UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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PUBLIC MEETING REGARDING THE NRC HEARING PROCESS

U.S. NRC

11555 Rockville Pike

Commission Hearing Room

Rockville, Maryland

Tuesday, October 26, 1999

The above-entitled meeting commenced, pursuant to notice, at 8:46 a.m.

P R O C E E D I N G S

[8:46 a.m.]

CAMERON: Good morning, everybody, and welcome to the NRC's public workshop on potential revisions to the NRC hearing process.

My name is Chip Cameron, and I'm the Special Counsel for Public Liaison here at the Commission, and I'm happy to serve as your facilitator for today's meeting.

As all of you know by now, the Commission issued a staff requirements memorandum that directed the staff to evaluate potential changes to the Commission's hearing process and procedures and to develop a draft proposed rule on that subject for Commission review.

The Commission has directed the Office of General Counsel to evaluate what changes should be made to the NRC hearing process, and the Commission also believed that it would be useful to get some early public perspectives on these issues.

So, consequently, we have asked the group around this table and the audience to be with us today to have a discussion on hearing process issues, and in a few minutes, we're going to go around and do some introductions, but we do have a impressive, and I would say, intriguing group of people around the table representing various affected interests that are affected by the Commission's hearing process, and the General Counsel hopes that, through a dialogue among all of you, that there will be some good information developed that she can then use to proceed with drafting this proposed rule, identifying what are the problems, are there any problems, what are the options for addressing those problems, and what are the advantages and disadvantages of those various options, and as your facilitator, I'm going to try to help you do a couple of things over the next day-and-a-half.

One is to keep the discussion relevant and focused and not only relevant to whatever particular agenda topic that we're on at the

time but also to try to help you develop discussion threads so that we don't just jump from one unrelated point to another, that we try to tie some of these points together.

Secondly, I may ask you to clarify your statement so that everybody understands the rationale behind a particular statement that you make.

I will try to keep track of any recommendations or action items that are developed as part of this discussion, hopefully keep us on schedule, and finally, make sure that everybody had a chance to talk, and in that regard, our ground rules are simple for this discussion.

If you want to speak, if you could just turn your name tent up on end like that, and I'll keep track of that, and that way, you won't have to keep your hand in the air, keep raising your hand, and also, it helps to have only one person speaking at a time.

It will allow us to get a clean transcript. Jon is our stenographer over there, and he's been through this drill before, and he does know who you are in terms of where you're sitting, but at least at the very beginning, if you could just state your name for the transcript when you talk.

Not all of the points that are going to be made are going to fit squarely within the agenda item that we're dealing with.

So, I'll try to keep track of things that come up that we might want to revisit later on in the process, and the focus of the discussion is down here at the table, but we also do want to hear from the audience, and so, we will be going out to those of you in the audience who want to comment at the end of each major discussion topic.

What I'd like to do now, before we get into an agenda overview -- and I have one suggested change that I want to explore with you.

I thought it might be useful at this point to have everybody

introduce themselves, and if you could just give us your name and affiliation and one or two sentences on what your interest or concern in this particular process is, and what I'm going to do is I'm going to start with Paul Bollwerk, who's chairman of our licensing board panel.

Paul?

BOLLWERK: My name is Paul Bollwerk. I'm am the Chief Administrative Judge with the Atomic Safety and Licensing Board Panel, the Commission body that handles the agency adjudications both for licensing and enforcement actions, and my interest here is, obviously, seeing there's a fair and full hearing process that's put together.

CAMERON: Why don't we go to Tony?

ROISMAN: I'm Tony Roisman. I'm with a law firm in Vermont -- Christianson, Carter, Scott, McGee. I've not been involved in nuclear licensing matters for a long time, and I guess I'm here on a historical preservation task.

LUBBERS: I'm Jeffrey Lubbers. I teach administrative law at Washington College of Law, American University. Before that, I was -- for about 12 years, I was a research director at the Administrative Conference of the United States, looking at administrative procedure reform issues.

HEIFETZ: I'm Alan Heifetz. I'm the Chief Administrative Law Judge at the Department of Housing and Urban Development. I've worked with Professor Lubbers at the Administrative Conference. I was a member for nine years and was the chairman of a group that drafted model rules of practice and procedure for administrative agencies.

I also have heard and decided cases for 19 different departments and agencies of the United States Government, not including the Nuclear Regulatory Commission.

CURRAN: My name is Diane Curran. I'm a lawyer with the law firm of Harmon, Curran, Spielberg & Eisenberg. For almost 20 years,

I've been representing citizen groups and state and local governments in NRC licensing cases.

I'm very interested in preserving what fairness remains in the NRC licensing process, and I feel like I've -- a little bit like I've been invited to plan my own funeral today.

ZAMEK: I'm Jill Zamek. I'm with the grassroots group, citizens group, Mothers for Peace, in California, and I've used the -- well, we've used the hearing process over the years, and so, I'm interested to see what changes you're planning.

CAMERON: Okay. Thanks, Jill.

MURPHY: I'm Mal Murphy. I'm the Regulatory and Licensing Advisor to the Nye County, Nevada, Nuclear Waste Repository Project Office.

So, obviously, my principle interest is the potential application of any changes in the licensing process to the high-level waste repository, but I'm interested in the rest of the process, as well. Principally, my focus will be on the high-level waste issue.

CAMERON: Okay. Thanks, Mal.

Mike?

McGARRY: I'm Mike McGarry. I went to the dentist this morning, so I've got novocaine on the side of my mouth. I'm with the law firm of Winston & Strawn. I have practiced for a number of years before the Nuclear Regulatory Commission, tried cases with Tony Roisman, Diane Curran, and like Paul Bollwerk, I'm interested in a fair administrative hearing process.

KOHN: My name is Stephen Kohn. I'm here with the National Whistle-Blowers Center, and I'm an attorney, and I've represented whistle-blowers in nuclear facilities for a number of years, and intervenors in licensing proceedings.

HIATT: My name is Susan Hiatt. I direct the Ohio Citizens

for Responsible Energy. We have been intervenors in the operating license proceeding for the Perry nuclear power plant in Ohio. My interest is in trying to preserve a fair and meaningful process for public participants.

RICCIO: Good morning. My name is Jim Riccio. I'm the staff attorney for Public Citizen's critical mass energy project. Public Citizen has brought several lawsuits against the NRC and the industry, and I'm here to see that our rights are protected.

SILBERG: I'm Jay Silberg, a partner at Shaw Pittman, Washington law firm, and representing licensees in NRC hearings and AEC hearing since 1969, and before that, for a years, with the Atomic Energy Commission, and our purpose here is to try to assure that the Commission's procedural rules are both fair and efficient for all parties.

BACKUS: I'm Bob Backus from New Hampshire. I'm a lawyer with the law firm of Backus, Meyer, Solomon, Rood & Branch, and along with Tony Roisman, I spent years and years in the licensing process over the Seabrook plant and in subsequent licensings, as well.

I'm currently writing a history of that, calling Seabrook the Parrot Victory. I think the subtitle is going to be "We Told You So," and I'm still representing clients that may appear in NRC licensing hearings.

THOMPSON: My name is Tony Thompson. I'm a partner at Shaw Pittman. I represent mostly uranium recovery licensees. I'm here on behalf of the National Mining Associations Uranium Recovery Environmental Subcommittee, and I'm primarily focused on preserving or making sure that the informal hearing process is fair and efficient.

GINSBERG: I'm Ellen Ginsberg. I'm Deputy General Counsel of the Nuclear Energy Institute. Prior to that, I was a law clerk when Tony was litigating the Comanche Peak case, law clerk for the NRC at the

Atomic Safety Licensing Board Panel, and I represent the industry's overall interest, and our interest is ensuring that the NRC implements a fair and efficient process to resolve the legal and technical issues that come before it.

EDGAR: I'm George Edgar. I'm a partner in the law firm of Morgan, Lewis & Bockius. I represent nuclear licensees, and I, too, am here to see that the process, if changed, is fair, efficient, and effective.

GRAY: I'm Joe Gray, Associate General Counsel for Licensing and Regulation at the Nuclear Regulatory Commission.

Some years ago I was a hearing attorney and hearing division branch chief. Since then I've been in various positions in the Commission and most recently the current one.

In this current position, our division will be working on any rule-making that results from these discussions and the Commission's desire to re-examine the hearing process.

CHANDLER: I'm Larry Chandler. I'm Associate General Counsel for Hearings, Enforcement, and Administration.

Since 1972, I've represented the staff or I've been responsible for the representation of the Commission staff in all administrative proceedings relating to the licensing of reactor facilities and litigation related to materials licensing and enforcement proceedings.

Like Joe, we're interested in assuring that any regulatory changes move in the direction of assuring a full, fair, and effective and efficient process for the development of a sound record from which Commission decisions can be drawn.

CAMERON: Okay. Thank you all, and thank you for taking your time to be here today and a half-day tomorrow, and what I'd like to do now is just go over the agenda and perhaps suggest one change to you

on the agenda, and bear with us.

The microphones -- the audio is not really working, but we have sent for someone to come down and help us out with that.

Luckily, the stenographer can hear, and I hope all of you can hear around the table, but we'll try to improve this so that the audience can hear this.

When we put together the agenda, we not only tried to make sure it covered all of the important issues in some sort of logical sequence but also to try to ensure that it didn't reflect any bias in terms of a particular result that we want to -- or that the NRC wants to come out of this particular meeting, and we hope that it doesn't reflect any bias.

We're going to get started this morning with a little bit of context from Larry Chandler on just an overview of the NRC hearing process, and we do want that to be a context and not really to spark our discussion at that point, but if there are some clarifying questions that you want to ask Larry at the end of that, we can take those.

We were then going to move into a presentation by Professor Jeff Lubbers from American University on emerging issues and addressing the degree of formality in agency adjudication.

Now, you'll notice that, if you look, after the break, we were going to get started in our first discussion area with what do we want to see come out of a hearing process? What are the objectives that we want to achieve?

And this probably does you no good at all, since you can't read it, but it is part of Attachment 3, it is in Attachment 3 to the SECY paper, and this was an attempt to lay out what some of the performance goals or objectives of the hearing process might be, and our opening discussion is going to be to talk about some of those goals or performance objectives.

Are those the correct ones? Do we want to add anything to those? Are there conflicts between those goals, and how do we go about trying to resolve trade-offs between these various objectives?

The two items right after lunch are going to start to get to this issue of how do we characterize a formal process versus an informal process, and the agenda change that I thought might be useful was, rather than having Jeff Lubbers at 9:30 this morning, is to put him on before we get to the 1:15 and 2:15 items.

In other words, he's going to be talking about informal and formal processes, and I thought that might be a useful introduction to those items.

Does anybody have any problem with doing that shift? It's okay with Jeff.

[No response.]

CAMERON: Okay. Well, we'll do that, and when Larry's done, we'll take some questions, and then we'll go into the objectives of the hearing process, and then we're going to have Jeff Lubbers, with his presentation, and we'll see how we do in terms of the time slots for these.

Then we'll go into the 1:15 and 2:15 sessions in that sequence, and this afternoon, at 3:30, we take -- try to marry these items in terms of how do the formal and informal processes meet these objectives that we're talking about, and you can see we have some questions after each of these items to try to stimulate some discussion, and we're going to try to get -- we'll get out of here about 5:15 today, and then, tomorrow morning, we're going to come back and see if we can do a summary of that, how do informal and formal processes compare to the objectives that we talked about?

At 9:30 tomorrow, we're going to get to a discussion of is a particular process more appropriate for one type of hearing than

another?

We heard Mal talk about the fact that he's interested in the high-level waste proceeding.

Tony talked about the types of proceedings that he's usually involved in, so that we'll explore that particular issue, and the last issue is, apart from trying to come up with new, informal processes, are there changes that should be made to the Commission's hearing procedures, generally, that would result in fairness, efficiency, any of these other goals, and some of you are going to have to, I know, be out of the room at particular times to do various things.

In other words, some people are not going to be here for the whole day-and-a-half, but I think that there's enough of a feedback loop between all of these different discussion items so that, if you have a major point that you want to make it's going to get into the discussion and on the record today.

So, with that, are there any questions on the agenda or any comments on the agenda before we get started?

Yes. Steve?

KOHN: Yes. You sent to us, just recently, about a week ago, I guess, the July 22nd memo.

CAMERON: Steve is referring to the -- I believe -- the Commission -- what's called the staff requirements memorandum that was issued in response to the SECY paper, 99-006, that was sent up.

Yes. Go ahead.

KOHN: And is the meeting here today limited to a discussion of the rule-making aspect, or is there going to be discussion on the legislative aspect? This says there's going to be legislation.

CAMERON: Let me say a few words about that, then I will see if Larry Chandler or Joe Gray want to say anything.

In the Federal Register notice that announced this meeting,

there was a statement in there that we were not going to focus on the -- what I call the scope of authority issue for a number of reasons, one of which is we're not sure that whatever proposed rules that come out of this -- we're not sure that there will be implications for the scope of authority issue.

Secondly, we didn't think that there would be -- it would be really productive to spend a lot of time debating the scope of authority issue versus talking about some of the policy issues of concern here.

So, that is not going to be a topic for discussion.

That doesn't mean that, if any of you want to make a statement at some point about your belief on that particular issue, that it's inappropriate for you to put that on the table. That would be fine. It's just that it doesn't seem that there's much usefulness in having a discussion on that.

If it remains an issue when the proposed rule comes out, then there will be plenty of opportunity to offer a full exposition of whatever your feelings are on that.

KOHN: Just so I understand where we're at, this discussion essentially assumes that there's no right to an on-the-record hearing, that the Commission essentially, through existing authority or through this legislation, will have almost complete discretion on setting up whatever hearing procedures it wants, and we're here to essentially give input into that discretion that the Commission will exercise. Is that essentially what's happening?

CAMERON: I would say that the Commission is looking for -- and I don't mean to dismiss or not emphasize the scope of authority issue, but the objective is to focus on the policy aspects of it and to assume suspend disbelief, even though you can offer your opinion on it, that the Commission does have the authority to do it, and I would ask, Larry or Joe, do you have anything to add to that?

GRAY: Only that I think we should assume, for purposes of discussions around here, that the Commission has broad discretion to fashion appropriate processes and procedures for hearings and focus on what kind of processes and procedures should it look to, as opposed to questions about the authority.

KOHN: And just for the record, our participation here does not mean we agree with that legal position.

CAMERON: Yeah. And let's put a real fine point on that, that we don't look at anybody's participation here as agreeing with that particular statement that Joe made, okay?

Any other comments on that particular point?

[No response.]

CAMERON: Okay.

Anything else on the agenda generally, before we get started?

[No response.]

CAMERON: All right.

Well, let's turn it over to Larry for sort of an overview on the NRC hearing process, and then we'll take some questions, and then we'll move into a discussion of objectives.

Larry?

CHANDLER: Looking around the table, it's sort of clear that I can go through my presentation in, I think, a rather brief way.

Most of you, many of you, at least, have had experience before the Commission in formal proceedings, what we refer to as formal proceedings, and many of you, as well, in informal proceedings, and what I'd like to do in the next couple of minutes is just, from a very generalized and high level, present sort of broad distinctions in the way the Commission has approached its various adjudicatory licensing and enforcement processes.

I don't plan to get into real detail about the procedures that are involved.

I don't plan to get into how the Commission's various policy statements may affect the implementations of the -- implementation of the Commission's regulations, really just sort of to set the stage in a very -- as I said before -- generalized way about how we might proceed in the future.

I'd refer all of you again to what I consider at least to be a pretty good discussion of the Commission's views on its hearing obligations, which is found in its decision back in 1982, in the Kerr McGee/West Chicago proceeding.

That's at -- I think it's Attachment 1 to the staff papers, that SECY 99-006, where the Commission lays out from both an Atomic Energy Act and constitutional standpoint its views on what its obligations are in terms of conducting various types of proceedings, formal and informal, relative to the different kinds of licensing activities that it engages in.

As I'm sure most, if not all, of you know, the Commission historically has used a rather formal type of process in connection with licensing, especially licensing reactor facilities.

It's very much a courtroom type of adjudication. It's had the full set of trappings commonly associated with courtroom trials.

It involves a motion practice, discovery through the use of depositions, interrogatories, request for document production, opportunities to seek summary disposition, presentation of testimony by live witnesses and cross examination of witnesses, submission of post-hearing submittals such as findings of fact, conclusions of law, opportunities for oral argument, in a framework in which literal adherence to rules of evidence is not mandate.

The process starts, I suppose -- it establishes a pretty

high threshold for participation, and that's an area, I know, that many of you have spoken to over the years in different ways.

It requires not only establishing conventional standing but the submission of intentions to demonstrate that there exists a genuine issue of material fact such that a hearing, an adjudicatory hearing, is truly warranted.

In addition, the process includes an appellate process.

For many years, that included an intermediate review stage before a three-member Atomic Safety and Licensing Appeal Board as a matter of right, prior to an opportunity to request a discretionary or certiary type of review before the Commission.

That intermediate step, the Atomic Safety and Licensing Appeal Board panel, was abolished in stages, I guess, actually, commencing in about 1990, but other than that the process has remained unchanged to this point today.

In the mid-'80s, the Commission, in response to the Nuclear Waste Policy Act of 1982, promulgated a new set of regulations.

Limited in scope, they apply to spent fuel storage proceedings.

Those regulations are found in sub-part K to 10 CFR Part 2, as opposed to the other proceedings I was alluding to earlier, which are in sub-part G.

Those procedures, the sub-part K procedures, have been invoked, as far as I can recall, actually only twice, and I think only now, in one proceeding, are being implemented fully. The first proceeding was terminated rather abruptly a number of years ago.

Sub-part K is a hybrid process.

It's essentially -- my characterization would be a summary disposition process within the envelope of a sub-part G proceeding, based on oral argument, with written facts and data in support of that,

which is designed to identify the issues on which there truly are genuine and substantial disputes which require resolution through adjudication.

In the later 1980s, the Commission concluded that the formality that it generally associated with hearings related to reactor facilities was not necessary in connection with all its proceedings, and I think, again, that Kerr McGee discussion gives you a pretty full picture of the Commission's thinking on that, and in 1989, the Commission developed what it refers to as an informal hearing process, and that's a question I think we'll spend some time over the next day or so talking about, informal hearing process, which is found in sub-part L.

Unlike the sub-part G process, which is conducted before a three-member Atomic Safety and Licensing Board, sub-part L proceedings are conducted before a single presiding officer, today often assisted by a technical assistant.

These are, for all intents and purposes, a paper proceeding.

The NRC staff may or may not be a party to them. Contentions are not filed but, rather, the requirement is that the parties, an intervenor, identify not just standing but areas of concern, a more generalized standard, and it's generally a lower threshold for admission.

Discovery is replaced by the compilation and distribution of something referred to as a hearing file, which the staff puts together and provides to all parties and to the presiding officer.

Examination and cross-examination of live witnesses is replaced by the submission of written presentations by all parties, and rebuttal submissions, as well, often in various stages.

Sub-part L does permit for more formality if the presiding officer determines it's warranted.

It can include the submission of proposed written questions which would be propounded by the presiding officer.

It could even call for the presentation and examination of live witnesses if, again, the presiding officer determines that it's necessary for the development of an adequate record.

The sub-part L procedures are now used in connection with material licensing proceedings, reactor operator licensing proceedings, and would be used in connection with reactor licensing proceedings following permanent cessation in operation and removal of fuel from reactor facilities.

Again, typically in connection with reactor cases and enforcement cases, the more formal sub-part G procedures continue to apply.

Most recently, the Commission developed a new hearing process, which again is limited in scope. It's essentially to be used in connection with license transfer proceedings.

These procedures, these new regulations, are found in sub-part M to 10 CFR Part 2.

Procedures were laid out in recognition of the narrower scope of the issues that are relevant to the transfer proceedings, as well as a recognition of the desire for improving the efficiency of the licensing process and taking advantage of the flexibility the Commission has to device suitable procedures with due regard for the due process rights of the parties and in the interest of providing a fair and efficient process to all participants, members of the public, applicants and licensees alike.

The procedures in sub-part M provide for a more direct and active role by the Commission at the outset.

In fact, it contemplates the Commission would be the presiding officer unless it designates otherwise and expects that the

Commission would be very involved in delineating case-specific procedures, perhaps schedules, to assure the expeditious conduct of these proceedings.

It retains essentially the high threshold that you find in sub-part G in terms of the submittal of contentions, but like the sub-part L proceeding, the sub-part M process does not mandate participation of the NRC staff, although it does explicitly provide that the staff safety evaluation will be offered through sponsoring witnesses in any proceeding.

Again, much like a sub-part L proceeding, discovery is much more limited. In this instance, however, it's confined to something called a hearing docket, which is maintained by the Secretary.

Hearings are generally expected to be oral hearings, although if the parties agree, they can be conducted solely on the basis of written presentations.

Proposed cross-examination would be submitted to the presiding officer, who is charged with conducting examination of witnesses at a hearing, and of course, if the Commission determines that it's appropriate and necessary, it can order additional procedures, including, in fact, conducting proceedings under sub-part G.

That, in a nutshell, I think, are the main procedures that are available.

I've avoided getting into the sub-part J processes which relate to the high-level waste proceeding. They don't, in large part, pertain to the actual conduct of the proceeding, and so, I have not gotten into those.

Anybody that's got any other thoughts or contributions to that, just -- again, to sort of set the stage for where we'll be going.

CAMERON: Are there any questions for Larry about that context that he provided?

Bob?

BACKUS: If the system does not change, which of those sub-parts would the Commission be using most of the time, would you think? I mean where is most of the Commission's business these days? Obviously it isn't for construction permits. So, where is the bulk of the process going to go in these various sub-parts as you see it right now?

CHANDLER: I think, if you look at the current cases that we see coming in, we have a fairly substantial number of cases coming in in enforcement cases which are sub-part G cases and I think would probably most likely continue to be more formal types of proceedings in the future.

In addition, we see some number of reactor license amendments come in. Under current practice, those are sub-part G, formal procedure-type cases.

We see a small number of reactor operator licensing cases come in. Those are sub-part L formal processing -- informal process, and we see some reasonable number of materials licensing proceedings come in. Those are sub-part L, as well.

The very large part of what we're seeing coming in today is under sub-part M in connection with license transfer proceedings. We haven't had all that many contested.

We are seeing an increased number of those come in, and I think we've seen a couple of recent decisions in that regard in connection with, more recently, the Seabrook, Millstone cases.

CAMERON: Okay. Let's go to Susan and then we'll go to Alan.

Susan?

HIATT: There's something that is, in my view, missing in this whole agenda, and that is a demonstration of a need for change.

I am reminded of the adage of folk wisdom, if you might, that you should not try to fix that which is not broken, and I have not seen, either in the SECY paper or even a place on the agenda, for a determination that the process is so deficient right now that it needs such fundamental revision. I would like someone to address that.

CHANDLER: I'll give you a thought on that.

I'm not sure that -- you used the word "fundamental" revision. I'm not sure that you need to think of this and our discussions as being driven by a need for wholesale, fundamental change, as opposed to a fresh look at the procedures that we currently have and thoughts and suggestions as to whether those procedures should be changed, can be changed, and if so, how, to assure that all participants in this process, various processes, are afforded an efficient and fair opportunity to contribute to a decisional record from which licensing action decisions can be based.

I don't think they're foregone conclusions, I don't think there's a pre-ordained outcome to the process, save for the direction to really take a hard look at what we've been doing and how we've been doing it. I mean that's the way I tend to read it.

CAMERON: Let me suggest -- I think this is going to be a useful initial discussion topic, is there a need for change, and it leads us right into the objectives or performance goals, and let's get some -- let's get the questions out of the way and then go into this is there a need for change discussion.

Ellen, did you have something on that?

GINSBERG: Mine is in the nature of an answer, actually. The question was asked about what hearings are we anticipated being -- where the concentration of hearings is going to be held, and I didn't hear you say license renewal, and the industry has lined up -- I think there are 22 or so plants scheduled that have been announced for license

renewal, and those will be, potentially, available for hearings.

CHANDLER: That's correct, and that's a sub-part G formal proceeding.

CAMERON: Okay.

Steve, did you have a question, or did you want to get off on Susan's topic?

KOHN: You predicted it, but the -- I agree -- I think the issue here really comes down to license renewal. Anyone who's watched the process over the last 10 years -- there have been some licensing proceedings, but license renewal, taking the plant from a 40-year to a 60-year life-span, with all of the issues of the operating history of a plant and potential discovery and hearings into how that 20- or 30- or 40-year operating history may impact on renewing it for another 20 years -- I think the industry wants to eliminate licensing hearings as formerly known for the renewal process, and the Commission also wants to eliminate it, because the Commission wants to encourage license renewals, and any operating plant that undergoes a license renewal process risks discovery into their current operation and into how that current operation will impact on future operation.

That's really what's happening. If it wasn't for the push for license renewal, this meeting would not be happening, and my major concern is that the very reasons why the AEC wanted on the record formal hearings in the 1950s, if anything, has increased numerous times in the types of issues that should be litigated in the renewal context, and that's why the whole discussion about how to make it less formal and give the public less rights -- what really needs to happen is there needs to be a formal discussion on how to increase public participation, and that's where this agenda should be moving.

For example, discovery: Well, why aren't the operating records of an existing plant made more fully open and accessible? All

the types of logs and the minutia that real experts would need to look at to see if a plant should have a license renewal.

So, I view the direction that the Commission has clearly set as a matter of policy the absolute wrong direction, and I think that's really why this whole debate is happening.

CAMERON: I think that we're getting launched into this discussion, and I know there's going to be some comments on that particular point.

So, unless there's any questions of clarification for Larry on this -- and I just would remind even the NRC folks to use their cards. There's no dispensation for you people.

Why don't we explore Susan's question in terms of is there a need for change?

I think I hear Steve suggesting, among a lot of other things, that perhaps the motivation for this is license renewal.

I don't want to, you know, put any words into his mouth, but let's have a discussion on that, and I would ask our guests who are here from a more neutral standpoint, Alan and Jeff, maybe you have some comments from your experience with either other agencies or your agency about what usually sparks the need for prompting change in these types of procedures.

Jay, are you going to go to this? Is there a need for change? Okay.

SILBERG: There are really two points that I'd like to make on the need for change.

First is that there have been, historically, in recent history, a number of NRC licensing cases that have been held up as how not to do it, cases that ran on interminably, that didn't reach decision either for or against, where issues were held over for long periods of time, case studies on how an adjudicatory process of any stripe should

not operate.

I think that's one reason for why a change needs to be looked at.

The second reason that I'd note is that the Commission's hearing process has begun to grow.

Larry outlined a number of different procedural options that are now in the rules, but no one, I think, has really sat back and taken a hard look at why does one have this kind of procedural steps but another doesn't, do we really need all of these different formats, have they been done in a coherent and thought through in a logical, coherent way?

It seems as if a particular need has arisen or a particular congressional bill has provided an opportunity to create a unique mechanism, but no one has sat down from first principles and figured out how the hearing process ought to work, and I think this is a good opportunity to do that.

We don't have now a large number of pending cases as we did in the '70s and the '80s. So, I think this is a good time, perhaps, to take a break, take a breather, step back, and look logically at what ought we have to have as the hearing process.

CAMERON: Okay. Thanks, Jay, and I want to try to see if we can follow up on that last point.

Of course, the first point you made is important, but your second point suggests that maybe this is an opportune time to take a look at the hearing process that has just been -- there's been various procedures grafted on over the years, and perhaps that's where these performance objectives come in, is to take a look at the existing hearing process through that lens of those performance objectives.

Does anyone want to comment on Jay's point about the hearing process has grown and it's time for a change at this point?

Diane?

CURRAN: I would be curious to know what plants are on Jay's list of cases that didn't work, and it's certainly been my observation that one of the cases perceived by the industry and some members of Congress has not having worked was the Louisiana Energy Services case, where a citizens group effectively prevailed, and some very complex issues were raised and litigated before a licensing board.

The licensing board took longer than the Commission and the applicant would have wished to decide, but it was in the hearing phase that the issues were really put to the test, and my observation has been that there's been tremendous fallout from that, that there's a perception that the public should be involved up to a point but not to the point where it could actually have an effective voice in the outcome of a licensing case.

I am one who very much favors the formal proceedings for licensing for the sole reason that there is a very uneven playing field in a nuclear licensing case.

All of the information, the relevant information, is generally in the hands of the company and the NRC staff, and to simply say, well, let's put a hearing file in the public document room, very selective process that doesn't allow the citizen group to get at the kind of detailed information that can actually allow that group to be an effective participant in the licensing decision.

I think the hurdles for the admissibility of contentions are one way that the Commission has tried to limit the effectiveness that intervenors can have. The very tight time-frames on the amount of time that one gets to prepare one's case is another big problem.

The lack of completeness of the application when the case is docketed for hearing, which puts a tremendous burden on the intervenor to be constantly amending its pleadings in order to stay in the case --

these are all very burdensome measures that the Commission has instituted in order to limit the effectiveness of intervenors in formal proceedings.

Nevertheless, on the other side of the ledger, there is the opportunity for discovery of important information.

In spite of all the difficulties in participating in a formal licensing hearing, in that case, a citizen group was able to use the process to really bring issues before a licensing board and get a favorable determination from the licensing board, and at least one of those was upheld by the Commissioners.

I feel that it's completely uphill to participate in a formal adjudication at all, that the Commission has pushed the public to the absolute margin of effective participation in an NRC licensing case, but to go beyond that and to render the proceedings completely informal and deprive the public of that access to information would make it not worthwhile to even participate in most of these cases.

CAMERON: Okay. We're going to get to that last point, obviously, is going to be the heart of our discussion.

Now, there was a question that Diane posed to Jay, and I don't know if Jay has an answer for it.

SILBERG: I'll be happy to answer it.

CAMERON: One point for the group is that -- Diane brought up a couple of points that I think go to these objectives again. In other words, more information needs to be disclosed.

I suppose that that fits under the transparency performance objective, or maybe we need to add to the performance objectives.

She talked about the existing contention standard really not being a model of fairness.

Again, I'm trying to link to these performance objectives, but before we go to Jay, Diane, would you agree that, from the

perspective of these two points that you brought up, you would think that there should be some changes to the hearing process or procedure in perhaps this regard. Would that be correct?

CURRAN: Yes.

CAMERON: Okay. Good. So, there are some suggestions from a point of view of a couple of different performance objectives that we might talk about in terms of change.

Let's let Jay give his comment to Diane, and then let's go to Joe Gray and Jim Riccio and then over to Tony.

Jay?

SILBERG: Yeah. Diane's correct. I mean the LES case is certainly one of the ones that we think was not a model of how cases should be done. It wasn't the fact that the result at the licensing board level, at least, was unfavorable. It's the fact that the case took seven years under a system that Congress enacted to make cases go quickly.

And the other case was the license transfer case for Southern Nuclear.

Now, if one goes back a little bit to the end of the operating license regime, we also had a number of cases that were very difficult to bring to conclusion, you know, Seabrook, Shoreham, Comanche Peak.

There are lots of aspects of any of those cases that one can look at, some of which work, some of which doesn't -- didn't, and I think if you want to draw lessons learned, you have to look at each one of them and see what went wrong, what went right, and try to draw the lessons accordingly.

CAMERON: Jay, you're suggesting that we need to put a finer point on some of these examples of cases that, quote, "didn't work," unquote, to see what exactly was wrong, to get away from the standpoint

of the belief that people have, perhaps, that you think that -- people think they're flawed only because the result was the opposite of what a particular interest wanted to see.

SILBERG: Correct.

CAMERON: Okay.

Let's go to Joe, and then we'll go to Jim and Tony, then we'll come over here to Jill and Steve and Susan.

Go ahead, Joe.

GRAY: I want to get back to Steve's point about motivation for change.

I don't know what the motivation was, but I do think that the Commission has looked at the pilot procedures that are in place, and picking up on Jay's point, we've got sub-part G, sub-part J, sub-part K, sub-part L, sub-part M. We've got also a 10 CFR Part 110, sub-part I, for export licensing hearing processes.

There are a lot of procedures. There are a lot of specific processes that have been -- have accreted over the years, and all of them tend to be -- to make hearing processes expensive and burdensome for a lot of people, including the public participants.

I think that the Commission is looking for a way to simplify some of this, to make it more effective, and to possibly make it more accessible, but looking for all of your suggestions about how to do that, and if it turns out that part of the motivation is an anticipation of a number of certain types of proceedings down the road, license renewal proceedings, so be it, but I think the ultimate aim was to look for a more efficient and effective process.

CAMERON: I guess what you're saying, Joe, is that the implication behind Steve's point, I guess, on license renewal is that the motivation is only to expedite things, and you're saying that there's a broader -- from your perspective, and you're giving your

opinion about the Commission's perspective -- is that there's a broader --broader objectives at work here.

GRAY: Right.

CAMERON: Let's go to Jim, and then we'll go to Tony, and then we will go down to Jill and back over this way.

Jim?

RICCIO: I would really have no problem in revisiting this whole process if it wasn't my belief that we're basically going to result in circumscribing the public's rights even further and that this is just another series of attempts to circumscribe the public's rights.

You've already removed our right to a hearing post-licensing. You're trying to close your meetings behind doors and under the Sunshine Act, and I just wanted to pull out something back from the early '80s, when I was still in college.

Peter Bradford said that the current NRC adjudicatory process was developed as part of a bargain in which the nuclear power industry gained a great deal in the late '50s.

In return for accepting extensive Federal hearings, the industry was exempted from any state or local regulation of radiological health and safety and received limitations on liability set forth in the Price-Anderson Act.

Thus, citizens in any community where the nuclear facility was located gave up both local regulation of the facility and additional financial and safety assurances that normal insurance industry operations would have brought.

In return, they got a commitment of a full panoply of trial-type proceedings as part of the Federal licensing process.

Now that memories have faded, the industry is seeking to revoke its share of the concessions in that original bargain.

And he went on to comment that, contrary to the popularly

held belief that the hearing process had prohibited a timely resolution of issues, that -- there's a letter here from -- basically from former Commissioner -- or Chairman Palladino saying that he has no evidence of this holding up.

I know Jay has mentioned the LES, and I would suggest that the industry avoid bringing up the Vogtle licensing transfer case, because if anyone takes a good hard look at that, what they'll find is that the reason that license transfer took so long is because a whistle-blower who is a former executive at Southern challenged the license transfer, and why?

Because his people had told him to lie about the reliability of the emergency diesel generators.

I don't think that's a real strong case for you all to be bringing up, because when you really look at it, it shows that -- a lack of hearing process rights actually hurt the public and it came close to melting down a reactor in Georgia.

Basically, this is all about knocking down the power lines leading in to plant Vogtle.

But to say that we're here merely to, you know, reform a process that doesn't work -- the public doesn't believe the process works.

We're minimized and basically driven to, as Diane says, the fringes of the process, and to think that we're going to come in here and get a fair shake from this Commission -- I really think you have to take a step back and ask yourselves, you know, what do you want?

Do you want to give us hearing rights, or do you want people meeting you in the streets?

I did a small survey, rather unscientific, of the people that I work with. Their comments were you take away our hearing rights, we will meet you in the street. Ask the Commissioners how they would

like a tent village on the White Flint green.

These are people who have used the process. These are people who are currently using the process in dealing with decommissioning and license transfers.

CAMERON: Okay. Thanks, Jim. You raised a couple of important points, one of which I'm going to ask Larry to address, but this is just sort of a courtesy point for you in terms of processes. I think, for most of us, we don't need to be reminded that you were in college in the 1980s.

RICCIO: Sorry, Chip.

CAMERON: Larry, Jim was, I think, expressing a view that -- Joe talked about a number of reasons why -- that there's a re-look going on, and I think Jim evidenced some skepticism about the objectiveness of the process, is there a particular result that is being looked at here. Do you want to comment on that?

CHANDLER: I think I said earlier, sometime ago, that, in my view, there is an interest in looking honestly at the broader question of how a process -- how the current processes are working and whether the current processes can and should be improved to result in a better and more effective and efficient process to make decisions.

I don't share his cynicism for the process. I think, on the contrary, it's worked reasonably well over the years.

It's had its high points and its low points, as any process will, and we can identify cases -- I've been identified with cases that I think have gone well and some which, candidly, have not gone especially well in terms of anyone's -- from anyone's perspective.

I think, in, in part, response to some comment that Steve Kohn made a bit earlier, I think one of the things we need to do when we think about how the process works and whether how it could be improved, what the objectives of the process need to be relative to the different

things the Commission does, the different kinds of actions the Commission takes, the process doesn't really act in isolation.

The hearing procedures really need to be designed to achieve certain points and objectives.

In the context of -- the historic context of reactor licensing proceedings, for example, you have a series of findings that are dictated in 10 CFR Part 50, and the question then becomes what kind of processes are best used to enable those determinations to be made when they are contested?

When you look at license transfers, as the Commission did recently in promulgating sub-part M, questions were asked, given the nature of the determinations that are needed in connection with license transfers, what processes will work well in reaching those?

Likewise, in connection with license renewal, the Commission determined the scope of findings needed to authorize issuance of a renewed license. Those are in Part 54. And again, the question becomes what processes, procedures are appropriate to making those kinds of findings. And enforcement cases, likewise, and you can go through and ask the same question.

I'm not suggesting that you need to have unique procedures for each and every kind of finding and determination the Commission needs. I'm just suggesting that it's an appropriate consideration as we talk about any revisions to existing processes, and in fact, it explains, in part, how some of these decisions were made over the years and why these sub-parts have evolved the way they have.

CAMERON: Okay. Thanks.

We're going to go to Tony and then to Jill, and I guess one question -- one issue for people to think about is that, if there is skepticism about where the Commission is headed in this -- with this re-look, how do you dispel that skepticism?

Is it only results-oriented solution, or are there process, including this process, that can help convince people of that?

Tony?

THOMPSON: The Commission engaged in a strategic assessment re-baselining initiative under Chairman Jackson that looked at all of its overall regulatory processes to determine what -- where they might go in the future, what were the issues, what were important.

I see no reason why looking at a hearing process that has been grafted together over 20 years or 30 years isn't an appropriate part of such a process.

The uranium recovery industry determined that there were a whole range of Commission policies or decisions or approaches to regulating uranium recovery industries that had been cobbled together over 20 years and presented a white paper to the Commission raising these issues, suggesting that now is the time for a fresh look.

It seems to me that makes sense for any agency at some point in time to consider whether what they're doing now can be improved. Perhaps it can.

Skepticism goes two ways. I've been a part of a proceeding, informal hearing proceeding for the lowest risk single type of process in the nuclear fuel cycle that's involved 10,000 pages from intervenors, most of it totally repetitious, interlocutory petitions for re-hearing, voicing exactly the same thing as in the briefs, and that's an abuse of the process from our perspective.

So, perhaps there is a need to look at all sides of these issues, and I don't claim to be all knowing, but it seems to me it makes perfectly good sense to take a look at things and see if there is a way to perhaps not have so many different sub-parts, maybe wind up saying that's what you're going to do. Maybe you keep them the way they are. Maybe you tweak them. Maybe you don't change things fundamentally. I

don't know. But it's certainly worth looking at.

CAMERON: Okay. I think that ties into what Jay was saying, that it may be time for a re-look.

I know we're going to get some response to your second point, which is a criticism of a particular proceeding and type of proceeding, and I think what we're seeing develop is that, just as Jim indicated a different view on the Vogtle license transfer, that there may be a different view about what to some person is a defect and may not be a defect to someone else.

Jill?

ZAMEK: I have a lot to say.

One is why are we second-guessing the Commissioners about their motivation? One idea is it's for license renewals, and my idea was the waste repository issue. Why are we making this change to make it less formal right now?

I want to talk a little about my experiences, getting in as a citizen into a license renewal case. It's already extremely difficult to get in, with standing and contentions, and then we can't talk about generic issues.

So, it's already -- your hands are tied from the start, and I think we need to go more in a direction like -- I agree with Steve Kohn. It's like we're going in the wrong direction and not less formal.

Although it simplified the process and allowed more people to come in the process, I think that what's going to end up happening is the process will be completely ineffective. That's my fear.

So, maybe we can allow more contentions in, maybe more people can participate, but then it's going to just get flushed down the toilet. Okay, we looked at that, we didn't find any basis, and throw it away, and what's our recourse.

So, I don't think simplifying the process is the answer.

CAMERON: Okay. Thanks, Jill, and we're certainly going to get to those substantive issues about whether simplifying the process is the answer, and I guess, similar to Steve, you're thinking that there is a particular proceeding that's a motivation or type of proceeding that's a motivation for the hearing.

ZAMEK: Whether it is or it isn't isn't really the point.

CAMERON: Okay.

Mal, since Jill mentioned high-level waste proceeding, do you want to go ahead, and then we'll move to Susan and then Steve, then Mike.

MURPHY: Well, I wasn't going to say anything about the high-level waste proceeding.

I will later, but I just would like to make the suggestion that perhaps we're hung up -- and I, you know, sort of thought of this when I was reading the SECY paper, and earlier than that, when the Commission asked for comments on the formal versus informal hearing process with respect to the proposed Part 63.

These, in a small sense, at least, are sort of buzz words, and the word "informal" hearing really freaks people out in many contexts, not just nuclear licensing but in the whole gamut of regulatory hearings.

There's lots of members of the public who are unsophisticated with respect to regulatory matters and who don't participate in the regulatory process the way some representatives of the public do who are just convinced that, when they hear the word an "informal" hearing, that the result has been cooked, and in some cases, history has proven them right, unfortunately, and not, again, with respect to nuclear matters, but just as a suggestion, I would think we might be better off for the next day-and-a-half talking more about how do we reduce the complexity -- I don't like the word "simplification"

either, but how do we reduce the complexity of the whole hearing process, how do we move toward reaching these performance objectives, and I guess, at some point in time, we have to talk about them specifically, in a way which serves the interests of all the parties -- the public, the industry, you know, state and local governments, for my case, etcetera -- rather than just saying, well, you know, shouldn't we have some hearings as formal, some hearings as informal?

I don't think that's the real issue, and I think that word "informal" with respect to complex, scientific, highly technical, highly emotionally charged and controversial hearings is frequently counterproductive in terms of public perception.

CAMERON: Okay. Thanks. And I think we may hear some more about that when we hear Jeff Lubbers' presentation, but I think your point is a good one in terms of trying to move towards the performance objectives at some point.

Let's hear some more comments around the table. I think that this is useful in terms of people getting out some basic thoughts here.

Susan?

HIATT: I just wanted to respond to Jay's examples of cases that didn't work and those that had a lot of delay involved in them.

I guess it all depends which side you're looking from.

From the perspective of the citizens being placed at risk by the nuclear industry, for them, delay is a victory.

Every day the facility isn't operating is a day they're not being placed at risk, and for them, it's a perfectly legitimate goal, and I would just note that this agency, when it suits its own purposes, has also seen delay as a legitimate strategy, the most recent example of which was its decision on potassium iodide funding.

CAMERON: Okay. Thank you, Susan.

Steve?

KOHN: Thank you, Chip.

I just want to say one thing initially. I just want to thank Chip for doing this.

I was a little skeptical coming in, but I've really been enjoying the discussion, I think, hearing from the different sides and getting a real feel for this. I hope the whole day continues. I'm finding it very stimulating and interesting.

I would like just to focus on a couple of the comments I heard and hope to have a reasonable conclusion, but someone made a comment that, over the last 20 years, there's been a lot of changes in the rules and maybe it's time now to change the rules or look at reformatting them because of, you know, all these different sub-parts and make it administratively more efficient, and I just sit back and say there's about 500 years, really, we're looking at in terms of how do you get truth in a process, and as our forefathers knew when they fought for the Magna Carta and other doctrines, the adversary system works. Cross-examination works. Neutral judges with true independence work.

If parties, through consent, can agree upon some form of alternative dispute resolution process, fine, but when push comes to shove, when you have two very adversarial interests, the adversary system, as it has been hammered out and achieved through a number of revolutions and the historical process, works, and I think where we see the tension here is certain efforts to take away those rights, such as meaningful cross-examination that needs discovery, that doesn't have judges do the cross-examination, that advocates do it, and I will say, in the context of good science, without meaningful cross-examination, you are living in a very dangerous situation.

I've had the honor of representing scientists at the FBI and I've had the honor of representing scientists at the EPA on all sides of

the spectrums, and one thing we have learned, that on questions of science, without good cross-examination and discovery, you will have tremendous problems.

Example in the FBI context, the World Trade Center or the Oklahoma City bombings, where witnesses in World Trade took the stand and were not subject to proper cross-examination, terrible science was occurring. You need the time, you need the experts to deal with that, and that's a fight they're having in EPA today about more openness in the process in terms of good science.

So, we should not look at certain procedural rights that have proven effective in the truth-seeking process. Those rights must remain sacred, and we shouldn't confuse efficiency with taking away cross examination. The two are in totally different ballparks.

Which brings me to the Vogtle case, which has been used as an example. I've been told it's been used as an example on a number of occasions. I've never been invited, on any occasion in which it's been used as an example, to offer any form of rebuttal, but for the record, I'll just offer it here.

I had the honor of representing that whistle-blower in the Vogtle proceeding, and what happened there was just cross-examination at work.

The proceeding which we thought would last a short period of time went on for a long time, because anything we did but because the company's witnesses were putting bad science on the stand.

We had an expert who could properly assist in cross-examination and demonstrate material issues at that plant, root cause problems, safety issues.

So, that process worked.

What didn't work at Vogtle was the non-adjudicatory process, the process in which the public had been pushed out, which caused the

adjudicatory process to go longer.

The staff delayed the investigation for years. They had the information in '90. It took them three years to write a report. It didn't take us three years to do a hearing.

Two level one violations were issued with no effect. Level two violations were issued with no effect.

So, if you have a utility that is essentially immune from being disciplined through the staff process, the only thing left is the adjudicatory process. Believe me, no one wanted to be there. If the staff process worked, we would have been out the door.

But again, cross-examination worked, and I could go into that for a long time.

I want to now deal with an issue that I think has to come to the table if this process is to work, and it's called trust.

Now, we may not, in some ways, trust each other, and if we can't overcome that, it's an issue, but I'll tell you what some of the trust buzz words are for me.

A discussion about less formal. The Commission clearly is not interested in less formal, or they should at least explain the contradictions.

An example: They've issued a policy statement that's in effect now that you should only get enlargements of time in unavoidable and extreme circumstances.

Less formal, to me, would mean that it might be easier to get an enlargement of time, easier for parties to work together, try to reach resolutions. Coming up with a standard of unavoidable and extreme is actually increasing formality.

Or the Commission's statement about board-admitted contentions in which they now say you can only have a board-admitted contention in an extraordinary circumstance, where the Commission went

in a rule-making proceeding 15 years ago and found that the extraordinary circumstances standard was a threat to public health and safety.

So, instead of going less formal, not only did they increase formality, they increased formality using standards that threaten the public health and safety, and then they went further, because then they said, if the board has the guts -- and under this standard, I doubt many will, but if the board has the guts to do a sua sponte contention, well, it's subject to immediate interlocutory review.

So, when the Commission is saying, on the one hand, we want less formal, but on the other hand, is mandating interlocutory review, making enlargements impossible, uprooting standards that they themselves thought were in the public interest, there is a trust issue here, because you can't just get informal on the side of utilities.

If you're going to go informal, let's see something good coming out of it.

This is purely -- it's a disconnect.

I also want to state that the underlying issue is -- someone made a comment that, I think, 22 plants were now seeking license renewal -- and there will be more, in time -- 22 plants seeking a 20-year renewal is the equivalent of 11 new plants going on-line.

It is the radiological equivalent in terms of potential exposures to the public, increasing radioactive waste, etcetera, of 11 new plants. That's what's really happening here, but with one major distinction.

When the 22 plants were truly new, you had the right to a formal adjudicatory process. That science could be tested through the time-honored methods of cross-examination.

Now, you have the equivalent of 11 plants coming on-line, but to use the word "new" is not correct, because they're not new.

They're used cars.

So, what you're doing is you're taking -- essentially, instead of these nice new machines, you're taking 11 used cars out there and you're telling the public that whatever consumer protections existed in buying a new car, we're going to gut them for selling you a used car.

To me, this is raising a lot of safety issues, but it goes back to the trust, because what is really -- the issue is how to design our procedures to sell these used cars and eliminate consumer protection. Well, fine. Let's be open about it.

If the issue is really how to do a process that is fair, I think we have to hear from the Commission, and my concern is the guidance being given in this July 22nd memo. If this is what's guiding these discussions, I don't know why we're having discussions, because this is completely disconnect, and that's my concern.

So, to get to the trust issue, I would like to see if the Commissioners themselves would be invited to come, at least maybe for the second day of this session, give us some input, talk with us, and let's see what their motives are, as opposed to us sitting here speculating on blank pieces of paper.

So, for Chip, I would like to say my only recommendation is can the Commissioners be here to hear this discussion and perhaps participate?

CAMERON: Okay.

When you said "disconnect," you meant disconnect between what you saw in the SRM and an objective evaluation of what needs to be changed in the hearing process? I just wanted to clarify that.

KOHN: The disconnect is bringing in true public participation and trying to get a just rule versus reviewing what the Commission is saying, essentially our guidance on what we're doing here.

There's a major disconnect, which raises a trust issue.

If this paper was issued, the July 22nd paper, after this discussion, that's one thing, but to come down with this type of explicit guidance before there's even the public participation, it just raises a trust issue.

CAMERON: Okay. So, this is going back to the point Jim made earlier, and I know that a lot of you have these concerns, and we can only harken back, I guess, to Larry and Joe's comments this morning, and we'll keep talking about that.

I don't know how successful we might be in bringing the Commissioners down here, but I think that the NRC has to pay particular attention to this problem about the SRM appearing to give some -- at least some type of marching orders and openness to a lot of different viewpoints here, but I think we're going to be back to that issue again.

Let's go Mike McGarry and then over to Tony, and we have Ellen and Jim, and then I think we'll take a break and sort of reassess where we are in terms of our next discussion, where we should start.

Mike?

McGARRY: I think the question we need to be focusing on -- is there a need for a change? Jay's given his thoughts, Larry's given his thoughts, and there's been reaction.

To me, there's nothing inherently wrong from taking a step back and looking at any issue. I serve on a number of charitable citizen public sector and educational boards, and I'm sure many of us in this room do the same thing.

We constantly are challenging ourselves. We have strategic plans. We have five-year plans. The question at the top of our minds is how can we do things better? I think that should be our focus here.

We have a range of issues. Jim said, look, you've taken enough away from us already, no change. Diane says a need for a level playing field. Mal says less complex hearing. Steve says trust, and he

said consideration should be given to both sides, the applicants and the intervenors.

I think those are the types of issues we should focus on. Let's look at the issue. Can the hearing process be made to be better? I don't think the question is how can we make the process better. Can it be made better?

CAMERON: Okay. Thanks, Mike, and I guess that use of the word "better" brings us back to perhaps performance objectives.

In other words, what does "better" mean?

I mean there's a lot of different perspectives on that, and I think someone -- I guess it was Mal -- talked about is there a way to identify problems with the hearing process and related changes to fix those problems with which a broad group of people might agree, or not agree, necessarily, but would everybody be best served by trying to pursue those changes, and let's just keep that in mind as we try to fashion an agenda for discussion for later in the day.

Tony?

ROISMAN: It seems to me that there is a basic question that we're still not really facing up to, and that is that -- I mean it's obvious from the discussion there are diametrically opposed positions and, in some ways, diametrically opposed goals.

There's some people in the room who want every nuclear decision to be made fast and favorably and some who want it to never be made and, if it's made, made negatively, and that's an unresolvable problem.

The whole reason for all these processes is to allow those two points of view to be expressed, heard, and someone independent to do it.

Now, obviously, there is a question that has existed even before this most recent version of the Commission, which is, is the

Nuclear Regulatory Commission made up of people who are really able to be neutral?

They split the AEC at one time because there was a concern about the promotion and regulation getting mixed together, and I'm not telling you something you don't know or revealing something that is shocking.

You know that the vast majority of the people who are not favorable to nuclear power plants don't believe that they can get a fair shake in front of the Commission, and they don't believe that because they look at the records of the people who are Commissioners, they look at the records of the people who are -- they're political appointees, they're appointed by presidents and by congresses, who have different agendas than the vast number of those people.

The hearing process, however, particularly its evolution from the time that I started with the operating license for Indian Point -- it's interesting. You can tell you're old when they start decommissioning the plants that you were opposing getting licensed.

But the hearing boards have really become what I think the bulk of the public always wanted the Commission to be but it really never has become. They've become the place where you can go and have a shot, have a fair shot at an independent group of people, and my experience with the hearing boards and with the -- I'm sorry that the appeal board is gone. I thought they fulfilled an enormously important function, and if there are going to be as many licensing hearings as it now appears there may be, for different reasons than the old operating license construction permit decisions.

I would hope that one of the things the Commission would reconsider is re-instituting that, in part to take away the burden on the Commissioners of having to decide so many detailed matters at their level and, in part, because like the licensing board, the appeal board

had developed a reputation and a perception -- I mean why would all of these people -- it's kind of interesting that all these people are here.

Why do they want this hearing process made more complete, more inclusive, more effective? Because basically there's that faith.

I remember a day -- I'll recount this one story, because I think it's illustrative of an important point. After many years of fighting in the Seabrook construction permit, there was a hearing before the Atomic Safety and Licensing Appeal Board, and they held it in a courthouse in Nashua, and the Clamshell Alliance had been very active at that point and a very, very effective citizen group, I might say, a model for sort of grassroots organizing, and they circled the courthouse.

There were, I don't know, several thousand people around the courthouse, and we were inside arguing, and when we came out, they were completely around the courthouse, and there was sort of this concern that maybe they were going to hold everybody captive, you know, the Atomic Safety and Licensing Appeal Board and everybody else, and when the Appeal Board members walked out, they opened a corridor for them, and they all applauded, and they walked through, and there was that kind of a faith, that kind of a confidence in the system.

So, I think that the question we should be asking ourselves is really a question, all right, if there's a process there that people have faith in -- and I think they do -- what is that process for, why is it there, and I think that's the second place where there's a real divergence here among the people who are talking.

I think the Commissioners believe, judging by what they've written -- I know the General Counsel believes, judging by what she has written, and I suspect that many of the people at the table who are in the nuclear industry side of it believe that the purpose of the licensing process in terms of public participation is to let the public

get its say and then get on with the business of nuclear power, that that is the function of it, that the public really doesn't have that much to substantively contribute to the process.

That's evident from Jay's listing of the plants that he considers to the be the failures, and it's sort of an -- I'm glad you asked him to list those, since two of those are cases in which I was intimately involved.

I think, in some ways, that I would agree with him that Seabrook was a failure, but we would agree for entirely different reasons. There's a plant that should have never gotten a license. It bankrupted the utility. It's in the process of bankrupting the state that I now live in, and it was a plant that was never needed and should have never been built.

But the point is we don't have the same view about what's a success and what's a failure. That's really important.

But that's because the premises between the utility on the one hand and the vendor and the regulatory staff on the other -- all the possible legitimate issues that could be explored have been explored, and all the possible legitimate facts that could be developed have been developed, and therefore, there's really nothing left for the public to do.

It's really a carryover of the early, early days that people -- I don't know whether there's anybody here that -- even I was not around at the time when the Commission used to hold essentially a dog and pony show. They would hold a construction permit or operating license hearing.

The public participation consisted of people standing up and making a little speech during that process that I think has now long since gone of just -- you weren't even on the record, and questions would get raised from the floor by people, and then someone from the

staff or someone from the utility would, in a very patronizing sort of way, pat you on the head and say, well, you don't understand, these nuclear power plants really can't blow up, because we're using -- we're not using that highly enriched uranium and we've got all of these safety -- and so forth, and that still sort of exists in the process. That's still kind of there.

Now, I think that, if a real study was done -- and that's -- sort of my first principle point is that I think that this whole thing is happening before anybody has done basic scientific research necessary.

I was surprised, when I finally got around to reading this material, that there has been no study done of the licensing process to determine, based on real cases, not anecdotes, actual case study, how many cases work, how many didn't, why they did work, or why they didn't work, and what did it mean to say that it worked.

What would I put as the top list -- top of my list of the biggest failure? TMI.

How in the world did that plant get through this complicated, thorough licensing process with such a group of incompetent people operating it that they could not deal with an emergency situation when it arose and we nearly had the worst nuclear accident ever? How did that happen? What went wrong?

That's the kind of question, because that's the only issue that we really all agree on. Nobody wants a Three Mile Island. No one wants anything close to a Three Mile Island.

Nobody wants to find out that a plant like Comanche Peak was being built by a bunch of people who had so intimidated the safety inspectors at the plant that the safety inspectors were afraid to put the safety word out. No one wants that to happen.

There was nobody on the side of the utility or the staff

that wanted that, but it happened, and so, the test of the licensing process should be what I think is listed as item five among the five objectives, substantive soundness. Did you get a good result?

When you see a plant like Shoreham taken all the way to initial critical testing and then canceled, you have to wonder, where was the failure?

Was it in the citizens who said you shouldn't license it at all and you would have saved all that money and time and effort, or was it in the utility that said you've got to have this thing licensed and then, in the end, realized that they couldn't.

Now, you may object and say, well, but the reasons were political or economic and they weren't legitimately safety issues, but they're all political and economic. It all gets down to that.

Henry Kendall used to point out, much to the chagrin of Ralph Nader, that he was not anti-nuclear. He knew you could build and operate a plant safely, but you couldn't do it economically.

The reason the nuclear industry didn't want to have Hyman Rickover as the Chairman of the Nuclear Regulatory Commission was obviously not because he was not pro-nuclear and it certainly wasn't because he didn't know the subject.

It was that, if he imposed on the private nuclear industry in this country the standards that he imposed on the nuclear Navy, very, very few utilities, if any, would ever be able to pass muster, and General Electric wouldn't be able to sell a nuclear power plant because it couldn't and wouldn't get itself down to the zero release for its nuclear fuels in boiling water reactors.

So, I wouldn't try, at this stage, and I wouldn't try on this day and I wouldn't try even in this year -- and I guess we can say in this century or this millennium -- to change this licensing process before somebody answers the question, what was right, what was wrong,

and what failed in the system, really get a good fix on what the problem is, and secondly, to recognize that, unless there is some sort of a sea change, it is a safety reason to have citizen opponents to nuclear power, and it doesn't matter -- I don't think -- and I disagree with Steve about this -- I don't think there's an issue here about the intentions of the Commissioners.

I don't think that's relevant anymore than there is an issue about the intentions of Judy Jonsrud, who has been opposing nuclear power plants since before most of the people at this table were born, almost.

JONSRUD: I beg your pardon.

[Laughter.]

ROISMAN: My point is this is not about a question of motives or intentions. It's about outcomes.

I can't imagine anything that would be more useful to a genuinely concerned Nuclear Regulatory Commission and a nuclear industry than to have a group of people who were so opposed to what they want to do that they would go out of their way to find every possible flaw and defect in the proposal.

The last place you want to find those flaws is like they did at TMI, after the plant is running. You want to find them in advance.

So, I think that it's a deeper question and we should look at it from the perspective of what do you want to get out of it, and I think what you want to get out of it is this -- a process in which, to the largest extent possible, you want to have the right result.

Now, lastly, is that inconsistent with a process which is -- and by the way, everybody at this table agrees, it should be fair, efficient, and effective, and I don't think it's inconsistent at all, and I would candidly say I think that you can do it with, quote, "streamlined processes," I think you can do it with tight deadlines, but

you cannot do it without the one thing that no one at this table except the people who are representatives of citizen groups would insist on.

You cannot do it if you do not fund the opposition.

If you look at what goes on in the licensing process, why is it -- why did we fight so hard to have cross-examination rights? Because we couldn't afford depositions.

When we had cross-examination rights, you put the people on the witness stand, you gave us the microphone, and someone transcribed the record, and you had to put the record into the public document room. We didn't have to buy a transcript. We couldn't afford to take depositions.

Do you think that we wanted to spend months, years in God-forsaken places like Ossining, New York? None of us wanted to do that. And Glen Rose, Texas.

[Laughter.]

ROISMAN: But seriously, I think that, if the Commission wants to make the process work, then it's going to -- in a more efficient way, if it wants things to move more quickly, then it has to provide the people who are going to have the input with the resources to play the game as fast as you want the game played.

If you don't, then the citizens are going to say I can't run this fast, and that's what Diane was talking about. You keep -- you raise the bar higher, and you make it harder for anybody to participate unless they are well-financed, and then you say to them, we made it fair, all you had to do was get your contentions in in 10 days, or whatever, and the advantage of that is that, to the extent that funding is done, it's done in a way which assures that you do not have to rely upon either no expertise or donated expertise, can really go out and find the people -- and you don't have to rely on secondary issues.

I discovered that the secondary issues are the easiest to

understand, and I won't confess to you how many times I raised secondary issues because I couldn't understand the primary issues, but I will tell you it happens a lot, but if I had had an expert, a nuclear engineer, who would have said to me, hey, the real problem is this issue, this is the thing you should be concerned about, and was then prepared to give me testimony to that effect, I would have needed much less time and the process would have moved more smoothly.

Now, the outcome might have been either a denied license or a markedly changed license, but that would have served the interest, I think, of the process.

CAMERON: Tony, thank you for all of that, and what I'd like to do is see if we can get the cards at the table and take a break, and I do want to hear from the public, okay, before we go on to our next discussion area, and we'll probably do that after the break, but maybe we'll do it before.

But what I would like people to think about is what -- Tony raised a number of points, and one of them is a -- it appears to me -- fairly neutral process point, and it goes to some of the issues that we were -- a lot of other people raised, is a thorough evaluation of real cases in terms of what worked, what didn't work before proceeding with any rule-making on this effort.

Now, Tony cited performance objective number five, the substantive soundness, sort of the litmus test of whether something -- whether a particular case worked or didn't work. I'm not sure -- I don't know if people agree with that or not.

Then, I think, Tony, you talked about citizen participation is a key to perhaps testing substantive soundness, but now it sort of happens in a haphazard way because of resource limitations, and I know there's people around the table who have been talking about this for years in terms of there must be a more systematic way to test this out.

Is that a fair summary?

ROISMAN: Yes.

CAMERON: All right.

I think we need to revisit some of these issues in our discussion, and I do want to get you to a break. So, let's go to Ellen, Jim, finish up with Bob, and then we'll see if we can -- I think Judy and perhaps some others might want to say something.

Ellen.

GINSBERG: There's been a lot of discussion this morning about the motivation of the industry, of the NRC, etcetera. Tony touched on it. Others at the table have touched on it. And I really think that that misses the mark in terms of focus.

I think you're not going to get to a better process, whatever the form of that process is, until you focus on or look at the objective of the process.

Let me just give you an example of what I'm talking about.

We sat down with some other folks in the industry in anticipation of this meeting and tried to craft what we believed might be a reasonable, if you will, mission statement or objective of the hearing process, and I will provide it to you for your consideration.

What we came up with was that the objective of the NRC's hearing process should be to provide a fair opportunity for interested members of the public to raise well-defined issues that are within the scope of review and for the NRC to efficiently reach a legally and technically supportable, substantive conclusion.

It goes directly to Tony's point about, really, what we're after here is the right, if you will, or a solid decision at the end of the process. I think that's extremely important and something that we shouldn't lose sight of.

You've got a whole host of performance objectives, but if

you don't know what the objective of the process is, it's very hard to create criteria for whether that process did or did not meet its objective.

The other thing is that I think it's important -- and Susan mentioned that they view as a victory delaying the process.

I think it's important to recognize that there are different agendas. Tony put his finger on it when he said, you know, there are polar extremes, if you will, in view about what the definition of victory is, if you will, and I think that's important to recognize, because I think to craft a process, at least knowing that our view would be that that is not an objective that's sustainable, is important.

Your view obviously differs, but I think it's important to get that on the table.

In addition, Steve talked about the adversary features of the, if you will, formal hearing process, and I think it's important to dispense with these categories of hearing processes, formal or informal, because this doesn't fit readily into formal adjudication in the sense of a courtroom proceeding.

You don't use Federal Rules of Evidence, or at least you don't adhere to them rigidly, and so, I think if we talk about it as a hearing process, it is more productive, and Mal had stated that earlier.

I think you can retain some of the features that we currently have.

I think you can dispense with some of the features that we currently have and still allow the public to participate, to get its issues on the table, put them before a Federal agency that's going to evaluate them, and have them resolved.

Our view is that some of that can be done on the papers far more than it is done now, but it is not a monolithic issue, it is a process that bears evaluation and that you can look at a whole host of

combinations and come up with a better process.

CAMERON: Okay. Thanks, Ellen.

What I'd like you to do during the break is if you could give me your statement of the objectives of the hearing process, which I think wrapped -- pretty much wrapped all of those five objectives that were discreetly identified by the staff.

I think it wrapped up most of that. So, I'll write that on a flip-chart for us, and perhaps we'll get back to discussing that.

Jim, you've been waiting patiently for a while.

RICCIO: I'd just like to toss this out to everyone around the table.

Why would you give up your rights to cross-examination and discovery? Would you do that on behalf of your industry? I doubt it.

But you're asking the public to basically take a back seat and basically to remove this title formal/informal -- I think there are substantive things that are going on there.

When you remove our rights from being formal to informal, you take away discovery and cross-examination, and I see no reason to give those up.

I enjoyed Tony's dissertation, and it raised issues of public confidence. That's supposedly one of the agency's cornerstones. I don't see that circumscribing the public's rights is going to enhance public confidence in the agency, industry, or the process.

Maybe you can address those after the break. Would you give up your rights to cross-examination?

CAMERON: I think -- I don't know when we'll exactly get to that issue, but I think that the context that people might put that question in is not would you give up your rights to discovery or cross examination, but are there any areas in this whole hearing domain where cross-examination or discovery is perhaps not needed? There needs to be

a context put around it, but I think we need to have that discussion. I mean if it does come down to that sort of bald statement, then I think that's revealing of a lot of things.

Bob, do you want to wrap up the table discussion for us, please?

BACKUS: Sure.

[Laughter.]

BACKUS: First of all, Tony, you are showing your age. It wasn't Nashua, it was Manchester. And it wasn't the Appeal Board, it was the Commission, and I know that because I'm researching my book, which is totally historically accurate, I assure you.

Just a couple of things.

First of all, I think there is a possibility of a grand bargain between the sides here, and it would involve some of the things Tony said, some of the things Steve said, some of the things Jim said.

I think we'd be well willing, speaking for public interest advocates, to see the process expedited to a quicker decision, so we don't have seven years, and the quid pro quo would have to be do we have a reasonable chance to prevail, a reasonable chance to prevail?

That would require that intervenors be given financial support to make a case in a timely manner. It would require that we stop playing these games with the contentions issue, which the contentions have become almost the trial now. To get an admissible contention, you almost have to prove your case just to get in the door.

If we could make that agreement, that the Commission will -- and we'd have to see evidence of this -- I don't know how it would be -- be capable of making a decision to turn down a license in a major case -- and I acknowledge Diane Curran for her skill in doing it in the one case I can think of -- then I think you'd find us much more willing to participate in expediting the process.

If this was an EPA gathering, I suspect the industry would be arguing against any informality in the procedures, because that agency does not have the cache of being as allied with the industry as the NRC does. I think we'd be taking different positions on this.

In looking through the materials that were provided, I went through the other agencies, and I noticed that the EPA is very much continuing with pretty formal procedures in its decision-making, and apparently there's not much effort there to change that. It's here that that's happening.

So, we get very suspicious about that.

Another thing that I think needs to be dealt with and the reason for a lot of citizen unhappiness is we don't ever get to raise the issues that really concern citizens in a major manner.

Like, for many citizens, a major issue is nuclear waste. We never get to raise that in licensing issues. That's all handled generically in some way. One time Tony succeeded in having that generic method invalidated by the D.C. Court of Appeals, until the Supreme Court got ahold of it, in the NRDC and Vermont Yankee case, but that's something that's got to be looked at.

And the last thing I'll say -- and we can all go out and get our coffee -- is that Jim is absolutely right. This is of vital importance, because this is a democracy. And if this doesn't happen, not only will we see people marching, we already have.

The Seabrook case is a perfect example. I represented an organization called the Sea Coast Anti-Pollution League. The president of that organization was a fellow named Guy Chichester.

He was just profiled in the Concord Monitor as one of the 100 people who changed New Hampshire, which I kind of objected to, but that happened.

Mr. Chichester would go to the licensing hearings and see me

march in -- and I was almost never there when Tony was, because we couldn't afford to be there on the same day. It was very rare that two intervenor lawyers would be there.

He'd come in and he'd see me and he'd see three Robeson Gray lawyers representing the applicant, three staff lawyers, and they were all in favor of the license, and then he'd see me, and he told me this to my face, says my little lawyer -- I was thinner back then -- my little lawyer's getting creamed in there, and he went out and formed the Clamshell Alliance.

So, you know, it is a democracy, and it's not going to be -- people are not going to give up their democratic rights, and they should be preserved in the hearing process, and it's got to be a meaningful process where the outcome is not always seen as fore-ordained, which is the problem we have now.

CAMERON: Okay. Thank you, Bob, and maybe one of the values of this discussion, I think, has been to perhaps illuminate a couple of paths forward for discussion during the rest of the day.

Tony was -- had suggested perhaps a process solution that should be -- we should explore.

Bob's grand bargain streamline -- I read that as, well, there are certain fixes that all of you who have participated in these processes might agree to, regardless of what the motivation, agenda, etcetera, etcetera, is.

So, perhaps it's possible to identify those, but the second part of the equation was also one that Tony brought up, which is the reasonable chance to prevail, what needs to be done on that account, and I mean you people here have the power, this group, to at least shape your own agenda and discussion for the rest of the day.

We have to see how that then goes in as grist for the mill for the Office of General Counsel and the Commission, but certainly, if

you think, as a group, there's some productivity to exploring certain issues, we can do that.

So, it's something to think about during the break.

Let's see if we can just get some people who might want to talk now quickly before we break.

Judy, do you want to say something?

JONSRUD: Yes. Thank you, Chip.

I have worked with a number of the people at the table.

I concur with the comments from Diane and from Steve, very strong comments, so Jim, Bob, and Tony, and there are a lot of things I'd like to say, but I am a firm adherent to the importance of the Federal Administrative Procedure Act.

Going back a number of years, the NRC began -- well, in its recent history, began to relax control in a very serious manner by its change in its regulatory philosophy, and I think that that is to the detriment of public safety.

Now, to attempt to bypass or eliminate the provisions that give access to the judicial system of the United States is outrageous beyond words.

The Commission, in my opinion, should abandon any efforts to relax those provisions of the Administrative Procedure Act. They're vital.

Tony mentioned TMI, and if I may, I was the pro se litigant in the TMI-2 operating license. We did it with no funding whatsoever. We did it with no technical or legal assistance.

We call it, you will forgive me, kangaroo attorneys in the kangaroo court, and I'm afraid that that sums up precisely the nature of the proceedings that we, from the citizen's perspective, have had to endure all these years.

In the TMI proceedings, we were denied opportunity to

question accidents whose consequences might be more severe than the safety systems were designed to withstand. On what basis? That the Commission's staff nuclear engineers were assured that these were highly improbable events and, therefore, they needn't even be considered.

We were not permitted to question the regulations of the Commission, although my colleague, Dr. Kepford, was able to do so in a manner that subsequently was concurred with by a member of the Appeal Board and was taken further in the courts.

It didn't stop the issuance of the license nor the accident that resulted.

I think that we have, in the TMI-2 experience, the real proof of this very unsavory pudding that has been the NRC's hearing procedure, and I would call your attention, going clear back, of course, to the declaration at the beginning of the Atomic Energy Act, which, very frankly, gives the license to the Commission to promote, to continue to promote and develop to the maximum extent the commercial as well as military nuclear industry, but in this case the commercial.

One other very quick point.

It has distressed me for a very long period of time that the decisions concerning human health and safety, not to mention all other components of the bio-system, are made primarily in this agency by nuclear engineers.

These are people who are not trained, who are not competent in the fields of biology, ecology, medicine, genetics, the issues that count with respect to health and safety of the public and the environment.

I strongly concur with the recommendations that you're hearing from the attorneys who have worked their hearts out for the protection of the public's interest.

I have very little hope that the Commission will adopt those

recommendations, but if you do so -- that is, if you fail to adopt these positive recommendations -- you do serious further damage to the American political and judicial system.

CAMERON: Okay. Thank you, Judy.

You made a number of points, but the one thing that sort of comes out to me as a facilitator is that, you know, harkening back to some of the comments from Mike now, Bob, Tony, others around the table, would be it would be interesting to see if, at least for this group's discussion, if perhaps there is a way to discuss what could be fixed, and of course, there's a lot submerged there, but what could be fixed with the existing hearing process and perhaps get away from the industry versus the citizen perspective, in a way.

I don't know if we can get to a discussion like that, but it might be informative and interesting.

Does anybody have any other comments out here before we take a break?

Yes, sir, and if you could just give your name and affiliation, if appropriate, for the transcript?

ZANNONI: My name is Dennis Zannoni. I'm here from the State of New Jersey, work in the Department of Environmental Protection. Actually, I'm here on other business, but my management asked me to attend, because they're very interested in this discussion.

Whatever the outcome of this discussion would be, what's taken place already, will be helpful in the way we manage processes within the State, and so it's good to see the consistency that's developing or the direction that's developing in the Federal Government approach to these types of issues and also on the state level, because it's difficult, at times, to have processes in a state setting that people have a certain viewpoint of, and in fact, nuclear power plants that -- we have four in New Jersey, and they're going through separate

processes, so it just helps in the alignment. So, I'm glad that I attended here this morning.

I only have two brief comments, because I know folks want a break, and that is, when we reviewed the SECY paper, I think it was imperative -- and already mentioned a few times and I just want to reiterate it -- the need for a study to determine what some of the root causes were, and I don't think you can fix anything till you really understand what the current existing problems are, and the second point is it does come to a discussion about process.

What we found very helpful was when some of these hearings, whether formal or informal, can actually take place in the vicinity of the location of the problem. We felt that that definitely, more than anything, outweighs -- well, builds the public confidence that we've seen lacking in this area for some time, and the other thing is it would be helpful to have a discussion about risk-informing the public hearing process.

The NRC as an agency, I think, has taken a bold step in doing that.

You have a pilot program to help risk-inform the way they inspect and overview nuclear power plants, and you can be one side or the other, but if you accept that as a mechanism to try to glean out some of the issues that are raised, there may be disagreement, but we're finding out in our state that it's becoming more and more helpful to try to eliminate unnecessary issues that are brought to the table.

So, that's what I'd like to add, and thanks for meeting today.

I'd like to thank the NRC for having this type of discussion, because we find it very helpful.

CAMERON: Thanks a lot, Bob, and thank you for being here. It's great that the State showed that interest in having you

here, and in terms of risk-informing, the closest that I think that we have gotten to that is perhaps Tony Roisman's point about substantive soundness being the litmus test that we might be looking for here.

Maybe that is risk-informing the process, and Murphy, do you want to get on the record here?

MURPHY: We had a roundtable discussion in Las Vegas just a week-and-a-half ago in front of the Advisory Committee on Nuclear Waste on that very subject, risk-informing the hearing process specifically in the repository context, but I think the Commission has already -- or at least an advisory committee to the Commission is already taking a deep look at that.

CAMERON: Thank you, Mal.

Let's take a break till about quarter after. That gives you about 25 minutes, and Jeff Lubbers has been kind enough to offer to do sort of a summary of emerging trends, and I think that that will not get us off-track in terms of miring us down into informal or formal but perhaps give us a springboard from which to proceed on that.

So, we'll figure out what we're doing when we come back.

[Recess.]

CAMERON: I think that was a real good starting off session on this subject. So, I'm going to ask you to all go home.

Seriously, we want to -- we are going to have Jeff Lubbers, who's a professor of law at Washington College of Law at American University, talk to us about some emerging trends, and we'll talk to Jeff about his presentation, but based on the discussion this morning, what I would suggest is that I think we need to deal with this objective issue, and I have written down the objective that Ellen Ginsberg read earlier, and we may not agree with all of it, we may want to fine-tune this, but I think at least we need to do something on the objective of the hearing process, okay? And I'm going to come back to this in a

minute, and I see that some of you cannot see it and probably can't read my writing.

BACKUS: Well, Tony has senior moments on memory. I have senior moments on vision. I can't see that far.

CAMERON: After the objective and before we start to get into the two parts of the so-called grand bargain equation, what fixes would we -- might we agree on or might we want to discuss, and that second part of the equation, which is the resources -- the resources is an underlying theme, but a systematic, well-prepared examination from the public's point of view of these issues -- we'll get to that, but there were a lot of concerns expressed around the table -- delay, etcetera, etcetera -- about the hearing process or changes to the hearing process, and I thought it might be useful to identify those concerns, and I'm using concerns rather than positions, okay?

In talking with Judge Heifetz during the break, from his experience, he was pointing out that, if you have a handle on what the concerns are, then perhaps we can start to work to address those concerns, and I think that's all part of examining the grand bargain, but at any rate, that's going to be after Jeff Lubbers.

Does anybody have any comment son that sort of broad way of proceeding at this point?

[No response.]

CAMERON: Okay.

Well, let's go to Jeff for a presentation.

Thank you, Jeff, too, for being here.

LUBBERS: Thanks, Chip.

I thought I'd speak from here, since it might lend me a little more authority, and I think I need it in this group.

I want to thank Chip for inviting me to this roundtable.

In my role at the Administrative Conference, I heard a lot

about the NRC from NRC alumni such as Bill Olmsted and Max Pagland, who unfortunately are no longer with us, and from Gary Ettles, who's teaching in England now, and I'm sure they could have contributed a lot to this discussion, as well.

I sort of have a little trepidation about speaking to this group, because I feel like, given the expertise in this room, I'm about to describe the basic recipe for French toast to the Academy of Cuisine of Paris, France, but I also want to start off with a few reactions to what I've heard in the opening discussion, which I thought was very interesting, very illuminating, and there were certainly some points that I think we did reach some potential common ground.

I think, with respect to the objective there, I think that we mentioned fairness, efficiency, effectiveness, and I think acceptability has to be added in there at some point, because that's -- perceptions of those things matter a lot in this field.

I also wanted to react a little bit to the comment that delay, in and of itself, might be an acceptable strategy or good in this area, and I'm reminded a little bit about how this delay issue plays out in other arenas.

You know, the so-called regulatory reform bills that have been pending in Congress for the past several congresses have been opposed by some of the very same public interest groups that are represented in this room today, like Public Citizen, because they would increase the delays and the ossification of rule-making, and you know, I've heard the regulatory reform bills the Regulatory Sand in the Gears Act of 1999, and so, that's something that I, as an administrative procedure person, don't really like as a goal in and of itself.

I also agree with the comment that the Administrative Procedure Act is a sound law, and after all, it stood the test of time pretty well for the last 50 years, and I think it should be generally

followed by Federal agencies in their adjudicative and rule-making processes, but we also have to remember that the APA does have a lot of built-in flexibility within it.

I agree with Tony Roisman's comments, and it was a real pleasure hearing him give his talk, because I remember back in those days when he was a very effective advocate, and I can see why now, again, but I agree with his comment that we may need a study of some of these issues, and unfortunately, the Administrative Conference isn't around to do the study, but I think that we need to know more about where the time lapses take place in these proceedings.

Are they in the pre-hearing stage, are they in the hearing stage, are they in the post-hearing stage? And why do they take place when they do?

I also agree with the general comment that it's probably a good idea to review where we are in the agency's Code of Federal Regulations.

I'm surprised that reinventing Government initiative hasn't forced you to cut the pages of your CFR already, but I think that it is sort of a question for someone like me, who's not steeped in the substance of the nuclear power field, to wonder why does the Commission need so many different types of modified procedure?

I think we all agree that enforcement cases should be done through formal, APA-style adjudication, sub-part G. I don't think there's any disagreement with that. At least I haven't heard any. And I think that most people here would agree that some type of decisions made by the NRC do not need full-fledged formal APA adjudication.

Some sort of modified procedure, if we can use that term, is a good idea in some types of decisions that the NRC makes.

So, if we can sort of take that as a broad area of something to talk about in the rest of the meeting, I think that might be helpful.

I also certainly agree with the idea that intervenor funding is something that should be pursued. I mean I thought that was a tragedy back in the '70s when those programs, not just at the NRC but some of the other agencies, were eliminated by Congress.

In the break, I was talking with Roland Frye about the fact that the food and drug industry has happily paid for the FDA's -- or added supplements to the FDA's budget so that the FDA could staff up to handle new drug applications, and I know the industry essentially funds the NRC, and I'm not sure how it works with respect to the appropriations process in Congress and then some figure is arrived at and then the industry essentially pays user fees to the NRC, but I would hope that there would be some way that some little increment could be added, like we see in our phone bills, to this NRC budget so that a fund could be established for intervenor funding.

So, those are just some ideas that the discussion generated in my own mind, as we discussed this morning, but my basic task that Chip asked me to do today was to provide sort of an overview for the rest of the meeting, what are the legal parameters for today's discussion, what does the APA require in terms of adjudication, and what are the emerging trends?

I think the written materials do a good job of providing some good information, an overview of many of these issues. So, if you've read those, this just might be a refresher for some of you.

But under the APA, agency adjudication is either formal or informal. That's the way the APA is set up.

When we talk about formal adjudication, sometimes called APA adjudication, we're talking about adjudication that is required and controlled by the procedures in sections 554, 556, and 557 of the Administrative Procedure Act.

Anything else has come to be known as informal adjudication,

and there is no section in the APA called informal adjudication.

The only section that bears on that is section 555, which is called ancillary proceedings, and there's not much in that.

Of course, the due process clause applies to informal adjudication.

Now, just a little bit of background.

When you teach administrative law, you often start with the due process cases, because that sort of forms the backdrop for administrative adjudication and the distinction between adjudication and rule-making which is at the heart of the APA.

If the issues in a dispute involving the government involve questions of general applicability, like whether your jurisdiction's property tax rate should be raised 5 percent across the board, you as a homeowner do not have a right to a trial-type adjudication on that issue. There are no facts that are specific to you with respect to that, and this is the famous Buy Metallic case from the early -- first part of this century, and these types of decisions are usually those that are made by legislation. A citizen doesn't have a right to a hearing before Congress passes a law.

Of course, Congress can have hearings, but no constitutional right to a hearing, and the analog to that in the administrative context is rule-making. There's no right to an oral hearing in the APA for rule-making. There's no constitutional right to a oral hearing with cross-examination, etcetera, in a rule-making situation.

But if you have a dispute that involves property or liberty that's individual to you -- like if you disagree with the assessment of your own individual property, yours was raised -- your assessment was raised 10 percent, your neighbor's was not, you have a right to a hearing on that point.

This is the Londoner vs. Denver case, the other early due

process case.

Now, these are all cases involving, you know, real property, and if your interest was affected on an individualized basis, you had a right to a hearing. Back then, a hearing meant a trial, essentially, trial-type hearing, similar to courtroom trials.

Now, the high water mark with respect to due process procedure in administrative hearings was the Goldberg vs. Kelly case.

Now, I put in your materials the 10 procedural ingredients of Goldberg vs. Kelly, and there's no secret here. I mean notice, confrontation of adverse witnesses, oral presentation of arguments.

If you all don't have my sheet, I'll go through them -- opportunity for cross-examination of adverse witnesses, right to retain counsel, disclosure of opposing evidence, decision on the record of the hearing, statement of reasons and evidence relied on, and impartial decision-maker.

It's pretty much what you have in a courtroom trial, although you don't have a judge -- a judge wasn't actually required by Goldberg vs. Kelly, merely an impartial decision-maker, but it's pretty close to a trial, and it seemed like the appropriate level of procedure to have when you're deciding questions of individualized adjudicative fact, especially in an area of welfare terminations, which was the Goldberg vs. Kelly case.

But the concept of property and the concept of liberty began to expand in the Supreme Court jurisprudence to include entitlements as property and to include situations where people were stigmatized as liberty interests, and at that point, with the expansion of the types of interests that gave rise to hearings, it became clear, at least to the Supreme Court, that you couldn't have a trial ever time an entitlement was threatened by the government.

You had a right to a hearing, but it didn't mean a

trial-type hearing, and actually, what happened in the Goldberg vs. Kelly aftermath is kind of interesting.

There's been some writing about what happened in New York, where the state was faced with having to do a lot of formalized hearings in the welfare termination context, and what they did was they avoided hearings.

They tightened eligibility rules so that fewer people go on the welfare rolls, they promulgated very bright-line rules, eliminated special treatment waivers, and they cashed out non-monetary benefits, and the upshot of all this was that it led to fewer beneficiaries getting on the rolls, the elimination of adjudicators and social workers, and a substitution of clerks to apply these bright-line rules.

Was this a net gain for the beneficiary community? Arguably not.

And I think that agencies' ability to sort of structure their proceedings to avoid formal trial-type adjudications because of the cost involved led the Supreme Court to come up with the three-pronged balancing test in the Matthews vs. Eldridge case, and that was similar to Goldberg vs. Kelly.

It was a Social Security termination situation, and the Court said, well, we're not going to require the 10 ingredients of Goldberg vs. Kelly, we're going to have a three-part balancing test.

The nature of the private interest affected, first prong of the test, the risk of error due to the process used and the likelihood that additional procedures would reduce that risk of error, and three, government's interest in avoiding additional procedures.

It's kind of a cost-benefit analysis, and it's much more open-ended, obviously. The courts have to go through this balancing test in every situation, and just a simple example, the Goss case, Goss vs. Lopez, where the high school student was suspended for 10 days.

He went to a public high school. He had a right to a hearing, it was an entitlement, but he didn't get a trial. He wasn't able to have a trial in the auditorium of the school with counsel and cross-examination.

The hearing he got was a chance to make his case to the principal, to say I was being bullied by somebody and that's why I got into a fight, and so forth. That was the hearing that the Supreme Court granted him.

So, in every context of entitlements, whether it's prison cases, public housing, student discipline, employee -- public employee dismissal cases, there's sort of jurisprudence that's grown up using the Matthews vs. Eldridge calculus.

Fortunately, the APA is not so difficult.

If you have a requirement of a formal adjudication required by another statute, then the APA's process is required, and that comports with due process, but as illustrated by the AEC act, the triggering language can raise questions.

Section 554 of the APA specifies that it applies in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.

Now, as the memo that you gave out accurately indicates, the Supreme Court has never definitively interpreted that phrase in section 554, but it did interpret a nearly identical phrase in the rule-making section, 553(c), to say, in the Florida East Coast case, that formal rule-making is not required unless the underlying statute uses the magic words "on the record."

The word "hearing" itself, by itself, was not enough to trigger the formal rule-making process, and the lower courts have generally applied this case as reasoning to the phrase in section 554, as well, most notably in the West Chicago case in the 7th Circuit and in

the Chemical Waste Management case in the D.C. Circuit, though the courts have allowed for the possibility of, quote, "exceptional circumstances demonstrating that Congress intended to require the use of formal adjudicatory procedures."

Whether these circumstances are present in relate to the NRC licensing of nuclear power plants under the AEA is a very interesting question. It's not what we're here to debate today, but that's where the line between formal and informal adjudication is, and it becomes important, because if it's not a section 554, 556, 557 type of hearing, what is it?

The answer is it's informal adjudication. At least we call it that. I mean I know it sounds pejorative to some of you, but it's just -- that's what we call it in the administrative law world. It's not formal adjudication, it's informal.

What procedures do agencies have to follow in informal adjudication under the APA? Only those in section 55, which aren't very much -- the right to counsel or other representative, the right to retain copy of report submitted, right to a subpoena when the law permits one, and a right to a statement of reasons, prompt notice of denial of application and petition with reasons.

Now, of course, due process may require more, and if you've seen my Goldberg vs. Kelly chart again, there are some numbers off to the side, and those are from an article that Paul Verkail did in 1976.

He's now the Dean at Cardoza Law School, and he did something that I thought was very helpful in thinking about informal adjudication, because most adjudication in the Federal Government is informal.

If you apply for a National Park permit, that's adjudication. If you send an FOIA request and ask for a ruling on the FOIA request, that's an adjudication.

So, obviously, most adjudications in the Federal Government are informal, and what Verkail did was he looked at four departments -- HUD, Agriculture, Commerce, and Interior -- and he identified all the non-formal, non-APA administrative law judge type of adjudications in those four departments, and he found 42 of them, and then he looked at the Goldberg vs. Kelly ingredients and he found -- he compared -- he looked to see whether the departments offered those procedures in the 42 programs, and he found that almost all of the programs required notice, statement of reasons, and an impartial decision-maker. About half had an oral presentation of arguments. Only nine had cross-examination.

Now, of course, these procedures or these functions, these adjudicative programs, were all over the lot -- grant programs, food stamps programs, procurement, government contract type things. So, it really ranged all over the place.

But I think it does sort of help think about the sort of overall scope of agency adjudication to realize you have many, many types of informal adjudications in the government.

Some other right to hearing issues have come up.

What if the agency's own regulations require a trial-type hearing? Well, of course, agencies have to follow their own regulations.

What if the regulations only use the term "hearing" and then also mentioned a record and the statute did require a hearing on the record? That would not be enough to trigger section 554, because agency rules themselves do not trigger 554; only the statutes can do that.

We don't want to discourage agencies from granting additional procedural protections for fear that they might somehow trigger a statutory requirement under section 554.

Another hearing question that comes up is what happens when a statute grants a right to a hearing on the record but the agency

issues generic rules that essentially eliminate or severely narrow the issues that can be disputed in each individual case?

The generic rule-making issue was mentioned earlier.

The administrative law case law permits this. There's a 1966 case called the block space case, American Airlines vs. CAB, where the CAB had issued a rule, gone through the rule-making procedures of the APA, that permitted only all-cargo airlines to offer so-called block space, which are large reserved blocks of space on aircraft that go for a cheaper rate, and the rule said that combination cargo and passenger airlines could not offer this type of fare, and so, they're prohibited from doing this.

Their licenses were amended to reflect this, after the rule-making process, and assume there were some good reasons to do so.

American Airlines was one of these combination carriers and said wait a minute, we have a right to a hearing on the record under our statute before the license could be amended, and the CAB denied the request for a hearing, saying that the rule covered the situation; you had a chance to participate in the rule-making process, raise these issues, there's nothing to have a hearing about, and Judge Leventhal, who was a leading administrative lawyer before he became a leading administrative judge on the D.C. Circuit, went through the difference between rule-making and adjudication and determined that agencies have a choice to make policy through rule-making or adjudication, and in this case, they went through a legitimate rule-making, and they didn't single out individual carriers, they treated these categories -- all the carriers within each category alike, all the combination carriers were treated the same way and so forth, and the Court said the proceeding before us is rule-making, both in form and effect, there is no individual action masquerading as a general rule, so they denied the right to a hearing.

The City of West Chicago case illustrates the fact, if there's no disputed issue of material fact, the agency can turn down the request for a hearing, even though the statute requires a hearing on the record in these cases.

There are many statutes that now condition a right to a hearing on the record on there being a disputed issue of material fact.

I was involved in a case involving the Bank Holding Company Act, trying to block a merger of two large ATM companies in Ohio, and we were representing a small ATM company that was trying to block the merger, and under the Bank Holding Company Act, we had a right to a hearing on the record if there was a disputed issue of material fact.

So, we strove mightily to come up with some factual issues that we thought were disputed issues of material fact, the fact that the rates would go up if the merger was allowed to go forward, because of the way the switching fees work in the ATM industry, this is going to create anti-competitive practices and the rates were going to go up in certain jurisdictions, and the Fed said, well, these are all economic issues, they're not really factual disputes, they're more like policy issues, so we deny the hearing.

We went to the D.C. Circuit, persuaded the panel, two to one, that we did have disputed issues of material fact, and so, we won the first round.

The Fed asked for an en banc review. It was granted. So, we knew we were in trouble on this issue.

The Fed then went to Congress and got the statute changed so that there was no right to a hearing for anything except savings and loans mergers.

So, we went back to the D.C. Circuit and said, well, you should revoke your en banc review, because this is not a precedential case anymore. There's never going to be another ATM merger that's going

to be covered by this statute, and the Circuit agreed with us and revoked their en banc review.

They also vacated the panel decision, unfortunately, and our clients eventually settled with the merging companies.

So, everything ended okay for our clients, but it's just an illustration of how important it is to be able to show disputed issued of material fact and how this is such a crucial issue in many different types of licensing contexts, and there are a lot of cases that go both ways in the courts, saying that, yes, you should have had a hearing, no, you didn't deserve to have a hearing because you didn't have a disputed issue of material fact.

Now, another reason that the triggering language in the APA is important is that, if you're proceeding under Sections 554, 6, and 7, that also requires a separation of functions, and it also leads to a ban on ex parte communications, and it also requires the use of administrative law judges as presiding officers, unless you have a special statute, like the NRC does.

Now, with respect to separation of functions, I'm not going to really say anything. I know the NRC has struggled with this issue for many years. My contribution is just a little summary that I hand out to my students on separation of functions that tries to boil down the APA requirements.

Similarly, ex parte communications -- I think that the NRC has an ex parte communications rule. I think that you would probably want to have one in any case, no matter what type of procedure you were doing, but if your statute does not require formal adjudication of the APA, there's no ex parte communications bar that applies to you under the law.

Now, I want to also point out that the APA does provide some greater flexibility in initial licensing. If you look at several of the

sections -- for example, the separation of functions requirements don't apply to initial licensing cases.

Most agencies have voluntarily applied them to initial licensing, but the act does not require it, and some years ago, Professor Mike Asimov from UCLA wrote an article urging agencies to take advantage of the flexibility with respect to initial licensing cases in the separation of functions area, where you have technical issues that would allow more communication between staff and decision-makers, non-adversarial staff especially.

Also, section 556(d) specifies that, in initial licensing, an agency may, quote, " -- when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

So, the APA itself -- you talk about APA adjudication. It allowed, in initial licensing, the agency to adopt written procedures if the parties won't be prejudiced.

So, that's something that needs to be researched more. I don't know that much about the cases in this area, but there is some -- there's leeway for agencies to experiment there.

Another key element is the presiding officer. Under section 556 of the APA, either the agency head, one or more members of the Commission, in your case, or an administrative law judge must preside. It's very rare for agency heads to do so.

I was interested in your sub-part M, I guess it was, that sort of encourages agency heads to preside, but you know, I realize you have special statutory authority, that famous "notwithstanding" clause, that allows your panel members to preside rather than needing an administrative law judge, but in general, I just want to say a few words about what agencies are doing in this area, and we have Judge Heifetz, who certainly knows more about this than I do, but one of the trends, I

think, in the administrative law area is that agencies have tried -- there's sort of a trend in that agencies are seeking to avoid the use of administrative law judges.

They're trying to find ways to use other adjudicators, even in relatively formal proceedings.

Administrative law judges are independent officers of the Federal Government. Their pay is set by statute. They have special tenure protections. They have special separation of functions protections. They're not subject to performance evaluation, and they can't be assigned duties that are inconsistent with their role as ALJs.

They're still not completely independent, though, because they're agency employees, they have to follow agency policy, they're subject to certain managerial perks like office space, parking places, and that kind of thing, they can be subject to reductions in force, and you know, there are some subtle agency pressures that might be brought to bear on administrative law judges.

I put a chart of the number of administrative law judges in the various agencies at the end of your packet there, and it's a year-and-a-half old now, but it shows -- I think it illustrates that most of the administrative law judges are in three agencies, the Social Security Administration, Labor Department, and the National Labor Relations Board, and what's striking, I think, is how few administrative law judges are employed by most administrative and regulatory agencies.

For example, the departments of agriculture, commerce, education, HUD, and justice have only four, one, one, five, and six administrative law judges respectively, these huge departments.

The department of defense, state, and veterans affairs have none.

The five bank regulatory agencies share two, and major adjudicatory and enforcement agencies like the Commodities Futures

Trading Commission, FTC, International Trade Commission, Merit Systems Protection Board, and Small Business Administration only have one or two.

CPSC, Equal Employment Opportunity Commission, your own agency, the NRC, and the Postal Rate Commission have zero.

So, why is this? It's not because agencies have stopped adjudicating. It's because they have been able to eliminate their reliance on administrative law judges.

We did a study in Administrative Conference back in 1989, and we identified almost 2,700 non-ALJ adjudicators in the Federal Government, and there are lots of big programs that use non-administrative law judge adjudicators, like Immigration, National Appeals Division of Agriculture, all the boards of contract appeals, the administrative patent judges, administrative trademark judges, Board of Veterans Appeals, MSPB, EEOC -- I could go on and on.

Now, Congress has been complicit in this, because they've allowed some agencies like EPA to use non-ALJ adjudicators to decide even civil money penalty cases where the penalty isn't too large.

Debarment and suspension of government contractors are handled by non-ALJ adjudicators.

So, I think the situation of the administrative adjudication is quite varied throughout the U.S. Government. Why have agencies sort of voted with their feet on this? Well, I realize this isn't completely germane to the NRC, but I think there are three reasons, and one is that I think it's become difficult for agencies to select administrative law judges, or at least the type of judges they want, due to the operation of the selection process and the importance of the Veterans Preference Act in the rating of applicants for administrative law judge positions.

I don't want to go into too much detail and take too much time there, but I think the selection process has gotten so difficult

that agencies would rather hire other lawyers, other types of employees to preside over even formal cases.

Managerial issues -- it's easier to manage most non-ALJ adjudicators because at least they can be evaluated, and I think agency managers feel that administrative law judges are -- you know, because they're exempt from any kind of appraisal, that they'd rather have somebody that they can do some sort of evaluation, and also, their salaries tend to be lower.

So, I think agency managers have great incentive to opt for using hearing officers who can be selected strategically, who are easier to manage, and who can be procured for sort of bargain rates, and so, you know, I'm not saying that this is a salutary development, that it's a good thing, but I think that the trend is clearly for agencies to look for alternatives to the formal APA administrative law judge adjudication process.

In reality, I think it's unfortunate but understandable.

I think the APA does provide a good model for enforcement cases, and in initial licensing cases, there is some built-in flexibility, but if the agency is going to move to a more informal type of adjudication, the question still remains: What steps should the agency require?

Even in that list that Verkail provided, you know, some agencies provided all 10 steps of the Goldberg vs. Kelly formula for informal adjudication.

Which is the APA's provisions cause problems? Which is the sub-part G provisions cause problems? Is the problem really one of case management? Can most of the delay problems that have occurred be addressed through strict case management?

These are all issues that I hope this sort of overview will help inform the discussion, and if you have any questions that I can

answer, I'll be happy to try to do so.

CAMERON: Okay. Thank you very much, Jeff, for that overview.

Do we have some questions or comments for Jeff, anybody around the table?

Jay?

SILBERG: One of the comments you made originally on your view of delay as an acceptable strategy -- I was wondering if you might elaborate on that a little.

LUBBERS: Well, I don't think delay in and of itself is a good thing.

I mean, obviously, you need to have enough time to prepare for cases and to argue cases and for the case to proceed to conclusion, but in some situations, it is certainly to one party or another's interest to just delay the proceeding in the hopes that it will never end or that people will give up, and my only comment was that, you know, I think that, if that's -- I don't think that's an acceptable goal as part of, you know, fairness, efficiency, effectiveness, and acceptability.

I don't think it's an appropriate goal in licensing, and I don't think it's an appropriate thing for people to try to do to gum up the ability of Federal -- of agencies like OSHA and EPA to be able to regulate through rule-making.

I think that strategy has been part of the regulatory reform, so-called, movement in Congress, and I think it's been part of the strategy of at least some people who try to avoid decisions in other agencies, and I think we should get beyond that as a strategy.

CAMERON: Tony.

ROISMAN: First of all, just a point on the delay. I mean that is sort of built into the democratic process. The Senate still has

the filibuster right.

LUBBERS: Checks and balances.

ROISMAN: And when the shoe's on the other foot, if it's torte litigation and the defendants are utilities, delay is a very popular tactic.

LUBBERS: Right.

ROISMAN: But I had a very different question for you.

What is the difference, as a practical matter, if any, that you see between an agency that has ALJs and an agency like the Nuclear Regulatory Commission, which now, I just learned, has none, no ALJs are now left, although they have hearing boards and hearing board members who are appointed through a process, etcetera?

Is there some clear delineation between the benefits and disadvantages of those two?

LUBBERS: I've never seen such a study. I mean I think, first of all, the Administrative Procedure Act specifically authorizes Congress to provide for different types of hearing officers, even in APA cases, even informal APA adjudication.

So, if you accept that what the NRC is doing is APA adjudication, that's what Congress did when it allowed for the use of panels.

You know, I think there are different types or different levels of non-ALJ adjudicators throughout the government.

You've got GS-9 asylum officers deciding asylum cases in the justice department, and you've got judges who are actually higher paid than administrative law judges, board of contract appeals members, deciding those cases.

Other agencies allow their non-ALJ adjudicators to be paid about the same as ALJs, to be as independent as ALJs, at least by regulation and by practice, so it really depends on the agency.

I used to know more about how the panel worked here, but my guess is that the panel has most of the ingredients of independence, if not all, that someone like Judge Heifetz has.

Maybe Alan could speak to this question a little better than I could.

HEIFETZ: Well, I can't speak to it in terms of the NRC, because I don't have the personal knowledge, but there is a wide variety of adjudicatory systems and reasons for going to administrative law judges or not.

In a number of cases -- for instance, the EEOC, with a tremendous backlog of cases, they're trying to get through process very quickly, and the idea is to get as many of these so-called hearing examiners as they can at a very low rate of pay -- most of them start out as a hearing examiner right out of law school, and some of them are capable of doing a very good job, but in another life, when I was doing trial work, I recall trying an afternoon's case at the EEOC one week, and that becomes a problem.

When you have someone who doesn't have the experience of managing adjudication, when you have someone who is sitting there saying I'll let the evidence in for what it's worth, records tend to get larger, and time gets consumed.

So, it depends on the intent of the agency at the time they decide how to conduct adjudications.

There was a comment this morning that substantive soundness is not concerned with the intent of the Commission, and perhaps that's true with regard to the Nuclear Regulatory Commission. As I said, I don't know.

But I can tell you that intent does have something to do with it, because essentially the administrative adjudicatory process has elements of political structure, and it depends on who is being

appointed to agencies, and if you look at various agencies and various administrations, you will see whether there is political influence which is having an impact on adjudication or not.

If you look at an agency like the National Labor Relations Board, it is basically an adjudicatory agency. That's what it does. It is not trying to enforce an administration policy, although there's some tinges to that, I grant you, but it's not a matter of fostering a particular industry or not.

I did some work for the Interstate Commerce Commission both as an enforcement attorney, an advisor to the Chairman of the Commission, and an administrative law judge, and you can see various changes in the results of cases depending on who was on the Commission and what their objectives were.

Some were much more politically influenced, result-oriented, if you will, in adjudications, and others were not.

If you have commissioners who are more result-oriented, they are going to try to get away from independence in the hearing process, because they can control the outcome. That's just a human response. That's why they were put on the commission.

So, you can't divorce politics from it. It is not a court that is there without regard to any policy considerations.

So, if you have appointees to commissions who are interested straight in adjudication and the search for truth, as you were talking about in terms of process, then you will not have that kind of influence.

So, the variations are infinite, and you have to be realistic to understand that there are things that go on in an administrative adjudication inside the hearing room and outside the hearing room and on the steps of the Capitol.

CAMERON: Tony, did your question evidence any concern about

the fact that the NRC does not use administrative law judges or it was just more a point of information?

ROISMAN: No, no. And I thought the answer was what Jeff and Alan both said, which is that there's nothing magic about calling someone an ALJ in order to get the qualities that are built into the ALJ process, but you could have agencies which don't put those factors into their non-ALJ positions and end up with bad adjudication as a result.

As I said before, I don't think the NRC's one of those agencies, but it's an issue on which the Commission always has the power, because they aren't constrained by the limits of the APA if they don't use ALJs not erode some of the independence of their boards if they chose to do so.

I think that would be a bad -- that's certainly one of the options that could arguably be on the table here, is that there would be some attempt to erode the independence of the licensing boards under broad discretion of the agency as a, quote, "efficiency move" or whatever.

I think it would be a very bad idea, and if anything, I would argue for moving it the opposite direction, even thinking about creating the licensing board as quasi-independent from the agency.

LUBBERS: If I could just add one point, I think that there is -- as mentioned in the paper that was distributed by the staff, administrative law judges are not supposed to be assigned work that's inconsistent with their role as judge, and OPM is the one that authorizes agencies to hire administrative law judges, and if an agency only has non-APA-type adjudication, they won't get administrative law judges to do that work.

So, NRC does have some flexibility by virtue of having non-ALJ adjudicators now, so that if they decided to move to something modified from the APA procedure, they could use the same hearing

officers they have now.

CAMERON: Bob.

BACKUS: I think the issue of who is going to preside at these adjudications, assuming we're going to continue to have adjudications, is a very critical one, and I have to somewhat disagree with Tony.

I think some of the presiding officers we were given on the Seabrook case were an embarrassment, just terrible. Certainly Judge Bollwerk was not among them. But there changes of presiding officers.

I think one of the things that needs to be done, whether they're going to be ALJs or however they are now selected, which I'll have to talk to Judge Bollwerk and see how these folks are selected --

BOLLWERK: I'll tell you that if you want to know, but it's up to them. I don't know what kind of record you're trying to build here.

BACKUS: I would be interested in hearing how you were all selected for your jobs and how you assure independence, but I think that the assurance that the fact-finders are neutral independents is a critical part of improving the process, and as I said, in New Hampshire, if I have to go to traffic court, I know that the judge that's going to hear the case has been through a public process to be confirmed.

He has to go through a hearing before a governing council, and of course, Federal judges have to go through a Senate confirmation process and there's hearings, and something to give the public that kind of confidence in the fact-finders for this agency I think would be very important.

CAMERON: Okay. I think I do want to give Paul an opportunity to talk about how they're selected. I guess we'll revisit this issue perhaps later on, too, about the -- the who presides issues. I just had one clarification on that.

When you were sort of emphasizing neutrality and independence, is that the problem that you're calling attention to in terms of who presides, neutrality and independence, or is it also expertise?

BACKUS: I think it's neutrality and independence more than expertise, and I don't want to tar everybody that's ever been an administrative -- sat on a ASLB for the NRC, but I tell you, it's not just my perception, it was the perception of others that some of these people were sent there with a mission to get the license issues.

CAMERON: Okay. So, it is neutrality.

Bollwerk's the only one who survived so far.

All right, Paul.

BOLLWERK: In terms of the current status of the agency in terms of having ALJs -- the last ALJ that the agency had was Ivan Smith, who retired about five years ago. At that point, it wasn't deemed necessary for the agency to have any administrative law judges.

The only cases that were clearly -- and this goes back to this whole question about whether it is or isn't on the record, but there are Program Fraud Civil Remedies Act cases that potentially could come before the agency. Those require an ALJ and they're clearly on the record, but we haven't had any of those in some time. They tend to come and go rather rapidly.

So, at current, we do not have any ALJs.

In terms of the administrative judges on the panel, we are considered independent as a matter of policy. We're not evaluated.

You will not find that in writing anywhere. It's not in our manual directive. It's not in the regulations. But as a matter of policy, the Commission does not evaluate the administrative judges.

Up until this past year, the chief administrative judge was a member of the SES and was evaluated on management issues.

As it currently stands, I am not a member of the SES, so it's not even clear to me how that is going to play out, but that's a different matter, and I guess I'll find out about that in the near future.

In terms of the selection process -- and in fact, we're going through this right now -- under the management directive that governs the panel, there is a register that's put together of both technical and legal judges, because we do have both, which makes us unique in the Federal Government to some degree.

The process is like any other Federal hiring process in that there are a list of rating factors that are put together, writing samples that are collected.

We're asked to address the rating factors, which deal with things like how much litigation experience do you have, what is your decision-making ability, your writing ability, all those sorts of things that you would expect.

The rating panel consists of myself, the deputy chief administrative judge, a technical, and also an OGC representative, who at this point is the solicitor of the agency.

We go through and rate the candidates. We then send the A candidates to the Commission, and the Commission then selects who they deem appropriate to be an administrative judge.

So, that's basically how the process works, and all that is set out in a management directive that governs the panel's business.

ROISMAN: There used to be an advisory panel, which I gather doesn't exist any longer, on hearing board selections.

It was made up of -- I was on it, there were industry representatives and others on it. ALJs were on it, from other agencies, I think. And that was when the Commission was gearing up. There were quite a few judges who went through that process.

Bob, I just want to separate my view from yours, because I think it's important for us to state them separately.

My feeling about judges is that I've had some terrible judges in my life. Some of them have been appointed to the Federal bench, some have been appointed to the state bench, some have been at the NRC, but in every case, I've always felt like they were judges and that that's just the luck of the draw.

There are terrible jurors out there, you know, and all that sort of stuff.

If the Commission has a process, I would like to see it go back to having an independent advisory panel on appointments, particularly if the number judges and adjudications are going to go up, and I think people can go through that and -- I'm familiar with some of the problems with the ALJs in some of the later Seabrook hearings, but you know that's kind of the -- that's the luck of the draw.

I can imagine some utilities that weren't too happy about some of the administrative law judges that they drew in cases where they didn't like the way those judges were ruling and might have thought that they were all pro-intervenor judges.

But all we can hope for is that there is a selection process and the people who get picked -- that's why I asked the ALJ question.

If people get picked who have a, quote, "judicial temperament," understand the idea of independence, the fact that they bring their own biases to the courtroom to some extent is unavoidable, and there certainly are judges who want to see the train run on time, and they can be really tough on you if you're not ready to board the train when the train's ready to leave the station, but I think all you can have is a good process out there, and I am convinced from what Jeff said that labeling the person an ALJ is neither a guarantee that you'll get a, quote, "good judge" or that you can't get good judges, as long as

they have all the other factors.

CAMERON: Okay. Thanks for that recommendation, also, Tony. Diane?

CURRAN: I just want to make a follow-up question.

I think what you were describing, Judge Bollwerk, was the process for selecting judges for employment, and one of the questions that Bob was raising was how do judges get picked to sit on a particular case. I wonder if you could address that.

BOLLWERK: Basically, that's a matter of the chief administrative judge's discretion, assuming the Commission does not send the case over to us with a particular judge be appointed, which the Commission could do, because they have that authority, as well, but generally, in looking at cases, I try to decide, you know, what is everybody's case load, who's got a heavy case load, who might have a little more time, what the case is going to involve, the usual things that would be involved in making that sort of determination, and then a panel is assigned, and I do the same thing with technical judges, looking at what expertise we need, who's available, what the case is going to involve, those sorts of things.

So, it's, you know, both to match the expertise of the folks we have as well as the workload.

LUBBERS: There is a provision in the APA with respect to administrative law judges that says that administrative law judges shall be assigned to cases in rotation so far as practicable. So, it's supposed to be more random with respect to administrative law judges.

Of course, if you only have one or two in the agency --

BOLLWERK: Well, right now, we only have three legal judges, full-time legal judges, so there's not a lot of randomness there.

Larry Chandler just asked me a question of whether the Commission had ever appointed a presiding officer, and I'm going to -- I

have a recollection -- if I'm wrong, we need to correct it -- that back when dealing with -- what's the reactor up in New York -- in special proceedings, but other than that, I don't think the Commission has ever appointed a specific presiding officer.

Even the most recent sub-part M case that was sent to us, which is one of the ones the Commission has indicated they may doing themselves from time to time, specifically, we were given the opportunity to appoint whoever we felt was the appropriate -- I can't remember exactly how that happened, but there was some consultation about who was available, I know.

CAMERON: Okay. Thanks.

Jay.

SILBERG: Just two points.

First, on the ALJ and the presiding officer, hearing examiner route, I think there are unique reasons why the ALJ process would not work well at the NRC.

One is the fact of the three-member board, which I think has been, over the 30 years or 40 years, it's been a tremendous benefit to the process in coming up with decisions that make substantive sense, and I remember at least being told about what life was like before the technical board members were appointed, that you were getting technical decisions written by lawyers who didn't understand physics.

I remember one case we had where the two technical board members overruled the chairman, who was an ALJ, who could not understand why water would not flow uphill from a cooling reservoir.

So, I think there are unique reasons in the NRC system. In fact, I'm surprised that more agencies haven't gone to a bifurcated or trifurcated hearing process, hearing examiner process, to get the technical input.

We're not the only agency that has heavy technical input

necessary on decisions.

In terms of the neutrality, you know, I understand that there were some cases where people thought that they were being leaned on too much by a particular judge, and it does work both ways.

I think the major problem that I've seen over the years is not with independence, it's not with the label, but there are -- and it is a problem, I think, that is behind a lot of why we're here today.

There are, frankly, some hearing examiners -- and mostly I think it's the chairman's role -- who are good at running hearings, and there are some hearing examiners, the chairman primarily, who are horrible at running hearings, and that's not a problem that's unique to the NRC.

There are certainly, as Tony said, bad judges everywhere.

You can look back at the O.J. Simpson trial as an example of how not to run a trial, and I don't know quite how you can improve that, except if there were perhaps better oversight and some ability to perhaps remove the most offending examples and get rid of the chairman who can't run hearings, I think that would go a long way.

I don't know if any of the people that I used to think of as incapable of running hearings are still on the panels or not, and I wouldn't address that in any event, but I think if you had hearing boards that could efficiently run the process, keep the trains moving, and get on-board or be left behind, I think a lot of the problems that we're talking about here today would simply disappear, because we would, from the industry side, be satisfied knowing that there's a process that moves along in a timely way.

The decision will come out how the decision will come out, and I think, with the kind of technical boards and chairman who can evaluate the evidence and make a determination on the record, they will get their shot at having the decision come out as the record determines.

I think, if you could somehow guarantee that, we wouldn't need all this stuff. The problem is you can't guarantee it, and therefore, what do we do procedure-wise to improve the process?

CAMERON: Okay. And I think you're bringing up the case management issue, and when we get further along this afternoon, when we identify concerns and problems and underlying causes, case management may perhaps be a fix for some of those.

It will be interesting to see what types of agreement we get on those types of fixes.

Would you agree with Tony on the -- re-instituting the advisory committee, assuming that there is a need in terms of new hires?

SILBERG: I don't know that I would. I know some of the people that were appointed. I remember one particular case where my partner, who was on that committee, came back and was all excited that the particular candidate that he thought was great was going to get on, and in hindsight, that turned out to be not such a great evaluation.

I'm happy to let it go with Judge Bollwerk and his cohorts and John Cordes. I don't know it's worked. I don't think there's the need for the massive infusion of new members that I think was one of the factors behind setting up the advisory panel.

CAMERON: Bob.

BACKUS: Tony's absolutely right. You can get bad judges anywhere, in state court, Federal court, at the NRC, EPA, anywhere, and sometimes that is just the luck of the draw.

The problem we had with the Seabrook case was that it was not perceived to be just the luck of the draw. We had one example of a presiding officer, the lawyer member of the board, the chairman of the board -- all of the sudden, one day, about 90 percent of the way through the proceeding, he up and left with no notice, and the next day -- Tony remembers this well, too -- a new presiding officer came in, and within

a day, we knew we had no chance, and there was never an explanation of how he got picked and put in there at that point, and so, I think if the system is fine -- this is maybe a public relations with the agency -- it's got to explain to the people, these people don't spring full-blown from the head of Zeus, they have gone through a process, they are legitimate and they are neutral, and here's the reason you can believe that.

CAMERON: Okay. Thank you, Bob. That was a useful discussion on judges.

I had just one question for Jeff before he sits down.

Your chart that you had, the Verkail chart, is mainly a horizontal estimate, and I take it that, if you look down vertically through all of these procedural ingredients, that there would be some programs that had all of these ingredients, and I guess my point is that some of these ingredients people would associate more with what people call formal versus informal.

So, going to Mal's point about the usefulness of using these labels --

LUBBERS: Eight of them had at least eight of the procedures. Two had all had 10, four had nine, two had eight.

CAMERON: All right.

LUBBERS: It's all in that article.

CAMERON: Okay. Thank you.

It's almost 12:30, and I thought what I could do is go and type this up and give everybody a sheet so that we could come back and discuss this after lunch and then start to go through some of the concerns or problems that you see with the hearing process, what the underlying cause of that might be, and then we can circle back and try to see what fixes are possible.

Does that sound reasonable to everybody to proceed that way?

Paul, do you have a comment?

BOLLWERK: Just one other thing for the record. If anybody wants to know about the status of administrative judges, John Frye, who used to be a licensing board member several years ago wrote an extensive article about administrative judges and how they are picked, and it goes into quite an extensive discussion about it, and that's certainly out there, if you're interested in that.

CAMERON: Okay. Thanks for that, Paul.

Why don't we take a break for lunch?

There's a cafeteria out here that I think most of you saw. There's also a larger cafeteria over in the other building, through the walkway.

There's a gourmet food store called Eatzies next door that is pretty accessible and quick, and there are some other restaurants around, but why don't we be back by 1:30?

[Whereupon, at 12:30 p.m., the meeting was recessed, to reconvene at 1:30 p.m., this same day.]

A F T E R N O O N S E S S I O N

[1:43 p.m.]

CAMERON: Welcome back.

I passed two things out to you.

One is a -- I think we could call it a straw-man rather than a proposal, right, Ellen? But this is an attempt to at least set a -- sort of define the objectives of the NRC hearing process.

I want to talk about that, and you each have a copy of that, and what I'll do is I'll mark this copy up here, and we'll see where we end up with that.

What I thought it might be instructive to do, then, is to see if we can just brainstorm some concerns, problems that you see with the hearing process, and identify some underlying causes.

People might agree on the concern or the problem, disagree on what the underlying cause is, but we can at least start to go through that, and at some point, either this afternoon or tomorrow, we can talk about what are the fixes for these problems.

Is it a case management fix, or is it something else?

We're going to be sort of walking through the grand solution that Bob brought up this morning, and we will get to this second part of the equation, which is the resources issue, also, and we also want to revisit at some time Tony Roisman's suggestion of the careful evaluation of actual cases to see what worked, what didn't work. So, we don't want to lose sight of that.

The other thing, speaking of case management, Jeff Lubbers pointed out to me that, in the Administrative Conference of the United States, there was a recommendation on case management as a tool for improving agency allocation.

You each have a copy of that, and if we get to the -- when we get to case management, I think that Judge Heifetz probably wants to

put a little bit of grains of salt on this recommendation.

LUBBERS: So do I.

CAMERON: Maybe everybody will, but at any rate, that's what you have.

Any questions or comments about how we're going to proceed for this afternoon?

[No response.]

CAMERON: Okay.

You all have the draft objective, and I broke it down into a couple of different parts, instead of writing it in one paragraph, because I think that that will help us to go through that.

No one probably has a problem with the objective of the NRC hearing process, but Ellen, do you want to say anything about this before we start to go through it in terms of why you believe it's important to arrive at a common understanding of what the objective is?

You don't need to, I just wanted to give you that opportunity.

GINSBERG: I appreciate the opportunity.

I think what we were trying to do was, for ourselves, try and articulate what we thought the process ought to be in terms of its objective in order to come up with some constructive suggestions, and it seemed to us that, to come up with a list of concerns and then immediate fixes to those concerns, was to go way too quickly to that process without at least identifying for ourselves what we wanted to achieve in the big picture, and that's why we rolled to this kind of broad statement of what we think is an appropriate objective.

CAMERON: Okay.

So, I think what you're saying is that, when we get to this next step of identifying concerns, underlying causes, alternatives for fixing those, that we should all be checking back into our objectives,

assuming that we can get somewhere on that.

Mal?

MURPHY: I'm sure this was inadvertent, but the NRC staff didn't mean to leave out the parties, did they, provide a fair opportunity for the parties and interested members of the public?

CAMERON: This is not the NRC staff.

SILBERG: I read that as meaning parties were a sub-group within the interested members of the public.

MURPHY: I thought you read it mean that you didn't have any damn rights at all, Silberg, only the public did.

SILBERG: Me personally?

CAMERON: Okay.

We're into the first bullet here. Mal brought up, is "interested members of the public" a term that includes parties, or does that need to be specified out?

Mal?

MURPHY: It doesn't to me.

CAMERON: Just causing trouble here.

MURPHY: No. I think, traditionally, most lay readers, most people who aren't sitting at this table take that terminology to mean -- "interested members of the public" to mean those people other than the applicant, the government, etcetera, and I think that's true in any administrative hearing process or licensing process, not just before the NRC.

If you're going to license a barbershop and you're talking about the interested members of the public, I think most people assume you aren't talking about the barber.

ROISMAN: Why don't you use your standing language?

CAMERON: Ellen, let me check back with you. Comment on that?

GINSBERG: Tony's suggestion is --

CAMERON: The suggestion is to provide a fair opportunity for -- and the exact language is --

GINSBERG: -- interested persons?

ROISMAN: Anybody who would have standing. Of course, that would include the applicant, would include the ACRS.

GINSBERG: We've got regulations on the books as we speak. So, I think we're talking about, within that context, persons, I think, would be acceptable.

CAMERON: What is it, Tony?

ROISMAN: The language of the statute Paul points out is any person whose interest may be affected by the proceeding.

CAMERON: Does anybody have any problem with that substitution, any person whose interest may be affected by the proceeding? Keep in mind -- you know, I don't want to put too fine a point on this. This is not necessarily something that we're drafting for any publication or anything like that.

It's trying to get a common understanding around the table about objective, and indeed, there may be more user-friendly ways to say some of this stuff.

Steve?

KOHN: I'm not quite sure what the goal is in terms of this objective or preamble, but I'm just going to throw out a couple of things -- and I don't even think -- you know, we can sit around and debate it, but the word "fair," I think is loaded, because the word "raise," "efficiently," and "supportable" -- and I'll just start from the top.

"Fair." Does "fair" mean cross-examination and the trappings of due process essential to reach a sound scientific decision, or is "fair" allowing us to chat?

"Efficiently." Does "efficient" mean the time necessary for world-class experts to carefully review extremely complex scientific issues, or does "efficiently" mean an arbitrary deadline and run?

"Supportable." Does "supportable" mean the best science, or does "supportable" mean get a C, kick it to the next phase, and that's really, I think, what we're actually debating here, because if you downgrade this process, you'll get the low road.

If you upgrade it, you may get the best science, and I just want to just put forward -- I'm representing a great scientist at EPA, not through the Whistle-Blower Center but in a personal capacity, how has just pounded into me the importance of good, sound science, and unless an adjudicatory process that deals with extremely technical and important issues can bring that fundamental concern of good science into the adjudicatory process, I think in the next phase of licensing process, we're out of it.

So, I'd like to see the word in here "good science, world-class."

CAMERON: I'm going to make a note of "good science, world-class," but the question I had for you is, although it's very important to define what "fair," for example, means, do you need to define that before you would say that that was -- that that's an objective of the hearing process?

In other words, would you want to debate whether a fair opportunity should be an objective of the hearing process?

KOHN: I think the bottom line is fair may not be good enough. It depends on how you define it, but fair in the context of atomic energy and the scientific issues it raises -- and I say this from a lot of my clients who are experts in nuclear power -- fair or do you want excellent? Do you want C or do you want A?

CAMERON: Okay.

Joe?

GRAY: I think the reference to fair is a reference to just, not moderate, fair, or excellent.

As you've stated it, you can define away the problem or define into the thing, the problem, by talking about fair as meaning the right to cross examination, the right to extensive discovery, the right to funding for all parties so that they can come up with expert witnesses and whatnot.

I don't think that is the -- I don't think the real intent here is to define fair at the beginning in such a way as to assume away the problem.

CAMERON: Okay. Thanks, Joe.

Let's go to George and then Susan and then we'll come over to Bob.

George?

EDGAR: I'll beg your indulgence first, because I missed a significant portion of the morning, and if I am on the wrong step, tell me, but before we get to an argument about what the adjectives are, does this objective define what we want the hearing process to do?

Tony will remember that, in '82, we went through a re-examination of the hearing process, and there's a fundamental question about what do you want it to do, what's its purpose?

Are you trying to resolve disputes, are you trying to educate the public, are you trying to inform the staff, or all of the above? What's your underlying purposes here?

Once you define that, a lot of other segments of the hearing process then have to be defined in different ways.

I'm assuming from this definition that the purpose here is dispute resolution. Is that a fundamental on which everyone agrees?

GINSBERG: George, you missed this early part of the

discussion. I proposed this just as an example of what we kicked about in discussions we've had as a way of preparing for this meeting, and Chip chose to use it as a straw-man so that we could get the discussion going.

But this is not a group effort. This was something that we had prepared, that I brought with me and used as an example of trying to focus on the objective, as you say, of what the hearing process is intended to do, rather than to try and fix ills that people identify before we've identified the objective.

CAMERON: Does anybody have a comment on George's three possible purposes, or George, do you want to say some more? Go ahead?

EDGAR: What is the hearing process for? Is it to resolve disputes raised by the parties? Is it to educate the public? Is it to inform the staff, who's the ultimate decision-maker or the person who issues the license, or all of the above? And it makes a difference than how you set the process in motion, depending upon what you choose for a purpose, and all I'm saying is that there isn't a crisp definition of why we're here within this. It's implied, I think.

I think what's implied in this statement is disputes resolution.

CAMERON: Larry, do you want to comment on that?

CHANDLER: Given the basic structure of, certainly, current practice, I think the emphasis would be on dispute resolution.

By its very nature, the issues that are brought before any of the Commission's tribunals in this regard, but for the mandatory hearings and construction permits, are confined to issues in controversy.

So, in terms of education of the public, certainly, and to an extent, as well, the staff, the airing of issues will be limited to those which are admitted as contentions or areas of concern or whatever.

So, its primary focus, I would think, would have to be in terms of dispute resolution.

CAMERON: In that context, George, do you have any comments on the straw-man objective up there at all at this point?

EDGAR: Well, I would reverse the logic and describe the objective of the process as to provide an efficient and effective mechanism for resolution of disputes placed in controversy by the parties.

CAMERON: Okay.

Susan?

HIATT: I think I could support that definition, but I think what's going to happen is people are going to start quibbling about definitions, like what do you mean by fair, and I wonder if the industry would support the outcome in a particular case if the legally and technically supportable substantive conclusion is denial of the license, or does that particular example then get paraded out as an example of how the process doesn't work and it's not fair?

CAMERON: Could we have some comments on that? And I'm hoping that -- this audio system here is not working as well as it should, I don't think, and I don't know if everybody heard Susan on that, but Ellen, did you have a response or a question for Susan?

GINSBERG: Yeah. The industry's objective is not to have a preordained outcome. I think we need to set that out at the outset here.

The industry believes that it submits applications that are subjected to scrutiny by interested parties and the staff, they address the questions, to the extent that they are brought to their attention through this process, and then the result is what the result is.

You know, we talked before about the decision-makers have separation or independence from the agency staff itself. We do not

believe that this process is designed to preordain the outcome, and we're not looking for that result.

We are looking for a fair, efficient, timely, legally and technically supportable results, and that's what the process we're looking for -- those would be the features of the process we're looking for.

HIATT: Well if I could follow up, could I have like a guarantee here that, if we have a process and a system where the license gets denied, you won't be going back to Congress and say you've got to change that Atomic Energy Act?

RICCIO: That's one-step licensing.

GINSBERG: Obviously, that's a question that I think is not going to be fruitful to discuss here.

CAMERON: Okay.

Jim and then Bob Backus.

RICCIO: I just wanted to address George's question of why we're really here. We're here because the Senate oversight committee was given the impression by the industry that the hearing process was unnecessarily burdening them in getting done what they wanted to do, and they marched out the LES case and they marched out the Vogtle case, and that's why we're here today discussing this, and as much as I don't want to -- I respect what you have to say, but the reality is, when we had a legitimate process for license renewal and we showed a non-biased judge that not only should Yankee Rowe not have been operating into the future, they shouldn't have been operating in the present, that the license was basically -- you guys came back in and you rewrote the rules for license renewal, and now Steve has to basically battle to get any contentions in in court.

So, when we're here talking about what are we really here doing, we're here basically answering the chain that was pulled on NRC

for having half its budget cut.

You know NRC was threatened with having half its budget cut by the Senate oversight committee, and that's why we're here, and you know, as much as I think the process doesn't work, it's not because the process was set up improperly.

CAMERON: Okay.

Jim, you're going to get a chance to put some of those reasons for why you think it doesn't work on the board here as soon as we're done with this topic, which is probably going to be sooner rather than later.

Bob?

BACKUS: To get back to what George said about the goals, I would certainly agree that the primary goal of the hearing process and certainly the adjudicatory process is dispute resolution. I don't think that's the only goal.

I think another part of the goal is to assure the public and have the public perceive that they have a meaningful opportunity for participation.

I know there's other avenues for participation, but I think this is an important one, and I think that's part of the goals, and in that regard, I think there's something missing between the first and second clauses that were proposed here, and that is not only should the public have a fair -- or the persons whose interest may be affected have an opportunity to raise issues, but they also should provide that those issues will be neutrally addressed and -- neutrally and objectively assessed and addressed. That's what I think is missing.

It's not just -- we don't want to just have an opportunity to get up and have our say and be told thank you for your participation and you're gone; we want to have the issues properly resolved through the process that we agree should be used.

CAMERON: I guess that we could accomplish that by inserting something in here for the NRC to objectively and independently -- objectively, independently, and efficiently reach legally?

BACKUS: Address those issues in an objective and independent manner, yes.

CAMERON: All right.

Tony?

ROISMAN: I agree with Bob. I think the second purpose of this is to do it in a manner that makes the decisions acceptable.

I mean it would be unacceptable for all of us if you went through all of this and then people started tearing down nuclear reactor buildings because they didn't believe the process had been fair enough and they didn't think that they had a chance to participate.

But I think there's another objective which wouldn't apply if this were not nuclear power plants, and that is the objective is to get it right, because the price of getting it wrong is too high, and so, although I think I like the idea of us looking at these bullet by bullet, I think "supportable" is not the word.

It's not is it supportable? That says there's a range of decisions that you could reach, all of which are okay and one of which might include TMI's accident, and I think that's wrong.

I mean it may happen, but I guess I sort of have a Rickover view of the licensing process. It should have as its goal zero tolerance.

The goal of the process should be to never make a mistake on these kinds of issues, because I don't think there's room in this technology for that, and I think one of the flaws in the industry's ability to make the public accept nuclear power sort of outside the hearing process is the perception that they somehow or another could tolerate, and after TMI, a lot of people would have said, well, that's

the end of nuclear power, and a lot of people did say, oh, that's the end of nuclear power, but they still operate and they still want to be relicensed, etcetera, etcetera.

So, the public has got to come to a realization and the process has to be altered so that the end result is that there is as high a probability as possible that you could come to the right decision, and those of you concerned with waste disposal, I think it's even -- the burden is even higher on you than it is on operating nuclear plants, because that's really where the crunch is coming. That's what people are concerned with.

Now, we could have without -- you know, we wouldn't have enough time if we started now and went through the end of tomorrow to discuss the issue of risk perception, but the truth is that a technology that has a low probability, high consequence, which provides marginally very little additional benefit to the people who are in that range, that may suffer the adverse risk, has a very hard row to hoe, and the way for that kind of a technology to make it in a democratic society is to set the bar for itself very high.

So, I would not -- when we get down to -- I don't know whether --

CAMERON: I'd put "correct" for now as sort of a placeholder on that.

ROISMAN: So, that would be a third purpose that would come in, in addition to the purpose that Bob added about just sort of public acceptability of the process.

CAMERON: All right. Get it right.

ROISMAN: Yeah. Set it as your goal to get it right.

CAMERON: Larry, do you want to comment?

CHANDLER: Yeah. A couple of points, if I might.

I couldn't agree more that -- although my answer to George

before was that the principle purpose here of adjudications is dispute resolution, there has to be public confidence in the process, the integrity of the process to reach sound decisions.

On the other hand -- and Steve Kohn made some comments earlier this morning about it, in reaction to what Tony was just talking about -- I have a concern that we not sort of superimpose through the adjudicatory hearing process substantive standards that differ from those that are found in the Commission's substantive regulations.

The fundamental safety standards objectives are those set forth in Part 50 for reactors. We're not only talking reactors.

We're talking about procedures here that will have application beyond just reactors. We'll be talking about materials licenses, waste, the panoply of different activities in which we engage.

There are our fundamental evidentiary standards that we've long accepted and the judicial process accepts as sufficient, and while we may talk, you know, world class and zero tolerance, there are standards set by statute, there are standards set by the Commission's regulations, in its substantive regulations, that we ought not be tinkering with when we consider how the hearing process ought to be made as defensible and as well-structured as possible to fit the needs and objectives of all participants, any person whose interest may be affected.

Just an observation.

Going back to the structure, maybe looking a step ahead of where we were in our conversation, what I was going to suggest when we look at these several bullets, these three pieces, is perhaps thinking about the process in terms of the process.

Namely, when you go through, however we wish to phrase, to provide a fair opportunity, etcetera, what we're looking at is several different stages of a process.

Translation: What does it take, what should it take for any interested person to participate? Standing, contentions, those kinds of issues. The intervention process.

Next you get into a pre-hearing process to raise well-defined issues that are within the scope.

Fair has implications on both sides. Fair is sort of the equity, the point that Joe Gray was alluding to before, an equitable opportunity to participate.

It also implicates some of the concerns that Tony and Bob Backus were talking about earlier in terms of funding.

So, if you look, you can structure concerns relative to various stages of the process that might help frame a discussion for what we currently have on the books by way of process and what we might think of in terms of changes, if appropriate, to that -- to improve upon the process.

Is it broke? What needs to be fixed? What are the kind of fixes?

CAMERON: Okay. I think we're going to get to that, what is broke, but you're taking us to the matrix.

CHANDLER: Yeah.

CAMERON: Okay.

Joe?

GRAY: I just wanted to follow up on what Tony Roisman said. I really think that, beyond simple dispute resolution and ideas of public confidence, the real fundamental goal ought to be to generate a sound record on which an accurate decision can be made on issues in dispute, and I can't conceive of another goal that would take precedence over that.

CAMERON: Tony, do you have any problems with sound record to make an accurate decision? I'm sorry I'm not getting all this up

here.

ROISMAN: In the abstract, no, but I've tried to follow your bullets. I haven't gotten to even bullet number two, which it seems to me raise well-defined issues is only half of it -- raise and effectively pursue.

CAMERON: Okay.

ROISMAN: And here, I'm using "effectively" the way I think everybody has used that phrase when they talked about an effective system.

Effectively, that is fully ventilate. You don't have an issue which doesn't get adequately pursued, and because it wasn't adequately pursued, as Larry points out, the Commission has rules and there are burdens of proof and so forth.

Someone raises a perfectly legitimate point, but they're not able to make the full record on it, so they lose on the burden of proof, but the point is still just as good as it was, but they didn't have the time to get the issue fully developed.

So, I don't know whether it's a sound record. Complete record, from my perspective, might be better.

CAMERON: Okay. And I think what you're doing is putting sort of a gloss on fair a la what Steve was talking about, in a sense. "Effectively pursue" would be an aspect of fairness, I would imagine.

ROISMAN: The reason I like this -- and maybe fair and meaningful might be a good way to flesh that out, but the reason I like the way you wrote the bullet up is I like that word "opportunity," because that's sort of the starting point.

We'd all agree that if you put a licensing notice in the Federal Register on a Monday and you had to have your contentions in by Tuesday, that no one would say you had a fair opportunity.

You could have all the funding in the world you wanted; you

could have the best experts in the world. Between Monday and Tuesday, you couldn't get them.

So, opportunity carries a certain connotation.

The second paragraph, I think, or the second bullet, deals with sort of the substantive processes, and the third bullet deals with the consequences of doing that.

First, you've got a fair change, then you get this record fully developed and you both raise and develop the issues, and then you get a result. At least that's how I saw it.

CAMERON: Hopefully the right one.

ROISMAN: Right. Yes, hopefully the right one.

CAMERON: Okay. Thank you.

Mike, did you want to say something?

McGARRY: I agree with Larry. Larry made the point I was going to.

CAMERON: Okay.

Jay?

SILBERG: One thing I think we tend to be losing track of is that the hearing process is not the major route for NRC to make a determination an activity is safe.

We've totally disregarded the fact that, before you get into the hearing process, except in the enforcement arena, there has been a very thorough soup-to-nuts review. Some people will say the standards are wrong, some people will say the staff doesn't do a good job, but there is a staff review Congress has chartered that agency as doing it right, and there are mechanisms to correct that if it's not done right.

The public acceptability issue, I think you're putting too big a burden on the hearing process. Public acceptability of nuclear power is something -- Congress has made at least the initial decision. It ought not to be up to a licensing board to make publicly acceptable

nuclear power.

There has been a governmental decision that it's determined to be safe, and if it's determined to be environmentally acceptable, then nuclear power is entitled to have its place in the sun, and I think, for us to look at the hearing process as the sole mechanism for assuring public acceptability or even a significant method for assuring public acceptability is really to put a shoe on a different horse.

The issue is, when people come in and they are unhappy with the folks that Congress has chartered as having primary responsibility to carry out the safety review, how do we assure that those folks are given a fair opportunity to bring issues to the fore and have those issues determined, but it is not to determine whether nuclear power is or is not the thing that our society should have.

CAMERON: I'm not sure -- Tony, you can correct me on this.

I wasn't sure that -- "public acceptance" may be the wrong term. I thought that this point was going towards public confidence that the correct decision was made because of other attributes to the process. Is that what you meant, rather than public acceptance of nuclear power?

ROISMAN: I think that's fair, but I don't agree with Jay's perception of what the Congress has done.

To begin with, in all deference to the Congress, I don't think there's a member of Congress that has the foggiest idea what's involved in either building, operating, or using a nuclear power plant.

So, if we were to defer to their judgement that authorizing the licensing of the plants they'd somehow or another made them publicly acceptable, we would be making a huge mistake, and the existence of the Commission and all of its staff and all of the people who work in it is evidence of the fact that the Congress at least leaves open, I would hope, equally the possibility that there would never be a nuclear power

plant, as well as a possibility that there would be that once dreamed of thousand nuclear power plants, and that this whole process was designed for Congress to say you guys figure it out and we'll go along with you.

If you say one's okay, then it's okay. If you say it's not okay, then it's not okay.

SILBERG: And that's what I said, if they meet the standards, if they meet the safety requirement, then it ought to go ahead. That is the function, primarily, of the staff's review.

ROISMAN: Right, but --

SILBERG: This hearing process is a check, if you will, on that, and it is not to supersede it.

ROISMAN: But we can't lose track of the fact that a significant reason why nuclear power is currently in all the trouble that it's in is the issue of public acceptability.

So, all those things may be true, and as a lawyer, I think I agree with you. The process is there; you go through the process.

The truth is that the thing that is crippling the nuclear industry and has at least since TMI, if not before that, is that the public doesn't have any confidence in this technology, and if the public had confidence in it, it would be like licensing airplanes.

CAMERON: Okay.

Let's go to Tony. He's had his card up for a while, and then Bob, and then we'll come back to Larry and then Ellen, and Mal, and then I think we may try to conclude this and go on to identifying some concerns and problems.

Tony.

THOMPSON: I think I agree with something that Larry said. We're dealing here with more than just reactors when we talk about the hearing process, and we are dealing with standards that the licensee and the affected or interested members of the public have to deal with.

For example, uranium mill tailings -- standards were created by EPA, and NRC had to conform its standards, and the standard for site closure is 1,000 years without active maintenance.

Now, I can tell you that industry went into the rule-making and litigated and lost on the fact that you can't be anywhere -- any kind of sure that you can go for 1,000 years without active maintenance, but that's the standard. So, now we have to live with that.

Now, the standard that you apply to determining whether something's going to last a thousand years without active maintenance is reasonable assurance, because you're talking about probabilities over a long period of time.

So, the question is how does risk information about the subject of the license play into the hearing process? Do you require the same level of scrutiny? Do you require the same kinds of zero tolerance for something that is essentially low-risk and low-probability?

And that's a question that we haven't addressed because we're all talking about reactors, but there are licenses and license practices within the ambit of the Atomic Energy Act, NRC, that are relatively low-risk and low-probability, and so, you have to recognize the hearing process, seems to me, to be efficient, has to deal with that and recognize that.

CAMERON: Okay. That's getting us into this idea of are there certain licensed activities or activities to be licensed that should have a particular process associated with it, which hopefully we'll get to tomorrow.

Bob?

BACKUS: Jay's comment led me back to the issue of a grand bargain, one part of which I think could involve the Atomic Energy Act. Jay is perfectly correct. The Atomic Energy Act said that this

technology should be supported and advanced.

Of course, that act was passed before any commercial reactor was in operation, before TMI, before Chernobyl. God knows it was before we had electric deregulation when all the electric generators are supposed to be competing in the marketplace.

I wonder what the industry would think if we gave them something like deadlines on proceedings, and in return, when the Commission sends its legislative package to Congress, it includes repeal of the promotional language in the Atomic Energy Act.

I think the Commission may have some influence with language that Congress considers.

CAMERON: Okay.

Tony, do you want to put that on the record?

THOMPSON: I would just say that the Commission has to take any legislation to Congress. It's got to go through OMB, first of all, and second of all, the promotional responsibilities under the Atomic Energy Act were separated from the Commission in 1974 and given to ERTA and later to DOE.

Now, you can argue that the Commission looks favorably on licensing activities, if you want, but there's no formal statutory basis for them promoting atomic energy.

CAMERON: Okay. Thanks, Tony.

Let's hear from Mal and then Larry and close up with Susan and see if anybody out there in the audience has something to say, and we'll go to Ellen, too.

Mal?

MURPHY: Yeah. Tony Roisman covered most of the point I was going to make, and that is, from Jay's points for discussion, I think what this language should be referring to and what we should be talking about here for the next day-and-a-half is the public acceptance or

public confidence in the particular decision which results from the hearing, not public acceptance of nuclear power in general or, in my case, public acceptance of deep geologic disposal, but is the public confident that this decision is at least arguably correct, and I disagree with Jay in that the way the hearing is conducted, openness, inclusiveness, fairness, however you want to define it, etcetera, I think is absolutely critical to that.

I mean without a full, open, all-inclusive, complete, fair, etcetera, hearing using all or most of, I think, the traditional panoply of hearing tools, I think there's very little chance that the public would -- or at least a large segment of the public would ever have confidence in the case of the high-level waste repository that the decision was correct.

So, it seems to me that's a fundamental aspect or attribute of the hearing process.

CAMERON: It may be different for the type of facility that Tony Thompson is talking about, but we need to talk about that.

MURPHY: I think the public acceptance, public confidence is very, very important, at least in terms of the nuclear waste side of this.

CAMERON: And the question is what gives the public confidence? What needs to be in the hearing process to give the public confidence of that?

Larry and then Susan and the last comment from Jim.

Ellen, you're done, right?

GINSBERG: Well every time I think I have something to say, someone else either addresses it or -- so, I'll wait.

CAMERON: We planned that.

Larry.

CHANDLER: Having circled the word "supportable" before and

inserted the word "correct," I'd suggest using the word "sound" as an alternative, reach legally and technically sound substantive conclusions.

CAMERON: All right.

We plan to send this chart up to the Commission.

CHANDLER: With arrows, I hope.

I wanted to pick up on a point that Jay made, and it's a little concern I would have.

I think the opportunity for hearings is not to focus on whether -- provide an opportunity for anyone to question the staff's -- the soundness of the staff's activities.

The opportunity is there to challenge the sufficiency of the application that's before the Commission, not the staff's review of that.

CAMERON: Okay.

Susan.

HIATT: I just wanted to make a comment about the promotional language in the Atomic Energy Act.

I can recall an ACRS letter report issued around the mid-'80s that went something to the effect that, well, you know, you have this population of reactors and accidents will happen and people will die and that will be a tragedy, not because people would die but because the resulting lack of public confidence in nuclear power would frustrate the congressional intention.

So, maybe there is some connection here with what the supposedly neutral regulator does.

CAMERON: So, you're suggesting that, even though the promotional language in the Atomic Energy Act may apply to another agency, that occasionally either the advisory committee or someone else connected to the Commission may give people the perception that we're

still promoting.

HIATT: That's correct.

CAMERON: All right.

Jim?

RICCIO: We've heard from different ends of the table that public confidence is important. I just want to draw us back to the reason, again, why we're here.

I fail to see how circumscribing our rights to cross-examination and discovery is going to enhance public confidence in either the repository or the closure of a uranium mine or the further operation of a nuclear power plant, and not to harken back to the SRM, but you know, the Commission has already set out its direction.

You know, they want to dual track legislation and rule change. They want to circumscribe the rights of the public.

So, this talk about, you know, wouldn't it be nice to have a hearing process that would make us believe in nuclear power is a bit off the beaten track, and as much as I like Bob's idea of a grand bargain, I have very little confidence that, once that grand bargain is sent up to the Congress, that we're not just going to see another instance where the public's rights are shunted aside in order to provide the industry with reliability in the licensing process.

CAMERON: Let me try to put a little context on the grand bargain, as Bob termed it.

It may be that that grand bargain, if, indeed, such a bargain was arrived at, that there may not be any need for any legislative blessing, okay?

The second part of the equation on resources, depending on how that was done, that may need some sort of legislative blessing, but it doesn't necessarily need to be a bargain that would need to go to the Congress.

I thought you were going to say whether the Commission -- if this group ever arrived at that, whether it would be something acceptable to the Commission.

Ellen?

GINSBERG: There were two points that I think need to be made, because we talk a lot about the industry, and there are people speaking for the industry, and I feel obligated to make sure I put on the record what I think the industry's view on some of these issues are.

I think, for sure, the industry believes that a very critical aspect, critical objective of this process is to generate a sound record on which an accurate decision can be made.

Tony made that point earlier. We can use a whole host of different words to craft that concept, and whatever words we use, I think that's the concept that -- that is where the industry is driving. So, that's one point.

With respect to the promotional issue, I think it's important -- and I have a personal experience, working as a law clerk, right out of law school, for the licensing board, and I can assure you that, when we looked at these controversial cases -- and it was more dinners and more late nights than I care to mention -- never was the issue of promoting the industry -- at that point, I barely understood what the industry was -- was that an issue. That just wasn't the issue.

They sat around, they looked at the piping issues, they looked at the feedwater issues. Whatever the issue was, that was the subject of discussion.

I just think it's important to give you that insight. At least that was my experience, and I think it's an important set of facts to bear in mind. Paul can talk to the same issue if he chooses.

CAMERON: Okay.

And Paul, do you want to add anything?

Oh, Jill, I'm sorry. Go ahead.

ZAMEK: I'm concerned about all the attention that's being placed on public perception, because I don't think that that really has a role in the hearing process and why we're here discussing what's going to change, because when I go to intervene with my -- against the nuclear power plant in my back yard, I'm not really concerned about public perception of nuclear power or any of that.

What I'm interested in is public safety, my safety, my family's safety, and nobody's talking about that, ensuring public safety, which is supposed to be what this is all about.

CAMERON: I would hope that we could -- there's probably a better way along those lines to say it -- a technically sound correct decision, Tony Roisman's get it right, is that translates into it would be safe. Is that right?

ROISMAN: Right.

CAMERON: Okay.

THOMPSON: You're talking about developing an adequate record to make a sound decision that assures protection of public health and safety. I agree. That's the end result. That's the goal.

ZAMEK: Public perception should not be an issue here.

THOMPSON: Because the public might perceive something as safe and it's not or the public might perceive something as not safe and it is, and the decision is supposed to be based on the compliance with the regulations, the technical components, and that assure adequate protection of public health and safety.

CAMERON: So, perception doesn't have any --

ZAMEK: -- bearing on the hearing process.

CAMERON: Okay.

One more comment and then I'm going to go back to Jill and Diane on something.

MURPHY: I beg to differ. In my case, at least, public perception has an enormous amount to do with it. One of the things that the people of Nye County, Nevada, for example, are concerned about is how the public and the rest of the country and the rest of the world is going to view this repository having -- what effect it's going to have on their land.

Out in the Amargosa Valley -- you've been there, Chip -- is the largest dairy in the State of Nevada, which the Department of Energy, incidentally, forgets to even mention in the draft EIS, but that's okay.

How the people in Los Angeles who buy milk perceive the safety decision made by an Atomic Safety and Licensing Board on licensing the Yucca Mountain repository is very important to the people who run that dairy, not just have they complied with the Atomic Energy Act standard of protecting to the public health and safety, but to the people who buy the milk that that dairy produces or the people in Los Angeles who buy the hay that's produced by the Amargosa farms -- are they confident that this decision is the correct one?

That's very important to the people who live in that valley.

CAMERON: Yes, it is. Are you going back to the public confidence as the bottom line?

MURPHY: It's a very integral, inseparable part of the hearing process. The public -- it seems to me that the Commission has to construct -- not to say that they don't have one already. I mean I'm not conceding that there's in any way any need to change the process you already have, but the Commission has to have in place a process which will not only allow for the -- not only allow the agency to arrive at the correct decision with respect to public health and safety but allow the public to feel, to believe, to have confidence in the fact that they have, indeed, arrived at the correct decision with respect to public

health and safety.

There should be more than one objective. One is to license the power plant, if, indeed, it is safe, and the second is not to make people feel uncomfortable about it, if that's possible.

It seems to me that that's unavoidable, and if you have a hearing process which makes a correct decision from the point of view of the physics involved but scares the bejesus out of everybody within 100 miles, there's something wrong with that process.

CAMERON: Okay. That's an interesting thought to try to figure out how to deal with.

Jill, do you have a comment on that?

ZAMEK: When I think of public perception and persuading people to think a certain way, I think of propaganda, and that's where I don't want to head, you know, with all the focus on what the public thinks, you know, brush over the real issues so that they feel good about this.

CAMERON: I think that perhaps you and Mal are using public perception in perhaps two different ways. You're thinking about it as the spin, propaganda.

MURPHY: I'm thinking about it in terms of can we cross examine their scientists, for example.

McGARRY: Isn't public perception, at least in the sense that Mal is using it, the outgrowth of a fair and meaningful opportunity, some of the words Tony used, a sound and correct record that objectively and independently and efficiently examines the issue? I think that's the natural outgrowth.

CAMERON: That's what I would have thought would go to your point, Mal, and I didn't know whether you had any other suggestions that you could have a sound, etcetera, etcetera, decision but still not have a -- not scare the bejesus out of everybody.

MURPHY: Well, you could. I mean you could make a decision behind closed doors. You could pull the curtains and turn off the lights and arrive at the correct scientific decision.

CAMERON: Okay. So, there's the transparency, etcetera, etcetera.

MURPHY: Mike put his finger on it. If you get the fair and -- you know, the words "opportunity," the words "fairness," etcetera, all connote at least having a process which does not inhibit the public arriving at some confidence that that particular decision is correct based on some science or however you want to phrase it.

CAMERON: Jill, you wouldn't disagree with that statement, would you, that Mal just made?

Tony, one last comment and let's go to the next part of this.

ROISMAN: I was just going to talk about the public perception question, because I think it does fit into an important difference and a point that Tony was making about different kind of proceedings and we look at them different kinds of ways.

I was at the Natural Resources Defense Counsel when they split with the intervenor, Nuclear Community, and I still believe in the position that we took, which was that, when it came to high-level nuclear waste disposal, that issue was too important to allow it to be some political -- the people who didn't want to see more nuclear power plants believed that, if we pushed on that issue, making it as political as possible, it would become a clog in the nuclear reactor pipe, and as a result, nuclear reactors would have to be shut down because there was no waste disposal solution, and the position that NRDC took on that, Tom Cochran and I, when I was there in the organization, was that, on the issue of nuclear waste disposal, we already had it.

Even if we didn't have a single operating nuclear reactor in

the country, we had all the high-level waste from the military operations and the waste disposal problems were essentially identical in terms of finding the repository, that if we allowed it to get politicized -- in other words, if the nuclear waste disposal act included essentially a gubernatorial veto, then we would end up with the politically safest place to dispose of these unavoidable wastes rather than the technologically safest place to dispose of these wastes.

Well, as you know, we lost that battle, and we now have this mess in which the public perception of the dangers of nuclear waste disposal may be scaring the nuclear waste disposal away from the safest site.

I don't know if that's true, but I know that the government, to some extent, didn't try to investigate sites in places where they knew that it was a political dead on arrival.

So, they ended up at places which they thought it had political viability, like land already owned by the government in some way or land owned by Indians who the government still thinks they own, but something like that, and so, there are public perception issues that actually end up going to the merits.

I don't think they go to the merits on nuclear power plants, as such, but I think they really do go to the merits on some of these other issues.

So, while I agree with Jill's point, the idea here is not to create a Madison Avenue ad campaign, get ourselves a logo and something like Ready Kilowatt or something and sell it, I think that, until the public has confidence in the process, they can't have confidence in the decision.

Except with the exception of George, who tells me he went to engineering school, probably most of us here at the table don't have the ability to make a nuclear engineering safety decision on our own. We're

also trust it to somebody else.

So, everybody's going to end up trusting it to somebody else. The question is, is the process such that you're willing to do that or are you unwilling to do that? But Mal's point is right -- or Mike's point -- which is that, if we go through all those other things, what comes out at the other end is all those objectives, dispute resolution, and public acceptance, but if it didn't produce public acceptance at the end, that would be, for me, a red flag that we'd done something wrong, we didn't get fair right or we didn't get opportunity right or we didn't get sound right or we didn't get correct right in terms of all the details that we attach to the platitude that whatever that statement ends up being, it will be, until we put the meat on it.

CAMERON: Okay. Thanks, Tony, for that. That was a good closing remark on this particular segment.

What I'd like to suggest that we do -- and I'll ask if anybody has a comment in the audience in a minute on what we just discussed -- is I would like to go around to all of you -- I don't want to have you give me every concern or problem that you see with the current hearing process now.

We'll get those down, and if you could give me an underlying cause, sort of get these down before we go and evaluate them and, at some point, take a look at what are the fixes?

Do people agree, and what are the fixes to these problems, and I think that these fixes are going to take us back into all of the phrases and terms in the objective that we've just been talking about, actually.

Does anybody in the audience have anything on the objective of the hearing process discussion?

Yes, Steve. Just identify yourself and affiliation for the record, please.

CROCKETT: I'm Steve Crockett. I am in Commissioner McGaffigan's office.

I would like to make essentially two points, one by way of clearing some ground so that we don't shortchange this discussion too much, and I want to reply to Jim Riccio.

The issue of whether there should be hearings and what the process should be, the issue of whether regulations should be risk-informed or not, any of those issues which have come so much to the front and center since our near-death experience with the Congress last year have been issues which have been there for a long time.

They are being raised by persons and organizations that will keep raising them long after the current composition of the Congress changes.

I have been working on these issues for years while our committee oversight groups have changed. They will not go away. We have to deal with them. We have to face them. The questions are permanent.

I give you as one example Justice Breyer's 1993 book on "Breaking the Vicious Circle." That raises issues about risk-informed regulation not just of nuclear power but across the government, every health and safety agency has to look into those.

So, I think you have to keep pressing the discussion that you're having.

Second, any of the aims of the hearing process that any of you, NRC or other people, have raised here today are all aims that can be met through processes other than hearings. I am not yet hearing from you anything which only hearings can do.

The public can be educated and should be educated through the availability of massive amounts of information, accessible to everybody in a short period of time. That doesn't take a hearing.

Disputes can be resolved through devices other than hearings. The public can be given a fair chance to participate through devices other than hearings.

Commissioner McGaffigan has argued that, in fact, people other than parties immediately interested in a particular licensing proceeding should have an opportunity to participate in licensing decisions.

A sound record which can serve as the basis for a decision has to be compiled in any case, whether there is a hearing or not.

I have not yet heard a reason why a hearing has to be held rather than some other kind of device. I think that's a question that you have to at least keep in the back of your minds, especially considering that the NRC is the only agency that has such a statutory requirement laid upon it.

Now, maybe Mr. Roisman is right, that it has such a requirement laid upon it because this is the only technology in which zero tolerance has to be the policy, but I'm not sure that's true.

ROISMAN: Which is not true? Zero tolerance?

CROCKETT: I'm not sure that nuclear power is the only advanced technology in which zero tolerance could be argued to be an advisable goal.

CAMERON: Okay. Thank you, Steve, for the first point in terms of the need to keep discussing and debating these issues, and also, we have been and, I think, will be addressing the second point that you raised.

Steve, do you want to respond?

KOHN: I wanted to respond on the not yet heard why a hearing must be held. I can wait and we get into at a later point, but he did pose that question. It might be time to take a break, but I'm more than willing to give my view on that.

CAMERON: I think we're going to get into that, and let me talk to you about that at the break, and we'll see where to put that in, and Steve, hopefully, you're going to be able to be with us?

CROCKETT: Having my remark reflected back by you right now makes me realize that I'm probably putting an emphasis in the wrong place.

I don't want to raise here a question which would invite your consideration whether the Atomic Energy Act should be rewritten so that 189(a) is no longer in it. I'm not posing that question.

Rather, I'm asking you, since 189(a) is there and we have to decide what the best thing to do under it is, that when you ask yourself what are the aims of the hearing process, you try not to be -- you may ultimately have to be satisfied with the kind of answer that I hear from you but don't like, but look to see whether there is something that can be done uniquely with it.

Is there some purpose which is served only by a hearing under 189(a)?

Now, let me put the question in a slightly different way.

You are here considering the form of a hearing under 189(a). I ask you to consider a different aspect of the form.

189(a) is the one door through which the licensing decision ceases to be the licensing decision of the staff. Looked at from that point of view, it's very odd. It's doubly odd, because it puts the Commission in the ultimate decision point.

It takes a politically appointed body which answers as much to Congress as it does to the President, but the initial route to the Commission's decision is through an independent judge, like Judge Bollwerk, but at that point, it ceases to be in the hands of the staff.

Now, what decision is it, what important technical get-it-right decision is it that has to be made by taking it out of the hands

of the long-term, steady-state civil service and getting it into the hands of the shorter-termed politically-appointed body called the Commission?

It's very odd, but there may be real opportunities there, and so, I would ask you, when you think about the form of the hearing, think about what kinds of decisions are best made by such an unusual structure.

CAMERON: Okay. Thank you.

KOHN: I just want to use the example of the Vogtle proceeding in which there was a major technical issue, and if you sat in that proceeding, which I think the industry has criticized, but what you saw -- there was a whistle-blower, whom I generally represent, a technical expert thrown out of the industry, someone with impeccable credentials, and when this man assisted in the cross-examination of the NRC witnesses and the utility witnesses and you did that process known as the adversarial system, it really demonstrated real scientific deficiencies in the safety of that plant, enough to have the board essentially say we're going to go look into sua sponte, major root cause issues here, because what you have, what major didn't exist 20 or 25 years ago, in a lot of other earlier licensing proceedings, you have a lot of whistle-blowers, people with tremendous technical expertise, who can add to a safety proceeding in a manner which only the adversarial system will allow, because when you put the engineer up on the stand who says this is safe and we have someone to cross-examine that person and we have a neutral judge and a transcript and judicial review, maybe we'll get to the truth, but once you pull that out, the same whistle-blowers who have been tossed out of industry, illegally, many of them -- their input will be gone, and I want to go back to plant Vogtle, because I represent two clients down there. One settled.

I have another client, Marvin Hobbie. This Commission

issued a level one violation, the highest possible violation in the regulatory hierarchy, about this man's illegal discharge, and that was 1995, and the utility has, I think, improperly been fighting and fighting and fighting, and we've been raising these concerns.

It's now 1999. He's been out of work for nine years, and the Commission hasn't lifted a finger to get this man back to work, to address his concerns, nothing.

The only place Mr. Hobbie will have an opportunity again is if Southern Company wants to relicense Hatch and he can come in and testify, but when you're talking about delays, I have a man who went from $120,000-a-year job in which Admiral Wilkinson, the former head of INPO, took the stand and said he was a great man and a great asset to the nuclear industry -- he's been out of work nine years, and you're talking about delayed proceedings?

CROCKETT: I'm not talking about delayed proceedings.

KOHN: Mr. Hobbie still is out of the industry.

CAMERON: Steve, I think, if you're able to stick with us for today and tomorrow morning, I think you'll get some more partial answers to this.

What I'd like to do now, at least start on, is get some opinions, perspectives from all of you on what is broken, and why is it broken, and I was going to start with Diane and Jill on this end of the table and then go over to Tony to get your perspectives.

CURRAN: I've got a long list, but I guess I'll start with my favorites.

We're talking about sub-part G here? Could be anything, huh?

CAMERON: Larry, I just want to check. Right? Could be anything, right?

CHANDLER: Well, I would think so.

CAMERON: Okay.

CHANDLER: I think the overall objective, the mission we're on, is to look at all of the hearing processes that the Commission has on the books right now.

CAMERON: Thanks, Larry.

CURRAN: I think we said before that, when you compare G and, say, L, which is the most formal with the least formal, with G, the advantage is you get discovery and cross-examination, the disadvantage is it's very difficult to get in in the first place.

With the informal proceeding, it's easier to get in, but once you get in, the amount of information that you have access to is restricted to what the staff puts in the public document room, there's no discovery, there's no cross-examination, and I think Tony was referring to the very large amount of paper that sometimes gets filed in these things, partly because you don't have a chance to winnow and hone things down, you've basically got to take a shot at this enormous record that you've got and address the evidence that's in there, but to get back to sub-part G, which is, I think, a major concern here because of reactor relicensing, the raised standard for admissibility of contentions has really had, I think, a chilling effect on intervenor ability to participate in NRC licensing cases, because as Bob was saying, you essentially have to prove your case right at the get-go, when the application is filed. It's a very, very high standard.

It's daunting. It forces one to make a lot of choices right at the beginning. You can do the best job you think you can possibly do, bringing to bear all of the evidence that you can think of, and still not get issues in, and it raises -- there is definitely a public perception that this is -- the bar has been raised to the point where the public is not really invited.

You know, if you're clever enough to somehow scale this

hurdle on at least a couple issues, you are one successful person, but you know, that's not the way it should be.

Another major problem that goes along with that is that generally when the application is filed, it's not complete, and I have found many times, if your complaint is there isn't enough information here on which to conclude that the regulation is satisfied, it's thrown back at you, you don't have any evidence to support your contention, you're out.

So, again, the perception and the reality is that it's very difficult. The target is moving all the time, but the intervenor is standing still.

Then, once you get an issue into a sub-part G proceeding, there's a constant obligation to revise your contention or else risk having it thrown out in summary judgement, and if you do revise the contention, it's the intervenor -- although, you know, it's not the intervenor's problem that the application is constantly being revised and wasn't complete at the outset, but it becomes the intervenor's burden of satisfying a significant good cause standard of keeping the contention alive as the application changes.

Again, the target keeps moving, but the intervenor is held still.

CAMERON: Before we see if Jill has anything, I just want to make sure that I got this. It's difficult to get into sub-part G proceedings, and the public perception is that the process is designed to keep the public out, they're not invited into the proceeding, there's not a fair opportunity to go back to our objectives that we talked about.

The cause of too difficult to get in is the contention standard is too high, you almost have to prove your case right at the beginning, and it's made more difficult to get an acceptable contention

in because there's a lack of available information that you might need that you don't have access to to do that?

CURRAN: Right.

CAMERON: Okay. Good. All right.

Larry, do you have a problem with the current hearing process? I don't want to get comments on this, but if you want to ask a clarifying question, go ahead.

CHANDLER: That's exactly what I'd like to do.

The standard we're talking about, of course, is the one that's been in place for 10 years. It hasn't been changed more recently, as I recall.

CURRAN: It's recent in my life.

CAMERON: Okay. Thank you.

CHANDLER: The clarification I would like to get is with respect to the last point that you made, Diane, in terms of lack of availability of information makes it difficult.

I understood earlier, the comments you made with respect to changes in information, caused by an applicant's periodic updating or revision of an application, how that could bear on the contentions that have been previously admitted, but I don't quite understand it in terms of the sufficiency of available information at the outset.

In other words, an application has been tendered by an applicant, it's publicly available, and where is the -- what is the unavailability of information in terms of then casting a sufficient contention?

CURRAN: Well, for instance, if you come in and say the applicant makes X and such an assertion but hasn't done the calculation to support it and my expert says I can't verify whether what the application is saying is correct, because I haven't had access to that calculation, whether it's because the calculation wasn't submitted or

whether it hasn't been done yet, but then the agency's response is, well, you haven't -- you, the intervenor, haven't done an analysis, you haven't given me evidence why whatever this assertion isn't supported, and then it's sort of a circular kind of thing.

CHANDLER: It's almost more the first issue, I think, that you're raising, that the standard is too high, that you essentially have to prove your case at the time you try and submit your contention.

It's not just simply showing a deficiency in the application but establishing as a matter of fact that the application is incorrect or inaccurate with respect to a particular point.

CURRAN: Yeah, that's probably fair.

CAMERON: Okay. Let's see if Jill has anything.

Do you want to add anything about problems that you see?

ZAMEK: I do.

CAMERON: Go ahead.

ZAMEK: One of them is the generic issue, where the public does not have the opportunity to address certain issues, and there are a lot of them. The waste issue is one of them.

CAMERON: In other words, issues taken off the table through rule-making are rather generic types of things.

I guess that the issue is not -- I guess that the concern would be that not all the issues are up for discussion and the -- I guess the underlying cause of that is that the issues have been taken off the table by generic mechanisms.

CHANDLER: Rule-making.

CAMERON: This is the NRC, right?

CURRAN: Making a generic environmental impact statement, which is often reflected in the rule-making, but all the reasoning is in the EIS.

RICCIO: Chip, if I could just give Larry an example, look

at Calvert Cliffs. Almost as much has been filed since these guys intervened than was originally on the docket.

There's no way you can present, you know, basically a prima facie case when you only have half a license application there or the relicensing application there.

SILBERG: But in the 1970s, it was the intervenors who wanted the notice of opportunity to be filed early so people could get in at the beginning and not wait till the staff review was complete.

ROISMAN: No, that's not right. They don't get in at all until the notice is filed when all that work's been done.

The problem -- and it was number one on my list -- was you must let the public sit in on the staff vendor and then staff utility process, then assuming that we've dealt with this funding issue -- then you can legitimately say to them, okay, you've been part of the process from day one, we're now at the end of the process, you've identified the things you don't agree with, presumably the utility has identified the things it doesn't agree with, the vendor has identified the things that they don't agree with, does anybody want to fight about it in a hearing and we'll go to a hearing board and we'll resolve it.

Then you can fairly say to someone I want to know exactly what you object to.

You don't have to worry about having seen the calculation, because you'll be there at the meeting when the guys says, hey, I did my calculation and it showed this was all right, and then you'll raise your hand and you'll say, sir, we'd like to see calculation.

Even if the staff doesn't ask for it, you'll ask for it.

But what's happened is the industry and the staff spend maybe years working together to come to a conclusion, and then they burst it out on the public and say, okay, guys, let's hear from you right away, what don't you like about this?

Let us in from day one. Don't hide it. Really have openness, or as this I think somewhat inappropriately refers to as transparency.

No internal memos, all the center's views fully laid out on the record and available to anybody to look at, from your vendors, from your utilities, from your consultants, from your staff. Get it all out.

SILBERG: Name one organization in the world that operates that way?

ROISMAN: Why shouldn't it?

SILBERG: Because it doesn't make sense.

ROISMAN: Of course it makes sense. It makes sense if you want to have a process which at the end -- you want at the end, when all of this stuff has gone back and forth, you want at the end quick decision. Okay. I think a quick decision is possible if everybody started at the same time.

But what you want to do is you want to run a 26-mile marathon, and at the 25th mile, you yell back to the starting gate and say, okay, intervenor, get started. That, I think, is really central.

CAMERON: This sounds like we're getting into perhaps a potential option to fix this, and I know that we have some other things to say.

ROISMAN: You were asking for problems, and that's a problem.

CAMERON: Okay.

ROISMAN: A problem is that the public doesn't get to participate meaningfully in the process until the process is essentially over, and if I were on the other side, I'd be complaining, too.

I spent three years getting the license through the staff, who beat the heck out of me all the way along, and now that I'm done, I've got some intervenor who comes along, a term that is itself

pejorative, an intervenor who comes along, a Johnny come lately, and he says I want to go through the whole thing again, and I can see why that would be frustrating to the industry, but see it from the standpoint of the citizen.

It's frustrating to them to not have been there at the inception. In fact, if they were, I think they would understand where the choices were made and be more comfortable with the choices that they understood from day one.

So, the first thing would be an openness issue, part of the staff deliberations and all the other deliberations. I mean what is it about an internal memorandum that makes it somehow or another -- this isn't like, you know, showing private parts.

This is real stuff somebody wrote in a memo that something was wrong.

SILBERG: We don't get to see them either.

ROISMAN: You should see them. Why shouldn't you? I'll support you on that. All the ones that I've been in that did run that way ran better for it.

CAMERON: Okay. We're going to come back and debate these, and that's why I don't want to even like get into some of this clarification business, because we'll never get through this. So, what I want to do is identify some problems.

ROISMAN: The next one, I think there's an objectivity problem, and I'm glad that a representative of the Commissioners is here.

I think that we need to take the Commissioners out of the process.

The Commission should set policy, and it should review decisions of licensing boards on policy concerns, but it should not be the ultimate decider, and I think that the gentleman from the -- is it

Steve? I think Steve made the point that the Commission is getting involved in looking at stuff that the staff has already done, and I think there is a problem with that.

I think that the staff is the arm of the Commission, and they should be. They should reach their decisions. These issues should to a licensing board, and I would favor the reinstitution of the Appeal Board, and once that's over, the Commission review should be limited to policy questions only.

CAMERON: Tony, can I just ask you, is that because of the potential political aspects or not being able to come up to speed to make the decision?

ROISMAN: I think it's much more the second. I mean the Commission is less qualified than the licensing board to make the substantive decision, and because of the appropriate limitations of the ex parte rule, they can't really rely on the staff to help them make the decision.

So, you have a board that sits for a year or two or whatever it is, two technical members, a lawyer, they go through this whole thing, and they say, based upon everything that we looked at, we decided the right answer is this, and then you let an appeal board, also made up of technical member and legal members, review that, and they say we either endorse it or we endorse this much of it, reverse that much of it, whatever, and then we send it to a group of commissioners who probably don't have the time, certainly don't have the staff, because the real staff is now a party -- the real substantive staff is now a party -- to really get into the substance.

They should be concerned with the policy. If someone is making a brand new policy decision, of course they should make that. Then go straight to the courts with it.

All right. That's the second.

Third thing: We talked about the fairness and opportunity question. So, I'm going to put funding of citizen participants on that, and I don't put that on there because the citizens need the money.

I put that on there because I think both the regulatory staff and the utility need the benefit of that objective, independent challenge to what they are doing, and so, I think there's a real benefit.

I reinforce the point that was made by Jill. The turning of issues that belong at the licensing process into generic issues just about the time it looks like they're going to get important in licensing issues does seem as I think one Court of Appeals referred to as disingenuous.

I think that it -- there needs to be some limit to the use of that authority.

CAMERON: We'll get to that.

ROISMAN: Recognizing that that authority is there.

I think all of those things go to what I believe is what the Commission, the utilities want. They want a process which, one, gives them certainty, gets completed in a reasonable period of time, and they can go on.

I think that Jay speaks what I believe is the utility's view, and that is the idea that they can tolerate a no.

What they can't tolerate is seven years of not knowing yes or no, and I'm sympathetic to that, but that process -- if you want to get everybody started at the same time on the marathon, you have to start them on the same day, at the same moment in time.

CAMERON: Okay. Thank you.

Let's see if we can get everybody out here on what their particular problem is.

Tony, I was going to go to you next, and then we're going to

come back and we'll have a discussion of all this.

THOMPSON: Once again, I'm not speaking of reactors. I'm speaking of the materials licensees and the sub-part L-type paper proceeding.

We have a lot of problems. For example, we didn't have a whole lot of hearings on uranium recovery issues for many, many years. All of the sudden, in the last three or four years, two-and-a-half, three years, we've had 20 of them.

As a result, neither the NRC legal staff or the presiding officers had much experience with the portions of the Atomic Energy Act that apply to these facilities, and so, when we get into a process where it's only on paper and the people coming in from the outside, the intervenors or the interested parties, don't understand the process much better, we wind up having a very protracted kind of situation, and one of the things that needs to be done, it seems to me, is that the presiding officer has got to control the paper proceeding.

The rules, for example, do not -- if the rules mandate you have an opportunity to reply, obviously you have the opportunity to reply.

If they don't mandate an opportunity to reply, then you shouldn't be able to request an opportunity to reply and then petition for rehearing on the request that was denied and petition for interlocutory review, because that is not leading towards a fair and efficient decision-making process.

I would say that, with respect to generic proceedings, I mean if you have rules -- for example, the GEIS for uranium mill tailings says this deals with the generic issues related to this particular part of the fuel cycle, but every individual license site is going to have to justify based on either an ER, EA, in some cases an EIS, depending upon what the activity is involved, and those rules have

been in place for 15 years, and to come into a proceeding and start arguing about the NRC regulatory program is a waste of time.

The presiding officer should say, you know, you've got to challenge those things within 60 days or you're out, you know, and you can't come in and complain about the Appendix A regulations 15 years after they've been on the books.

So, there has to be, I think, some sort of controls on the informal hearing process, and the presiding officer, I think, bears the burden.

The bar is lower, as Diane said, for standing, and frankly, in some cases, what we have is people that come in, and the judge will give them three and four chances to revise their filing in order to satisfy standing requirements, and by the time all that's done, the licensee's spent 15,000 bucks pointing out the fact that, you know, it isn't any different than it was before.

I mean there has to be some limit on how many times you get to go to the well. If we're supposed to live by the rules, recognizing that a pro se person is going to get a little bit of an extra break -- they don't need to get three and four bites, and that's what we've been experiencing.

And I think the other thing to remember, at least as far as I'm concerned, is that the NRC is, by definition `nd by statute, as an independent regulatory agency, a reactive body.

The licensee has the prime responsibility to propose either a license amendment or a license application. The NRC is limited to accepting it, rejecting it, or accepting it with conditions, essentially.

And so, by definition, if we're not going to have just sort of an arbitrary end to a license application, it's an iterative process.

I don't know why, for example, if a uranium recovery

licensee applies for a license amendment for a reclamation plan and it's noticed in the Federal Register, why people can't get in and get involved in the information and the discussions right from the beginning.

It may be different in the reactor side, but it's certainly not -- NRC has to notice every meeting with a licensee that involves a discussion of a regulatory issue, and we frequently have people who are adverse to our interest, such as, for example, Enviro-Care, who I wouldn't exactly call a public interest group, sitting involved with us and the Commission staff as we're discussing what are the regulatory requirements or what are the things the staff wants to see or what information do they need for this or that or the other.

And frankly, in an informal hearing process, I wouldn't object to oral proceedings if there were a means to control things.

We had, in the old days, in the MSHA area, we used to have -- the statements were provided -- not even provided in advance, but if you could provide witness statements in advance, if you could try to get together and agree on stipulating to facts, people can read their statement into the record, they can be cross-examined, and then you can go on.

I don't object to oral parts of informal hearings, but what I really think is important is that the judges and the presiding officers need to develop some guidelines, and it's only fair if everybody understands what those guidelines are, that Diane and I both understand what is expected of us, and if that's the case and either one of us doesn't measure up, then we have to take that. That's our problem.

CAMERON: Okay. Thanks, Tony, and as I just told Ellen, we are going to come back and discuss each of these, okay? I'm trying to see if we can exhaust -- sort of get a litany of potential problems up

there to discuss it at one time.

THOMPSON: I just wanted to add one more thing, and that is that I think that, particularly with an informal hearing process, you set out the outlines of the process, but depending upon what the issues, the technical or health and safety issues that are the focus of the inquiry are, then I think risk-informed control of the proceeding by the presiding officer is important.

In other words, the presiding officer in a hearing that involves some minor thing that somebody doesn't understand and it isn't really a big deal anyway doesn't need to have all of the trappings of something that, for example, a uranium conversion facility, where a release of certain uranium gases could pose a threat both to workers and public health and safety, significant threat.

So, I think there needs to be some risk-informed approach of the presiding officers, and the Commission needs to give them guidance, that we don't necessarily require the same level of assurance for something, in Tony's words -- just changing it around slightly -- low-probability and low-risk.

There's a difference between low-probability and low-risk and low-probability and high-risk of adverse impact.

CAMERON: Okay. I guess we probably have to be a little bit more concise in putting these problems up, because there's a lot of good commentary associated with it that is getting everybody's juices going about responding, and we'll probably never work out way out of this if we do that.

We're getting ready to take a break, and I know that Diane -- I want to give Diane and Larry a chance to respond to Tony, but Mike McGarry, do you have some examples of, you know, concerns, problems with the existing hearing process?

McGARRY: Observations rather than concerns, and this is

more meat and potatoes. I think Tony Roisman took us to a nice plane. It was at a higher level. This is a little lower level.

One is efficient discovery. I think we all would agree, too many fights, too many motions. I would subscribe to the implementation of Rule 26 making documents available and let's get on with it.

Efficient conduct of the hearing. I'm not necessarily in favor or disfavor of a rocket docket. I'm not suggesting that when I say efficient conduct of a hearing, but reasonable case management.

Third, efficient decision-making. I've been scratching my head thinking about how many cases I've been involved in and how many cases where I just think it took too long for a decision to be rendered, and we understand that the boards are busy, at least in the past they were. Now they're probably just as busy, because there are fewer board members.

I don't need to get into particulars, but there are more more than one or two examples where any reasonable person would say that just took too long.

Fourth, role the staff. From my perspective, representing utility clients, you can't get to it until you've got an SER or an EIS, and yet, you've started the process and we're into discovery.

I wonder if the process can earlier focus on the five or six contentions that are at issue and develop positions on those matters as we all go forward.

Fifth and last, novel questions. Questions come up in hearings -- Diane and I had several. One was the role of competition in an NRC license. Another one was the scope of attention and review of the issue of -- important issue of environmental justice.

We all have issues from time to time that arise that they don't necessarily lend themselves to a decision by the board and then maybe you go up for an interlocutory appeal, but clearly we all

recognize they're going to be big items and perhaps some vehicle to get novel questions to the Commission so we can establish the Commission, so we know what we all have to deal with.

CAMERON: Thank you, Mike.

Susan?

HIATT: I just wanted to ask Mike real quick, when you talk about competition, are you talking about whether an economic competitor should have standing?

McGARRY: Yeah, that issue.

CAMERON: Susan, do you want to raise anything that you haven't heard so far?

HIATT: I'd like to tough again on the issue of delay. I said earlier that, in my view, delay can be a legitimate strategy, but that's the case, really, when that's the only thing left to us, when we can't win fair and square, because either there's a biased agency or because the vast disparity of resources will virtually assure a one-sided record.

So, I think, from our perspective, if delay is a problem, it's because of primarily a resource issue and the idea that it isn't fair either on a resource basis or the fact that -- I know I've had cases where I brought an issue before the Appeal Board, a seismic issue, the Appeal Board was going to hold an exploratory mini-hearing, the Commission sua sponte shot it down, and I think what happened in the resultant judicial review is it caused more delays there for the licensee than if the Appeal Board had been allowed to go ahead.

It's a perception of maybe the system isn't necessarily always fair to us, so delay is the best thing we can get.

SILBERG: Remember, in that case, we were not opposed to the Appeal Board hearing.

HIATT: I know you weren't. You weren't the problem.

CAMERON: For once. Okay.

We're going to take a break in two minutes, and we'll come back to all this, but I wanted to give Diane and Larry a chance to say something before we break.

CURRAN: I guess the main point I wanted to make was the issue of control by the presiding officer has come up today.

Tony raised it, and we're both talking about -- I think we both have recent experience in mind on the same case in which it was the intervenor's perception that the applicant got quite a few trips to the well and so did the NRC staff, that if the record was considered incomplete for purposes of rendering a decision on behalf of the applicant, the presiding officer asked a number of questions, invited the applicant or the staff to amend the record, and then of course, based on this additional evidence, ruled for the applicant, and at various times when the intervenors tried to do something similar, it was ruled that we had not provided enough evidence to support our position.

So, there's certainly a perception that control, or lack thereof -- it can be seen two different ways.

Tony, for the second time today, you were talking about using risk to inform the level of procedural protections that are provided to the public, and I just want to point out that, often, the most hotly debated issue in the case is what is the level of risk to the public posed by this particular project, and you know, it was our very strong position that the particular project that we were both litigating was more dangerous than the applicant thought, so that I would just ask the agency to venture very, very carefully in that particular direction, because it's very much based on the perception of the viewer.

CAMERON: The issue of risk may be the central point in the proceeding, actually. All right.

Larry, we'll give you the last word, and then we'll take a

break.

CHANDLER: Just a couple of quick observations, if I could.

Jill and Tony had alluded to difficulties and concerns related to the inability to get into certain matters because they've been generically resolved, and I would just point out and I'm sure Tony appreciates that there is the opportunity to challenge the application of specific regulations in specific cases.

It's an extremely high threshold. I don't know that it's one that's ever been used successfully, candidly, but it's an opportunity that is there. Rules can be challenged.

Then Tony and Tony made observations about participation with the staff, participation at meetings between the staff and license applicants, and just for perspective, I think Tony Thompson is right.

There are opportunities provided to members of the public to attend meetings between the staff and applicants. At the same time, in fairness, those meetings typically are open for observation and not for full participation.

So, clearly, members of the public have an opportunity to be there, to observe. I wouldn't say they're never afforded an opportunity to ask questions, but it certainly is not a full participatory opportunity, in fairness, to members of the public who might want to be there.

The other thing that that raises, however, is a question of notice and when notice of an opportunity for a hearing is provided, and I guess Jim was only in maybe high school at the time, but Tony and I remember, and maybe some others, when the Commission's regulations were different.

In fact, notice of opportunity was not given until the staff reviews had been completed.

In fact, the criticism Tony leveled perhaps was justified at

that time because it was well recognized that the staff would have gone through discussions with license applicants prior to a time in which public involvement was afforded.

Those regulations were changed -- it was either '72 or '74 when the rules were restructured -- to provide for early notice, notices provided very shortly after an application is received.

So, meetings then between the staff and applicants are publicly noticed.

The public has an obligation to come in early in the process, but they also have an opportunity early in the process to observe and take from meetings with the applicants concerns that the staff may have, as well as an opportunity early on to see the application and supporting documentation.

CAMERON: Okay. Thanks, Larry. We are going to come back to discuss these issues.

Ellen?

GINSBERG: Thanks.

At the risk of a little bit of repetition, I think it's really important to articulate one of the industry's views on an issue that's been bandied about here somewhat indirectly, and that is the issue of this resolution of issues generically.

I think the industry thinks that there is a -- the agency has long done this, there's efficiency, these are generic issues that apply to licensees across the board, and there is a public participatory opportunity when you go through the proceedings at the NRC, the Federal Register notice, the opportunity for comment, etcetera, etcetera.

I do not want to -- we would not want to see the NRC somehow use or view generic issues as an opportunity to be revisited.

I think case law is pretty clear here, first of all, but second of all, generic issues are very appropriately evaluated and

resolved generically, and the industry feels very strongly about that, and that's an issue that's been back and forth here a little bit, and I just wanted to put that on the record, and that's government-wide.

There's nothing unique about the NRC with respect to how it handles rule-makings in the context of the notice and comment, etcetera, etcetera.

CAMERON: Okay. Thanks.

Let's take a break till 10 to. That gives you about 20 minutes.

[Recess.]

CAMERON: I'd just like to remind everybody to try to speak into the microphone, because people out here are having trouble hearing you.

I want to give you a chance to come back and comment on some of these things that we have discussed, but I wanted to ask Jay and others about an issue that Jay had raised this morning when we first began, and that was proceedings too long, which I'm distinguishing from a problem that I put up that Susan raised, which was delay by intervenor, underlying cause, perhaps biased decision-making.

We'll go back to explore that, but for example, I haven't heard anybody say we shouldn't have cross-examination, all right, as we look at the problems with the current process, and I've been told that there may be some implications for cross-examination as an underlying of proceedings too long, and this gets us into this case management issue as a potential solution, perhaps, to be discussed, but I guess I just wanted to make sure that we paid attention to this proceedings too long, and I think the word was "interminable" that Jay used this morning, and I guess I would just like to open that up for discussion, to see if people want to talk a little about what some of the underlying causes, perhaps, of these interminable proceedings are.

Jay?

SILBERG: Case management, I think, you know, solves a lot of problems.

Interminability in some cases has been because decisions go unwritten or unissued, in some cases because discovery gets strung out forever, in some cases because I think cross-examination becomes endless and pointless, and there, I think, are cases where cross-examination is not worth doing, in some types of issues, in some types of proceedings, not necessarily across the board, although I think we can have philosophical discussions on whether cross-examination is, indeed, the engine of truth for scientific issues, and I think most writers, scholars have said it shouldn't be and there ought to be other mechanisms, Steve's experience to the contrary. I can say that since he's not here.

But I think that is -- I think that is one of the issues on schedules.

I think there are a variety of ways that that can be managed. Case management is one. Generic issues -- I agree with the latter part of the discussion before, that if we allow generic issues to be resolved by rule-making and then put back on the table, I think we're reversing 100 years of administrative law and Supreme Court case precedent that I think is fairly well accepted by almost everybody, at least, and I think, if -- in fact, one of my recommendations for the permanent repository 15, 20 years ago was we ought to try -- the Commission ought to try to set forth the criteria more precisely, and through rule-making, in order to take those decisions not off the table but to make them earlier, give people an opportunity to participate early on, and then it becomes simply a matter of establishing whether you fall within the parameters that have been established by the rule.

I think there are a number of areas where that's being done

today.

In the Part 72 proceedings where people are now using the certified spent fuel storage casks in the rule-makings that have granted the certificates of compliance, I think that's been a very helpful addition to the process.

People are not frozen out. The same people who are proceeding, who are participating in our site-specific licensing case are also participating in the generic license of the casks, and their views are not being ignored or swept aside.

I think there are a variety of devices which ought to be used. Some of them are now. Some of them should be used more. Some of them aren't.

Tony's suggestion of a different kind of administrative review process was a very interesting one, to let the intervenors come in, to have everything totally transparent, they become a full party. We might not even charge them license fees to participate.

But I might well be willing to consider that provided that, when you get to the end of that process, that's the end of the process.

You don't have hearings, because all the issues have been vetted in a, if you will, scientific, technical forum, everyone's had their day in court in a scientific and technical court, rather than a court of law, and we'll make the decisions that way.

That is, perhaps, more typical of the way technical decisions are made by administrative agencies if you want to look at new drug applications or FAA certifications or, you know, lots of other issues.

You don't have, you know, a public hearing before the FAA before you issue a type certificate for the 747, and you don't have a public hearing with intervenor funding before you approve some new drug.

Maybe that is worth exploring. I, for one, don't think,

though, that Tony and his clients would be willing to make that part of the grand bargain, if you will, but I might well be willing to consider it.

CAMERON: Okay.

SILBERG: I think that's beyond the scope of this discussion a little bit.

CAMERON: Are there any other problems that we should get up here before we go back and discuss these, and we can go from most recent, since there seems to be some need to talk about that.

Jill?

ZAMEK: It was brought up earlier about neutral presiding officers being a problem. Somebody else brought that up and I agree.

CAMERON: Good point. I mean that was a discussion we had.

SILBERG: Is the concern that the current ones are not or some of them are not?

ZAMEK: Correct, or with the changes, that perhaps they wouldn't be. So, it's just a concern that we make sure we have them.

CAMERON: Any other new problems that we want to put up here before we go back?

RICCIO: Not really a problem, Chip, but I guess I want to comment that we have already had a grand bargain, apparently, at least according to Commissioner Bradford, to get to the process where we are now, and now the industry wants to renege on that, the industry and the agency wants to renege on that promise.

CAMERON: So that everybody understands what you're talking about -- and I'm not sure, at least, that the agency is saying that it wants to renege on anything. I don't know about the industry, but could you let people know what you're referring to?

RICCIO: Okay.

When we opened up this discussion this morning, I referred

to a comment by Commissioner Bradford that, in order to get the current hearing rights that we currently enjoy, we had given away our rights to local -- as a local regulation of radiological health and safety and limits set forth in the Price Anderson Act. At least that was his understanding of the grand bargain that was struck, and obviously, the industry has a different perspective on that grand bargain.

SILBERG: First of all, Price Anderson was passed in 1957. The Atomic Energy Act and Section 189 was passed in 1954. So, we've got a three-year disconnect.

RICCIO: At any rate, basically we have little faith that any grand bargain structure is going to put us in a better position to defend our rights, and again, I hate to be drawing us back to the SRM, but when I say the Commission wants to circumscribe our rights, I'm talking about the SRM.

We're heading down a path that they've already, you know, signed off on, the Commissioners all voted upon it. So, why should we be talking about it as though it doesn't exist?

CAMERON: Jim, could you -- this has come up several times, and there might be some different answers to what you're raising, including even though there is an SRM, the Commission also in that SRM asked for the staff to get early feedback from the affected interests.

That SRM is not necessarily written in stone, okay? The Commission can change their mind based on what they heard. But when you say that the SRM has set the scope here, is there a specific -- is there -- I'm not sure that the direction was that specific.

RICCIO: I was referring to setting out both on a legislative track as well as a rule-making track to basically change our rights from -- you know, under formal to informal hearings. That's what I'm talking about. Go ahead with option four, I think it was, in the SECY paper.

CAMERON: Joe and Larry, maybe you can address this, because I never read option four as making a decision about whether formal hearings should be eliminated, and I keep getting confused when you bring this up, Jim, and I see where you're coming from now, and maybe we should clarify this, because I don't think that it's as it might appear.

Joe?

GRAY: I think the option four was a -- is a proposal to proceed administratively with an exploration of ways to improve and de-formalize the agency's hearing processes and, at the same time, a proposal to seek legislation that would make it clear that the agency has the flexibility to de-formalize.

I guess we haven't read the Commission's SRM as a hard and fast direction to come out any particular way but, rather, we've read it as a direction to explore, do some of what we're doing right here, and to come back to the Commission with a proposal as to how the hearing processes might be improved.

It's possible the proposal would be something along the lines of do nothing, but I think --

RICCIO: Wasn't that an option they already denied, though? Wasn't it one of the other options?

CAMERON: I think this is an important point for people to understand.

GRAY: At the outset, the Commission did not choose the "do nothing" option. They basically said move forward, explore it, come back with a proposal.

CAMERON: Which does not mean that the result has been dictated yet at this point.

ROISMAN: With all due respect, Joe, before I talked about dis-ingenuity. The Commission has made a decision that the General Counsel's rather extreme view of the 30 years of history, 40 years of

history of this agency are meaningless when it comes to adjudicatory hearings.

That is the most fundamental question. The Commission decided that. This statement says they decided that. This should, arguably, be appealable, if it had been made public in the usual way.

So, it's disingenuous to tell us that this train has not already left the station. All that's left is whether or not it's going to run over everybody on the track or only some of the people on the track, but this is a done deal.

And with all due respect, if you want us to participate in this process in a meaningful way, please don't patronize us with this.

That statement that reads, "The rule-making should outline the NRC's discretion and flexibility to determine the type of proceeding for hearings" is a massive sea change in the Commission's position, in our view, from what the Commission has stated and what Congress stated when the temporary operating license statute was passed in 1972, and if you look at the legislative history of that, which the General Counsel's memo does not address, it makes crystal clear that adjudicatory hearing rights are built into 189 and that they had to be continued in the temporary operating license.

So, the Commission wasn't even made aware of that piece of legislative history, but it's now made the decision, and the decision is that all we're going to talk about is how much damage you're going to do to the formal hearing process, not whether you're going to do damage to it, and I think we just ought to be honest about that.

CAMERON: Tony, I think that there still is -- there may be a legitimate misunderstanding here about that. I'm not sure that they're being disingenuous about that, although it may appear to be that way.

Larry, do you want to add anything to what Joe said, because

it's a fundamental point.

CHANDLER: I had earlier said that I would not look at this as a pre-ordained course that we're embarked on, simply focused on how best to abridge the rights of the public to participate.

I think the Commission has charged the General Counsel with conducting, as Joe just said and I had said earlier, a reasonable, realistic, and thorough examination of the current processes to see where they could be improved, informalized where possible, to make the process work better.

I think if you look -- and you say it's a colossal sea change.

If you look back in the Commission's decision going back in West Chicago, they recognized there the tremendous flexibility afforded the Commission in defining its adjudicatory processes, and this is carrying forward, really, on that kind of analysis.

ROISMAN: (A) That's one court. (B) If what you and Joe are saying is true, then we would expect to see within a week a clarification memo.

CHANDLER: I don't think one is necessary.

ROISMAN: Well, then I think we've got a problem. Because if what you're saying is so, it's not what's said in there, and we can look at the words. If that's what the Commission intended and there's an honest misunderstanding, then let them say that.

We're not talking about a rule-making. We're talking about a memorandum sent out by the Commissioners. It's not a complicated thing to do if they agree with what you and Joe are articulating to us.

CAMERON: Okay. Well, that recommendation is on the record, and I think there probably will be a summary of this meeting prepared for the Commission, and perhaps that will be forthcoming.

I think we have the problems identified. Let's go back and

talk about them, but let's take these cards that are up right now.

Alan, you haven't spoken too much with us today. Why don't you tell us what's on your mind?

HEIFETZ: Well, I haven't spoken too much because I've been listening, and I've been trying to understand what the concerns are around the table.

It seems to me that, before we get hung up in the labels of what's formal or informal, we ought to look at what is the problem with the formal proceeding in the first place, and the one thing that I seem to see agreement on is delay, the length of time that it takes.

I heard about a seven-year proceeding. Well, a seven-year proceeding is not because of cross-examination of witnesses in those cases.

So, it seems to me that you have to take a look at what causes delay in proceedings, and proceedings have to be divided into three segments -- the pre-hearing segment where you're doing your application, your staff work, and getting prepared for the hearing; the second is the hearing itself; and the third part is, after an initial decision, whether it's by an individual judge or a board or whatever, that decision then gets appealed.

In the usual course, in most agencies -- and again, I'm not speaking about the NRC. I don't know what happens at the NRC, but let me just tell you what happens everywhere else.

The greatest amount of delay that I have seen is from the time an initial decision is rendered and the time a commission renders a decision after the initial decision.

So, if that is a problem, then you have to start backwards and say what can we reasonably do to get an appeal of a decision decided quickly?

What I see people talking about is also a cross-over between

part two, the hearing, and appellate aspect, and that is when you're talking about interlocutory appeals and you're talking about petitions for re-hearing on motions or whatever.

Those are also very calculated to delay proceedings, and perhaps you ought to look at limiting interlocutory appeals to -- the most extraordinary questions of policy are those that present new questions and not just another bite at the apple, and the same thing on petitions for rehearing.

If you want case management, you want someone to listen to a motion on the one side, a response on the other side, and then make a decision, make a decision, then move on with the proceeding.

If the decision is a bad one and is error, it can always be appealed later, but this idea of trying to appeal everything piecemeal is something else that just delays and delays and delays.

Better to have a decision that's out there that you don't like and take a chance on appealing it and getting it reversed later on and see what the relief has to be rather than saying we've got to correct this thing now.

So, those are suggestions that I would have there.

The hearing process itself, the presiding officer does have to control the proceeding, whether it's an oral hearing or a paper flow hearing, and there are ways to do that.

Paul teaches a course in complex case management out at the Judicial College. I took that course out there before Paul arrived, and it was given by Federal District Court Judge Fred Lacey, who knew how to rocket docket before the rocket docket was invented, and there are ways to get people to do things quickly and still guarantee due process rights.

One of the things that he had suggested and that used to be done all the time at some of the other regulatory agencies was to get

all expert testimony in writing, direct testimony. The only oral examination of an expert witness would be cross-examination.

There's no reason to put an expert on the stand and to have that expert give direct testimony orally. Who wants to sit there and listen to his qualifications and all of this stuff? Put it in paper, and if there's any controversy, let somebody examine on it.

If you put his testimony in writing, then you get -- there are two advantages.

From the sponsor's perspective, the testimony can be ordered beautifully and set out as best as you can possibly set it out. You don't take the chance of having an expert getting up on the stand and fumbling his testimony. So, that's from the sponsor's point of view.

From the cross-examining point of view, you get the testimony in advance of the hearing. You get a chance to let your expert look at it and analyze it and come up with a pointed cross-examination that does away with trying to think on your feet while you're there, but you're prepared to do it.

The only direct testimony you need for the expert witness in that case is you put him on the stand, you have him introduce himself, you give him his testimony, you say is this your testimony, he says yes. Do you have any minor corrections to make? There's a typographical error on page 32, it's a period. Anything else? No. I tender the witness for cross-examination. That does away with a tremendous amount of time.

So, there are ways of doing that.

If you start to look at these ways of speeding up the hearing process, then what becomes a formal proceeding -- it's a formal proceeding, but it's a fast formal proceeding.

So, you're not concerned about saying, oh, get out of this formal proceeding, we've got to get to something informal. Well,

something informal, depending on the way it can be structured, can be much slower than the formal proceeding.

The best cases that I ever presided over were ones where rules were practically nonexistent and I was able to sit down with the attorneys in a case and we prescribed a whole series of discovery functions and timing, motions practice and everything, and got the cases done in a very, very short period of time.

In regulatory reform, you can go from one extreme to another. I have a device that will give you the fastest decision in the world on any kind of a case, regardless. It's in my pocket, and it's called a coin.

Now, that's fast decision-making. It's not necessarily good decision-making, but if you want it fast, you can get it that way.

You can also get it much more slowly, and you can go to a seven-year or a 12-year kind of scenario, but it is possible to conduct adversary adjudications within shorter time-frames and do it with all due process protections as long as you can come up with an agreement on how long should it take to do admissions, how long should it take to do interrogatories?

If you're going to do any kind of depositions, look to this prospect of saying that a deposition can only be one day, seven hours. Is that a possibility? How many witnesses?

If you look at it that way and you try to telescope down the time periods, you can have a full panoply of due process rights without stretching these cases beyond what is reasonable, and I think that's where your focus ought to be.

CAMERON: Okay. Thanks a lot, Alan. I think tomorrow we'll examine how we might make that work here and which of these problems that's going to address. The Commission does have a policy statement out of sorts on case management. It would be interesting to hear a

discussion about the different perspectives on how well we're doing on case management and what do you do to make that better, and does that solve the types of problems that people are concerned about and that the Commission might be concerned about?

Let's hear what Bob has to say.

BACKUS: It's interesting we're talking about delay, because I don't know how that got injected into here, but this is an example of where we need the case study that Tony was talking about. You have to look at, really, what was the delay.

Diane was telling me that, you know, the uranium enrichment thing down in Louisiana is often cited, and there were several years when the applicant abandoned the project that's not acknowledged when they talk about how long the proceeding took, and I could certainly explain the so-called delay on the Seabrook thing by numerous Commission interventions in the proceeding.

So, I think we need that case study to see whether delay is a real problem or just a handy thing that the politicians latch onto to castigate this agency, because all they see is the number of months or number of years it took from application to decision, and you need to know what's behind that.

I had a couple of other problems I was going to discuss, just let you list.

One is standing. As I was saying during the break to my friends here on my right, I don't think we should let standing become a big issue and spend a lot of time on it. I think we should let people in that want to get in, like you do, certainly, in our state court, with very broad standing, very liberal standing requirements.

Everybody has a great concern that ne'r do wells will come in and screw up the process. I don't think that really happens. Litigation isn't bean-bag. It's hard work. It takes a lot of effort.

It takes a lot of money, which most people don't have.

I don't think you're going to get people in if they don't have a genuine and legitimate concern, and if you do, that's what your presiding officer is there for, and he's got tons of authority under your CFR to handle non-productive participation, tons of authority that can be exercised.

So, instead of having all these fights over standing, I would let them in.

Same with the contention issue. I think we should go back to what the Commission said originally was the standard for contention. It was noticed pleading like you had in the Federal court. You know, the other driver negligently turned and ran into me and caused me injury, in violation of the rules of the road. Okay, you're in. Later on, you have to specify what that's all about.

But I would say let people in, open up the process, insist that meaningful discovery be done, and then you'll cut down on the cross-examination, which I agree with Steve we certainly can't forego, because it is the best engine for the discovery of truth, as Dean Wigmore once wrote.

End of speech.

CAMERON: Thanks, Bob.

Susan.

HIATT: I'll just pick up on a few points that have been made.

First, with regard to what Judge Heifetz talked about, the pre-filed written direct testimony, I would note we already do that under our rules of practice. So, it's already there.

Talking about interlocutory appeals, this is another case where the rules can work both ways. I recall in the Perry case where Jay filed a number of interlocutory appeals in the form of motions for

directed certification to the Appeal Board. They were not particularly effective.

[Laughter.]

HIATT: Going back to this idea of this bargain that former Commissioner Bradford talked about, I recall seeing a NUREG that documented a process somewhat similar to this back in June of 1978, I know Tony was a participant in, and I believe it was Gerald Charnoff of Jay's law firm, was also a participant, and he made, remarkably, the same statement, that this was a trade-off between Price Anderson and hearing rights, that this bargain had already been struck back in the '50s, and that's documented. Maybe it wasn't documented correctly, but I have that NUREG, and it's in there.

CAMERON: Okay. Thanks, Susan.

Mal.

MURPHY: Some of you may wonder why I'm sitting here silently and not bringing up any problems.

I'm sort of limiting my participation in this effort to how it will impact the high-level waste repository, because my experience with other nuclear licensing is so old and musty that I don't want to embarrass myself by bringing it up, but I'm sitting here listening to the various problems that people are throwing out on the table, beginning with Tony Roisman, and realizing that most -- certainly not all, and some of the ones that Tony mentioned, definitely not, but many of the problems that people are mentioning with respect to the hearing process don't pertain to the high-level waste process as the pre-licensing proceedings, at least, because the potential intervenors, the state, the local governments, and the public itself is already afforded those same rights that people are sitting here talking about being granted in any changed hearing procedure.

But our process is so unique that I'm not certain that it

translates easily to other licensing proceedings that the NRC might be engaged in.

For example, we have a statutory site characterization process where Congress has mandated certain interactions, certain cooperation between Federal agencies, etcetera. It's been going on for 17, 18 years now.

There have been dozens, probably hundreds of informal meetings between the NRC staff and DOE, technical exchanges, as we call them, between the NRC staff and DOE, Appendix 7 meetings, which are another kind of even less formal interchange between DOE and the NRC, and all of those meetings are open to the public.

We attend them. We have an on-site representative designated who has an office in the DOE offices in Las Vegas, who has another office available to him out at the -- out at what's called the Field Operations Center, next to Yucca Mountain itself.

There's daily contact with the Department of Energy, with the NRC on-site representatives, whose office suite is next -- you know, almost adjacent to the Nye County office suite in the Department of Energy building.

The members of the public can attend any of those meetings, and do. Judy Trikle, who represents the Nevada Nuclear Waste Task Force, a public citizen's group, is at virtually every single meeting. Citizen's Alert attends some. NRDC could attend if they wanted to. Anybody could attend if they wanted to.

So, many of the things that you're bringing up as concerns and problems that tend to slow down the hearing process, because public interest groups or public citizens or intervenors or however you want to designate them have this tremendous job of catching up once the license application is filed, don't necessarily apply in our case.

The other major difference -- and you might -- those of you

who are on the table who aren't familiar with it might take a look at this evening, and we could talk about it tomorrow, I guess -- is sub-part J, which itself, in a sense, constitutes a grand bargain.

It was a large grand compromise that Jay Silberg and I can take some personal credit for crafting in which all sides, for the only time in the high-level waste process, at least, gave up something in exchange for something else that they thought was in their interest.

DOE, the NRC, the State of Nevada, the local governments, the environmental groups, all with differing interests in the program, were able to fashion a compromise which produced the original sub-part J, the so-called licensing support system rules.

They have since been added to and subsequently amended to change the licensing support system from a stand-alone, monolithic, huge, very expensive system to a web-based document exchange system, but assuming that thing is going to work -- and I remain confident that it will -- we're not going to worry about discovery, document discovery, because everybody who intends to participate in the hearing, in the licensing process, as a pre-condition to that participation, is going to be required to post all of their relevant documents and documents which are likely to lead to the discovery of relevant evidence, of admissible evidence, on a web-site and make them available over the internet.

Nye County is in the process of upgrading our web-site right now. The Department of Energy, which has a massive problem, because they've got hundreds of thousands of documents to deal with, has been working on it for years.

So, a lot of these problems, you know, aren't going to exist in the context of the high-level waste licensing proceeding because of the tremendously long lead times involved and the fact that the public, through their representatives, has been able to participate so extensively throughout the process, and it may be, rather than throwing

the baby out with the bath-water -- and I don't like to use the words again, but I guess I have to, in talking about going from an informal -- and there are some licensing cases today, obviously, wherein formal rules are perfectly valid, but rather than going from a formal to a more informal rule-making model, it may be useful to take a look at what's been happening for years in the high-level waste -- in the Yucca Mountain program to see if there isn't some way that the public can't get involved in this process at the outset.

We don't get internal staff memoranda. We don't get dissenting opinions routinely. We don't get invited to meetings where two Department of Energy scientists are beating on each other or where the NRC is questioning the work done by its own Center for Nuclear Waste Regulatory Analysis, etcetera, and I'm not sure that any process we could fashion would ever go that far, and I'm not sure it's desirable to do so in the first place.

But short of those kind of things, I already enjoy all of the things that most of you have identified as concerns. Sorry, but that's just the way it is.

[Laughter.]

MURPHY: This also, of course, excludes the, to many of you, I know, very critical issue of funding. We are funded. We're funded directly by an appropriation from Congress out of the nuclear waste fund.

We're certainly not funded as well as we ought to be, you know, and it certainly inhibits, and it's going to limit the kind of issues we'll be able to deal with in licensing, and it's forced us to prioritize what things are really truly important to the Nye County program and which ones aren't, but we do have money available to allow us to participate in the program.

All of these other things that I've been talking about, of

course, presuppose that from somewhere, either utility funding, funding from Congress, or bake sales, the traditional method of funding intervenors, that somehow there's a few dollars available to do this.

CAMERON: And I would just note, before I go to Jay -- I think you want to amplify on some of Mal's remarks -- that although the government entities might be receiving funding, the citizen group community is still in the same --

MURPHY: They were at one time. The Nevada Nuclear Waste Task Force received a grant from the State of Nevada's Nuclear Waste Policy Office. That is no longer the case for a couple of reasons.

The principle citizens group which is actively involved in the Yucca Mountain program right now has raised its own money. They have no outside source of funds, and they have no program source of funds whatsoever.

CAMERON: Okay.

Jay, do you want to just tie on to Mal's sub-part J, and then we'll go to Diane and then down to Tony?

SILBERG: I was actually going to expand on that a little bit. The repository process is not the only one in which the bells and whistles are available. In fact, in our current EFS case, we have put on the record every document, you know, that we have.

The entire four-volume calculation package was made available a month after the application was filed and several months before contentions were due to be filed.

The meetings are all open. In fact, our problem is that we can't have meetings with the staff on a as-needed basis, because we have to have this two weeks pre-notice. So, by the time we need to get something done, it's too late if we five the notice, you know, that the staff is insisting on.

So, actually, it's getting in the way of interactions

between the applicants and the staff, but it is and has been from the beginning a very, very transparent process.

We have an open document discovery where all relevant documents on both sides have been made available from the very beginning, courtesy of Judge Bollwerk, and we have a massive document room out in Salt Lake City that is free and open roaming for the intervenors out there.

Most of those don't have a funding problem because the State of Utah has a much larger budget than I think we have as the applicants and maybe more than the staff has, and I think that's probably more true today in reactor cases, as well.

Certainly, in the Baltimore Gas license renewal case, there were tens, maybe hundreds of meetings that were open to the public years before the application was put on file.

Sections of the application in draft form were made available to the public, put in the public document room.

This was an extremely open process, and I think to say that, you know, you get involved in the marathon in mile 25 and you've got to catch up, I think, is overstating it quite a bit.

There's, from our standpoint, probably more openness than is good for the technical review right now because it gets in the way of the interaction rather than assist the interaction.

MURPHY: Some of these in the Yucca Mountain -- talk about transparency -- for some of these meetings -- and I don't mean the public meetings of the ACNW or the meeting that you're going to be facilitating next Tuesday, for example, Chip, but for some of the informal interactions between the staff of the NRC, the staff of DOE, etcetera, we have members of the press there.

I've been to meetings in which television cameras were present in the room when people were hassling out whether or not some,

you know, section of the total system performance assessment was based on adequate modeling.

It's an extremely transparent, open program, and like I say, because of the unique nature of that, I don't know that translate all of them to any other licensing proceeding, but it seems to me you can transfer quite a bit of it.

CAMERON: Okay.

Tony brought up this morning -- and Bob just referred to it -- this aspect of doing a careful evaluation of existing cases to see exactly what works and what doesn't, and Bob tied it to delay.

That's a solution in terms of trying to address this problem.

I think that the things that Mal said and Jay said and Judge Heifetz are starting to get us to potential solutions for the problems.

In the case of sub-part J or the private fuel storage, there may be lessons learned right within the NRC framework at this point that could be more carefully explored or taken advantage of it.

MURPHY: Let me just say one word about standing, too, before I forget about it, because I want to help out my friend, Jay Silberg here.

We talk about standing in the context of the environmental and citizens groups being denied access to this process from time to time, and I've always considered it somewhat preposterous, for example, that under -- things may have changed in the last 10 years since we first started talking about this, you remember, Jay, in the LSS negotiations, but at that time, at least, the NRC took the position that the utilities themselves, which were funding almost the entire high-level nuclear waste process, would not have standing to participate in the licensing proceeding, because interest had to be something other than financial or economic interest, even though you were paying the --

like I say, except for the defense waste -- the entire freight.

So, if we're going to liberalize standing rules, which I absolutely support, Bob, we ought to liberalize them to the extent that Jay Silberg's clients can get in the door, too, just out of a sense of fundamental fairness.

CAMERON: Okay. Thanks, Mal.

Diane.

CURRAN: A minute ago, Chip, you made a general reference to these problems, and I think my big problem is that I don't know what the problem is.

When I read this staff requirements memo, I took it as basically a declaration of the death knell of the formal hearing process for NRC adjudications, and I still don't know why, and you know, we've had a really interesting discussion here today, and we have put some good things on the board, but I still don't know why, and I am guessing that this comes out of a process that started summer before this past summer, after the LES withdrew its license application and Chairman Jackson was called on the carpet before some members of the Congress and basically read the riot act, and then, shortly after that, I was in the middle of a proceeding where we got an extremely, extremely tight and draconian schedule and were told by the presiding officer I can't help it, I have been ordered by the Commission that we have to clamp down on license proceeding schedules.

I am guessing that this is just another reaction to that kind of political pressure, because it doesn't reflect any kind of reasoning by the Commission.

We're concerned about X, Y, or Z, and therefore, we're doing A, but we want to go from formal to informal hearings, and I would just really urge the Office of General Counsel, when you're dealing with this, go back through the Commission -- I know this has been said

before, but go back through the Commission and ask what is the problem, what do you want us to look at, and don't take this discussion today as the homework that needs to be done.

A great deal more -- first of all, the issues have to be clarified, and then a great deal of work has to be done. We have a process that's been going on for many, many years, and a very vague proposal to completely change it.

CAMERON: If anything, this discussion today might only demonstrate that there is not a wholesale problem with the formal hearing process that needs to be fixed by going informal, and the staff is going to communicate with the Commission about the perception that's presented by the SRM, and I think that we need to do a better job of explaining that.

The only way that I can explain it -- and perhaps Joe and Larry can think about this overnight and we can try to do a better job of it this morning -- is that the so-called legislative solution or legislative option is independent of any policy-based conclusion that the Commission has reached that the formal process should be changed in a wholesale way, and that may be hard to glean from reading that, but I think that that might be the intent.

But I don't want people to -- I mean we can -- one solution to this is to go to the Commission for clarification, as Tony suggested and you're suggesting, but I would like to hope -- I would like to think that we could perhaps provide some clarification on this before the meeting adjourns tomorrow, but we'll have to see if we can do that, and I think that we understand -- the staff understands what your concern is.

CURRAN: That's quite a major undertaking to get legislation passed just so you can keep it in your back pocket.

CAMERON: All right.

Tony?

THOMPSON: I think that we ought to recognize something here that we haven't brought up today, and that is that it is not only -- the delays involved are not only the result of the hearing process.

They are frequently part and parcel of the licensing process itself that goes on and on and on and on either because there maybe aren't the resources or people don't want to face up to the problems, whatever it is.

So, it isn't just the hearing process. Sometimes, when the hearing process becomes pondersome and is tacked on to the tail-end of a pondersome licensing process that you get a problem, and then to have somebody come in at the last moment and say, well, now, I want to redo the whole thing, I want to re-look the whole thing, it seems to me that's unreasonable.

I think, you know, if you, for example, in the relicensing of reactors context, know which reactors are going to be applying to relicense and the information is public, then if you're interested in it, you ought to go and get involved, but don't get involved three years after the -- or four or five years after the licensing process has gone its whole self, there's been an ER or EIS or whatever it is, and then say in the hearing we've got to go back and redo this.

That's not fair, and that's not appropriate, and there's no excuse for it, frankly.

If you're interested in it, then you need to get in it from the beginning, as far as I'm concerned.

Now, one of the things I know in NMSS did here recently was to set up completeness reviews so that when a license amendment comes in or a license application comes in, within 90 days they will tell you whether it's complete enough to go forward or -- it doesn't mean it's absolutely complete, but it's complete enough to go forward, so that you

don't wind up, three years down the road, with the staff saying this is incomplete.

So, there are probably things that the staff can do in the licensing context that are just as important as looking at problems with the hearing process.

I commend to your attention the Court of Appeals decision in the Enviro-Care versus Quivira and International Uranium Corporation case. This came down here, I guess, last week. Two important things in that.

It has to do with standing, and it basically upholds the Commission's position that a competitor who's really only alleging the fact that the license amendment granted to the license applicant or amendment applicant -- the only complaint is that this will injure, in this case, Enviro-Care's competitive status is not a basis for standing.

The Commission held this in two cases, and it even then goes on a little further. The Commission said we're not going to allow a competitor, for example, to come in and abuse our hearing processes and our regulatory processes for their own personal reasons.

The other important thing that this case says and which Professor Lubbers, I'm sure, will be interested in is that, when the Commission makes a decision about its hearing processes, including the issue of standing, it isn't an Article III court, it is interpreting the Atomic Energy Act, it gets Chevron protection.

If the statute is ambiguous and the Commission's position is reasonable, the Commission's decision gets Chevron protection.

If the Commission were operating under the Administrative Procedures Act, it would not get Chevron discretion, because that's a statute that's applicable across the board to agencies.

So, it is directly relevant to the issues that we've been discussing today.

CAMERON: Okay. Thanks, Tony.

Let's go to Joe and then George and to Ellen and then come back to Tony.

Joe?

GRAY: Just a couple of clarifications, I guess, and I'm not going to talk about the SRM.

Chip, you asked about cross-examination and protracted cross-examination and the effects of that. I have not heard for the last 13 or 14 years complaints about protracted cross-examination.

In fact, since sometime in the early '80s, when the Commission put out one of its earlier policy statements on adjudications where they suggested that plans should be used, I think the licensing boards have been fairly astute at controlling cross-examination, and if it's not controlled by the board itself, the parties have the opportunity to control it by the various objections that are available.

So, the law I know, at least, any assertion that cross-examination is a problem is not supportable.

CAMERON: Okay. Thank you, Joe.

GRAY: Just a clarification on a couple of other points made somewhere along the way here.

As an independent agency, we do not have to submit legislative proposals to OMB except those that concern our budget. So, legislative proposals directed to hearing requirements would not have to go to OMB.

We do have a statutory bar on intervenor funding, and if there is a proposal to consider intervenor funding, we would legislatively have to do something.

Finally, I guess I had a question about -- one of the problems or concerns that have been put up on the sheets there was a concern about eliminating issues by rule-making, and I guess, to the

extent that you can give some clarification on the basis for that concern, it would be helpful, I think.

I note, for example, that the rules that set out standards and whatnot are intended generally to resolve problems generically, applicable to all licensees and applicants, and I guess, if -- I just don't see what problem there is with a generic resolution.

Our rules of practice also provide for waiving a rule or setting aside a rule in an individual case if it can be shown that the rule doesn't apply in the particular circumstances.

That is available, admittedly a high standard, but it is there for those cases where the rules, particular substantive rules really can be shown not to apply in that particular case.

So I guess I'm sort of at a loss for the reason why resolution through rule-making is --

CAMERON: What I would like to do is to ask Jim and Jill and Tony to perhaps address that tomorrow when we get to that particular problem, okay, so that we can give some other people time to finish up here tonight, but I think that some further explanation is needed about whether that's always a problem or whether that is only a problem in particular circumstances, the way that it's used.

Let's go to George now and then Ellen.

EDGAR: I want to make sure that at least my view is understood, that I think there are a number of things that need to be done to fix the process. I think it's a process that does have within it considerably uncertainty, lots of unpredictability.

There are some very positive improvements out there that I think should be considered for codification.

In the case management area, many of the things that the Judge talked about are in place already. I think, in particular, though, the Commission policy statement on adjudications has had its

effect. It has imposed a discipline on hearing milestones.

I think, also, the notion of active Commission oversight, Commission intervention in the process is an important feature of control, and it's an important feature for the Commission to make sure that its policies are understood. That should continue.

Historically, if you look for the largest single cause of licensing delays and trace the critical path through most of the cases, you'll find that a good deal of that critical path is tied up with the staff milestone documents, the FES, the SER, and whatnot.

That seems to be an area, to me, that's under significantly improved control. The staff's performance in the license transfer area and on renewal are both extremely positive.

I think the notion of contention thresholds, particularly with the current rules, are good, that they should continue.

One area of weakness and uncertainty historically which I think ties into the purpose that you ascribe the hearing is the sua sponte authority of the licensing board. I would eliminate it entirely.

It is circumscribed already, and it does require Commission review, but if the purpose is essentially dispute resolution, then you don't need sua sponte, shouldn't have it, and I would suggest that the purpose of the hearings should not be educational, it should be simply dispute resolution.

Time for decisions -- I think there is an area where, historically, there has been a question-mark. None of us have quite found the time-line for a decision to be predictable.

I think, generally speaking, there's a recognition of that, but that's an area where I suppose all we have now is some sensitivity that's been borne out of some of the cases.

In terms of cross examination, I'm well aware of cases where I think it's been excessive and non-productive. It is certainly not

true in all cases.

There are many types of cases -- and I think that's on the agenda for tomorrow -- where cross-examination is an important engine for finding the truth, if you will, particularly cases such as individual enforcement, where the question of an individual's conduct might be at issue.

In terms of scientific exchange, I'd have to say that I'd align with Jay on that, that that's not an area where cross-examination is always productive. I would not start with a presumption that, on scientific issues, you would have it.

I would exchange testimony, I would look for conflicts, and I would give the boards the authority to order cross-examination on very specific areas if that were to aid in the decision.

The staff role has always been a subject of some discussion. The staff is the ultimate licensing authority. They are delegated the authority to issue the license. The licensing board's hearing would modify the -- or the licensing board decision would modify the staff license decision, but it would seem to me there shouldn't be a presumption that the staff would have to be a party to the hearing, that the staff could have the discretion as to whether or not they'd participate.

Where there is an issue in which they have a stake, an issue, then certainly they should be allowed to participate, but otherwise, I wouldn't establish the presumption.

The final thought is that, when I look at the question of public participation -- Jay mentioned a number of instances of recent experience where other forms of public participation than the hearing process have been effective. I can think of a number of areas.

The Commission's open meeting policy has been in place for some time, it is observed.

I think Millstone restart is a good example of a situation where the staff opened up the process, local public meetings, a whole series of Commission meetings.

The Union of Concerned Scientists letter was, I thought, well taken. It simply said I don't agree with the decision to restart, but you gave me the opportunity to be heard, and so, there is a positive endorsement of the process.

I think we've been through several ugly, hotly contested licensing cases that, at least two, we've been able to settle, provide intervenors with access to information that really has to do not so much with whether or not the facility should be licensed but how the facility should be licensed, under what conditions and what the state of compliance is.

We spent the better part of three years with an intervenor group at one site, working with them, not always agreeing with them, but at least giving them access to information so that they could assess the level of compliance, in exchange for which they gave up their hearing rights, but I think if you talk to them about it, they would tell you that they got more out of that access to information than they got out of hearing participation.

I can't speak for them, but I have discussed it with them.

So, when I look at this picture, I think we've still got a way to go to improve this hearing process. I wouldn't stop here.

I don't know whether "wholesale" is the right term but certainly it needs to be looked at carefully, and it needs to be looked at in a way that does not assume that this process should remain as it is.

CAMERON: Okay. Thanks, George.

I think people -- although you can't speak for that particular group, people might be interested tomorrow, when we talk

about potential solutions, you know, in a description of what particular process that you're talking about.

EDGAR: Sure.

CAMERON: Ellen?

GINSBERG: Thanks.

I just wanted to put on the table, in response to what Diane has said, you know, this looks like an -- you indicated that this looks like an activity in search of a problem, and I think the industry's position is that putting it that way may not be accurate, but there are certainly improvements that should be made to this process and that there are improvements available that could assist in many different productive ways.

We are not satisfied with the process as it is. We think there are improvements. We will be encouraging the NRC to make those improvements.

Some of the ones that George just identified, some of the other ideas, models -- sub-part J, sub-part M might be another model -- we think ar very applicable to other proceedings than just those for which they are currently being used.

So, to crispen a response, I wanted to be clear that the industry does think there's a need to not only re-look but to make potentially significant improvements to the process.

CAMERON: Okay. Thanks, Ellen.

Tony?

ROISMAN: Two things.

Number one, when we talk tomorrow, I think one of the things that we ought to think about is solutions that do not involve the Commission, because that's what George is talking about.

He's talking about the utility and the interested party, intervenor, working out a deal, and maybe the laboratory that now exists

from experience up until now is a spotty laboratory, it doesn't have good -- everybody's been talking about good science. It certainly doesn't have good science.

But let's just take -- just give you some hypotheticals.

You have a licensing hearing coming up. You've got a utility that says, boy, I'd really like to get this thing decided fast, and what I'd like to do is I'll go find who the interested intervenor groups are, I will fund them in exchange for what I want to bargain for.

I will give them the money necessary to do what they think they need to do to convince themselves either that this is okay or to convince themselves there are problems that they want to air and to go out and get them aired in whatever way, and then, I, the utility, want something back. So, there would be an intervenor funding option.

Another option would be George's proposal. We will give you complete access inside the plant and inside the company to how things are going on, you'll be part of our internal decision-making, and you'll have some voice in all of that, and in exchange for that, you give up all hearing rights.

Here's another model. Okay. Let's try that.

I think the thing that would be really a disaster is to have the Commission start -- first of all, you buy yourself a lawsuit, you buy yourself a long delay, so no one's really going to benefit from that.

If the Commission, particularly on the basis of the available record, goes out and follows this SRM along the lines of laying out a little tool box of weapons that it can draw on whenever it feels like it wants to fore-shorten intervenor rights, it's going to just find itself tied up in nothing but litigation. Doesn't make sense to me.

It makes much more sense -- I'm a believer in negotiation,

not litigation. You would think, based on my career, that I don't follow that. I've just had the unfortunate result of always running into people who believed in litigation instead of negotiation; they closed off the options.

For purposes of tomorrow, I think one of the things we ought to put on the table is a set of options that we could try in the laboratory without doing anything with the Commission at all.

That's number one.

Number two --

EDGAR: Your choice of opponents is bad.

ROISMAN: Well, we've finally got some decent opponents. Took a while. We had to drive a few other law firms, but we got to some people we could talk to.

But I want to talk about some practical considerations, because I think there is one thing -- and this is certainly a case of I'm the blind scientist and I put my hand on the elephant and I think it looks like a long, thin tube.

That's my picture of the elephant. Maybe the elephant really looks very different than that.

But in my experience, most of the things that utilities are upset about, legitimately upset about in terms of delay, have to do with the efforts of intervenor groups to do the best they can with what they've got. Let's take cross-examination as an example.

I certainly confess -- if this were an AA meeting, I would stand up and say hi, I'm Tony, I'm a cross-examine abuser, and the truth of the matter is that we don't do that because we love it or because we even think it's a very good way to get information. We do it because it's all we've got.

Nobody in their right mind would want to spend all that amount of time doing cross-examination, but you don't have to spend any

money, except your presence, to do that. To take a deposition, you have to spend a great deal more money.

You have to go there, you have to order a transcript, you may even have to pay for the witness to come if the other side really wants to be tough about it, etcetera, etcetera.

Interrogatories -- I can tell you I have spent weeks writing interrogatories until my hand fell off. Why would I spend that much time writing interrogatory? Because I couldn't afford to do a deposition, and I didn't want to wait for the hearing to find out the answer to the question.

So, I would write thousands of interrogatories, hoping that maybe somewhere somebody would answer it without talking to their lawyer first and I'd actually find out something, but it was the only tool that I had.

I think that is the reality of what happens in this licensing process.

Now, I know that the Congress of the United States has forbidden the Commission to intervenor funding, and I don't think any of the solutions that are coming from the intervenor side of the table are possible here unless and until we bring to the table, if you really want to have a negotiated rule-making, so to speak, as opposed to an imposed rule-making, the relevant congressional people and they sign on.

If they don't sign on, there's no deal, there's nothing, because yes, they can stop it, and they've already stopped it, but I feel that the underlying problem is that it's hard for you -- and the problem that I think Tony mentioned where they kept giving the intervenor another change and giving the intervenor another chance -- why did they keep doing that?

Because at root, lawyers, in general, and hearing chairmen, in particular, realize the inherent unfairness of telling some little

old lady from Iowa that she's got to figure out why it is that the pump doesn't work, and she tries to do it the first time and she doesn't quite get it right, and his technical guy says, you know, there may be an issue here, so he says, well, I'm going to give you another chance and I'm going to give you another chance. You give the little old lady the resources to hire herself a pump expert and then you don't have to give her more than one bite at the apple; by God, she gets it in.

So, you can be very tough on equally funded people, but it's very, very hard to be tough on them when they don't have the resources to do what you're wanting them to do.

Now, you can run them over. You can steamroll them. You can just push them aside and go ahead and do your thing, and then, whatever the consequences of that are, they are.

I think, from the perspective of the utility and the Commission what happens is that you end up with less safe facilities getting licensed, and from the perspective of the society, you end up with the possibility of a lot of disruptive activity, but that's a possibility.

But if the real plan -- if that statement that was back up there is something that we all believe in, I want you to understand where intervenors come from when they take longer to do something.

They come from that because they don't have the ability to do it in less time, and if they have the ability to do it in less time, as much as some may squeal about it, they can then be expected to act on the basis of the same kind of time schedules that everybody else can meet.

Now, lastly, this issue about the applicants not getting their act together, or the staff, and then getting another chance and another chance -- someone told me this once, and now the General Counsel's office people can correct me if I'm wrong.

I believe that the Nuclear Regulatory Commission does not have the authority to deny licenses.

It only has the authority to say, on the basis of the available record, the license will not be approved, that no utility can ever be told no and never come back again, the way an intervenor can be told no and never come back again, and that that is one reason why there's never a resolution of the case where the utility has just -- or the staff, whoever, has just failed and it's over, it's ended, and I don't know whether that's built into the statute or practice or whether I'm just wrong about that, but I do know that that's one reason why, in these hearings, when the intervenor finds a flaw, we don't go to a verdict, we go to a delay which then allows the other side to try to fix the flaw, and then we come back and do it again, and that may be delay.

I don't think it's our fault. I don't know whether it's built into the system or not, but I certainly have seen it happen in the licensing hearing process.

The last thing I want to say is -- because I know you want to talk about this generic question, and somebody raised, you know, what are these generic issues.

GESMO -- just about the time we thought we had the mixed oxide fuel thing locked. The Commission took out of GESMO the only issue that anybody cared about, proliferation.

Nuclear waste disposal -- we had the construction permit for Seabrook stopped over the failure to consider the nuclear waste issue in the NEPA process. The Commission took it away from us and said no, no, we're going to do it generically.

The history of this agency is, whenever the intervenor gets you guys really good, you change the rules on us.

So, should you have the right to make generic rules? Of course you should. Is that a sensible, fair thing to do? Yes, it is.

But it's been done in a way that has made us very skiddish and very nervous, and so, we feel like we're always getting screwed. It's the ultimate Catch-22.

GRAY: Okay. So, it's a concern about last-minute rules when you've got an issue that the Commission then says no, take that away.

ROISMAN: They didn't mention re-racking. They did it on re-racking, too.

CURRAN: License renewal.

RICCIO: License renewal. There's more to it, though, too. I just want to get this out, because I may not be here tomorrow. I haven't decided yet.

The problem is that you're genericizing things that people don't even know are going to be -- you know, affect their interests at all.

Site-banking, for instance, you know, under the new one-step process -- how does someone know that they're going to build a reactor there 30 years ahead of time or 20 years ahead of time, I think is the date. How do people who don't even know their license is going to be renewed yet address the generic environmental impact statement on relicensing?

I don't even know the 22 reactors you guys are talking about. How does someone in the general public have an opportunity to comment on a generic rule-making that may affect their interest when the industry hasn't even decided whether they're going to renew yet?

It's basic fairness questions.

CAMERON: We'll be back tomorrow for further discussion of this to see if we can at least suggest some legitimate constraints on the use of generic methods to take issues off the table but also for other reasons.

Tony's second point about some of the problems -- I put dysfunctionalities up there -- that result -- Diane and Susan both mentioned the fact that, if there were better alternatives available, then some of these things might not happen, and I think we need to explore that tomorrow.

What I'll do is I'll type up these problems that we have talked about today for a hand-out tomorrow so that we can proceed to discuss them, to see what the extent of the problem is and a potential solution.

We've heard a lot of suggestions about solutions, so we've covered a wide range of issues today.

ROISMAN: Would you also type up the sort of -- at least the tentative draft rewrite of Ellen's proposals just in one place so people can look at it again and see do they agree with that or not?

CAMERON: I'll type up something that is -- I'll put all of that in for tomorrow, and I think if we can -- I think we had a necessary discussion about a lot of issues today, and maybe tomorrow we can put a finer point on some of these things and be more specific.

Jay and Larry, final comments, and just let me go to the audience to see if there's anything out there, since we're about ready to adjourn.

Jay?

SILBERG: In responding to a couple of things that Tony said, are there solutions that don't involve the Commission. Yeah. Whenever we can, we use them.

In DFS, the local landowners came in armed for bear, lots of resources, but they were willing to sit down and tell us what their problems were, and we settled with them. They dropped out of the hearing. They're now in support of the project.

We tried to do the same thing with Diane's client. They

don't want to talk to us.

When you have a party that says over my dead body, terms and conditions, none, you know, you can't have a solution that's outside the scope of the Commission.

ROISMAN: I'm talking about procedural solutions.

SILBERG: We'd be happy to talk about procedural solutions or substantive solutions.

BOLLWERK: I always encourage the parties to settle.

[Laughter.]

SILBERG: When you have parties for whom it becomes a religious issue, as opposed to a substantive issue, if you will, there doesn't seem to be any common ground.

I would love for there to be common ground. I would love for there to be a procedural out, another route. We've been able to accomplish that in a number of cases, but it's just not always the case.

CURRAN: It doesn't have to be a religious issue for someone to feel strongly about it.

ROISMAN: I always thought it was the utilities that had the religious, that when God said let there be light, it was a utility executive that flipped the switch.

CAMERON: All right, Jay. Anything else?

SILBERG: In terms of genericizing, I think that the more generic resolutions to issues we have, the better off everyone is, because yes, you don't know if you are going to have a plant in your back yard, but everybody in the country knows that there's an issue that's now on the table, and if they are interested in it, you know, they ought to be able to participate, and yes, there may be some people who will participate unnecessarily, but I don't think that's really been the case. The folks who are going to be upset know who they are, and they're going to be upset regardless.

And in terms of the multiple bites at the apple, I think we have to bear in mind that the purpose of the NRC is public health and safety. It's not a game of seeing, you know, whose license we can grant or deny, but it's having the public health and safety protected.

And to say that you can't -- if a problem comes up in a staff review, that we can't amend the application and change the design to cure a problem that the staff had pointed out or to do the same if it's a problem that the intervenors have pointed out in a hearing, I think, is warping the process and why the NRC is here.

The NRC is not here to give lawyers on both sides the opportunity to expand their litigation skills. It's to protect the safety of the public, and I think we need to bear that in mind. It's not a game.

CAMERON: Okay.

Quick comment from Susan, last word to Larry.

We are going to discuss these issues again tomorrow, hopefully with some results.

Susan?

HIATT: I guess I would touch on what Jay talked about, finding common ground, and the reluctance of some people to do that.

I guess I'm reminded of an article that I saw with the title of "Will He Talk and Other Thought Pollutants," and common ground is one of those in there, and it was a place to meet after you alone have handed over your sword, and I think there's a perception among some people that that's what that involves, finding common ground, that you've given up your sword, like what's in 10 CFR 2, and maybe that's why they're reluctant to do that.

CAMERON: All right.

Larry.

CHANDLER: Tony had suggested or at least asked whether

there's any foundation to what he recalls having heard. I'm not aware of any statutory requirement or regulatory provision that prevents the Commission from denying a license.

In the material area, we have at least one pending denial proceeding underway. In the reactor area, they're practical issues. Where the staff identifies technical deficiencies, it certainly can deny a license.

There have been a number of facilities at which -- let me back up. There have been a number of applications for facilities, in connection with which the staff questions have caused the applicant to rethink the advisability of their proposal, and they have been withdrawn.

ROISMAN: I think my point was can you tell them no and they can't ever come back with it again, and the answer is I don't think you can.

CHANDLER: You can deny the application. The initial application itself has been denied. You wouldn't foreclose them, obviously, from coming back. The APA doesn't contemplate that either, as far as I can tell.

ROISMAN: Right. I didn't mention it to suggest that it shouldn't be allowed, and I understood why it was. I mentioned it to indicate where a lot of delay comes in the process is you go -- I mean in Comanche Peak, we went to a certain point and the utility basically said we're going to stand still for a while, and they stood still for a while.

So, if you look at start date and end date in Comanche Peak, you'd say, wow, that took a long time to license.

CHANDLER: And there are any number of cases like that, in which utilities have sort of gone back for any number of reasons. Comanche was one set of reasons; Diablo Canyon was another set of

reasons.

RICCIO: Good reasons, too.

CHANDLER: They were good reasons. Absolutely, they were good reasons, and the process -- even the hearing process, not only the staff review, but the hearing process.

GRAY: George Edgar points out that the NRC can deny an application with prejudice. The NRC could find, for example, that a proposed site is no good. You can't amend the application to fix it. I mean that can be done. I don't know that it has been done up to now with regard to a nuclear power plant.

CAMERON: Larry, did you want to make one final comment?

CHANDLER: I would bring that to the attention of the Los Angeles Water & Power people and ask them about Malibu.

CAMERON: I guess this is where I've got get into this, case management.

CHANDLER: From an agency standpoint we, too, are as interested as others in any settlement of a proceeding. Litigation is not necessarily the answer to everything.

CAMERON: That's a great closing remark from the NRC.

Is there anybody out in the audience who's left standing?

Bob, state your name and affiliation for the transcript, please.

TEMPLE: Bob Temple, a partner with Hopkins & Sutter.

A quick note possibly for your board is to add fast-track procedures where appropriate, where risk-informed reviews suggest it's appropriate.

It's an answer to delay under certain circumstances where it would be inappropriate to be holding up a particular activity because of an intervention or a particular motion.

CAMERON: And when you say it would be inappropriate to be

holding it up, it would be inappropriate because of the types of things that Tony Thompson was saying, low-risk, or inappropriate for some other reason?

TEMPLE: Either low-risk or procedurally inappropriate.

CAMERON: Okay. We'll put that on the list, and I just thank you all for staying with us today, and we'll see most of you back tomorrow, and we'll have some materials for you tomorrow morning to make the discussion a little bit easier, and we'll start at 8:30. Thank you.

[Whereupon, at 5:27 p.m., the meeting was recessed, to reconvene at 8:30 a.m., Wednesday, October 27, 1999.]