly says that the representative shall
2 identify those contentions on which it will
3 participate, in advance of any hearing held.

4 That, in my way of looking at this, pre-
5 supposes that there must be a contested hearing, and
6 it's consistent with the guidance that has been
7 provided elsewhere, that the parties in a mandatory
8 hearing consist of the staff and the Applicant.

9 JUDGE KARLIN: Well, okay, what if they say
10 they want to participate on the five questions that
11 are in Appendix DA? I think that's -- I'm just not
12 sure whether, in this environment, the Commission is
13 going to tell us that if there is an interested state
14 out there, who would like to participate, they -- we
15 should bar them from doing so, and that last sentence
16 in 2.315C trumps the words of the statute.

17 But we'll cross that bridge when we get to
18 it, I guess. You know, I think that state
19 participation, as a state entity, not as a party,
20 could be valuable and helpful to a Board, in
21 understanding what to focus on and what could be of
22 importance, because we have a lot of reading to do,
23 reading the EIS, reading the SER, and we are certainly
24 not omniscient.

25 We try to probe the logic and to double-

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1 check what's going on and to ask questions that we
2 think of, but it may be that the state or local
3 entities may have something that would be helpful to
4 us.

5 So, we're thinking that through and trying
6 to understand it. Maybe I could turn to the staff
7 now, and ask you to address question six and seven,
8 please.

9 MS. LEMONCELLI: Your Honor, again, this is
10 Mauri Lemoncelli for the staff, and Mr. Curtis gave a
11 very comprehensive answer to these questions, which
12 the staff agrees.

13 The Commission, in our view, has already
14 afforded a reasonable opportunity to a state or local
15 government body in its July 30, 2009 order, and
16 indicated that the state, county, municipality, such-
17 and-such, may submit a petition to the Commission as
18 a party, under 2309, or alternatively, the Commission
19 order indicated that these entities could also seek to
20 participate in the hearing as a non-party under 10 CFR
21 2.315C.

22 Although as Mr. Curtis correctly
23 indicates, 2.315C specifically contemplates an
24 admitted contention, and notes that a representative
25 should identify those contentions on which it might

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1 participate, in the event of a contested hearing.

2 So, the staff maintains that these two
3 options that the Commission has afforded, comply with
4 Section 274L of the Atomic Energy Act, that mandates
5 that a state be given a reasonable opportunity to
6 participate.

7 Furthermore, Your Honor, it's the staff's
8 view that Commission has not articulated an
9 affirmative obligation, either on the part of itself
10 or the Board, to invite or solicit state and local
11 government participation.

12 JUDGE KARLIN: Okay, what if we decided to
13 conduct a limited appearance statement session, out in
14 Idaho Falls, which seems to be normal and appropriate,
15 actually, quite valuable sometimes, in a mandatory
16 hearing context?

17 That would be an opportunity for non-
18 parties to speak their peace, whether it be for five
19 minutes or for two hours. Mr. Curtis, your thoughts
20 on that?

21 MR. CURTIS: I think ultimately, that's a
22 decision that the Board will have to reach. I would
23 note that in the July 30, 2009 order, the issue of
24 limited appearances and the opportunity for interested
25 members of the public, to use that term in a non-legal

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1 sense --

2 JUDGE KARLIN: Right.

3 MR. CURTIS: -- to request an opportunity
4 to participate in a limited appearance session, was
5 provided for and a deadline was established for that.

6 JUDGE KARLIN: Yes.

7 MR. CURTIS: I would say, just to follow up
8 on the staff's remarks, with which I completely agree,
9 in terms of the legal basis here, the -- it won't come
10 as a surprise that the state is well aware of
11 everything that's going on. They have participated in
12 the scoping meeting on the EIS. They have been very
13 supportive. They have written comments.

14 I think it's notable that with the Federal
15 Register on July 30, 2009 and the public notice that
16 exists for this discussion that we're having here,
17 that here, about 15 months after the application was
18 submitted in December 2008, we have no requests by
19 states, Indian tribes or local governments, to
20 intervene.

21 We had not request by an of those entities
22 to file limited appearances and we had no requests, so
23 far, for a state, local government or Indian tribe, to
24 participate under 2.315C.

25 Our legal view, I think, would be that

1 2.315C pre-supposes the existence of a contested
2 hearing, but this process is open and public and the
3 state, should they choose to participate, certainly,
4 in a limited appearance or so forth, have the
5 opportunity and the vehicle to make their views known.

6 The fact that they haven't, I think,
7 reflects that they have elected not to proceed in that
8 way.

9 So, I think your comment about crossing
10 this bridge, if and when we get to it, is right and I
11 think the approach that the staff has outlined and the
12 legal basis for that are -- is an analysis that we can
13 confer with completely.

14 JUDGE KARLIN: Okay. Why don't we move to
15 question number eight? I think it would probably be
16 useful.

17 The site visit question, we grapple with
18 that and we know that -- I know that a site visit is
19 often a burden to the Applicant and to the staff.
20 It's not just us showing up whenever and having a
21 tour.

22 I'm not sure whether it would be useful.
23 What do you -- I mean, for the environmental
24 perspective, it might be helpful to understand the
25 site. What is your assessment, Mr. Curtis? Would you

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1 be amenable to a site visit and do you think it would
2 be of value to us?

3 MR. CURTIS: Whether it would be of value,
4 I'll have to defer to you.

5 I think our view is that first, all you
6 will see in Idaho is a Greenfield site.

7 JUDGE KARLIN: Yes.

8 MR. CURTIS: For example, it wouldn't be
9 like the USEC facility, where there is a pre-existing
10 facility there.

11 We actually did have a site visit out in
12 the LES case, but that's because the contested hearing
13 -- the mandatory hearing was right around the corner
14 and it was easy enough to do.

15 This is a Greenfield site and I'm not sure
16 that would inform the Board generally.

17 Secondly, unlike the case that we might
18 have in a contested hearing, where an intervener might
19 raise a specific issue about, for example, proximity
20 to populations or how utilities might be brought to
21 the site, or something of that nature, here, I think
22 at this stage of the process, Your Honor, without any
23 further explication of the areas of interest, that the
24 Board might wish the pursue, I think my view is that
25 a site visit would be of limited value to you.

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1 Again, noting that is just a great deal of
2 -- Idaho is a nice place, but it's just a Greenfield
3 site and I'm not sure you would find it worth time or
4 the effort, to make that trip.

5 JUDGE KARLIN: Okay, I mean, it seems to me
6 that contrast between a contested proceeding and an
7 uncontested mandatory proceedings, I mean, has some
8 relevance here, but I think it cuts the other way, or
9 my concern is it might cut the other way and that in
10 a contested hearing, there may be a very narrow rifle-
11 shot issue that's been admitted.

12 Whereas, in this uncontested mandatory
13 hearing, the five questions that are in Attachment A
14 are quite broad, quite broad, in deed, and thus,
15 understanding the EIS is more challenging -- we have
16 to read the whole EIS and the whole SER, which we have
17 to do in a contested proceeding because there, we have
18 a very narrow issue or two or three, whatever it may
19 be.

20 So, I'm not sure whether the breadth of
21 the issues under Attachment 5 council more in favor of
22 a site visit.

23 MR. CURTIS: I would say that it's really
24 up to the judgment of the Board and you will see a
25 Greenfield site there.

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1 I would say, if the Board decides at
2 whatever point that it wants to do a site visit, in
3 the final analysis, we would certainly support that
4 administratively, in terms of getting the Board out
5 there and ensuring that they see the relevant -- not
6 relevant, location.

7 It would be our hope, I would say, Your
8 Honor, that if you decide to do a site visit, that it
9 wouldn't impact the critical path on the schedule.

10 JUDGE KARLIN: Agreed, agreed, I think that
11 could be done, if it's going to be done, without
12 hitting the critical path, at least we can certainly
13 try.

14 Staff, your thoughts, if any?

15 MS. SAFFORD: Your Honor, it's Carrie
16 Safford again. We agree with Mr. Curtis, that in our
17 opinion, that the site visits wouldn't necessarily
18 assist the Board, at this stage, it being a Greenfield
19 site, there not being any major environments
20 concerned, that were raised by parties, outside
21 parties or contested issues.

22 JUDGE KARLIN: The fact that the parties --
23 no one had the where-with-all to file some
24 contentions, doesn't mean there aren't any significant
25 environmental issues of importance.

1 We have five -- three or four major questions that
2 deal with environmental issues.

3 Let me ask a question. Has an enrichment
4 facility like this ever been built? Is there one
5 existing in the world somewhere?

6 MR. CURTIS: Yes, Your Honor, I'm advised,
7 and perhaps, I will defer to Sam Shakir, who is here
8 as the President of AES, to describe it.

9 But my understanding is that there are
10 four that have been built. But Sam, could you speak
11 to that question?

12 MS. SHAKIR: Yes, Your Honor, this is Sam
13 Shakir with Areva Enrichment Services.

14 There are three operating plants in
15 Europe. There is a fourth plant that's constructed
16 and has gone through all the testing and is ready to
17 being operation, also in Europe.

18 A fifth one is here, in the United States,
19 in New Mexico, that's been constructed and is in the
20 final stages of again, getting ready for operation.

21 So, there are essentially five built,
22 three in operation and two, very close to starting
23 operation.

24 MR. CURTIS: And I believe, Your Honor,
25 those facilities all employ the same basic design, as

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1 what we're talking about here, Sam?

2 MS. SHAKIR: It's identical technology
3 being deployed at all these plants.

4 JUDGE KARLIN: Okay, all right, that's
5 helpful. There is one in New Mexico that's in the
6 final stages and is virtually identical to technology,
7 if that became something that my colleagues would have
8 thought was important, to try to understand better.

9 Okay, that's good. Let's see here, the
10 next question number nine -- I'm sorry, we're going so
11 slowly, but I think this is helpful to me.

12 I might ask, at this point, Dr. Lathrop or
13 Dr. White, do you have anything you want to add or
14 jump in on here?

15 JUDGE LATHROP: I don't.

16 JUDGE KARLIN: Okay.

17 JUDGE WHITE: No, this has been very
18 helpful, but no, no questions here.

19 JUDGE KARLIN: Okay, question number nine,
20 it really just grapples with the classified
21 information safeguards. Let me ask the staff this
22 question first.

23 Without reviewing, obviously, any of that,
24 can you -- to what extent are we -- the nature and
25 extent of classified information, safeguard

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1 information or other privileged information that's
2 going to be involved in the application, the EIS, SER,
3 that sort of thing?

4 MS. SAFFORD: This is Carrie Safford from -
5 - representing staff, Your Honor, and we've gone
6 through and done sort of a preliminary review of all
7 the documents, the SER, the ER, draft EIS, the draft
8 SER that's currently being prepared, in addition to
9 the request for additional information and the
10 responses we've received on those RAIs, and throughout
11 all of these documents, there are security related
12 information, export controls, proprietary and
13 classified information --

14 JUDGE KARLIN: Well, let's just -- wait a
15 second, wait a second. Let's break it down by
16 category.

17 MS. SAFFORD: Okay.

18 JUDGE KARLIN: Classified information, you
19 know, how much -- how many chapters of the
20 application, how many chapters of the -- what are we
21 talking about? What's classified information?

22 MS. SAFFORD: I believe just the one
23 chapter of this safety analysis report, which would be
24 a document that was supplied by Applicant.

25 JUDGE KARLIN: Okay, that one chapter of

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1 the SAR, okay, and would you consider how similar one
2 chapter in the FSER?

3 MS. SAFFORD: I'm sorry, Your Honor, if I
4 could just correct that last statement?

5 There is three different places within the
6 SAR, where there is classified information.

7 JUDGE KARLIN: Okay, because we're going to
8 have to look at that.

9 MS. SAFFORD: Okay.

10 JUDGE KARLIN: And we're going to have to
11 figure our mechanisms. Certainly, we'll follow the
12 regs, we'll follow 10 CFR Part 2, Sub-Part I, and
13 etcetera, but just trying to get, you know, order of
14 magnitude on how much there is and whether it's
15 interspersed throughout or segregated, reasonably
16 segregated, into separate chapters.

17 MS. SAFFORD: And based on our review of
18 all of these documents, that's the only place where
19 there is classified information.

20 JUDGE KARLIN: Okay, and SGI next, where is
21 -- how much SGI are we talking about?

22 MR. CURTIS: Your Honor, maybe we can also
23 step in here. I will say that there may be an easy to
24 facilitate the Board's consideration of these issues.

25 April 30th, the Applicant submitted a

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1 revision to the application that incorporates all of
2 the RAI responses, which is customary step, and that
3 submittal is broken down in a way that might
4 facilitate your thinking about this.

5 There is -- it consists of a number of
6 disks. There is one disk that contains the export
7 control information.

8 JUDGE KARLIN: Okay.

9 MR. CURTIS: And that's a term of art, and
10 that's addressed in one disk. I'll go through this
11 and then if Jim Kay, who is in charge of this, he is
12 to correct this, I'll look to him.

13 There is a body of proprietary
14 information, business sensitive information that AES
15 has submitted, that obviously, it wishes to maintain
16 in a manner consistent with Commission's regulations
17 on proprietary information, and there are two disks
18 that contain the proprietary information.

19 JUDGE KARLIN: Okay.

20 MR. CURTIS: With respect to the classified
21 information, I should take a moment, just to describe
22 how that's been handled and if the Board wishes to
23 examine classified information, that steps that
24 perhaps, will need to be taken.

25 The application contains, I believe, two

1 topics that are classified, the fundamental nuclear
2 materials control plan, the FNMCP, and then the
3 classified version of the ISA, integrated safety
4 analysis.

5 And those classified portions of the
6 application -- let me back up a step.

7 All classified information, involving this
8 application, has been handled by the entity in Europe
9 that owns the technology, Enrichment Technology Corp,
10 or ETC, and interactions on classified information,
11 including the submission of those parts of the
12 application that contain the classified information,
13 were submitted by ETC, directly to the staff.

14 I say that because no one within AES,
15 including the people around this table, have access to
16 classified information. That was a prerequisite of
17 the processes employed, given the sensitivity of that
18 classified information.

19 So, we do not have in our possession, any
20 of that information, nor if there were any RAIs that
21 relate to that classified information, with the RAIs
22 likely being classified as well, we're not aware of
23 and wouldn't be privy to that information.

24 I would also say that the process here
25 that was followed, contemplated that information that

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1 was in the staff's files, as a result of the LES
2 review, that was classified, may have been relied here
3 too.

4 I go through that because to be precise in
5 responding to your question, there are portions of the
6 application that contain classified information. The
7 only parties that have been privy to that information
8 are on the commercial side, ETC, in the UK, and the
9 staff.

10 So, if it is the desire for the Board to
11 examine classified portions of the application, I
12 would say just parenthetically, that the Board's in
13 LES and USEC found that they didn't need to get into
14 classified information and if the Board is interested
15 in examining that information, the process will have
16 to be established, to reflect that only certain
17 parties and not AES, have access to that classified
18 information.

19 Now, I will look to Jim Kay or Sam Shakir
20 here, both to correct anything that I've said, that's
21 incorrect.

22 MS. SHAKIR: I think you're quite accurate.

23 MR. CURTIS: I'm getting a nod here, that
24 that description reflects the view, as Jim Kay
25 understands it.

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1 JUDGE KARLIN: Okay, that's helpful. I
2 mean, I know that it's complicated and very important.
3 I am a little startled to hear you say, Mr. Curtis,
4 that you are the applicant and you don't have portions
5 of your own application. Is this what I'm hearing you
6 say, as the Applicant, AES does not have portions of
7 its own application?

8 MR. CURTIS: I'll elect to Jim Kay to
9 address that, but we do not have access to the
10 classified information here.

11 MR. KAY: Your Honor, until we have the
12 pentapartite agreement, it's a treaty, established
13 between the five countries, we do not have access to
14 that classified information.

15 MS. SHAKIR: Well, I mean, this Sam Shakir.
16 Also, just to be clear, you know, this is part of a
17 non-preparation regime that's been established and
18 agreed to by the countries, that the technology is
19 protected, you know, the term 'black box' has been
20 used, to only allow those who are involved in the
21 development, manufacturing and delivery and
22 commissioning of this technology, have the need to
23 know and have access to it.

24 We, as AES, are using that technology, as
25 it's been developed, reviewed by the NRC staff, as

1 being acceptable.

2 We are basically, deploying that
3 technology in this plan and operating it for
4 commercial purposes, and that's really how it's been
5 handled before, both for -- for both companies that
6 own ETC, the company that manufactures these
7 centrifuges, and that is Areva and Urenco.

8 So, we are owners of the entity that holds
9 the technology, but we do not have the ability to peek
10 into the technology development or details.

11 We have a need to access some classified
12 information, down the road, to allow us to operate the
13 facility. That will be made available to us, once we
14 have the pentapartite agreement that Jim just referred
15 to. But really, we don't have a need to know the
16 details of how these centrifuges have been designed
17 and how they, in fact, perform their function.

18 JUDGE KARLIN: Okay.

19 MR. CURTIS: I would offer just a couple of
20 additional thoughts, perhaps, to relay your concern,
21 Your Honor.

22 The staff has access to all the
23 classified. So, from the standpoint of the
24 sufficiency of the staff's review, the focus of this
25 hearing, the staff has the information and they have

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1 the opportunity and perhaps, it wouldn't surprise me,
2 although we wouldn't know of this, has asked ETC
3 questions about the information.

4 So, as the focus is on the sufficiency of
5 the staff's review, I do believe, and I would look to
6 the staff to confirm this, that they have all the
7 access they need to review all information, including
8 the classified information.

9 The final point that I would make is, this
10 is the same process that was followed with respect to
11 LES, the facility that's being built in New Mexico.
12 ETC was the owner of the information, or its
13 predecessor entity, and followed the same process and
14 the staff, in that case as well, followed this same
15 sort of interaction that did not involve the Applicant
16 and ultimate license holder, but never the less,
17 reached conclusions that included view of and any
18 questions that they might have on the classified
19 portion of the application.

20 JUDGE KARLIN: Okay, well, we need to --
21 our question, among other things, is to, as you note,
22 in the safety issue, general issue one and general
23 issue two -- general issue one, we have a need to
24 focus on the sufficiency of the staff's review of the
25 application.

1 And so, the staff has access, is this
2 correct, Ms. Safford?

3 MS. SAFFORD: Safford, yes, that's --

4 JUDGE KARLIN: Okay, the staff has the
5 documents and if we need them, as we need them, we can
6 access them, through the staff.

7 But in order to assess whether the staff's
8 review has been sufficient, I'm not sure how we can
9 discharge that duty, if we haven't looked. Maybe the
10 other Boards have been able to avoid that. It's not
11 something we're necessarily interested in burdening
12 ourselves with. It's a lot -- it's more work and it's
13 something we take very seriously, in terms of managing
14 this in a confidential way.

15 I might add in this discussion here, are
16 the Board -- my colleagues on the Board have asked
17 that we'd like to get a copy, a DVD or CD or whatever
18 copy, of the application, and -- which will include
19 the SAR and the ER, I guess, and anything else that
20 has been submitted with the application, minus the
21 classified information, if it can be segregated in
22 separate disks, as you've been talking about, minus --
23 perhaps, separately managed, even the SGI.

24 We'd like to have the SGI, but we -- so,
25 can we get a copy of the -- a set of the DVD's or

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1 CD's, three sets, or four, Mr. Curtis?

2 MR. CURTIS: Yes, Sir, we'll provide you
3 whatever you wish, and the April 30th submittal, as I
4 indicated, is broken down in a way that I think will
5 provide helpful.

6 We have provided 20 copies to the staff
7 and I assume they're going to use theirs, but how many
8 copies would you like?

9 JUDGE KARLIN: Well, I think that would be
10 great. The April 30th -- let's say, three Judges and
11 a Law Clerk, Ms. Wright, Megan Wright. So, I think
12 four would be great. Could we get that?

13 MR. CURTIS: Yes, we'll arrange to get that
14 to you promptly.

15 JUDGE KARLIN: Thank you, and if you would,
16 in your cover letter, lay out what you're giving to us
17 in the CD's and what you're not giving to us, i.e.,
18 what is in the -- maybe on a separate CD that needs to
19 be handled more sensitively.

20 MR. CURTIS: Yes, Sir, we'll turn to that
21 promptly.

22 MR. HARPER: It would also have -- this is
23 George Harper. There would also have to be some
24 special handling requirements for the ECI information
25 and storage.

1 MR. CURTIS: The export control
2 information.

3 JUDGE KARLIN: Oh, export control,
4 certainly. Well, I'm trying to think that through.
5 What -- I'm familiar a bit, with export control
6 information, but I'm not sure what -- it's not -- does
7 it qualify as restrict data or classified information?
8 No, it's -- what privilege is it?

9 MR. CURTIS: It's not RD.

10 JUDGE KARLIN: Yes, not RD.

11 MR. CURTIS: But it is a separate
12 classification of information.

13 JUDGE KARLIN: Yes.

14 MR. CURTIS: Perhaps, what would be --
15 we'll do whatever you'd like, Your Honor, but as Mr.
16 Harper indicated, with certain of the disks involving
17 information that needs to be managed a certain way,
18 should we work with your Legal Clerk Megan, to ensure
19 that we know what you need and obviously, the number
20 of copies, we can provide, but to make sure that
21 everyone is aware of the restrictions in handling this
22 information?

23 JUDGE KARLIN: Yes, that would be good.
24 Ms. Wright will take care of that with you, and ask
25 that you submit that. It will be on the record

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1 formally, but I think we are -- we have no capability
2 to handle all classified information.

3 We all have top secret clearances on this
4 Board. So, whatever it is, we just want to make sure
5 what category it is claimed to be, you know, SGI,
6 restricted data, proprietary, and that sort of thing.

7 If it's proprietary, I mean, we get that
8 all the time. SGI, we have a separate safe and system
9 for locking that up. We lock up the proprietary as
10 well, but there's a different level for SGI and
11 there's even a higher level for classified, as you
12 know.

13 MR. HARPER: We have no SGI information in
14 the application.

15 JUDGE KARLIN: Okay, that's good to know.
16 That's helpful.

17 MR. CURTIS: And just to reiterate the
18 earlier point, if it is the Board's desire that it
19 receive classified information, that would need to be
20 a process that is worked out with the staff, as we
21 don't have access to that.

22 JUDGE KARLIN: Okay, I think we -- my point
23 and presumption is, we will need to see it, but we'll
24 look at what happened in LES and Urenco -- I'm sorry,
25 not Urenco, USEC and see if we can understand how they

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1 dodged that problem and didn't find it necessary to
2 look at that.

3 Question number 10, the Commission's
4 internal procedures, which we've already alluded to,
5 from the conduct of mandatory hearings on applications
6 for combined licenses.

7 Now, these are internal, so, they apply to
8 the Commission itself and they apply to combined
9 licenses. There may be some things in there we can
10 learn from, but your thoughts, Mr. Curtis. You've
11 already expressed some of them.

12 MR. CURTIS: Yes, I think it's certainly
13 appropriate to look to the guidance that the
14 Commission has established for mandatory hearings that
15 it might conduct.

16 I think there are probably two areas that
17 might be useful to consider here.

18 As I noted earlier, the Commission at
19 least, in its procedures, explicitly states that
20 limited appearances will not be entertained. That,
21 we've already talked about. So, I won't repeat the
22 point there.

23 I also think, consistent with our earlier
24 comments about the schedule --

25 JUDGE KARLIN: Now, Mr. Curtis, let me stop

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1 you there. I may have -- maybe I've got something
2 different.

3 I have a February 25, 2010 excerpt from
4 the internal Commission procedures, conduct of
5 mandatory hearings. It's like, three pages, page 28
6 of 53, 29 of 53 and 30 of 53. It may be in there, but
7 I'm not finding it.

8 Is that what you're referring to, the
9 conduct of mandatory hearings on applications for COLs
10 and something about saying limited appearance
11 statements will not be entertained?

12 MR. CURTIS: Unless I have the dated
13 version under Section 2 of the hearing.

14 JUDGE KARLIN: I see, number one, before
15 the hearing, number two, the hearing. Okay, I'm with
16 you. I'm with you.

17 MR. CURTIS: For the second paragraph, that
18 begins 'testimony'.

19 JUDGE KARLIN: Right, I'm with you.

20 MR. CURTIS: That, by the way, just
21 parenthetically, is the sentence that I was referring
22 to earlier, where it appears that the Commission for
23 mandatory hearings has identified the staff and the
24 Applicant as the parties.

25 But at the end of the paragraph, unless I

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1 have a dated version --

2 JUDGE KARLIN: Yes.

3 MR. CURTIS: -- the reference to limited
4 appearances --

5 JUDGE KARLIN: The end of the paragraph,
6 number two, the hearing, the first paragraph, opening
7 remarks, second paragraph, testimony.

8 MR. CURTIS: So, at the end of that first
9 paragraph, unless mine is outdated, limited
10 appearances statements.

11 JUDGE KARLIN: The last -- oh, limited
12 appearances, yes, the limited appearance statements
13 will not be entertained, okay, I see that, yes.

14 MR. CURTIS: And we talked about that
15 earlier. It's just something that I would note in
16 passing.

17 The other thing that I think is of
18 interest here, and again, these procedures were
19 established to apply at a different level and for a
20 different type of application, but you've asked the
21 question about whether there is some analogous value
22 here.

23 I would note on the schedule, they do set
24 forth a schedule here, at least for the Commission
25 perspective, that has the staff and the Applicant

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1 filing their statements with the Commission 30 days
2 before the Commission hearing, hearing the last -- no
3 more than three days, they expect, and the record to
4 close within two weeks.

5 That's a level of granularity, Your Honor,
6 that we're not suggesting here for the Board. It's
7 obviously your call, but you asked, is there anything
8 in this set of guidance that's relevant, and I just
9 note, those are the things that occurred to us.

10 JUDGE KARLIN: Okay, my impression is that
11 the Commission is contemplating -- and this drives
12 from the Merrifield Approach, which was the
13 predecessor, I suppose. This is a more elaborate and
14 I think, improved version, but whatever. It's their
15 call, for their proceedings, a more legislative-type
16 hearing, where the staff and the Applicant pre-file
17 documents.

18 The staff should file written statements
19 and the staff should form S-SECY Paper, providing a
20 summary of the application, discussing the safety
21 environmental reviews and addressing the findings and
22 issues identified.

23 It's a little bit like the fox guarding
24 the hen-house for the staff to be telling us what we
25 should be looking at in their documents, that might be

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1 wrong, or might be problematic, or where the logic is
2 troubling or difficult. Do you see my concern?

3 We're suppose to probe the logic and
4 challenge the issues and sort of think independently,
5 and it's very difficult for me to think that the staff
6 is going to provide us with a synopsis of all the
7 difficult and troubling spots in their FEIS.

8 MR. CURTIS: If I could -- and I'll defer
9 to the staff, I would refer back to CLI06-20, that I
10 think addresses this point, Your Honor, and says a
11 mandatory hearing Board must narrow its inquiry to
12 those topics or sections in staff documents that it
13 deems most important and should concentrate on
14 portions of the documents that do not, on their face,
15 adequately explain the logic, underlying facts and
16 applicable regulations and guidance.

17 JUDGE KARLIN: Right.

18 MR. CURTIS: And so, I think there is lot
19 of flexibility, of course, in how you interpret that,
20 but I think the Commission has been clear, for
21 example, that a de novo review is not contemplated in
22 mandatory hearings and secondly, that the Board, in
23 its review, should identify issues that it believes
24 are significant and that on the face of the staff
25 documents, suggest questions that the Board would

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1 pursue.

2 But I think aside from that, it's
3 appropriate for the Board, if it sees on the face of
4 the documents, no reason for additional inquiry or
5 pursuit, to rely on the staff's conclusions, in part,
6 because they have gone through a rigorous process of
7 external review, other agencies, public comment, that
8 sort of thing, and I think that is appropriate for the
9 Board to rely on the staff analysis and the documents,
10 except where you see, on the surface, significant
11 issues that may be -- may reflect inconsistencies or
12 questions you have about the depth of the review.

13 JUDGE KARLIN: All right, let me ask this,
14 Mr. Curtis, I know you're a student of this.

15 If you could go to the Federal Register
16 Notice, page 38054.

17 MR. CURTIS: Hold on, just a minute, I have
18 it here, yes.

19 JUDGE KARLIN: Okay, I'm looking at our
20 assignment, the Notice of Hearing II, Sub-Section C,
21 D, E and F, okay?

22 MR. CURTIS: Yes, Sir.

23 JUDGE KARLIN: Those are the basis for the
24 Appendix A, as you would know.

25 MR. CURTIS: Yes.

1 JUDGE KARLIN: Roman Numeral IID, says, "If
2 this proceeding is not a contested proceeding, as
3 defined in blah, blah, the Board will determine the
4 following, without conducting a de novo evaluation of
5 the application, one and two," follow me?

6 MR. CURTIS: Yes, Sir.

7 JUDGE KARLIN: Go down to F.

8 MR. CURTIS: Yes, Sir.

9 JUDGE KARLIN: F, in the center of the page
10 says, "If the proceeding becomes a contested
11 proceeding, the Board shall make findings of fact,"
12 blah, blah, blah, and but not covered in this --
13 "Without conducting a de novo of the -- make the
14 determination set forth in paragraph D, without
15 conducting a de novo evaluation."

16 So, D itself says, "Without conducting a
17 de novo evaluation," right?

18 MR. CURTIS: Yes, Sir.

19 JUDGE KARLIN: And F says, when you're
20 doing D, you don't conduct a de novo evaluation,
21 right?

22 MR. CURTIS: Yes, Sir.

23 JUDGE KARLIN: B has three findings we have
24 to make, and the words 'without conducting a de novo
25 evaluation' do not appear. Is there a difference as -

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1 - in -- I'm not suggesting that the findings in E are
2 with a de novo evaluation, but I am suggesting, as was
3 suggested in the North Anna decision that I cited you
4 to earlier, that there is a difference, with regard to
5 the type of review that's required under the NEPA,
6 three baseline findings in NEPA, and the others, which
7 explicitly say twice, which will not be de novo, what
8 is that difference?

9 MR. CURTIS: Well, I would turn to CLI05-
10 17, on that topic and I may not have the same page
11 number again, so, I apologize, Your Honor.

12 But I'm looking at the section -- if I
13 could bore you, that talks about this exact issue. It
14 is under Section C, Charlie, scope of Board review, de
15 novo or sufficiency.

16 JUDGE KARLIN: Yes.

17 MR. CURTIS: And I flipped over to what I
18 have on page 19. There is a paragraph that begins,
19 "It is true that our hearing notices, in the present
20 cases."

21 JUDGE KARLIN: Yes, well, I'm sorry, you're
22 in C?

23 MR. CURTIS: Yes, Sir, and several
24 paragraphs into that, about -- it's about two pages,
25 in what I have.

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1 JUDGE KARLIN: Okay.

2 MR. CURTIS: Paragraph, "It is true that
3 our hearing notices in the present cases."

4 JUDGE KARLIN: Right.

5 MR. CURTIS: At the end of that paragraph,
6 I think the Commission has spoken to that issue, where
7 they say, "Today, we decide as a general matter, that
8 de novo review of uncontested issues is prohibited,
9 whether the issues arise under the AEA or NEPA."

10 JUDGE KARLIN: Yes.

11 MR. CURTIS: And I think that, if I
12 understand your question, Your Honor, addresses that
13 issue.

14 I certainly appreciate that the Board has
15 explicit findings that it must make under the July
16 30th order, and that you've referenced here as well.

17 Because of the lack of clarity in the five
18 cases that led to this decision, as you know, I think
19 the Commission, in this language that I just referred
20 to, addresses the question by saying that de novo
21 review is not contemplated in either the AEA or the
22 NEPA issues.

23 I won't read this whole decision, but it
24 goes on and says, in the next paragraph, the add a
25 caveat.

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1 So, I would simply advert to that decision
2 as the relevant guidance on the extent to which the
3 NEPA review and the Atomic Energy Act review might
4 differ in some respects, but in either case, I think
5 the Commission has clearly said that it -- a de novo
6 review is not contemplated.

7 JUDGE KARLIN: I think that's right. I
8 think, however, you would find that the -- some of the
9 issues are a sufficiency review, i.e., sufficiency of
10 the staff's determination regarding safety and NEPA,
11 whereas the issues in E are not sufficiency reviews,
12 but they are an independent determination of --
13 independently consider the final balance,
14 independently determine whether the permit should be
15 issued at all, and that's under Calvert Cliffs, of
16 course, and the -- I'm sorry, not Calvert -- yes,
17 Calvert Cliffs and other decisions.

18 So, in any event, I think there is a
19 difference and you might look at LBP-07-90-65 NRC 539,
20 which is the Dominion Nuclear North Anna case on pages
21 558 and 559, for some of the distinct or nuance
22 between those safety issues, which are Appellant
23 review versus NEAP issues, which are not de novo, but
24 are independently determinations, not simply deciding
25 whether what the staff did was right, but deciding the

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1 issue for ourselves.

2 MR. CURTIS: I will review that, Your
3 Honor. I would say that in this decision, the CLI05-
4 17, there is a discussion of the Calvert Cliffs case
5 and what that means, in the context of mandatory
6 hearing. I have it just before paragraph E, later in
7 the document --

8 JUDGE KARLIN: Right, that's in Section D
9 of that case. Okay, staff, your thoughts on the
10 Commission internal procedures on mandatory hearings
11 for COLs.

12 MS. LEMONCELLI: Your Honor, as Mr. Curtis
13 indicated, we do think that the Commission has
14 provided a useful guidance, although we recognize that
15 it is in the context of COL.

16 We do believe that some of the
17 Commission's guidance certainly would be applicable to
18 our process situation and mandatory hearing.

19 We've certainly contemplated -- I'll just
20 sort of step through the Commission's guidance here.
21 We've certainly contemplated submitting documents,
22 pre-filed documents, including the final safety
23 evaluation report and the final EIS, to the Board for
24 its review.

25 We would -- it's our view that it would be

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1 helpful, perhaps for the staff, to identify in advance
2 of the hearing, written questions for the staff and
3 the Applicant, and then, hold an oral hearing in the
4 form of presentations from the staff and Applicant.

5 Your Honor, I think you alluded to this
6 earlier and perhaps, Mr. Curtis did as well, we echo
7 that it is our view as well, that we would suggest
8 that the Board, before the oral hearing, identify any
9 topics where there still might be some outstanding
10 issues or ambiguity and inform the staff and Applicant
11 to prepare some information for the Board on those
12 specific topics and also, so that we may have the
13 appropriate experts on hand, to answer any of the
14 Board's questions, and then, we would assume that the
15 Board would prepare and initial written decision.

16 With one caveat, Your Honor, and I suppose
17 I'll defer, if you would like to get into this topic.

18 I believe that the Commission anticipates
19 holding its hearing after issuance of both major staff
20 documents, meaning the final SER, the final EIS.

21 You know, we certainly would entertain the
22 Board's questions, on bifurcation of the proceeding.

23 JUDGE KARLIN: Okay, let me -- before you -
24 - we'll get into bifurcation in a moment.

25 MS. LEMONCELLI: Yes, Your Honor.

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1 JUDGE KARLIN: But that's helpful. Let me
2 just give you mine -- this is not for the rest of the
3 Board, but I'm not sure that a -- you know, a passive
4 approach, where we sort of sit back and let the staff
5 and the Applicant put on a dog and pony show is going
6 to cut it. That's not my contemplation.

7 Essentially, I think what we did in North
8 Anna was, we identified topics where we have concerns
9 and we asked and required that witnesses are ready to
10 address those topics, attend, and then we ask them
11 questions, and didn't really spend a lot of time with
12 dog and pony show presentations on whatever topics the
13 staff or the Applicant thought we should hear about.

14 So, I think we'll be a little more
15 activist than some of the Boards you might have seen
16 in the past, on that, focusing on what we think is
17 important, what we think is relevant or important and
18 asking you to be ready to address those.

19 Okay, maybe we ought to -- I have question
20 number 11, any other suggestions for promoting fair,
21 efficient, expeditious management? You know, Mr.
22 Curtis, your thoughts?

23 I mean, we're trying to run this thing and
24 run it efficiently and fairly and expeditiously.
25 You've thought a lot about this. You know, do you

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1 have any other ideas or approaches we might use?

2 MR. CURTIS: I have two, Your Honor, just
3 to offer for your consideration.

4 JUDGE KARLIN: Okay.

5 MR. CURTIS: As the staff has indicated in
6 its April 21st filing, the relevant final documents
7 will be out, respectively, the SER in August and the
8 FEIS in February 2011.

9 They also note that the draft and relevant
10 impact statement will be out in July of this year, and
11 I think we are not proposing that the Board ought to
12 move forward in the same bifurcated way that we can
13 discuss about the SER, but the Board will have the
14 draft EIS, about seven months before the final, and I
15 think it would be helpful for the Board, if it were to
16 review the draft and be familiar with the issues in
17 the draft EIS.

18 They are largely issues that the Applicant
19 has addressed in the ER, and you will get the
20 application that includes the ER. So, you will have
21 a substantial amount of information on environmental
22 issues in advance of the FEIS coming out.

23 It would be our interest, focusing in on
24 the comment here, about how we might do this
25 efficiently and expeditiously, that because that's the

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1 first document you will likely get, the draft EIS,
2 that it would be, I think, helpful for the Board to
3 familiarize itself with those issues.

4 We're not proposing that formal questions
5 be propounded, based upon the draft. But if the Board
6 has any reaction or issues or areas that you
7 ultimately might pursue, that might be helpful for at
8 least the Applicant to know, so that when we get to
9 the FEIS stage in February 2011, that we can hit the
10 ground running.

11 JUDGE KARLIN: Okay.

12 MR. CURTIS: The second thought that I had
13 here is that, as we have alluded to earlier, this
14 Eagle Rock design is very similar to other plants that
15 have been built or are in the process of being built,
16 and in particular, my thought here really focuses on
17 the LES proceeding, and as you know, the A Board in
18 that proceeding, conducted a thorough mandatory
19 hearing review of the LES application.

20 I think it might be helpful for the Board
21 to be familiar with the issues that were addressed in
22 that roughly 100 page decision, not because I believe
23 that decision is legally binding on this Board. I do
24 not believe that's the case, but I do think it would
25 help inform the Board's evaluation of what issues are

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1 significant.

2 You may find, and in fact, as I've thought
3 about this, I think you will find, that there are
4 issues in the Eagle Rock application that are
5 identical to issues that were thoroughly evaluated by
6 the Board in the LES application.

7 And you're certainly within your right,
8 Your Honor, legally, to disregard that earlier
9 decision, but I think it might be helpful for you to
10 review that, as you have the time to do that, if you
11 do, so that you can identify issues that might rise up
12 and be significant here, and hopefully, minimize
13 repetitious review of issues that are identical to the
14 issues that were addressed before and simply ask the
15 staff if they've conducted a similar review.

16 So, those are my two thoughts on how --
17 aside from bifurcation, which I assume we'll get to,
18 in response to your question number 11.

19 JUDGE KARLIN: Okay, that's helpful. I
20 think both of those are helpful. Rest assured, that
21 I will, and I think my colleagues will read the LES
22 decision and probably, the other decisions that the
23 Board -- the Commission cites in the notice.

24 I'm not sure how much that will -- how we
25 are to know that they are identical and how we are to

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1 confirm that the issues are the same, but we'll
2 certainly read those.

3 Staff, your thoughts, please. Ms.
4 Lemoncelli? Staff?

5 MS. LEMONCELLI: Yes, Your Honor?

6 JUDGE KARLIN: Your thoughts on question
7 number 11, suggestions about how we can best manage
8 and handle this case?

9 MS. SIMON: Your Honor, this is Marcia
10 Simon, for the staff. We'd just like to make --
11 briefly, with respect to Mr. Curtis' first objection,
12 regarding the draft EIS, that will be out in July and
13 certainly, the Board will have the ability to look at
14 it, if you have the time and inclination.

15 JUDGE KARLIN: Oh, we definitely would like
16 to have a copy of that. I actually would -- I'm an
17 old fashion guy. I like to have a hard copy of it,
18 bound -- you know, the nice little bound one that you
19 come up with, with the appendix as well, and I'm sure
20 an electronic DVD version, as well, please, for all of
21 us. You know, four sets, if we could have that.

22 MS. SIMON: Yes, Your Honor, we'll work Ms.
23 Wright to get that to you.

24 JUDGE KARLIN: Okay.

25 MS. SIMON: And the only other suggestion,

1 in the interest of efficiency and expeditiousness, we
2 would ask that as you're contemplating the scheduling
3 -- and maybe this will come up in the logistics
4 discussion to follow, but we would ask that the Board
5 consider holding the hearing here, in Rockville, given
6 that all the parties are local.

7 JUDGE KARLIN: Okay, we'll consider that.
8 I mean, the Commission policy is to hold the hearings
9 in the vicinity of the proposed facility.

10 I feel that that's an important policy.
11 It's a good policy for public openness and
12 transparency. Just because all the lawyers and the
13 Judges happen to be sitting in D.C., never bothered me
14 a wit. I think the -- we're not doing this for
15 ourselves. We're doing it for the public.

16 So, even if we were to web-cast our
17 activities, I think it needs to be out there, in the
18 community that's being affected. The fact that no one
19 filed a challenge, no one had the resources to
20 actually file a lawsuit, doesn't mean that there's not
21 a community out there that's concerned and interested.

22 We're having, for example, oral argument
23 in Diablo Canyon on May 26th. All of the lawyers are
24 here in Washington, D.C., and the Judges are certainly
25 here in Washington, D.C. The easiest thing to do is

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1 to walk down the hall and have it here in Washington,
2 D.C., but that's the people of -- the public out there
3 and I think it's important for them to see it.

4 Okay, 12, anything -- here is my next
5 question. I don't know that we've really gotten
6 anything that's that difficult, but do you see
7 anything we should certify to the Commission, about
8 what we've discussed above or anything else? Mr.
9 Curtis?

10 MR. CURTIS: No, Your Honor, I do not. The
11 staff has referenced the bifurcation discussion, which
12 I know you'll get to, but I -- based upon what we have
13 discussed here and depending upon the outcome of the
14 Board's deliberations and the scheduling order to
15 come, at least at this point, I don't see any novel,
16 legal or policy issues that warrant certification.

17 JUDGE KARLIN: Okay, staff?

18 MS. SIMON: Your Honor, this is Marcia
19 Simon again. We don't see any novel issues either
20 that would warrant certification.

21 JUDGE KARLIN: Okay, I don't think I see
22 any at the moment. I don't know, I'll talk with my
23 colleagues and we'll see, but I thought it was worth
24 asking.

25 Let us now turn to the "additional items",

1 category. I think we've completed a review of the 12
2 questions asked in the April 12th order.

3 The first of the additional items was one,
4 I think, we've all grappled with a little bit, is
5 bifurcation. By that, meaning, you know, that because
6 the FSCR and the EIS, final EIS are going to be issued
7 six, seven months apart, should we hold two hearings?
8 Should we break this into two parts?

9 I mean, footnote three on page what,
10 38056, as Mr. Curtis has properly pointed out, says --
11 let me get it here.

12 "This schedule assumes that the SER and
13 FEIS are issued essentially at the same time. If
14 these documents are not to be issued very close in
15 time, the Board should adopt separate schedules, but
16 concurrently, running for the safety and environmental
17 reviews, consistent with the time frames herein for
18 each document."

19 So, certainly, we can start reading the
20 FSCR as soon as it comes out, and we will, but the
21 next question is, maybe we should just proceed with a
22 separate on hearing on safety issues and you know, and
23 then a hearing on environmental.

24 Mr. Curtis, you were addressing that
25 thought earlier. Is there a comment here?

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1 MR. CURTIS: Yes, Sir, Your Honor. I do
2 think the point you have suggested would provide for
3 an efficient and fair deliberation hearing.

4 It is our view that your reading of
5 footnote three is exactly right, that in the interest
6 of efficient conduct of these proceedings, and in
7 recognition that the SER will be out seven months in
8 advance of the FEIS and is a free-standing document,
9 that is to say, you will not need to have information
10 from the FEIS, in order to conduct your SER review.

11 We believe that the seven month period
12 between August -- upon the publication of the SER, and
13 the following February, the FEIS would allow the Board
14 to conduct its review of the SER and to identify any
15 significant issues that it wishes to pursue, testimony
16 that it wishes to have and witnesses that it wishes to
17 have, to actually, in that time frame, have the staff
18 and the Applicant file their response, as to your
19 areas that you wish to pursue further.

20 And then, actually proceed with the
21 evidentiary hearing. We do have seven months in this
22 period of time. Proceed with the evidentiary hearing,
23 which you would -- as I think you have correctly said,
24 have the opportunity independently, to examine issues,
25 the witnesses for the staff and the Applicant, and

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1 then proceed within that same seven month time frame,
2 to actually issue a partial decision on the SER.

3 We think that time frame, which is a
4 little bit longer than most cases, where there is a
5 delta between the two documents, would allow you to
6 address all of the SER issues in that time frame.

7 That, coupled with the EIS before you in
8 July and the FEIS coming out in February, would then
9 allow us to focus, we would hope efficiently, on the
10 environmental issues, upon the publication of FEIS and
11 hopefully, in a three to four month time frame, go
12 through the same process on that.

13 And that, collectively, I think would, for
14 the Applicant, be a reasonable process, but I think it
15 would hopefully spread out the work in a way that
16 would be suitable for the Board and -- as well as the
17 staff.

18 But we very much support that approach.
19 I would say that a similar approach, although the time
20 frame was not that different, was in some respects,
21 used in the Vogel ESP, where the FEIS came out first
22 and the Board actually went forward and asked the
23 questions and then SER came out later.

24 They did hold one evidentiary hearing,
25 because the documents were closer in proximity to

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1 being issued, but we certainly support that, Your
2 Honor, and would strongly encourage that we move
3 forward with the SER upon its publication and reach
4 the point where we would have the benefit of the
5 Board's partial initial decision on those issues, by
6 the end of the year.

7 JUDGE KARLIN: All right, thank you.
8 Staff, Ms. Simon?

9 MS. SIMON: Back to Carrie Safford, Your
10 Honor.

11 JUDGE KARLIN: Okay.

12 MS. SAFFORD: We're going to jump around on
13 you here. I just wanted to say from the staff's point
14 of view, we're not opposed to a bifurcated hearing.
15 We do have some concerns with logistics and expenses
16 and the use of resources, in traveling to Idaho Falls,
17 to conduct two -- to come in for a hearing in two
18 separate and distinct phases, and we would ask that
19 the Board consider that, when you ultimately make your
20 determination on whether or not to hold the bifurcated
21 hearing and also, in considering where a hearing would
22 best be served for everyone involved.

23 One possible avenue might possibly be to
24 consider issuing the question and answer part of the
25 hearing on the documents and then, at the very end,

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1 holding the mandatory hearing, at one time, out in
2 Idaho Falls, thus necessitating one single trip.

3 But prior to that, we will have vetted the
4 issues and responded to the Board's questions in
5 writing or however the Board sees fit. That might be
6 one possible alternative.

7 JUDGE KARLIN: Okay.

8 MR. CURTIS: Your Honor, I would just note
9 -- I'm certainly sensitive to that issue, but as the
10 Applicant, we are paying through license fees, the
11 entire cost of this proceeding.

12 So, both the application and review, it is
13 our view that the seven month time frame between the
14 FEIS and the SER gives you the opportunity to defer
15 the consideration of issues before an evidentiary
16 hearing, has -- holds the potential, in our view, for
17 the mandatory hearing to be directly, as it is now, to
18 be more directly on the critical.

19 And we think the Board has the time and
20 the free-standing SER. We're charged for the costs of
21 this application, including this review, and we would
22 hope the Board would proceed in that manner.

23 JUDGE KARLIN: Okay, that's good to know.
24 Another additional issue, which was, I guess,
25 logistics for the hearing, which has been addressed a

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1 little bit here as well, the policy is to hold the
2 hearings in the vicinity of the proposed facility, and
3 I am an inherent to that approach.

4 I believe the Commission, as currently
5 constituted, would strongly support that approach. I
6 also note that the hearings are to be open to the
7 public, 10 CFR 2.328, and we would proceed in that
8 way.

9 So, at some point, perhaps not now, we
10 will probably ask your suggestions, in terms of
11 identifying locations that might be used in the -- is
12 Idaho Falls, is the local -- the closest city to the
13 proposed site? Is this correct, Mr. Curtis?

14 MR. CURTIS: Yes, I believe it is. I would
15 just note, you know, this is ultimately a decision for
16 the Board.

17 I would note that the procedures for the
18 conduct of the mandatory hearing by the Commission
19 contemplated those hearings are going to be held in
20 Rockville.

21 So, the Commission themselves, in the case
22 where we're talking about just a mandatory hearing,
23 obviously, the contested hearings have a special
24 degree of local interest, but I wouldn't -- and for
25 the reasons that the staff has identified and the

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1 resources and so forth, you know, I think it's
2 generally, perhaps a sound idea.

3 I would note that the Commission's, I
4 think, contemplates holding its mandatory hearings in
5 Rockville.

6 JUDGE KARLIN: Well, the Commission is sort
7 of like the Supreme Court, you know. They can stay
8 here in Washington, D.C., but the rest of us get out
9 to the hinter lands, where the people are.

10 MR. CURTIS: I would just say
11 parenthetically, if that's your desire, and I say this
12 somewhat tongue and cheek, we would probably want to
13 hold that hearing earlier, rather than later, so you
14 don't get out there in the middle of the winter
15 months.

16 JUDGE KARLIN: Yes, I know, I know. I
17 mean, it's not something that is particularly fond,
18 but I think there's a duty involved, not so much --
19 you know, it's so much easier to stay at home and walk
20 down the hall and have a hearing right here in
21 Rockville, 20 feet from my office.

22 But I think there is a responsibility that
23 is important too, and I think the staff -- you've
24 already, you know, expressed your concerns about the
25 location. Anything more on that? The logistics? No?

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1 I'm hearing nothing?

2 MS. SIMON: Nothing at this point, Your
3 Honor.

4 JUDGE KARLIN: I think we're pretty much
5 done, on the issues that we had -- that we have put
6 together.

7 I do note that we have to deal with the
8 San Luis Obispo Mothers for Peace, 9th Circuit
9 decision. We're in the 9th Circuit. This is in the
10 9th Circuit, and I'm not sure that that will add a lot
11 -- will that add any complexity to the review by the
12 staff in this matter, or by this Board?

13 Staff, what's your thoughts on that?

14 MS. SIMON: No, we don't anticipate it
15 adding any complexity to our review, Your Honor.

16 JUDGE KARLIN: Any thoughts, Mr. Curtis?

17 MR. CURTIS: No, we agree with the staff.

18 JUDGE KARLIN: Okay, okay, I think we're
19 just about done. Are there any other items that Judge
20 Lathrop or White, that you want to cover, or questions
21 you have, from what we've discussed?

22 JUDGE LATHROP: This is Judge Lathrop. I
23 have no other items.

24 JUDGE KARLIN: Okay.

25 JUDGE WHITE: No, I have none either.

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1 JUDGE KARLIN: Okay, good. I think, let's
2 try to reiterate our action items.

3 One, I think we've asked the staff to give
4 us a DVD, CD or whatever version of the draft EIS, of
5 all documents. You know, let's just say, the draft
6 EIS, the final EIS and the final SER, we'd like to get
7 CD or DVD versions of those, say, what would be
8 reasonable? Within 10 days of them being issued by
9 the staff?

10 MS. LEMONCELLI: Yes, Your Honor, this is
11 Mauri Lemoncelli for the staff. We'd be happy to
12 accommodate the Board and we will certainly work with
13 your Law Clerk on that.

14 JUDGE KARLIN: Okay, yes, well, why don't
15 we just say right here, could you send them out to us
16 within 10 days of their issuance by the staff, each of
17 those, the draft EIS, the final EIS and the final SER.
18 In fact, the faster, the better on the final's,
19 especially, because they are more on the critical
20 path, and I would like hard copies.

21 MS. LEMONCELLI: Certainly, Your Honor.

22 JUDGE KARLIN: Okay.

23 MS. LEMONCELLI: Given our proximity to
24 you, we would hope to beat that 10 days.

25 JUDGE KARLIN: Great, the other thing is

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1 the Applicant is going to give us, within let's say,
2 10 days of today's date, the DVD and CD versions of
3 the application, as we discussed earlier.

4 MR. CURTIS: Yes, I have a to-do, to
5 provide you four copies, of the April 30th
6 application, which is the latest version of it and
7 we'll work with Ms. Wright to ensure that we get to
8 you in the appropriate way, given the sensitivity of
9 some of the disks, but we will provide that you
10 promptly.

11 JUDGE KARLIN: Okay, great, and I think
12 that's about it. We're going to -- where we go from
13 here, I guess we will try to issue -- we will issue a
14 scheduling order, that tries to lay out some of the
15 things we think are going to happen, to think about
16 the bifurcation -- well, I'll discuss this with my
17 colleagues.

18 Which ever we do, when we get down to the
19 hearing time frame, I mean, for example, if we
20 bifurcate and go with a hearing on safety issues, some
21 time after August 2010, the FSCR is issued, we might
22 be talking about an evidentiary hearing -- you know,
23 or mandatory hearing on safety issues three months
24 later, August, September, October, November.

25 I mean, not necessarily your best time for

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1 Idaho Falls, I know, but -- and holidays come in there
2 and all of that sort of thing, where ever you are, but
3 we might ask for a black-out date calendar, i.e., when
4 are you blacked out and not available for an
5 evidentiary hearing during that three month window of
6 say, November, December, January, something like that,
7 and the same with a later one.

8 So, we'll -- with that, I think this has
9 been helpful to me and I appreciate your input and
10 thoughts and I think we're closed. Ms. Wright,
11 anything we've got that we've missed?

12 MS. WRIGHT: Nothing.

13 JUDGE KARLIN: Okay, well, then we will
14 hold this pre-hearing conference adjourned and I
15 appreciate your time and effort on this. Thank you.

16 MR. CURTIS: Thank you, Your Honor.

17 MS. LEMONCELLI: Thank you, Your Honor.

18 JUDGE KARLIN: We're singing off.

19 (Whereupon, the above-entitled matter
20 concluded at approximately 4:00 p.m.)
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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: Areva Enrichment Services
 Eagle Rock Facility

Name of Proceeding: Pre-Hearing Conference
Docket Number: 70-7015-ML
ASLBP Number: 10-899-02-ML-BD01
Location: (phone conference)

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
direction of the court reporting company, and that the
transcript is a true and accurate record of the
foregoing proceedings.


Matthew Mawhinney
Official Reporter
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