UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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PUBLIC MEETING REGARDING

NRC HEARING PROCESS

U.S. NRC

11555 Rockville Pike

Commission Hearing Room

Rockville, Maryland

Wednesday, October 27, 1999

The above-entitled meeting commenced, pursuant to notice, at 8:40 a.m.

P R O C E E D I N G S

[8:40 a.m.]

CAMERON: I'm glad to see that most people came back. I realize that people have schedules where they might have to leave early or leave at certain times today and before, I'd give you at least a suggestion of where I think we might want to go this morning. We have a new participant with us. Why don't you introduce yourself to us?

LASHWAY: Good morning. My name is Dave Lashway. I'm here on behalf of the National Mining Association. Tony Thompson was unable to make it. Katie Sweeney, also from the National Mining Association, is probably going to join us at some point, as well.

CAMERON: Thanks a lot, Dave. Yesterday, we spent a lot of time discussing some overall perspectives on the hearing process, as well as the objectives of the hearing process, and I did do a rewrite of the objective, draft objective statement that we were looking at yesterday, and I would suggest that when we start off our discussion this morning, we spend a little time discussing that. And we also began to identify some problems or concerns that people have with the existing hearing process and there's also a handout you have on that.

I tried to put them in an order that I thought would be most productive for discussion this morning and we'll go over this when we get to that part of the agenda.

And I guess I would suggest that we go first to a discussion of the objective statement and then start going through the problems and when we get to each of those problems, let's just have a full discussion on that in terms of whether people think that it's a problem, what the various facets of the problem are and what some potential solutions are, and we'll work through that way.

And in terms of a wrap-up, there may be suggestions for future process suggestions on this rulemaking. For example, Steve Kohn, who can't be here this morning, called and suggested that he thought that before a proposed rule is published, but after it's drafted, that it might be beneficial to get this group back together again to discuss that, and I'll just leave that there for the moment and we can think about whether there's any other process types of suggestions like that for the NRC.

MURPHY: Does that presuppose that a proposed rule will be published?

CAMERON: No. If there is a proposed rule drafted, that would be a suggestion. And I can assure you that we're going to have a break at 10:00 today, and I won't say anything more than that, but at 10:00, we're going to take a break, and we'll try to finish up around 12:15 today. I just thank all of you for being here. Before we go to the objectives statement, does anybody have anything that they want to add before we get started on objectives in terms of what we're going to do today?

ZAMEK: I have a question.

CAMERON: Sure. Go ahead.

ZAMEK: My question is whether you had input from the Commissioners during the night.

CAMERON: At 3:30 this morning. No. On that point, I will ask Joe if he wants to add any -- Joe Gray if he wants to add anything to this.

MR. GRAY: Probably not.

CAMERON: But probably not. We were joined by some of the legal assistants from the Commission offices yesterday and we are going to raise the issue of concern from yesterday and Tony suggested that, for example, we get a clarification on the SRM. That issue will be raised informally with the Commission.

Joe, are you going to --

MR. GRAY: With the Commission offices.

CAMERON: With the Commission offices.

MR. GRAY: It probably will be tomorrow before I can get to them, but there will be a meeting at which I will indicate the concerns and what some of the views are with regard to the SRM and what it seems to portend.

CAMERON: And I am going to make, at the break, copies of the SRM. Most of you have it, but also I wanted to make a copy of the voting record that is available, the individual Commission votes, and I'll bring that down after the break.

Jill, anything else on that?

ZAMEK: I just feel like we're working in the dark in terms of what they're looking for from us. So I was hoping for some clarification on that.

CAMERON: I think that the material that is being developed and conversation around the table is going to be, from the indications I've had from the Commission legal assistants, that the information is going to be very helpful for their deliberations.

Okay. Let's introduce -- is this Katie?

SWEENEY: Yes. I'm sorry, I'm losing my voice.

CAMERON: And you haven't even begun the discussion.

SWEENEY: That's why Dave had to be here with me. Katie Sweeney, National Mining Association.

CAMERON: Thanks, Katie. Let's go to the handout, the redraft, so to speak, of the objective in the NRC hearing process. Just to -- before we discuss it, just to tell you what this means, if it's confusing, is if you look at -- the objective of the NRC hearing process is to provide a fair, and then there is an addition, and meaningful opportunity for interested members of the public.

There is a substitution for interested members of the public, substitute any person whose interest may be affected by the proceeding, and that's

the language from the statute. And then we go to Ray's and we have an addition there, and effectively pursue well defined issues that are within the scope of review and for the NRC to efficiently, and there is an addition, objectively and independently reach legally and technically supportable, was the original, and there is a substitute there, sound substantive conclusions.

For those of you who were here yesterday, I think you recognize the discussion behind all of those particular points.

What isn't reflected here is we did have a discussion on what's the purpose of the hearing process. Resolve disputes was suggested, educate the public, inform the staff, and we also had some discussions around public confidence, public acceptance, and also public perception.

So let's go to the first phrase, to provide a fair and meaningful, et cetera, et cetera, opportunity. Does anybody have any comments on that? Bob?

BACKUS: First of all --

CAMERON: And speak into the mic, Bob, for everybody in the back.

BACKUS: We all get trained on this. I do think there could be confusion between objective and purpose and I -- before we even get to the first phrase, I would rather describe this as just saying the NRC hearing process should, because I think we did discuss purposes and these are really not the purposes.

The purposes were dispute resolution and, at least for some of us, additional purposes, such as meaningful public participation and so forth.

So I would not want to ever use this, think that we have defined this as the purpose, and I think there could be confusion when you say objective as being the same as purpose.

CAMERON: Well, you can get wrapped up in the ambiguities, the

differences between objectives, purposes, outcomes. Anybody have any problem with Bob's suggestion? Ellen?

GINSBERG: This is just a suggestion, but I was thinking that one of the things we talked about yesterday and there seemed to be some agreement around the table is that a very important aspect of this is to reach a sound, legally sound and technically sound decision, and I wonder, if we flipped it, if it might be clearer by saying that the NRC hearing process should, and I'm not providing the exact words, but the concept would be should generate a sound record on which a legally and technically sound decision can be made through providing a fair and yada yada yada.

That sort of change in emphasis.

CAMERON: And yada yada yada, that's --

GINSBERG: That's the first part of that.

CAMERON: I'm sorry. I just was checking on the spelling of that. Let me just check in and see if anybody has any problems with Bob's suggestion, which is to get out of the definitional quagmire by just saying the NRC hearing process should.

Okay. Now, Ellen, your suggestion is to start off basically with the generating the record, so that -- in other words, take the last phrase about efficiently, objectively, independently arriving at a sound decision and start off with that.

GINSBERG: Yes. Whatever words we use, and I'm not necessarily wedded to these as opposed to some of the other words we bandied about yesterday, but to provide the initial concept as being that this is to get to the right decision, to use Tony's words.

I think that if you start off that way and then you say -- and you're going to provide the first part, which is a fair and meaningful opportunity for interested persons to participate, I think that that might really more crisply cover the purpose.

CAMERON: Fine. Anybody have any problem with essentially putting that, reorienting the emphasis here? Tony?

ROISMAN: Only in this sense. I think that the first part of that phrase, which is fine if it's at the end of the statement, shouldn't be at the beginning of the statement, the NRC to efficiently or, for that matter, objectively and independently. I think that emphasizes the wrong thing.

If I understand Ellen's suggestion, she wants to start, and I don't have any problem with that, with the idea of getting to the right result is the first important thing.

So I would put, if we go with Bob's idea, the purpose of the NRC -- or the hearing -- the NRC hearing process should reach legally and technically -- I'm not sure whether sound is the right word, but whatever it is, something other than supportable, substantive decisions and then I assume the connecting phrase is "by" and then go to the other clauses.

But I would put the efficiently, objectively and independently somewhere in the body of those next two clauses, not as the lead-off after the purpose is.

CAMERON: Ellen?

GINSBERG: Tony, yes, I agree with that. That was my intent, to get to the right answer as the first emphasis, first part of the emphasis. The other thing is, we talked yesterday and I think you may have come up with this language, I wrote it down, somebody -- or Joe Gray may have said this, to generate a sound record on which a legally and technically sound, or whatever word we choose to use, decision can be made.

I think there's a benefit in including that, because what that talks about is sort of a broader part of the process.

But I throw that out for consideration, to talk about generating a sound record.

CAMERON: Okay. Go ahead, Tony.

ROISMAN: I'm sorry. All I wanted to say is I don't know how much time you want to spend on playing with words. I don't like this word sound, because --

CAMERON: I think that's an important word probably to talk about. We'll spend a little bit of time on that.

ROISMAN: I just want us to blow past that.

CAMERON: And I just want to make sure that I understand, before we go to Larry's, what Ellen's point was. Is there something that needs to be added in here or is it in here already?

GINSBERG: All I was suggesting is the concept of generating a record is not in the current paper in front of us and yesterday it was made, I think Joe made the suggestion and I was just posing it as a possible additional concept to be included in this.

CAMERON: Generating a certain type of record. Do you want to put some modifiers on that? Is that what I heard you say, too?

GINSBERG: I think I'll just make this comment and then we can go by it. The idea was to generate a record on which a technically and legally sound decision could be made, and I though that covered a lot of interests.

CAMERON: Okay. Great.

GINSBERG: That's why I was suggesting it.

CAMERON: All right. I got that. Larry?

CHANDLER: My variation on the theme is sort of what started the preamble, taking some of Bob's thoughts into mind, start off by saying in order to develop an adequate record upon which a legally and technically sound decision can be reached, the NRC hearing process should provide, and then go through the other, start off with that, capture, I think, some of what Ellen was just discussing.

CAMERON: Do you want to repeat that? Ellen looks --

GINSBERG: Puzzled.

CAMERON: -- like she didn't --

CHANDLER: I would start off the whole concept by saying in order to develop an adequate record upon which a legally and technically sound decision can be reached, be made, the NRC hearing process should, then you capture the remaining words, provide a fair, and et cetera, et cetera.

CAMERON: Jeff is reaching for his card.

LUBBERS: Just a phrase. How about legally and scientifically correct decisions?

CAMERON: Tony, does that help you in terms of the sound?

ROISMAN: Yes. That's better, I think that's a lot better than sound. It doesn't leave any ambiguity about what this is supposed to be.

CHANDLER: I'm sorry. Which word?

CAMERON: Legally and scientifically correct.

CHANDLER: I'm not sure scientifically could work.

CAMERON: Speak into the mic, please, Larry.

CHANDLER: I just thought scientifically -- we talked about good science yesterday and technical could have a -- scientists and the engineers tend to --

CAMERON: Right. Is that indeed -- we're on the science versus engineering question here, a Paul points out.

CHANDLER: There are lots of folks who wouldn't necessarily consider themselves to be scientists.

CAMERON: And that technical is a better word.

CHANDLER: Technical I tend to think of in a broader way.

CAMERON: Let me just check in with Tony here. Substituting the word correct for sound.

ROISMAN: I think I would agree with that.

CAMERON: Better?

ROISMAN: But I'm not sure I agree with Larry's -- I think technical -- it's different than scientific and I agree there is this dispute between scientists and engineers, but it seems to me that, if necessary, if that really is -- if there is some history to it, that maybe both phrases should be there, because if it's technically correct and scientifically wrong, it wouldn't be the decision the Commission wants to reach, and, conversely, if it's scientifically correct and technically wrong, it wouldn't be what the Commission wants to reach either. So if there really is some substantive difference between those two words, then I think maybe they both have to be there.

CAMERON: Let's go to Larry, and speak into the mic, Larry, and then we'll go to Ellen.

CHANDLER: The distinction I'm trying to create, and we could be spending more time than needed on this, but the distinction I'm trying to recognize is there are many issues which are not what I would think of as scientific issues.

In the license transfer area, for example, there are numerous issues related to corporate relationships, control over corporate entities, which tend to be more of an economic or business nature, that I wouldn't necessarily consider to be scientific issues. They may be issues of foreign control, which I wouldn't consider to be scientific issues. So the term I'm looking for, and I don't know if technical is the better one, is something that would -- it captures the substantive.

Now, maybe the word -- substituting the word substantive for technically, just say legally and substantively, and my preference would be the word sound decision.

CAMERON: So I'll do a reprise on this in a minute on what these variations are. Let's hear from Ellen, and then Susan, and then see

where we are. Ellen?

GINSBERG: Thanks. With respect to sound versus correct, I have a nagging concern about correct, because correct implies or at least I infer, when you hear the word correct, that there is only one answer and when you have a plaintiff and you have a defendant in any civil case, my guess is that the losing party views it as an incorrect decision. And I really worry about, in this context, using the word correct as opposed to sound or supportable. And, again, I'm not wedded to either of those words, but something that captures the concept that there are certain issues where we may not agree on correctness of the decision. I don't know, I don't have at my fingertips a word to substitute for it that might satisfy everybody, but I do want to express a concern about the word correct.

CAMERON: Okay. Thank you. Susan?

HIATT: I want to address some of what I think are appropriate qualifiers for generating a blank record. You might fill in that blank with a full record, a complete record, and a balanced record.

CAMERON: So you would have full and balanced as a substitute for adequate or --

HIATT: Yes. I would prefer substituting that for adequate.

CAMERON: Let me just try to sum this up for people. Again, I think it's worthwhile to try to work on this, but I don't think that we need to kill ourselves over it either. I think we have three issues up here. We started out with supportable. We've gone to sound. Is sound better than correct? Is there another word to use there? Second issue, this technically, scientifically, versus substantive, the use of the word substantive, which covers -- which would cover any of the types of issues in any hearing that could come up, I think is Larry's point.

And Susan's point that it should be a full and balanced record, as

opposed to an adequate record.

Tony, did you want to say something now? Then we'll go to Jay.

ROISMAN; I think Ellen's point put her finger on an important issue, if you will, and probably, I mean, the real answer to this would be a -- if we came up with something like this, what would happen to it.

If the Commissioners adopted it and put it into the preamble to something or whatever, what language would be used by general counsel in that statement to describe what it means.

Ellen and I, I think, have a somewhat different view of what we think the role of those words, correct versus sound, are supposed to mean. My idea is that what it's supposed to mean is that the Commission has, as its goal, getting correct answers and that there are correct answers and the fact that there is a losing party doesn't mean that just because they still believe they were correct, their answer is correct.

Ellen's point is to emphasize the process part of it, which is that we're trying to have a process which will produce, among possibly correct answers, the one that the Commission has chosen that will stand up legally in court and stand up in other ways.

I think that's a not insignificant difference. I really intended yesterday, when I suggested that we not use supportable, but we go to some other word, that the purpose of this part of the phrase would be a statement by the Commission, assuming it eventually got to that point, of a policy that this agency has as its goal, getting correct decisions, whether the word is correct or whatever word you want to use for it, not that it has as its goal providing a fair forum for people to have a fight and when the game is over, they'll declare a winner and the losers will go home and say we'll play again next week.

That's a different thing. So I think Ellen and I are talking about something slightly different as to what the purpose of this phrase is.

CAMERON: Let's check in with Ellen on that. What do you think about

what Tony just said?

GINSBERG: I don't think I disagree with you that we are looking for the best decision that you can reach given the record in front of you. We are looking for protection of the public health and safety. That is every -- what I heard yesterday and what I think still stands is that that is everybody's goal.

The question is when you say correct, is there only one correct decision, and I guess I have my doubts about many of these decisions having only one correct answer.

I am very concerned, not can you add one and one and come up with two, yes, that is quantifiable, you can come up with a very specific and correct answer there. There are a whole host of issues that may not lend themselves to that kind of quantifiable or specific response.

I think correct is misleading in terms of the objective. The other thing is, yesterday, there was a comment made about or several comments made about zero risk. The court has already talked about zero risk. We can't impose now, unless the Commission decides to go in this direction, a zero risk standard where the court has said that's not what adequate protection means. That's not the definition in the Atomic Energy Act and in the NRC regulations.

I think that plays into this. I just wanted to make that point, because I didn't have a chance to do it yesterday.

CAMERON: Let's hear from Alan before we go over to Jay. I don't think that Tony was suggesting that the word sound or the word correct would mean zero risk, but I'll --

ROISMAN: That's correct.

CAMERON: All right. Alan?

HEIFETZ: I found Larry's formulation to be one that was very understandable to me and clear. I'm concerned about this word correct because I don't think it falls within my understanding of what

scientific method is.

There isn't any correct scientific method. There's a theory that is acceptable and it stays acceptable until you can demonstrate that it's no longer acceptable, but there may be a paradigm shift. So I don't now any scientist that would say you could come to a correct decision and I would hesitate to have to make any decision on the record and say that it is the correct decision.

As Ellen points out, half the people who read my decisions think I'm a genius and the other half think I'm an idiot. So be it. The only other question I had is I understand Susan's concern about the record, but I'm not sure I understand what I would consider to be a, quote, balanced record. Again, that seems to be -- which balance may be in the eyes of the beholder, but as somebody who is presiding over a proceeding, I'm not sure I could satisfy myself that something is necessarily balanced or should be balanced.

Sometimes the weight of evidence is tremendously on one side or the other. That's not a balanced record, but I can reach a correct result as long as it's an adequate record; in other words, there is enough evidence in there for me reasonably to reach a decision.

CAMERON: But not necessarily a correct result.

HEIFETZ: Not necessarily a correct result, but go on the theory that seldom wrong, but never in doubt.

CAMERON: Right. Is that on the NRC flag? Mal?

MURPHY: I personally don't -- I mean, I don't read the word correct as being limited to one decision. I think -- I mean, I sort of prefer, like Tony, prefer the use of the word correct versus sound for the reasons I think he expressed, that that ought to be the goal of any agency such as the NRC, the goal of their adjudicative processes ought to be to reach correct decisions. And in lots of cases, there are more than one correct decision, but the

goal ought to be, to phrase it differently, I think, the goal ought to be to avoid incorrect or wrong decisions. And I don't know how long we need to beat these two words, but I prefer the use of the word correct, as Tony does, and I don't read that to be limited, to limit the NRC to one single decision in any given licensing proceeding.

CAMERON: I think you can understand, I guess, the point that Alan and Alan have made.

MURPHY: Sure.

CAMERON: In the use of that term. Let's take two more comments on this and this will all be grist for the mill for the Office of General Counsel. Susan, did you want to respond to Alan's point about full and balanced?

HIATT: Yes. I wanted to clarify, where I was getting at with the idea of balance is that what is typically done in practice is when you have a poorly funded intervenor, the record is not balanced, is decidedly unbalanced on one side, where the weight of the dollars is on behalf of staff and the applicant.

I guess what I was getting at is could you try to, perhaps through intervenor funding or some other means, inject more fairness into the process so that you don't have this one-sided record that will inevitably lead to one conclusion.

CAMERON: So perhaps the concern there might more fully addressed by what fair includes, and that's your concern.

HIATT: Right. And I think maybe having full and complete, maybe that's a better term than balanced, but that's what I was getting at, is frequently when you have such a vast disparity of resources brought to the proceeding by the parties, is you don't have a balance, you don't have a full and complete record, that would have been there had there been a level playing field among the parties.

CAMERON: We're going to get to that substantive issue today. Let's go

to George, Jay, and the rest of you, and finish this up. George?

EDGAR: I'd favor, if we're going to draw some distinction between a process-based purpose or objective and a result-based objective, I really have trouble with the notion that the adjudicatory process is one that creates precise results.

It never has. It's always been a way of approximating an answer. We have a system where we'll generate a record, we will have a set of standards for a decision, which are really not precise standards, reasonable assurance, adequate safety, and in the end, a court is going to look at this record and say was it supported by substantial evidence. I think we're trying to impose and freight too much in the process by a statement that would use a term like correct. I think it's a little too absolute and it doesn't reflect the realities of the existing process.

CAMERON: Thank you. And you're weighing in on obviously the side of not using the term correct.

EDGAR: Look at how this process has been invented. Why are you trying to rewrite the standard?

CAMERON: I think -- and Tony, correct me if I'm wrong on this, but your point is that the decision should be one that fulfills the Commission's mandate to protect public health and safety, because.

ROISMAN: Right.

CAMERON: I mean, that's the underlying concern.

ROISMAN: That's right. To say correct doesn't mean a correct or the correct. It just means correct. That's number one. Number two, it doesn't attempt to change the standard. If it's adequate for the Commission to license a plant, if there is reasonable assurance, then all this mean is that its decision that there is reasonable assurance is correct and not -- so there is no intent to use the phrase to try to bootstrap some new standard, but to simply say what the standard is, the Commission's decision on that standard, they should

have -- I mean, it almost, it seems to me, that it's a little surprising anybody would argue with it, although I'm often surprised that people argue with positions that I take. This one seems to be more worthy of being embraced than most. It's that they want to make correct decisions and sound is just kind of -- I don't know -- it's just kind of mealy-mouth word. Correct is pretty clear. It means, yeah, we are right.

Now, some court might tell them, no, you're wrong, and events might prove them wrong, but the goal is we want to have a correct decision and to take away any suggestion that the decision is okay as long as we had a good process and the fact that it's correct or not doesn't matter would be really a bad thing.

CAMERON: Mike, you, I think, wanted to amplify on what Tony just said, right?

McGARRY: I do. I think Tony's comments have clarified a statement I was going to make before, because it seemed like, as George pointed out, we're moving into a direction of maybe creating a new standard for judicial review. But as Ellen said, we all want the right decision. So if this statement somehow is going to work its way into a statement of considerations, if there is a rule, I wouldn't object to the word correct as long as it is defined as you have laid it out, Tony. I think George's position should be recognized in a statement of considerations that the Commission is not about establishing a new standard for judicial review, that this test of substantial evidence is to support the decision, but it is the objective of the Commission to reach the correct and right decision in this context.

CAMERON: Okay. We're just going to take the cards that are up and then we're going to move on. Let's go -- is it going to be Dave or is it Katie? Dave, all right.

LASHWAY: Not beating a dead horse, but there is a lot of baggage, I

think we would agree with you on that point, but there is a lot of baggage with the word sound. At PA, for example, sound science is being debated thoroughly in the GMO context and let's be sure that if we don't want to amend or alter the judicial standard here, sound science may not be the term we want to choose.

CAMERON: Thank you. That's useful for us to look at. Jim, and then let's go to Larry for last comment. Jim?

RICCIO: After listening to Ellen, I understand why the industry wants to move towards risk-based regulation. There is a standard and the standard should be met. We had a deterministic standard for regulation within the industry, and I just wanted to point out the irony that we're 45 years into the process and we're deciding what constitutes a legitimate hearing.

This reminds me of the meeting we had a couple weeks ago where the agency and the industry are sitting around trying to determine what is the design basis. You guys are 45 years into the process. You figure you'd have it down by now.

I also get the feeling that I'm sitting around writing the statement of considerations for a rule which I oppose, and I fail to see how re-working this language is going to make it any more palatable to me that you're going to remove my rights to cross examination and discovery.

And I base that upon the SRM, I also base it upon the vote sheets that came down from the different Commissioners, and while I think it's beneficial to banter around words of legalese, I think it's more important that we address what's on the table. And hopefully we can get there before I've got to leave.

CAMERON: And that's where we're going, although I think that people might disagree with some of your characterizations.

RICCIO: I'm sure they will.

CAMERON: But I don't think that we're -- the intent here is not to be drafting the statement of consideration. The relatively, I think, simple idea was expressed by Ellen yesterday that we need some sort of a -- and as the NRC pointed out in a paper, that there needs to be some foundation for what comes out of this revision and that it would be useful to refer back to certain objectives in trying to do that. Larry, you want to wrap this up? Then we're going to go into the first problem we identified yesterday.

CHANDLER: I'll try to be real brief. Susan had suggested the addition of the word complete into the process and I have a concern about that, and especially with that word in the context of some comments that Tony then made.

The completeness of the -- the hearing process is just that. It is a process. It provides a forum by which the participants have an opportunity to raise issues and have those issues adjudicated. We talked about that yesterday and I think George had raised a concern about what the objective is; is it dispute resolution or something else. The completeness of the record is a function of what the parties offer, but also it's something that may be controlled by the tribunal, by the presiding officer, by the board, whoever is presiding in a given case. In other words, a party may have what it believes to be more evidence to offer and that evidence may be excluded by the tribunal because it may be cumulative or for lots of reasons. So the term completeness could imply some subjective notion that I don't think the Commission may want to subscribe to. It certainly needs to be an adequate record, it needs to be a substantial record, in order to support a decision that's made.

I was a proponent of the word sound, I still believe it's a good one in the context, but I'm concerned about introducing a notion that we're changing -- as I said yesterday, changing standards here when we

describe what really is a process by which substantive decisions get made.

CAMERON: Thank you, Larry. What I'd like to do now is to move on to our list of issues and we had a lot of discussion of these issues yesterday, including some proposed solutions. What I'd like to do is to move through these issue by issue, and including whether you agree that there is a problem, what are the aspects of the problem, what are some potential solutions. I put the generic issue on first. We had a lot of discussion of that yesterday and the feeling was while people understand perhaps that there is a long tradition of trying to address issues through generic means rather than case specific means, but there have been some circumstances where there seems to be perception, an element of unfairness associated with using generic mechanisms to take issues off the table. And if we could put a finder point on what circumstances people think are inappropriate for that use, then I think that would be very, very helpful.

I'm going to start with Jeff Lubbers on this one and then go to the rest of the folk. Go ahead, Jeff.

LUBBERS: If I could make a generic point about this. I think that it's usually beneficial for agencies to make policy through rulemaking, if they can, and I think one of the problems with the administrative process now is that rulemaking itself has become more difficult. But we have many situations where agencies want to sort of settle issues that come up in a case by case context. OSHA has been trying to do an ergonomics rule for years and it's kind of been thwarted by Congressional appropriations, riders, and things like that. The National Labor Relations Board, which decides cases case by case has been urged repeatedly to do more rulemaking rather than just wait for cases to come up.

So I think as a general matter, deciding issues through generic means -- and really, I don't know what we're talking about except rulemaking there -- is a good thing.

Tony Roisman raised a few issues with respect to how this is done that I just want to comment on. I think that it can be a problem if an agency that does a lot of adjudicatory policy-making starts -- decides that, well, here is an issue that's coming up frequently, let's try to do a rule on it. Meanwhile, there are cases in the pipeline where the issue is coming up.

I think there, and we talked about this in one of our studies at the Administrative Conference relating to the NLRB, we just said that the NLRB should continue to decide those cases based on prior precedent while they're doing the rulemaking.

If it's an issue of first impression, and this is what I gathered Tony's main concern was, where some issue has come up in a licensing proceeding and the intervenors are sort of making hay with this and all of a sudden the Commission decides, well, let's take it out of the licensing proceeding and treat it as a rulemaking issue and not allow it to be brought up in the licensing proceeding, that might be a problem. I think that isolated issue needs to be addressed and I'm not sure I have a good answer for that yet.

But with respect to NRC rulemaking in general, we haven't talked about the NRC's rulemaking process. I know you have a few rules on that. I don't want to add a new issue here.

CAMERON: Thank you.

LUBBERS: But I just want to throw out a few things there. You do have a petition for rulemaking process in your rules that citizens can take advantage of and the agency has to respond to petitions for rulemaking. Intervenor funding might be something that could be thought of in the rulemaking context, as well.

The internet obviously gives people or gives the agency an opportunity to get more public participation in rulemaking. Then there is negotiated rulemaking, which I know that the NRC has had to do -- has been required to do, in some instances, where it hasn't worked that well, but I think if you're talking about an issue that is going to recur and that there's a lot of interest in the intervenor community about or the industry, and/or the industry, I think it might be wise to try to do a negotiated rulemaking on one of these issues. So I think there are some things that the NRC could think about doing in improving the rulemaking process, but I think the real only problem I see is the specific problem of plucking an issue out of a -- a first impression out of a licensing case and saying, oh, we're not going to handle that in licensing, we're only going to handle that in rulemaking.

CAMERON: Thanks for those suggestions. You mentioned a couple of things that I think might sort of zero on in this problem. One is the timing issue, the timing of when the generic resolution is done, and, also, perhaps the type of issue. I don't know if there's anything associated -- there are certain types of issues. You mentioned this novel new type of thing. I don't know if that -- if there's a type of issue criterion that might be used here and I think Jill is going to give us some examples, perhaps.

But just as a point of clarification, we have done two negotiated rulemakings. One of them was required, on radiopharmaceuticals, but the other one was the one that Mal Murphy mentioned yesterday that came up with some new rules for the high level waste proceeding on this hearing process issue.

Jill?

ZAMEK: Some of the issues that have been labeled generic really have some site-specific exceptions. Diablo is one that I work on and when we came -- we did a license recapture, is what we did, and we weren't

allowed to talk about the waste, but the -- it's sitting on an earthquake fault, for one thing, and the pools are going to be filled by the year 2006 and they gave them the license till the year 2023 and 25. It seemed like we should be able to speak to what's going to happen to this waste and the earthquake fault and all that kind of stuff. It's not generic when it's site-specific.

CAMERON: But do you -- I guess the question would be, do you feel that you can't raise the issues that you want to raise effectively by commenting on the proposed generic solution to a particular issue that might apply on a site-specific basis.

ZAMEK: One of the problems is the time, talk about delay. This hearing was, you know, I don't know, five years ago and I never got to speak up about this and I doubt that I ever will. And there's no resolution. The same thing happened with the Thermolag stuff. You're only allowed to talk about that in a small context and it doesn't get resolved for many, many years and we don't have any input in that.

CAMERON: We're going to go to Larry now. Larry, besides -- in addition to the point you were making, if you have anything to offer in terms of what Jill just said, please do so.

CHANDLER: Actually, I was not going to make a point as much as ask for clarification and I think it was of Jill, who had made reference, and you've captured it in the words generic EIS. I just don't understand what the context was in which those words were used yesterday, because I can understand having issues foreclosed, perhaps, because of generic resolution or treatment in a rule and we discussed very briefly yesterday the fact that they can be challenged in certain circumstances. But simply the existence of a generic environmental statement, I'm not sure why that would have foreclosed consideration of an issue, unless that's somehow captured in a rule.

CAMERON: Now, Jim, it may be -- I'm not sure if Jill was the one who mentioned that yesterday, but Jim had an example.

RICCIO: I think I may have raised it yesterday. Basically, if you look at license renewal, the industry has mentioned there are at least 22 plants that have now moved forward and said they want to do license renewal.

Many of the generic issues that touch upon license renewal were foreclosed long before the public had any idea which of these plants were going to be renewed. So there is no reason for the public to get involved, because they didn't know whether or not there was an eminent threat of the reactor being relicensed.

So just by basically foreclosing issues early in the process, prior to the public even having notification --

LUBBERS: What sort of issue?

CHANDLER: Let me help. When the license renewal rulemaking was undertaken, our Part 51, which are environmental rules, dealt with environmental issues associated with renewal through a generic process.

But this is not just simply a freestanding generic environmental impact statement. There was a rulemaking associated with it.

There were -- I forget what the total number was, 88, 90, some issues that were identified as being pertinent to renewal, environmental issues.

Of those, some 60 were determined to be and were captured in the rule as being generically determined, cannot be raised. Some others were question marks and others were left open for case by case resolution.

So there was specific treatment in the rule. It's not, as I say, just a freestanding environmental statement, but, in fact, the way in which the rule itself is written.

LUBBERS: Was the rule challenged in court?>

CHANDLER: No, not on this aspect. No.

RICCIO: Not the second rewrite of it.

CAMERON: All right. Let's -- thanks for that clarification. I mean, the conclusion of the environmental statement is, I think, what Larry is saying were institutionalized in a rulemaking.

CHANDLER: A rulemaking in which there was notice and comment.

RICCIO: Of course, there was notice and comment, but the point is if the public has no idea that it's going to affect their interests, why are they going to participate? It's a way to foreclose public involvement at an early stage.

CAMERON: Can I put -- and we're going to go to Ellen, but maybe to sort of get to the essence of your comment, Jim, and perhaps it's sort of what Jill was talking about, it's that when an issue is being dealt with on a site-specific basis, the people in that community have notice that something is going on, whereas if things are being dealt with in a generic manner and the famous publication in the Federal Register issue, et cetera, et cetera, that people may not have the notice that they ordinarily would have in order to resolve things. I know that from the -- from Jeff's point of view, they probably have things to say about that. But, Ellen, you want to comment about the license renewal issue. Go ahead.

GINSBERG: I think it's important to recognize that in the course of developing the generic environmental impact statement, the NRC left open, you've got these category one and category two issues.

CAMERON: I participated in the process.

GINSBERG: Right. So the NRC -- well, perhaps for other people's edification. The NRC left open the prospect of if you could -- and I think the standard is new and significant information, that you could open up an issue that had been generically determined, but admittedly it was intended to be a reasonably high standard because this was generally determined through a rulemaking, et cetera, et cetera.

CAMERON: Thanks, Ellen. Tony, what do you have to say about all of this?

ROISMAN: Well, I think a couple of things. One, since it's not this group of Commissioners, although it may be some of the staff, I can talk openly about GESMO, because it's a good example for Jeff to understand what this problem is.

The Commission was proceeding ahead with certain kinds of individualized licensing decisions and the issue got raised as to whether or not there were environmental impacts associated with the use of plutonium as a fuel in nuclear reactors, and the most significant of those or the hottest one was did it make a terrorist risk much more palatable by creating something that terrorists could interfere with.

And we could certainly argue that there's a lot of site-specific things that are involved in that. If the site that you're going to have all the plutonium at and moved from and the site that it's going to be moved to are all in very remote areas, where it's relatively easy to do surveillance and watch out and protect, you have one set of risks, and if it's moving along the eastern seaboard, you have a different set of risks.

For whatever reasons, the Commission made the decision that that issue should be dealt with generically. And let's assume for the moment that that was a sound decision and a correct decision, and that there was nothing wrong with that decision.

But what the Commission did was it said we're going to take that issue away from individual licensing proceedings and we're going to move it into a generic context and while we are deciding it, the individual licensing proceedings will continue and if they reach a conclusion before we're done, tough.

That history makes people very nervous about the Commission using the generic process as a device to evade facing of questions. They did the

same thing on what's called the S3 rule, which deals with the nuclear waste disposal. The Commission didn't, doesn't and, as far as I know, has no intent to ever honestly answer the question does it make any sense to allow new nuclear waste to be generated when we do not have in place a solution to the problem of disposing of it. What they said in the S3 rule, which is the still rule that applies in every case, is because we will have to have a solution, we are going to assume we will have a solution.

Now, with all due respect, I just think that's garbage and it's political garbage. It's not even substantive garbage. But that's what they have done. So there is this history of people being concerned that the Commission is deliberately playing games with this generic rulemaking process as a way of taking all the hard issues away from individual licensing proceedings and keeping the train running on time. Having said that, and I don't know that there is a solution for that if you can't convince a court, we did in GESMO, we did not in S3, that what the Commission did was wrong and that may be the only remedy to that. But there is at least the second part of it, which I think you addressed and I think it raised some important points. That is, should there be some kind of restriction on the use of generic rulemaking as a device for taking issues out of individual licensing proceedings when the issue had already started in the individual licensing proceeding and the generic rulemaking comes after the fact.

So as the Commission always wants to do when it sets new safety standards, it ought to be considered, if not adopted as a rule, that if you're going to do generic rulemaking, you grandfather every case in which the issue has already been raised and let that go to conclusion in the individual case.

If the generic rulemaking is completed before that case is completed, then you might put in place a process by which you blend the generic rulemaking with the individual action, but there ought to be -- I think Larry mentioned there is a fairly high standard for interfering with the decision made in the generic rulemaking in an individual case, if you meet a high standard.

I would say if you've got a case that's already ongoing and a generic rulemaking concludes, the high standard is automatically deemed met and the licensing board considers equally the resolution of the matter in the generic process, informed by whatever additional evidence got developed in the individual case.

At least if you grandfather, I think it takes care of some of the concern that the process is being used to avoid the tough questions. Ultimately, on some of them, the Commission can follow what I think would be a procedurally acceptable approach and then it's just a matter of a legal dispute that you have to take to court; could they legally take this issue away from individual cases that are decided in this way. That's what I think is kind of the history of it.

CAMERON: Thank you, Tony. It does -- you have put one suggestion for how to deal with perhaps what people view as the most egregious use of this mechanism.

I really want to make sure that we start on another issue before 10:00. So what I would suggest is we take the cards that are up and if the people who do have their cards up, I'd like to hear some comment, and particularly from Larry and Joe perhaps, on Tony's suggestion on the feasibility of that, if you want to say anything.

Let's go to Jay, and then Bob, and then over to George. Jay?

SILBERG: First, on Jim's point that putting issues into the generic hopper, somehow this affects individuals because they don't know that their particular neighborhood plant will be affected, I think would cut

the legs out from under the whole generic process. By definition, any issue that's going to be dealt with on a nationwide basis generically is going to affect everyone and if somehow we exclude people whose neighborhoods or neighborhood plant or neighborhood licensed activity is not yet known to be in the group that's going to be affected, you do weigh what the whole possibility of generic solutions. If we have a situation, if we have a scheme which allows for generic treatment, by definition, some people will not know that it will apply to them, because generic solutions tend to last for long periods of time. There may be people yet unborn, there may be nuclear plants or activities yet unborn who will be affected by generic solutions, and if you adopt the view that somehow you can't apply those generic solutions in individual cases because those individuals didn't know that they were going to be directly affected, you might as well get rid of generic solutions completely.

I think you can make the same comment about national legislation. Any national legislation that establishes standards that are going to govern everyone is subject to the same argument and either we have nationwide or generic solutions or we don't, and I think the benefits of having them far outweigh the detriments.

There are going to be people on both sides who may not know they're affected. There may be people who will be applicants who don't know they're applicants at the time a generic rule is adopted, and they're just as harmed, if you will, as the citizens who don't know that their local licensed activity is going to be affected.

In terms of Tony's comment on grandfathering individual cases where an issue is raised, I think the law is pretty clear on that and I think it goes back as far as Ecology Action, 2nd Circuit decision in 1972, in the NRC arena.

I think there is a lot of case history on retroactive legislation. I

think there's a lot of case history on retroactive rulemaking. The idea that you would be grandfathered, I think, again, cuts the legs out of generic rulemaking.

I'm not sure how Tony would react if an individual case were grandfathered and it turned out that the resolution in that case were significantly more beneficial to the applicant than the generic solution. I doubt Tony would let the applicant get away with having, if you will, a less restrictive rule applied to it because it happened to prevail that way in a site-specific case, and it can't be a one-way street.

If a generic determination is safe, meets the reasonable assurance standard or meets the NEPA standard, then that ought to be good enough for everybody, whether it was started in the generic proceeding or not, and there are lots of reasons why you start -- issues come up in generic proceedings that may be, as it was in the case of some of the spent fuel storage casks, that the generic licensing had not yet been completed, the utility had to get on with the process.

They started a site-specific process. The rule was eventually issued and they converted from the site-specific to the general; perfectly reasonable use of a regulation.

To say that you can't move from one category to another seems to turn the licensing process upside down, if you will, and I think it will significantly reduce the utility of rulemaking in general and generic solutions in particular.

CAMERON: Thanks, Jay. I'm sorry that -- I'm going to take these cards that are up and then we're going to move on to the next topic.

SILBERG: Let me just add one more on the S3. I don't know GESMO as well as S3, but the Commission, I think it's not quite accurate to say that the Commission took the issue out of individual hearings and didn't resolve it. They did an interim rule in 1976 when the issue first was

given generic treatment. Then they did a final rule. In taking the long-term issue off the table, the waste confidence rule that wasn't a political decision, there was a very long intensive rulemaking, with massive submittals by all parties, including lots of intervenor participation, and decisions were made. You may disagree with those decisions. We disagree with a lot of decisions the Commission makes in rulemaking.

But there was a rule, there was a process, and nobody challenged the result in court. If people are unhappy, there is a forum to go to and there are lots of reasons why people choose not to appeal various decisions in court.

But that is where it ought to be fought and I think to say now that the decision was garbage, when those who now say it was garbage chose not to appeal it, I think, is after the fact and sour grapes.

CAMERON: Thank you. I guess let's go to Bob and then George and then finish off on this. I'm sorry that I need to do that.

RICCIO: I'm not going to let -- the generic process that you talk about with the dry casks now has given us basically exploding casks on the shores of Lake Michigan. So if that's a proper process and it is a good outcome, you have hydrogen bursts occurring in dry casks that came out of that generic process.

So if that's a proper process and it reaches a sound conclusion, I think we're all in trouble.

CAMERON: Let's go to Bob. Bob Backus.

BACKUS: I think the logic for generic treatment of certain issues is unassailable. Nuclear waste in Diablo is the same as nuclear waste in Seabrook and so forth and generic treatment of that, though we may not like it, it's awfully hard to argue against it.

But this whole discussion shows that we need -- when we're talking about hearing process, we cannot exclude the generic process, because to the

extent we acknowledge the right to go to treat these issues generically, we have to look at what is the process by which these issues get treated generically.

And I would say if the intervenors think they have a hard time in the adjudicatory process, and we do, the mountain is twice as high in the generic process and the rulemaking process.

I think the GAO did a study of rulemaking petitions and I don't think any non-industry group has ever had a rulemaking petition even acted on. I may be wrong, you'll tell me if I'm wrong. I know the State of Maine at one time tried to initiate a rulemaking to expand the emergency zone beyond the ten miles. It never got anywhere. So there's a real sense of disparity there and I would say if you want general acceptance, that issues like nuclear waste are going to be moved off to be handled generically, the Commission would have to go beyond merely intervenor funding.

I think they would have to, as they do with licensing proceedings, the mountain would have to come to Mohammed. They have to go around the country. If there are not intervenors, I think they should find them and create them to deal with that. So that there cannot be a legitimate claim, as Jay says, it's just tough luck if you didn't know about it. I think the Commission has got to go beyond just the notice in the Federal Register. I mean, who reads the Federal Register for fun? It doesn't have any pictures in it, for gosh sakes. And create an extraordinary -- I think you have to go beyond the ordinary, because after all, this is a unique agency, it's dealing with a unique technology, with unique risks.

And if they want to have, as the industry clearly does, many of these issues handled generically, you've got to go the extra mile or three miles to create a process -- or nine miles -- 26 miles, we'll make it a marathon -- and create a process that really seeks out the intervention

on this.

CAMERON: Thanks, Bob. I think that that point is noted and the Commission is trying to go that extra mile in the rulemaking area, too, and certainly there can be improvements to that. But I think that the underlying philosophy that we're talking about for hearing process also applies to other types of regulatory interactions.

Final point to George.

EDGAR: I would really -- I have a real problem with the notion that the agency's hands should be tied, their discretion should be constrained in terms of their ability to take issues from individual cases and put them in a generic process.

That's precisely why the agency has that discretion. The Supreme Court has upheld that discretion. The classic case is ECCS. You have it being raised in nine individual cases. You consolidate it, you put it into one proceeding, and you resolve it.

If there is a timing issue, if you will, and if there is some hardship engendered by that, that's what the waiver doctrine is for. That's codified in NRC's regulations.

If, for some reason, the rule wouldn't serve the purpose for which it was adopted, then one can seek relief under the waiver doctrine. There is no need to build new structure to accommodate that timing issue. It's in place.

CAMERON: Okay. Thanks, George. Before we take a break, I at least want to start on a major issue and it is the third issue down, which is proceedings. We heard yesterday proceedings can be overly long and complicated, ascribed to at least one -- one underlying cause is that the boards do not exercise the control necessary over the case in terms of cross examination.

I think Jay used the term endless, pointless cross examination, discovery, many other things were pointed out yesterday.

Alan was nice enough to talk about the fast formal process that can be used, looking at case management. He talked about the management of complex litigation, that Paul teaches a course on. Let's start on this issue. I guess that in deference to a guest, I would just ask if Alan has anything to say in addition to what he said yesterday on this particular issue.

HEIFETZ: I think the only thing that I would suggest is if there are particular problems that you have with the process, those need to be articulated so that they can be addressed. What I tried to do yesterday was just give you a brief idea of how you can go from one type of proceeding to another, collapse timeframes, engage in case management techniques, but I don't come away from the workshop so far understanding exactly what it is about the NRC process that makes things so slow. If I had more of an idea of what you were talking about that stretched something out to a number of years, I could respond to any questions that you have and any suggested solutions. But I can't do it without knowing exactly what is taking so long and I'm here to respond to anything that you have, but I don't have generic suggestions at this point.

CAMERON: Thanks, Alan. I think that's sort of a perfect introduction to this session. I would just call everybody's attention again to Tony Roisman's suggestion yesterday that particularly on this particular problem, is that there needs to be a more in-depth, careful evaluation of actual cases to identify what problems have resulted and why. Some of the problems that we heard raised yesterday, we heard sort of a conflicting story about why that particular problem resulted, and perhaps this evaluation might help in that regard. But in response to what Alan -- the question he put to the group, does anybody have anything to say on that? Joe?

GRAY: I guess I would just reiterate your question. Twenty years ago

and up through the mid '90s, there were various examples of protracted proceedings.

More recently, to some extent, at the Commission's urging, the presiding officers, licensing boards, have utilized many techniques to control proceedings.

I guess my question is what is the more -- what are the views on the more recent history with a lot of these techniques being used. Is the thought that there's still unnecessary delay and protracted proceedings, despite these controls? And if so, what additional control techniques would people suggest that might address the problem.

CAMERON: Thanks for that articulation from the NRC infrastructure, so to speak, of what Alan was asking. Responses to Joe and Alan on this one? Let's go to Edgar, and then over to Dave.

EDGAR: I think the recent history is positive, the policy statement, direction the Commission has given, the way it's been carried out by licensing boards, but most significantly, the continuing Commission oversight, the intrusive role of the Commission in managing or at least overseeing the process is crucial.

I would suggest that the mechanisms for control of the hearing process are well understood within the Commission and by the licensing boards.

Judge, you asked a question, what's different about the NRC, is there something different, and the answer is yes.

As distinct from other agency proceedings, the degree of polarization in an NRC proceeding amongst the parties is generally higher than in most decision-making proceedings.

It tends to be a yes/no. That's not true in all cases. There are many cases in which we've participated in which the parties aren't that far apart. There are ways for cooperation or for people to adopt a common mission of getting through the proceeding.

But it's only fair to recognize that there is a high degree of

polarization. I don't know whether you sensed it from some of the debate here.

That's not to say that's good or bad. That's the reality. I mean, that's what it is and it doesn't tend to create a process where you're going to get a predictable managed result.

CAMERON: I guess that's the -- what are the implications of polarization in terms of the need for more effective case management, is the question. Does that lead to more abuses or even, not terming it abuses, does that lead to more delay, et cetera, et cetera? Just a question to think about.

Dave, let's go to you and then over to Tony.

LASHWAY: Obviously, our experience lies primarily in the materials licensee context and I'm sure Tony Thompson, as he indicated to me last night, commented yesterday on the less risk involved with materials licensees.

But certainly the informal process that I've been a part of on behalf of various licensees, including Hydro Resources, has been a very interesting one from an administrative law context, in that while we certainly, as licensees, are happy about engaging in an informal process, an iterative process, and we welcome Commission oversight readily, the process, at least in the HRI context, as well as in the international uranium context and I can also say in the ATWS context, has been one that has been drawn out and has indeed lacked structure. The kind of a chart we put together the other day reflecting the HRI process shows that more than 70 briefs were filed over the course of a year in the HRI proceeding. Unlimited reply briefs were filed by the intervenors. Every decision of the presiding officer, both procedural and substantive, were appealed to the Commission and, in fact, were subsequently appealed to the DC Circuit Court of Appeals. We now, in the HRI proceeding, for example, have two cases pending in

the DC Circuit. The DC Circuit recently issued an opinion dismissing one of the cases and has requested the intervenors to show cause why they shouldn't be sanctioned for abusing the process. This type of proceeding certainly does not fulfill the goals that we have kind of outlined or you have roughly sketched and we discussed earlier, nor any of the goals in the policy statements. So as a licensee, it's difficult for us to move forward and have faith in the process, that we can come to the agency, receive a license and move forward, and give the process that's due and then move on, and that has resulted in some concern not only from HRI, from IUC and ATWS, but all uranium licensees and the recovery industry generally.

CAMERON: David, let me ask you a question at this point. What would your solution be to some of those -- I'll just use the term excesses at this point. Perhaps they were things that were a matter of right for the -- afforded to someone.

How would you fix that? Are some of these fixable through case management? Does the Commission need to change its rules in subpart (l)? What's your solution?

LASHWAY: I think it's a difficult one and I think it involves a variety of different factors.

One factor that we have encountered is that under the rules now, for example, a potential party can seek to intervene both pre and post-licensing. That has raised some difficulties for some of the licensees.

Unlimited reply, for example, the rules allow parties to request for replies. And in our case, the presiding officer was very willing to open up the record and allow all parties unlimited reply. So it is difficult to come up with some sort of generic rule or generic recommendation. I think it would be wise to look at a case by case basis and certainly, when you do so, please do not skip the uranium

recovery industry, because I think some of the issues that we have confronted in our hearings can certainly be useful and enlightening in the broader context.

We also have had to deal with this generic decision-making issue with respect to not only the generic environmental impact statement that exists with respect to the uranium recovery industry and mill tailings, but also in the context of performance-based licensing.

The intervenors, for example, in the HRI proceeding have attempted to challenge directly the performance-based licensing approach by the agency in the agency proceeding, as well as now at the DC Circuit. That has raised a whole slew of issues, many of which we've begun to talk about here, but I certainly recommend that you take a look at these cases and I think it will become readily apparent after reading some of these decisions and the briefs of the parties, what the major issues are.

CAMERON: And I guess that based on what you said, that there's still some -- there's a question of what could the Commission -- what direction, in addition to the policy statement, could the Commission give to the licensing boards to exercise in their discretion to prevent or to mitigate some of the things that you're talking about? We still haven't heard anything on that. Tony, do you want to go ahead?

ROISMAN: If I heard that correctly, he seemed to be saying what, at least in part, what I was saying, which is we ought to study this, because nobody knows whether there's a problem.

CAMERON: You think that just reaffirms the need for study.

ROISMAN: I think it would be a huge mistake to make policy on the basis of anecdote. And with regard to the underlying premise of the uranium recovery people that they're are low risk, low consequences category, I would say the magnitude of resistance that you're getting to your licensing would suggest that you're wrong about that.

Somebody out there must think that you're either a high risk or a high probability problem or else you wouldn't have that kind of opposition to what you're doing.

So there's something going on. I mean, it's like a -- you know, when the canaries start dying in the coal mine, you begin to think there may be gas down there. In this case, you've got a number of people showing up with concerns.

But third, I think you seem to be suggesting that in the informal hearing process, which I gather is what you've had, that a licensing board chairman has felt that that process requires him to be more lenient in terms of how he exercises his discretion, which he has an enormous amount of, about allowing reply briefs or allowing additional briefing and so forth and so on.

And that seems to me to be a tradeoff that your industry can make a choice about. If you want the tougher rules, and, believe me, they are tougher when you're in the adjudicatory hearing, come to the adjudicatory hearing process. The hearing board chairmen that I'm familiar with use their authority under 2.718 to really crack down, and you didn't get to file reply briefs automatically and there were much tighter time limits.

So it's kind of a tradeoff between the processes there that I think -- but I think that your -- whatever your experience has been, it's worth studying to find out where does the problem lie. It doesn't sound like there's an automatic answer. I assume your solution would not be automatically preclude all reply briefs. You might be the side wanting to file one once. And it can't be automatically punish everyone who files a reply brief and then loses the issue.

So in the end, it's going to depend upon Paul and his lawyers.

CAMERON: Time for the break.

[Recess.]

CAMERON: Just a couple of points, one from Judge Heifetz, who had to go. Okay. He made the point to me that the fact that there are delays, et cetera, et cetera, with the "informal process" indicates to him that perhaps going to so-called informal is not a panacea for particular problems. He wanted me to put that on the record. I did put Dave on the spot a little bit about, well, what contributes to these problems, what fixes would you come up with. I just wanted to say, in that regard, it goes back to Tony's point about doing an evaluation of these cases. I think that the staff heard about three cases and I'm sure it's not news to them, but three cases that might be put on the list, ATLAS, HRI, International Uranium, put on the list to take a look at, among others, to see what problems do those evidence here; is indeed there a problem and how do you fix that. So we keep coming back to Tony's suggestion. Larry, why don't we go -- you wanted to ask a question and then we'll go to Jill. Go ahead.

CHANDLER: I did. And by the way, I guess we heard about some other cases, I think people had mentioned LES, people mentioned Vogtle, if we want to put those all into the pot for consideration. But really a point of clarification, because we've been dancing around an issue. We're here discussing whether changes to our rules of practice, part two, in a very broad sense, are appropriate. Jim has very clearly expressed his reading of the SRM. To perhaps a lesser extent, others have, as well, that it's sort of a preordained outcome to the process, with the single objective. But from -- if I could sort of, for our purposes, as we go through this, if I could put maybe Ellen, Jay, Mike McGarry conveniently left, George is here, and Dave on the spot, from an industry perspective, am I hearing the concerns focusing more on the type of process -- that is, a formal versus an informal process, with a preference towards the formal

because it may be more manageable, or is it more literally a case management issue? That is to say, irrespective of the process, it boils down to case management concerns, for which the parties, as well as, perhaps in some instances, the presiding tribunal may have some responsibility.

CAMERON: I think that's within this agenda item that we're on. So let's start with George and go to Ellen, Katie, Dave, Jay.

CHANDLER: I'd start with Jay.

CAMERON: We'll start with George.

EDGAR: Larry, my answer to you would be it's both. It's there are case management issues, but as I've previously indicated, I think the Commission oversight policy statement, the way the boards have adopted some of those suggestions, have been encouraging, but there are some process issues that you need to examine now. I think there are some changes that you need to codify now to build some permanence into that process. There are elements of these proceedings that don't require and should not require formal process. I would particularly urge consideration of whether there should be any presumption on cross examination, particularly on technical issues. Certain types of cases should preserve that option, but for the most part, that is not something that I would establish presumption of having.

I think much of the discovery can be shortened and controlled, if nothing else, through leveraging technology. I think Mal Walker explained some of the things that have been done in the waste area, but there is a great deal that can be done there. I simply fail to see the need to continue with a trial type process for licensing proceedings. I think there's a set of things that need to be looked at. I've gone through most of them yesterday, but the short answer to your question is it's both implementation and it is structure

of the process. You should look at both.

CAMERON: Thanks, George. What we're going to do, we're going to go to the rest of the people for their answers to Larry's question. Then I want to give the rest of the panel an opportunity to respond to what they heard. Ellen?

GINSBERG: Like George, I strongly believe it's both. I think there are significant improvements that can be made in the current process if greater case management was implemented, but I also think there are aspects of the current process that could be improved significantly. One of the issues that we are dealing with is the view that -- or one of the views we're dealing with is that to reach the technically and legally supportable, sound, correct decision, it's not clear. In fact, we think trial type adjudication is not necessary. Maybe there are some features of it that should be retained. I believe that a lot more can be done on the paper, allowing full participation on the paper. I think there are opportunities to get the views of the parties, all of the parties, out on the table, but that the trial type trapping or the typical things that we think of as a more formal process aren't necessarily helpful to reaching that ultimately right, correct, sound conclusion.

CAMERON: Katie?

SWEENEY: We're not advocating the elimination of subpart (l). It has worked smoothly for industry in quite a few cases. I think in the cases that we wrote down that have been a problem, better case management would help resolve quite a few of the issues there.

LASHWAY: I might just add, I think it's both. Again, I think we're in agreement on that. But clearly subpart (l) has been a terrific process for a variety of some of the materials licensees. But case management clearly has been the problem and I think the tools are in the regulations now, as George pointed out. For example, the

Commission oversight and their ability to intervene suasponte. The ability of a presiding officer to bring in a technical expert, like they did in the HRI proceeding, proved very useful with respect to ground water. I think Judge Bloch knows more than he ever wanted to about the West Water Canyon member aquifer in northern New Mexico, 10,000 pages filed on that issue.

So I think the tools are there and I just -- you know, I recommend that they be used.

CAMERON: Ellen wants to add one thing. Go ahead.

GINSBERG: Small lapse. I just wanted to mention that we've been talking about not just problems, but potential solutions, and one of the potential solutions that I wanted to identify is that the NRC has already implemented subpart (m) and from my perspective, from the industry's perspective, that provides a good model in which some of the concepts that we've talked about here might be -- or a way that the concepts might be used, broadened.

CAMERON: I guess the big question is when you would apply those subpart -- the question is when -- we've heard a lot of suggestions about changes, but when would -- what types of proceedings, when should they apply, but we'll get to that.

I'm going to go to Jay and then we're going to go over to Tony and Jill and --

RICCIO: I'd like to go, so I can get out of here.

CAMERON: Okay.

RICCIO: Thanks, Larry. I'm not sure the NEI is going to feel the same way when I get my hands on them. I just wanted to say I asked this question yesterday to the industry. Would be still willing to give away your rights to cross examination and discovery if your clients are being asked to take the hit, and I've yet to hear a response out of the industry and I expect and I'll say that

the answer is probably no.

GINSBERG: Let me speak for myself here. The industry, if there was a proposal to either eliminate or largely restrict cross examination, I believe that the industry would agree to that.

ROISMAN: In enforcement proceedings?

GINSBERG: I think enforcement proceedings need to be characterized differently.

RICCIO: Because it's your rights that would be getting circumscribed.

GINSBERG: No. I think there are a lot of individual rights that are at issue in enforcement proceedings and they are not necessarily the utility's.

RICCIO: The last point I wanted to make --

CAMERON: Tony? Tony, we won't let your comment go unsaid, but let's just try to keep it a little bit organized.

RICCIO: The last comment I wanted to make, you actually raised the question in the original agenda as to whether it was appropriate to circumscribe the public's rights in the review of Yucca Mountain.

CAMERON: I don't -- just for the record, it wasn't phrased like that.

RICCIO: No, it wasn't phrased like that, but that's the gist of it. Other alternative means of having a hearing. Check out footnote seven, you've already promised the public a formal hearing. We're going to hold you to that promise, although apparently the industry's memory is lapsing again as to the promises that were cut back in the '80s. It was a pleasure discussing these issues with you all and I'm sure we'll see you around campus.

CAMERON: Okay. Jim, thank you for being here on the high level waste licensing proceeding issue that was flagged in the agenda. Mal Murphy had some words to say on that when he comes back, and I'm sorry that he is not here now to sort of follow-up on what you said.

RICCIO: It's in footnote seven, on the SECY paper that was on the web

site. I don't believe it's in the packet.

CAMERON: Yes, okay. I understand what you're saying about the SECY paper. All right. Jay?

SILBERG: I think it's both. I've had a lot of experience in the past two years with case management, as I think it ought to be applied, and, Judge Bollwerk, if you'll cover your ears so you won't blush, but --

BOLLWERK: I've been thinking about leaving this for a while.

CAMERON: We have a booth in the back of the room that you can listen.

SILBERG: We have had problems in that proceeding. Frankly, they've been with the staff review in terms of getting through an expeditious and effective process so far, and we've yet to go to hearing. So I don't want to give the judge my perpetual blessings, but I think he has run the case as it should have been run. I think he has put tough time restrictions on all parties.

I think he has limited discovery on all parties. He has imposed the Rule 26, open discovery process, where we have basically opened up a public document room and supposedly the state has done the same.

I think the process so far has worked well. I think there still are many areas in which cross examination is not the best engine to get to a scientifically correct, sound, technically supportable, et cetera, decision.

I've been in a lot of hearings in the past where the same witness who was discredited in three prior proceedings was allowed to step on the witness stand and put forth his credentials and his statements and the board was willing to let it in for what it's worth, even though we tried to strike the testimony in advance, and he let it in for what it was worth and it was worth nothing.

I think there are a lot of improvements that need to be made. I think there are lots of areas where cross examination -- the winner in cross examination is the best lawyer and not the soundest witness, and I think

if a case where Tony is on the other side will have a very different result than a case where lawyer X is on the other side, because Tony is, frankly, more skilled than lawyer X. And I'm not sure that that's the way technical decisions are best made. I think we really need to take a hard look at that.

CAMERON: Thanks, Jay. Your last comment does get us to an issue that we're going to discuss shortly, which is the issue of making sure that the public litigant has the best preparation for these particular -- it's the whole resource issue. There's a number of those raised. And I guess that we would want to add the phrase to Bollwerk to our lexicon to mean to manage a case effectively.

BOLLWERK: Set me up for a fall.

CAMERON: Larry, do you have a quick clarification before we go to Tony?

CHANDLER: Yes. Having asked the question earlier, Jay, I understand the concerns that you've raised. In some cases, it's staff review; in some cases, it's inadequacy of the application that's submitted by the applicant, which underlies issues; in some cases, case management types of concerns.

Is there a preference that you see for a formal process with appropriate case management or informal process which doesn't have some of these ingrained at all?

SILBERG: If I could be assured that I would get a Judge Bollwerk in all cases, I might be willing to take --

CHANDLER: I can assure you, you will not.

BOLLWERK: I can't do them all. That's right.

SILBERG: That's one of our problems that we worry. I might be willing to take what I would view as the disadvantages of a formal process, but since I can't guarantee a Judge Bollwerk in all cases, that's one of the reasons why I think you need to codify a lot of these procedures and move in the direction of less formal approaches in many cases.

CAMERON: We still keep talking in sort of generalities here, use less formal approaches in many cases. Maybe we can put a finer point on what people believe on that.

But as sort of a question for Tony before -- in addition to what he is going to say. Tony, what do you think when you hear statements like Jay's about, well, we could live with a formal process if we were guaranteed that we would have a Judge Bollwerk? I mean, why can't we have more -- you made a comment yesterday about let's bring back the advisory committee on selection of judges. I mean, why can't we have more Judge Bollwerks?

ROISMAN: Well, I've never had the pleasure of being in a case in which Judge Bollwerk was involved, so I'm going to make it non-personal, but my reaction to Jay's comment was that this is outcome determinative and it has nothing to do with anything substantive, and it only underscores the point, the first point that I wanted to make, which is there is absolutely not a shred of scientifically reliable, admissible evidence that the Commission needs to do anything to change its current hearing process in the direction that these distinguished lawyers have recommended.

Each of them has a little anecdote to tell and when you get to the root of their anecdote, it turns out some hearing board chairman didn't do it the way they wished they would, and I think Jay just put his finger on acknowledging that that was really the case.

Now, the hearing board chairmen have all the authority they need to control adjudicatory hearings. If they didn't have it in specific rules, they have it in 2.718. They can do pretty much whatever they want and there's very little limits on their power and when they choose to use it, they use it effectively, and when they choose not to use it, that's also effective.

Now, the party who gets gored by that particular decision always says,

oh, we need to change the rules or we need another judge or the case manager -- you heard Bob talking about he didn't like some judges that showed up at Seabrook, and now we hear the people talking about the judges that they don't think are managing the mill tailing hearings properly, et cetera, et cetera.

I just think it just underscores that. We're talking here about generic rulemaking and the Commission has a duty, and I'm sure it will see to it that that duty is carried out, to make sure that it doesn't begin to tinker with the system until it has some hard evidence that, A, there's a problem and, B, that it knows what the solutions to the problem are. In that vein, I think it's important that two things be done in order to make that record. One, don't just review the cases that the industry tells you are the problem cases or, for that matter, that the intervenors tell you are the problem cases. Maybe more useful is to review the cases that everybody thinks worked.

You heard George Edgar say the ECCS hearing was a good example of a rulemaking that worked. I agree with you. It was an adjudicatory rulemaking. It had cross examination of scientific experts associated with it. It went on for a while. It came to some important, interesting conclusions that still remain the law in the agency today, and it involved a huge amount of disclosure of internal documents of the agency as part of that process.

And a lot of the cross examination was done by scientists of scientists, a process which the Commission's rules have long allowed, but is not used nearly as much as it could be, partly because often, at least on the intervenor side, there isn't a scientist available to them because of resource limitations to do that type of examination.

But regardless of the ECCS or any other, I think we should look at the hearings that worked, as well as the ones that didn't work and I think there should be a pretty broad definition. What does worked mean? And

really study this question.

I remember at one time the licensing -- I think Atomic Safety and Licensing Appeal Board addressed the question of whether or not intervenors were of any use in the hearing process in a case in Louisiana in the early '70s, as I remember, and they wrote a rather ringing endorsement of and gave some specific examples of why they thought the intervenors were useful in the process and provided a useful input.

That kind of historical review to find out when have the boards ever commented upon this, because no one will know better. In many ways, there's only one expert at this table -- that's Paul -- on these questions, because he sits there as the hearing examiner listening to these different points of view and seeing the case evolve in front of him.

So he has a better sense of whether or not he's working on a broken machine or whether he's driving a perfectly good machine that sometimes runs into potholes like you do when you drive on a rough road. So the first point is broaden the scope of what kind of cases you look at. Secondly, do it just like the engineers do it when they look at nuclear events; look for root causes. Don't look for the -- you know, it isn't automatically a problem when there was cross examination in the case and the case took four years and you could imagine that it should have taken only one year.

Why did cross examination take that long? What was the root cause of that? Was it because, as some people have said, that the examination was repetitive and endless and went on and on, and then was that because the hearing examiner wasn't paying attention and he let it go on and on repetitively, or was something else going on? Really find root causes. You've got the records, it's not hard to do that.

The second thing about this question of the adjudicatory process. I

want to be very, very clear that I believe that the premise is not only insupportable, but, with all due respect, anti-democratic to suggest that somehow or another scientists can't be questioned in cross examination usefully.

First of all, we have an entire court system dictated by the Constitution of the United States and every state in the union that says that they can be. We have the Supreme Court having just recently articulated, in the cases of Dalbert, Cumho, and the Joyner cases, the idea that scientific testimony in the Federal court system is an important component of reaching decisions and subject to all kinds of examinations and tests and so forth, and cross examination is a piece of that.

There is nothing about the scientific question that doesn't lend itself to cross examination. Is it bad when it's bad cross? Sure. Is it better when it's good cross? You bet.

You run a system in which you make sure one party has an inadequate amount of resources and they are not likely to get you the best examination and they're not likely to get the best advice from technical people.

I can tell you personally, in the Indian Point operating license hearing in 1970, I spent a morning cross examining one witness on the question of whether or not the droplet size of the bisulfate, I think is the substance, spray that was to be used in the event of an accident to control iodine releases in a pressurized water reactor containment, whether the droplet size would be the size that it was assumed it was going to be.

The size made a difference as to how much iodine it absorbed. And at the end of the cross examination, the witness, who was a staff person, came off the witness stand and said to me, "That is absolutely the best cross examination I have ever experienced." Since, of course, you were

not talking about the relevant point. The relevant point isn't the droplet size. The relevant point is the effectiveness of the filters. Who knew? I could understand the droplet size. I didn't understand the effectiveness of the filters issue at all. So I spent the morning doing that, $1,000 worth of expert consulting would have solved that problem and I would have spent much less time doing more useful cross examination.

So the fact that it was good, and I appreciate Jay's compliment, didn't make it useful and it wasn't useful for the hearing or anything else. But I believe cross examination inherently is a way of getting at truth and is a valuable -- is a valuable tool.

The Commission shouldn't -- I don't mean that they shouldn't abandon it casually. They shouldn't abandon it. They should maintain it and it should be a part of the process and licensing hearings should be absolutely continued with that.

Discovery; suggestions on reducing the time necessary for discovery, I've heard those. Mal talked about some things that are being done in the waste project. Jay suggested that there were things that were being done in one of his cases to try to deal with that. I think those are excellent suggestions and I think that they speed up the process and that they are beneficial; easy, extensive, ready access to documents.

But it has to be a total data dome. It can't simply be all the documents, we don't care, you see. If there are conflicts among the technical people for the utility or for the staff, they should be aired.

Why should it -- I mean, I can't think of a logical reason why a legitimate conflict that existed at the staff level or at the utility or between the staff and the utility shouldn't get to the hearing board if that dispute seems to be important to the public, but they don't know that it's important because they don't know that it exists unless the underlying documents are there.

This process, this adjudicatory process has stood us in great stead and I think it is an important test, very important test of the bona fides of those who urge that it be abandoned or limited in some way, that when they are defendants in tort cases in court systems, they insist on every one of these rights and we, as plaintiff lawyers, often complain that they abuse the process, slow it down and make it more expensive for us and use delay as a tool to try to keep from getting a judgment. Now, I complain about it, but I've never proposed and would not propose that the right be removed and I do what a lot of you have suggested here; I go to the hearing board or, in that case, the judge, and I say I want you to put some controls on this, and sometimes they agree and sometimes they don't, and I end up with months of discovery which should be done in weeks and depositions of witnesses that go on for days and days, when they should have gone on only for hours and hours. But those rights, whenever you're the party who doesn't want to see the outcome, those rights are very important to you and it's not because they cause delay, it's because they find information that helps you fight your battle and anything short of that is inadequate.

CAMERON: Thank you, Tony. Before we go to Jill, who has been waiting patiently, and I think Mal wants to play off one of your comments, I want to specifically ask the people around the table for -- to try to close on this. Tony has made a suggestion earlier, and a number of us have talked about -- a number of you have talked about it, about an evaluation of the cases to find out is there a problem, what is the problem, and he made a couple of suggestions right here in terms of looking for root causes and, of course, what do you review these cases against in terms of to decide what worked or what didn't work.

And yesterday he suggested going to the -- one of the performance objectives that the NRC has, substantive soundness. I would think that

maybe the work that we did on the objective statement or, for shorthand, it's the "NRC should" now, but maybe that statement could be used as sort of the litmus test to examine this question. But what I want to know from people is there is a process, a methodology suggestion to try to get answers on the floor, and I want to know what people think about that in terms of recommendations to the NRC on whether that is something that should be pursued.

With that, I'm going to go to Jill and then Mal.

ZAMEK: Do I respond to that?

CAMERON: No. Whatever you wanted to say. I know you've been waiting.

ZAMEK: I would like to respond to Dave's example and he perceives that case you're referring to as low risk, but I want to point out that the intervenors clearly perceived it otherwise and if maybe not high risk to themselves personally, perhaps to the environment and the water, the ground water, et cetera.

But because of their powerful beliefs and their really powerless situation, because speaking from an intervenor's point of view, we're desperate and we do whatever it takes to attempt to get our point across.

I think that intervenor funding would really eliminate so many of these problems, because if we had good counsel and we had witnesses, we wouldn't have to do, like Tony was saying, that extensive cross examination and the piles of paperwork that we have to do in an attempt to accomplish what we want, but don't have the resources to finance. So I strongly believe that we should maintain the formal hearings, with the discovery and with cross examination, but we need the funding in order for this to be an effective process.

CAMERON: Thanks, Jill. And let me take this opportunity to point out that there is a whole suite of issues, so to speak, on page two and three of this problem sheet that I want to get to soon, so that we can

have a good discussion of that, because I think it deserves a good discussion and it raises the -- you know, Jill's comments were reflective of those.

Let's go to Mal and then let's go over to -- we'll go to Jay, Dave, George, and then we'll come back over to Jeff and Paul.

MURPHY: Thanks, Chip. I do have a couple of quick points and I did want to play off of something that Tony mentioned, and that is that access, the facilitating discovery and access to documents. Again, I urge everybody who is not familiar with it to take a look at subpart (j) in that respect. On the question of whether or not it should be a complete data dump, and you can argue about what data is really needed, et cetera, but on that question, under subpart (j) and in the high level waste licensing proceedings, we have an LSN, licensing support network administrator, for example, who works in the next building, works for Paul, who is essentially in charge of making sure that everybody who wants to participate in the licensing proceeding complies with the requirements for document discovery and for loading up their web site and making sure it's accessible to the public on an easy basis, et cetera.

There will be disputes over whether or not the Department of Energy or the NRC staff, for example, has placed all of its relevant or could lead to admissible evidence kind of documents in the LSN and under the rule, the presiding officer will decide those challenges. So that kind of mechanism, that vehicle is in place in subpart (j) for the high level waste proceeding.

And I have felt for years that assuming our system works the way we intended it to work when we originally negotiated a precursor to the current system, that it will eventually be used in all NRC licensing proceedings or all complex, complicated, significant ones. Obviously, you're not going to make every dentist put his records in an

LSN when he wants to reload his X-ray machine or whatever the hell they do to get their -- but for serious licensing cases, I think ultimately something like this will ultimately be, will eventually be used, and I'd certainly urge the Commission and everybody here at the table to look at that and for the Commission to take a look at that to see if some of the problems that some people have raised in the last day couldn't be addressed by the use of something similar to subpart (j) in reactor licensing or license renewals or the uranium side of it, which I'm totally unfamiliar with, et cetera.

One other point that I want to associate myself with, partly at least, with some of Tony's remarks. It's not only important to an opponent in a licensing process. It's not only important to someone who wants to get to know that all of this whole panoply of protections, if you will, cross examination, complete document discovery, motions practice, et cetera, are available. I'm suggesting strongly that for a neutral party, such as Nye County, that is also very important because we have been telling and the NRC staff has been telling and the Department of Energy has been telling the public in the State of Nevada, and I speak only on behalf of the folks who live in Nye County and whose government is officially neutral, for years, that Yucca Mountain will not become a repository unless and until the NRC grants it a license or a construction authorization or however you want to phrase it, after a full trial type exposition of all of the technical and scientific issues.

So that the people in my area, whether opposed to the repository or in support of the repository, view the Department of Energy as on a mission to characterize the site and if it's adequate, to then build a repository there.

But they have been -- the message they have received from all parties, including us and the DOE and the NRC and everybody else is that the

mission of the NRC in the high level waste process is to arrive at the correct decision, after a full, fair, and complete, transparent exposition of all of the technical issues. So from my point of view, it's not only important to the utility industry that DOE be able to succeed in the high level waste repository, so they have someplace to place their excess material. I don't even like the word waste. And it's not only important to DOE that it be able to state its case. I think it's -- and the State of Nevada to be able to fully oppose the repository. It's important to a neutral party that not only do we -- and we'll have some issues -- not only are we able to litigate our issues, but that our public is satisfied that the correct decision has been made or at least there has been a legitimate, serious, good faith, good-hearted attempt to arrive at a correct decision after all of the issues have been fully litigated.

CAMERON: So just to put a finer point on that and maybe you already did, it's pretty clear that in terms of the issue of the -- since we had a comment on that -- the issue of making the high level waste licensing proceeding informal, whatever that means, what would your views be on that?

MURPHY: In this context, I hate that word informal, but I don't think -- we'd have to see. I mean, the devil is in the details, obviously. I don't personally have any objection to making some changes to the licensing process. Obviously, everything can be improved or at least subject to examination in that regard. But I think whatever is done, and I read, incidentally, the SRM not to foreclose at least the high level waste process licensing and reactor licensing or whatever, I read the SRM as indicating that the Commission wants flexibility in order to somewhat relax or make less rigid some of their licensing hearings, but not necessarily to apply that to every case before it.

But certainly I think some improvements can be made, but the basic -- the historical, fundamental attributes of a full adjudicative process in which all parties get a chance to air in a meaningful way their concerns and to present their evidence and to test the views and the evidence of the other parties should be retained; that is, discovery and I think we've got a pretty good handle on that with the licensing support network. The right to present evidence orally and in writing and certainly written expert direct testimony is the way to go. I mean, it would be silly to do it in any other way, I would think, and the right to cross examine witnesses, make motions, present arguments, et cetera.

As long as those basic attributes of a fundamental adjudicatory process are retained, how you massage the margins to make the system more efficient, I think, is not that important and I don't think it's all that important to the public.

And with respect to cross examination, let me just close with this one thought. I've never met a scientist, and I've worked with lots of them and I've cross examined lots of them and we've got lots of them working for us now and they all just have nightmares about being cross examined by lawyers in proceedings, even though some of them make a pretty decent living doing it.

But cross examination has, from the days of Galileo, been a fundamental attribute of the scientific method. Every one of these people, I mean, that's what scientific peer review is, for crying out loud. They get together in a room and sometimes they can be as mean and nasty and insulting to each other, you wouldn't believe it.

I've sat in on scientific peer reviews, sort of in the back row, and I think, good God almighty, I thought lawyers were bad to each other, these people are just outrageous.

CAMERON: That's a positive statement.

MURPHY: Every scientific article that's published in the peer review journal has, in effect, been subject to cross examination. Every scientist in the country, at least who has a Ph.D. or a master's degree from some legitimate educational institution, has been cross examined by a bunch of smart professors.

My father-in-law ran the air pollution control Ph.D. program at Oregon State University and that was one of the more fun things he did in his life, was make life really miserable for his Ph.D. students when they had to defend their thesis. Well, what is that? It's cross examination, because that's the way the scientists have for years, for centuries, determined as a way to test the validity of the theories and analyses that they're advancing.

Why in the world that shouldn't apply in something like a reactor licensing case or repository licensing case or any other complex case involving these kind of scientific or technical issues is beyond me.

And why these people get nervous about it, I don't understand. But clearly, I mean, by allowing cross examination in the licensing process, it seems to me all we're doing is extending the scientific method, in any case.

CAMERON: Thanks, Mal. What I'd like to do now is go to finish off the cards that are up, so that we can move on to these other important issues, and go around this way, starting with Jay, and if you could, I would like to hear opinions about the suggestion about the systematic evaluation of cases to find out what exactly the problems are here as opposed to what has been referred to as an anecdotal approach. Jay, go ahead.

SILBERG: First, I like Mal's formulation of full, fair, complete, transparent analysis to arrive at the correct decision. I guess the problem I have is that we're adopting one particular paradigm to do that and I think I do disagree with you that adjudicatory, legal cross

examination is the only or the best way to do it. The fact that you have scientific peer review, we, in fact, do design technical projects using the scientific method. We built the space shuttle with scientific peer review and not with lawyers cross examining the witnesses.

We developed the internet not with lawyers cross examining scientific witnesses, but with scientific peer review. It seems to me that a system that is more shaped by the scientists debating rather than the lawyers debating is probably one which is more likely to arrive at the truth, and I think that is the system that by and large exists today outside of the hearing process.

I would hope that the more of that we would get to, the better we would be. I don't think that the legal cross examination is necessarily identical to or even as good as the scientific system that you described.

In terms of whether we need an objective third-party approach instead of anecdotal, I think what you're going to come back with is anecdotal anyway, because what we're doing is looking at a series of case studies or a series of anecdotes and I think that the folks that will be looking at this process certainly within the Commission have been through these hearings and they have collected, if you will, the anecdotes from all the hearings, the good ones and the bad ones, the ones that worked and the ones that didn't work.

And I don't have a problem if Joe and Larry and their minions put together that in a more formal way. I think to go outside and to charter an academic body or the National Association of -- National Academy of Public Administration or somebody like that to do it, will put this whole process into dead storage for an extended period of time and I think we will miss the opportunity that we talked about early on to look at this issue during a window, and we may actually have some

time before we get deluged with another round of hearings. If we can cure the problems, whatever they may be and however they're described, when there aren't a lot of hearings out on the table, I think we're better off than putting this off into a -- for several years while someone goes off and does a wonderful academic study. One thing I would like to get into, because I'm going to have to leave in a little while, is the intervenor funding issue.

CAMERON: And I specifically want you to be here for that and I would like to do it all at one time. Can you just hold that for a couple of minutes and let's see if we can get through this and then we can --

MURPHY: Let me just respond to a couple of things Jay said, because he was responding to me. The big --

CAMERON: And is he going to have to respond?

MURPHY: No. This is going to be real short. No surrebuttal. I get to manage this case.

CAMERON: Okay. Go ahead, Mal.

MURPHY: The big difference, the essential difference between scientific peer review and what I refer to with cross examination, of course, is that one of them is done behind closed doors and the other is done in the open, and available at least to be reported in the press. Secondly, you mentioned being -- you don't think lawyers questioning scientists adds that much to the process. Would it make you feel more comfortable if your hydrologist was questioned by my hydrologist rather than by the lawyer? Because that's possible. I can guarantee you, Jay, you've worked with enough of them yourself, if you want to unduly prolong this or any other licensing proceeding, you have the scientists question the other scientists on the witness stand. It will never end. The questioning will be interminable.

SILBERG: That's what we do in the review process before you get to

hearing.

MURPHY: Well, you still have to do some of it in the light of day. And even under the NRC rules, there's nothing that says -- we don't have a complete monopoly on this process, as we lawyers have been able to maintain in others. There is nothing in the NRC rules that would prohibit --

CHANDLER: It's explicitly provided.

MURPHY: Right, exactly. It's explicitly provided. But if you want to see this thing go 15 years, you have the scientists question each other during this process. It will never end.

CAMERON: Thanks. Let's go to Dave or Katie, who wants to talk?

LASHWAY: Just quickly. I think the logical approach outlined by Tony and modified by Jay we would agree to.

But let me add, Tony, that we are not in any way arguing against the outcomes, the results from the presiding officers in these various cases that we mentioned.

However, the actual practice and the management of the cases during the course of proceedings has resulted in not only great expense to the licensee, which could be -- which was foreseen. So that's not the negative, in and of itself, and the protracted litigation wasn't the negative, in and of itself.

However, the legitimacy of the process was called into question and that's difficult for the licensee. At the end of the process, when the license is upheld or should the license be upheld, if the process, if the legitimacy of the process is questioned -- i.e., for example, in the HRI proceeding, the judge was continually called biased in the press. Bias assertions were made to the Commission, as well as the DC Circuit. Where does that leave the licensee? The licensee has gone through this long process at great expense, but isn't really sure or secure in the license, even though it's been upheld, because the legitimacy of the

process has been called into question. It's not a good position for NRC to be in, it's not a good position for the licensee to be in, and the intervenors who feel that they have not been given adequate or due process can simply raise this legitimacy of the process. So all we're trying to point out is we're not complaining about certain judges, we're not saying this judge is better than this judge, but what we are saying is that when managing the process of the hearing, standardized tools, even in the informal process, should be used universally to ensure that when the process is complete, the process can be deemed legitimate and so that there is faith in the institution and that the licensee can rely upon the validity of the license to go forward with the project without concerns about bias or legitimacy of the process.

CAMERON: Thank you, Dave, and thanks for responding to the suggestion to do the review of the cases. We're going to go to Paul, and then Jeff, and then I would like to kick off the suite of intervenor issues by going to Jay. Then that will give us hopefully about a half hour to discuss all of that before we finish. Paul?

BOLLWERK: I just want to say two things quickly. First, in terms of case management, that's obviously a problem that I have to deal with. I've only been in this job as a permanent chief judge for three months, but it's something we're beginning to address and the Commission has made it clear that they expect the cases to be well managed, and so do I.

So that's something we're going to move forward on, obviously, on a regular basis. We already are talking about that quite a bit. And it's an important thing. As I mentioned, I do teach a course at the Judicial College where I talk about case management and complex cases.

So I understand fully the concerns there and we need to deal with that. The other thing I just wanted to mention briefly is the informal process and the way it was put together, and since I drafted that rule back ten years ago, I kind of know why it was done the way it was. Some people like Marty Mulls can probably speak to it as well who were involved with it.

But when that was -- the idea there -- and I should also mention that was an experiment. It was done ten years ago and it probably is time to re-look at it. I would be the first one to admit that. But the idea there was really to make two fundamental distinctions between the formal process. One was to lower the threshold, in many instances, the threshold for contentions. There really is no threshold, other than if you have something that relates to the proceeding. Maybe that was going too far in terms of calling it informal, but that was the idea. Allow the -- in theory, the way the Commission had laid this out, these proceedings were supposed to be less complicated, arguably, than what was going on on the reactor area. They may not have turned out to be that way and that's one of the things that needs to be looked at.

The other idea was put into the rule and besides sort of lowering the ability of folks to get in and participate in terms of at least the issues that they brought forward, was the idea that the presiding officer was given more responsibility for developing the record. There are two sides to that. One is the presiding officer, obviously, to some degree, we do that now. We can question witnesses even in the formal proceeding. But I think there's some uncertainty among the board and the presiding officers about how far they should go in that, even now, and it's something we're particularly comfortable with. It's something that we need to continue to look at. But if that's really what is wanted, then that's something we're going

to have to maybe take more of a role in, depending on how the rule is written.

But right now, the parties, on a formal proceeding, there's the general back and forth of the adversary process. That informal rule was written to highlight something different and maybe that hasn't quite come out the way it should have.

Maybe that isn't something that should be in the rule. That's something that maybe needs to be looked at in terms of the whole informal process.

So those were two things that I would think we would kind of look at. And someone talked about subpart (m). Subpart (m) does have some of the informality, but, of course, one of the things it does is raises the contention standard back up again. Is that how you want the whole process to be played through? I leave that obviously to you all to talk about.

One other thing and we've sort of thrown this idea out on the table, as part of the process at the Commission in terms of the SECY paper is should there be a process whereby the folks, whether it's the intervenors or the licensee, depending on who is involved, they sort of choose the procedure they want. If an intervenor doesn't have the money, can't do a number of things, well, but they want to get their issues in, want to get them heard by a neutral presiding officer, maybe use an informal process with a lower threshold for contentions. They can come in and what they don't then have are all the panoply of things that go with the formal process, which includes discovery and cross examination, but nonetheless they don't have the high threshold for contentions. That was an idea that we had put on the table.

Now, that has -- the devil is always in the details and there's obviously -- that could affect different things different ways in terms of who participates, but that may be something you want to think about, again, as well.

Again, if folks really want to get into the process, but they can't participate in terms of having experts, but they want to have their issues heard, that may be one way to deal with it.

But there is a fundamental question, I think, about the complexity of the cases and at least with the way the informal process now works as to whether, for the really complex cases, whether, putting aside the distinction between reactors and materials, whether that is, I think, an appropriate dividing line.

One of the things we found, interestingly enough, in the reactor operating license cases, which are informal, and you would think, given their exam, they'd be the most -- when we get into simulators, where you've got a number of people on a floor saying who did what when, then we get into all kinds of problems and you cannot cross examine an affidavit. You just can't do it. All you get is more affidavits in and then you're -- especially if you're getting into credibility questions, who is telling the truth on these affidavits.

So, again, I would throw that on the floor as something to think about, as well.

CAMERON: Okay. Thanks, Paul. I think that you raised an issue that we're going to get into in about two minutes, which is the threshold on contentions.

Let's finish this off with Jeff, so that we can get into these other issues, and we'll see if we have time to go back to Dave later.

LASHWAY: I just wanted to quickly add just one point. With respect to the questions from the presiding officer, in the subpart (l) context, we have found that incredibly useful. Judge Bloch was very effective and efficient at using questions to the various parties to get to the heart of the various issues when they were complex issues; our medicine man versus their medicine man, their hydrologist versus our hydrologist. And the going back and forth on the papers was very difficult.

CAMERON: Thank you, Dave. Jeff?

LUBBERS: Just a few observations. I think it's very important to encourage the judges, the presiding judges to have fairly stiff backbone on these kinds of issues, whether to admit evidence, whether to be sort of tough-minded on limiting -- trying to put some limits on cross examination, because it's always -- a judge will never be reversed for letting in evidence, for the weight of the evidence. So they're always going to have a tendency to sort of err on the side of letting things in.

And if judges are not subject to performance appraisals and performance evaluations, then you have to rely on the chief to sort of keep some good standards there.

And for example, I've seen some administrative proceedings with multi-parties where each lawyer representing the varies parties or, in this case, intervenors, I guess, is permitted to do his or her own cross examination of the witness, and you get a lot of redundancy and repetition.

So, again, that's something that I think the Commission would have to pay attention to, try to make sure the lead attorneys are designated, if you have similar issues. And here is a situation where intervenor funding might be helpful, because if you fund intervenors, one of the conditions might be that you try to organize yourselves in terms of lead attorneys for cross examination purposes. That's point one.

Point two, with respect to the study that we've talked about, again, it's too bad the administrative conference isn't around to do this study, it sounds like a perfect study for the old administrative conference to do.

But we used to try to do some statistical studies on agency cases and so I would hope that you have the resources to go back into the files in selected or maybe all the cases under subpart (g) and subpart (l) and

various subparts, and try to do an analysis of an elapsed time study; where are the elapsed times in the pre-hearing, the hearing and the post-hearing stages.

We came up with about 21 steps in a -- as a generic timeline for administrative cases, seven in each of those stages, and it can be very illuminating. You also have to take into account sort of tolling of the case, for some reason. You can't really count that the same way. So I would hope that you can just assign somebody to do such a study here at the NRC.

Third, we haven't talked at all about ADR and I would hope that there is some way that some forms of alternative dispute resolution, mediation techniques could be used to try to settle issues or narrow the issues before the case gets to hearing.

Fourth, we haven't talked much about the review by the Commission; does the Commission review every case, is there some sort of sertiari review procedure where the Commission decides whether to take a case. The old Civil Aeronautics Board had a rule that two out of five members had to want to review the case before they would even take it up. So that if only one member wanted to review the case, that wouldn't be enough and the initial decision would be affirmed. That may be an area where you could eliminate some delay at the review stage.

Last is sort of an unrelated point. We've talked some about scientific issues. I know that there are some issues that have scientific review boards, scientific advisory committees. EPA has one. When you're dealing with an issue like renewals, you know that there are going to be some issues coming down the pike about deterioration of plants, some metal in the power plant, at what rate does it deteriorate. You can sort of project issues down the road that you may be encountering as a prelude to generic rulemaking. I think it might be

useful for the NRC to consider the EPA model of having a scientific advisory board to throw some of these futuristic type questions for resolution before it gets caught up in the individual case proceedings.

CAMERON: Thanks a lot, Jeff. We appreciate your outside perspective, on this.

LUBBERS: Naive perspective.

CAMERON: I didn't say that. But thank you and also for -- we do want to get to the suite of issues and a lot of them thread to this intervenor funding issue and I think we have to pay attention to that major set of issues before we adjourn here today. And let's start off with Jay and then go to Susan. Jay? And we can -- I mean, fold whatever you want from that suite of issues into your statement.

SILBERG: I don't want to take up all the time and I think I could do that. Intervenor funding, I think, is a basic issue that I thought was resolved a couple decades ago. There are several models that one can adopt.

One is a model in which an independent agency is created to make decisions, to review issues, grant or deny licenses, set standards, and that those decisions, those actions by the independent agency are subject to challenge.

There is another model, the common law model, people want to do something and someone doesn't want it, you go to court. There is no independent agency other than the court and the court will decide. Where the government has created a knowledgeable independent agency to make those determinations, the idea of establishing intervenor funding to create yet another level of independent review seems to cut the heart out from the purpose of having an independent agency in the first place. We do have checks and balances. Do we need an independent agency to check the independent agency? Do we then need another independent

agency to check the independent agency that's checking the independent agency? And then do we need to have fully funded intervenors who can check the independent agency that's checking the independent agency that's checking the independent agency? At some point, we have to go with a system that we are creating a body that is chartered to make the decision. If people are unhappy with those decisions, they have a right to challenge them. But does the government have an obligation, in essence, to create a shadow agency, so that anyone who wishes to challenge that determination, in essence, will create a new mini agency, again, independent, to go through the whole process again, because they didn't like the initial result. It seems to me if you're going to go that route, we don't need the NRC.

We ought to let the applicants do whatever they want and then if intervenors want to come in and maybe we fully fund them as the check on the applicant.

But having set up one check and one balance, I don't know where you stop. The idea that intervenors should be, quote, fully funded, whatever that means, and that, in essence, the applicants will have to pay not only for the NRC review, but also for the intervenor's review, and then what if someone wants to come in and support the application, the applicants have to fund that review as well. I simply don't know where you cut off the process and philosophically, if we are to have agencies that are chartered by the government to make these determinations, the idea that there ought to be a fully funded shadow agency to second guess those determinations, I think, is just going the wrong way and is not what -- certainly what Congress had in mind in creating the whole idea of independent agencies, those going back 100 years, or specifically in this case.

I just think it would be a bad thing philosophically, a bad thing governmentally. If people want to devote their own resources, that's

fine, but I don't think that the government should need to support that. I think it would raise very difficult questions of who gets the funding and how much funding they get and what happens if six intervenors show up in a hearing, as often is the case, do they all get funded; do we allocate one pile of money and who is going to divide it amongst them and how much should that money be, how many witnesses do they get to hire, and which witnesses.

I think you go down a slippery slope and it becomes even more than an unmanageable process.

CAMERON: Thanks, Jay. Let's go to Susan and then we'll got to Bob Backus.

HIATT: First, I want to touch on a point that Jeff raised about elapsed time studies. These are very complex proceedings and just because a case, such as Perry, that I was involved in, lasted five years, doesn't mean that there were five years of continuous hearings.

Much of that time delay was attributable to delays in staff review, actual delays by the applicant, delays in construction. The plant just wasn't ready to operate during much of that time. The schedule kept slipping and the costs kept increasing. I mean, it's not something that you can really blame on intervenors and say that hearing went on for five years, so there was a problem there.

I mean, there are things going on outside of the hearing process that often contribute to the apparent delay and the intervenors had nothing to do with it.

LUBBERS: A quick question. Is that apparent from the files? If someone went back to the file, they could see that? Because I was certainly not suggesting that those factors be ignored.

CAMERON: I think that's the important point.

LUBBERS: It's doable, but it would be very difficult.

HIATT: I'm not sure you could go back to like a transcript or a hearing

file and fully pull that kind of information out. You'd have to look at the staff review and the SER dates and everything else. But it does add some complexity to that.

With regard to Jay's comments, first, some of the logistical questions that you raised, well, how do you decide who gets the funding and how much. Those are things that agencies and entities that gave grants, that issued contracts, those are things that you have to consider. If you put out an RFP and you get a number of proposals, you have to make a choice of who gets that contract. Some people will get it and some people won't and you have to develop rules and a process and some people won't be happy, but it's doable. It's done on a day to day basis by varies foundations, agencies that do things like grants and issue contracts.

I think that there are things that maybe, besides outright funding, that the NRC could do to make a more balanced record. It's not that intervenors are coming here with our hand out looking for a welfare program. I mean, we want the resources to do the good job. We want a balanced record. We don't want to think we're wasting our time and ending up with a record that just we're bound to lose because it's one-sided.

And one of the things that can be done, there is precedent in the agency, I believe it's a Midwin case, I think it's ALAB-382. The idea of calling a board witness, the board would actually appoint a witness and the expenses for that would be paid out of the agency, and that's one of the things I tried in the Perry cases, get the board to appoint a witness, because we couldn't afford it and we felt the record would be deficient without it.

But I think there are some things that can be done to try to alleviate some of the burdens on intervenors from a cost basis that wouldn't necessarily involve writing a huge check.

CAMERON: Thanks, Susan. You're indicating that there is a spectrum of things that might be done to alleviate some problems that you've seen, problems that Tony or Joe might have brought up. Do you have any comment on Jay's shadow government issue, that he connected to funding of intervenors?

HIATT: I'd just say that something we did in Ohio, our enabling legislation for the low level waste facility has partial intervenor funding in it and we never got to experiment with this because the process was canceled, more or less. In raising in -- in that legislative process, I don't remember anybody raising that kind of issue about it's a shadow government. I think people recognized the lack of a level playing field, that this would be a very controversial, difficult to cite, difficult to build facility, and there would be opposition and the question I think that kept arising is what kind of opposition are you going to get. Are you going to get people rioting in the streets and that sort of thing? Are you going to get people working within the system and serving what I feel is an essential QA function? And I don't remember anybody arguing, well, it's a shadow government. It's something we -- it's on the books in Ohio. I don't know if -- I doubt it if will ever be implemented. But it's something we wanted to try there and I don't remember anybody raising those types of arguments against it.

CAMERON: Thank you. That's useful to know that there may be examples out there that can be looked at. Bob?

BACKUS: On the issue of shadow government, I think the whole premise of this country is the government is shadowed by the citizens, who keep a watch on it and check on its operations to a greater extent than any other country. In New Hampshire, we even guarantee the right of revolution by constitution. I wanted to talk about the ADR thing that Jeff mentioned, because I'm a

big believer in ADR. I'm a mediator. I do a lot of mediations for our courts in New Hampshire, do them privately, and I really believe in the ADR process and particularly mediation.

I think the experience we had in the reactor licensing was, even with that belief I had, it was probably not going to be very fruitful, because it's really a total divide. The applicant got the staff on board and they want their license issued to build the nuclear plant here. The opposition says no way, no how, and it's really not an easy issue to resolve. You can't split the difference on that. Reactor license extensions, that might be possible. Maybe you could do a mediation and say, okay, you give them an extra five years, but we don't want the thing to run for 20 years. I don't even know whether the jurisdiction or the authority is there for that.

But the place where I think we might try ADR is I think where we are right now, and that is doing some negotiations that could result in changes to the hearing process and the regulations for those hearing process, and I think I'm the one that yesterday talked about a grand bargain.

I think these folks in the industry have some things that they want. I don't think it's impossible that there could be some negotiations, some give and take, to have a negotiated rulemaking, which Jim Riccio would have my head because he says never do a negotiated rulemaking, but I'm willing to contemplate it.

Obviously, some of the things we want are some of the things on the list. We'd like to see the contentions requirements reduced so we don't have to, in our view, prove your case before you get in. We'd like to see standing not made a big contested issue that takes a lot of time. The funding thing we've talked about a lot and I certainly agree with Susan. It's doable, but it's damn hard to do. There's a lot of devil in those details.

And another thing we would want is an issue that's very contentious, because George has mentioned it several times, the Commission's intervention in particular things. I think he likes the Commission's intervention, because I think it's always worked out to be favorable to his client's interest. In my experience, it's not been favorable to my client's interest. But one of the things we would want is some discussion about standards for Commission intervention, some objective standards for the Commission to intervene in proceedings.

I could go on with the list, but if there was an interest in talking about this, I think a mechanism could be set up to do it and arising out of this very process you've got going here, Chip.

CAMERON: Thanks, Bob. Mal Murphy certainly, if not -- he didn't explicitly recommend it, but I think that he implicitly supported the use of some type of a negotiated rulemaking or a discussion concept to set these types of rules, and maybe there's some -- maybe there is something that could be developed along those lines and we'll see if we can come back to that issue.

Let's go to Tony and, Tony, I don't know whether you want to comment on that, also, but whatever you want to say.

ROISMAN: I really want to go back to intervenor funding. Jay is, of course, right. It is an old issue. But its age doesn't make it any less relevant.

I think that many of -- as I look over this list of other items, which at least I and Bob are not going to have time to be here for, because of our flight this afternoon, but that many of them are problems which, if the parties to the litigation, forget about intervenor funding, if the parties to the litigation were equally well financed, wouldn't present a problem.

If you had the resources to take advantage of the agency's openness with

regard to all the licensing processes and meetings that are going on and so forth before the license gets noticed up, you wouldn't have any problem putting together the contentions that are relevant and, in fact, presumably, you would get to the ones that really mattered and along the way you may very well have, as a result of the give and take in those meetings, negotiated out or resolved or become satisfied that this particular issue is being dealt with.

So I think a lot of these things, tight time limits on cross examination, one of the things is that if you have intervenor funding or something like it, depositions can take the place of cross examination and you simply submit -- you're not trying to, except in rare cases, get the hearing board chairman to hear a particular witness for a credibility reason and the deposition then becomes the vehicle for putting that together.

So I think that making the process run a lot faster and expecting a lot more out of the parties who are opposed to the license is an easy tradeoff for making sure that they have the resources to do it, but I don't think anybody in the room can fail to understand why the party, in the case of Susan, in the case of Jill, who are basically doing this themselves, without the benefit, for the most part, of legal assistance and technical assistance, for them to lay down very stringent rules that say you've got to do it fast and you've got to do it with these clear contentions and so forth, is simply intolerable, and that's kind of the situation.

So that's the first point.

The second point is that this is reminiscent of the old story about the farmer who was asked by the preacher, "Do you believe in Baptism," and he said, "Believe in it? Hell, I've seen it done." And we already have intervenor funding. The Commission, in its wisdom, amended its rules to provide for transcripts to be given to parties for free.

And if you think that's not a significant amount of funding, ask the Commission -- I don't know what the dollars are, but I know transcripts are expensive, unless you guys are breaking some copyright rules.

CHANDLER: That's been long changed.

ROISMAN: It has?

CHANDLER: For more than ten years.

ROISMAN: Changed in what way?

CHANDLER: That rule has been suspended.

ROISMAN: Oh, it has.

CHANDLER: A long time ago.

ROISMAN: All right. Well, okay.

CAMERON: Let's go on.

ROISMAN: But anyway, there was that. Comanche Peak, we had -- I talked to George about this -- we had effectively intervenor funding and it was a result of a negotiated resolution. The utility wanted to get a decision by a certain date. We said there were 100 witnesses that we needed to call and put on the witness stand in order to get their testimony about whether there had been intimidation of the safety inspectors at the plant.

We and they agreed to do them all by depositions in a two-month period, seven depositions at a time, provided that we would then submit the depositions in lieu of testimony and be ready for proposed findings of fact and conclusions of law by a certain date.

They agreed to it, we did it, and the results were that there was a rapid resolution. It turned out not to be what the utility had hoped for, but that's a separate question. The point was the process worked.

Third, about this question of review upon review upon review, the whole system is review upon review upon review. The only question is where does it stop. No utility would be willing to take the lowest member of the staff that they deal with and let him make all the decisions and

they have no right of appeal up to the next highest person in this chain, up to the hearing board if they don't like the result, out to the court if they don't like it.

I mean, this is -- review upon review is the way it's done. There is a limit. The US Supreme Court ends it, unless you go to Congress and change the law. So it's not -- it's a slippery slope anywhere you stand on the slope.

I don't think that there is any way to have intervenor funding; by the Commission's declaration, you are prohibited by law from doing it. So the only way that it would ever happen is if the Commission, the industry and the intervenors jointly said we've got a proposal, went and sat down with the key members of Congress and said we've struck a deal, but you have to agree to it, and this is the deal, here is what intervenors give up, here is what intervenors get, here is what we want, will you approve it.

If they say no, there can't be a deal.

CAMERON: That hearkens back to perhaps using some type of a process like Bob suggested to try to do that.

ROISMAN: Right. And I think the logistics of it, while admittedly are complicated, they are not by any means insolvable. The simplest thing is you set a physical dollar amount per hearing. You say we've got this much money, it will be available, provided that all the intervenors agree that that is to be used by them jointly and they decide how to divvy it up, having to prove, of course, that they used it for appropriate purposes, et cetera.

CAMERON: And just let me put a -- just let me emphasize something so that it's clear. Provision of funding is not just a quid pro quo for certain improvements, other improvements in the hearing process. They are, as I think people pointed out, there is a relationship between some of the what I call dysfunctionalities that occur in the funding

that is well prepared issue, and I didn't want people to think that what you were suggesting in terms of the tradeoff, that's really -- there is really a link between some of these things.

ROISMAN: Right. Yes. I think that's right.

CAMERON: Thanks.

ROISMAN: I'm sorry that we've got to go, but --

CAMERON: Yes, and I --

ROISMAN: I fly infrequently to Manchester, New Hampshire.

CAMERON: Right. And I would thank both of you for being here and a couple people, Mal Murphy suggested, Steve Kohn suggested that there should at least be another get-together like this before the proposed draft proposed rule goes out. That was one suggestion that was made. You heard Bob Backus talk about negotiated rulemaking. So there's some process suggestions here. I don't know if any of you other guys -- did we have -- should we adjourn now or do we have other things that we need to get out on the table here? Tony and Bob are leaving. Susan?

HIATT: I just wanted to make a comment about the dysfunctionalities. My perception is I don't think any intervenor, maybe some rare exceptions, has done anything that any industry wouldn't do if you were in that intervenor's shoes.

CAMERON: Good point. Ignore my characterization of it. It's just a shorthand way of trying to describe that.

I would just -- Jeff, did you have a quick thing?

LUBBERS: Just a quick thing on the intervenor funding. I don't think anybody was suggesting creating another agency, although there are models of having an office of public counsel and public utility commissions and things like that. We're not even talking about that. We're just talking about increasing public participation through funding and when Mr. Silberg said that this issue was settled 20 years ago, it wasn't really settled 20 years ago. Agencies were in the process of

figuring out how to administer intervenor funding at that point and all of a sudden all these programs got cut off. Agencies had inherent authority to use intervenor funding and then Congress starting putting riders on appropriations bills that blocked these programs.

So I don't think the issue was settled. It's just the progress of these sorts of programs was just sort of cut off in midstream.

CAMERON: Thanks for that clarification. Let's go to see if George has a comment, and then I just will turn it over to the NRC folks for anything that they want to say before we close. George?

EDGAR: I just wanted to weigh in on the intervenor funding issue. I think the sense of Jay's comment, as I took it, was a historical comment. The same debates transpired 20 years ago. We've heard the same discussion. Tony and I have been in the room over the years with the same pros, cons and arguments.

For better or for worse, in my judgment, the NRC has to be the arbiter here, the notion of private attorneys general, not accountable in any way to the Executive or the Congress, to me, is a fundamental policy choice and it's one that thus far has been made in the negative.

There is a GAO opinion that says that the NRC does not have authority to do this. I think there are many ways of improving the process to reduce the resource burden, but it's far from obvious to me that providing intervenor funding does then result in a more effective or efficient process.

I don't think that you're going to see empirical evidence of that. I think when you look out there at states where intervenor funding has been provided and state proceedings, that there is no evidence that that's resulted in a more efficient process, a more effective process. I wouldn't assume that merely because you provide funding, that you've solved six other problems. I don't think that linkage is there.

CAMERON: Thanks, George, for pointing out that there may be things that can be done to reduce burdens, also.

Before I turn it back to Larry and Joe to see if they have any final comments, I just wanted to thank all of you for being here and for your contributions on this, and I don't think I've ever worked with a more impressive group of people, although sort of a daunting group to work with in some respects.

But thank you. Larry, Joe, any final comments?

CHANDLER: Just speaking for myself, I wanted to thank all the other participants for their contribution. I think it complicates our life, the input, and it makes it easier at the same time. So thank you very much.

GRAY: And I just wanted to say the same, but we will also carry back to the Commission the substance of what was discussed around the table here the last day or so.

CAMERON: And I guess Jill gets the award for coming the farthest distance to join us. So an extra thank you for that.

All right. We're adjourned.

[Whereupon, at 12:03 p.m., the meeting was concluded.]