

UNITED STATES NUCLEAR REGULATORY COMMISSION

ORIGINAL

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, et al.,

(SEABROOK STATION, UNITS 1 AND 2)

) Docket Nos.
) 50-443-OL
) 50-444-OL
) OFF-SITE EMERGENCY
) PLANNING

EVIDENTIARY HEARING

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EVIDENTIARY HEARING

Monday
April 24, 1989

Auditorium
Thomas P. O'Neill, Jr.
Federal Building
10 Causeway Street
Boston, Massachusetts

The above-entitled matter came on for hearing,
pursuant to notice, at 1:00 p.m.

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

JUDGE KENNETH A. MCCOLLOM, Member
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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P R O C E E D I N G S

JUDGE SMITH: Good afternoon.

MS. TALBOT: Good afternoon, Your Honor.

JUDGE SMITH: Is there any preliminary business?

MS. MCPHETERS: Yes, Your Honor.

On last Friday the 21st FEMA submitted by mail its reply to the motion to compel the production of documents by the Massachusetts Attorney General.

I would like to deliver copies of that motion. And also a document that FEMA elected to produce voluntarily rather than contest disclosure to the litigants present here.

I would also like to deliver to the Board in camera copies of documents that FEMA is withholding from production based on the deliberative process privilege.

JUDGE SMITH: All right.

MS. MCPHETERS: Thank you.

MS. TALBOT: Your Honor, Mass AG requests that that motion could be argued sometime before the end of this week, just so in the event that the documents are deemed disclosable we may have them before the break.

JUDGE SMITH: While we're on this point. It seems like there is a step being cut out. Matters are being brought to the Board before it's really been determined that we need to look at them.

1 Normally you would come back and identify a
2 document to the person seeking production and claim the
3 deliberative process privilege and they may agree with you.
4 And they may say, all right, that's fine and accept that.
5 And it may not be necessary for the Board to evaluate it.

6 MS. MCPHETERS: I think that we have already gone
7 beyond that, Your Honor.

8 JUDGE SMITH: That point has already been passed.

9 MS. MCPHETERS: We did submit a log initially
10 identifying the documents we were withholding and they are
11 challenging some of them.

12 JUDGE SMITH: All right.

13 That's fine then. Just so it's right.

14 MS. MCPHETERS: We would be prepared to argue the
15 motion any time the Board wants to take it up.

16 JUDGE SMITH: Whose job is it going to be to
17 remember it? That will be yours, you want the documents.
18 So you bring it into the process when you're ready. When
19 you think it's timely.

20 MS. TALBOT: Thank you, Your Honor.

21 (Documents proffered to the Board.)

22 JUDGE SMITH: Any other preliminary business?

23 MR. TROUT: Yes, Your Honor.

24 First of all, Applicants would like to report to
25 the Board and the parties that the discovery dispute between

1 Applicants and the Town of Amesbury has been resolved.
2 There will be no need for the Board to rule on the motion to
3 compel which Applicants filed.

4 Secondly, Applicants have filed today and have
5 distributed to the parties and the Board in the courtroom
6 two motions in limine concerning the witnesses which would
7 be coming on today.

8 JUDGE SMITH: Did the Attorney General just now
9 receive your motion?

10 MR. TROUT: Yes. I'm afraid so, Your Honor.

11 MS. TALBOT: Yes, Your Honor.

12 JUDGE SMITH: Well, you're going to need some time
13 to read it, I believe.

14 MS. TALBOT: Yes, Your Honor.

15 Your Honor, at this point I would also like to
16 bring up that Applicants have indicated, in their rebuttal
17 that pertains to the survey, that they did an update on the
18 survey or that an update in the making as of January of '89.

19 I believe that Applicants are obliged to
20 supplement their answers to interrogatories. This was asked
21 before to give any information on any surveys or analyses
22 that were done.

23 In addition, I have asked Applicants repeatedly to
24 provide me with the information. I did so on April 2nd in
25 writing and as of this date I have had no response.

1 MS. SELLECK: I believe you had two questions,
2 Pamela, and I will have answers for you this afternoon.

3 MS. TALBOT: Thank you.

4 I would have preferred to have had the answers
5 before we had Dr. Dillman here, just for the record. It
6 would have been more timely.

7 JUDGE SMITH: Do you want some time to read the
8 objection of the testimony?

9 MS. TALBOT: Yes, Your Honor.

10 (Discussion off the record.)

11 JUDGE SMITH: Ms. Talbot, are you going to argue
12 for the Attorney General?

13 MS. TALBOT: Oh, yes, Your Honor, I am.

14 I believe the Applicants, do they go first on
15 their motion in limine and I can respond.

16 JUDGE SMITH: Well, their arguments are already
17 before us. So it's up to you now to address them.

18 MS. TALBOT: I would start, Your Honor, by saying
19 that I characterize their argument as a game of semantics.

20 I think that if you look at the bases underneath
21 the contention you will see that their arguments are not
22 well founded.

23 In particular on page four of Applicants motion
24 they characterize Basis B, C, and D as dealing with
25 confidentiality of information gathered. I would say that a

1 clear reading of Basis C -- and if Your Honor wants I can
2 read it into the record -- deals with method. In part it
3 says: "Much information on functional characteristics needs
4 could and should be obtained to enable appropriate and
5 timely assistance to be provided."

6 JUDGE SMITH: Wait a minute.

7 MS. TALBOT: Page 88, Your Honor, of the
8 consolidated contentions, Basis C.

9 MR. TROUT: Pamela, could you read all of the
10 sentence in the motion that you're referring to and not just
11 one part.

12 MS. TALBOT: I have my turn to speak, Mr. Trout,
13 then you will have yours.

14 (Document proffered to counsel.)

15 MS. TALBOT: Oh, thank you.

16 Your Honor, Mr. Pierce gave me his book and in his
17 book it would be page 50 -- actually page 60.

18 Basis C deals with the needs codes and Appendix 5.
19 Maybe to appease my brother counsel Trout I will read the
20 entire thing to put in context.

21 JUDGE SMITH: What are you reading now?

22 MS. TALBOT: The sentence that I thought was
23 pertinent was the last sentence which says: "Much
24 information on functional characteristics" --

25 JUDGE SMITH: You're reading Basis C?

1 MS. TALBOT: Yes, Your Honor.

2 I query how one could obtain such information if
3 one wasn't using some sort of a method. I mean this is what
4 the survey is all about is identifying the people and
5 determining their needs.

6 Basis C is all about individualized needs
7 determination. Contrary to how Applicants characterize it,
8 it has nothing to do with confidentiality.

9 MR. TROUT: That's where I want you to read the
10 rest of the sentence in my motion.

11 MS. TALBOT: It was unclear.

12 (Counsel reviewing document.)

13 MS. TALBOT: Oh, I see.

14 You're right, Jeffrey. My apologies.

15 Applicants have characterized Basis C as
16 concerning the manner of listing information in Appendix M.
17 I think that just buttresses the argument I just made that a
18 clear reading of Basis C shows that it could not deal with
19 anything other than a method for obtaining information
20 otherwise we're into some obscure game of semantics.

21 I mean, maybe I didn't put the magic word "survey"
22 in there. But it's pretty clear that to obtain the
23 information you have to use some sort of a means.

24 Shall I continue, Your Honor, or do you want to
25 take a minute to peruse.

1 JUDGE SMITH: Yes. Just give us a moment here.

2 (Pause)

3 JUDGE SMITH: So your argument then is that Basis
4 C faults the plan for its failure to gather the functional
5 characteristics and needs of the special needs population.

6 MS. TALBOT: Right.

7 I have other arguments, too, but that's one of
8 them.

9 JUDGE SMITH: All right.

10 Go ahead with your next argument then.

11 MS. TALBOT: I also would direct Your Honor to
12 Basis D, which Applicants have characterized as concerning
13 identification of outside groups.

14 I would say that this basis doesn't only concern
15 outside groups but it sets clearly that the plan also fails
16 to identify people resources within the handicapped
17 community who may be utilized in the development and
18 exercise of the plans.

19 JUDGE SMITH: Does the testimony cover that point?

20 MS. TALBOT: It's mentioned in the testimony, yes.

21 JUDGE SMITH: Where?

22 MS. TALBOT: I'll have to go back and look at it.

23 (Pause)

24 MS. TALBOT: I have a corrected copy here of the
25 testimony. There were some mistakes in the original filing,

1 so if I refer to pages from this -- in the beginning of the
2 testimony -- oh, here is the original.

3 On page seven I asked Dr. Dillman and Ms.
4 Moriearty to opine as to the special needs poster which was
5 the mechanism that Applicants used to --

6 JUDGE SMITH: Wait a minute.

7 I see your pages aren't numbered.

8 MS. TALBOT: Your Honor, do you have the corrected
9 version or the old one?

10 JUDGE SMITH: We have the old one.

11 MS. TALBOT: You have the old one. So it's page
12 seven.

13 JUDGE SMITH: Yes, I have page seven.

14 All right.

15 MS. TALBOT: The question --

16 JUDGE SMITH: Where are you reading from now?

17 MS. TALBOT: Question: "Before we go any further
18 regarding the survey can you both provide comments you had
19 with respect to the special needs poster?"

20 The special needs poster was the method that
21 Applicants used to supposedly employ the help of these
22 outside groups. And we have an opinion on that.

23 In addition, a lot of the --

24 JUDGE SMITH: Wait a minute.

25 Let me read that. I keep searching for the point

1 you're making and I just don't easily find it there.

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1 MR. TROUT: Has the corrected version of the
2 testimony been distributed yet?

3 MS. TALBOT: Not yet.

4 (Pause to review document.)

5 JUDGE SMITH: You'll have to be more helpful,
6 because --

7 MS. TALBOT: Okay.

8 JUDGE SMITH: -- I just can't find where that
9 language on the bottom of page 7 and top of page 8 is.

10 MS. TALBOT: Well, I guess what I --

11 JUDGE SMITH: Let me back up to make sure I
12 understand.

13 MS. TALBOT: I think Applicants have made an
14 artificial distinction, Your Honor, between the survey
15 method and the methods that are employed to try to engender
16 this help from outside, when in fact the special needs
17 poster was given to us in discovery as part of the survey
18 materials.

19 JUDGE SMITH: Now, wait a minute. You are saying
20 Basis D, which used to be Attorney General --

21 MS. TALBOT: 50(d).

22 JUDGE SMITH: -- Contention 50(d), Basis D says
23 that organizations capable of assisting handicapped persons,
24 with one exception, on an individual basis have not been
25 identified.

1 MS. TALBOT: Correct.

2 JUDGE SMITH: And that people resources within the
3 handicapped community, who may be utilized in development,
4 review and exercise of plans from homebound and other
5 special needs residents, had not been identified.

6 MS. TALBOT: Right.

7 JUDGE SMITH: I just simply can't find on page 7
8 of their testimony, in response to that question, about the
9 needs.

10 MS. TALBOT: Well, they discuss that.

11 JUDGE SMITH: Now where do they --

12 MS. TALBOT: Maybe you don't know what the special
13 needs poster is.

14 JUDGE SMITH: Well, let me read what it says.

15 "Encourage people to call in in order to be
16 surveyed."

17 MS. TALBOT: Right.

18 JUDGE SMITH: And it talks about targeted
19 individuals.

20 MS. TALBOT: Right, which would be those with
21 special needs who need assistance.

22 JUDGE SMITH: Yes, those are the targeted group.

23 MS. TALBOT: Right.

24 JUDGE SMITH: Do you know the logical relationship
25 between the language you have just cited to us and the

1 thoughts set out in Basis D?

2 It's just not there in my mind. I cannot connect
3 it.

4 MS. TALBOT: I guess all I was trying to point
5 out, Your Honor, is that I think it's an artificial
6 distinction that Applicants have created to try to separate
7 the survey from the efforts to try to engender help from
8 outside resource groups, which may or may not even exist,
9 because it was treated as one problem, and the special needs
10 poster went out only to people that dealt with handicapped
11 individuals. And in the course of preparing testimony, the
12 experts didn't look at them as separate matters.

13 The issue that was attacked was were the special
14 needs people identified, and were the actual people
15 identified and were the needs identified.

16 JUDGE SMITH: I just can't see that. There is no
17 fair reading of the language on the bottom of page 7 and the
18 top of page 8 which relates to identification of individuals
19 and organizations capable of assisting handicapped people.
20 It's just not there.

21 MS. TALBOT: Okay, Your Honor, maybe --

22 JUDGE SMITH: You are not pointing it out. You
23 are not focusing in on any nexus between them, and I can't
24 see it for myself. It just isn't there.

25 MS. TALBOT: Okay. I will then direct Your Honor

1 to Basis E. I mean I don't think Basis E could be any more
2 clearer. It says that periodic surveys will be mailed
3 which, for reasons stated above, is an unreliable method. I
4 mean there is the magic word.

5 JUDGE SMITH: Periodic surveys in themselves are
6 an unreliable method.

7 MS. TALBOT: No, Your Honor. The proposal
8 provides no reasonable assurance that information collected
9 will be validated, updated or maintained. It merely asserts
10 that periodic surveys will be mailed which, for reasons
11 stated above, is an unreliable method. Reasons being
12 inability to identify the people and inability to determine
13 the needs and inability to procure assistance.

14 What the testimony does is it describes what a
15 reliable method would be. I mean just to get back to the
16 magic words for a minute. Let me get my notes.

17 The purpose of our testimony was twofold. On the
18 one hand, we had to rebut the FEMA finding. FEMA, in its
19 finding in J.10.d, all it says is that lists of special
20 needs are maintained by way of mail-in cards, et cetera; you
21 know, mail-in card posters, which was what page 7 was about,
22 telephone calls, et cetera.

23 So then our contention says the list is
24 inadequate. It's clear that we're talking about the lists
25 that FEMA was concerned with when it made its finding which

1 was the list that was generated by the survey. I mean I
2 think some element of common sense --

3 JUDGE SMITH: Now the help that we need now is for
4 you to point out in a careful, deliberate way so that we can
5 follow you word by word, line by line, where in your
6 contention, where in your Basis and where in your response
7 to interrogatories the subject matter of the Dillman-
8 Moriearty testimony is covered.

9 MS. TALBOT: Okay, Your Honor.

10 JUDGE SMITH: We need slowness and deliberateness
11 and care, because when you start talking real fast --

12 MS. TALBOT: Okay:

13 JUDGE SMITH: -- about your views of it, it just
14 passes. I want to be able to read somewhere in paper
15 submitted by you, not orally, but somewhere in the papers
16 submitted by you where the subject matter of this testimony
17 is covered.

18 MS. TALBOT: Okay.

19 JUDGE SMITH: And so far I haven't been able to
20 find it.

21 MS. TALBOT: Well, let me walk you back through
22 the contention and then I will read to you some things that
23 we said in discovery that hit it right on the nose.

24 JUDGE SMITH: Well, so far I have to say that none
25 of us have been able to find the subject matter of the

1 testimony covered by the written aspects of the contention
2 and bases that you have identified so far.

3 MS. TALBOT: Your Honor, what about C? I mean, I
4 want you to enlighten me. Maybe I'm not seeing it your way,
5 but it talks about, you know, gathering the right
6 information.

7 (The Board confers.)

8 MS. TALBOT: Your Honor, if I could direct the
9 Board to --

10 JUDGE SMITH: We're still assessing your Basis C
11 to see if that --

12 MS. TALBOT: C, right.

13 JUDGE SMITH: -- in itself can carry the whole
14 thing.

15 MS. TALBOT: Also, the first sentence in the
16 actual contention I just wanted to emphasize, too, that
17 that's very unambiguous. And to the extent that the bases
18 relate back to the contentions, I think that the Judges
19 might want to take a peek at that.

20 (Pause.)

21 JUDGE SMITH: Incidentally, the Board believes
22 this subject matter, this motion could have been raised
23 earlier. You are correct. You can wait until the moment
24 comes up that evidence is offered and then make your
25 arguments orally, and that the objections in limine are a

1 voluntary effort. But the fact is this could have been
2 offered, this could have been submitted last week earlier,
3 and we could have been prepared for it.

4 Now we're sitting here juggling through papers,
5 really wasting time available for hearing. And this could
6 have been done better.

7 MR. TROUT: Your Honor, I want to apologize to the
8 Board and the parties for that. Applicants last week were
9 under the impression that Mr. Sikich would be on before Mr.
10 Dillman and Ms. Moriearty.

11 MS. TALBOT: No, Your Honor, I made that clear. I
12 made that clear.

13 MR. TROUT: Yes, you did, Pamela. but you --

14 MS. TALBOT: Mr. Dillman flew in today.

15 MR. TROUT: You did at the end of the week. And
16 at that time we scrambled to get this together and we just
17 didn't have it done by the close of business Friday to get
18 to the Board and the parties. But I recognize that as a
19 problem, Your Honor, and the Applicants did the best that
20 they could do.

21 (The Board confers.)

22 JUDGE SMITH: We cannot find, based upon the
23 contention itself and Basis C standing alone, the arguments
24 we have seen in the objections that you provided sufficient
25 notice to the Applicants in your pleadings as to the

1 methodological infirmities of the survey. So we are going
2 to desist ruling until we hear the rest of your arguments,
3 and then we will reconsider it in its entirety.

4 MS. TALBOT: Okay.

5 JUDGE SMITH: But you are going to have to
6 continue your arguments. You haven't made your point yet.

7 MS. TALBOT: Okay, Your Honor.

8 But also, Your Honor doesn't have in front of him
9 answers to interrogatories that Mass AG filed in response to
10 Applicants' requests.

11 JUDGE SMITH: That's correct. We are relying
12 solely upon the motion.

13 MS. TALBOT: Well, I will read No. 172. It's
14 under JI-49. It says, "Please state all facts underlying
15 your assertion that separate protective action plans need to
16 be developed for each of the main categories of handicapped
17 individuals present in the EPZ in order to provide
18 reasonable assurance that adequate protective measures can
19 and will be taken, and define adequate. Please also list
20 all such main categories."

21 Response: "Only if an assessment is made of the
22 needs of the different categories of special needs
23 individuals within the EPZ can planning take place to
24 provide for those requirements in the event of a
25 radiological emergency. Without such planning, a sector of

1 the population that will have among the most logistically
2 demanding set requirements in the event of an emergency are
3 left unprovided for."

4 And it goes on for like another six or seven
5 sentences.

6 Although Applicants characterize their
7 interrogatory as pertaining to JI-49, the response clearly
8 goes towards their survey. Again, only if an assessment is
9 made of the needs of the different categories of special
10 needs individuals.

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1 JUDGE SMITH: Are you saying that we should infer
2 from that that there is only one way in which an assessment
3 can be made, and that is by survey.

4 Is that your point?

5 MS. TALBOT: No, I'm saying, Your Honor --

6 JUDGE SMITH: Therefore, necessarily the survey is
7 inadequate.

8 MS. TALBOT: Yes, Your Honor, a survey of each
9 individual who is going to be served. I'm also trying to
10 point out --

11 JUDGE SMITH: No, I want you to be careful now
12 what you are reading from and what you are saying is orally.
13 Read back again the interrogatory response upon which you
14 depend.

15 MS. TALBOT: "Only if an" -- well, there is more
16 than this one, too. "Only if an assessment is made of the
17 needs of the differing categories of special needs
18 individuals within the EPZ can planning take place to
19 provide for those requirements in the event of a
20 radiological emergency."

21 I guess my point is that it couldn't have been a
22 surprise to Applicants given that answer that we are
23 concerned about the lack of assessment, i.e., the inadequate
24 survey or the means by which information was garnered.

25 This survey that's on the table, Your Honor, is

1 really an assessment of the individual needs. It's not a
2 sample survey we're talking about. Maybe the word --

3 JUDGE SMITH: No, I understand that.

4 MS. TALBOT: -- itself is deceptive.

5 JUDGE SMITH: I understand that. My concern is
6 that whenever you had an occasion to talk about -- and there
7 was effort to find out about surveys -- that whenever you
8 had an occasion to talk about surveys, you lapse into
9 particulars which don't talk about methodology. And nowhere
10 in any papers that you have given to us do you point out, in
11 response to the interrogatories, specifically what is
12 deficient.

13 MS. TALBOT: Well, Your Honor, can I point you to
14 another one?

15 JUDGE SMITH: Well, yes, I want to hear all of
16 your arguments.

17 MS. TALBOT: Okay.

18 JUDGE SMITH: Come up with the best information
19 you have which talks about the methodology of the survey.
20 Come up with the best information that you have, the
21 methodology of the survey itself.

22 MS. TALBOT: Your Honor, the --

23 JUDGE SMITH: Not the overall result that the plan
24 is still inadequate in that there has been no assessment of
25 the needs.

1 MS. TALBOT: Okay.

2 JUDGE SMITH: But talk about the survey itself.

3 MS. TALBOT: Okay.

4 JUDGE SMITH: If you can. Make all your
5 arguments, but that is what would be very helpful.

6 MS. TALBOT: I think the first point I'll make is
7 that, and I'm not going to pretend anything here. I mean,
8 the basis of our argument came in the form of Dr. Dillman
9 and Sharon Moriearty's testimony on JI-48. I mean I see
10 that as a functional equivalent of our supplementary answer
11 to discovery.

12 You know, the schedule was rather truncated and we
13 did the best we could. And we said, well, there are
14 problems here with assessment, and then, you know, here is
15 the package.

16 JUDGE SMITH: Are you then seeking leave of the
17 Board to make a supplemental response? Is that it?

18 MS. TALBOT: If Your Honor will grant it to me, I
19 think that would be a great thing.

20 JUDGE SMITH: You're not going to put it on that
21 basis unless you know you are going to prevail.

22 MS. TALBOT: I think that would be great. I mean
23 I'll make the request, sure. I mean I also think there is
24 other little points I can bring up here, but I think that
25 what I just said is really the most honest in that again I

1 don't think there was any surprise. They asked us
2 interrogatories about the survey. There are some other
3 answers here that talk about the method, I'll grant you, not
4 in great detail because we didn't have the expertise on
5 board yet.

6 JUDGE SMITH: Well, I think that your candor is
7 commendable. I think what you are saying is that you did
8 not have specifically in mind survey methodology until you
9 got your experts on board.

10 MS. TALBOT: Right. Your Honor, I'm not a survey
11 expert. I wouldn't know.

12 JUDGE SMITH: Right. All right, I understand
13 that. It may be that your candor may not help you win this
14 unless we find good cause for late revealing of your
15 litigation strategy. But I might also say that your candor
16 enhances your credibility, and I'm convinced that it will
17 come in handy some time during this litigation. Believe me,
18 this is very, very important. Very, very important.

19 MS. TALBOT: I would also point Your Honor to
20 Interrogatory 171. And since you don't have it in front of
21 you, I will read it.

22 Again, Applicants chose to characterize this
23 question as one pertaining to JI-49, although the answer
24 bears on this survey.

25 The question was, "Please state all facts

1 underlying your assertion that a generic plan is inadequate
2 to meet the different needs of different categories of
3 handicapped individuals...."

4 Response, among other things. "Nor does the plan
5 provide for ways of assessing what the requirements of
6 individuals may be in the event of a radiological
7 emergency."

8 Again, to the extent that you have to garner and
9 obtain information in order to assess requirements of
10 individuals, it's not a very broad leap to make to think
11 that, oh, that assessment means the survey. How else did
12 they get the information? It didn't drop in their lap.

13 JUDGE SMITH: That is part and parcel of your
14 argument. There is only one way these assessments can be
15 made is by survey.

16 MS. TALBOT: Yes.

17 JUDGE SMITH: And we should always have assumed
18 that --

19 MS. TALBOT: You have to ask people.

20 JUDGE SMITH: -- you have to ask people, and they
21 are not doing it right.

22 MS. TALBOT: Right.

23 JUDGE SMITH: So we have to read your particular
24 criticisms of the survey in a different light then. Your
25 criticism that opponents skewed the results and that a mail

1 survey is not valid means something else.

2 Would you summarize all of your arguments that,
3 when called upon to criticize the survey, you came up with
4 essentially two forms of criticism?

5 One is that opponents to Seabrook nullified the
6 reliability; and two is, a mail survey is inherently -- is
7 being among the most unreliable methods of gathering
8 information?

9 MS. TALBOT: I must admit that Dr. Dillman has
10 convinced me otherwise about, you know, how good mail
11 surveys are.

12 JUDGE SMITH: But as far as the surveys used by
13 Applicants known to you before the close of discovery is
14 concerned, you are not able to point out any specific
15 language faulting the surveys other than the opponents of
16 Seabrook frustrated the survey effort --

17 MS. TALBOT: Right, because we didn't --

18 JUDGE SMITH: -- and your response.

19 MS. TALBOT: That's right.

20 JUDGE SMITH: Which you no longer stick by your
21 response.

22 MS. TALBOT: Right, because we hadn't retained Dr.
23 Dillman yet, so how could I have known?

24 JUDGE SMITH: So you just didn't know. You just
25 didn't know that the survey was methodologically infirm

1 until you got Dr. Dillman.

2 MS. TALBOT: Well, we knew that the assessments
3 were off.

4 JUDGE SMITH: Yes, you knew that the assessments
5 were not good. But you didn't know why. You didn't know
6 that the survey wasn't doing its job until you got your
7 expert.

8 Is that how it adds up?

9 MS. TALBOT: Well, we knew the survey wasn't doing
10 its job, because the assessments would have been better if
11 it was, but we just didn't know why.

12 JUDGE SMITH: Yes, all right.

13 MS. TALBOT: I mean, to be frank, I didn't even
14 look for an expert to talk about the effect of opposition on
15 the adequacy of a survey.

16 JUDGE SMITH: All right, that's your argument.

17 MS. TALBOT: I mean it wasn't in the phone book.
18 I didn't even look.

19 JUDGE SMITH: All you knew is that the results,
20 you didn't know where the failure was, but the results.

21 MS. TALBOT: Right.

22 JUDGE SMITH: And you knew that there was some
23 infirmities in the survey, and that is that the opponents
24 interfered with it. And you knew that it could be a good
25 survey or a bad survey, but the results were bad. And you

1 didn't know until you consulted with Dr. Dillman that the
2 survey was methodologically flawed.

3 MS. TALBOT: Well, in part the reason I didn't
4 know, Your Honor, aside from the fact I'm not an expert, is
5 that Applicants still had yet to give us all the discovery.
6 We had none of the survey discovery in our hands until the
7 end of discovery, until whenever it was we got those
8 documents sometime in --

9 JUDGE SMITH: Well, that was in October.

10 MS. TALBOT: Was it?

11 It was in the fall some time.

12 JUDGE SMITH: All right. When did you consult
13 with Dr. Dillman?

14 MS. TALBOT: February.

15 JUDGE SMITH: Okay. Do you have anything further
16 to say?

17 MS. TALBOT: Just one more thing, Your Honor.

18 FEMA's report implies, contrary to our contention,
19 that the mail in cards and telephone calls did in fact
20 identify all the people who needed to be identified. And
21 the testimony really simply just seeks to rebut that
22 presumption.

23 JUDGE SMITH: The testimony rebuts the FEMA
24 findings.

25 MS. TALBOT: Right, in addition to --

1 JUDGE SMITH: In addition to the contention.

2 MS. TALBOT: Right, Your Honor.

3 JUDGE SMITH: All right.

4 MS. TALBOT: Granted the contention could have
5 been more artfully drawn if we had had more facts on hand at
6 the time, but it's just not the way it panned out.

7 JUDGE SMITH: So you're rebutting -- you are going
8 back to the basic contention, and you're rebutting FEMA's --

9 MS. TALBOT: FEMA's J.10.d finding.

10 JUDGE SMITH: All right.

11 Mr. Trout.

12 MR. TROUT: Several points, Your Honor.

13 The first point would be that the specific
14 interrogatory responses that Ms. Talbot read into the record
15 are grouped under JI-49, and they deal with testimony, or
16 they are related to testimony that is in fact submitted
17 under JI-49 by Ms. Moriearty in her stand-alone piece of
18 testimony. Applicants have not objected to that across the
19 board. There are a few little sentences that we have
20 objected to, a few little words.

21 But the issues raised in JI-49 and in that piece
22 of testimony, Applicants had notice of, and we're not going
23 after that.

24 If we had known, Your Honor, at the outset that
25 JI-48 and its predecessor, which is Mass AG 50, was to be or

1 to include an attack on the survey methodology, we would
2 have argued up front against the admission of that
3 contention in the first place, because it's both the law of
4 this case and the law of the NRC in general that the
5 methodology used by Applicants, a card survey, is
6 sufficient.

7 More than two years ago Judge Hoyt ruled on a
8 motion for summary disposition in this case relating to the
9 New Hampshire survey, and granted the Applicants' summary
10 disposition on precisely that issue. There is also --

11 JUDGE SMITH: On the narrow issue, the use of mail
12 surveys or survey cards?

13 MR. TROUT: The methodology question, yes.

14 JUDGE SMITH: Well, now, --

15 MR. TROUT: Well, that's right.

16 JUDGE SMITH: -- how broad was that ruling? How
17 much did you win there?

18 MR. TROUT: That's right. That's a question --.

19 JUDGE SMITH: Yes.

20 MR. TROUT: And I do not have the ruling in front
21 of me. So I cannot say that it's on all four.

22 JUDGE SMITH: I think that your ruling was that
23 surveys by mail as such may be an acceptable way as compared
24 to the quality of the questioning and the quality of the
25 identification of the target group and the quality of the

1 completeness of the responses.

2 MR. TROUT: I understand, Your Honor.

3 The point that I was driving at, Your Honor, is
4 the notice point. What prejudice Applicants have suffered
5 from first finding out that this was going to be the Mass
6 AG's attack no sooner than the filing of the prefiled
7 testimony. And the first prejudice is that, Your Honor,
8 that we would have at the contention-admitting stage at
9 least have scrutinized this contention differently on the
10 question of admissibility. Because if the answer that we
11 had gotten back then was the answer that we got in discovery
12 in December, that mail surveys are no darn good just as a
13 generic matter, then we would have raised the prior ruling
14 of this Board and the ruling out of Limerick. It's ALAB-
15 836, which I think again is that generic surveys in general,
16 mail surveys in general are good. I'm not sure that it's on
17 all fours with the specific arguments that Dr. Dillman and
18 Ms. Moriearty make in their piece. So that would be, Your
19 Honor, the first question.

20 The second question I would raise about not giving
21 us notice until February is, I guess, really an equitable
22 argument. And that is the question of how important to Mass
23 AG this whole issue is.

24 As Your Honor knows, Applicants made an offer to
25 resolve this particular contention and that offer was

1 rejected. And as Your Honor also knows from reading -- you
2 haven't read the discovery responses, but you've read the
3 contention and you've read Basis A. And you know from Basis
4 A that Mass AG was aware that there were opposition groups
5 going around trying to sabotage the survey.

6 And if you had read the discovery responses, you
7 would see that Mass AG had received a telephone call from a
8 member of one of these opposition groups saying, yes, we're
9 going around sabotaging, or trying to sabotage the survey.

10 Now I can't say that I know what Mass AG did. I
11 can only tell you that there is no indication whatsoever in
12 their discovery responses that they ever did anything to
13 stop that process.

14 MS. TALBOT: Excuse me.

15 What does this have to do with what we're talking
16 about, Your Honor?

17 I take umbrage at this, this conspiratorial
18 paranoia again.

19 JUDGE SMITH: I guess I slipped off your chain of
20 logic there. I don't really understand the connection, the
21 relevance either of today's business.

22 You're talking about the opponents to Seabrook
23 sabotaging the survey. Is that what you were talking about?

24 MR. TROUT: Yes, Your Honor.

25 JUDGE SMITH: And then they did nothing to stop

1 it.

2 MR. TROUT: Mass AG knew about it.

3 JUDGE SMITH: But that isn't even an issue. They
4 have lost on that issue. They haven't submitted any
5 evidence on that issue, have they?

6 MR. TROUT: That's right, Your Honor.

7 JUDGE SMITH: Well, I don't think that that is
8 known.

9 MR. TROUT: It's a measure, Your Honor, of how
10 important the issue is to Mass AG.

11 MS. TALBOT: How do you know what's important to
12 us, Mr. Trout, with all due respect?

13 JUDGE SMITH: Now what do you say about how
14 diligent you believe the Attorney General was, or was not
15 diligent, when they learned in February that for the first
16 time we have counsel's representation, for the first time
17 the survey is deficient. Not only is deficient not only
18 because of the efforts of the anti-Seabrook group, but
19 because of its basic logical structure and methodology.

20 What was their duty at that time assuming that we
21 would find it within the umbrella of the basic contention
22 and the Basis C, assuming that it would be appropriate
23 testimony and the only question we have is how much notice
24 you have and how timely that notice was?

25 Because I think that they can make an argument

1 JUDGE SMITH: So what we have here then, in your
2 view, is not only --

3 MR. TROUT: It's late filed contentions.

4 JUDGE SMITH: Late filed contentions.

5 MR. TROUT: Yes, Your Honor.

6 JUDGE SMITH: Late filed Basis.

7 MR. TROUT: Yes.

8 (The Board confers.)
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1 that the basic contention does cover identification of an
2 assessment of the needs. And Basis C sort of restates it,
3 and that the survey testimony would have been properly
4 within the contention and basis if they had been specific
5 timely that this survey method was inadequate.

6 Would you agree that that would be the case?

7 MR. TROUT: Your Honor, certainly if it had
8 been --

9 JUDGE SMITH: Or much of it, not all of it, but
10 the basic thrust of it.

11 MR. TROUT: If that had been a Basis submitted
12 under Mass AG Contention 50 back in April when the
13 contentions were filed, that would have fit logically under
14 that contention and there would not be this problem today.

15 JUDGE SMITH: Okay, so it does fit.

16 So the question is you didn't get it when you
17 should have got it on discovery.

18 MR. TROUT: Well, we didn't get it as a Basis,
19 Your Honor, to begin with. What we got was a Basis that
20 said the survey is bad, and the survey is bad for exactly
21 two reasons.

22 JUDGE SMITH: All right.

23 MR. TROUT: One is the opposition groups, and the
24 other is the suspicion, both directed at Seabrook. And that
25 was the full scope of their attack on the survey.

1 JUDGE SMITH: Ms. Talbot?

2 MS. TALBOT: Yes, Your Honor.

3 JUDGE SMITH: The Board is in agreement with the
4 Applicants generally. Instead of just saying in that
5 shorthand way let's summarize what the Board believes to be
6 the situation before us.

7 That the contention itself was broad enough to
8 have included the attack on the survey. Contention C is
9 also a broad one. The inadequacies of the survey, if known,
10 should have been listed as a Basis, separate Basis.

11 The basis that alleges that the survey is
12 inadequate because it's a mail survey. And because it is
13 interfered with by the anti-nuclear groups, would by silence
14 suggest that you had no other complaints about the survey
15 except those named.

16 So there would be every reason to believe by
17 Applicants and the Staff as far as notice is concerned that
18 you had no methodological complaints about the survey as of
19 the close of discovery. Particularly when you come back and
20 you do say on discovery that the method of surveying by mail
21 is bad.

22 So as of that time, as of close of discovery you
23 had not put the Applicants on notice as to the issue that
24 you wish to pursue with respect to the survey.

25 Now you have candidly conceded that the bases and

1 the contentions previously drafted did not focus in on the
2 particular aspects of Dr. Dillman and Ms. Moriearty's
3 criticisms. That you didn't learn about those until you
4 retained Dr. Dillman in February.

5 I think that is where we are. This is actually
6 wrapping it all up. You simply didn't know about the
7 substance of that testimony until February. And I don't
8 think you have made a good argument nor do you think that
9 you made a good argument that the methodological infirmities
10 of the survey were properly alleged prior to that time.

11 I think what you have here is indeed a late-filed
12 issue. You're going to have to argue then the standards
13 that were required to consider. And that's not a matter of
14 discretion, we're required to consider on receiving late-
15 filed issues.

16 You are going to have to discuss the Catawba case.
17 You're going to have to discuss the good cause for late
18 filing, bearing in mind that the survey information was
19 available to you from the outset.

20 You're going to have to discuss the impact it will
21 have on the proceeding. The contribution you can make to
22 the record. And whether that issue that would be
23 represented would be taken up by other parties to the
24 proceeding.

25 All of these are set out in 2.714 of the Rules of

1 Practice. The five basic late filing criteria.

2 Would you elaborate then on why you believe --
3 specifically, what it is that FEMA found, that you believe
4 that you are now timely? And when did FEMA find it, that
5 you believe that you are now timely addressing through this
6 disputed testimony?

7 MS. TALBOT: Your Honor, in FEMA's report on the
8 SPMC in December of 1988 under "Evaluation Criteria J.10,"
9 the actual criteria, as the Board knows, is that the plan
10 has to show means for, "Protecting those persons whose
11 mobility may be impaired due to such factors as
12 institutional or other confinement. These means shall
13 include notification, support, and assistance in
14 implementing protective measures where appropriate."

15 The only part of the rather lengthy statement that
16 FEMA gives in relation to J.10.d. is on page 61 of the SPMC
17 report which says in the end of the third full paragraph:
18 "Lists of persons with special needs are to be maintained.
19 The mailing cards, posters, phone inquiries and personal
20 visits, these and other lists of special facilities are to
21 be maintained in Appendix M."

22 So our testimony goes to the fact that we think
23 that these mailing cards, posters, and other efforts did not
24 in fact identify all the people nor did they identify all
25 the needs of all the people who should be dealt with.

1 If I may go a little further. I'm not at all
2 familiar with arguing about standards for late-filed
3 contentions, but I'm prepared to just --

4 JUDGE SMITH: Well, talk about all excuses you
5 have for not coming up with it until February 21st.

6 MS. TALBOT: The only excuse, Your Honor, is had
7 we had more time -- I'm not saying we should have, I'm just
8 saying if we had had more time. I mean, that's a dead
9 argument. But if we had had more time we would have filed
10 supplemental response to discovery in the form of, you know,
11 this is what we have come up with or whatever. Instead when
12 the shoe dropped on February 21st in lieu of a supplemental
13 response to discovery was in fact testimony of Dr. Don
14 Dillman and Sharon Moriearty on JI-48.

15 This goes to identification of individuals in
16 assessment of needs.

17 JUDGE SMITH: And you're representing to the Board
18 that this is the first practical opportunity that the
19 Attorney General had to inform the Board and the parties.

20 MS. TALBOT: Absolutely, Your Honor.

21 I wish I had kept time sheets of the hours that
22 were put in, in that period. There was no time to come up
23 with additional supplemental answers that would have, you
24 know, maybe preceded this by a day. There was just no time.

25 And I honestly thought that the text of the

1 testimony fell within the broad language of the actual
2 contention and the broad language of Basis C. I knew that
3 it had nothing to do with some of the specific language of
4 other bases.

5 Your Honor, also, if I might add. I'm sorry for
6 the unanticipated development of this matter. I just want
7 to put on for the record, though, that the issue that this
8 is about -- this is about disabled people. They have no
9 spokesperson in this matter other than me who sits here
10 right now.

11 Mass AG is perfectly willing to allow
12 Applicants --

13 JUDGE SMITH: Your argument is exactly in
14 accordance with the five standards for late-filing. Why
15 don't you sort of -- do you have those standards?

16 MS. TALBOT: Yes.

17 JUDGE SMITH: On page 71.

18 MS. TALBOT: Your Honor, I would just as soon, you
19 know, I would rather not take any time. I would rather do
20 it now.

21 JUDGE SMITH: No. If this testimony is important
22 to you, you take the time that you need.

23 I'm pointing out to you how you should organize
24 your argument. How we are hearing your argument. And what
25 you're saying, as I understand it, that if you don't do this

1 it won't be done. And therefore, category number three, to
2 the extent to which your participation may reasonably be
3 expected to assist in developing a sound record should be
4 scored on your behalf.

5 MS. TALBOT: Absolutely, Your Honor.

6 It won't get in the record if I don't put it in.
7 The Applicants won't put it in.

8 JUDGE SMITH: Are there any other means by which
9 the Attorney General's interest will be protected in this
10 hearing?

11 MS. TALBOT: Well, to the extent that the Attorney
12 General represents the disabled in the EPZ community the
13 Attorney General's interests are affected by not --

14 JUDGE SMITH: No. But is there any other means?

15 MS. TALBOT: Oh, any other way of doing it?

16 JUDGE SMITH: Yes. Right.

17 MS. TALBOT: None that I can think of unless you
18 can tell me one and then I will do that.

19 JUDGE SMITH: It just won't be represented by
20 other parties.

21 MS. TALBOT: Absolutely not.

22 JUDGE SMITH: Now will it broaden the issues or
23 delay the proceeding?

24 MS. TALBOT: Oh, Your Honor, I think it will --
25 no, it won't broaden the issue or delay the proceeding, on

1 the contrary. We can get to it right now and it will be
2 done and put to bed and it will have been -- except if we
3 want to give the Applicants more time to respond.

4 I just want to point out to the Board that they
5 did retain a professional survey person that did the survey.
6 In their answers to our interrogatories they mention the
7 name of two people that oversaw the survey. Why those
8 people aren't on their panel in the rebuttal, I don't know.

9 I'm just saying that we're perfectly willing to
10 give Applicants more time to find, you know, an expert, if
11 in fact they can find one, who will defend the methodology
12 and results of the survey. That's the only thing that would
13 take more time.

14 JUDGE SMITH: Do you have anything else to add?

15 MS. TALBOT: Just, Your Honor, again, if this
16 issue doesn't get aired today it won't get aired. And, I
17 think that of all the issues that are in this case, to me,
18 this is the most important. Because it's about people that
19 don't have, you know, I'm the only spokesperson for this,
20 for these people in this proceeding. And if it doesn't get
21 in the record it's really -- it's a shame.

22 MS. CHAN: Your Honor, the Staff would like to
23 make note of its response on the 27th of May 1988 which is
24 11 months ago in response to Mass AG Contention 50 which is
25 the basis of the current JI Contention 48.

1 The Staff had opposed the admission of the
2 contention on all the bases on which it was based.
3 Specifically the Staff stated, quote: "Basis C is overly
4 vague because it provides no explanation of what additional
5 information it is alleged that the utility should obtain
6 about the special needs resident population."

7 I think at this time if the Mass AG had read the
8 Staff's response they would have known there was some
9 question as to the specifics of how they were planning to
10 obtain additional information about the special needs
11 population. And this was some notice over almost a year
12 ago. That at least the Staff questioned what deficiency the
13 Mass AG was pointing to.

14 JUDGE SMITH: Mr. Trout?

15 MR. TROUT: Your Honor, on the five factor test.

16 JUDGE SMITH: Take in your argument, too, address
17 the response to FEMA's finding. The timeliness of the
18 response to FEMA's finding, too.

19 MR. TROUT: Okay, Your Honor.

20 I'm having a little difficulty figuring how FEMA's
21 finding would give Mass AG -- would broaden the contentions
22 that Mass AG had already filed.

23 JUDGE SMITH: Well, we've had trouble with that
24 concept, too. If you can put some light on it, it would be
25 helpful.

1 MR. TROUT: Well, Your Honor, the contention --
2 the Board is here to litigate the contentions that were
3 submitted by the Intervenor. And there has been a finding
4 by FEMA of adequacy across the board as to all the criteria
5 by which FEMA, as a regulatory agency, has to test the SPMC
6 and has to test the exercise performance.

7 But we are not here to litigate every single
8 finding and subfinding in that FEMA report. We are here to
9 litigate the contentions that were submitted by the
10 Intervenor back in --

11 JUDGE SMITH: You're relying upon FEMA's finding,
12 J.10?

13 MR. TROUT: Yes, Your Honor, we are.

14 JUDGE SMITH: I don't have it handy here. But
15 you're relying upon it. You want us to find that it does
16 the job.

17 MR. TROUT: That's right.

18 JUDGE SMITH: And they have surrebuttal testimony
19 to it.

20 MR. TROUT: Yes, Your Honor, we are relying on the
21 FEMA finding. And we're relying on the FEMA finding for the
22 purpose of this litigation to the extent that part of that
23 FEMA finding goes to the issues that were raised.

24 Now what has developed is a situation where
25 another part of that FEMA finding would be implicated by

1 this late-filed issue of Mass AG.

2 It's the same little subfinding, but the issues
3 have been broadened. And we're still relying on the FEMA
4 finding.

5 But my difficulty is that I hear the Mass AG
6 arguing that they're here to litigate the FEMA finding of
7 adequacy and then anything that's in the FEMA finding of
8 adequacy is fair game. Because the FEMA finding of adequacy
9 didn't come out until later.

10 I don't understand how that argument can work
11 conceptually when the purpose of these hearings has been all
12 along to litigate the Intervenor's contentions.

13 The FEMA finding has had certain evidentiary and
14 procedural significance. But the scope of the litigation is
15 and will always be the contentions filed by the Intervenor's.

16 JUDGE SMITH: So you're relying upon FEMA's
17 findings only to the extent that they address the properly
18 admitted contentions?

19 MR. TROUT: For the purposes of this litigation.

20 JUDGE SMITH: So the fact that FEMA made findings
21 with respect to J.10 as to which they rebut doesn't do any
22 good because you would not have relied upon that aspect of
23 FEMA's finding anyway because it was not in issue.

24 MR. TROUT: Yes, Your Honor, again, for the
25 purposes of this litigation.

1 I mean, obviously we rely --

2 JUDGE SMITH: Before this Board.

3 MR. TROUT: Right. Yes.

4 To briefly go through the five factors, Your
5 Honor, I see three of the five including the first one, the
6 most important one, as weighing against Mass AG.

7 The first being good cause, if any, for failure to
8 file on time. The contentions were drawn up at the
9 beginning of last year. They were filed in April. There
10 was a period from the end of July, after the Board had ruled
11 on all the contentions, and discovery opened and Applicants
12 made all their documents available. To the extent that the
13 documents had not previously been made available and some of
14 them had been made available previously. That was why we
15 had of course the protective order in this case.

16 Some documents were made available in February;
17 the rest were made available shortly after the end of July
18 when discovery was opened.

19 Mass AG has had Applicants' documents for many
20 months. Frankly, I cannot as I sit here, Your Honor, tell
21 you when these particular documents were made available.

22 MS. TALBOT: Sometime in the fall.

23 MR. TROUT: Well, they were examined by Mass AG
24 sometime in the fall. And I think short of going back and
25 looking at the records that may be the best we can do at

1 this point in time.

2 The other information, the information in the
3 testimony which is not dependent on looking at Applicants
4 information. For example, the census information, the
5 Commonwealth and the Mass AG presumably had that also for
6 quite some time.

7 I don't want to be in the position of Applicants
8 criticizing the efforts of individual members of the
9 Attorney General's Office. We don't like to do that. And
10 it's not nice and it's not appropriate.

11 But the position of the Attorney General -- the
12 Attorney General's Office as an institution has elected to
13 pursue this litigation in a manner that is broad and across
14 the board. They have launched a campaign on every front.
15 And that's fine. That's their right.

16 But as we have argued to this Board before, having
17 made that election they then have to meet their obligations.
18 And they just have not in this case met their obligation to
19 decide what issues they want to litigate in a timely
20 fashion. So that goes to the first issue.

21 MS. TALBOT: Excuse me, I'm lost.

22 What does this address?

23 JUDGE SMITH: Good cause.

24 MR. TROUT: Good cause.

25 MS. TALBOT: Oh, okay.

1 MR. TROUT: The second of the five factors that
2 is, "Availability of other means whereby the petitioner's
3 interest will be protected."

4 Your Honor, with all due respect this goes back to
5 something I adverted to earlier. Applicants offered to do a
6 Dillman survey.

7 MS. TALBOT: Your Honor, I object. I object.

8 This is a total misrepresentation. You did not
9 have the Dillman testimony in your hands at the time of that
10 negotiation.

11 MR. TROUT: It was here in the courtroom. It was
12 after the testimony was filed.

13 JUDGE COLE: That's true, Ms. Talbot.

14 MS. TALBOT: Excuse me?

15 JUDGE COLE: That's true, Ms. Talbot.

16 MS. TALBOT: I wasn't here then.

17 MR. TROUT: The third of the five factors is, "The
18 extent to which the petitioner" --

19 JUDGE SMITH: Could you refresh us. What was the
20 nature of that offer? To have Dr. Dillman do the survey or
21 just use his methodology?

22 MR. TROUT: To have a survey performed using
23 methodology approved by the Attorney General's Office. If
24 the Attorney General wanted us to use Dr. Dillman, we use
25 Dr. Dillman or whoever else Mass AG wanted. But we do the

1 survey the way they wanted the survey done. And that offer
2 was rejected.

3 I believe the rationale for rejecting it is the
4 rationale that has been articulated several times in this
5 case which is, the Commonwealth is not engaged in planning.

6 MS. DOUGHTY: Excuse me.

7 I believe there is a condition attached to that
8 offer which was that the Applicants could go to five percent
9 power before the survey was done.

10 JUDGE SMITH: No, no.

11 MS. DOUGHTY: Up to five percent power. That's my
12 recollection of what Mr. Dignan said. Now I could be wrong.

13 JUDGE SMITH: I think that the --

14 MR. TROUT: The condition was withdrawal of the
15 contention, obviously.

16 JUDGE SMITH: I think what he said was -- what do
17 you think he said?

18 MR. TROUT: Oh. This is not a five percent
19 contention. This is a full power contention.

20 JUDGE SMITH: I understand that.

21 But he did put it in context of five percent of
22 power. Do you recall what he said?

23 MS. SELLECK: I believe he said, prior to full
24 power operation.

25 JUDGE SMITH: Prior to full power.

1 MS. SELLECK: That we would do a methodology
2 survey.

3 JUDGE MCCOLLOM: Prior to what?

4 MS. SELLECK: Full power operation.

5 MR. TROUT: Full power operation.

6 JUDGE MCCOLLOM: Full power.

7 MR. FIERCE: That's unacceptable --

8 MS. SELLECK: I don't recall Mr. Traficonte saying
9 that was his stumbling block. I do recall Ms. Doughty
10 bringing up the issue.

11 MR. FIERCE: I wasn't here, Your Honor, but if it
12 was made conditional that a full power license could be
13 granted and then the survey could proceed, I can say on
14 behalf of Mass Attorney's Office --

15 MS. SELLECK: No, no.

16 MR. TROUT: No. It was prior to full power
17 operation.

18 MS. SELLECK: Prior to full power operation as
19 opposed to prior to five percent operation.

20 JUDGE SMITH: Let's go ahead.

21 MR. FIERCE: But we may be able to talk some more
22 about this. If it's prior to full power operation, we may
23 have discussion we can ensue in.

24 JUDGE SMITH: Would you repeat what you said?

25 MR. FIERCE: There may be a negotiation we can

1 engage in if the survey that they are indicating they would
2 be willing to undertake would have to be completed such that
3 the data would be in hand prior to full power operation
4 license being granted.

5 JUDGE SMITH: You think there's room for a
6 settlement of that?

7 MR. FIERCE: There is certainly room to talk on
8 the issue of a proper survey for the handicapped and special
9 needs.

10 JUDGE SMITH: All right.

11 MR. TROUT: Well, I would go on, Your Honor, to
12 the third criteria.

13 JUDGE SMITH: Just for completeness right now and
14 then let's return to the other point. There is no other
15 means -- I mean, no other petitioner -- no other way that
16 this particular adjudication would have the record developed
17 in the absence of this contention. You're not going to
18 argue that, are you?

19 Well, go ahead and argue. Just go ahead and
20 argue.

21 MR. TROUT: No, Your Honor, I'm not going to argue
22 that the issue would be litigated. No. Certainly not.

23 JUDGE SMITH: And it won't be represented by
24 existing parties.

25 MR. TROUT: The issue; right.

1 JUDGE SMITH: The extent to which it will broaden
2 the issues or delay the proceeding is pretty self-evident.
3 It certainly would broaden the issue over, if it's not in by
4 that amount.

5 MR. TROUT: Yes.

6 JUDGE SMITH: And the amount of time it takes to
7 hear cross-examine, rebut, and decide would delay the
8 hearing.

9 MR. TROUT: Yes.

10 JUDGE SMITH: Okay.

11 MS. TALBOT: Your Honor, can I just -- since I
12 have looked at this a little closely I may have spoken too
13 quickly before.

14 JUDGE SMITH: Wait a minute.

15 (Board reviewing transcript.)

16 JUDGE SMITH: Mr. Dignan did put in a commitment
17 that they would do a Dillman survey before five percent of
18 power.

19 Now I understood him to say or to be saying there
20 that they would adopt the methodology proposed by Dr.
21 Dillman. I didn't hear him elaborate.

22 Where are we on this possibility?

23 MS. SELLECK: Your Honor, I believe the offer was
24 not accepted. That's where it stands.

25 MS. TALBOT: I think it was put in limbo.

1 MS. SELLECK: Your Honor, I think it was not
2 accepted.

3 JUDGE SMITH: All right. The offer wasn't
4 accepted, I understand that.

5 Are you saying the offer is irrelevant?

6 MS. SELLECK: Your Honor, can I have a moment to
7 ask my client if I can -- what representation I can make.

8 JUDGE SMITH: Why don't we take a short break here
9 and see exactly where we are on this particular point.

10 Fifteen minutes.

11 (Whereupon, a 15 minute recess was taken.)
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1 JUDGE SMITH: The Board began, as we stated we
2 would, we began with the proposition that the testimony
3 should be considered as a late filed issue under the five
4 factors.

5 And looking at the first one, a good cause for
6 late filing, we looked at the statement that the Attorney
7 General did not learn of the methodological inadequacies
8 until they consulted with their expert, we don't believe
9 that information learned from an expert after the close of
10 discovery is the type of late available information that is
11 normally regarded as supporting good cause for late filing.
12 We have several things about that we didn't understand, in
13 addition, and that is, Dr. Dillman is clearly an expert on
14 methodology; why was he consulted?

15 Apparently there was a concept by the Attorney
16 General that the methodology of the survey would be an issue
17 that they wanted to pursue. But in any event, you can't
18 frame your contentions, go through discovery, get an
19 extension on discovery, wait until discovery closes, and
20 then, in preparation for your testimony, then and only then
21 consult with an expert as to what the basis of your concerns
22 are. That's much too late. That is not good cause.

23 We have also looked at the FEMA report to see if
24 there was anything in there that would generate good cause
25 for late filing, and we agree there was two aspects of that.

1 We agree with Mr. Trout that they are relying upon the FEMA
2 report only for issues properly raised by Intervenor's
3 contentions and bases. To any extent that the FEMA report
4 goes beyond that, it is irrelevant.

5 However, we went farther than that. We looked at
6 FEMA's J.10.d finding with respect to notification of the
7 special needs people. We saw nothing in there which in
8 itself would have triggered for the first time an inquiry by
9 the Attorney General into the methodological adequacy of the
10 surveys.

11 We don't believe that there is, in the traditional
12 sense in NRC adjudications, good cause for the late filing
13 of an issue based upon the adequacy of the surveys other
14 than those inadequacies which were alleged in the Basis or
15 responded to in the interrogatory, which is not relevant to
16 the Dillman-Moriearty testimony before us.

17 The other issue, however, and that is, whether the
18 matter will be developed or pursued by anybody else if the
19 Attorney General does not do it, would weigh in favor of
20 receiving the testimony. The fact that it would broaden the
21 hearing and delay it would weigh against it. Normally when
22 you find that there is no good cause for late filing, it
23 becomes much more difficult to establish your late filing
24 case based upon the other factors.

25 Having said all of that, I guess if we were going

1 to apply in a cold surgeon-like application Commission
2 precedent, we would have to find that the tes'imony cannot
3 be received and that it's not justified under the five
4 factors.

5 But we're not quite willing to let it go at that.
6 We think that Dr. Dillman's credentials are excellent. We
7 haven't seen it as a Board, but I have some difficulties
8 with his analysis. I also have some difficulties with Ms.
9 Moriearty's analysis. The thing that the Board is focusing
10 on more than anything else is the importance of this issue.
11 This issue is as important as any issue which can be faced,
12 and we have an interest in having either the matter resolved
13 to the best satisfaction possible for the public health and
14 safety, or resolved to the satisfaction of the Intervenors.

15 So we're taking some extra liberties on this
16 issue, and as a matter of Board discretion we're going to
17 try to push a negotiation along the lines suggested by Mr.
18 Dignan. Even though Applicants might be entitled to prevail
19 on this point purely as a matter of precedence, the Board is
20 taking into account that this is a very important issue. We
21 think that there is a possibility of a contribution by Dr.
22 Dillman and Ms. Moriearty, and that possibility should not
23 be wasted if it is really available.

24 We also recognize that in this instance, without
25 waiving the position, the Attorney General has not fallen

1 back on the stated position that they simply refused to
2 participate in planning. I think we have here a situation
3 where you don't have to say one way or the other. We may
4 have a situation here where you want the issue resolved to
5 the best satisfaction no matter how it affects your
6 litigative position.

7 Would that be fair to say?

8 MS. TALBOT: Yes, Your Honor.

9 JUDGE SMITH: So I think what we have here then is
10 the only time that I have been able to identify specifically
11 is a willingness to participate in the improvement of the
12 plan.

13 Without detriment to your position all over the
14 place, which you made amply clear, but because of the
15 special tender nature of this problem no matter how the
16 litigation comes out, you want to make sure this problem is
17 taken care of as well as it can.

18 MS. TALBOT: That's right, Your Honor.

19 JUDGE SMITH: Is that right?

20 MS. TALBOT: That's right.

21 JUDGE SMITH: You represent that.

22 MS. TALBOT: But, of course, there would have to
23 be a check and balance in that, too. If Applicants were to
24 do an appropriate or a Dillman-type survey, Mass AG would
25 still like to reserve the right to be able to look at the

1 results of that and raise any contention if -- you know, I
2 sort of hear these --

3 MR. DIGNAN: That takes the offer off the
4 table --

5 MS. TALBOT: -- inarticulated moans.

6 MR. DIGNAN: -- as far as I'm concerned, Your
7 Honor, right there.

8 MS. TALBOT: It's a legitimate offer, Mr. Dignan.

9 JUDGE SMITH: Well, wait a minute. In the first
10 place, the Board's at a loss here, because we don't even
11 know what a Dillman-like survey is. The only thing we know
12 is we've read the testimony, and they have spent some time
13 and attention to their concerns about it. And we don't have
14 any idea of what the offer really is and what the
15 negotiation might be.

16 But one thing we're concerned about is that a word
17 spoken without thorough consideration will suddenly result
18 in the withdrawal of the offer. It's more important than
19 that, Mr. Dignan.

20 MR. DIGNAN: Well, Your Honor, you see I don't
21 think my sister spoke it without consideration, because this
22 is exactly the position that was taken when I put the offer
23 on the table.

24 First of all, and I apologize that I'm speaking
25 not having been here this morning. If I say anything at

1 variance with what happened this morning, it's just a
2 failure of communication on my part.

3 But the point is this. When I put the offer on
4 the table, first of all, the offer as it was put on the
5 table, to remove any doubt, was it would be a license
6 condition concerning above 5 percent power operation. It
7 was never an offer to affect the low power license. And if
8 anybody doubts that, they can review the transcript.

9 The second thing is this.

10 JUDGE SMITH: Would you explain that better?

11 MR. DIGNAN: Yes, Your Honor.

12 When I put the offer on the table the first time,
13 I said we would take a license condition that we would do a
14 Dillman-type survey before going above 5 percent. In other
15 words, it was never offered as a condition to our operating
16 the plant at low power. In other words, at 5 percent --
17 doing the 5 percent testing.

18 JUDGE COLE: Yes. That's at transcript page
19 18166.

20 MR. DIGNAN: Yes.

21 JUDGE SMITH: I'm sorry, but I just don't
22 understand what those words mean.

23 MR. DIGNAN: Well, Your Honor, we have now
24 authorization, as you know, subject to some resolution of
25 financial qualification matters, to operate the plant up to

1 5 percent of power.

2 JUDGE SMITH: Yes.

3 MR. DIGNAN: And do low power testing.

4 My understanding is that there was a suggestion
5 this morning, and if there wasn't, I don't bring this up,
6 that the offer I had made is to condition our operating at
7 low power on doing the Dillman survey, and that was never my
8 offer.

9 My offer was to condition the license that we
10 would not operate above 5 percent power before doing a
11 Dillman survey.

12 MS. TALBOT: If that was construed as our offer
13 before, it's not our offer now.

14 JUDGE SMITH: Let's take a break. They are going
15 to have to explain this to me.

16 (Whereupon, a recess was taken.)
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1 JUDGE SMITH: Mr. Dignan, none of us heard your
2 remarks the same way. So would you say them again?

3 MR. DIGNAN: Here -- and I'm not sure it's a
4 problem any more after talking to my sister over there.

5 I understood this morning the suggestion was made
6 that the offer that was put on the table was to condition
7 not only the full power license on doing this survey --
8 correct, the full power operation.

9 JUDGE SMITH: Yes.

10 MR. DIGNAN: But, in addition, that we couldn't do
11 low power operation either until the survey was done.

12 JUDGE SMITH: No. No, just go above it.

13 MR. DIGNAN: Right. That's right. It was just to
14 go above it.

15 JUDGE SMITH: Right.

16 MR. DIGNAN: And I want to just get that clear,
17 and I guess the AG's office was clear, too, that nobody
18 understood my offer to condition the low power operation.

19 Now having that out of the way, the reason I
20 jumped in, and it was just to take an offer off the table,
21 is because my sister was quite consistent with what I heard
22 when I put the offer on the table.

23 What they want to do is two things. Well, what
24 they want to do is one thing. They want the right, after
25 the survey is done, and keep in mind it will take some time

1 to do the survey.

2 JUDGE SMITH: Yes, I understand that.

3 MR. DIGNAN: They want the right to then come in
4 and open up the issue if they don't like the way the survey
5 was run.

6 JUDGE SMITH: That's right.

7 MR. DIGNAN: And I would rather litigate it now.

8 JUDGE SMITH: Just wait a minute, because we
9 didn't get that far yet.

10 MR. DIGNAN: Okay.

11 JUDGE SMITH: We recognized as soon as that was
12 said the mischief that that could cause.

13 MR. DIGNAN: All right, fine.

14 JUDGE SMITH: And you could come back in, you are
15 all ready to crank her up.

16 MR. DIGNAN: Okay.

17 JUDGE SMITH: And they say, no, Dillman bad, bad
18 Dillman.

19 MR. DIGNAN: Bad Dillman.

20 JUDGE SMITH: And here we go, back up here, and we
21 start and we file briefs and everything else.

22 Is that what you are worried about?

23 MR. DIGNAN: That's one thing I'm worried about.

24 JUDGE SMITH: That's what you're worried about.

25 MR. DIGNAN: And there is a second thing I'm

1 worried about.

2 In the exchange with the Attorney General, you
3 took the position that they wouldn't have to plan, and I'm
4 not trying to make them plan. But I want you to understand
5 one thing. Any settlement of this thing whereby we agree to
6 do a survey as we look at the Dillman-type survey, we have
7 to have the cooperation of the Commonwealth and its
8 political subdivisions to do such a survey. And so a
9 condition has got to be that they will cooperate with us in
10 the survey.

11 JUDGE SMITH: With this one issue.

12 MR. DIGNAN: That's right.

13 JUDGE SMITH: That they don't walk away from
14 their --

15 MR. DIGNAN: I'm not trying to hook them into an
16 admission for the rest of the case. But the settlement has
17 got to include a stipulation that the Commonwealth will
18 cooperate in the doing of the survey.

19 MS. TALBOT: In doing what, though? I don't see
20 what we have to do if you have your survey guys out there.

21 MR. DIGNAN: Because as I understand it, and I'm
22 not an expert, Dr. Dillman calls for certain things to be
23 done that our people can only do if they have the
24 cooperation of the Commonwealth and its political
25 subdivisions --

1 MS. TALBOT: Like what?

2 MR. DIGNAN: -- and the encouragement of private
3 entities to cooperate with us from the Commonwealth, because
4 otherwise we will get the same turndowns we've gotten
5 before.

6 MS. TALBOT: But like what?

7 MR. DIGNAN: Like what?

8 Like answering questions.

9 MS. TALBOT: The private individuals -- no, Mr.
10 Dignan. I mean, I don't see the connection. I'm not trying
11 to belabor this or confuse the issue. I just don't see the
12 connection.

13 MR. DIGNAN: Well, if you don't see the
14 connection, my people do. And I don't pretend to want to
15 see or not see the connection, because I'm not expert enough
16 to know. But my people tell me --

17 MS. TALBOT: Maybe we should ask Mr. Dillman. I'm
18 not expert enough to know either whether state participation
19 is necessary to conduct a survey.

20 I would like to let the Board know, though, that
21 if Applicants are concerned about sabotage, we'll stipulate
22 right now on the record that we would never challenge that
23 as a basis in any future contention, nor is it necessary
24 that there would be future contentions, Mr. Dignan, if the
25 survey identified the people in the EPZ and appropriately

1 determine the needs.

2 MR. DIGNAN: Ms. Talbot, I do not doubt your good
3 faith, all right, your personal good faith. The approach of
4 the Commonwealth in this case, as articulated very well by
5 Mr. Traficonte, is to do what it takes to stop this plant.
6 I am not prepared to make an offer that will give you a
7 second bite at this apple after the survey is done, and it's
8 that simple.

9 MS. TALBOT: Your Honor, just for the record I
10 would like to just make the offer and make it clear that an
11 appropriate survey be done prior to full power licensing,
12 that Intervenor get to view the results, and challenge if
13 and only if necessary, and that Intervenor would never
14 assert as any basis to any potential future filed contention
15 anything concerning "sabotage".

16 JUDGE SMITH: I didn't understand what you said.

17 MS. TALBOT: I was just sort of framing the offer
18 concisely for the record.

19 JUDGE SMITH: Well, I know, for the record, but
20 for right now just assume we're the same as the record.

21 MS. TALBOT: Oh, okay.

22 JUDGE SMITH: We want to understand what you are
23 saying, too.

24 MS. TALBOT: Here's the deal. For the record, we
25 are prepared to make the following offer: That an

1 appropriate survey be done by the Applicants, or a Dillman-
2 type survey, if that makes it more understandable; that this
3 be done prior to full power licensing; that Intervenor's are
4 allowed to see the results; and only if necessary, to
5 challenge those results in the form of contention. And that
6 because Applicants --

7 JUDGE SMITH: In a reopened litigation.

8 MS. TALBOT: Well, does Your Honor appreciate the
9 fact that we have to have that handle?

10 JUDGE SMITH: I know.

11 MS. TALBOT: I mean, they don't trust us and we
12 don't trust them.

13 JUDGE SMITH: Right. All right.

14 MS. TALBOT: It's unfortunate, but --

15 JUDGE SMITH: I understand, but I think that when
16 we point these things out and then we might find something
17 that is acceptable to both sides.

18 MS. TALBOT: Okay.

19 JUDGE SMITH: Now the shortfall, of course, is the
20 one we just tested; that you would be holding veto power --

21 MS. TALBOT: Right.

22 JUDGE SMITH: -- over the full power operation,
23 and you could at a late date say, we're not happy. Here's
24 our contention as to the inadequacy of the implementation of
25 the Dillman survey. And under this stipulation a full power

1 authorization would be delayed while this Board resolved the
2 matter.

3 MS. TALBOT: Or if they went back and brought the
4 survey up to par.

5 JUDGE SMITH: But in the last analysis the
6 Attorney General would be sitting there with the power to
7 approve or withhold approval of the effort, which would be
8 the same power as approving or withholding approval of a
9 full power license. And Mr. Dignan, I'm sure, will never
10 agree to that.

11 MS. TALBOT: But isn't it ultimately your
12 decision?

13 JUDGE SMITH: Particularly in view of the fact
14 that several stipulations that have been entered into have
15 fallen apart in the implementation when there has been
16 arguments as to what they meant. And so I just don't think
17 we would ever convince Mr. Dignan to turn over the short-
18 term ability to win the right to operate that plant to you.
19 I just don't think that he would agree.

20 MS. TALBOT: But isn't it ultimately your
21 decision, Your Honor, not mine?

22 JUDGE SMITH: Well, right. But if you file a
23 contention in October or whenever, or May, or June, or July
24 saying they have not abided by the stipulation, and we want
25 contentions and we want litigation of the contentions, and

1 we want evidence and we want proposed findings and a
2 decision, you are asking more than I think the Applicants
3 would be willing to give.

4 MS. TALBOT: Your Honor, we can't just let them do
5 any old thing. The last survey they did, you know, and I'll
6 let Your Honor read the executive summary of that survey,
7 there's a disclaimer on it.

8 JUDGE SMITH: Would you be willing then to do it
9 under a circumstance in which full power would not be an
10 issue, but the Applicants would agree in advance to abide by
11 Board rulings as to how the survey has to be implemented?

12 MS. TALBOT: They have to have the names before
13 full power, Your Honor.

14 JUDGE SMITH: Well, then, I don't think you are
15 making a proposal that they will ever accept. I mean, they
16 just can't accept it. I mean, I don't think you can. They
17 already turned it down.

18 While you were conferring, Mr. Dignan, a proposal
19 that I made was rejected was that there be no condition of
20 full power. However, the Applicants agree in advance that
21 if they bring the matter, the Board would retain
22 jurisdiction even if we were to issue a full power license
23 to approve the implementation of the Dillman survey. And
24 they won't do that.

25 MR. DIGNAN: In other words, as I understood the

1 suggestion of the Board, it would have been -- the
2 settlement essentially then would have been this. That the
3 Applicants would go out and do the Dillman-type survey.

4 JUDGE SMITH: Subject to our approval.

5 MR. DIGNAN: Subject to your reservation of
6 jurisdiction which reservation you are already saying would
7 not be license-blocking.

8 JUDGE SMITH: That's right.

9 MR. DIGNAN: That is to say, it would be the same
10 thing as if a remand came down to the Board.

11 JUDGE SMITH: Exactly.

12 MR. DIGNAN: And in the Board's judgment the
13 remanded issue was not one that required the picking up of
14 an already issued license. And, therefore, that the plant
15 would continue to operate while we litigated what they
16 wanted to. And in addition, after that litigation, we would
17 then, I assume, be subject to the Board telling us you do it
18 this way.

19 JUDGE SMITH: Better.

20 MR. DIGNAN: Or something will befall you.

21 JUDGE SMITH: Right.

22 MR. DIGNAN: That kind of offer would sell me.

23 MS. TALBOT: Except then the plant is licensed and
24 there is no list and there is no adequate protection.

25 JUDGE SMITH: That's right. So you won't accept

1 that.

2 MS. TALBOT: I feel like we can't.

3 JUDGE SMITH: All right. So I don't know what
4 else. The most powerful hold that you would have would be
5 to approve or disapprove blocking license. The second most
6 powerful thing available to you is to have a condition upon
7 Board approval on a nonlicense-blocking thing, which after
8 the fact we could say do it better or shut down. But that
9 is a second most powerful thing that is available to you,
10 and you've rejected that. And you are certainly not going
11 to accept anything less powerful than that, are you?

12 So the only thing you are willing to accept is no
13 full power unless you are happy with their modification of
14 the survey.

15 MS. TALBOT: Unless they have the list of the
16 names with -- yes.

17 JUDGE SMITH: Unless you are happy with that.

18 MS. TALBOT: Yes. Well, it wouldn't be us. It
19 would be the experts.

20 JUDGE SMITH: Well, whatever. But as a party --

21 MS. TALBOT: Right.

22 JUDGE SMITH: -- you would have to come back in
23 and give, based upon the advice of your experts, your
24 approval before the full power ticket could issue.

25 MS. TALBOT: I just feel like we could never agree

1 to let the balloon go up without a list.

2 JUDGE SMITH: And you won't put it in the hands of
3 the Licensing Board.

4 MR. FIERCE: I think we would like to put it in
5 the hands of the Licensing Board, Your Honor. I think the
6 critical point is will the plant operate for a day --

7 JUDGE SMITH: Yes.

8 MR. FIERCE: -- without a list of the handicapped
9 people. And under your second proposal, it would.

10 JUDGE SMITH: It could.

11 MR. FIERCE: And that's where we just can't go
12 farther because of the protection that we think needs to be
13 in place for the handicapped prior to operating at full
14 power, and that's the only difference.

15 We trust the Board. We would like the Board to
16 have an opportunity to decide this issue. We've got the
17 testimony here today. If we filed contentions at that time,
18 we again put it in the hands of the Board where it belongs.

19 JUDGE SMITH: They could possibly sweeten it up a
20 little bit if they were to commit to completing the survey
21 that they believe meets the requirements, that they believe
22 meets the requirements of your expert before they would go
23 to full power, but leaving it to the Board to decide,
24 without regard to full power, whether it does in fact meet
25 it.

1 They are not going to turn over the key to that
2 plant to you. I can see that. They never will do that.

3 MR. DIGNAN: Your Honor, could I put another
4 counteroffer on the table?

5 JUDGE SMITH: Mr. Dignan?

6 MR. DIGNAN: What if I committed the Applicant to
7 hiring Dr. Dillman and doing a survey that Dr. Dillman
8 approves, but I will not take a license condition or
9 anything else?

10 We will hire and pay Dr. Dillman to design a
11 survey for us. And I would agree to execute whatever he
12 designed. In other words, what I won't agree is to let the
13 completion of that or anything else block power operation.
14 But I would commit the client -- I am authorized to commit
15 the client that we would hire, pay Dr. Dillman his normal
16 fees, take whatever suggestions he had or his design of the
17 survey and execute it as he designed it.

18 JUDGE SMITH: Now look down the road a little bit.
19 Before you reject or accept, look down the road a little
20 bit. Let's assume that as a consequence of this debate this
21 afternoon we decide that no matter what we want to hear from
22 Dillman and Moriarty about their ideas, and at the end they
23 convince us.

24 Now what are we likely to do with that
25 information? Say, well, tear down the plant, your survey

1 was not good, go on home, you've lost the case, that's it.

2 Or are we likely to say --

3 MS. TALBOT: Do it right.

4 JUDGE SMITH: Conform it with the guidance offered
5 by your people.

6 What are we likely to say?

7 MS. TALBOT: I think the latter.

8 JUDGE SMITH: Well, I can tell you what we're
9 likely to say. If it can be done, if we believe it could be
10 done, we are under mandate from the precedents of NRC law to
11 give them a shot at it.

12 So what is the most you could gain if you are
13 to -- what is the most that you could possibly gain?

14 The most that you can gain, in my view, is having
15 a survey conform to your witnesses' specifications. That's
16 the most that you can gain.

17 MS. TALBOT: I guess I would just feel better in
18 the posture of having the Board do it the Board's way than
19 having me give away the store. We are not in a position to
20 say, okay, go to full power without the list, which we think
21 is so critical to anything prior to full power.

22 JUDGE SMITH: They would commit assuming -- I
23 guess, if Dr. Dillman would be available -- they would
24 commit, as I understand it, moving on it right now and
25 having the so-called list before full power. But they are

1 not going to commit keeping the record open for litigation
2 of the adequacy of that.

3 MS. TALBOT: I would think if they had Dr.
4 Dillman, there would probably be a very small chance that
5 there would even have to be further litigation. But we
6 still can't dissuade that.

7 JUDGE SMITH: I would question that they are not
8 going to give you any chance. I would just really question
9 that.

10 MS. TALBOT: I feel in a difficult position, and
11 I'm not trying to stonewall, but I just cannot say, fine,
12 you know, don't have the list and plug the thing in. There
13 is no way I can do that.

14 JUDGE SMITH: You would have the list as I
15 understand it. You would have the product of Dr. Dillman's
16 advice and efforts, if he's willing, before full power.
17 What you would not have would be the right to block full
18 power license by further litigation on it. That's what you
19 would not have if I understand what the proposal is.

20 It would require on your part some trust, some
21 trusting.

22 On the other hand, you had better weigh, or you
23 should weigh what it is that is likely to happen if you
24 reject the offer. I don't know what's going to happen. We
25 have not yet ruled upon the admissibility of the testimony

1 except we told you that it does not meet, in our view, the
2 standards set by NRC regulations and precedence for the
3 receipt of a late filed issue. It only meets the standard
4 that arises to a significant level that the Board has taken
5 its own direct sui sponte interest in it.

6 MR. DIGNAN: Your Honor, in terms of considering
7 this, as long as we are in a negotiating session, the
8 Commonwealth continues to refer to the fact that there is no
9 list. There is a list at this time. It's the list that we
10 generated. Speaking to the record of this case at this
11 time, I would point out to the Board our list generated a
12 list of names approximately equal to 1 percent of the
13 population involved here.

14 If I recall correctly the testimony by Mr. Daines
15 last week, when he did a similar survey they only generated
16 a list that equaled, I think it was about three-tenths of 1
17 percent of the population.

18 MS. TALBOT: He admitted his survey was
19 inadequate.

20 MR. DIGNAN: Well, no, he didn't as a matter of
21 fact.

22 MS. TALBOT: Yes, he did, Mr. Dignan.

23 JUDGE SMITH: Well, Mr. Dignan --

24 MR. DIGNAN: You'd better reread the record
25 because he --

1 MS. TALBOT: I already have this morning.

2 JUDGE SMITH: -- we are right now in a negotiating
3 session.

4 MR. DIGNAN: No, no, I understand that. But my
5 point is simply this. The argument that there is no list
6 out there, the suggestion as the part of negotiation that
7 there is no list out there just isn't so. There is a list.
8 It is a list generated in a fashion that the Attorney
9 General doesn't like and would like a better list generated.
10 But there is a list out there There would be a list out
11 there if nothing gets done and so forth. So I think that
12 has to be taken into consideration here.

13 Now what we are offering to do here is generate
14 the new list their way. But Your Honor is quite correct
15 that I will not -- I have no authority and would not advise
16 my client to execute any agreement on this basis which could
17 result in blocking full power operation of the plant.

18 JUDGE SMITH: On the unilateral action of the
19 Attorney General.

20 MR. DIGNAN: Exactly, exactly.

21 JUDGE SMITH: Well, I don't think they are arguing
22 that any more. That's already been rejected.

23 MS. TALBOT: No. By the same token, we really
24 have no authority to waive the position of the Commonwealth
25 for the past whatever number of years it is. We would like

1 nothing better than for you to come up with an adequate
2 list, and we would like nothing better for that list to be
3 approved by the Board prior to full power licensing. And I
4 think that's the condition of the offer.

5 MR. FIERCE: I'm still looking for some --

6 JUDGE SMITH: I don't think we could be a party to
7 such a commitment, because I wouldn't envision it working
8 that way. The only thing we would approve would be the
9 existence of an augmented list with Dr. Dillman's input. We
10 would not be in a position to approve the validity of that
11 list on any other basis, including criticisms you may have
12 of it.

13 We would be in a position to say, yes, it has been
14 done and know nothing more about it than it has been done
15 without evaluating whether it has been done correctly or
16 adequately or what, other than it has been done according to
17 the stipulation. That we could commit to, but we could not
18 commit to any evaluation of the adequacy of it, because,
19 number one, this is a stipulation.

20 I want to clarify what we are doing. We are not
21 taking this up as a sui sponte issue, admitting it for
22 litigation. What we are ruling here is legally you haven't
23 made the case on getting this late filed testimony in here.
24 But we don't want to drop it quite that easy. We want to
25 keep pressure on the Applicants because we can do it. We

1 have the power to do it. Whether we have the legal
2 authority to do it or not, we have the power to do it. We
3 don't want the efforts to go wasted. We want to give you
4 what we can.

5 Now what you will be losing would be any right to
6 appeal the error of any decision we made by throwing this
7 testimony out.

8 MS. TALBOT: I lose the right to appeal by
9 entering into the stipulation.

10 JUDGE SMITH: I would say so, yes. I would say
11 so.

12 MS. TALBOT: Oh, absolutely.

13 JUDGE SMITH: I mean I can't decide what you can
14 appeal or not, but that would be my view of that. I just
15 tried to have all of your cost and benefit on the table for
16 you.

17 MS. TALBOT: We realize that if we entered into
18 the stipulation we would withdraw the contentions so there
19 would be no grounds for appeal.

20 JUDGE SMITH: Right. Do you want to go consult or
21 something?

22 MS. TALBOT: We should really give the chief a
23 call.

24 JUDGE SMITH: I think so.

25 MR. FIERCE: We need to talk to Mr. Traficonte. I

1 know that one of our concerns is we don't like to just turn
2 over our experts to the Applicants.

3 JUDGE SMITH: I understand that.

4 MR. FIERCE: There may be some middle ground. We
5 would like to retain some expertise on the issue by
6 continuing to consult with our experts.

7 I also want to point out that it's not just Dr.
8 Dillman and Sharon Moriearty.

9 MS. TALBOT: That's right.

10 MR. FIERCE: As well as substantive input that
11 would need to be applied.

12 JUDGE SMITH: I understand. It's the methodology
13 approach, however, that we were focusing on.

14 MR. FIERCE: And I am wondering, first of all,
15 before we kind of draw the lines in the dirt whether there
16 isn't perhaps some room for some further discussion on
17 whether the two sides can get together, keeping their own
18 experts and looking first at a design, at a survey design,
19 and perhaps a questionnaire, and maybe if we could make that
20 the focus of any further disputes. We don't have to wait a
21 long time on this, Your Honor. This could be done fairly
22 quickly. Both sides retain their own experts. Then we see
23 what the Applicants come up with, with our suggestions, and
24 at the point where they say, this is what we're going to do,
25 you know, that be the subject of litigation, not something

1 that happens six or eight months from now, but something
2 that is a process that happens in the new few weeks.

3 JUDGE SMITH: They have committed, they have
4 committed to do a survey based upon the present criticisms,
5 as I understand it, of your experts, and taking their advice
6 in the implementation of it.

7 MR. FIERCE: That's a starting point. But it
8 would be the end product that needs to be examined to see if
9 it meets, in fact, those standards.

10 JUDGE SMITH: Well, I don't know what you can do.

11 MS. TALBOT: Can we call our chief, Your Honor?

12 JUDGE SMITH: I would recommend to you that a
13 matter of this importance, if I were you I would want the
14 responsibility for rejecting it to be at a higher level.

15 MS. TALBOT: Oh, absolutely.

16 Or accepting it, Your Honor.

17 JUDGE SMITH: I beg your pardon?

18 MS. TALBOT: Or accepting it, too.

19 JUDGE SMITH: Yes.

20 MS. TALBOT: Just for the record, Your Honor,
21 could I just -- I never got to address the good cause, and I
22 know it's already been decided. But just for the record, I
23 want you to know that I honestly thought the issue was
24 there. I would have never drawn up the testimony, had the
25 experts draw up the testimony, and I couldn't specify the

1 particular problems with the survey until I got the
2 documents through discovery and then I had my expert review
3 them.

4 JUDGE SMITH: And the documents, would you be very
5 specific about what documents and when you got them?

6 MS. TALBOT: I got about 11 inches of documents
7 that pertained to the survey. I put them in a Federal
8 Express box. I sent them to sort of a person named Dr.
9 Petterson, who we have retained. I sent them to him, and I
10 said, what do I do with these. Please sort --

11 JUDGE SMITH: And when was this?

12 MS. TALBOT: This was early February. What do I
13 do with these, and he's the one who went through them and
14 said, I think that you need an expert on survey method, and
15 then he referred me to Dr. Dillman, and that's when our
16 negotiations started.

17 I got this tremendous bundle of stuff from
18 Applicants and couldn't make head nor tail out of it through
19 no fault of Applicants. It was the nature of the documents,
20 and just sent them off. Maybe I read the contentions too
21 broadly, but I thought it was there.

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1 (The Board confers.)

2 JUDGE SMITH: Do you want to go talk to your
3 office?

4 MS. TALBOT: Sure.

5 Thank you, Your Honor.

6 (Whereupon, a recess was taken.)

7 JUDGE SMITH: We thought you were making a report.
8 That's not the case?

9 MS. TALBOT: Excuse me, Your Honor.

10 JUDGE SMITH: We were conferring and I thought
11 you --

12 MS. TALBOT: Mr. Traficonte is coming down to
13 clear up any questions. But I asked him, I said, you know,
14 basically outlined the deal for him and my instincts were
15 correct that we can't enter into any sort of a deal that
16 would allow the plant to be licensed without our review and
17 judicial approval of a special needs survey.

18 JUDGE SMITH: So he is coming here to say that?

19 MS. TALBOT: No. I think he is just coming here
20 because he wants to come here.

21 (Laughter)

22 MS. TALBOT: I asked him to.

23 JUDGE SMITH: But you are officially reporting
24 that you cannot accept any such --

25 MS. TALBOT: That's the official report.

1 Maybe if the Judge wants to impress upon him the
2 significance of it maybe he will have a different response.

3 JUDGE SMITH: Well, do you want us to do it again?
4 Review the stature of it?

5 MS. TALBOT: I think it might be helpful to just
6 put it to bed once and for all with Mr. Dignan and Mr.
7 Traficante here to just say, here is the deal. It's in or
8 it's out and then just move on.

9 JUDGE McCOLLOM: When will he be here?

10 MS. TALBOT: He is on his way now.

11 JUDGE McCOLLOM: What does that mean?

12 MS. TALBOT: Oh, we're only up the hill, five
13 minutes. Ten minutes.

14 Your Honor, may I add at this point --

15 JUDGE SMITH: Just a second.

16 (Pause to peruse document.)

17 JUDGE SMITH: Go ahead.

18 MS. TALBOT: I just wanted to point out that there
19 has been so much discourse on the methodology aspects of the
20 testimony and I know that Your Honor hasn't ruled yet on the
21 five criteria which I probably inartfully discussed.

22 JUDGE SMITH: Oh, yes, we have. We have ruled.

23 MS. TALBOT: You have.

24 JUDGE SMITH: Yes.

25 MS. TALBOT: Okay.

1 I just want to point out then that there is a lot
2 of the rest of the testimony in -- a lot of the language in
3 the testimony is independent of methodology related items
4 and I don't think it would fall under the same category.

5 JUDGE SMITH: This would be another instance -- if
6 that's the case -- another instance of the basic thrust of
7 the testimony is methodology, completeness, validity,
8 getting the proper information, and anything that isn't
9 covered by that we don't want to sit down and filter
10 through, sieve through your testimony and come up with the
11 parts that might have survived.

12 I mean, it's a survey methodology criticism.

13 MS. TALBOT: Most of Ms. Moriearty's testimony,
14 Your Honor, goes towards needs assessment which was
15 addressed clearly in the bases.

16 JUDGE SMITH: Most of her testimony is, we know
17 what the needs assessment should be and the survey doesn't
18 do it.

19 MS. TALBOT: I think I'm ahead of myself here
20 because you haven't even really discussed what you're going
21 to do with the testimony anyway. So I should just be quiet
22 and wait my turn.

23 JUDGE SMITH: Do you want to begin to argue what
24 you believe should survive of Ms. Moriearty's testimony?

25 MS. TALBOT: Has Your Honor already ruled that

1 despite the equitable considerations that --

2 JUDGE SMITH: Here is where we are. We said, you
3 didn't make it on the five factors for late filing. The
4 only one that you had going for you was the one that there
5 is no other means -- I mean, you will assist in the
6 developing of a record. And your point is correct. If you
7 don't do this the record will not be developed on it.

8 We also observed that you failed to show good
9 cause for late filing. And when you fail to do that, that
10 your burden on the other counts increases commensurately.

11 All in all, if we were to apply the Commission's
12 regulations and the adjudicative precedence we would not
13 accept this testimony into evidence. However, the Board on
14 its own, in the interest of having this aspect of the case
15 developed as well as it is possible to develop, readily
16 available information can make it develop, has taken a
17 special interest in it. So we are presiding over
18 negotiations from that perspective.

19 MS. TALBOT: If negotiations have fallen through,
20 then where are we?

21 JUDGE SMITH: Then we rule.

22 MS. TALBOT: Okay.

23 JUDGE SMITH: And you're ready for our ruling? If
24 that's it, you can just tell Mr. Traficonte to stay home.

25 MS. TALBOT: I just don't know what we will do in

1 the meantime until he comes.

2 JUDGE SMITH: Continue your argument then.

3 MS. TALBOT: Okay.

4 JUDGE SMITH: No, that's all right, you don't have
5 to.

6 MR. TROUT: I also have another motion in limine
7 that has really only one issue and perhaps we could clean
8 that up while we're waiting.

9 JUDGE SMITH: That's a good idea.

10 The sole testimony of Sharon Moriearty.

11 MS. TALBOT: This is on JI-49?

12 MR. TROUT: Yes, Your Honor.

13 (Pause to review document.)

14 JUDGE SMITH: So your argument is going to be that
15 the issue survives under Contention 49?

16 MS. TALBOT: What issue, Your Honor?

17 JUDGE SMITH: The issue of notification of the
18 special needs population.

19 MS. TALBOT: Actually, Your Honor, if I could just
20 have one minute. I haven't looked at this before, I was too
21 involved in the other motion in limine. I'm a fast reader.

22 (Pause)

23 JUDGE SMITH: Well, let's not get off on that
24 motion, Mr. Traficonte is here.

25 MS. TALBOT: Okay.

1 Your Honor, if I could ask Mr. Dignan just for the
2 record to restate the offer that's on the table that I have
3 sort of, you know, been indicating that we probably wouldn't
4 take, but just for the record reiterate it once and then we
5 will just make that final one way or the other.

6 JUDGE SMITH: Mr. Dignan?

7 MR. DIGNAN: The last offer?

8 JUDGE SMITH: Yes.

9 MR. DIGNAN: The last offer that was put on the
10 table was the Applicants would commit to retain Dr. Dillman
11 to design any proper survey. Would execute the survey that
12 he designs. And would utilize it when completed. That
13 offer is not made subject to any license condition that
14 would block full power operation either by way of completion
15 of the survey or by the adequacy thereof.

16 JUDGE SMITH: So when I characterize it as one
17 that would be completed before full power, that was not
18 intended by you?

19 MR. DIGNAN: The completion of the survey -- I
20 just want to understand, I'm glad to complete the survey
21 before full power.

22 The problem with it is, I don't know how long it's
23 going to take Dr. Dillman to design, but let's assume he
24 designs. I'm advised the completion of the survey is no
25 problem. The problem is, I think most people are thinking

1 survey in this room as being the list. That's what my
2 sister keeps referring to. The list doesn't come out of the
3 completion of the survey, but rather comes out, as I
4 understand it, of the verification, the process that takes
5 place thereafter.

6 Do you see what I mean? If there is a hangup in
7 there I don't want that to block full power operation.

8 But we are prepared to execute the survey and
9 verification process that Dr. Dillman designs.

10 JUDGE SMITH: Well, without regard to any time
11 limit?

12 MR. DIGNAN: That's a fair question.

13 There ought to be some time limit on it.

14 May I have a moment with my people?

15 (Counsel confers.)

16 MR. DIGNAN: Yes.

17 I'm going to be unable to give it time and let me
18 explain why and maybe possibly Your Honor can further things
19 by getting an answer.

20 We don't know how long Dr. Dillman thinks it will
21 take him to design the survey. Nor are we totally clear at
22 this juncture as to what verification process Dr. Dillman
23 would think was necessary. And this is my hesitancy.

24 * I am prepared to state that if Dr. Dillman designs
25 the survey with milestones in it, we would be prepared to

1 meet the milestones he says.

2 My problem is, I just simply don't have the
3 information without talking to him as to what the realistic
4 time limitation is.

5 JUDGE SMITH: Mr. Traiconte, to bring you up to
6 speed.

7 We have determined that the Dillman-Moriearty
8 testimony had to be viewed as a late-filed issue. And going
9 over the regulatory factors that have to be considered in
10 viewing a late-filed issue we found that good cause had not
11 been established for the late filings. Specifically that
12 learning from an expert after the close of discovery is not
13 in itself a suitable time period for good cause for late-
14 filed testimony.

15 Now I'm only listing the reasons; I'm not trying
16 to restate them. I doubt if I could restate it in the time
17 available.

18 We did acknowledge that the Commonwealth and only
19 the Commonwealth can contribute to a complete record on this
20 particular issue. And that the issue would have fallen
21 within a broader rubric of the contention and one of the
22 bases for it. But there was insufficient notification.

23 So the Board ruled that it doesn't make it --
24 there was insufficient notice to the Applicants for the
25 testimony to be accepted as it is and you didn't make it as

1 a late-filed issue.

2 But because of the fact that if the Commonwealth
3 doesn't make the point it will never be made. And we
4 believe it is a matter of unusual sensitivity. And we
5 believe there is readily available expert help on the survey
6 that we did not want to see that expert help wasted or just
7 not utilized.

8 Therefore as a matter of the Board's own
9 discretion we have tried to prod the parties into some
10 settlement which could take advantage of Dr. Dillman's
11 expertise. And so far you have heard the problem stated by
12 Mr. Dignan. And there is just one slight aspect of the mix
13 that has not been put to you and that is, in my view this
14 issue should not be viewed in the light of whether the
15 Attorney General engages in planning or doesn't engage in
16 planning. That has been taken out of the Attorney General's
17 hands.

18 The only thing left to the Attorney General as far
19 as I can see is to take or leave what is likely -- what
20 likely would be a Board condition. If you had prevailed on
21 getting the testimony offered and the Board had accepted
22 your expert's criticisms, it is very unlikely under
23 Commission precedence that we would say, tear down the
24 plant.

25 Under Commission precedence we would condition

1 operation based upon conforming to the criticisms, if they
2 survived. The advantage that I would see to the Attorney
3 General is, without putting your testimony to risk on cross-
4 examination, without putting your testimony to risk of being
5 disregarded in its entirety, you have an opportunity, not of
6 your own making, but to assure that at least the Attorney
7 General get out of this issue is that it will have an
8 opportunity to have the inadequacies addressed according to
9 your own expert's standards.

10 I recognize the problem that you face as a
11 litigator, as Ms. Greer made clear last week with respect to
12 Dr. Leaning's testimony, that you simply are not in the
13 business of improving their plan.

14 But in this instance I think that, in my view,
15 it's somewhat different because this is not something --
16 this is something that has been placed in your lap by the
17 Board and not a matter of litigation strategy on your part.
18 Here is your chance to at least come away from this issue
19 with this; otherwise compared really, as far as I can see,
20 the most you can ever gain on it is a condition.

21 On the other hand, as you probably are very well
22 aware, if you just allow the Board to strike the testimony
23 or reject the testimony, then you have preserved your
24 appellate rights on that issue.

25 I don't want to be advising you on that. And I

1 don't want to start telling you these things without giving
2 you a full picture.

3 MR. TRAFICONTE: I was just about to ask you a
4 question, if I might.

5 JUDGE SMITH: Because the contention would be
6 withdrawn.

7 MR. TRAFICONTE: Would be withdrawn. Okay. Just
8 to make that clear.

9 Could I just make an inquiry. Assuming that the
10 testimony were admitted and we carried the day, I understand
11 the Board could and perhaps would make it a license
12 condition that an adequate survey in fact be done.

13 JUDGE SMITH: Right. Subject to the NRC Staff's
14 approval. And we're sweetening it up by keeping
15 jurisdiction.

16 MR. TRAFICONTE: And you would keep jurisdiction.

17 JUDGE SMITH: Yes. *

18 MR. TRAFICONTE: Just as a technical matter how
19 would that work? Would the Applicants subject to a licensed
20 condition as they are engaged in meeting that condition be
21 free to go to full power.

22 JUDGE SMITH: Yes.

23 MR. TRAFICONTE: I'm sorry?

24 JUDGE SMITH: That's possible. Yes.

25 I don't know. We might say, bearing in mind that

1 you already have a list that you can go to full power
2 providing that within six months you improve the quality of
3 your survey. I don't know, it would be a matter of
4 judgment.

5 MR. TRAFICONTE: But the Board is of the view that
6 that issue as to the timing of these events is left to the
7 discretion of the Board to fashion a remedy any way it wants
8 to.

9 JUDGE SMITH: We have to look at the whole record.

10 MR. TRAFICONTE: Yes.

11 JUDGE SMITH: Yes.

12 I think that our remedy also is subject to appeal.
13 You know, the whole thing. But I think that that is one of
14 the things we could do.

15 We could, of course, always find that the
16 testimony is so convincing that the list that already exists
17 has to be done before full power. That's a possibility.

18 But the thing that is not going to happen in all
19 likelihood is that we will find the SPMC favorably and
20 irreversibly flawed based upon the survey technique, if we
21 believe, as this very testimony suggests, that there are
22 flaws in it that the experts say could have been remedied by
23 proper technique.

24 MR. TRAFICONTE: I understand that.

25 JUDGE SMITH: We are very sympathetic to your

1 litigative problem, because every time you come in with a
2 criticism you say, how can it be improved; you're stuck with
3 it.

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1 JUDGE SMITH: But in this instance you've got a
2 little bit different matter.

3 MR. TRAFICONTE: Well, let me just be candid about
4 our view on this contention or at least our view on what we
5 thought the contention encompassed and this particular piece
6 of testimony.

7 We're of the view that their plan has a deficiency
8 under the regulations with regard to the identification of
9 the handicapped population. And we think that there are
10 pieces to that or there are parts to that. But one of the
11 major parts is the identification of the handicapped in the
12 first instance.

13 There are few pieces of this case where we think
14 we have got a strong a case on the deficiency as on this
15 aspect of it because in many ways there may have been
16 perhaps inherent difficulties that they had in gathering the
17 information. For whatever reason, we think it's, on its
18 face, inadequate because they don't have enough and they
19 don't have the right kind of individuals. So they don't
20 have enough of the right kind of individuals.

21 For that reason, as I now understand it, the
22 contention has been read or interpreted in such a fashion
23 that the particular critique of the survey vehicle seemed to
24 be outside of the contention and so it's being treated as
25 late-filed.

1 JUDGE SMITH: No, it is not outside of the
2 contention. There was no basis or specificity sufficient to
3 have that included. And interrogatory responses did not
4 produce the sufficient specificity either.

5 MR. TRAFICONTE: Right.

6 JUDGE SMITH: So therefore, if it is going to come
7 in at all it would have to be as a late-filed subissue.

8 MR. TRAFICONTE: And that has been argued and we
9 don't prevail on or at least it's in question whether we
10 would prevail on it as a late-filed.

11 JUDGE SMITH: You didn't prevail, but it wasn't 5
12 to 0.

13 MR. TRAFICONTE: Right. Was it 3 to 2?

14 JUDGE SMITH: No. It was 4 to 1. And that is,
15 the third one was, there will be no record made on your
16 criticism at all unless you come in and offer this
17 testimony. And the Board looking at that, realizing that if
18 you don't make the good cause for late filing, you have a
19 very large burden on the others. And you probably applying
20 Commission regulations and precedence would not be able to
21 get this testimony in as late-filed.

22 But we were convinced by the persuasive and well
23 delivered arguments of your co-counsel there that if the
24 Commonwealth doesn't come in with this, it just is not going
25 to be heard. So she has persuaded us to step in, using our

1 discretion, to see if we could not provide some way without
2 detriment to your position to salvage the readily available
3 advice of Dr. Dillman.

4 MR. TRAFICONTE: If I understand, and I think I
5 do, if I understand the posture now, I don't understand why
6 the Board can't -- why the Applicants, for example, could
7 not stipulate that the contention has merit; thereby
8 removing the onus on us to withdraw it. Stipulate that the
9 contention has merit. The Board could then as a license
10 condition, in whatever way the Board in its wisdom chooses
11 to actualize that condition, require of the Applicants to
12 engage in a survey as described with whatever timing
13 requirements the Board wants to impose relative to full
14 power operation. Leaving us with, if you will, the same
15 appellate posture that we would have had we gone through,
16 had the testimony in, had the Board find our way or not find
17 our way.

18 My point is, the posture of the situation is that
19 we are being asked to withdraw the contention; and thereby
20 that has an appellate consequence.

21 I'm saying if the Applicants are prepared to
22 stipulate that the contention has merit or some other formal
23 equivalent; thereby we win, if you will. The Board then
24 issues an order, as to this point at least, in some fashion
25 up to the Board making a condition of full power license,

1 the adequacy of the survey and that we would abide by.

2 JUDGE SMITH: That was being offered to you
3 without delay right now.

4 MR. TRAFICONTE: Yes. Except it's being offered
5 in the form of our taking the action to withdraw. And I'm
6 just going back to Mr. Dignan and saying, since that has an
7 appellate consequence to us and since the Board has just
8 disclosed the fact that it's free to permit full power
9 operation with this survey coming in on line after that
10 operation.

11 JUDGE SMITH: Put that aside for the moment.

12 MR. TRAFICONTE: I can't do that because it would
13 be our view that -- our own view at least -- that there
14 should be -- this is an important component part of the
15 emergency plan and if there is a deficiency in it the
16 deficiency should be essentially met.

17 JUDGE SMITH: We haven't found a deficiency.

18 MR. TRAFICONTE: Nor will you -- and you may not
19 if we don't take the deal that's offered.

20 JUDGE SMITH: We're not even deciding if there is
21 a deficiency. We're saying, we're not looking at the record
22 that has already been produced and finding that it's
23 inadequate and it needs Dr. Dillman.

24 We're saying that Dr. Dillman comes in here with
25 credentials --

1 MR. TRAFICONTE: Yes.

2 JUDGE SMITH: -- that show that he knows something
3 about a survey. And that we don't want it to go to naught.

4 MR. TRAFICONTE: In my scenario it would not.

5 JUDGE SMITH: But look down the line.

6 Remember this chain. Let's say that we decided,
7 just as a matter of discretion, we can get reversed on it
8 and maybe we will and we will violate the rules, but we're
9 going to let this testimony in. And the Applicant can
10 cross-examine or not cross-examine.

11 Let's say that they choose to not cross-examine
12 and we read it and say, okay, that's what they think, these
13 are problems that they have here, we're doing to condition
14 the license. You have prevailed on that contention.

15 MR. TRAFICONTE: Yes.

16 JUDGE SMITH: We're going to condition the
17 license. We are not going to say, no ticket. We were going
18 to say, the license must be conditioned.

19 Now what are your choices?

20 You can say, the condition is not adequate and
21 appeal it. Or you can say, we've prevailed we're not going
22 to appeal.

23 MR. TRAFICONTE: Right.

24 JUDGE SMITH: And I'm just telling you right now
25 that if we condition the license based upon the advice of

1 the testimony -- if it's received in evidence -- that it is
2 very unlikely that the Appeal Board is going to -- what is
3 it that an appellate body is going to do to us? They're
4 going to say, hey, you shouldn't have conditioned the
5 license, you should have denied it. What is it?

6 The only thing that you would have is that the
7 conditions we put on do not satisfy your contention. Well,
8 that's where you enter it right now. You can make sure that
9 the conditions satisfy your contention now.

10 MR. TRAFICONTE: But not prior to full power
11 operation, as I understand it.

12 JUDGE SMITH: Right.

13 No, no, you can make sure. Here is what you can
14 be assured of.

15 MR. TRAFICONTE: No. Mr. Dignan is not prepared
16 to do that.

17 JUDGE SMITH: Well, let's just wait; we're not
18 done with that.

19 You can be assured that the condition -- you can
20 be involved in the pre-fashioning of what would be the type
21 of condition that you might expect at the end of this
22 litigation, if you could get it somehow to reverse our
23 ruling. And that is, that there be a survey of the type
24 fashioned by Dr. Dillman and that it be implemented and it
25 be done within a certain time.

1 But what you would gain is that the Board would
2 retain jurisdiction overseeing that it is done. And perhaps
3 even seeing that it's done well. But not with regard to the
4 issuing of a full power license. Some other time -- some
5 other time factor.

6 The Applicants will not yield to the Attorney
7 General any unilateral hold over the issuance of a full
8 power ticket. They will not do that.

9 MR. TRAFICONTE: My proposal did not entail that
10 they do. My proposal was simply the procedural inverse of
11 what is being presented to me, which is just as much in
12 their -- they hold the key to this one as much as we hold
13 the key to the other proposal.

14 If they agree in some procedural fashion or
15 stipulate to the merits of the contention, at least as to
16 the inadequacy of the survey and the identification of the
17 handicapped, they stipulate to that, the Board therefore
18 conditions as a or fashions a remedy for that to be exactly
19 what we are now discussing, a survey to be engaged in at
20 some point after today. It is to have these p... , et
21 cetera, et cetera.

22 And the Board in its wisdom links that survey in
23 any way that the Board chooses to the issuance of the full
24 power license; then the onus is off of us to withdraw. In
25 fact it's identical. The outcome could very well be

1 identical to the present posture with the only difference
2 being that he had stipulated that in fact there is merit to
3 the contention.

4 The Board has thereby fashioned a remedy for it.
5 It's the same remedy that we are now discussing and we don't
6 have to withdraw --

7 JUDGE SMITH: Here is what you already have. You
8 have Mr. Trout saying, had this contention been -- had this
9 testimony been offered as a basis at the time of the
10 original filing of the contentions you would have no
11 problem. They could not object to it. So you may have
12 something to go there.

13 The Applicants could say, except for the lateness
14 of the filing this testimony relates to an issue properly
15 within the ambit of the contention and properly within the
16 ambit of the proceeding as a whole.

17 They do not waive their arguments that there was
18 late filing and should not be heard on that account. And
19 then you go on from that point.

20 Does that satisfy you?

21 They have already made that. They already made
22 that argument and concession that the only infirmity of this
23 testimony is that there was, on one hand, not sufficient
24 notice of the specifics; and on the other hand, there was no
25 justification for late filing.

1 They have agreed already that the contention would
2 otherwise have raised issues properly within the purview of
3 the Board and the proceeding.

4 MR. TRAFICONTE: Your Honor, let me try to be
5 completely candid.

6 There are two levels here. One is the substantive
7 level which is a concern that we have about the plan having
8 an inadequate part in it. That's to say, we don't think
9 there is sufficient identification of the handicapped.

10 We are trying to see our way clear to protect that
11 interest, if you will. The substantive concern that the
12 contention, as we understood it, expressed.

13 There's another procedural interest we have, which
14 is quite obvious and that is, that we are loath to withdraw
15 something and thereby give up our appellate right.

16 Now, please appreciate that I understand --

17 JUDGE SMITH: That's right.

18 MR. TRAFICONTE: -- understand that our view is
19 that if you're going to read the contention with the bases
20 to keep this testimony out, and if you are then going to
21 apply the late-filed contention criteria and again rule that
22 when you weigh the five factors it still stays out -- and
23 please don't misunderstand this or take this the wrong way
24 -- but we would obviously view that as an appellate
25 opportunity, if you will.

1 JUDGE SMITH: So why in the world would Applicants
2 agree to anything to you if you want to keep your appellate
3 rights? What is their incentive to negotiate?

4 The only incentive they have to negotiate is the
5 Board's own judgment that, hey, we don't want to walk away
6 from this one quite as readily as the law and precedence
7 would have us do. That's the only thing you've got going.

8 MR. TRAFICONTE: Would permit you to do.

9 That's why my proposal is really right back at the
10 Board's interest in the contention. In other words, you're
11 looking at us and saying, if you'll withdraw it we'll
12 fashion something --

13 JUDGE SMITH: I'm not saying that. I'm just
14 speculating. I'm not going to answer for Mr. Dignan
15 anymore, he can answer quite well.

16 I just don't see why he would agree to that.

17 MR. TRAFICONTE: Because he'll get exactly the
18 same result, quite frankly.

19 JUDGE SMITH: Let's see what he says.

20 MR. TRAFICONTE: I think he will get exactly the
21 same result. He will get a new survey or we will all get a
22 new survey. The handicapped population will be identified
23 to the extent it's possible. He will get the issuance of a
24 license. The survey results and the survey as an act or as
25 some yet not committed procedure will be linked to the

1 license in whatever way the Board's discretion wants to link
2 it and that will be the end of the matter.

3 But we will be -- I mean, from our perspective we
4 will not have to withdraw the contention, which we are very
5 loath to do.

6 JUDGE SMITH: What is it that you would appeal
7 then?

8 MR. TRAFICONTE: We would be limited -- since we
9 would have won the issue, essentially, by stipulation, the
10 only thing we would be able to appeal is the relationship in
11 your remedy between the survey and full power operation.
12 That's to say, if you permit full power operation and the
13 survey comes in later we could seek an appeal on that.

14 MR. DIGNAN: Would you be able to argue that the
15 full power operation should be stayed in --

16 MR. TRAFICONTE: You know the law as well -- look,
17 I mean --

18 MR. DIGNAN: Excuse me.

19 Would you not, if I made the admission you want of
20 substance, go to both the Appeal Board -- three places: the
21 Commission and the Court of Appeals -- and argue that my
22 admission that the contention had substantive merit is
23 grounds to stay operation? Are you going to waive that
24 right or aren't you?

25 MR. TRAFICONTE: Could I have a minute on that.

1 MR. TRAFICONTE: That may be the heart of the
2 matter, in fact.

3 MR. DIGNAN: Well, I'm sure you're not.

4 (Counsel confer.)

5 MR. TRAFICONTE: If I could ask Mr. Dignan for a
6 clarification.

7 I heard you say that you would want a waiver from
8 us of using your admission as --

9 MR. DIGNAN: No, I didn't say what I wanted. I
10 said do you understand that if I go along with your
11 suggestion, that you would not be able to argue for a stay
12 on the basis that I've made a substantive admission of
13 deficiency.

14 MR. TRAFICONTE: Right.

15 MR. DIGNAN: Because that's what I understand you
16 to be asking for. You're not asking me for what Mr. Trout
17 has happily conceded. That is to say, your testimony --

18 MR. TRAFICONTE: No, no.

19 MR. DIGNAN: You want me to admit that our survey
20 is no good.

21 MR. TRAFICONTE: Right.

22 MR. DIGNAN: And then I asked you, assuming I
23 could be talked into that admission, and you keep an
24 appellate right.

25 Now you said you want to keep an appellate right.

1 So I think what you want to do with that, frankly, is, (a)
2 you want to appeal on the grounds that I made that admission
3 and therefore by law my license should have been denied; (b)
4 you want to take it to whatever court you can and say they
5 admit their survey is no good, and therefore there is good
6 grounds under the appeal in the stay motion. I want a stay
7 for full power operation. That's my guess as to what you
8 want to do with it.

9 And so I'm asking the question as to whether the
10 Commonwealth, if I make this admission, is prepared to waive
11 any right to use this in the stay. And I'll tell you my
12 next question.

13 If you say, yes, then my question to you is going
14 to be, then why aren't you willing to just give up the
15 contention, because you haven't got any appellate right left
16 at that point that's worth anything to you.

17 And I guess you're going to tell me, I still don't
18 want to. And then I just get scared.

19 MR. TRAFICANTE: Well, you say we would have no
20 appellate right worth anything. We would have the appeal on
21 the merits.

22 MR. DIGNAN: No, you don't. The appeal on the
23 merits is gone.

24 MR. TRAFICANTE: You said the stay. You are using
25 it only at the point I'm seeking a stay.

1 MR. DIGNAN: Yes, but the only appeal you've got
2 on the merits is the one that Judge Smith outlined to you.
3 That is to say, that his condition is not satisfactory, and
4 I rate that as zero. I mean, you can rate it as many as you
5 want, but I rate it as zero. And so I might be willing to
6 make this extraordinary concession.

7 MR. TRAFICONTE: Right.

8 MR. DIGNAN: But I have a feeling you want it for
9 more than that. And so my first question to you is, are you
10 prepared to waive any right to use that admission on a stay
11 motion.

12 MR. TRAFICONTE: On a stay --

13 JUDGE SMITH: Mr. Traficonte, I also get the
14 impression that there is something unspoken in your
15 reservation.

16 MR. DIGNAN: Yes.

17 JUDGE SMITH: And I'm trying to --

18 MR. TRAFICONTE: Yes. Well, I haven't reserved
19 anything.

20 JUDGE SMITH: Well, in your unwillingness to give
21 up your appellate rights on the rejection of the testimony
22 in favor of the remedy. And if I knew what it was, I would
23 try to fashion something that might relax you on it, but you
24 are not really coming out with it. And Mr. Dignan, I think,
25 is -- his antenna is quivering, and ours is too, because I

1 just don't understand what it is, particularly bearing in
2 mind that we have put you now in a posture where I don't see
3 where practically speaking you have any choice, you know.

4 MR. TRAFICONTE: Well.

5 JUDGE SMITH: And I'm saying that for your
6 benefit.

7 (Laughter.)

8 MR. TRAFICONTE: You always say that for my
9 benefit.

10 JUDGE SMITH: I mean, I don't really see what your
11 choice is when we are saying to you that we are extending a
12 protective arm around this testimony for the time being --

13 MR. TRAFICONTE: Yes.

14 JUDGE SMITH: -- to see if it cannot be salvaged
15 in some way and speculating on what conditions we might
16 impose, if we took Dillman and Moriearty without even cross-
17 examination, just took it as stipulated testimony and what
18 conditions we might impose, and then we're giving you an
19 opportunity to negotiate what 100 percent success on this
20 testimony might bring you. And I am predicting that the
21 only success it would bring you is a license condition. And
22 the license condition is not likely to be a pre-operational
23 one given the state of the record.

24 Now that is right there, that is the nub right
25 there.

1 MR. TRAFICONTE: That is the heart of it.

2 JUDGE SMITH: That is the little area of --

3 MR. TRAFICONTE: That is the heart of it.

4 JUDGE SMITH: Yes, that's the heart.

5 MR. TRAFICONTE: Right. Because without going,
6 and I profess that I have not recently looked at the law,
7 the NRC law on this very point. But without looking, we
8 would take the view that in fact, and obviously this is
9 matter of judgment, but depending on what it is, what kind
10 of condition or what the condition, license conditions runs
11 to, there are certainly license conditions that have to be
12 met prior to full power operation.

13 JUDGE SMITH: The way I would fashion it is that
14 assuming that Dr. Dillman is available and would be
15 cooperative, which is another problem.

16 MR. TRAFICONTE: Yes.

17 JUDGE SMITH: But that there would have to be --
18 we could even have milestones. A contract would have to be
19 entered into by X date. The initial identification
20 completed by X date. Verification and validation by yet
21 another date.

22 MR. TRAFICONTE: Would the milestones be in any
23 way linked to full power operation?

24 JUDGE SMITH: We would not put in Dr. Dillman's
25 hands, or your hands, or anybody's hands the unilateral

1 power to block full power operation. That would remain in
2 the Board's hands. But it is possible that some milestones
3 like the contract and the additional identification without
4 validation would be pre-operational.

5 MR. TRAFICONTE: We would be prepared to withdraw
6 the contention to the extent that we could agree that
7 sufficient portions of the results of the survey are
8 obtained pre-operational.

9 JUDGE SMITH: Yes, but --

10 MR. TRAFICONTE: That's the nub of our --

11 JUDGE SMITH: -- you would be willing to accept
12 this. And that would be not that you had retained the power
13 to approve whether those results were in fact obtained, you
14 would have to sacrifice that trust to the Board.

15 The only thing that we would be prepared to do
16 pre-operational was say the contract was entered into, the
17 identification list has been prepared, without going into
18 the merits of it, pre-operational.

19 MR. TRAFICONTE: Yes.

20 JUDGE SMITH: Because that would, in turn, give
21 you the unilateral power to block it.

22 It's not that we would never entertain a
23 contention that the list is faulty, but it would not be a
24 condition of operation. And we say that based upon -- we've
25 already heard some evidence that there is a list, and we

1 already have a record.

2 MR. TRAFICONTE: Yes, there is a list.

3 JUDGE SMITH: So we are not concerned about a
4 short period of operation based upon the state of affairs
5 now.

6 Our interest right now is are things as good as
7 they can be, not are they adequate.

8 MR. TRAFICONTE: Right.

9 JUDGE SMITH: Are they as good as they can be.

10 I'm not saying that we have found them adequate.
11 I'm just saying that's part of the mix. Our intercession
12 right now is based upon are things as good as they can be
13 with readily available information already generated,
14 already agreed to, is it as good as it can be. And this is
15 the only area that we've entered into where we believe is
16 worth our intercession.

17 MR. TRAFICONTE: Let me put it another way, and
18 I'm going back to the substantive concern that we have.

19 I think that, to the extent that the remedy is
20 fashioned to include milestones be met, and the one that
21 pops in my mind is that the identification process be
22 complete. If that milestone -- if part of the condition, if
23 you will, or the stipulation, however you want it fashioned,
24 if that milestone were met prior to full power operation, I
25 think we could live with that result.

1 JUDGE SMITH: If you bear in mind that --

2 MR. TRAFICONTE: But that is not what, of course,
3 Mr. Dignan has indicated.

4 JUDGE SMITH: I know, he hasn't said that.

5 MR. DIGNAN: And I can't.

6 JUDGE SMITH: You can't do that.

7 MR. DIGNAN: My people tell me this. Now, you
8 know, maybe Dr. Dillman alone in a room could convince me
9 I'm wrong. My people tell me this. That doing the survey
10 is not all that long. I've heard numbers from six weeks to
11 two months to do the survey. What takes the time is what
12 takes place after that, which is the verification.

13 JUDGE SMITH: No, verification. No, I am
14 specifically excluding until post-operation -- it's not a
15 pre-operational milestone for this reason. And that is,
16 verification is most likely to reduce the list.

17 MR. DIGNAN: Correct.

18 JUDGE SMITH: Rather than augment it.

19 MR. DIGNAN: Correct. There is no question about
20 that, Your Honor.

21 JUDGE SMITH: See, so --

22 MR. DIGNAN: And that's the point. The point I'm
23 getting into is it would be one thing if the settlement was
24 we withdraw the contention and you agree to finish the
25 survey, and that's the way I was putting it and somebody

1 just said, look, they aren't talking the survey; they're
2 talking the list.

3 But my understanding is the raw survey, which
4 produces the first list, if you will, can be done in six
5 weeks to two months, in our judgment. I don't know if Dr.
6 Dillman would be willing to state, because that's the other
7 problem I have, I don't know what Dr. Dillman's view of that
8 is or how long it will take him to do the designing. I mean
9 that's another temporal problem I have.

10 JUDGE SMITH: Would there be any value of us
11 adjourning early -- I think we have discussed it enough --
12 and talking privately among the people as what can be done
13 on it?

14 MR. TRAFICONTE: There might be if Mr. Dignan --
15 if there is the possibility of movement in this regard.
16 That's to say, if portions -- if you could agree that
17 portions would have to be complete before you operate, if
18 that's the bottom line that you can't go over.

19 MR. DIGNAN: No, no. I've got to hear from Dr.
20 Dillman as to what can be done when, because I have my own
21 views of when I will need it done by. That's point one.

22 Point two is, so we don't kid anybody, what is
23 going to be coming from the other side is a withdrawal of
24 the contention. You are going to kill your appellate rights
25 in this matter, as far as I'm concerned, dead -- D-E-A-D,

1 dead.

2 So the Board understands where I'm coming from, we
3 have treated this in this negotiation session, as we should,
4 the theory being that Dr. Dillman has something to
5 contribute, that Dr. Dillman -- we went all the way, as you
6 said, we might not cross-examine it. You know, this is the
7 most you could win.

8 If it goes in, we'll cross-examine, and we may
9 have some people to say some other things about what he's
10 done. I am not prepared to concede that Dr. Dillman is
11 right here.

12 JUDGE SMITH: I understand that.

13 MR. DIGNAN: I am prepared to concede, which Mr.
14 Trout has, that the testimony would have made it otherwise.
15 And I am perfectly prepared to admit on the record, as I
16 have before and as we have in other contexts, we're very
17 aware of the fact that any time you are using surveys other
18 qualified people can do it a different way. But in line
19 with the discussion we had of the law some days ago on this
20 matter, you see I don't think they are merely showing there
21 would be another way to do the survey will carry the day for
22 them.

23 JUDGE SMITH: Well, I understand that.

24 MR. DIGNAN: And that's my point.*

25 JUDGE SMITH: Would this pre-operational condition

1 be with our approval?

2 That there be a contract tendered and accepted by
3 Dr. Dillman, the terms of which provided for the completion
4 of a survey, not with verification or validation, but with
5 the initial completeness of the list pre-operational, just
6 the terms of it. The contractor provide for good faith
7 efforts on both parts to meet that deadline.

8 MR. TRAFICONTE: So the only thing that would be
9 pre-operational will be the tendering of the contract that
10 itself would have those terms?

11 JUDGE SMITH: Right. But not the verification.
12 Verification, as we pointed out, is likely to reduce the
13 list. I don't regard verification as a safety matter. It's
14 a resource matter, and that extends indirectly to safety.
15 And the verification takes longer, but the contract would
16 call for the completion of the initial survey and list pre-
17 operational with a date certain.

18 MR. DIGNAN: Your Honor.

19 JUDGE SMITH: July 1st or something like that.

20 MR. DIGNAN: In order to focus this, unless the
21 Board is reluctant to do it, or the doctor is, what I need to
22 know right now before I -- and I imagine Mr. Traficonte
23 does, too -- is how long does Dr. Dillman think, starting
24 with today as day zero, if you will, it will take him to
25 design the survey; and does he concur from that day forward

1 when it can be completed by.

2 I mean we've all been sitting here trading on Dr.
3 Dillman. For all I know Dr. Dillman won't work for my
4 people anyway. Or if he does, my understanding of these
5 times are at great variance with his. So before I can do
6 anything on the way of a milestone, I have to know what does
7 Dr. Dillman believe is possible.

8 JUDGE SMITH: Well, that's why I suggest we
9 adjourn early tonight and you talk about it.

10 MR. DIGNAN: Yes.

11 MR. TRAFICONTE: That may be advisable.

12 Let me just make sure I understand what's on the
13 table. I know that the contention and the testimony that we
14 had prepared was the testimony that ran to the survey of Dr.
15 Dillman, and Sharon Moriearty's testimony, which was not a
16 critique of the survey vehicle. I am coming into this a
17 little bit late.

18 Are both of these pieces of testimony linked here?

19 JUDGE SMITH: Well, we have spoken both ways on
20 that. But on reflection, Ms. Moriearty's testimony talks
21 about what would in effect be the validation of the methods
22 used by Dr. Dillman and not survey methodology itself. And
23 they were in remarkable agreement along certain lines there.

24 Having read the testimony, I don't know how Ms.
25 Moriearty's contribution would add to the product that we're

1 seeking right now.

2 MR. TRAFICONTE: All right.

3 JUDGE SMITH: I don't know how. You would have to
4 work that in.

5 MR. TRAFICONTE: Could I just confer for about 30
6 seconds on that to make sure?

7 JUDGE SMITH: Yes.

8 (Counsel confer.)

9 MS. TALBOT: Your Honor, JI-49 is not on the table
10 now, correct?

11 JUDGE SMITH: The what?

12 MS. TALBOT: JI-49 is not on the table.

13 JUDGE SMITH: No, no.

14 MS. TALBOT: Good.

15 JUDGE SMITH: No, that's separate.

16 MS. TALBOT: Okay, good.

17 (Counsel confer.)

18 MR. TRAFICONTE: If I can just add a comment on
19 that last point.

20 I am now clear that there is another piece of
21 testimony from Ms. Moriearty, and I had confused those. But
22 her input on the critique of the survey, as I understand it,
23 is that Dr. Dillman was critiquing, if you will, the
24 methodology narrowly construed, and Ms. Moriearty was
25 critiquing the types of questions, for example, which could

1 be considered methodological as well.

2 JUDGE SMITH: Well, she was critiquing it from her
3 view of what the results should have been, and were not.

4 MR. TRAFICONTE: Yes.

5 JUDGE SMITH: And, therefore, that is empirical
6 evidence.

7 MR. TRAFICONTE: That it's an incorrect vehicle.

8 JUDGE SMITH: Yes.

9 MR. TRAFICONTE: Or an insufficient survey
10 vehicle.

11 JUDGE SMITH: Right, that was my understanding of
12 it. That that was empirical evidence that she found faults
13 in the survey. But her contribution was something has got
14 to be wrong with the survey because it doesn't come up with
15 what I know it should come up with. That was the division
16 of responsibility, and she's indicating yes.

17 MR. TRAFICONTE: They do go together. I mean as I
18 understand them, they go together in the sense that they
19 would both be part of this discussion that we're having.

20 But I just want to represent that Dr. Dillman, if
21 I understand the nature of his expertise, would still need
22 the assistance of an individual with the kind of expertise
23 in this survey area that Ms. Moriearty has. I mean, that is
24 to say it would be a combined --

25 JUDGE SMITH: That's a validation rather than

1 methodological, or is it methodological?

2 MR. TRAFICONTE: Well, I believe it's
3 methodological. If those terms are clear, and maybe they
4 are fuzzy, but I think it's actually part of the methodology
5 itself to have some understanding of the populations that
6 you are attempting to survey and the kinds of questions you
7 would want to pose and the way in which you would want to
8 pose them. That's methodological as is the more hard
9 mathematical components of how exactly you get an accurate
10 enough survey and what methods you use.

11 So we are not resisting that the two pieces go
12 together, but the only thing we're adding is that Dr.
13 Dillman would need the input, if you will, of someone with
14 Ms. Moriearty's type of expertise focusing on this type of
15 population.

16 And just for the record, it would not be an
17 individual employed by the Commonwealth of Massachusetts.

18 JUDGE SMITH: It would not be.

19 MR. TRAFICONTE: It would not be. Ms. Moriearty
20 is an employee of the Commonwealth.

21 JUDGE SMITH: Yes, I know.

22 MR. TRAFICONTE: And it would not be.

23 JUDGE SMITH: So tell me that again.

24 MR. TRAFICONTE: She couldn't do it.

25 JUDGE SMITH: Right. Well, what I would envision

1 would be a condition where, assuming that Dr. Dillman is
2 available, that there be a contract entered into with a
3 completion date agreed to by both sides of it. Dr. Dillman
4 can take advice from whomever he wishes --

5 MR. TRAFICONTE: Whomever, yes.

6 JUDGE SMITH: -- on the design, the way he
7 believes the design of it, with the understanding, however,
8 I would think, that it is his professional services that are
9 being retained professionally, not as an employee of --

10 MR. TRAFICONTE: No.

11 JUDGE SMITH: -- professionally.

12 MR. TRAFICONTE: Right.

13 JUDGE SMITH: His professional services. He could
14 take advice from wherever he feels he needs it.

15 How does that sound?

16 MR. DIGNAN: All right. I assume that if Dr.
17 Dillman comes to work for us under a consultant contract,
18 he's like any other consultant. He will build into his fee
19 and everything else everything he needs to do the survey.
20 And where he takes his advice from is up to him. And it is
21 his professional judgment that we rely upon, and that
22 professional judgment presumably will be exercised, among
23 other things, in where he seeks data or where he seeks
24 matters of design.

25 JUDGE SMITH: And he would accept or reject any

1 advice available to him, but it's his professional
2 responsibility.

3 MR. DIGNAN: That's right.

4 He would be -- I would envision it -- he would be
5 in the position of any other consultant to New Hampshire
6 Yankee, and I want that fully understood.

7 That does not mean that Dr. Dillman reports back
8 to the Attorney General after every session with my people.
9 He would become an employee of New Hampshire -- excuse me --
10 a consultant to New Hampshire Yankee as much as any other
11 consultant who works for us in this matter subject to all
12 the same restrictions that any such consultant. So I don't
13 want to mislead anybody on that.

14 MR. TRAFICONTE: No, I --

15 MR. DIGNAN: In short, I'm not prepared to put an
16 agent for the Attorney General in the company unless it's
17 you, John.

18 MR. TRAFICONTE: Why don't we talk about it. I
19 mean it might avail us to have --

20 JUDGE SMITH: In the first place, you've got to
21 talk about availability.

22 MR. TRAFICONTE: Yes, that's right.

23 JUDGE SMITH: Why don't we adjourn tonight, and
24 the parties remain and talk more thoroughly.

25 MR. TRAFICONTE: All right.

1 JUDGE SMITH: Is that satisfactory?

2 MR. DIGNAN: Yes, Your Honor.

3 JUDGE SMITH: All right, we would adjourn and meet
4 tomorrow at nine a.m.

5 (Whereupon, at 4:40 p.m., the hearing was
6 recessed, to resume at 9:00 a.m., Tuesday, April 25,
7 1989.)

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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name: Public Service Company of New Hampshire, et al.
(Seabrook Station, Units 1 and 2)

Docket No: 50-443-OL
50-444-OL
(Off-site Emergency Planning)

Place: Boston, Massachusetts

Date: April 24, 1989

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.

/s/ 

(Signature typed): Donna L. Cook

Official Reporter

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