

ORIGINAL

UNITED STATES NUCLEAR REGULATORY COMMISSION

In the Matter of:)
)
PUBLIC SERVICE COMPANY OF) Docket Nos.
NEW HAMPSHIRE, et al.,) 50-443-OL
) 50-444-OL
(SEABROOK STATION, UNITS 1 AND 2)) OFF-SITE EMERGENCY
) PLANNING
PREHEARING CONFERENCE)

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1 UNITED STATES NUCLEAR REGULATORY COMMISSION
2 ATOMIC SAFETY AND LICENSING BOARD

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5 PUBLIC SERVICE COMPANY OF) Docket Nos.
6 NEW HAMPSHIRE, et al.,) 50-443-OL
7 (SEABROOK STATION, UNITS 1 AND 2)) 50-444-OL
8) OFF-SITE EMERGENCY
9) PLANNING
10)
11 PREHEARING CONFERENCE

12 Thursday,
13 August 4, 1988

14 Room 12
15 John McCormick Building
16 Post Office Square
17 Boston, Massachusetts

18 The above-entitled matter came on for hearing,
19 pursuant to notice, at 9:06 a.m.

20 BEFORE: JUDGE IVAN W. SMITH, CHAIRMAN
21 Atomic Safety and Licensing Board
22 U.S. Nuclear Regulatory Commission
23 Washington, D.C. 20555

24 JUDGE JERRY HARBOUR, MEMBER
25 Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

JUDGE GUSTAVE A. LINENBERGER, JR., MEMBER
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P R O C E E D I N G S

1
2 JUDGE SMITH: Good morning. Is there any
3 preliminary business?

4 Mr. Brock, can you proceed?

5 MR. BROCK: Your Honor, I'm balancing some things
6 on my lap. I'll do the best I can.

7 JUDGE SMITH: If you would rather move over to the
8 witness stand, you may argue, but not under oath, if you
9 choose.

10 MR. BROCK: Let me actually move over there, Your
11 Honor. It may be a little easier.

12 (Pause)

13 MR. BROCK: For the record, I'm Matt Brock for the
14 town of Amesbury. And there is one contention that we would
15 ask the Board to provide some clarification on. That is
16 Town of Amesbury Contention Number 5.

17 And referring to Page 16 of the Board's Part 2 of
18 its Order, the Board is correct to interpret that
19 contention, and I'm quoting: "Amesbury posits the situation
20 where under the SPMC, the protective action recommendation
21 would be changed from evacuation to shelter in order to
22 maximize dose savings.

23 The Board proceeds, though, to reject the
24 contention, stating that Amesbury does not assert that those
25 posited circumstances are contemplated in the SPMC.

1 In reviewing the contention as we read it, which
2 we offered for the Board, first of all, on Page 17 of our
3 contentions, we cite the portion of the SPMC which states as
4 a specific goal of that plan that the plan will formulate a
5 PAR based upon actions which provide the greatest dose
6 savings.

7 We proceed also to cite additional sections which
8 state that once a PAR is determined, that there will be
9 ongoing review during the course of an emergency of taking
10 field measurements and determining whether in the language
11 of the plan various constraints appear such as problems with
12 weather, traffic, et cetera, which may require in the
13 language of the plan that the PARs be refined.

14 So we believe we cited operative sections which
15 contemplate within the SPMC that this is going to be an
16 ongoing process of review during an emergency -- and indeed
17 we think that is reasonable. But what we allege in this
18 contention is that even if it is determined at some point
19 after an emergency is declared, and for example, evacuations
20 ordered, that for whatever reason, evacuation is no longer
21 the preferable PAR to maximize dose, there are no
22 procedures, personnel, any other implementing
23 characteristics in the plan to shift one to another. We
24 think that is a defect in the plan. The plan invites that
25 inquiry, but offers no means to resolve the problem if it

1 arises.

2 We would also point out that the Board, in
3 rejecting the contention, said that as a basis for rejecting
4 it, the plan does not contemplate those circumstances.

5 It would be additionally our position that even if
6 the plan did not contemplate circumstances where a change in
7 PARs would be appropriate to maximize dose savings, that
8 under the case law of NRC, that is the goal of emergency
9 planning and we think that that should be taken into account
10 by the planners.

11 So we would ask for clarification/reconsideration
12 on that basis.

13 JUDGE SMITH: Mr. Dignan.

14 MR. DIGNAN: I confess, I don't understand the
15 argument. I really don't. I don't understand it. I stick
16 to what I said. I saw no basis in this, regulatory basis
17 given for what they claim they want.

18 JUDGE SMITH: Would you go over that point again
19 about the plan? You said something to the effect that the
20 plan seems to invite something but doesn't provide for the
21 acceptance of whatever it is that it invites.

22 MR. BROCK: Your Honor, I believe the plan
23 specifically calls for an ongoing review of dose
24 consequences. that based on that review --

25 JUDGE SMITH: Dose consequences?

1 MR. BROCK: Dose projections.

2 JUDGE SMITH: Dose projections.

3 MR. BROCK: Ongoing review of dose projections
4 during emergency.

5 Based on that ongoing review, when environmental
6 data becomes available where it may not be initially, the
7 PARs will be, in the language of the plan, refined.

8 We read that as saying they're going to change
9 them if it is appropriate to maximize dose savings. Our
10 position is there is nothing in the plan on how to implement
11 that change.

12 JUDGE SMITH: And Mr. Dignan would argue that, nor
13 need there be.

14 MR. DIGNAN: Yes. I still don't understand the
15 problem. First of all, we're in the plan now, and we're
16 supposed to make it on the basis.

17 The argument I made against it, which I thought
18 was sustained, was there was no basis for the contention
19 stated.

20 JUDGE SMITH: The basis alludes to the plan.

21 MR. DIGNAN: I thought I couldn't use the plan,
22 because if I could use the plan and get to the merits, the
23 short answer to this is, as the Board will recall from New
24 Hampshire, once you start an evacuation, you don't pull it
25 back to shelter.

1 JUDGE SMITH: Wait a minute.

2 MR. DIGNAN: That's the problem.

3 JUDGE SMITH: The whole reason for being here is
4 to litigate asserted defects in the plan.

5 MR. DIGNAN: Correct.

6 JUDGE SMITH: And he asserts some defects in the
7 plan. But you're not responding to his assertion.

8 MR. DIGNAN: I'm responding to his assertion that
9 he states no regulatory basis as to why such a defect has to
10 be cured. And he hasn't.

11 MR. BROCK: The basis is that if you don't cure
12 that defect you are not assuring maximum dose savings which
13 is the stated goal in the plan and it also requires a matter
14 of NRC case law.

15 MR. DIGNAN: I don't see that your basis gets you
16 there. What in your basis says that I'm not going to
17 maximize dose savings?

18 JUDGE SMITH: Because there is no way to implement
19 the subsequent dose projections. I mean, there is no way to
20 modify the protective action recommendations based upon
21 subsequent dose projections.

22 Therefore, you've gone halfway; you're not
23 availing yourself of the opportunity to achieve maximum dose
24 reductions. That's the way I understand it.

25 MR. BROCK: That is correct, Your Honor. And

1 essentially, to leave the plan as is, there is a lot of
2 language in here about this ongoing review of dose
3 projections. But in fact what will occur is, evacuations
4 ordered and then whether or not applicants are in possession
5 of information, that that continues to be the best PAR.
6 People just keep evacuating.

7 MR. DIGNAN: No, no. The plan provides for
8 continuing these -- now I get the drift -- and expanding, if
9 necessary. If you're in a shelter mode or if you're in a
10 mode where you've gone to a certain area, and subsequent
11 dose projections say well, look, the wind is blowing the
12 other way now, or something of that nature, you move it
13 around and you start evacuating that area. That's the way
14 the whole plan works.

15 But again, to answer the allegation, Your Honor,
16 you're putting me into arguing the plan. And I still don't
17 see the regulatory basis.

18 There is none cited. There is no provision of
19 NUREG 0654 cited.

20 JUDGE SMITH: There's a fundamental regulatory
21 assumption established by the Commission and this Board in
22 reviewing the objectives of the emergency planning, that the
23 objective is to achieve maximum dose savings.

24 And he's saying that you start out by taking
25 measures to do that, but you don't follow through.

1 MR. DIGNAN: No. This is the point. You take
2 measures and you order certain things on the basis of
3 measures that you see. You've got a projected dose. Here
4 we go. When the merits -- if I'm in the merits maybe the
5 answer is you should let the contention in in which you try
6 it. I admit, they are forcing me into the merits now.

7 But this is the problem with --

8 MR. BROCK: Thank you, Mr. Dignan. We'll accept
9 it.

10 MR. DIGNAN: No. The problem is that we're in a
11 procedure where they give a basis. The basis is found not
12 to be good. We expand the basis out, force it into the
13 merits, and then say to the Judge, hey, they're in the
14 merits, so you're going to have to try it.

15 Now, I think the ruling was absolutely right.
16 They don't state a regulatory basis for what they're saying.

17 MR. BROCK: Your Honor, the regulatory basis --

18 MR. DIGNAN: And I don't see why a statement of
19 counsel made in a clarification thing, which forces me then
20 to answer to what the plan says, should now give us a
21 litigable contention. But if that be the procedure engaged
22 in, I guess we've got a litigable contention.

23 MR. BROCK: Your Honor, I have cited to our
24 contention, not to any clarification subsequently offered by
25 the town. It specifically concludes with saying, whether or

1 not that PAR presents the public with maximum achievable
2 dose savings under the circumstances. If the public is
3 going to evacuate, they'll continue to evacuate, whether or
4 not that's the best alternative.

5 JUDGE SMITH: Your contentions, although few in
6 number, were very, very wordy in their explanation. And the
7 emphasis that we -- the inference that we drew from your
8 basis seems to be, and I'm only going by not a real sharp
9 memory on our deliberations, only what we said -- seems to
10 be that you believe that the plan would require a provision
11 to switch from evacuation to shelter.

12 And you say if that is the way we read it, we
13 misread it. That is an appropriate motion for
14 reconsideration. If we made a mistake in reading your
15 basis, it's appropriate for you to point it out to us.

16 Do you think that we understand your position now?

17 MR. BROCK: Yes, Your Honor, I believe you have
18 articulated it.

19 JUDGE SMITH: Do you want to comment, Staff?

20 MS. CHAN: Staff has no comment.

21 JUDGE SMITH: All right. Well, it is very wordy.
22 And rather than trying to resolve it now, we'll just get the
23 transcript of your argument, re-read the basis, see if we
24 did make a mistake.

25 MR. BROCK: Thank you, Your Honor. That's all I

1 have. Thank you.

2 (Off the record conversation)

3 JUDGE SMITH: City of Newburyport.

4 MS. SAINT ANDRE: Thank you, Your Honor. Your
5 Honor, I have two very brief clarifications, beginning with
6 our Contention Number 2, which begins on Page 24 of your
7 decision on Part 2.

8 If you look at Page 25, Your Honor, the very last
9 sentence, where it says Contention 2 is accepted, as limited
10 to the three TCP locations identified in the contention and
11 to those established by the SPMC, I believe, Your Honor that
12 that should read: "Contention 2 is accepted as limited to
13 the three TCP locations identified in Contention Number 1 of
14 the City of Newburyport and to those established by the
15 SPMC."

16 JUDGE SMITH: I'm looking at what we thought were
17 TCP locations identified in Contention 2.

18 MS. SAINT ANDRE: Your Honor, in Contention Number
19 1 we identified three additional TCPs and that was admitted
20 as a contention.

21 There were no additional TCPs identified in
22 Contention Number 2.

23 JUDGE SMITH: All right. So you think the
24 contention was properly -- given our policy on accepting and
25 rejecting contentions -- you think that our policy should

1 have accepted a contention limited to the TCPs identified in
2 Contention 1?

3 MS. SAINT ANDRE: No, Your Honor. I believe that
4 the intent was to limit it to those established already in
5 the SPMC and to also accept it as to those three additional
6 TCPs which we asked for in our Contention Number 1.

7 JUDGE SMITH: Right. So Contention 2 would be
8 correctly accepted if we were to state, "as limited to the
9 three TCP locations identified in Contention 1."

10 MR. DIGNAN: There are no TCPs. That's the
11 problem. There are no TCPs at those locations.

12 JUDGE SMITH: There should be.

13 MR. DIGNAN: That's right. In Contention 1 you
14 admitted the point, their argument, or their contention that
15 there should be TCPs, that there should be something more
16 there.

17 And Contention number 2, and the reason we
18 suggested a rewording is, we read it as alleging a number of
19 things, including personnel and equipment inadequacy for the
20 TCPs that were in the plan, but we objected to so much of it
21 as wanted to weave in more TCPs.

22 And I don't know if this can be just resolved in
23 the shakeout, because I think the Board has made clear in
24 the ruling on the two contentions, if I understand the Board
25 correctly, the Board has admitted the question of whether or

1 not there should be something more at these three --

2 JUDGE SMITH: Yes, that was our point --

3 (Simultaneous voices)

4 MR. DIGNAN: -- but is not allowing a contention
5 to the effect that there should be more quote "unidentified
6 TCPs."

7 JUDGE SMITH: That was our purpose.

8 MR. DIGNAN: I think on that basis, counsel, we
9 can work out a solution between the two contentions, if
10 counsel agrees.

11 MS. SAINT ANDRE: Your Honor, the ruling on Number
12 1 was limited to the three TCPs which I identified and I'm
13 not asking that that be reconsidered.

14 JUDGE SMITH: That you proposed.

15 MS. SAINT ANDRE: That's correct.

16 JUDGE SMITH: Between the two contentions, you
17 have what you want?

18 MS. SAINT ANDRE: I want to make sure that I have
19 what I need.

20 JUDGE SMITH: Well, I agree. You understand what
21 we were trying to accomplish. We were trying to accomplish
22 it seems what you orally have stated.

23 MS. SAINT ANDRE: Yes, Your Honor.

24 JUDGE SMITH: And if it can't be worked out, with
25 counsel, which is really the cleanest way to do it because

1 it has to be lot of redrafting anyway. Then you allude to
2 this transcript and you insist upon your point of view and
3 we will give it consideration.

4 MS. SAINT ANDRE: Thank you, Your Honor.

5 Your Honor, I do have one other, which is our
6 Contention Number 8, which begins on page 29.

7 If I could direct your attention to Page 30, the
8 paragraph that begins: "An alternate interpretation of
9 Contention 8 is that the city wishes to participate in the
10 Seabrook radiological emergency planning as it affects its
11 citizens."

12 I just want to make sure that it's clear that that
13 was not the intent of Intention Number 8, that in fact it
14 was addressed to what we felt was an inadequacy in the plan
15 and it was not a request on our behalf to participate.

16 JUDGE SMITH: Anything further?

17 MS. SAINT ANDRE: No, Your Honor.

18 JUDGE SMITH: The next one is Newbury.

19 MR. HILL-WHILTON: Good morning, Your Honor. I
20 also have a couple of requests for clarification, regarding
21 the town of Newbury's first contention. The Board admitted
22 that contention for litigation, except for three areas
23 dealing with first, human behavior; second amount of travel
24 speed reduction due to adverse weather and third, stalled
25 vehicles.

1 According to the order, as I understand it, the
2 reason for those limitations was that those issues had been
dealt with in the New Hampshire litigation.

4 My confusion is based, or my request for
5 clarification is based on my uncertainty of what human
6 behavior, the words "human behavior," encompasses.

7 For example, one of the allegations with regard to
8 one of the bus routes, just to pick one, states that a bus
9 will not be able to travel the way it is going to travel
10 under the route, for this reason.

11 The bus is supposed to cross a bridge heading
12 North on Route 1A. Route 1A is a major Southbound
13 evacuation route.

14 The bus, we contend, would not be able to cross
15 that bridge Northbound because of its total use by
16 Southbound evacuees.

17 In my mind, that is not a human behavior issue.
18 And I just want to clarify, if indeed I am correct, and that
19 type of contention is something which we would be permitted
20 to litigate in this proceeding.

21 JUDGE HARBOUR: I'm sorry. I missed your reason
22 for the bus not being able to go across the bridge.

23 MR. HILL-WHILTON: Route 1A is a major Southbound
24 evacuation route. The bridge is narrow and is approximately
25 one quarter [sic] in length. It is our belief that both

1 lanes of the bridge will be utilized by Southbound evacuees.

2 JUDGE SMITH: Now, these are people actually
3 evacuating, not people returning to the evacuation zone.

4 MR. HILL-WHILTON: Correct.

5 JUDGE SMITH: These are literally leaving the EPZ?

6 MR. HILL WHILTON: That's correct. And the bus,
7 according to the evacuation bus route, is supposed to head
8 North across that bridge.

9 Now, I don't view that as a human behavior issue
10 and I just want to clarify if indeed I am correct.

11 JUDGE SMITH: I would not identify what you have
12 just posited, no, not as a human behavior issue, as we have
13 previously regarded it.

14 MR. DIGNAN: Yes, it is.

15 JUDGE SMITH: How would that be?

16 MR. DIGNAN: Because he's assuming that because of
17 panic and human behavior it won't be two-way traffic but
18 evacuees will break out into a lane they're not supposed to.

19 JUDGE SMITH: I didn't hear that assumption.

20 MR. DIGNAN: I know you didn't. But that's how
21 you get there.

22 MR. FIERCE: It's not panic. We want to make sure
23 we characterize things carefully here, Mr. Dignan, today.
24 Because that may well be --

25 (Simultaneous voices)

1 MR. FIERCE: -- rational behavior --

2 (Simultaneous voices)

3 MR. DIGNAN: Rational behavior, but the point is
4 the plan calls for that street to be two way, one in and one
5 out.

6 (Simultaneous voices)

7 MR. DIGNAN: -- both lanes which is for the people
8 not to go where they're told which I believe is a human
9 behavior point.

10 JUDGE SMITH: I did not hear you say that. I
11 heard you say, I thought I heard you say that the plan
12 anticipates that traffic will be on both lanes.

13 MR. HILL-WHILTON: No. The plan does not provide
14 for it.

15 JUDGE SMITH: Reality does.

16 MR. HILL-WHILTON: Reality does. There's no
17 traffic control or route guides situated at that bridge.

18 JUDGE SMITH: All right. So you would be saying
19 that the plan is defective in that it does not have a
20 traffic control point or traffic guide at that point to
21 assure aberrant behavior does not exist?

22 MR. HILL-WHILTON: In part. I feel that the
23 reason it would be unable for the bus to travel North across
24 the bridge is because the drivers would be utilizing both
25 lanes, the Northbound and the Southbound. And one of the

1 reasons for that would be the lack of traffic guides there.

2 JUDGE SMITH: We have fairly well litigated the
3 issue as to whether drivers will disregard indicated routes,
4 disregard travel guides, disregard traffic laws and
5 indications and engage in what has been called "aberrant
6 behavior." That seems to be what you are saying will happen
7 now.

8 But your point is somewhat more refined, and that
9 is you are saying that the plan recognizes the need for some
10 traffic guides. If it were a perfect world none would be
11 needed, and you would just have signs up. And in that some
12 traffic guides are required, one is required here.

13 MR. HILL-WHILTON: At a minimum. Yes. I, as the
14 Board probably knows, the town of Newbury did not
15 participate in the New Hampshire litigation dealing with
16 evacuation times. So I cannot of my personal knowledge, I
17 mean I just simply don't know what was and was not litigated
18 in that proceeding.

19 If this -- and I don't think this route was
20 identified -- and perhaps I'm wrong -- but I don't believe
21 that this route was identified as a major evacuation route.

22 If indeed it was, it would seem to me that it was
23 not litigated in the New Hampshire proceeding, and that the
24 Town of Newbury should not be foreclosed in this proceeding
25 to raise that issue, both from the standpoint of evacuees

1 simply are going to utilize both lanes of that bridge,
2 first; and second, that if it is intended, if the plan's
3 intent is for only one lane of that bridge to be used, then
4 it is deficient in that it does not have a traffic guide
5 present.

6 JUDGE SMITH: Would you believe that the
7 contention would be acceptable if it asserts that the plan
8 is deficient in that it lacks a traffic guide at that point?

9 MR. DIGNAN: You see, indeed, when I responded to
10 the contention, at one point I said I thought an acceptable
11 rewrite -- I think while I was talking during Basis A --
12 SPMC is deficient in that it does not call for a TCP at the
13 intersection of such and such and so and so.

14 I have no problem litigating the question of
15 whether we should have more traffic guides in this route to
16 assure that people get correct instruction. That's all
17 right.

18 But I just want it clear that most of these
19 contentions about that particular road are on a theory that
20 what will happen is the traffic guides will be disregarded
21 and so forth and so on.

22 If the contention is rewritten to simply say there
23 aren't enough traffic guides to make the rules clear, no
24 problem.

25 JUDGE SMITH: And in particular at that point.

1 MR. DIGNAN: At that point, no problem.

2 JUDGE SMITH: Is that satisfactory to you?

3 MR. HILL-WHILTON: That is, but that does raise
4 another question, which was my next request for
5 clarification.

6 As I understand -- and again, not having
7 participated -- but as I understand the New Hampshire
8 litigation, and the Board's ruling saying that matters
9 alleged in our contentions which were litigated in New
10 Hampshire cannot be relitigated here, which I understand and
11 I don't quarrel with, but in the New Hampshire litigation,
12 unless I am mistaken, the New Hampshire plan called for I
13 believe police officials, presumably uniformed, who would
14 direct traffic.

15 This plan calls for, provides for no traffic
16 direction. It provides for an uniformed private citizen who
17 members of the community, according to my understanding of
18 the plan's public education process, would know are private
19 volunteers, not to direct traffic but to encourage and
20 discourage travel in certain directions.

21 It seems to me that whether the public in New
22 Hampshire would disregard a uniformed police officer and
23 travel in a manner contrary to what that officer is saying
24 is vastly different than what the general public would do
25 when a member of the general public is encouraging or

1 discouraging travel in certain directions.

2 I think it is a big distinction between this plan
3 in that respect and what I understand the New Hampshire plan
4 to be.

5 So it does not seem to me that the New Hampshire
6 litigation really did address some of the issues that we
7 wished to raise here, that it dealt with a significantly
8 different factual setting.

9 JUDGE SMITH: What contention raises that point?

10 MR. HILL-WHILTON: Well, without -- I don't know
11 of it is specified that a non-uniformed volunteer as opposed
12 to a uniformed police officer, would less likely be
13 regarded. But it does say throughout the contention -- I
14 certainly can find an example, I believe there's one at Page
15 16 -- which simply states that the route guides will in all
16 likelihood be disregarded.

17 JUDGE SMITH: When we draft our rulings on the
18 contentions and we have later discussion, collegial
19 discussion among the Board, we are very much saturated with
20 the facts of the contention and everything else.

21 As we sit here right now, we do not have that same
22 command of your pleadings. There were a lot of contentions.

23 I would appreciate if you'd be more specific as to
24 where in your pleadings, where in our order you find a
25 defect.

1 MR. HILL-WHILTON: Well, in the contention on Page
2 16 --

3 JUDGE SMITH: I don't have your contentions before
4 me right now. We have the Applicant's version of your
5 contentions with us. Just give us something to read here,
6 to know what you're talking about.

7 MR. HILL-WHILTON: I will. I can also, because I
8 would like the Board not only to know the Applicant's
9 characterization of my contention, but also what the
10 contention expressly says. I would appreciate --

11 MR. DIGNAN: No. I quoted them all. I quoted
12 them verbatim is what His Honor is referring to.

13 JUDGE SMITH: Just for convenience, I have brought
14 Applicant's response because they are organized.

15 MR. HILL-WHILTON: Fine.

16 JUDGE SMITH: And I save some paper that way.

17 MR. HILL-WHILTON: On the Board's Order, the page
18 dealing with this matter is found on Page 32 in the last
19 sentence of the third paragraph says there are three such
20 topics which would not be admitted to litigation: human
21 behavior, amount of travel, speed reduction to accommodate
22 adverse weather and stalled vehicles.

23 This question again relates to my uncertainty as
24 to what the term "human behavior" encompasses, then as to
25 the contention, to one specific assertion in the contention.

1 JUDGE SMITH: All right. The Board, I recall
2 now, looking at many, many bases, to go through some eight
3 pages single spaced in Applicant's thing, had aspects of
4 human behavior. We contemplated going through them and
5 identifying them and taking them out, or letting you do it,
6 letting the parties do it, consistent with our previous
7 rulings. We opted to let you do it.

8 MR. HILL-WHILTON: I have no problem doing that,
9 Your Honor.

10 JUDGE SMITH: Now what you're asking for is, is
11 the difference between a citizen suggesting traffic go a
12 certain way and a uniformed policeman requiring traffic go a
13 certain way, is that eliminated because of our ruling on
14 human behavior?

15 MR. HILL-WHILTON: Yes.

16 JUDGE SMITH: I have no memory that such a thing
17 was litigated before.

18 MR. DIGNAN: Could counsel point me to the
19 statement he is relying on that he's raised now? Because
20 I've got the contention and basis in front of me, and at
21 least I cannot find anything raising a distinction between
22 uniformed and non-uniformed, or maybe I'm just not reading
23 correctly.

24 MR. HILL-WHILTON: No, you're correct. The
25 contention does not expressly raise that.

1 What the contention does expressly raise is
2 Nwebury's contention that drivers will in all likelihood
3 disregard the traffic guide who is encouraging or
4 discouraging travel in a certain way.

5 MR. DIGNAN: Where is that in the contention?

6 MR. HILL-WHILTON: It's in a number of places.

7 MR. DIGNAN: Please point me to the words.

8 Because I'm having a problem following it.

9 MR. HILL-WHILTON: I'll find that for you. It is
10 in a number of places dealing with a number of the bus
11 routes. I'll see if I can find one quickly.

12 (Pause)

13 MR. HILL-WHILTON: I'm looking at Page 194 of the
14 Applicant's response under C and D. At one place in C it
15 says, after talking about traffic guide, it says: Thus, the
16 guide will discourage drivers from turning right from Route
17 1A --

18 MR. DIGNAN: I said I don't object to admission of
19 contentions that there should be another guide somewhere.

20 Where do you say that there's a distinction
21 between a police officer and our guide?

22 MR. DIGNAN: As I mentioned, there is no
23 contention which expressly states there is a distinction
24 between a police officer and a private citizen. What I'm
25 saying is the contention, and I apologize for not readily

1 finding one, but I know that the contention states that
2 drivers will likely disregard the route guides.

3 JUDGE SMITH: Why don't you find it during the
4 mid-morning break and direct it to our attention? Because I
5 can't find it, either.

6 MR. HILL-WHILTON: I certainly will do that.

7 MR. DIGNAN: Because I'll be honest with you. As
8 I recall this contention, this is the one where you went
9 route by route, sign by sign --

10 JUDGE SMITH: Yes.

11 MR. DIGNAN: -- turn by turn and you said traffic
12 cones would be disregarded and stuff like that. But I
13 honestly don't remember any allegation in there concerning a
14 distinction between uniformed and non-uniformed, or for that
15 matter, any assertion therein that a traffic guide would be
16 disregarded, of any kind.

17 MR. TRAFICONTE: Your Honor, I'd like to cut this
18 short. I'm going to take up Mr. Dignan's lead of yesterday
19 and when I hear something that we might be able to benefit
20 from, I'm going to step in.

21 We had a contention that was admitted, an ETE
22 Contention Number 39, basis O, which reads: The ETEs are
23 based on the unrealistic assumption that the ORO traffic
24 guides, who are not professional traffic handlers, will be
25 able to move the traffic in Massachusetts just as fast as

1 state/local professionals would. That's been admitted. It
2 seems to me that that, as an admitted issue, raises point
3 blank the capacity and ability of a non-professional, i.e.,
4 citizen, traffic control guide, to function as effectively.

5 MR. DIGNAN: I agree, Mr. Traficonte, but it does
6 not raise, and we might as well have it out now, the issue
7 of whether because they are un-uniformed, they will be
8 disregarded.

9 MR. TRAFICONTE: Disregarded. Ineffective, in
10 other words.

11 MR. DIGNAN: I understood that contention to be
12 that people who weren't trained police officers wouldn't
13 know how to direct traffic, that they themselves would not
14 function properly.

15 I did not understand that, nor do I think it can
16 be construed to be, a human behavior question, that because
17 this person is not a police officer and is rather some
18 utility employee, in proper garb indicating that he is a
19 traffic guide, will be disregarded.

20 MR. TRAFICONTE: Maybe we should have that
21 clarified, because that was in part the intent.

22 I think the clear language of O says that they
23 will not function adequately. And we are on a very subtle
24 line here, if I understand Mr. Dignan's distinction, between
25 their capacity themselves, because they're not professional,

1 and how they would be seen and viewed by those that they are
2 trying to -- the traffic that they're trying to direct.

3 Clearly, the language would cover both. We say
4 because they're non-professionals, they won't be effective.
5 That means that they are untrained and that they will be
6 perceived as non-professionals and perhaps for that reason,
7 not obeyed.

8 I certainly intended both, we intended both in
9 that sentence. Let me put it this way. We would have
10 intended to put in evidence running to the fact that they
11 would not be respected the way a professional, armed or
12 uniformed guide would be.

13 (Continued on the next page)

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1 JUDGE SMITH: What contention are you talking
2 about?

3 MR. TRAFICONTE: Mass. AG 39, Part O, basis O.

4 JUDGE SMITH: Thirty-nine. What page in our
5 ruling.

6 MR. TRAFICONTE: Of your ruling?

7 JUDGE SMITH: Yes.

8 MR. TRAFICONTE: Sixty-three.

9 JUDGE SMITH: What's the quarrel? I think that
10 the contention anticipates a blend of inexperience in
11 getting the ebb and flow of traffic to comply with
12 directions and the perception of the traffic of the traffic
13 guide which I think probably exists no matter where you are.
14 It may even be a gender thing. I think you are covered by
15 your basis there.

16 MR. TRAFICONTE: As I do, and I was trying to cut
17 short the discussion --

18 MR. DIGNAN: Let's be sure what we are going to
19 do, because we are going to have to thrash this out.

20 Is the Board saying that there is open for
21 litigation in this thing under these contentions? This is
22 the easy question. The issue of whether or not the human
23 behavior question of whether people will disregard these
24 traffic guides because they are not uniformed police
25 officers, or isn't it?

1 I don't believe that O does it for them. I know
2 it's been admitted, but it says the ETEs are based on the
3 unrealistic assumption that the ORO traffic guides, who are
4 not professional traffic handlers, will be able to move;
5 that they will be able to move traffic in Massachusetts just
6 as fast as state and local professionals.

7 That, to me, raises the issue of whether these
8 people who are volunteers working for us have the training
9 to direct traffic and know when to move them, how long to
10 let traffic run one way, that sort of thing; their ability
11 to direct traffic.

12 It does not raise, in my judgment on a fair
13 reading, the issue of whether they will be disregarded
14 simply because they are garbed other than has a uniformed
15 police officer.

16 Now that's for the Board to decide, but I think
17 the Board ought to decide whether that human behavior issue
18 is going to be litigated.

19 JUDGE SMITH: Tell us what has been our practice.
20 Have we excluded all human behavior issues if they fall in
21 that category, or have we excluded human behavior issues
22 that have already been litigated?

23 MR. DIGNAN: I think the fair assumption is the
24 latter, because you carefully articulated one yesterday that
25 you had deliberately let in because, in your judgment, that

1 particular human behavior issue had not been litigated.

2 JUDGE SMITH: And I think we do have here a
3 different kind of approach to --

4 MR. DIGNAN: Now understand my question. I am not
5 arguing the principle -- that's gone -- that all human
6 behavior is out. You have made clear that the Board's
7 rulings were intended to only let back in the human -- not
8 let back in -- to let in only the human behavior issues that
9 have not been litigated. That, I understand.

10 The point I am arguing is does this pleading raise
11 that issue, and I don't think a fair reading of it does. I
12 do not quarrel with the principle that the Board is picking
13 and choosing very deliberately here. I quarrel with the
14 fact that's the assertion that basis O raises it. I don't
15 think that's a fair reading of basis O.

16 Basis O, fairly read, is a contention that the
17 police officers are not trained, whatever, capable of doing
18 what an officer ought to do. It does not raise the question
19 of whether they will be obeyed.

20 MR. TRAFICONTE: Your Honor, if I could just be
21 heard one last time on that.

22 I really think that's reaching. The clear
23 language is that the ETES are based on the unrealistic
24 assumption that the ORO traffic guides, who are not
25 professional traffic handler, will be able to move the

1 traffic. And that language -- would it be relevant evidence
2 in support of that contention that they are unarmed,
3 ununiformed, nonprofessionals?

4 Clearly it would be evidence. That would be part
5 of the showing that because they are not --

6 JUDGE SMITH: It seems to me we -- I remember in
7 that long hearing up in New Hampshire the suggestion that a
8 traffic guide without a gun isn't going to be able to
9 control traffic. I just see them shooting aberrant drivers,
10 you know.

11 (Laughter.)

12 JUDGE SMITH: I have that imagine in my mind. I
13 just have a memory that we talked about this. This has been
14 litigated.

15 But on the other hand, everything in the world has
16 been litigated in this proceeding, and I am no longer sure.

17 MR. TRAFICONTE: I don't think Mr. Dignan is
18 disputing the fact that the issue has not been litigated.

19 JUDGE SMITH: All right. I don't recall.

20 MR. TRAFICONTE: I think his --

21 MR. DIGNAN: I am disputing that it has been
22 litigated, but I am not disputing it out loud here, because
23 before I make that assertion I want to go back and check the
24 record on it. And the only argument I am capable of making
25 now is a pleader's argument.

1 MR. TRAFICONTE: Right. You don't think we said
2 it.

3 MR. DIGNAN: I don't think O can be read to say
4 what they now say it said.

5 MR. TRAFICONTE: Right.

6 JUDGE SMITH: Quickly, any more to say on it? We
7 are ready to consult.

8 Staff want to be heard?

9 MS. CHAN: No, Your Honor.

10 MR. HILL-WHILTON: Your Honor, may I be heard real
11 briefly?

12 Your Honors?

13 (Board confer.)

14 JUDGE SMITH: The Board, in a four-way split --

15 (Laughter.)

16 JUDGE SMITH: -- agrees that we have not litigated
17 and we do not foreclose from litigation in this proceeding
18 the issue of whether the public will react to a civil or a
19 nonuniformed, nonsworn traffic guide. That is appropriate.
20 That goes to the contention he's trying to find, that he
21 can't find.

22 MR. HILL-WHILTON: I have located one, Your Honor.

23 JUDGE SMITH: Oh, you did?

24 And it goes to your version of basis O. The board
25 is unanimous as to that aspect.

1 We are split. The two other members of the Board
2 says your basis O does not raise that issue, and I say that
3 a fair alternative reading would include it. Therefore,
4 your basis does not raise the issue.

5 MR. TRAFICONTE: Could we then hear from Mr. Scott
6 Hill-Whilton who may have found one that does fairly raise
7 it?

8 MR. HILL-WHILTON: I'm looking at the --

9 MR. DIGNAN: How many more players have I got in
10 the game here?

11 (Laughter.)

12 MR. HILL-WHILTON: The very bottom of the
13 Applicants' response, page 201, and then going into page
14 202, it states that, "In the improbable event," this is
15 dealing again with one of the routes. "In the improbable
16 event that Parker Street permits freedom of movement by the
17 bus, evacuees who otherwise might observe the traffic
18 guides' activity to discourage entry on to Parker Street
19 will likely disregard the cones and guides' direction."

20 Now that, as I mentioned before, does not
21 expressly raise the distinction between volunteer versus
22 professional.

23 MR. DIGNAN: Well, let's put that in context.

24 MR. HILL-WHILTON: Let me finish, please, let me
25 finish.

1 However, I think to say that it would only be
2 permissible to raise that issue if that precise distinction
3 was raised in the contention plainly seems to me to be a
4 requirement of pleading evidence at this stage.

5 MR. DIGNAN: Your Honor, I wish the Board would
6 read it in complete context. This is one of these long
7 bases that starts describing evacuation Route No. 4, up at
8 G, where it says G IV on page 201. And it starts the bus
9 out and runs them down in the evacuees.

10 And then it say B, meaning it will turn left
11 easterly, turns from Green Street to Parker Street are
12 discouraged, pointing to a place in the plan. "The bus
13 driver would thus be required to disregard traffic cones
14 located at the turn or be obstructed by the in-bound traffic
15 on Parker Street. In the improbable event that Parker
16 Streets permits freedom of movement by the bus, evacuees who
17 otherwise might observe the traffic guides' activity to
18 discourage entry on to Parker Street will likely disregard
19 the cones and guides' direction."

20 Now as I read that, the problem is they are saying
21 the physical makeup of that intersection is such that they
22 will disregard cones or guides or anybody else and do
23 something. Nobody is arguing about that.

24 The problem is I don't think that can fairly be
25 read to say that the reason for disregarding is going to be

1 because it's an uninformed guide and it's rather than a
2 police officer. It's, rather, an assertion that the
3 physical makeup of that intersection, as I understand it, is
4 one which will cause the person to disregard whatever is put
5 there, even a police officer, to discourage them from that
6 turn. And I don't think it's a fair reading to say it's
7 raised this issue any more than basis O of MAG 69, whatever
8 it was.

9 MR. HILL-WHILTON: Well, I respectfully have to
10 disagree with Mr. Dignan. There are other areas of the
11 contention that deal with that issue, and I would like to
12 take advantage of the Board's offer to allow me to locate
13 them during the break so I can draw them to the Board's
14 attention after the break.

15 JUDGE SMITH: Here is what I think would be a fair
16 test of whether you really mean that, this explanation of
17 what you intended by a contention, or talked about to
18 include, is address the point wherever it comes up.

19 I mean, there would not be a sudden aberration in
20 human behavior which at a particular traffic control point
21 would render civilian traffic guides ineffective as compared
22 to the same civilian traffic guide at another traffic
23 control point.

24 How many times do you talk about traffic control
25 points in your many, many scenarios here?

1 MR. HILL-WHILTON: I can't identify the precise
2 number --

3 JUDGE SMITH: Okay.

4 MR. HILL-WHILTON: -- at this point.

5 JUDGE SMITH: Well, come back to it after the
6 break.

7 MR. HILL-WHILTON: Thank you. I appreciate that.

8 JUDGE SMITH: For now does that conclude your
9 contentions?

10 MR. HILL-WHILTON: No, it does not. I do have
11 some more.

12 JUDGE SMITH: Okay.

13 MR. HILL-WHILTON: With regard to that same
14 contention, I had a request for a clarification regarding
15 that portion of the Board's order that would not permit
16 Newbury to litigate the other aspect of the New Hampshire
17 litigation which was travel reduction speed due to adverse
18 weather.

19 A portion of Contention 1 did I think pretty
20 expressly challenge the ETE, and I am not questioning or
21 contesting that we are not going to be permitted in this
22 proceeding to indeed relitigate something that happened
23 there. We did feel it had to be raised in this pleading
24 nevertheless, for the same reasons espoused by the Attorney
25 General yesterday.

1 My reason for a request for clarification is to
2 make sure that the portions of the contention which do not
3 address reductions, which do not address reductions are not
4 going to be similarly precluded. For example, the
5 contention in a couple of spots addresses or raises the
6 issue of not reduction of speed, but impassibility of
7 certain roads due to flooding, which are in flood plains and
8 are subject to periodic flooding.

9 The Board's order simply said that those issues
10 which relate to speed reduction would not be litigated. We
11 are not talking about speed reduction. We are talking about
12 an impassable roadway.

13 JUDGE SMITH: That is specific to the town, a
14 particular roadway that comes impassable.

15 MR. HILL-WHILTON: Yes.

16 JUDGE SMITH: And in other towns they have offered
17 such contentions, and where they have specified them we have
18 accepted it. In fact, in one instance we even gave them
19 leave to specify. I would think that ruling ought to cover
20 you.

21 But if you have -- if you have intertwined a town-
22 specific contention with a generic contention already
23 litigated, and they cannot be separated, then your town-
24 specific contention would fail. But if it's severable, that
25 has been our ruling. If you have identified a particular

1 road that becomes impassible because of flooding, I think
2 the same ruling we applied to other towns would apply to
3 you.

4 MR. HILL-WHILTON: In a similar vein --

5 JUDGE SMITH: We didn't say otherwise either.

6 MR. HILL-WHILTON: I know you didn't expressly --

7 JUDGE SMITH: What we are telling you -- what we
8 are telling you is that you gave us too much for our plate,
9 and you see what our rulings now. Now you have a job of
10 redoing it.

11 MR. HILL-WHILTON: And I have no problem redoing
12 it. I just want to make sure that I understand what the
13 Board's order is.

14 JUDGE SMITH: Sure, this is a good opportunity.

15 MR. HILL-WHILTON: Another question I have which I
16 think perhaps is a more difficult question does deal with
17 the issue of snow removal. The contention that we have
18 raised is not that the -- well, in part we did raise that
19 the evacuation time were unrealistically low because of snow
20 removal. I understand that's out.

21 However, we have also raised, I think squarely,
22 the issue of impassability of roadways due to snow. The
23 issue as we see it is not whether snowfall is going to cause
24 a reduction in travel speed. The issue as we see it is
25 whether the snow will be able to be removed at all during an

1 emergency evacuation, rendering those roadways impassable;
2 the same as with a flooding situation.

3 JUDGE SMITH: There were, you recall, two parts to
4 our ruling on snow removal. One part was there is an
5 assumption that snow will be removed in any event as it
6 normally is, consistent with the presumptions of the rule.

7 The other presumption -- the other consideration
8 is that the bases, and everybody seemed to have a contention
9 like this, assumed that there would be an evacuation ordered
10 when the roads are impassable because of snowfall, and we
11 couldn't see any basis for that. There was no basis that
12 pointed to it.

13 From what we know about emergency planning
14 generally from this case and other cases, we would assume
15 that the decisionmaker would not order an evacuation when an
16 evacuation is known to be impossible.

17 MR. HILL-WHILTON: The contention -- I think the
18 issue is not whether the evacuation would be ordered because
19 snowfall would render it impossible. The issue, as I see
20 it, is evacuation could be commenced during a period of
21 snowfall. Because of the evacuation snow removal becomes
22 impossible, rendering those roads impassable once the
23 evacuation has already commenced.

24 It really is very similar to the flooding issue.
25 We are saying --

1 MR. DIGNAN: I'll concede right now that if you
2 posit the case that an evacuation is ordered under a clear
3 blue sky, and the sky opens up and the blizzard of '78
4 occurs, there is going to be one hell of a problem, and
5 there is going to be one hell of a problem whether my people
6 are running the evacuation or the Commonwealth is or the
7 State of New Hampshire is.

8 And this is this thing of trying to go for the
9 maximum accident on a summer day followed with a snowfall.
10 I mean, you know, yes, I've admitted constantly you can
11 "what if" this case or any other to death. I can "what if"
12 a plant out on the plains of the Dakotas with no one around
13 it to death. I can give you the accident.

14 But, Judge, do we have to litigate this? What the
15 contentions, as I understood it were, were exactly what Your
16 Honor said, two types of contentions. And one we met with
17 the argument that the towns would remove snow as they
18 normally do, and the other one was met that there is no
19 basis for saying we would start throwing people out onto the
20 street in the middle of a snowstorm.

21 Now if what we have got to do now is litigate -- I
22 admit, I will stipulate with you we've got a problem if the
23 skies open in the middle of the evacuation and fill up and
24 the blizzard of '78 occurs. I'll stipulate it. You can put
25 that finding in, and I'll tell the judge to make it.

1 JUDGE SMITH: Let's take this thing all the way
2 through. There is an evacuation ordered based upon whatever
3 factors the decisionmaker uses, an evacuation starts, comes
4 a big snowfall, evacuation cannot be completed for -- your
5 scenario goes on, for some reason snow removal can't get in
6 it. Why is that? Because cars are on the roads, and they
7 can't get in?

8 MR. HILL-WHILTON: That, and just the inadequate
9 ability of the town --

10 JUDGE SMITH: Okay.

11 MR. HILL-WHILTON: -- under those circumstances to
12 be able to remove the snow.

13 JUDGE SMITH: And this town is somehow different
14 than other towns?

15 MR. HILL-WHILTON: No, the town is no different
16 than the other towns.

17 JUDGE SMITH: Okay. So this town can't get in and
18 remove the snow, and therefore the evacuation stops. And
19 then what do we do? Where do we go from there?

20 MR. HILL-WHILTON: And there is nothing in the
21 plan to identify any type of contingency measure in the
22 event of the impassability of roads for that reason.

23 MR. DIGNAN: And there is no contingency measure
24 for Your Honor if on the possibility that two airplanes are
25 going to crash into the middle of town while the evacuation

1 is going on. We haven't got that contingency covered
2 either, I agree.

3 MR. HILL-WHILTON: I would just like to make one
4 further point.

5 And I can appreciate Mr. Dignan's desire to get
6 this matter litigated. The town wishes to get this matter
7 litigated also but --

8 JUDGE SMITH: You don't want him to interfere with
9 your arguments, right?

10 MR. HILL-WHILTON: I don't want him to interfere
11 with my arguments, and also I would just simply like to
12 point out to the Board, and maybe remind Mr. Dignan that the
13 town of Newbury for a substantial period of time attempted
14 to devise an evacuation plan, genuinely made efforts in
15 cooperation with the Applicant to devise an evacuation plan.
16 And only after significant efforts by its elected officials,
17 by appointed officials, by citizen volunteers determined
18 after that effort that it was not going to be able to
19 adequately, no matter what the plan was, adequately, in the
20 opinion of those people, protect the citizens of that
21 community.

22 I can appreciate Mr. Dignan's frustration that
23 this matter has not been resolved, but I hope that the Board
24 keeps in mind the fact that the Town of Newbury and its
25 officials are concerned about the health and the safety of

1 thousands of its citizens, and tens of thousands of people
2 who routinely visit that community. And that's why we are
3 here. We are not here in any respect to interfere with the
4 licensing process. And that statement was made yesterday in
5 regard to the City of Haverhill; that Haverhill apparently
6 wanted to get in to interfere.

7 Well, that's not what we are trying to do. We are
8 trying to protect the health and safety of our inhabitants,
9 our children, our elderly and everyone else that's there.
10 So I hope that our participation in this is not viewed as
11 interference with this process.

12 MR. DIGNAN: Well, Your Honor, I will accept that
13 statement, but if I might inquire of my brother, who was
14 apparently upset at my remarks, what does the Town of
15 Newbury plan to do when a chlorine truck turns over, breaks
16 open in the middle of the snowfall? Because I assume you
17 are going to do something there.

18 But for some reason the Town of Newbury finds it
19 impossible to do any planning for a nuclear accident. And I
20 must admit a little cynicism as to whether the only motives
21 of the town are those of protecting children and families
22 when they apparently happily sit there with a road that
23 conceivable a chlorine truck could go down tomorrow, burst
24 open in the middle of a rainstorm.

25 JUDGE SMITH: Let's back off. We see that your

1 contentions, very carefully detailed and a lot of work went
2 into them, description of how you see the problem, although
3 they created a problem for the Board, that is not your
4 fault. You gave a lot of information, detailed information
5 as to the town's concerns, and you should not be criticized
6 for it. nor are you being criticized.

7 With respect to your snowfall removal contention,
8 I think you have made your point. Your basic point is that
9 the plan is deficient unless it addresses this scenario and
10 the one you have just described, a snowfall after evacuation
11 begins, and there is no provision in the plan for whatever
12 has to be done. That's it, and we will just take it under
13 advisement.

14 I cannot see how your problem differs from any
15 other town in any other emergency planning zone, in any
16 other part of the whole country in the snow belt. I just
17 don't see how it is. But --

18 MR. HILL-WHILTON: We have raised --

19 JUDGE SMITH: -- I don't know if emergency plans
20 have to address it or not. We will just take it under
21 advisement.

22 MR. HILL-WHILTON: I think also in respect to West
23 Newbury, counsel is going to be addressing that issue also,
24 and I would just like to incorporate her statements.

25 Moving on, regarding Contention 4, the regulation

1 as I understand it requires a plan to project traffic
2 capacities of evacuation routes under emergency conditions.
3 This plan for inland Newbury, excluding -- the plan says
4 inland Newbury, I assume that means excluding the Plum
5 Island portion of Newbury -- does not identify at all inland
6 evacuation routes.

7 The Board's order appears, to my reading, to be
8 based on the perceived allegation that the contention merely
9 alleges that subsidiary evacuation routes must be
10 identified. That's not what the intent certainly, and I
11 don't think the words of the contention raised. We are
12 saying that the route identified, or that the plan
13 identifies no evacuation routes for inland Newbury.

14 JUDGE SMITH: Would you just simply repeat your
15 argument?

16 MR. HILL-WHILTON: The evacuation plan does not
17 identify any inland evacuation routes, and I believe that's
18 required. The Board's order addresses -- it uses the words
19 "failure to identify subsidiary evacuation routes". Now I
20 wasn't --

21 JUDGE SMITH: Your contention is there are major
22 evacuation routes that should be taken into account.

23 MR. HILL-WHILTON: My contention is that the plan
24 fails to identify -- right, it should identify evacuation
25 routes for inland Newbury. It does for Plum Island, but not

1 for inland Newbury.

2 JUDGE SMITH: Would you address the argument about
3 subsidiary and primary?

4 MR. HILL-WHILTON: I don't know what the argument
5 about primary versus subsidiary is. I certainly feel that
6 at a minimum primary routes are supposed to be identified.
7 I guess, frankly, I'm not sure what the argument is about
8 primary versus subsidiary.

9 (Pause.)

10 JUDGE SMITH: My difficulty with your basis is
11 that going from the first sentence where the plan fails to
12 identify evacuation routes at all to therefore failing to
13 project traffic capabilities is a strained relationship. So
14 we put the emphasis on traffic capabilities rather than the
15 failure to identify anything.

16 MR. HILL-WHILTON: Well, I think and --

17 JUDGE SMITH: We read it that you have the plan
18 come in here and take all the roads that would be used and
19 analyze the capabilities of them, and you are now saying
20 that is a misreading of the contention. That simply there
21 have been no evacuation routes identified for inland
22 Newbury, and that is a deficiency.

23 MR. HILL-WHILTON: Well, yes, and I'm saying that
24 the traffic capabilities are insufficient, because the
25 routes themselves are identified.

1 JUDGE SMITH: That's where I slip off. That's
2 where I slip off.

3 JUDGE LINENBERGER: I respectfully point you, Mr.
4 Hill-Whilton to a statement in your basis that says, "The
5 inland routes are not identified except in the vaguest of
6 terms," as though indeed there are covered somehow. But,
7 you see, you made it -- you imposed a mind reading
8 requirement on us here to try to determine what was
9 inadequate about those vaguest of terms, which gift we don't
10 have.

11 MR. HILL-WHILTON: And I know that the Board is
12 not familiar with the plan. There is no route identified
13 for inland Newbury.

14 JUDGE SMITH: What do you say, Mr. Dignan?

15 MR. DIGNAN: Well, the argument I gave was that
16 there is no regulatory basis requiring these routes to the
17 trunk routes. And if I could bring the Board back to --

18 JUDGE SMITH: Of course, we don't know if there
19 are trunk routes --

20 MR. DIGNAN: Hang on. I think it will become
21 clear, because what I did is reference back to how I dealt
22 with their J-2 under Contention, I think it is 1.

23 On page 203 of my response to contentions, if Your
24 Honor has that version, and there they had a basis that we
25 thought out where they said, "The SPMC provides that all

1 inland evacuees should take the most convenient road to
2 Route 1 or I-95 South. No routes or alternative routes are
3 identified or suggested. Traffic on any route will be
4 likely to be congested so that no convenient route will
5 exist. Drivers are expected to choose the best route."

6 Now, yes, what that comes down to is this. One
7 anticipates that if public information is handed to a
8 resident of my town of Sudbury and it says, go to Route 20
9 and turn east, we assume in the real world that most people
10 who live in Sudbury know where Route 20 is, because it
11 happens to be a four-lane road that runs through the middle
12 of town.

13 And to be sure, the plan at some point, short of
14 each individual's driveway, stops short of delineating
15 routes.

16 JUDGE SMITH: That was our understanding, and that
17 was the basis upon which we rejected it to begin with.

18 MR. DIGNAN: That's right.

19 JUDGE SMITH: But we don't know anything about
20 your town, or the plan in that respect. And he is now
21 representing that such a thing is needed, and we don't know.

22 MR. HILL-WHILTON: I would also just --

23 JUDGE SMITH: I suspect that it is not.

24 MR. DIGNAN: It wasn't represented all that
25 clearly in the --

1 (Simultaneous conversation.)

2 JUDGE SMITH: -- and I suspect that it is not, but
3 that is going into the merits. I suspect that every last
4 citizen of your town knows exactly how to get to the major
5 evacuation routes.

6 MR. HILL-WHILTON: I don't dispute that.

7 JUDGE SMITH: And that is prejudging.

8 MR. HILL-WHILTON: I don't dispute that at all.
9 Our main issue is the fact -- the plain simple fact that
10 many people who are not familiar with our town comes into
11 Newbury. We have a tremendous number of transients in that
12 town.

13 JUDGE SMITH: And they got there and they don't
14 know how to get back out.

15 MR. DIGNAN: They came on I-95.

16 MR. HILL-WHILTON: I'm not saying they are not
17 going to know how to get out. But I am saying that this
18 plan calls for certain roads to be utilized. Those are the
19 main roads. Those roads are going to be tied up. The
20 transients are not going to be familiar with how else they
21 are going to be able to get out.

22 The plan says take the most convenient route.
23 People that live there will know, well, if this street is
24 blocked off, I can go this way. People who are transients
25 are not going to know that.

1 JUDGE SMITH: All right, tell me is there a
2 situation particular to your town that creates a different
3 problem in that respect?

4 MR. HILL-WHILTON: Compared to what?

5 JUDGE SMITH: Would you address Mr. Dignan's point
6 that your transient may be on a residential street? Is it
7 your argument that every residential street then has to be
8 identified as to direction and access to the main routes?

9 MR. HILL-WHILTON: I think that the main
10 routes --

11 MR. DIGNAN: And one of the point --

12 MR. HILL-WHILTON: Excuse me, Mr. Dignan.
13 I think that the routes themselves should be
14 identified.

15 JUDGE SMITH: Which routes?

16 MR. HILL-WHILTON: And that's what I am saying,
17 and they are not.

18 JUDGE SMITH: Which ones?

19 MR. HILL-WHILTON: I don't know which ones.

20 MR. DIGNAN: Your Honor, if I --

21 JUDGE SMITH: Well, you know the town. You know
22 how to get out of the town. How do you get out of the town?
23 Which egresses are not identified?

24 MR. DIGNAN: But more importa . . . Your Honor --

25 JUDGE SMITH: Let him answer the question.

1 MR. HILL-WHILTON: I think the issues is none of
2 them are identified. That's what I am saying. There is
3 no --

4 JUDGE SMITH: How big is your town in square
5 miles?

6 MR. HILL-WHILTON: I would have to really guess.

7 JUDGE SMITH: How many people are there?

8 MR. HILL-WHILTON: I believe there are about 4,000
9 permanent residents, and I believe that in the summer --

10 JUDGE SMITH: So it's a town that is big enough to
11 accommodate 4,000 permanent residents.

12 MR. HILL-WHILTON: I believe so, but I am not
13 positive of that figure.

14 JUDGE SMITH: Well, about that, five, three,
15 something like that.

16 MR. HILL-WHILTON: In that range. The transient
17 population brings that up frequently to about 10 to 15,000.

18 JUDGE SMITH: And so I assume that it's a town
19 that typically would be large enough to have 4,000 permanent
20 residents in it.

21 MR. HILL-WHILTON: Yes.

22 JUDGE SMITH: And you are saying that part of the
23 town has egress routes marked, but another part of the town
24 does not.

25 MR. HILL-WHILTON: Correct.

1 JUDGE SMITH: And you are saying that the plan is
2 defective in that respect.

3 MR. HILL-WHILTON: That's correct.

4 JUDGE SMITH: All right, we will take your
5 argument under advisement.

6 MR. HILL-WHILTON: With regard to Contention 9,
7 which was the town's contention dealing with sheltering.

8 MS. CHAN: Your Honor.

9 JUDGE SMITH: Just a moment.

10 MS. CHAN: Your Honor, before leaving this
11 contention, I want to point out that Mr. Hill-Whilton
12 presumes -- he says that transients won't know the way out
13 of town because they are not familiar with the streets.

14 But the Staff would posit that that presumes that
15 the transients are going to read this plan to determine how
16 to leave town which is not a very logical presumption in our
17 mind.

18 JUDGE SMITH: Okay.

19 MR. HILL-WHILTON: Contention 9 was rejected by
20 the Board --

21 JUDGE SMITH: See, now the pattern is not for you
22 to point out a mistake or clarification. You are simply
23 rearguing the contentions so far, but continue. I want you
24 to --

25 MR. HILL-WHILTON: Appreciate that. Thank you,

1 Your Honor.

2 JUDGE SMITH: Yes.

3 MR. HILL-WHILTON: The Board's decision with
4 regard to Contention 9, which dealt with sheltering, was to
5 reject the contention in part because of draftsmanship and
6 in part because it was covered, sheltering was covered in
7 the New Hampshire litigation.

8 Again, I did not participate in that, but my
9 understanding is that the sheltering capacity of Newbury,
10 and indeed Massachusetts, was not covered in the New
11 Hampshire litigation. I am not quarreling with that portion
12 of the, or asking for clarification with regard to that
13 portion of the order that rejected the contention because of
14 the bases, but I am confused as to whether it actually was
15 litigated in New Hampshire.

16 JUDGE SMITH: Did you make that point in your
17 reply?

18 MR. HILL-WHILTON: I believe I did. I believe I
19 said it was not litigated -- that it was not litigated in
20 New Hampshire.

21 JUDGE SMITH: I beg your pardon?

22 MR. HILL-WHILTON: I believe I did say in the
23 reply it was not litigated in New Hampshire.

24 JUDGE SMITH: And I think we probably read your
25 reply. I'll have to get it out and see.

1 Now, are you -- are you simply rearguing your
2 point or have we made a -- is there a fundamental mistake in
3 fact here?

4 MR. HILL-WHILTON: Well, I guess I'm not sure of
5 the distinction between fact and law.

6 JUDGE SMITH: Okay. But I'll try to answer --

7 JUDGE SMITH: So you are just rearguing your
8 point.

9 MR. HILL-WHILTON: Well, I am trying to -- in
10 fairness, yes.

11 JUDGE SMITH: All right.

12 MR. HILL-WHILTON: What I am pointing out to the
13 Board is that the Board's decision said that the contention
14 was rejected in part because of the way in which it was
15 drafted, and in part because it dealt with an issue that was
16 litigated in New Hampshire. And that is where my confusion
17 arose, because I did not believe that sheltering was
18 litigated in New Hampshire, at least as far as Massachusetts
19 communities are concerned, and that's where my confusion
20 arose.

21 If it was, certainly I can't dispute that.

22 MR. DIGNAN: Your Honor, I think the confusion is
23 what the Board actually said is that the contention was
24 being rejected in part having been covered by prior
25 litigation.

1 Now the argument that was made to you by the
2 Applicant is the part -- the part that had been covered by
3 prior litigation was the fourth sentence of the basis, and
4 that was, "Moreover," and this is -- if you can look at my
5 reply on page 214-215 of my reply to contentions. That last
6 sentence said, "Moreover, the SPMC provides no basis for
7 dealing with the realistic possibility that the owners of
8 buildings normally open to the public will not allow their
9 buildings to be used as shelters, or that potential shelters
10 are constructed of materials which provide a sufficient
11 level of protection."

12 And I said that the part that was -- in my reply I
13 said the part that was previously litigated was the human
14 behavior question of whether or not people would open their
15 shelters. And that was squarely litigated up in the New
16 Hampshire proceeding.

17 My objection to the rest of it is it was without
18 regulatory basis. There simply is not requirement for the
19 study that my brother seeks to have us make. And I detailed
20 those things. And I understood the Board's ruling in part
21 to deal with that problem that we had squarely litigated, I
22 submit, the question whether people would open the shelter
23 or not.

24 MR. HILL-WHILTON: If that was litigated in New
25 Hampshire, I have no quarrel with that aspect. But the

1 bases also says that the plan provides no evaluation of the
2 sheltering capacity of Newbury or the number of public
3 buildings available for such use.

4 It strikes me that if there is no way to determine
5 what sheltering capacity is, then the decision to shelter
6 versus evacuate is an extremely difficult one.

7 MR. DIGNAN: But there is no requirement that a
8 plan have such capacity studies. There is just no
9 regulatory requirement for that. There was -- you will
10 recall there was one introduced in connection with certain
11 of the New Hampshire areas. The State of New Hampshire has
12 not adopted it, and it has been our position, and no one has
13 pointed me to a regulation or a reg guide or anything else
14 that says you have got to have such a study. We did it up
15 in New Hampshire for evidentiary and other reasons. But
16 there is no regulation that requires it.

17 MR. HILL-WHILTON: If I can respond. The plan, as
18 I understand it, says there are two options -- shelter or
19 evacuate.

20 Now if there is no way of knowing at all whether
21 sheltering in fact would provide any protection whatsoever
22 to the public, that seems to me to be no better than saying
23 we're going to shelter, and here is how we are going to
24 shelter. And if we can't do that, then we'll evacuate, but
25 have absolutely no plan for how to evacuate.

1 MR. DIGNAN: Your Honor will recall that what was
2 litigated up in New Hampshire was the issue, and as the
3 State of New Hampshire has done, and as the way these
4 decisions are made is that a conservative assumption is made
5 as to the shelter available. You don't go around and do a
6 thing and assume everybody is going to be able to get into a
7 cement block building. You assume frame houses is what's
8 going to be available to anyone.

9 JUDGE SMITH: Does the plan contain those
10 assumptions?

11 MR. DIGNAN: Now I want my technical people before
12 I answer.

13 (Pause.)

14 MR. DIGNAN: That's what I wanted to confirm.
15 It's the .9 rational that was litigated up in New Hampshire
16 that appears in this one. And the assumption is that a .9
17 is what will be available.

18 JUDGE SMITH: So if this is --

19 MR. DIGNAN: And that use of conservative is with
20 apologies to the technical members of the Board who often
21 catch me in which way do you mean conservative. But I think
22 it became quite clear in the record. The kind of
23 conservative that only .9 would be available when you made
24 the decision, and we are assuming that everybody had better
25 shelter.

1 JUDGE LINENBERGER: Correct me if I am wrong, sir,
2 but I think I hear you saying what you would like to see in
3 the plan rather than justifying with respect to some basis
4 of support an inadequacy in the plan. And there again we
5 have a problem with the way you have approached this.

6 MR. HILL-WHILTON: Well, to be perfectly frank, I
7 would love to see that in the plan.

8 JUDGE LINENBERGER: Sure.

9 MR. HILL-WHILTON: But if there is no obligation
10 for the Applicant to do that, there is no obligation. But
11 there is an obligation for the Applicant to have a range of
12 protective actions. One of those protective actions is
13 sheltering.

14 But I don't know how this Board could determine
15 that that one possible protective action is going to be
16 adequate. We are saying it is not going to be adequate. I
17 think that squarely raises the issues.

18 If it would help to redraft the contention, I
19 would be happy to.

20 JUDGE SMITH: No. What you are saying -- that's
21 not what you are saying. You say that it provides no
22 evaluation, is that what you said?

23 MR. HILL-WHILTON: Well, the contention also says,
24 Your Honor, that the SPMC fails to provide a reasonable
25 assurance that adequate protective measures can and will be

1 taken in the event of an emergency, and that it does not
2 provide reasonable assurance that sheltering is an adequate
3 protective measure for Seabrook, or provide adequate
4 criteria for the choice between sheltering, evacuation or
5 other protective measures.

6 JUDGE SMITH: All right.

7 (Board confer.)

8 JUDGE SMITH: We will take it under advisement.

9 MR. HILL-WHILTON: That's all I have, Your Honor.

10 JUDGE SMITH: Thank you.

11 All right, a 10-minute break.

12 (Whereupon, a recess was taken.)

13 JUDGE SMITH: The Town of West Newbury, Ms.

14 Mizner.

15 MS. MIZNER: Thank you, Your Honors.

16 I am requesting some clarification of the Board's
17 ruling on part of West Newbury Contention 4 which does
18 address the issue of snow removal, because it seems to me
19 that the Board's basis for rejecting the contention is
20 inconsistent with the meaning of the contention.

21 Now, the contention is based on the assumption
22 that the town will use its best efforts, but that using
23 those best efforts West Newbury will simply not have
24 adequate resources, equipment or personnel to remove snow in
25 a timely fashion if evacuation of the entire town is

1 required during or immediately after a major snowstorm.

2 And by major snowstorm, I mean the normal major
3 snowstorms that can be expected in this area of New England
4 every winter, and that routinely tie up traffic. I am not
5 talking about the blizzard of 1978 where no amount of
6 equipment would have been able to clear the roads.

7 What West Newbury is saying is that we do not
8 normally have any need to clear the entire town at the same
9 time, and that we do not simply have the equipment or the
10 resources to do that using whatever best efforts we can,
11 including the fact that West Newbury routinely employs
12 private contractors to assist in snow removal, and you
13 cannot assume that those people, who have no affiliation
14 with the town, would come into an area that has been ordered
15 evacuated.

16 Now, in addressing this contention, the Board
17 referred in its ruling to Mass AG And in that ruling,
18 the Board interpreted that contention to mean that the Board
19 must infer that an evacuation would interfere with normal
20 snow removal, and stated it could see no basis for assuming
21 that evacuation would be ordered if unremoved snow made that
22 protective action impractical.

23 And the Board also said it was not consistent,
24 that that contention was not consistent with the best
25 efforts presumption.

1 Now, West Newbury's contention is not that
2 evacuation would interfere with normal snow removal, but
3 whether normal -- whether snow removal could be accomplished
4 in time to make evacuation feasible if evacuation is the
5 protective action deemed to be the necessary response to a
6 particular emergency.

7 I don't think it's fair to say that you simply
8 wouldn't order evacuation if the town couldn't remove
9 snow, because it's like saying that you wouldn't order
10 evacuation if there weren't enough buses or enough emergency
11 vehicles to deal with the town population, because the plan
12 has to address the issue of the sufficiency of resources to
13 deal with a normal situation. And snowstorms in the winter
14 in New England is a normal situation.

15 And, further, the contention is predicated on the
16 town's using its best efforts, and the Board said in its
17 ruling on Mass. AG 30 that it wasn't consistent with those
18 best efforts.

19 So I would request some clarification of the
20 Board's position.

21 JUDGE SMITH: I think you are simply rearguing the
22 snow removal issue. There are several threads that follow
23 through all of them, and that is that -- all right, we will
24 assume that the towns will do what they normally do. The
25 fact that there is a radiological emergency will not prevent

1 them from doing what they will normally do. That's an
2 assumption we have to have.

3 The next is that implicit in all of these
4 contentions, and particularly yours, is that there has to be
5 some type of snow removal resources over and above normally
6 available to the towns because of the Seabrook plant. We
7 find no regulatory basis for that.

8 MS. MIZNER: Well, I believe that the regulatory
9 basis would be in part NUREG-0654 1(d), 1(c), that assumes
10 that local officials will have resources sufficient to
11 implement those portions of the utility offsite plan where
12 local response is necessary. And snow removal is one of
13 those areas where local response is necessary under the plan
14 because there is no provision for New Hampshire ORO to
15 remove any snow. And this assumption is simply improper in
16 this case because the local officials here do not have the
17 resources sufficient to implement that portion of the plan.

18 JUDGE SMITH: Do you remove snow in the winter?

19 MS. MIZNER: Excuse me?

20 JUDGE SMITH: Do you remove snow in the winter?

21 MS. MIZNER: Yes, we do, but what I am saying is
22 that we do not -- we are not faced with the situation of
23 having to remove snow in all areas of the town at the same
24 time as would be required to allow evacuation along all
25 these different routes. It takes sometimes days for West

1 Newbury to finish its snow removal, because the town simply
2 does not have the equipment to do all of the roads that
3 would be necessary to be done here at once.

4 JUDGE SMITH: Okay.

5 MS. MIZNER: So I think there is a regulatory
6 basis for it, and I would ask the Board to reconsider.

7 JUDGE SMITH: All of your arguments were taken
8 into account by the Board as we viewed all the scenarios
9 that the towns presented to us, even those which postulated
10 that the town would not exercise its best efforts. We
11 assumed that they would.

12 You have made no argument that we have not already
13 considered.

14 MS. MIZNER: Excuse me, I'm having trouble hearing
15 you.

16 JUDGE SMITH: You have made no argument that we
17 have not already considered.

18 MS. MIZNER: That's all I have.

19 JUDGE SMITH: Yes. We are up to West Newbury.

20 Mr. Graham, we are ready for you.

21 MR. GRAHAM: Yes, Your Honor, for Salisbury.

22 I have one, that's with respect to --

23 JUDGE SMITH: I wish you lawyers would move to the
24 town that you represent for the Board's convenience so that
25 we don't get confused.

1 (Laughter.)

2 JUDGE SMITH: So we don't get confused about when
3 you are addressing your client.

4 MR. GRAHAM: I am concerned with Salisbury's
5 Contention No. 9 which appears on page 46 of your order.
6 And I wanted clarification as to the Board's reasoning for
7 rejection. In the order you recite that the Staff states
8 that the Salisbury offers no reason for presuming the Gillis
9 Bridge will be open during the evacuation usage of Route 1,
10 and no basis for presuming that opening the bridge will have
11 an adverse impact on evacuation and require compensatory
12 measures.

13 Quite frankly, at the time of drafting this it
14 appeared to me as a matter of fact such that the Board could
15 even take judicial notice that this is a drawbridge. It's
16 one of two bridges east of Route 95 that crosses the Merimac
17 River that any boat, particularly sailboats in excess of a
18 certain height require that it be open for their passage to
19 move back and forth in the river basin. And that any
20 evacuation scenario would envision some treatment and some
21 evacuation effort with respect to boaters, if not in an
22 organized fashion, in an unorganized fashion, which would
23 employ the opening mechanism of the drawbridge. And it
24 would only seem natural to me that that would have some kind
25 of traffic impact, particularly where Route 1 is a

1 southbound route for certain portions of evacuating traffic
2 from Salisbury.

3 JUDGE LINENBERGER: Mr. Graham, is it your
4 position that boaters are not adequately provided for by the
5 plan, or is it your position that the normal comings and
6 goings of boaters will result in a bridge opening, which in
7 turn will result in traffic not being adequately provided
8 for? It's a little difficult for me to tell as you have --

9 MR. GRAHAM: You have allowed a separately stated
10 contention with respect to boaters being adequately dealt
11 with in the river basin area.

12 This is addressed to the impact upon vehicular
13 traffic caused by normal and perhaps enhanced and increased
14 traffic of boats proceeding under the bridge. I guess
15 fundamental is the consideration that as this is a navigable
16 waterway. It is commonly recognized that the boats enjoy
17 the first priority. When a boat approaches the bridge, the
18 bridge is to open for the boat. That being the normal state
19 of affairs, there is nothing addressed in the plan which
20 would suggest that arrangements would be made to change that
21 such that boating traffic wouldn't interfere with auto
22 traffic, and there is nothing compensatory in the plan with
23 respect to auto traffic being backed up substantially on
24 account of the drawbridge being opened for boats, be it
25 normal boat traffic or boat traffic increased due to boaters

1 getting to one side of the basis or another to get off their
2 boats, in their cars, and out of the area.

3 JUDGE SMITH: Mr. Dignan would have accepted a
4 reworded version of the plan -- I mean of the contention.

5 Ms. Chan, what do you have to say?

6 MS. CHAN: The Staff just assumed that the bridge
7 would open and close with its normal frequency, and that if
8 traffic flow were interrupted, that it would not be a
9 permanent condition, and the contention suggests by its
10 wording says substantially impeded by closure of the Gillis
11 Bridge for passage of boats.

12 JUDGE SMITH: Your position, if I could perhaps
13 argue it for you a little bit for you here, is to achieve
14 the best achievable evacuation times there should be some
15 recognition of the increased road traffic and some provision
16 made to account for that.

17 MR. GRAHAM: With respect to --

18 JUDGE SMITH: That perhaps when a 17-foot sloop
19 comes up the river, they might make him wait a little bit
20 longer in a radiological emergency as you normally would.

21 MR. GRAHAM: Well, I won't use the 17-foot
22 example, but I guess what I'm trying to arrive at is there
23 is nothing in the plan with respect to how do you handle
24 this potential conflict between boating traffic which would
25 cause the bridge to be opened and therefore hold up auto

1 traffic, and auto traffic. Do you change priorities that
2 are normally recognized in the river basin that has a 4 knot
3 tide, or what action do you take. And if you don't change
4 those priorities, what compensatory measures are in place in
5 recognition of them.

6 For instance, I believe it's Bus Route No. 6, I'm
7 not sure, which turns from Bridge Road on to Ferry Road in
8 Salisbury immediately before the bridge. Even a normal
9 backup of traffic on the bridge on a summer day, today, if
10 the bridge were opening now, I would be able to offer
11 substantial evidence that traffic would be backed up such
12 that that bus route would be impassable, albeit temporarily.

13 In any increased boating traffic, perhaps due to a
14 radiological emergency, that bus route could become
15 impassable for considerably longer periods of time.

16 JUDGE SMITH: All right.

17 (Board confer.)

18 MR. DIGNAN: Your Honor, could I inquire
19 respectfully if counsel asserting the contention would
20 accept my rewording? Because I am prepared to stick to my
21 word. reword it, I have no problem with the contention.

22 MR. GRAHAM: I would have to ask Mr. Dignan --

23 MR. DIGNAN: Page 225 of my document.

24 MR. GRAHAM: I wonder if you could briefly read it
25 to me.

1 MR. DIGNAN: Okay. I would have -- I suggested a
2 rewording like this. "SPMC has not adequately addressed the
3 problems that will occur during an evacuation in the event
4 that Gillis Bridge is closed to traffic in order to
5 facilitate the passage of boats."

6 JUDGE SMITH: We are going to give you license to
7 correct your language in the recommendation if you wish.

8 MR. DIGNAN: Did I blow it? I didn't use a past
9 tense where I should have?

10 JUDGE SMITH: Yes.

11 MR. DIGNAN: Thank you. I always like to think in
12 the future, Your Honor.

13 "SPMC has not adequately addressed," it should be
14 past tense, "the problems that will occur during an
15 evacuation in the event that Gillis Bridge is closed to
16 traffic in order to facilitate the passage of boats."

17 I can assure you there was no attempt to hook. If
18 I have left something out that you wanted, I was trying to
19 state it as broadly and get out all the detail, because my
20 people would be prepared to say, okay, here is Gillis
21 Bridge. What are we going to do with Gillis Bridge, and I
22 am willing to litigate it that broadly. We will take care
23 of Gillis Bridge.

24 MR. GRAHAM: The offer being made, I'm not going
25 to turn it down. I think that that would afford the town

1 the adequate range of evidentiary options that would bring
2 any issues regarding Gillis Bridge into play.

3 MR. DIGNAN: Well, as I say, I stand by the -- as
4 far as the Applicant is concerned, I stand by the assertion
5 I made. If it is reworded, the Applicant has no objection.

6 Now the Staff still has objection, which I guess
7 has to be resolved, but as long as it's reworded the
8 Applicant has no objection.

9 MS. CHAN: In the Staff's filing, Your Honors,
10 the --

11 JUDGE SMITH: Ms. Chan. Oh, I'm sorry, go ahead.

12 MS. CHAN: In the Staff's filing, the Staff stated
13 that there was no basis for the presumption that the opening
14 of the bridge would have any adverse affect on the
15 evacuation which will require compensatory measures.

16 In that respect the Staff pointed to the ETES, and
17 that unless the ETES were affected, that the issue was not a
18 problem because --

19 JUDGE SMITH: I think that the way we are viewing
20 it is that it is a factual allegation that the ETES would be
21 affected which makes it suitable for litigation, and that we
22 believe that it is appropriate to examine whether an
23 adjustment to the normal bridge opening and closing could
24 achieve greater dose savings by improving the evacuation
25 times.

1 MR. DIGNAN: I have a great difficulty if we are
2 letting it in on the basis that it's affecting an ETE.

3 JUDGE SMITH: Well, I don't understand how it
4 could get in any other way.

5 MR. DIGNAN: Well, if that be so, it shouldn't be
6 in. I had taken the contention as one is are you people
7 going to just let Gillis Bridge operate, or are you going to
8 have somebody down there, or some plan of how to deal with
9 Gillis Bridge.

10 But as soon as you say that it could affect the
11 ETE, then I think Ms. Chan's argument is right on the money,
12 because unless you state a basis that the normal operation
13 of that bridge will affect the ETE, which you remember is
14 the last person out of the area. In other words, the ETE
15 never deals with the question of particular individuals. It
16 may well mean when the bridge operates certain people will
17 stay in a queue that would otherwise already be moving. But
18 it doesn't affect the ETE until you state a basis --

19 JUDGE SMITH: All right, would you accept it if
20 we -- would you believe we are correct if we accept it that
21 there is a possibility by adjusting the normal opening and
22 closing of the bridge that significant dose savings could be
23 realized?

24 MR. DIGNAN: No, I would not accept it on that
25 basis. To me, what's critical is that the -- a plan has two

1 aspects, or the plan litigation. One is the grand issue as
2 you stated it, which I don't think this affects.

3 My thought, and the reason I reworded it is I
4 think it's a legitimate contention to say, you people have a
5 plan here and you say it's going to work, but I have noticed
6 you haven't got -- you aren't telling us in here what you
7 are doing about Gillis Bridge, which makes sense to me.

8 Here is a drawbridge. It opens up and a route
9 closes. What thought? How are you handling it?

10 JUDGE SMITH: Why handle it at all if there is no
11 objective?

12 MR. DIGNAN: The objective is is this something we
13 missed.

14 JUDGE SMITH: All right.

15 MR. DIGNAN: And should we have accounted for it.

16 JUDGE SMITH: Toward when?

17 MR. DIGNAN: Towards completing the evacuation, or
18 running the evacuation properly. And I don't know --

19 JUDGE SMITH: Properly is for what purpose.

20 MR. DIGNAN: To achieve dose savings.

21 JUDGE SMITH: All right.

22 MR. DIGNAN: Okay, well done.

23 (Laughter.)

24 MR. DIGNAN: But what I am getting back to, Your
25 Honor, is then I agree with Ms. Chan. If we are going to

1 take it as a broad issue --

2 MR. TRAFICONTE: Your Honor, can't he just respond
3 to the questions asked by the Board?

4 MR. DIGNAN: No, I like to argue just for fun.

5 (Laughter.)

6 MR. DIGNAN: And I'm doing okay.

7 JUDGE SMITH: We haven't enforced that.

8 MR. TRAFICONTE: I realize that.

9 JUDGE SMITH: But not reserve this of Board's
10 disclaimer, always reserving our right to.

11 MR. DIGNAN: The point is at that point I jumped
12 to the Staff argument which I think at that point it does
13 have -- should carry the day. There is no statement of the
14 nature that you have now stated for it. And I don't think
15 it should be included on that basis. I think it's not well
16 pleaded.

17 JUDGE SMITH: The Board is going to accept your
18 rewording of it.

19 MR. DIGNAN: Thank you.

20 MR. GRAHAM: That's all I have.

21 JUDGE SMITH: Does anybody else wish to be heard
22 now on the contentions?

23 MR. HILL-WHILTON: Just for clarification --

24 JUDGE SMITH: That's right, you were to come back
25 after the break.

1 MR. HILL-WHILTON: I was able to identify a couple
2 of areas in the time that was available. I certainly don't
3 mean to say these are the only area in the contention that
4 deals with disregarding traffic guides. But in looking at
5 the Applicants's response on page 194, the first paragraph,
6 it says, "The SPMC fails to address how traffic on Route 1A,
7 which does not heed the directions of the traffic guides,
8 and say continues south on Route 1A, will impact the
9 intersection of that street with Rolfes Lane." This dealt
10 with one of the evacuation routes.

11 Paragraph D in that same page, it notes that --

12 JUDGE SMITH: Well, you can just point out --

13 MR. HILL-WHILTON: Very well.

14 JUDGE SMITH: -- because we are not going to make
15 a ruling today. We are going to look at your arguments, the
16 transcript and your references.

17 MR. HILL-WHILTON: So that's another reference.

18 JUDGE SMITH: Unless you believe your reference
19 has to be explained.

20 MR. HILL-WHILTON: No, I don't.

21 JUDGE SMITH: Okay.

22 MR. HILL-WHILTON: And then on the very bottom of
23 page 101 to the top of page 102. Excuse me. 201 and 202.

24 JUDGE SMITH: And give the --

25 MR. HILL-WHILTON: It's paragraph B.

1 MR. DIGNAN: That's the one referenced earlier,
2 the same one?

3 MR. HILL-WHILTON: That is the same one I
4 referenced earlier.

5 JUDGE SMITH: Okay. Paragraph what?

6 MR. HILL-WHILTON: B, beginning at the very bottom
7 of page 201, the last two words.

8 JUDGE SMITH: 201, last -- oh, all right. It's
9 the same one, yes.

10 All right, anything further?

11 MR. DIGNAN: Your Honor, I would like to address
12 the other one that has been given to you for the first time,
13 and say I don't think a fair reading of that raises this
14 issue of uniform versus uniform. It just says there may be
15 traffic that disregards route guides, without reference to
16 the reason they disregard it. That's not the same thing as
17 pleading this issue of whether the civilian versus the
18 police officer is going to make a difference.

19 MR. HILL-WHILTON: I just briefly would say that's
20 a question of evidence.

21 JUDGE SMITH: Well, we are going to look at it and
22 see if this was a fair inference to be drawn from your bases
23 to begin with, or rather, this is in effect a revision on
24 it.

25 Ms. Chan.

1 MS. CHAN: Your Honor, the Staff would like to
2 point out an internal inconsistency in Mr. Scott Hill-
3 Whilton's desire to litigate the contention that drivers
4 will disregard nonuniformed traffic guides and then in other
5 parts of his proposed contention he wants to ask for more
6 guides to direct traffic.

7 JUDGE SMITH: He doesn't say that they are
8 useless. He says that they are inadequate.

9 MS. CHAN: I believe that he said that --
10 (Simultaneous conversation.)

11 MS. CHAN: He said that they are going to
12 disregard nonuniformed traffic guides. At least the example
13 he just pointed out, likely to disregard the cones and the
14 traffic guides' direction. If that's the basis of
15 litigating uniformed versus nonuniformed traffic guides,
16 then I don't see why he wants more guides at these other
17 locations.

18 JUDGE SMITH: Okay.

19 Mr. Flynn.

20 MR. FLYNN: Thank you, Your Honor.

21 I do have some questions about the meaning of the
22 ruling that the Board has made. My first question deals
23 with Massachusetts Attorney General Contention No. 14, and
24 your discussion of that appears on page 33 of Part I of your
25 order.

1 Your discussion deals with bases E and F, and the
2 Staff's recommendation that the contention be rejected, and
3 those bases consolidated with Massachusetts Attorney General
4 Contention 47.

5 Now, on page 34 you reject the Staff's contention
6 and accept the contention. But if we go to page 75 where
7 you have dealt with Contention 47, you say there -- I'm
8 sorry, I referred earlier to bases E and F. I really meant
9 to refer to C and D.

10 You say there that bases C and D are consolidated
11 with Massachusetts Contention 14, and that seems
12 inconsistent.

13 JUDGE SMITH: What was the last reference -- the
14 second --

15 MR. FLYNN: On page 75, the last sentence of the
16 disposition of MAG Contention 47.

17 (Board confer.)

18 JUDGE SMITH: The remedy I guess is to proceed
19 with consolidations, and do not take as binding any Board
20 ruling on it. I am having trouble grasping the
21 inconsistency and getting reoriented to the subject matter
22 other than telephone communication.

23 MR. FLYNN: I take it then that the effect of your
24 order is simply an organizational one that --

25 JUDGE SMITH: That's the way I see it.

1 MR. FLYNN: Okay, that answers my questions.

2 JUDGE SMITH: Does that satisfy it?

3 MR. FLYNN: Yes.

4 My next question deals with Massachusetts Attorney
5 General Contention 17, and the discussion of it.

6 JUDGE SMITH: How many do you have?

7 MR. FLYNN: Two more.

8 JUDGE SMITH: Okay.

9 MR. FLYNN: The discussion of it beginning on page
10 36. It's not clear to me what the issue is. The contention
11 talks about ORO activation of the EBS system being alien to
12 the purposes and design of the EBS. And I am not sure what
13 the substance of the admitted contention is.

14 Does the issue go to the content of the EBS
15 messages and the mechanism for approval of the content of
16 those messages, or does the -- is the issue the authority to
17 activate the system?

18 Is it a legal impediment issue, or does it go to
19 the next level of detail, namely, the content of the
20 messages?

21 MR. TRAFICONTE: I'm not sure I understand the
22 nature of this inquiry exactly.

23 JUDGE SMITH: Are you quarreling with the Board's
24 ruling --

25 MR. TRAFICONTE: Are you doing some informal

1 discovery or --

2 JUDGE SMITH: -- or the contention itself? Are
3 you asking the Board to -- my problem, Mr. Flynn, is that to
4 get reoriented to Contention 17, which is two and a half
5 single-spaced pages in Applicants' proposal, it's not
6 possible at this moment. You are going to be very specific
7 as to what ruling the Board has made that you think is an
8 error.

9 Now as to the contention itself, you didn't file
10 responses and replies.

11 MR. FLYNN: I'm not suggesting any error, Your
12 Honor.

13 JUDGE SMITH: To whom are you proposing the
14 question, propounding the question?

15 MR. FLYNN: Well, I think you have suggested to me
16 that I should address my question to the proponent of the
17 contention, and I would be glad to do that outside of the
18 hearing.

19 JUDGE SMITH: Because it's not going to be
20 possible for this Board member, at least, to get back on top
21 of this contention and all of its bases and sort them out in
22 time to deal with any additional rulings which I think you
23 are seeking.

24 MR. FLYNN: I will accept that advice.

25 My next question may fall in the same category,

1 but I will ask it and see where we go with it.

2 On page 98 Massachusetts Attorney General
3 Contention No. 75 deals with the issue of request for
4 federal assistance. And in the Board's discussion you
5 identify an issue, or in the middle of the page you say, "We
6 interpret the allegation to mean that it is not clear that
7 the respective federal agencies must under their federal
8 responsibilities respond under the FRERP."

9 And I am wondering if the issue that has been
10 admitted for litigation is what the statutes and regulations
11 say the agencies must do, or if the issue is the willingness
12 of the agencies to follow the requirements that are imposed
13 on them by the plan?

14 JUDGE SMITH: I thought that our ruling made it
15 pretty clear. We do accept a contention which brings into
16 question what the agencies are required under their
17 controlling federal responsibilities to do. We reject a
18 contention that suggested they would not do what they are
19 required to do.

20 MR. FLYNN: I think the area where I am confused
21 is we may find that the plan, the FRERP imposes voluntarily
22 assumed obligations on federal agencies; that they have
23 committed themselves to doing things which strictly speaking
24 they don't have to do.

25 Now is that -- is their willingness to carry out

1 those voluntarily assumed obligations at issue?

2 JUDGE SMITH: I don't know. That was not before
3 me when I wrote that.

4 MR. FLYNN: And if not --

5 JUDGE SMITH: I did not see it as being before us.

6 MR. FLYNN: Then I think my question has been
7 answered and I don't have any other questions.

8 JUDGE SMITH: But if we misread it, that's one
9 thing, but I read it as being -- confusing as to whether
10 they would do what their charter says that they should do,
11 or what is it that their charter says that they should do.
12 I read it as an either/or, not extra. But I don't know.

13 Does any of the participants in that debate have
14 any comments on it?

15 MR. TRAFICONTE: Well, I didn't see the -- only
16 until I read the order did I see the ambiguity.

17 MR. DIGNAN: And now you think you might have
18 another contention.

19 (Laughter.)

20 MR. TRAFICONTE: I'm not as creative and
21 inventive.

22 MR. DIGNAN: They took Flynn's law, and we're not
23 asking them to do anything voluntarily.

24 MR. TRAFICONTE: Just for the record, the quoted
25 portions of the Board's order on page 99, the portion in

1 quotes, "must respond to meet their statutory
2 responsibilities" is a quote taken from the contention, and
3 in turn, the contention is a quote taken from the plan.

4 So I wasn't trying to be ambiguous. I intended
5 just to track the language of the plan, and to put in issue
6 what the plan said about those federal responsibilities and
7 capacities; nothing more and nothing -- and for the record,
8 I want to emphasize this -- nothing less than what the plan
9 says.

10 JUDGE SMITH: I see no language that's been
11 pointed out to us today that the contention raised or the
12 plan raised any issue of what the federal agencies might do
13 over and above their responsibilities.

14 MR. TRAFICONTE: No.

15 JUDGE SMITH: I just didn't see that there, and I
16 don't believe that that contention --

17 MR. TRAFICONTE: Nor was it intended that they
18 would not fulfill their statutory obligation.

19 JUDGE SMITH: All right, so then we have given the
20 proper interpretation to the contention, I believe.

21 MR. FLYNN: That's helpful. Thank you.

22 JUDGE SMITH: Anybody else on the contentions?

23 MS. CHAN: Your Honor, I believe it's the Staff's
24 turn to request a clarification now.

25 On a number of proposed contentions that were

1 accepted pending further guidance from the Board at the
2 prehearing conference about resolving matters where there
3 was no genuine issue of fact, and I believe all these were
4 surrounding the factual issue of whether or not the SPMC
5 relies on local government officials or local resources.

6 JUDGE SMITH: Yes, thank you. I forgot to put
7 that as a specific point on the agenda.

8 MS. CHAN: And I have the three contentions that I
9 have identified where those issues were put on hold.

10 JUDGE SMITH: Exactly. That seems to be -- run a
11 thread through all the contentions, or many of the
12 contentions. It seems to be something that can be easily
13 resolved, and I would expect the parties to resolve it. I
14 mean, does it or doesn't it? I think that we can probably
15 expect a stipulation from the parties on that.

16 That's a good point, Ms. Chan.

17 MS. CHAN: The contentions are identified --

18 JUDGE SMITH: Do you want to identify those
19 contentions?

20 MS. CHAN: Were the Town of Newbury No. 11 on page
21 38; Town of Salisbury No. 23 on page 53; and the Town of
22 West Newbury No 17 on 58. I believe that's a comprehensive
23 list but when we go through --

24 MR. TRAFICONTE: It is not a comprehensive list,
25 Your Honor. And I think this is an important issue, and

1 would like to also add the ones that I know that the Mass AG
2 filed.

3 JUDGE SMITH: It is not --

4 MR. TRAFICONTE: If there is a point to that.

5 JUDGE SMITH: -- then go ahead.

6 MR. TRAFICONTE: Well, I --

7 JUDGE SMITH: I thought that there were more.

8 MR. TRAFICONTE: There are more.

9 MS. CHAN: These are ones from the towns.

10 MR. BROCK: Your Honor, for Amesbury, I know we
11 have raised that issue as well, and I will look and see, but
12 I am not sure that I can right now identify each contention
13 that raises that issue.

14 JUDGE SMITH: I think that the point is
15 understood.

16 MR. DIGNAN: The assertion of the Applicant is we
17 don't rely. We accept nonparticipation, and that's the way
18 we understand we drafted the plan. And all I can ask
19 everybody to do is read the plan and tell me, by letter or
20 something, where I am wrong. In other words, where in the
21 plan did we rely on some other official as opposed to doing
22 it ourselves, because certainly the philosophy, the
23 draftsmanship and the technical people who did this
24 absolutely assure me, and I have drilled them on this so
25 many times they are getting sick of it, there is no

1 assumption that there will be help from local officials. It
2 is assumed they will not participate.

3 We undertake to man the TCPs. We undertake to do
4 everything, and that's -- and that's the way we ran the
5 exercise and so forth. And I get a feeling that what
6 happened is people are thinking there must be other things
7 of government going on, and we're expecting town officials
8 are -- and, yes, we have admitted that. We expect the town
9 officials would plow roads in the case of a snowstorm. We
10 expect that police officers, if called because somebody is
11 killing somebody on a corner street, will react to that and
12 stop the killings. In other words, that the police
13 officers -- and that we expect the firemen will go about
14 their duties putting out fires. Yes, that we do expect.

15 But I honestly know of no place in the plan where
16 we assume that a town or local official will cooperate with
17 us in order to man it.

18 MR. TRAFICONTE: This may not be the point to take
19 this up, but if Mr. Dignan could harmonize --

20 MR. DIGNAN: If we could describe, yeah, what we
21 are relying on. Of course, we have got a mode in there that
22 says we'll just have our standby people help you out. We do
23 not rely on --

24 MR. TRAFICONTE: That has been, I think, our
25 collective problem. You have a mode in there that talks

1 about your plan being followed in Mode 1 with government,
2 local and state doing things.

3 MR. DIGNAN: Right. If the -- one of the modes of
4 operation is that we have got the equipment, we've got the
5 people and so forth. And in its wisdom the Commonwealth
6 says, look, what we want to do is send our own cops out
7 there but we need your help, we'll send the traffic guide,
8 you send the state police officer, and they will both be
9 there and our traffic guide can tell him what he ought to
10 do, if you elect it.

11 But if you do not elect, we are prepared to man
12 that traffic post ourselves with a thoroughly trained
13 traffic guide. That's the distinction I'm making.

14 And the contentions that we argued on this were
15 ones that said it was necessary, and we had to rely on a
16 local official to do something, and the plan was drafted on
17 the assumption that local officials would do nothing more
18 than they normally do. That is, firemen will go put out
19 fires just as they normally would; policemen will stop bank
20 robberies as they normally would; and people will plow snow
21 as they normally would. That's the theory.

22 And I am sure we can't resolve it today, but I
23 will ask each of you to just send me a letter, say, Dignan,
24 you're wrong. On this part of the plan you are relying on
25 this selectman doing that, or you are relying on this police

1 officer doing that. Because, honestly, I know of no place
2 in the plan where we do that.

3 MR. BROCK: Your Honor, if I can responds to that.
4 Section 2.2.1 in the plan, and I believe this is a quote,
5 "This section provides an outline of the organizations in
6 the Commonwealth of Massachusetts capable of providing
7 responsive actions following a radiological emergency at
8 Seabrook Station --

9 MR. DIGNAN: Exactly.

10 MR. BROCK: May I finish, Mr. Dignan?

11 MR. DIGNAN: Yes.

12 MR. BROCK: "As discussed previously, it is
13 assumed that these organizations will attempt to fulfill
14 their responsibilities to protect the public in an actual
15 emergency."

16 Now I read that as saying more than simply they
17 are going to perform normal functions.

18 MR. DIGNAN: Well, if you will look at that chart,
19 what we have done is paralleled our organization to the
20 Commonwealth, and we eventually get to the presumption,
21 which is that everybody will do what they can to protect the
22 citizenry. But the plan itself, the execution of the plan
23 itself is strictly by our people, and I -- you know, I can
24 understand people reading one section and saying, well, gee,
25 they must be doing something, but that is honestly the way

1 the people have drafted it. I will be glad to take a letter
2 from somebody and we'll fix it. We are not doing that.

3 Put the reason I made the argument I did is
4 because my people assure me -- I have been drilling them on
5 it. I have gone through this stuff with them. There is no
6 place where we assume, for instance, that Selectman X will
7 pick up a phone and do this.

8 JUDGE SMITH: The parties will have the choice of
9 either conforming their contentions to reflect the reality
10 of the plan, or what would be a substantial burden, it seems
11 to me, for everybody involved to respond to discovery
12 requests that would tend to flesh out the contentions.

E3

13 (Continued on next page.)

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1 JUDGE SMITH (Continuing): I think that probably
2 it is a very good idea on this particular point to come up
3 with a stipulation, or conform your contentions to precisely
4 take into account what Mr. Dignan has said, if you believe
5 him.

6 MR. TRAFICONTE: It's not a question of believing
7 him or disbelieving him, Your Honor. I take his comments to
8 be in the form of an admission.

9 But the problem I have is that the logic of the
10 plan in light of the delegation that is postulated in Mode
11 2.

12 I take Mr. Dignan at his word. My concern is --

13 MR. DIGNAN: We do rely on delegation.

14 MR. TRAFICONTE: Clearly you do. And in the event
15 that delegation either in its pure form where total
16 authority is given or some variant of that is held not to be
17 lawful, I would not at all be surprised to see the plan in
18 Mode 1 come back with a vengeance.

19 And Mode 1 is there. It clearly indicates that
20 the local governments and the state government may go out
21 into the field with its resources and do various things.

22 JUDGE SMITH: Okay. Then the contentions should
23 be held --

24 MR. TRAFICONTE: In our opinion, the contentions
25 should not at this point be developed because of the clear

1 statement that they are not relying on these resources, but
2 in the eventuality that Mode 2 is not lawful, and that the
3 delegation on which the plan is hinged can't take place, I
4 think the applicant is going to be coming back and saying
5 that the governments and the state have resources and that
6 they will be able to perform some functions and that they'll
7 use our plan as a set of emergency planning options.

8 And that is what we understood to be Mode 1.

9 So I would say that this issue could come back and
10 the issue of our resources collectively could be very much
11 with us.

12 JUDGE SMITH: Here is what is before the Board.
13 About six or so contentions say hey, the plan improperly
14 relies upon this and the Applicant says no it doesn't and so
15 does the Staff.

16 And over and over again, same thing. We're
17 saying, do a better job. The parties of this proceeding do
18 a better job, get together and formulate what the factual is
19 better than has been formulated now.

20 MR. TRAFICONTE: Well, we are going --

21 JUDGE SMITH: It's almost like yes it is, no it
22 isn't. 'tis, 'taint, 'tis.

23 MR. TRAFICONTE: Well, maybe --

24 JUDGE SMITH: That's a Board directive. I'm
25 saying that the contentions have not informed the Board as

1 to what -- neither the contentions nor the answers have
2 informed the Board as to what the issue before it is, and
3 that is one of the things that I believe needs refinement.

4 And I think it probably can be worked out, it
5 should be able to be worked out, not as a part of but at the
6 time of the contention consolidation process.

7 MS. WEISS: I think that is a good idea, Your
8 Honor. For my part, I just heard an interpretation of Mode
9 1 that was different than anything that I had understood
10 from reading the plan, and I do think we need to talk about
11 it.

12 JUDGE SMITH: Well, will you put that on your
13 agenda, and I think it should be worked out.

14 Anything further, Ms. Chan?

15 MS. CHAN: No, Your Honor.

16 JUDGE SMITH: Are we ready to go into the next
17 agenda item?

18 That is the housekeeping matters. I don't think
19 we need to spend much time on it.

20 I wanted to bring to the parties' attention that
21 the service list they are using seems to have grown and I am
22 in the process of working with the Docket and Service Branch
23 of the NRC in bringing the Board's service list back to slim
24 healthiness. It just grew and people asked to be put on it
25 and there are people on it now who really are not entitled

1 to be on the direct service list.

2 I wanted to invite the parties to seek a first
3 accommodation and a clarification as to whom they do have to
4 serve.

5 Everyone seems to hvae a slightly different
6 service list. You are serving people like, well, bless her
7 heart, Representative Devear. I mean, she doesn't need to
8 be served with all of these papers. And I'm inviting you to
9 slim down your service list.

10 MR. DIGNAN: Your Honor, I would like to put on
11 the record one strike we have made from our service list and
12 the reason why just so if there is any subsequent argument
13 about this later, not that I think anyone here would do it.

14 The Town of Brentwood we have been serving
15 regularly. Lately, everything we've served them with has
16 been sent back, after we've sent it out there, with the
17 statement to our messengers that they will accept nothing
18 nuclear.

19 I then wrote them a letter saying that unless and
20 until they told me different I was taking them off our
21 service list. I continued to get back everything I sent them
22 with no further response to my letter.

23 JUDGE SMITH: You can't even get --

24 MR. DIGNAN: Get them to say I want off. But so
25 they're off. Which I assume is their goal. But I want to

1 announce to the Board I've done this to protect the record
2 later in case somebody shows up from Brentwood to say
3 they've been shortchanged.

4 JUDGE SMITH: Do the parties perceive a problem?
5 Is it burdensome to follow what you have been following? No
6 one has complained. It's just that I saw that people were
7 doing more work really than I thought they have to.

8 MR. DIGNAN: I would love to cut our service list
9 down. We are serving a lot of people who are getting served
10 simply because they are Mayor of a town and so forth and so
11 on although they have a Town Council now involved in the
12 case, and I'd prefer just to make one service to each party.
13 I have a feeling some of this stuff is piling up in town
14 halls unread. And if we could have a general rule that we
15 would go back to the usual rule that the only people you
16 serve are the attorneys in the case, that would make my life
17 a lot easier.

18 JUDGE SMITH: I think that is a little bit too
19 severe.

20 MR. DIGNAN: How about Gordon J. Humphrey,
21 Senator. Can I get him off my list?

22 JUDGE SMITH: Well, he has to be.

23 MR. DIGNAN: I've got him twice, though. I have
24 to serve him once in Concord and once in Washington.

25 JUDGE SMITH: I don't think you have to do that.

1 We can either allow you to propose a revised
2 service list or we can on those inactive parties, we can
3 require, we can send them a mailing telling them we're doing
4 to drop them from the service list unless they indicate that
5 they have a reason for it. Or we can just arbitrarily drop
6 the inactive parties and announce a new service list.

7 I would say as a rule of thumb however that where
8 you have counsel and an active representative that one of
9 them, I think the rules only require you to serve the
10 counsel. But I think as a matter of courtesy, where you
11 have an active representative, that person should be served.

12 MR. DIGNAN: Your Honor, how about people like
13 Sandra Gravutis, who is the Chairman of the Board of
14 Selectmen in Kensington, and the Town of Exeter Town
15 Manager. I mean I assume they wanted the New Hampshire
16 stuff because it involved them, but now we're down in
17 Massachusetts, they aren't participating.

18 JUDGE SMITH: Maybe the approach is that the Board
19 send them a letter saying you should respond if you wish to
20 be on the service list with justification for it.

21 But I don't see any point in serving people who
22 have never come to the hearing, who have never proposed
23 findings, who have never done anything except whatever they
24 do with their mail.

25 MR. HUNTINGTON: In that vein, our office had a

1 conversation with the Attorney General's office of the State
2 of Main this week and they specifically asked that if this
3 issue came up that I request all the parties to make sure
4 that they are not excluded from the service list.

5 JUDGE SMITH: Do we need both the consumer
6 product, the consumer advocate in Main?

7 MR. HUNTINGTON: We only had one address for the
8 Attorney General's office in Main on our service list. I
9 didn't realize that maybe some --

10 MR. DIGNAN: Is Phil Aaron still the one to serve
11 in Maine?

12 MR. HUNTINGTON: Yes, he is.

13 MR. DIGNAN: Because there was a rumor that he was
14 no longer the one. That's who we have.

15 MR. HUNTINGTON: To my knowledge, he is still the
16 one. Maybe that should be clarified as well.

17 JUDGE SMITH: As the parties get together on your
18 negotiations, have an agreement with these active parties
19 that have been present here as to what their service
20 requirements are. To the parties that are not active, the
21 Board will take a -- submit to the Board the people you
22 nominate to leave off your service list and we will take a
23 look at it.

24 If you are confident that somebody should be left
25 off, you don't have to do that. If you are in doubt, submit

1 it to us. But certainly the active parties in this plan
2 must be served. The Attorney General of Maine must be, and
3 Senator Humphrey must be.

4 Senator Humphrey has a person in his Washington
5 office who is handling this matter for him and that's where
6 his service should be. Unless the Senator has requested
7 both. I don't know. If he has, if the Senator has
8 requested both, I think we better give deference to him.

9 MR. DIGNAN: Yes, we will. Your Honor, may I make
10 an inquiry? Have any of the Town Council not been served by
11 Ropes & Gray, or does any Town Council wish a name change or
12 a street change or anything else to make life more
13 convenient? I'd like to know it now.

14 JUDGE SMITH: May I suggest that all this stuff
15 can be at a work session? Because we're going to have the
16 issue of lead Intervenors, procedural Intervenors, all this
17 which would be a product of work sessions. Unless you want
18 it now for a particular reason.

19 Why don't you immediately after we adjourn all get
20 together and satisfy your service needs.

21 We'll leave it at this. If you are confident that
22 somebody is on your service list that should not be, that is
23 your responsibility. Drop them. If you are in doubt,
24 submit to the Board your doubts and we will make a ruling as
25 to whether a person has to be on or off.

1 Format of pleadings. We have requirements that
2 are not set out in the rules, in addition to the rules. On
3 the face page. On the face page of the pleading that you
4 submit we want to know who the pleader is and in this
5 proceeding, everyone has been pretty careful about that
6 requirement. Almost always you can see the pleader is the
7 Town of West Newbury, right off the bat. But we want the
8 date of the pleading on the face page. And the date of the
9 pleading should be, wherever practical, the same date as the
10 date that it is served.

11 The title should be limited to a very simple
12 descriptive title as to what the pleading is about.

13 Do not try to make a self-fulfilling request for
14 deadline extension. Do not ignore deadlines. Use the
15 telephone. You can call up any Board member and request an
16 extension. But do not let one pass.

17 It's not just a question of discipline, it is a
18 question of great aggravation to the parties who make an
19 assumption that they need not respond to a matter and find
20 later that that need has come up.

21 I think we're pretty clear there. To submit a
22 pleading past the deadline with a request that the deadline
23 be extended does not comply with our rule.

24 There is no place for the acceptance of delivery
25 of standard mail to the Board. You have to use the NRC Post

1 Office address to the licensing board.

2 Express Mail, however, and hand delivered mail,
3 can be submitted to our physical location of their offices
4 and the address I gave there. I've also given numbers for
5 facsimile transmission. A member of our staff has gathered
6 the facsimile numbers of those of you who have it.

7 If anybody has a facsimile number that you would
8 like for us to use and we hvae not gathered it from you,
9 well, submit it.

10 MR. DIGNAN: Your Honor, I have a question on B.
11 You say Express Mail or hand deliver the Board, three copies
12 to the Chairman. Do I understand then if Express Mail is
13 utilized we just simply send all three copies to you or
14 should we still also send a separate envelope to Judges
15 Linenberger and Harbour?

16 JUDGE SMITH: No. There's no need to do that. If
17 there's one envelope that comes in -- see, the reason that
18 people fell into the practice of separate envelopes is
19 because some boards have out of town members. Since we're
20 all in the same office, I see no need for the expense or the
21 nuisance of having three separate packages. I'm just
22 talking about money here.1

23 MR. DIGNAN: And when it's a regular mail filing,
24 should we follow that same rule?

25 JUDGE SMITH: No. Regular mail should serve the

1 Judges separately.

2 MR. DIGNAN: Three separate envelopes.

3 JUDGE SMITH: You received a memorandum to the
4 effect that there should be two copies of pleadings to our
5 panel. The panel has not put that to use and this Board
6 does not enforce it.

7 The telephone conferences. By experience we have
8 learned that speakerphones have a voice actuated pre-emption
9 mechanism which causes a lot of difficulty. And
10 speakerphones should be avoided wherever possible. The
11 Board has to use one because we're making usually the
12 verbatim transcript.

13 But try to avoid using speakerphones, even if it
14 means that your participants have to be on separate
15 extensions.

16 The telephone operator advises that you can set up
17 a telephone conference call with some parties only
18 listening. And that cuts down some of the potential for
19 confusion and disconnections.

20 If your participation is only to hear what is
21 going on, then become a passive participant, and otherwise
22 you would be an active participant.

23 It will not be possible to put all the towns and
24 all the intervenors on every telephone conference call. We
25 will entertain proposals for procedural intervenors that

1 they will be included. That will put whatever burden upon
2 that person to communicate to the other towns what is
3 happening. I propose that Mr. Brock, if the townpeople
4 don't mind, is very familiar with our procedures, that you
5 make him your representative on telephone conference calls.

6 Now, we use telephone conference calls instead of
7 dragging everybody down to Washington for procedural
8 matters. But they have to be workable, otherwise we can't
9 use them.

10 But it is not practical to get 10, 12 parties,
11 some of whom are represented by more than one person, on a
12 telephone conference call.

13 So if you want the Board to be using those, I'm
14 going to have to propose a way through a procedural lead
15 Intervenor to minimize the number of actual people on a
16 telephone conference call.

17 We have already discussed the electronic
18 submission of large documents. We put that to very good use
19 in the contentions. As maybe you could observe, we used
20 Ropes & Gray's word processing diskette to pick up the
21 contentions and we will be doing that in the future.
22 Without word for word comparison, we are accepting that
23 electronic submission as being accurate. And that was the
24 case here.

25 The parties are under a responsibility to make

1 sure that the electronic translation, through whatever,
2 avenue accurately reflects what they put into the pipeline
3 in the first instance.

4 If any of the parties wish to participate more
5 thoroughly in the electronic exchange of information in this
6 hearing, we do have the staff at the panel that can help you
7 do that.

8 Apparently, we still have not been able to work
9 out a useful way to go from the Attorney General's word
10 processing system to ours. It just hasn't worked out.

11 MR. TRAFICONTE: I was actually going to make an
12 inquiry.

13 Did the Board receive from us our contentions and
14 reply on a diskette?

15 JUDGE SMITH: Yes, but you could not -- all of the
16 codes are stripped, which makes it satisfactory for reading
17 but not satisfactory for accepting and duplicating.

18 We will still be using the same equipment. We're
19 going to change to WordPerfect, which is going to help us in
20 having a direct communication, but still is not going to
21 help your problem.

22 MR. DIGNAN: The Board's facility is going over to
23 WordPerfect?

24 JUDGE SMITH: This Board.

25 MR. DIGNAN: Yes.

1 JUDGE SMITH: Yes.

2 MR. TRAFICONTE: Did what we sent you do any good
3 in diskette? Would it not have mattered?

4 JUDGE SMITH: I think as it turned out right now
5 that it was a waste.

6 MR. TRAFICONTE: We didn't know that. I know that
7 we had sent it and I didn't follow up to see whether you had
8 gotten it.

9 JUDGE SMITH: We did receive it and our computer
10 expert can read what you sent but our word processing people
11 cannot put it to practical use yet. That could be a problem
12 of training on our part. But as it turned out, the issue
13 went away because Mr. Dignan submitted your contentions over
14 again in a useful form.

15 Any questions about that, these housekeeping
16 matters?

17 It is our purpose and desire to make your
18 participation in the proceeding as easy as we can. I mean,
19 as efficient and as unburdensome as possible, consistent
20 with the requirements of a full hearing.

21 If you have ideas on how we can do that, we will.
22 We don't want you to incur unnecessary expense or burden or
23 anything else.

24 So these housekeeping matters are important and
25 they are intended at least to accomplish those purposes. If

1 you have any better ideas, propose them.

2 Anything further on housekeeping?

3 (No response)

4 JUDGE SMITH: The next item is the agenda. And we
5 use as a point of departure -- I mean the schedule. And we
6 use as a point of departure the Applicant's motion with
7 respect to motion.

8 Not only is it a point of departure, but it has
9 departed my possession. I do not have it. I have the whole
10 package someplace.

11 (Pause)

12 JUDGE SMITH: We will get a memorandum and order
13 out on those matters that we took under advisement, the
14 reconsideration arguments we took under advisement, week
15 after next. The Board won't be available next week. We
16 will be on vacation. Those matters are so few that I see no
17 need to delay any of the next procedures pending those
18 rulings.

19 The Staff has agreed to be the Chairman of
20 contention organization and consolidation meetings.

21 I would like to have them schedule a date by which
22 the recommendations are submitted to the Board.

23 MR. DIGNAN: Your Honor, Mr. Traficonte and I have
24 been talking. And I want to confirm some things with him
25 and then we can probably do it.

1 The way we left it yesterday was that Mr.
2 Traficonte is going to assemble the Intervenor and town
3 participants and attempt to draft, as I understand it, a
4 list of the contentions reworded to reflect the Board
5 rulings that they believe to be in the case as of now.

6 Hopefully, this will be done in time for it to be
7 transmitted over to me Monday morning and we have set a
8 meeting at 2:00 O'clock in my office for Mr. Traficonte and
9 I and Ms. Chan and anyone else who wishes to attend. We
10 don't mean to exclude.

11 At that time, to the extent I disagree that
12 something that is on that list should be there in light of
13 the ruling, we hope to be able to simply thrash it out and
14 our goal is to present the Board with -- you're not going to
15 be there next week anyway so we'll probably take the benefit
16 of that week.

17 The first thing the following week will arrive a
18 signed document that indicates that there is agreement that
19 these are the contentions as worded that should be
20 litigated.

21 On the assumption that there will be some
22 differences of opinion, our proposal would be to submit
23 those to the Board. That is to say, a simple statement that
24 says it is the belief of the Intervenor that this issue is
25 in based on whatever, either a Board ruling or something

1 said in the transcript, and it is the belief of the
2 Applicant that this is excluded or should be reworded based
3 on that.

4 And the Board presumably then can advise us who is
5 correct and hopefully at that point we will have set the
6 contentions of the case and hopefully straight numerical
7 order, one to whatever, and hopefully grouped together in
8 some sort of order that makes some sense.

9 Now, that's my understanding of what we're going
10 to attempt to do. I want to be sure that John thinks I've
11 stated correctly my expectations here.

12 MR. TRAFICONTE: The only problem I have is the
13 last part about grouping. In the immediate present I
14 thought the Intervenors, in fact, this afternoon are going
15 to gather and go through all of our contentions and identify
16 what they are.

17 We weren't going to take on the burden. I thought
18 that was the staff's role to help us take on the burden of
19 grouping them according to --

20 MR. DIGNAN: I don't think you have to group. I
21 said what we would hopefully give the Board is something
22 grouped. And that would arise out of the subsequent
23 discussions. That was my thought.

24 JUDGE SMITH: The Staff and the Applicant have
25 proposed August 15 for the contentions on the exercise. I

1 understand that that is proposed by Intervenors in a joint
2 motion of July 13.

3 MR. DIGNAN: Your Honor, that date, when I
4 proposed it, was on an assumption, and perhaps we should
5 have some guidance from Mr. Flynn, that the preliminary
6 exercise report would be out August 1, which it isn't. But
7 I do understand it is on the way and maybe we could get a
8 date from Mr. Flynn and then I would indicate at least how I
9 would adjust that at least for my motion.

10 MR. FLYNN: Yes, Your Honor. I spoke with people
11 in the headquarters yesterday and was advised that the draft
12 exercise report was mailed from our office in Bothell,
13 Washington, and was being sent to Headquarters and to the
14 Applicant and to the other participants in the exercise.
15 And it should reach them by Monday at the latest. I would
16 hope it would reach them today or tomorrow. And I think
17 that was the event that the staff and the Applicant were
18 assuming would trigger the filing of contentions on the
19 exercise.

20 My only concern about that is that it should be
21 recognized by everyone that the report is a draft. It has
22 not yet received any review by FEMA Headquarters and it is
23 subject to change.

24 I don't want FEMA to be committed to positions
25 which are expressed in that draft report. I want the

1 maneuverability to be able to refine the report to make
2 additional comments or whatever may be appropriate and to
3 come into the hearing prepared to testify on the final
4 report and not the preliminary report.

5 But for the purposes of generating contentions I
6 think it makes sense to start from that preliminary report,
7 with the understanding that there may be changes.

8 I should also report to the Board and the parties
9 that in discussions with the NRC, FEMA has committed to the
10 production of a final report by September 2nd. Now, there
11 is one significant assumption in that schedule and that is
12 that the State of New Hampshire, the State of Maine and the
13 Applicant will respond within a week of receipt of the draft
14 report with any proposed changes in the plan which address
15 issues raised in the report. But as the schedule currently
16 stands we will have a final report to the NRC by September
17 2nd.

18 MR. TRAFICONTE: Could I just ask for a
19 clarification. Did you say you were going to send this to
20 the parties or just the participants in the exercise, and
21 that they'd receive it tomorrow?

22 MR. DIGNAN: My understanding is that the rules
23 are that they can only send it to participants. And I
24 assume as we get it I'm going to turn it around and send it
25 Federal Express to you.

1 MR. TRAFICONTE: We don't accept anything nuclear.

2 (Laughter)

3 MR. DIGNAN: I know that in this state.

(Laughter)

5 MR. DIGNAN: But in any event, my point is that
6 unfortunately you do have to go through that because my
7 understanding is the rules are they have to send it to us.
8 What our people are going to do is as soon as it comes
9 through the door, reproduce it, serve it Federal Express on
10 everybody.

11 MR. TRAFICONTE: I think it's just a procedural
12 example of why the draft is not the document that should
13 kick in the contention drafting, period. And in fact, I
14 think Mr. Flynn himself has just given us two or three good
15 reasons why we should wait until September 2nd when FEMA
16 produces a final that will not be changed that Headquarters
17 would have reviewed, and in fact their procedural rules
18 would permit them to serve on us directly, that we should
19 then have the obligation to prepare our contentions.

20 JUDGE SMITH: So what do you propose?

21 MR. TRAFICONTE: I heard him say September 2, so
22 the proposal would be -- and I think we've said this in our
23 filing of July 13, what we would propose is not stating a
24 number of days, some reasonable period of days. And I think
25 the Applicant had 30.

1 JUDGE SMITH: 14.

2 MR. TRAFICONTE: Applicant had 14. Some
3 reasonable period of days be set after the receipt or
4 service of the final draft report as of September 2,
5 thereabouts, in which to file the contentions on the
6 exercise.

7 MR. DIGNAN: Your Honor, if I could argue by
8 analogy on the safety side of a case, usually when you go
9 into the filing and you set the contentions, the only thing
10 that is out is the FSAR. FSAR gets amended from time to
11 time. It's never been the rule on the safety side for
12 example that the staff safety evaluation has to be out
13 before contentions are filed. I think the analogy is very
14 apt between -- indeed I think it is better than apt --
15 between a preliminary report and the final report of FEMA.
16 Indeed, by waiting for the preliminary report,
17 presumptively, is a better deal than one gets on filing
18 contentions on the technical side because you don't have any
19 government position normally other than the preliminary
20 environmental statement maybe out in the normal course. I
21 think the appropriate way to move this case is to take the
22 contentions filing date off that thing. If the final report
23 reveals something for the first time, obviously, there won't
24 be any trouble establishing a late filed contention.

25 I doubt that, since the final report will probably

1 show more resolution than the initial report, as a matter of
2 logic, the likelihood is the only thing the final report
3 will do is perhaps cut out some contentions that were made.
4 But I don't see any need to wait to start the ball rolling
5 on the exercise litigation until that final report.

6 The September date may sound attractive because
7 I'm already prepared to move my -- obviously to move my
8 August 15 date to accommodate the fact the preliminary
9 report got out. But the September 2nd date is subject to
10 the same vagaries the August 15 date was and it may not make
11 it.

12 I prefer we get this ball rolling off the
13 preliminary report and I think it is a perfectly legitimate
14 thing and as I say, by analogy to what happens on the safety
15 side I think it is the appropriate thing.

16 MR. BROCK: Your Honor, if I could say something
17 for Amesbury. I think Mr. Flynn has pointed out that this
18 preliminary report in no way is going to reflect FEMA's
19 final position, or may not. FEMA is reserving all options to
20 change it.

21 The Board has itself just expressed the view that
22 we want this proceeding to be done as efficiently as
23 possible.

24 We here are representing towns, as the Board
25 knows, with very limited budgets. To wade through a

1 preliminary report, prepare contentions on that and find out
2 down the road either we have to conduct substantial
3 modificatio s or throw out contentions wholesale, we don't
4 think is an efficient use of our time or resources which are
5 indeed limited.

6 I just make that point on behalf of Amesbury.

7 MR. FLYNN: As a point of clarification, Your
8 Honor, the largest difference will be, between the draft
9 report and the final report, will be reflection of the
10 changes that are submitted by the two states and by the
11 Applicant.

12 So Mr. Dignan is correct in that it is likely to
13 identify fewer issues rather than more.

14 (Judges confer oif the record)

15 JUDGE SMITH: The Board is beginning to measure
16 reasonable time from the filing of the draft, presumably on
17 the 8th, but we do not want the parties to submit
18 contentions subject to change after the final report so the
19 target date, the date for the filing of exercise contentions
20 is seven working days following the Express Mail service of
21 the final report, which would be, I believe, September 2nd.
22 You get the -- no Labor Day -- four days, which would be the
23 14th. That's the way, if it comes out.

24 MR. TRAFICONTE: Your Honor, we just, for the
25 record, don't think that seven working days is enough and

1 not only have we not seen the reports, so we're a little bit
2 in a vacuum, but we --

3 JUDGE SMITH: We know that may be, and there is
4 always an opportunity to file motion for extension. But the
5 problem is, I can tell you right now, Ms. Curran is going to
6 file a motion for extension. No matter what happens, she is
7 going to file a motion for an extension.

8 And these automatic motions for extension don't
9 help anybody. I mean, it is absolutely automatic on her
10 part.

11 MS. WEISS: I can assure you, Mr. Chairman, as
12 someone who works down the hallway from Ms. Curran, that she
13 doesn't file a motion for an extension unless she absolutely
14 needs it. She works harder than anybody that I know.

15 JUDGE SMITH: Ms. Weiss, you have misconstrued the
16 Board's -- you have -- you have been contentious. You may
17 file a motion for extension. It may or may not be
18 entertained. I am trying to help you. I recognize what Ms.
19 Curran has done in the practice is judicially observed. And
20 you are admonished. Next item.

21 (Pause)

22 JUDGE SMITH: Our rationale is that the final
23 report is expected to be an extension of the draft report.

24 (Pause)

25 JUDGE SMITH: Let's go on back to that point. We

1 try very, very hard to take into account the scheduling
2 problems brought to our attention by the Intervenors. You
3 have frequently fallen into the pattern of automatically
4 asking for impossible amounts of time, expecting a quotient
5 verdict, or that we will cut it back. It does not help us.
6 It does not help us in our deliberations as to what are
7 reasonable time limits. If you want your pleadings to have
8 persuasive effect, then have them be reasonable.

9 MR. TRAFICONTE: Your Honor, if I could just
10 address the point of reasonableness.

11 MR. DIGNAN: Could I just find out -- as I
12 understand the ruling of the date that has been proposed,
13 what the Board is saying is that the -- the assumptions the
14 Board is working on is the preliminary report will come out
15 as indicated -- or is out, if you will, and I will get it in
16 everybody's hands no later than hopefully Monday. But then
17 the contentions are not filed until seven days after the
18 final report in fact comes out.

19 JUDGE SMITH: Seven working days.

20 MR. DIGNAN: Seven working days --

21 (Simultaneous voices)

22 JUDGE SMITH: -- final report is served by Express
23 Mail.

24 MR. DIGNAN: Which I guess then the ball is in my
25 court as to whether I want to answer contentions.

1 JUDGE SMITH: Yes. Call it. Name it.

2 MR. DIGNAN: Can I have a moment to look at the
3 days of the week?

4 JUDGE SMITH: I think they should be sequential
5 now.

6 MR. DIGNAN: If I can't shorten anyone else up, I
7 may shorten myself up.

8 (Off the record conversation)

9 MR. DIGNAN: We will respond a week after the
10 filing date of the contentions assuming they are filed by
11 express mail. In other words, add seven days to whatever
12 date or tentatively September 21.

13 (Pause)

14 MR. TRAFICONTE: Your Honor, just to backtrack,
15 Mr. Dignan's pledged to Fed. Ex. the preliminary report to
16 us as soon as he receives it is still good.

17 MR. DIGNAN: Yes. If I could get your government
18 and mine to send it to you directly, I would. I can't.
19 What I'm going to do is the instruction my people have is as
20 soon as that comes in up at the site, which is I understand
21 where it has been mailed to, it will be immediately put into
22 reproduction either there or at Ropes & Gray, whichever has
23 the facilities available to do it fast, turned around and
24 sent out Federal Express to all the parties, the Board,
25 everybody on the service list.

1 JUDGE SMITH: What is this problem that FEMA can't
2 mail something to the Commonwealth. Is that true? You can,
3 can't you?

4 MR. FLYNN: Your Honor, it represents a distinct
5 departure from our usual practice of sending preliminary
6 reports to the participants for their comments and
7 responses.

8 JUDGE SMITH: You are going to provide one to the
9 Board?

10 MR. FLYNN: If directed to do so, yes, but you
11 see, I think it's moot because you will already have gotten
12 it from the Applicant by the time we could get it to you.
13 It's 400 pages.

14 JUDGE SMITH: Oh, 400 pages.

15 MR. TRAFICONTE: 400 pages. This goes back to the
16 point of reasonableness, which I didn't get a chance to
17 address because Mr. Dignan --

18 MR. DIGNAN: 400 pages to September 14th?

19 MR. TRAFICONTE: There are two items here that we
20 haven't had on the table yet. One, we now know it's a 400
21 page draft report. We didn't know that five minutes ago.
22 Two, it's going to go into substantial revision, maybe get
23 cut down, maybe eliminate some of the contentions, which it
24 seems to me, just from a procedural point of view, would be
25 another reason to wait.

1 And the other additional item is the controller
2 messages which have just, I believe in the last three days,
3 become available to us, of which there are eight volumes.

4 MR. DIGNAN: They have been available since July
5 15th. Nobody was so anxious to see them, nobody has come
6 to see them yet. Nobody has called up to ask to see them,
7 either.

8 MR. TRAFICONTE: They've been available for seven
9 days, then.

10 MR. DIGNAN: And nobody has asked to see them.

11 MR. TRAFICONTE: We have not been sitting on our
12 hands, Mr. Dignan.

13 MR. DIGNAN: I didn't say you had.

14 MR. TRAFICONTE: For the record, the letter came
15 to Mr. Fierce. Mr. Fierce was on vacation until this week.
16 But the short of it is, we got those controller messages
17 which we were not permitted as observers to see during the
18 exercise. So there's a body of material that is the heart
19 of contention drafting for the exercise and the adequacy of
20 the organizational response, which is seven or eight volumes
21 that has to be digested, a 400 page report which will then
22 be subsequently replaced with another report. And we're
23 talking about, today is August 4, and right now it looks
24 like we're going to be due to file that on September 14. I
25 personally don't think that is a reasonable amount of time.

1 And just for the record, I think that if the Board has
2 observed a repeated habit of asking for extensions --

3 JUDGE SMITH: Not, it's not the frequency of
4 extensions. It is a totally impractical stop the
5 proceeding, stop the proceeding, stop the proceeding. And
6 we never do it and we can't do it. And so therefore, your
7 recommendations are not useful.

8 Which means that you are not really getting your
9 voice in in a meaningful way in the scheduling, when you say
10 okay, stop the proceeding until further notice. It just
11 doesn't work.

12 MR. TRAFICONTE: But we are not requesting that
13 the proceeding get stopped.

14 JUDGE SMITH: Those recommendations do not help
15 the Board in arriving at a reasonable, fair schedule. They
16 tend to be disregarded.

17 MR. TRAFICONTE: Your Honor, we are trying to
18 represent our client.

19 JUDGE SMITH: I know. That was the context of my
20 remark before.

21 MR. TRAFICONTE: We are trying to represent our
22 clients as best we can.

23 In major part, in terms of scheduling --

24 JUDGE SMITH: Mr. Traficonte, there is no
25 suggestion from the Board that you are not trying to

1 represent client the best you can.

2 MR. TRAFICONTE: That is why we are asking for the
3 additional time that we are asking for. It is not to delay
4 the proceeding or stop the proceeding.

5 It is to provide the attorneys who are working
6 on --

7 JUDGE SMITH: I have stated that, that I have not
8 seen that in your approach.

9 MR. TRAFICONTE: Well, the point is that we are --

10 JUDGE SMITH: Tell us what you need, and why you
11 need it.

12 MR. DIGNAN: Your Honor, before that proceeds, if
13 I heard that remark, the earlier remarks about what they had
14 to go through, now I am getting penalized for doing
15 something I don't have to do.

16 They are saying they need time to go through what
17 is up in that room. I have no obligation to produce what is
18 up in that room beyond my voluntary willingne-- to do it.

19 There is no discovery before you set contentions.
20 But I said look, it will move things along, so I am making
21 that room available.

22 Now, the plea is going to be made apparently for
23 more time to do contentions, because I did something I did
24 not have to.

25 There have been complaints about the fact that

1 they didn't get to see everything they wanted in the
2 exercise. The Board has received those letters, I guess.

3 There again, the Board had ruled that there was no
4 obligation on my part of the State of New Hampshire to let
5 anybody observe the exercise.

6 We did it. We did what we could.

7 JUDGE SMITH: You did it not because you're just a
8 lovable fellow; you did it so that you could move the
9 proceedings along.

10 MR. DIGNAN: Just trying to move the proceeding
11 along. But now you see, when you do that, then a compliant
12 is raised that you did it and that is used as a vehicle for
13 more time.

14 Now, maybe it is going to be hard work to both go
15 through the report and go through the controller messages if
16 they want to.

17 But the requirement could have been that they file
18 contentions without ever even seeing the controller message.

19 MR. TRAFICONTE: That's right, Your Honor.

20 MR. DIGNAN: And they have to go through them.

21 MR. TRAFICONTE: Let me interrupt once, Mr.
22 Dignan, today.

23 The reality would have then been we would have
24 gotten the controller messages. Start with the basic
25 principle that we have a right to litigate the adequacy of

1 the exercise. That is a right. We have a substantive
2 procedural right to litigate the adequacy of the exercise.

3 At a point at which down the road we would have
4 gotten access to these documents, which we of course would
5 have, through discovery --

6 MR. DIGNAN: And could have since July 25th.

7 MR. TRAFICONTE: I've already responded to that
8 point.

9 At the point at which we would have gotten those
10 documents, the review of those documents may well have led
11 to what would then be termed a late filed contention.

12 So to cut short really would be a duplicative
13 contention filing process, Mr. Dignan, not out of the
14 kindness of his heart, but Mr. Dignan said well, here, this
15 is what it involves. We're not going to give you the
16 controller messages at the time of the exercise. And I
17 don't know why he didn't do that, but he didn't. We'll hold
18 those off for a period of weeks. Then we'll make them
19 available up in New Hampshire. They are eight volumes.

20 MR. DIGNAN: What do you mean, you don't know why
21 I did? Didn't your colleagues tell you the reason it was
22 given?

23 MR. TRAFICONTE: I have to say, I have been at
24 this a year, Mr. Dignan, but you are setting new limits, or
25 overstepping old limits, in terms of interrupting other

1 counsel.

2 MR. DIGNAN: You made a representation that I
3 didn't explain why I didn't do it. But I did.

4 JUDGE SMITH: Wait a minute. Round table
5 discussions have very often been useful.

6 MR. DIGNAN: I apologize.

7 JUDGE SMITH: However, when counsel requests
8 opportunity to argue uninterrupted, then you have to honor
9 the request.

10 MR. DIGNAN: I apologize, Your Honor.

11 MR. TRAFICONTE: The point is, I start with the
12 principle that we have a right to litigate it. I think the
13 Board should be cognizant of what, as lawyers, we feel is
14 obligatory for us to review. I'm looking at this very
15 primitively.

16 What we feel it would be necessary to review are
17 the seven volumes, seven or eight messages of controller
18 messages and the FEMA reports. That is the life of the
19 exercise.

20 Our observer status is not going to produce, to be
21 completely frank, the limited observer status we were
22 permitted it not going to produce one half of one
23 contention. So we are going to get whatever contentions we
24 have, which we have an obligation to our clients to generate
25 good, honest contentions, and we are going to get those from

1 the review of that material.

2 And that is a lot of material. And I am looking
3 at -- you now said the schedule essentially is September 14.
4 And I, for the record, what to indicate that I don't view
5 that as a reasonable time.

6 I understand the Board is trying to come up with a
7 reasonable time. We don't think, at least the Attorney
8 General, I don't know if the other Intervenors agree.

9 (Pause, off the record conversation)

10 MR. SCINTO: Your Honor, on behalf of the Staff, I
11 just want to indicate, we think the Board's allotment of
12 time is generous.

13 MR. TRAFICONTE: Does Mr. Scinto take into
14 consideration what else has been going on in this case and
15 what other filings are due on the same Intervenors in the
16 interim?

17 MR. SCINTO: Mr. Scinto is aware of that,
18 regularly, every day, as I put through our attorneys through
19 the ropes to get the stuff out on the same time periods.

20 JUDGE SMITH: The Board is going to extend it to
21 the 21st in recognition of the large amount of material
22 involved, and the previously unconsidered fact that the
23 period of time, the elapsed time involved, is traditionally
24 one where it is hard to find people work.

25 It's -- you need more time during the heaviest

1 vacation time of the year. It's not that the vacation plans
2 of the active participants would delay it but the people you
3 depend upon, and it's a time of year when it's hard to move
4 things along.

5 So we're going to set it the list. There's always
6 the right to move for extension. But our admonition to the
7 intervenors about reasoned, justified extension requests
8 should be considered carefully. They are intended -- it
9 was spoken in frustration, but it also was intended to try
10 to improve your voice and your input into the scheduling.

11 Sometimes we take into account, and it may not be
12 apparent to the parties, that we provide time, not just on
13 the arguments presented to us, but our ability to use the
14 information when submitted, our capacity to take it into our
15 process.

16 So we therefore give the maximum amount of time to
17 the parties in that we don't try to make them present work
18 and have it sit on our tables unread.

19 And then the contentions would be due, responses
20 would be due when?

21 MR. DIGNAN: The 28th.

22 JUDGE SMITH: And the Staff, when would you
23 request your responses?

24 MS. CHAN: The 3rd of October.

25 JUDGE SMITH: All right.

1 MR. TRAFICONTE: Your Honor, the motion on the
2 table has no provision for written reply. And having
3 researched that issue fairly recently, I now understand we
4 have a right to a reply.

5 JUDGE SMITH: Could you point that out?

6 MR. TRAFICONTE: Could I now, or have I?

7 JUDGE SMITH: I think that our rules are very
8 vague on it.

9 MR. TRAFICONTE: Let me restate what I meant.

10 We have a right under the case law for a reply.

11 JUDGE SMITH: You have a right to not have a
12 contention rejected on grounds that you have not had an
13 opportunity to redress.

14 MR. TRAFICONTE: We have a right not to have a
15 contention excluded --

16 JUDGE SMITH: For bases that you did not have an
17 opportunity --

18 MR. TRAFICONTE: -- opportunity to be heard on, on
19 that basis.

20 JUDGE SMITH: Yes.

21 MR. TRAFICONTE: That's right.

22 JUDGE SMITH: I agree with you.

23 MR. TRAFICONTE: And I think it is straightforward
24 that we either would have an oral right or a written right.

25 JUDGE SMITH: I think so.

1 MR. TRAFICONTE: Or both.

2 JUDGE SMITH: That isn't automatic, however, all
3 the time, because if you submit a fundamentally flawed
4 contention, it can't be revived to buy a reply.

5 MR. TRAFICONTE: In light of the context that
6 we're in I would imagine that in this case, contentions on
7 the exercise, we would need to schedule some form of reply.
8 That's my point.

9 And the motion that is on the table doesn't have
10 that point.

11 JUDGE SMITH: The Board will probably begin
12 drafting its efforts on contentions as soon as we receive
13 the Applicants' response; and we certainly will not issue it
14 until the Staff responds.

15 We'll provide another seven days for Intervenors'
16 reply.

17 MR. TRAFICONTE: From the date of the filing by
18 the Staff of its response, so it would be a reply to both
19 Staff and Applicant?

20 JUDGE SMITH: Seven days after October 3rd. If
21 that's a good day.

22 MR. TRAFICONTE: That's a Monday. Yes.

23 JUDGE SMITH: Then you just got another day,
24 because that's a holiday. So you get the 11th.

25 It may be that the Board will dispose with pre-

1 hearing conference on those contentions. It is probable.

2 MR. TRAFICONTE: Is the Board prepared to commit
3 itself to a date when it would issue an order on that?

4 JUDGE SMITH: On the contentions?

5 MR. TRAFICONTE: On the exercise contentions?

6 JUDGE SMITH: No, we can't. Because I never fully
7 appreciated the capacity of an Intervenor to generate
8 contentions before it was my pleasure to meet you, Mr.
9 Traficonte.

10 (Laughter)

11 MR. TRAFICONTE: I took that in the good spirit in
12 which it was offered.

13 MR. DIGNAN: I was more than one unit operating in
14 the generator's shop.

15 JUDGE SMITH: That is true.

16 JUDGE LINENBERGER: And Mr. Brock, also.

17 (Laughter)

18 JUDGE SMITH: I would ask that you try to forbear
19 from pleading the same issue multiply. If you believe that
20 the same issue has different applications, say so. If the
21 same factual issue has different applications, say so. But
22 to restate the same factual issues as one of the towns did,
23 the identical paragraph appeared about four or five times
24 under different contexts, it tends to befuddle us.

25 We wonder what is the difference between this

1 statement of an issue, as the earlier one. And it makes
2 your contentions a lot more readable if you make a statement
3 once and leave it go at that.

4 MR. TRAFICONTE: Your Honor, in light of the
5 schedule that you've set for the exercise litigation, it
6 seems to us at least that one of the thrusts of this motion
7 that's on the table is that the two pieces of litigation
8 should be in some fashion combined.

9 And the Intervenors have talked about schedule on
10 the SPMC contentions and would be prepared to address that
11 issue.

12 But the short of it is, I don't see how, in light
13 of the fact that decision would not be available to us on
14 what contentions would be admitted on the exercise until the
15 middle to end of October at the latest, I'm not sure how
16 these two pieces of litigation are going to be combined, if
17 that was the Board's intent.

18 MR. DIGNAN: Could I make a suggestion? That the
19 Board order that the last thing is the AG, or the Intervenor
20 and AG response to contentions, responses to responses --

21 JUDGE SMITH: Replies.

22 MR. DIGNAN: -- and at some date thereafter, X I
23 will call it X, the Board will issue an order and open
24 discovery on the exercise contentions.

25 And I propose, given the fact that they've been

1 handed time because I've already given them the stuff,
2 additional time, I propose you cut back discovery to two
3 weeks. Two weeks. I proposed 30 days. I see no need for
4 more than two weeks' discovery. They will have had the
5 controller messages and all that stuff since July. They
6 will have had the exercise report all this time. They will
7 have filed their contentions. And I don't see any need for
8 any big, long discovery period at this point on the exercise
9 contentions.

10 Meanwhile, parallel to that, we'll be running a
11 substantial period of discovery on the plan itself. That's
12 open now. And I haven't asked that it be closed before the
13 exercise.

14 And I propose that X plus 14 days discovery closes
15 on the case, across the board, whatever that date is.

16 JUDGE SMITH: I'll heed my own advice and refer
17 you to my dialogue with Ms. Weiss.

18 Two weeks, I don't know what you could do in two
19 weeks. I don't understand that recommendation. It doesn't
20 have any application to the rule of litigation that I am
21 familiar with.

22 What will we do? What's it going to be?
23 Interrogatories, depositions, document requests?

24 MR. DIGNAN: Whatever.

25 JUDGE SMITH: Does that include responses?

1 MR. DIGNAN: No. Get it out.

2 JUDGE SMITH: Get it out.

3 MR. DIGNAN: In 14 days.

4 JUDGE SMITH: The difficulty is, the Board doesn't
5 have any idea of how large the exercise issue is going to
6 be. We expect to get our decision out rather rapidly. But
7 we always do. But in this instance we think that we don't
8 have to spend much time on issues of law, that these are
9 going to be, I would imagine, rather straightforward factual
10 contentions.

11 I just don't think it is possible for us to say
12 now that there's a two-week discovery period and I just
13 don't see how it would work. I just don't have any feeling
14 for it.

15 MR. DIGNAN: My reasoning is, I had 30 days in
16 there in the schedule, which I don't think was unreasonable
17 on that circumstance.

18 The reason I said it is this. Keep in mind, we
19 have already put in a room and made available, and
20 presumably going to be reviewed before they file
21 contentions, all the exercise documents, so-called, the
22 controller messages and all that other stuff. That's there,
23 now, to be looked at, and presumably is going to be looked
24 at, according to Mr. Traficonte, before they even file the
25 contentions. That's all out of the way.

1 The document stuff is essentially all out of the
2 way.

3 I assume there may be some request for a document
4 that comes to their attention in analyzing the thing, do you
5 have such a thing, and we'll kick those out as soon as we
6 can.

7 So that gives 14 days to write a set of
8 interrogatories or take some depositions or what. I mean,
9 how much can you depose and interrogate on an exercise,
10 anyway?

11 MR. TRAFICONTE: Your Honor, if I just might be
12 heard on that point.

13 Part of this is, I for one am in the dark. I do
14 know what we're talking about in the way of documents, just
15 by external description. And I also know, because I have
16 reviewed and talked with the lawyers involved in, the
17 litigation on the Shoreman exercise, which I am sure the
18 Board is aware it was administratively set to a different
19 board. And I know the opinion, because I've read it, runs
20 to well over 200 if not over 300 pages in typescript. I
21 don't believe it's been reported yet.

22 But the idea that the exercise litigation is a
23 start Monday and it's over Wednesday is just empirically
24 wrong and it will be a very clear day, it will be one over
25 the next two or three months, that that is wrong and that

1 the Shoreham model is there to indicate how wrong that is.

2 Now, I am certainly not saying the Board should
3 duplicate with another Board, but I am indicating that Mr.
4 Dignan's whole conception that he is proffering here is way
5 wide of the mark and frankly, I can't say how we could set
6 any discovery period that would be reasonable under the
7 standard of reasonableness until we see what contentions
8 have been admitted.

9 I don't know, I can't --

10 JUDGE SMITH: We can't sit here today and set the
11 schedule for it. We don't know, in the first place, how
12 this would fit into the discovery of the contentions as now
13 admitted. We don't know if it will be toward the end of
14 that or where it will be, we don't know what the size of it
15 is or the complexity.

16 Your relief is to make your motion as to
17 discovery, either at the time you answer the contentions or
18 respond to contentions, or at the time that the Board issues
19 its rulings on the contentions, we will have a better
20 feeling for it.

21 I just don't think we can set two weeks or any
22 period of time without having any feeling for the size of
23 the exercise litigation. I did see the Shoreham decision on
24 the exercise. I didn't read it. I know it was a large
25 decision.

1 Just make your motion at that time so that we can
2 take it in context.

3 MR. DIGNAN: We re at that point, Your Honor,
4 we're now open ended on the question whether we're going to
5 litigate, when we're going to litigate.

6 JUDGE SMITH: I don't know how to handle it. I
7 don't know how to get a handle on the size.

8 MR. TRAFICONTE: Why can't we go ahead and
9 schedule? I think this was pretty clear from the motion
10 that we filed.

11 We intend, or we hope, that the Board is going to
12 continue to address the issue of the schedule on the
13 contentions that we've just had admitted and that we just
14 discussed.

15 I know the discovery has opened and we would like
16 some notion of what the Board has in mind as a reasonable
17 time in light of the admitted -- we do have a set of
18 admitted contentions now. We'd like to know what the Board
19 has in mind on that so we can plan.

20 MR. DIGNAN: How about closing discovery on the
21 admitted contention on October 4th? That's 60 days from
22 today.

23 MR. FLYNN: Your Honor, when we get to the subject
24 of consolidation of the contentions for hearing purposes, or
25 alternatively, when we talk about the discovery and the

1 scheduling of hearings on the contentions that are already
2 admitted, I need to be heard. Because we have some
3 constraints on our ability to participate in discovery until
4 we finish writing the reports that we're deeply involved in
5 right now.

6 JUDGE SMITH: That's on the exercise.

7 MR. FLYNN: No. No, I'm just alerting you to the
8 fact that we have some needs to finish up the report on the
9 plan, the review of Amendment 6 of the SPMC.

10 JUDGE SMITH: Oh, I see. Do you expect to be
11 active in discovery? Do you expect to be the subject of
12 discovery requests?

13 MR. FLYNN: Yes.

14 MR. TRAFICONTE: I can address that. Just for the
15 record, and I have neglected over the weeks to say this and
16 I'm sorry I have -- we, the Intervenors, have never received
17 the various draft reviews that FEMA has made of the SPMC.
18 We have never received that from FEMA. And I don't think
19 that is going to be contested.

20 So we will be getting for the first -- and I have
21 asked for it. It's not that I tried to not -- I called Mr.
22 Flynn on various occasions; I called Vic Nerses at the NRC
23 and said this would be a helpful document for us. And for
24 whatever reason, probably the same reason that we're not
25 entitled to drafts of the review of the exercise, we have

1 not been given a copy.

2 So part of the discovery that we're going to need
3 on the SPMC is the FEMA material.

4 So there will definitely be some discovery on the
5 FEMA by the Mass. AG's office.

6 JUDGE SMITH: Mr. Dignan, I appreciate your
7 frustration. I did not notice your gesture of anger, but I
8 understand it. I want you to know that the Board has done
9 everything it can do. The pacing item here has been the
10 Board and not the parties. We've done everything we can do
11 to move the case along. We have taken extraordinary steps
12 to increase our resources. We're trying to do it now.
13 We're a little bit late on it. We have not taken the
14 vacation that we should have been taking. We have been
15 working as hard as we can. We just can't do it any faster.
16 This is a problem of the system, and not of the parties.
17 And we will continue to do that.

18 MR. DIGNAN: Your Honor, there is no -- and if
19 there was a gesture of frustration, I abjectly apologize
20 that the Board took it as a . . . erence to them or to anybody
21 in here.

22 But the frustration as I experience as a lawyer
23 for a utility, and if I would be just permitted this one
24 time to just say it: there's a plant up there, in our
25 judgment, ready to run. The New England region will hit a

1 new peak today. That's another factor. And it can't run
2 because we lawyers are going to get ready to litigate.

3 JUDGE SMITH: I understand.

4 MR. DIGNAN: And that, when you are a private
5 attorney -- and I understand people who represent
6 intervenors and government agencies have their problems --
7 but it is awfully tough to go back to a board of directors,
8 look them straight in the eye as their chief litigation
9 counsel, and say, I know you've built your plant, I know
10 everybody says it's built right and I know this. But we
11 lawyers -- and I take the Bar as a whole, not you, not my
12 brothers here, and I include myself in the group -- are
13 going to let it sit there for three months while we get
14 ready to have a trial about it.

15 And somehow, businessmen don't understand that.
16 And that is my frustration. It is certainly not a personal
17 frustration.

18 JUDGE SMITH: And that is what you are going to
19 have to explain to them, as eloquently as you can.

20 MR. DIGNAN: At my usual hourly rate, as they say.

21 (Laughter)

22 MR. DIGNAN: And that frustrates them, too.

23 JUDGE SMITH: The way the hearing process works,
24 the Administrative Procedure Act and the right to a hearing
25 under the Atomic Energy Act, all this information has to be

1 somehow funneled, forced through our individual minds. And
2 that's not parallel -- all of us. None of us are
3 eliminated. The Executive Director for Operations has given
4 us unusual authority to seek additional resources. There is
5 hardly any request that we can make for resources that will
6 be turned down if it doesn't flatly fly in the face of law.

7 We haven't been able to do it as fast as we want
8 because it just hasn't worked out. We're working as hard as
9 we can. We're putting all of the resources that can be used
10 to work in giving you a prompt and fair hearing.

11 The time restraints that you seem to think were
12 generous to the Intervenor, they don't agree, but you think
13 we are, as I say, an important component of that is that we
14 don't make people do work faster than the work can be used.

15 We will expect the Intervenor to take our
16 admonition to heart that the time we give them should not be
17 used to just expand and expand and expand.

18 Your submittal, Mr. Traficonte, was clearly a
19 product of quite a few people because the same point was
20 made over and over again, and it is not necessary to do
21 that.

22 There was a very, very large contention, I mean
23 body of contentions. It didn't have to be that large. I
24 think you could have got your points in better. You had a
25 pretty good batting average. I think that you should be

1 pleased with how you came out with them.

2 But I think you can do even better if you take
3 into account the rulings of law that we have made, the fact
4 that you can contaminate a perfectly good contention by
5 mingling it with one that isn't very good, and make your
6 point once and be assured that we will read and try to
7 understand the point once made. It doesn't really get
8 proved with repetition. It deteriorates with repetition.

9 We can't set a schedule for the exercise until we
10 look at it. But the parties can count on the fact that we
11 are going to push it as fast as it can be pushed consistent
12 with a fair hearing.

13 MR. DIGNAN: Can we set a cutoff date on discovery
14 on the contentions that have just been admitted?

15 JUDGE SMITH: Yes, I think that that is
16 appropriate now and I think 60 days is a pretty good period.

17 MR. FLYNN: May I be heard on that, Your Honor?

18 JUDGE SMITH: Go ahead.

19 MR. FLYNN: As I said a few moments ago, we have
20 some particular needs that have a bearing on that.

21 We are in the process of preparing an evaluation
22 of the SPMC.

23 Now, the Nuclear Regulatory Commission had asked
24 us for a consolidated finding that would include evaluation
25 of the New Hampshire plan and the Maine plan. But it has

1 become very clear to us that we can't do all of those things
2 and cooperate fully with this Board in moving the schedule
3 along.

4 So by agreement with the Nuclear Regulatory
5 Commission, a review of -- a consolidated finding dealing
6 with New Hampshire and Maine as well as Massachusetts will
7 not be done at this time. That will wait.

8 The schedule for the completion of the review of
9 the SPMC is as follows:

10 By September 7th, a draft report will be sent to
11 the RAC. There is now scheduled a meeting of the RAC to
12 discuss that plan on September 20th. There is a RAC meeting
13 scheduled for September 20th.

14 Now, we have accelerated the process somewhat in
15 that it has been the practice in the past for the RAC to
16 convene, generate comments during the RAC meeting and then
17 for a report to be written on the basis of those comments.

18 The process has been turned around, and that is,
19 FEMA is generating a draft report which is subject to full
20 review by the RAC and any comments that are brought to light
21 will be folded in.

22 But in the absence of major revisions coming out
23 of the RAC meeting, the report will be made final very
24 shortly after that.

25 The schedule currently calls for the proposed

1 final report to be sent to Region 1 on October 7th, to be
2 immediately transmitted to Headquarters and to go to the NRC
3 in final form on October 14th.

4 Now, the point of all this is that the principal
5 party involved in this is Richard Donovan, who essentially
6 ran the exercise for FEMA and is the principal reviewer of
7 the plan.

8 He is committed to a schedule which has him
9 working six and seven days a week, 14 hours a day. The
10 schedule that I have outlined for you is as compressed as it
11 can possibly be.

12 Now, the effect of it is that he and all the other
13 people involved in producing these documents will really not
14 be available to respond to discovery until after the 14th of
15 October. And that obviously has an impact on the rest of
16 the litigation.

17 MR. DIGNAN: So what I'm being told right here is
18 discovery can't commence against FEMA until after the 14th
19 of October? It could commence, I take it, but we wouldn't
20 get answers.

21 MR. FLYNN: The kind of answers you'll get is, we
22 don't yet have a position.

23 And this may appear to be obstructing the process,
24 and I want to assert vigorously that that is absolutely not
25 our purpose. In fact I submit that we are accelerating the

1 process by completing the review of our position and doing
2 as thorough a job as we can because we all have very vividly
3 in our memory what can happen when we assert a position that
4 has not been fully reviewed.

5 We will save time at the end of the hearing by
6 having everything pinned down before FEMA is called upon to
7 explain its position or to produce documents and do the
8 normal things that it is called upon to do in discovery.

9 MR. TRAFICONTE: Your Honor, if I could be heard
10 on our suggestion, because I don't think I got an
11 opportunity to make it.

12 The Intervenors have collectively gathered and
13 talked over what we think a reasonable --

14 MR. DIGNAN: Can I just cutin one thing? Having
15 heard that, then I will move my 60 days, to give the 90
16 days, and that will bring us until November 4, which means
17 they can do all kinds of discovery on us and they will file
18 their discovery with Mr. Flynn. We will be able to start
19 reacting to it October 14th and that ought to be able to
20 take care of it.

21 JUDGE SMITH: What does that come to?

22 MR. DIGNAN: That would come to November 4. Just
23 for the fun of it, let's make it election day.

24 MR. TRAFICONTE: In the hope that that might --

25 (Simultaneous voices, laughter)

1 MR. TRAFICONTE: In the hope that might save us a
2 lot of work.

3 Our proposal was November 15 and that was after
4 discussion with the Intervenors.

5 The other thing that hasn't been put on the table,
6 but the Board doesn't have to be reminded, we're judging the
7 reasonable period of time not just with regard to what Mr.
8 Dignan has to go back and tell his Board of Directors but
9 looking at the contentions that we have gotten admitted and
10 would want to pursue discovery with respect to.

11 So we're looking at what we feel like we have to
12 do in discovery and we were going to propose November 15.
13 It doesn't sound to us like we're that far apart.

14 MR. DIGNAN: November 15. I'm agreeable.
15 Discovery closes out.

16 Now, Ms. Weiss, that's as far as I'm going.

17 JUDGE SMITH: It is very likely that we will also
18 be closing out discovery on the exercise at the same time.
19 But we're not setting that. But for planning purposes.

20 MR. TRAFICONTE: Well, just so the schedule as
21 we've set it is clear, if I understood the Board's last
22 comment -- if the Board comes in with a decision on the
23 admissibility of contentions on the exercise in the latter
24 part of October, which as it now stands, is a possibility.

25 The only way the discovery closure on November 15

1 could -- it would have to be a two-week discovery period on
2 the exercise to have that happen.

3 JUDGE SMITH: We'll see. I say it's possible.

4 MR. TRAFICONTE: Okay.

5 JUDGE SMITH: I'm not setting it. Just whatever
6 benefit that observation has to you, so be it.

7 MR. DIGNAN: Your Honor, that date having been set
8 and with all the other unknowns, I guess at this point it is
9 the Applicant's preference at least that we probably stop
10 there, for the simple reason, I would like -- as I
11 understood the Board indicated, they would at least look
12 favorably upon, to keep my flexibility to make the decision
13 that date, as to whether what I wish to do is press the
14 schedule towards a combined hearing or things have worked
15 out that I feel it would be more rapid from my point of view
16 to try to do seriatim. And that is a judgment I probably
17 will be able to make by the 15th, indeed before the 15th,
18 and I will advise the Board of it as soon as I do, but at
19 that point I guess I would just as soon stop trying to set
20 dates.

21 JUDGE SMITH: I agree.

22 MR. DIGNAN: Because I would like the flexibility
23 of making that decision --

24 JUDGE SMITH: We know what the traditional
25 sequences have been, but I agree that that is probably

1 overplanning to go beyond that.

2 Anything further?

3 Do we need a date to report on lead intervenors,
4 or will that be taken care of in the consolidation process.

5 I ought to leave that up to you, Mr. Traficonte.

6 MR. TRAFICONTE: Well, as I understand the
7 process, after we have consolidated and grouped -- after we
8 have consolidated the contentions in light of the Board's
9 orders, grouped them with the benefit of the staff's input
10 according to issues, or issue areas, it would be at that
11 point that we could -- I take it the intervenors could
12 identify lead intervenors by grouping area.

13 JUDGE SMITH: Yes. My question was, when do you
14 report?

15 MR. TRAFICONTE: If the Board doesn't have a
16 problem, we are going to have some scheduling and vacation
17 problems in August.

18 JUDGE SMITH: There's no big urgency on that. I
19 don't see that that's an urgent matter.

20 MR. TRAFICONTE: Shortly after Labor Day.

21 JUDGE SMITH: All right.

22 MR. DIGNAN: I have one other matter, Your Honor.
23 I am assuming that when discovery ends, let's take that
24 first, it will be in order -- I don't want a deadline set
25 for doing it or not doing it -- but it will be in order to

1 file summary disposition motions at that point on these
2 contentions.

3 JUDGE SMITH: Yes.

4 MR. DIGNAN: And I am wondering would the Board be
5 willing to entertain -- and I'm not going to play a tactical
6 game, and I'll give Mr. Traficonte the other side of this --
7 even before that date, would the Board be able to use
8 summary disposition motions directed at the purely legal
9 issues that we know are in this case?

10 And I want it clear, I won't try to out-tactic my
11 brother by filing it just as he's leaving for vacation.
12 I'll file it and if he wants 60 days to answer it that's all
13 right with me, whatever is reasonable.

14 Or would the Board prefer to leave all summary
15 disposition matters until after the discovery period is
16 completed?

17 JUDGE SMITH: When were you talking about summary
18 disposition on legal matters?

19 MR. DIGNAN: Well, I'm thinking of one legal
20 matter in particular. The basic thrust of the
21 Commonwealth's case. Incidentally, I have drafted and will
22 file in due course the certification question. I assume
23 that if the Board receives this in due course that's fine.
24 They weren't expecting it today, and I apologize. It just
25 couldn't be drafted overnight.

1 But one of the fundamental issues in this case is
2 this question of delegation of authority. They have urged
3 upon you that Massachusetts law would preclude our governor
4 from delegating the authority.

5 Wholly apart from what forum, wholly apart from
6 whether or not that is a legitimate contention any more
7 after my reading of Shoreham, there is the fundamental
8 question of Massachusetts law. Are they right? I happen to
9 think they are wrong. I think there is more than enough
10 power in the Governors to delegate both in our State
11 Constitution and in our state statute.

12 So at some point I would file with you a summary,
13 disposition motion that says here's the law of the
14 Commonwealth, they're wrong. And they would brief to you
15 the opposite thing.

16 And the question I am really putting is would the
17 Board prefer that that motion be held to be filed as one of
18 whatever summary disposition motions come in in this
19 exercise or would the Board be in a position to entertain
20 such a motion prior to that time? Because that one doesn't
21 depend on discovery or anything else.

22 JUDGE SMITH: I wasn't sure that was the case.

23 MR. TRAFICONTE: I don't disagree that it doesn't
24 involve, as long as we could come to some agreement on the
25 issue. That is to say, we would have to describe a plan.

1 MR. DIGNAN: No, I would move for summary
2 disposition of the contention. I would move for summary
3 disposition of contention whatever it is, 1, 2, 6 and 8 and
4 say the grounds is there is legal authority in the Governor
5 to make the delegation. And presumably he will write a
6 brief as to why I am wrong.

7 JUDGE SMITH: I think under our regulation that
8 you can probably make a summary disposition motion whenever
9 you elect to.

10 MR. DIGNAN: I understand that, Your Honor.

11 JUDGE SMITH: And enter it; and will we entertain
12 it?

13 Well, I would say that we would try to entertain
14 it early. It's important.

15 But Mr. Traficonte will be free to come back with
16 an answer to the summary disposition as to reasons why he
17 cannot yet answer, if that's the case.

18 MR. DIGNAN: I understand that.

19 JUDGE SMITH: And there you are.

20 MR. TRAFICONTE: Can we just address that? What I
21 would say, just so the record is clear, we intend to go into
22 the state courts. We are going to go affirmatively into the
23 state courts with this issue and seek a declaration of law,
24 which our state procedure would permit.

25 Whenever Mr. Dignan would present this issue to

1 you, and maybe I was mis-speaking yesterday, we obviously
2 think this is the issue. This issue has to be decided by
3 this Board. There is no question.

4 The contention has been admitted by this Board and
5 the contention is going to have to be dealt with by this
6 Board.

7 We on the other hand have the burden of coming
8 forward with evidence to support our position. That
9 evidence, in our view, is the statement from the state
10 courts. You don't want the Attorney General, because we
11 also by the way can speak the law of Massachusetts, you
12 don't want us to do it.

13 MR. DIGNAN: That's the point. I say that this
14 Board, if they haven't gotten their declaration -- file the
15 papers anytime they want, we all know where the courthouse
16 is. IF they haven't gotten their declaration, it is going
17 to be for this Board to decide what the law of the
18 Commonwealth is.

19 And with all due deference, I just ask the Board
20 to read the cases that were cited to you because I've read
21 them, too, and they seem to be thoroughly consistent with
22 what I am saying.

23 By that I mean the cases that Mr. Traficonte
24 cited.

25 And this is no different, if you will, than a

1 Federal Judge sitting in diversity or a Federal Judge
2 sitting with a pendent claim in a case before him under
3 Federal jurisdiction.

4 MR. TRAFICONTE: That's right, Your Honor. It may
5 not be any different. And in fact, I have researched the
6 law of exactly that issue and when there is an issue of
7 uncertain state law arising under a state constitution, or a
8 state statute of public nature, it is reversible error for a
9 Federal court not to certify the issue, assuming there is a
10 certification procedure available. In the alternative, it
11 would be a declaratory judgment.

12 MR. DIGNAN: And you rely on the authorities you
13 cited.

14 MR. TRAFICONTE: Pardon me?

15 MR. DIGNAN: And you rely on the authorities you
16 cited for that proposition?

17 MR. TRAFICONTE: The authorities I cited in the
18 motion for agenda.

19 MR. DIGNAN: Yes.

20 MR. TRAFICONTE: Wright & Miller, Section 4247 I
21 believe.

22 MR. DIGNAN: I will submit the question on those
23 authorities to the Judge. I've read them.

24 JUDGE SMITH: It's the Pullman Abstaining issue?

25 MR. TRAFICONTE: It is a variant of one of the 15

1 types of abstention. But the point is that the key to
2 grasping it as an abstention issue is that this is an
3 uncertain area of state law.

4 Mr. Dignan argued yesterday on that point that
5 this is not unlike other issues of state law that would come
6 up that I would immediately agree that the Board would and
7 should address.

8 Those are not uncertain. Those are issues of
9 state contract law to which you could go to a black book and
10 find out the answer.

11 In our case, we really have an issue -- I can't
12 cite you the statute or the case that says a private utility
13 cannot be delegated the authority. If I could I don't think
14 you would have much of a problem.

15 We have an issue here that is uncertain and it
16 rises, it arises in part under the Mass. Constitution. I
17 would certainly, certainly argue that Mr. Dignan is not
18 going to win the day, carry the day on whether a Federal
19 Court would address that issue.

20 The Supreme Court has reversed appellate courts
21 that have addressed that issue without seeking declaration
22 from the state courts.

23 The Board will do whatever the Board will do. But
24 it is my opinion that if the Board -- I take it Mr. Dignan's
25 view is well, if you just haven't got your answer back from

1 the state court, we can't wait.

2 MR. DIGNAN: Let's get Mr. Dignan's view. You
3 have cited the case to the Board of Commodity Features
4 Trading Commission v. Schor, 106 Supreme Court 3245, 3258.

5 MR. TRAFICONTE: On a different point, Mr. Dignan.
6 On a different point.

7 MR. DIGNAN: Hold on. And you state agency
8 determination of state law claims not narrowly linked to
9 agency's Federal claims jurisdiction. Then you put quotes:
10 "may create greater constitutional difficulties."

11 So I pulled the case. And what the case says is:
12 while wholesale importation of concepts of pendent or
13 ancillary jurisdiction into the agency context may create
14 greater constitutional difficulties, we decline to endorse
15 an absolute prohibition on such jurisdiction out of fear
16 where some hypothetical slippery slope may disposit us.

17 Indeed, the CFTC's exercise of this type of
18 jurisdiction is not without precedent.

19 And then the Court goes on, and this is why I just
20 commend the cases to the Board --

21 JUDGE SMITH: We're not really prepared --

22 MR. DIGNAN: And it lists all the times when
23 Federal agencies have decided these very kinds of questions.
24 And with the permission of the Supreme Court.

25 JUDGE SMITH: I know that it is almost

1 irresistible, in fact it is irresistible --

2 MR. TRAFICONTE: It is irresistible. That's my
3 problem. It is irresistible.

4 JUDGE SMITH: I will forbear from responding to
5 that. Believe me, it is not necessary. We will approach
6 this issue with innocent minds.

7 (Laughter)

8 JUDGE SMITH: And give it careful consideration.
9 We will start fresh. I would like for you to not rely upon
10 your reply or even your motion, but to bring it as a cogent,
11 and at the proper time, I guess it would be the summary
12 disposition time?

13 MR. DIGNAN: The reason I brought this particular
14 one up is this. If you are forced to decide it, and I think
15 one way or another you are going to be, I was really asking
16 the Board, bearing in mind the Board's admonition that one
17 thing has to be, and properly so, considered, is the Board
18 can only do so many things at one time. Did the Board feel
19 it useful if this issue was raised before, when I would
20 normally contemplate filing summary disposition, which is
21 after discovery closes, or not; and secondly, we're probably
22 going to need a little different kind of procedure in this
23 sense. As the Board is aware, you file your summary
24 disposition motion, a reply comes in and normally nothing
25 else is entertained. I have a feeling I will be asking you

1 right up front that I will probably want to write a reply
2 and not to cut Mr. Traficonte off any further.

3 The point being he is making a legal argument and
4 a contention. I have to move on it and I haven't seen his
5 whole legal argument first. And so I will want to write the
6 reply.

7 JUDGE SMITH: I don't know how it could be
8 resolved, projecting it without a reply. And of course we
9 have to have the Staff's input and any other party's input.

10 MR. TRAFICONTE: Just so we leave this, before we
11 leave this, so it's clear.

12 In my view, there are two issues. The threshold
13 issue is, would the Board in the first instance decide the
14 issue of Massachusetts law?

15 I take Mr. Dignan's point to be that at some point
16 fairly early on he may ask you to do that in the form of a
17 motion for summary disposition.

18 What I would intend to do at that point, I already
19 would have started a state case seeking the declaration that
20 we think we will get.

21 I would put in a reply at that point -- two
22 things. I would brief, substantively brief, unless the
23 Board would want me to brief it earlier than that -- I would
24 brief at that point why the Board should simply not reach
25 the issue and wait until we get a determination from the

1 State court.

2 I guess in the alternative I would also submit to
3 you the brief that we would have filed and the pleadings we
4 would have filed in the State court.

5 We will have two proceedings going on. We will be
6 seeking a declaration of law from the State Court. He will
7 be seeking the identical declaration, the opposite
8 declaration of law from this Board.

9 So that issue is going to be there and it sounds
10 like it's going to be there on the short term rather than
11 the long term.

12 JUDGE SMITH: You've excluded the possibility Mr.
13 Dignan's brief may have persuaded you. You haven't even
14 seen it yet.

15 MR. TRAFICONTE: Mr. Dignan's brief on the
16 delegation of authority by the Governor to an out of state
17 corporation is going to persuade me that that is
18 constitutional? I guess I have excluded that as a
19 possibility.

20 MR. DIGNAN: You see, I guess the reason I might
21 take a whirl at this, Your Honor, is the operative statute
22 in our state is the so-called Civil Defense Act, Section 4
23 of which has a piece of language that prompts me to maybe
24 file the motion, per a new Governor. He may cooperate with
25 the Federal Government, with other states, and private

1 agencies, in all matters pertaining to the civil defense of
2 the Commonwealth.

3 Well, that sure sounds to me like our Governor can
4 cooperate with me.

5 JUDGE SMITH: Mr. Dignan, when I said that we're
6 not prepared to entertain arguments on it --

7 MR. DIGNAN: That was an hors d'oeuvre.

8 JUDGE SMITH: I'm listening to your argument also
9 with my eye on the clock wondering if I'm going to miss my
10 airplane.

11 Anything further? I hvae plenty of time for the
12 airplane.

13 Anything further today?

14 (No response)

15 JUDGE SMITH: All right. We're adjourned. Thank
16 you very much.

17 (Whereupon, at 1:00 p.m., the pre-hearing
18 conference was adjourned.)

CERTIFICATE

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This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of: PUBLIC SERVICE CO. OF NEW HAMPSHIRE, et al

Name:

Docket Number: 50-443-OL, 50-444-OL

Place: Boston, Mass.

Date: 8-4-88

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken stenographically 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.

19/ Khalid C. Sekander

(Signature typed):

Jhalid C. Sekander

Official Reporter

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