

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Dominion Nuclear Millstone Plant
Pre-Hearing Conference

Docket Number: 50-336 and 50-423; ASLBP No.: 05-837-01-LR

Location: (telephone conference)

Date: Tuesday, April 12, 2005

Work Order No.: NRC-327

Pages 1-96

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD (ASLB)

5 PRE-HEARING CONFERENCE

6 -----x

7 IN THE MATTER OF: :

8 DOMINION NUCLEAR, : Docket Nos.

9 CONNECTICUT, INC. : 50-336 and 50-423

10 (Millstone Nuclear Power : ASLBP No. 05-837-01-LR

11 Station, Units 2 and 3 :
12 -----x

13 Tuesday, April 12, 2005

14 The pre-hearing teleconference came to
15 order at 2:00 p.m., the Honorable Michael Farrar,
16 Chair, Presiding.

17 BEFORE:

18 MICHAEL C. FARRAR Administrative Judge, Chair

19 ALAN S. ROSENTHAL Administrative Judge

20 PETER LAM Administrative Judge
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1 APPEARANCES (continued):

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20 and

21 MATIAS TRAVIESO-DIAZ, ESQ.

22 TIMOTHY WALSH, ESQ.

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19 ALSO PRESENT:

20 Paul Sabatino II, Chief Deputy County Executive
21 Michael Deering, Director of Environmental
22 Affairs
23 Joseph F. Williams, Commissioner of Fire,
24 Rescue, Emergency Services
25

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1 APPEARANCES (continued):

2 Warren Horst, Chief Fire Marshall

3 Richard Gimbl, Fire, Rescue, Emergency Services

4 Martin Trent, Acting Chief, Office of Ecology,

5 Department of Health Services

6 Pat Doddona, The Day of New London

7 Neil Sheehan, OPM

8 Dennie Williams, Hartford Courant Report

9 Nancy Burton, Connecticut Coalition Against

10 Millstone

11 Sherverne Cloyd, Board Staff

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P R O C E E D I N G S

(2:04 p.m.)

ADMIN. JUDGE FARRAR: This is Mike Farrar. I'm the Chairman of Millstone Licensing Board. I'm at Licensing Board Chambers. With me are my two colleagues, Judge Alan Rosenthal and Judge Peter Lam. We have the Court Reporter here with us. And Sherverne Cloyd is with us from our staff who was so helpful in setting all this up.

It's the county's motion. Who is representing the county?

MS. KOHN: The Suffolk County Attorney Jennifer Kohn and Assistant County Attorney and George Nolan, Bureau Chief. We also --

MR. SABATINO: The other people present are myself, Paul Sabatino, Chief Deputy County Executive. And I'll let the other people introduce themselves. We have some staff people here.

ADMIN. JUDGE FARRAR: All right.

MR. HORST: Warren Horst, Chief Fire Marshall from the county's Department of Fire, Rescue, Emergency Services.

ADMIN. JUDGE FARRAR: You'll have to come closer to the phone. We missed your name.

MR. HORST: Warren Horst.

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1 ADMIN. JUDGE FARRAR: All right.

2 MR. HORST: I'm the Chief Fire Marshall
3 with the county's Department of Fire, Rescue,
4 Emergency Services.

5 ADMIN. JUDGE FARRAR: All right. Thank
6 you.

7 MR. WILLIAMS: Joseph Williams. I'm the
8 Commissioner of Fire, Rescue, Emergency Services,
9 Suffolk County.

10 ADMIN. JUDGE FARRAR: Okay.

11 MR. GIMBL: Rick Gimbl, Fire, Rescue,
12 Emergency Services, Suffolk County.

13 ADMIN. JUDGE FARRAR: All right.

14 MR. DEERING: Michael Deering, Director of
15 Environmental Affairs for Suffolk County.

16 MR. TRENT: And Martin Trent with the
17 Department of Health Services for Suffolk County.

18 ADMIN. JUDGE FARRAR: All right. And the
19 first person with you, Ms. Kohn, was George Nolan?

20 MS. KOHN: George Nolan.

21 ADMIN. JUDGE FARRAR: Yes.

22 MR. NOLAN: From the Municipal Law Bureau,
23 County Attorney's Office.

24 ADMIN. JUDGE FARRAR: All right.

25 For the company? Oh, and by the way, I'm

1 sorry, we appreciate all of you taking the time to
2 participate. Thank you.

3 MR. SABATINO: We also -- we want to thank
4 you on behalf of the County of Suffolk for giving us
5 the opportunity to make the presentations. So thank
6 you very much.

7 ADMIN. JUDGE FARRAR: All right.

8 For the company?

9 MR. TRAVIESO-DIAZ: Yes, good afternoon,
10 Mr. Chairman, members of the Board, my name is Matias
11 Travieso-Diaz. And I'll spell it for the Reporter.
12 First name is --

13 ADMIN. JUDGE FARRAR: He's got it. We
14 gave him a list.

15 MR. TRAVIESO-DIAZ: All right.

16 MR. SABATINO: Could he spell it anyway?
17 I'm sorry.

18 MR. TRAVIESO-DIAZ: Sure.

19 MS. KOHN: Could I get a list at the end
20 of the day? Thank you.

21 MR. TRAVIESO-DIAZ: First name is spelled
22 M, as in Mary, A-T, as in Thomas, I-A-S. Last name is
23 a hyphenated name Travieso-Diaz spelled T as in
24 Thomas, R-A, V as in Victor, I-E-S-O, hyphen, D as in
25 David, I-A-Z. The Law Firm that I worked with is

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1 called Pillsbury Winthrop Shaw Pitman.

2 With me in the office today is Timothy
3 Walsh, also from our firm. And I believe on the line,
4 although not with us, is Lillian Cuoco. That's
5 spelled C-U-O-C-O. And she's in-house counsel for
6 Dominion Nuclear.

7 MS. CUOCO: That's correct. I am on the
8 line. Good afternoon everyone.

9 ADMIN. JUDGE FARRAR: All right.

10 Mr. Travieso-Diaz, this is not just a
11 coincidence. A gentleman by that name appeared in
12 front of us in the Private Fuel Storage proceeding for
13 a number of years.

14 MR. TRAVIESO-DIAZ: I vaguely seem to
15 remember that, sir.

16 (Laughter.)

17 ADMIN. JUDGE FARRAR: I'm glad to have you
18 on board.

19 For the staff?

20 MS. POOLE: Good afternoon. This is
21 Brooke Poole. With me in the room is Katharine
22 Wisberg, also from the Office of the General Counsel.
23 And Johnny Eads, E as in Eric, A-D-S. And he is the
24 Safety Project Manager from Millstone.

25 And, I believe, Neil Sheehan from the

1 Office of Public Affairs is present from another line,
2 correct?

3 ADMIN. JUDGE FARRAR: Yes, I'll get to him
4 in a minute.

5 All right. We welcome all the parties.
6 Neil, you're on here?

7 MR. SHEEHAN: Yes, sir.

8 ADMIN. JUDGE FARRAR: Okay. Good to hear
9 from you.

10 Is Diane on?

11 MR. SHEEHAN: No, just myself and Mary
12 Joann.

13 ADMIN. JUDGE FARRAR: All right. And I
14 think we had a couple of reporters.

15 MS. DODDONA: Yes, Pat Doddona from The
16 Day of New London.

17 ADMIN. JUDGE FARRAR: All right.

18 MR. WILLIAMS: Johnny Williams from the
19 Hartford Times.

20 ADMIN. JUDGE FARRAR: All right. Welcome
21 to both of you.

22 Anyone else on the line?

23 MS. BURTON: Yes, Judge Farrar, it's
24 Nancy Burton. And I'm here participating to a limited
25 extent on behalf of the Connecticut Coalition against

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1 Millstone.

2 ADMIN. JUDGE FARRAR: All right.

3 This is a -- welcome all of you. This is
4 a little bit of an unusual proceeding. When we have
5 pre-hearing conferences in person, we have them in the
6 courtroom and they're open to public observation.

7 When we do them as conference calls, we
8 have tended not to have anyone but the parties
9 involved. And I think there are three reasons for
10 that. There has always been a concern that you could
11 lose control of the proceeding. The only way we can
12 have any control is to end the call entirely rather
13 than in a courtroom where we have more control.

14 Second, when you're on the phone, to the
15 extent that there is humor injected to alleviate
16 tensions, people who are not present may not -- and
17 don't know each other, may not see that.

18 And third, we sometimes would bring
19 counsel to the bench for off-the-record conferences on
20 things that we don't want to have on the transcript.
21 And, of course, we can't do that on a phone call.

22 But all things considered, we thought it
23 was worthwhile to go ahead with the reporters and with
24 Ms. Burton. I think -- well, I mean if the rules
25 weren't explained, this is not a public hearing. The

1 only people entitled to speak at this are the counsel
2 for the parties and anyone with them whom they
3 designate.

4 Ordinarily it would be counsel who speaks
5 but Ms. Kohn has a number of people there who she
6 could call on if a question requires it. And the same
7 thing with the staff with the Project Manager and the
8 company with in-house counsel somewhere else.

9 But as far as the two reporters and Ms.
10 Burton are concerned, you're welcome to listen but not
11 welcome to speak. Is that all right, Ms. Doddona?

12 MS. DODDONA: Absolutely.

13 ADMIN. JUDGE FARRAR: Mr. Williams?

14 MR. WILLIAMS: Yes, that's fine. One
15 thing is if, at the end, we could make sure that if
16 something comes up that we understand who is who
17 because, you know, there are a lot of names here. But
18 that's fine.

19 ADMIN. JUDGE FARRAR: Yes, and you are, of
20 course, welcome to call the parties afterwards --

21 MR. WILLIAMS: Okay.

22 ADMIN. JUDGE FARRAR: -- and, you know,
23 get their view on what they thought. But we'll not do
24 that --

25 MR. WILLIAMS: Right.

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1 ADMIN. JUDGE FARRAR: -- on the call.

2 And Ms. Burton, those ground rules are
3 fine with you?

4 MS. BURTON: Understood.

5 ADMIN. JUDGE FARRAR: Okay. Thank you.

6 Let's get started. Our order convening
7 this call, it said -- and we've, you know, we've read
8 all your briefs.

9 We said we would start with wanting to
10 hear -- even though this is the county's motion, we
11 want to hear first from the company and the staff
12 about the West Valley series of decisions, the issue,
13 of course, being the county was late filing its
14 request here.

15 But there is a West Valley case in which
16 the Commission held that a county nine months late
17 with no excuse would be permitted to intervene. And
18 so we thought we'd want to hear first from the company
19 and the staff.

20 And it's no coincidence that the name of
21 the Appeal Board dissenting decision that became the
22 law of the case is the same Judge Rosenthal who is
23 sitting here with me.

24 So, Mr. Travieso-Diaz, do you want to
25 start?

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1 MR. TRAVIESO-DIAZ: Yes, surely.

2 I would like, at an opportune time, to
3 talk more generally beyond the West Valley decision.

4 ADMIN. JUDGE FARRAR: All right.

5 MR. TRAVIESO-DIAZ: I hope I have the
6 opportunity to do that later on. But let's just get
7 into West Valley now.

8 The 1975 West Valley case, the main
9 holding of the case was that in evaluating an untimely
10 intervention petition, one must look at all the
11 factors that were at the time listed. There were
12 five. Now there are eight. And I think that is still
13 the law and I don't think anybody disputes that. Both
14 the Applicant and the staff have addressed at some
15 length all these factors in the file.

16 However, there are other Commission
17 decisions, both more recent and more on point, that
18 control what we have before us today. The most
19 important, I think, because it is most akin to the
20 facts that we have here, is the decision by the
21 Commission on the Comanche Peak case. I'm referring
22 to CLI-93-4, 37 NRC 156. And as I discuss that case,
23 you will see why it is directly on point with what we
24 have here.

25 In the Comanche Peak case, there was, like

1 here, a very late intervention petition by a party who
2 did not have a good excuse for the late intervention.
3 The Commission looked, again, at the time, there were
4 only five factors as opposed to the eight that we have
5 now, and went through all of them in determining that
6 a party should not be allowed to intervene.

7 With respect to the first factor, which is
8 good cause for a non-timely filing, the Commission
9 noted that that particular intervention petition
10 raised an issue that had to do with the use of
11 thermal-like insulation at the Comanche Peak plant.

12 The Commission found that Investor
13 Vinershu had known for a long time that this issue had
14 been raised. And they were at least six months late,
15 specifically one date he would certain that they had
16 noticed, in filing the petition. That is, of course,
17 exactly as it is that we are here.

18 We are nine months of actual notice in the
19 Federal Register and six months of beyond doubt notice
20 not contested by the county by virtue of the
21 resolution passed by the County Board -- pardon me --
22 by the County Legislation authorizing the initiation
23 of proceedings to oppose the renewal of the Millstone
24 license.

25 So in that situation, the Commission --

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1 Comanche Peak felt that when there is no excuse for a
2 late filing, that petitioner must make a compelling
3 case with respect to the other factors.

4 ADMIN. JUDGE FARRAR: All right. But then
5 you would agree that the nine months late with no good
6 cause and for purposes of this portion of the
7 argument, let's assume there was no good cause, that's
8 not disqualifying on its own?

9 MR. TRAVIESO-DIAZ: No. But as was said
10 by the Board in the Comanche Peak decision, and I
11 believe that was said by Judge Rosenthal in another
12 case, in a situation like that, you must make a
13 compelling case with respect to the remaining factors.
14 That is the significance of Comanche Peak and others
15 in this part.

16 ADMIN. JUDGE FARRAR: Is that the one from
17 West Valley where the showing looked to be a little
18 less than compelling?

19 MR. TRAVIESO-DIAZ: No, actually even in
20 West Valley, the Commission, when the rule said the
21 burden would just be find intervention when the basis
22 of the other factors in the rule is considerably
23 greater than when the latecomer has no good excuse.
24 So if you want to call it compelling, very strong, or
25 greater, they have to show significantly more than

1 just, you know, even money. They have to make a very
2 strong case on the remaining factors --

3 ADMIN. JUDGE FARRAR: Let me ask you --

4 MR. TRAVIESO-DIAZ: -- if there is any
5 decision on that.

6 ADMIN. JUDGE FARRAR: -- let me ask you
7 this. In West Valley as in this case, the late
8 petitioner is a governmental entity. Was that true in
9 Comanche Peak? And if not, is that a factor that
10 should be taken into consideration in weighing these
11 various criteria?

12 MR. TRAVIESO-DIAZ: Well, in Comanche
13 Peak, the party was not a government entity. However,
14 I believe the status of the petitioner as a government
15 entity or not is only relevant to the most outstanding
16 interest. But I don't think that a government entity
17 has any greater rights to participate in a hearing if
18 it doesn't meet the requirements about the regulations
19 than anybody else. They are not privileged to come in
20 if they don't meet the requirements.

21 ADMIN. JUDGE FARRAR: And wasn't there a
22 hint of that in West Valley? That the -- I think it
23 was the County of Erie, that that was a -- that they
24 had -- they were a little more equal than say a
25 private party?

1 MR. TRAVIESO-DIAZ: No, I think the
2 distinction was valid. And, again, it is a
3 distinction between that case on the one hand and
4 Comanche Peak and our case on the other.

5 ADMIN. JUDGE LAM: This is Judge --

6 MR. TRAVIESO-DIAZ: In the West Valley
7 situation, there were already other parties in an
8 already ongoing proceeding. And that the state entity
9 had raised an issue that nobody else had raised. And
10 that it was a legitimate issue for a hearing.

11 So in that respect when you have an
12 already ongoing proceeding, it's not going to be
13 greater prejudice if somebody else comes in
14 particularly if it is a new issue that has not been
15 alleged by anybody, a valid contention represented by
16 somebody who is in a position to raise it. I think
17 that that would be -- that would put the county, in
18 that case, in a position of being more equal than the
19 others.

20 But I don't think it applies here at all.
21 Because here we don't have a proceeding going on.
22 Here we don't have a contention that it is admissible.
23 And I will talk on that at quite long length later if
24 you want.

25 And secondly, there is nothing that would

1 justify establishing a proceeding only on that basis.

2 ADMIN. JUDGE LAM: Mr. Travieso-Diaz, this
3 is Judge Lam. Let me go back to things you earlier
4 said about compelling reasons. Assuming there is
5 indeed a lack of good cause, isn't it true the
6 Licensing Board also had considerable discretion in
7 determining what the standard for compelling reason.

8 MR. TRAVIESO-DIAZ: Obviously compelling
9 is like any other word, one that is open to
10 interpretation. However, you look at the way that
11 that word has been applied, say in the Comanche Peak,
12 as I will tell you in a moment, you will see that it
13 is clear that compelling is not just making some sort
14 of a case. You have to have very strong arguments on
15 your side as to why you should be able to intervene
16 based on the other factors.

17 If I could go on? Unless you have any
18 more questions?

19 ADMIN. JUDGE FARRAR: Yes. You talked
20 about the distinction with West Valley, the nature of
21 that proceeding and here you have no proceeding. Your
22 client's two licenses are due to expire when?

23 MR. TRAVIESO-DIAZ: Ten and 20 years from
24 now.

25 ADMIN. JUDGE FARRAR: 2015 and 2025?

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1 MR. TRAVIESO-DIAZ: I believe that's
2 correct.

3 ADMIN. JUDGE FARRAR: And how much under
4 the Commission's rules, how far in advance are you
5 ordinarily allowed to apply for a license renewal?

6 MR. TRAVIESO-DIAZ: You are allowed to
7 apply in 20 years. And if I could tell you why the 20
8 years was set that way, that might clarify what these
9 numbers mean.

10 ADMIN. JUDGE FARRAR: Hold it. So you are
11 allowed automatically to apply 20 years ahead of time?

12 MR. TRAVIESO-DIAZ: Yes.

13 ADMIN. JUDGE FARRAR: I thought -- for
14 some reason, I thought it was shorter. I've never had
15 a license renewal case. I thought it was shorter.
16 And that you got a special permission to apply early.

17 MR. TRAVIESO-DIAZ: Well, let me tell you
18 why that special permission. And I'll tell you where
19 you are going to find it. You can find it on 56 FR
20 64943. At 64963, that is the rule that established
21 the procedures for license renewal.

22 And the NRC explained in that statement of
23 considerations for renewal that you need 20 years
24 because -- and the numbers, I suspect, are even longer
25 today, if the application is for some reason denied,

1 you want to plan on startup generation, you need 10 to
2 12-year minimum for a fossil plant and 12 to 14 years
3 for other generation plus that doesn't take into
4 account the amount of time that the staff has to spend
5 reviewing the application before they decide to turn
6 it down.

7 So they felt that 20 years was a
8 reasonable time because it's not just a question as to
9 when the license expires but what happens if you don't
10 get the renewal.

11 ADMIN. JUDGE FARRAR: All right. And if
12 there were no interveners in this case, when is the
13 staff due to pass its judgment on your license renewal
14 request?

15 MR. TRAVIESO-DIAZ: I believe that the
16 schedule that has been set is for November of -- okay
17 -- November of this year. Let me tell you that the
18 staff has published, and you can find this on the NRC
19 website, a table of estimated times for acting on a
20 license renewal application.

21 And the table indicates, based on
22 experience, that the difference between having a
23 license application that is uncontested and one that
24 is contested leading to hearing is a minimum of eight
25 months.

1 So having the petition accepted and
2 carried through could add eight months to the period
3 that the staff would need in order to be able to issue
4 the license.

5 I'm making this point, not only because
6 you asked but also because the county has suggested
7 that there is no prejudice to Dominion by having the
8 application delayed by the institution of the
9 proceeding as they request. That's actually not the
10 case for a number of reasons. But the ones that I
11 gave you a moment ago are the most obvious ones.

12 ADMIN. JUDGE FARRAR: All right. That's
13 helpful.

14 I'll tell you how we'd like to proceed.
15 I think we have your view on what West Valley means
16 and doesn't mean. I'd like to hear -- unless you have
17 -- we want to hold the discussion of the -- you know,
18 how the factors weigh and whether they are, in fact,
19 compelling or if that is the right standard -- hold
20 that to the next phase.

21 Do you have anything else you want to say
22 about West Valley and the timing issue before we hear
23 from the staff and then from the county?

24 MR. TRAVIESO-DIAZ: Well, I'd be glad to
25 answer any more questions. I do want to address when

1 we get to the factors the relevance of the Comanche
2 Peak decision in which all these things were
3 discussed.

4 ADMIN. JUDGE FARRAR: All right. Well
5 let's hold that. We have your view on West Valley and
6 the timeliness.

7 ADMIN. JUDGE LAM: Now this is Judge Lam.
8 I'd like to hear you clarify this timing issue. Now
9 given you had 10, 20 years' time to renewal, why isn't
10 the county's argument persuasive?

11 MR. TRAVIESO-DIAZ: Well, I think I
12 explained to you what and how the numbers play out,
13 okay? In fact, as you just pointed out, the license
14 for Unit 2 expires in ten years. If you go through
15 the mathematics that the Commission used in
16 implementing the rule, the tables that the staff
17 provided, but you will find that the schedule for Unit
18 2 is relatively tight.

19 And, in fact, should there be a denial
20 either by the staff or as the result of this hearing
21 of the license, Dominion may have to scramble to find
22 a way to replace the power for Unit 2. So I think
23 that there is urgency.

24 And anything that derails the schedule as
25 it is, it is going to adversely impact our client and

1 their ability to continue normal operations at
2 Millstone.

3 ADMIN. JUDGE FARRAR: So that's more on
4 the order of the company's business planning to supply
5 the consumers in Connecticut than it is tied right to
6 the operation of the plant itself?

7 MR. TRAVIESO-DIAZ: Well --

8 ADMIN. JUDGE FARRAR: And I'm not
9 discounting that factor. But that's the argument that
10 you're making. That the company is entitled to know -
11 - or the consumers of electricity in Connecticut are
12 entitled to have the company know sooner rather than
13 later which direction it is going.

14 MR. TRAVIESO-DIAZ: Well, it goes to one
15 of the eight factors for allowing a late petition to
16 be accepted because you have to see where the burden
17 for having such an application accepted -- pardon me -
18 - such a petition filed and accepted as timely.

19 It is a burden of potentially
20 significantly adverse consequences to the client -- to
21 the company.

22 ADMIN. JUDGE LAM: Well, you know, but
23 this really not -- I mean I understand the value of
24 long-term planning. But if you've got 10 years, 20
25 years, assuming the intervention by the county would

1 cause a delay of a few months, that should not
2 materially impact on your planning because you have
3 such a long lead time.

4 I mean I understand what you were saying
5 about a tight schedule. But the impact, to me, seems
6 to be perhaps minimal.

7 MR. TRAVIESO-DIAZ: I'm sorry. But, in
8 fact, 2.309(c)(vii) says in deciding whether to
9 consider an unjustifiably late petition for
10 intervention is the potential for delay. And this is
11 what I'm talking about. So it is a factor that needs
12 to be considered and given considerable weight.

13 ADMIN. JUDGE FARRAR: All right. Well,
14 let's hold that until we get to the factors. Thank
15 you, Mr. Travieso-Diaz.

16 Ms. Poole, you want to give us the staff's
17 position on this?

18 MS. POOLE: Thank you. The staff agrees
19 that the fundamental premise of the Commission's
20 decision in West Valley is still good law. Which is
21 to say that a showing of good cause for lateness is
22 not a condition precedent to consideration of the
23 other factors, then four, now seven, in the late
24 filing rule.

25 But I think that underlying the

1 Commission's decision in West Valley are some
2 circumstances that the staff believes necessitate
3 coming to a different conclusion in this case.

4 In West Valley, the Licensing Board and
5 the Commission determined that under the rules in
6 effect at that time, Erie County had proffered an
7 admissible contention. In the case before us,
8 however, putting aside completely the county's lack of
9 good cause for its lateness, the petition must still
10 be denied for failure to proffer an admissible
11 contention.

12 ADMIN. JUDGE FARRAR: Yes, but wait --
13 that's -- we want to hold that.

14 MS. POOLE: No, no, and I understand. We
15 need to talk about that --

16 ADMIN. JUDGE FARRAR: Right.

17 MS. POOLE: -- later on.

18 ADMIN. JUDGE FARRAR: For purpose of the
19 timeliness argument, let's assume that this was a
20 valid -- for purposes of this part of the argument --
21 and I know we'll hear from you later that it isn't,
22 but let's assume that this was a valid contention, you
23 know, within our jurisdiction and well stated and so
24 forth.

25 MS. POOLE: Well, the Commission also said

1 in CLI-75-4 that favorable findings on some or even
2 all of the other factors in the late filing rule need
3 not outweigh the effect of the inexcusable tardiness.
4 And for the reasons set forth in our answer, I think
5 we continue to believe that the silence of the late
6 filing factors doesn't weigh in favor of granting the
7 petition.

8 ADMIN. JUDGE FARRAR: Is that because you
9 think not only is there no excuse for being late here
10 but there's really no excuse? If you --

11 MS. POOLE: Well, putting the late filing
12 aside, the other factors, we think, don't weigh in
13 favor of granting the late petition.

14 ADMIN. JUDGE FARRAR: Okay. Because I
15 will tell you that when I read West Valley, I was
16 surprised at how really no excuse there was there. Or
17 is that an improper reading of West Valley?

18 MS. POOLE: No, no. There was really no
19 excuse there. And we think there's really no excuse
20 here. But even still, we have to consider the other
21 factors and we don't think they weigh in favor of
22 granting the petition.

23 ADMIN. JUDGE FARRAR: All right. Then if
24 you don't mind, we'll hold the discussion of the
25 factors for a minute. And let me call on the county

1 to talk both about West Valley and about the degree to
2 which your excuse, whether you do have an excuse --
3 and I'll caution you that not getting the Federal
4 Register is not viewed around here as much of an
5 excuse. We've had a series of cases on that.

6 But, Ms. Kohn, go ahead.

7 MS. KOHN: Well, as I said in my papers,
8 I did believe that the West Valley case directly
9 applies to these facts and circumstances. I think
10 that the county has a very clear cognizable interest
11 here that outweighs any tardiness.

12 I think first of all, that we are within -
13 - we're in a close distance to the plant. There is a
14 proximity presumption, which I outlined in my papers.

15 ADMIN. JUDGE FARRAR: Yes, well wait a
16 minute. Let's hold those that go to the factors.
17 Let's talk first on the matter of the excuse. Can we
18 proceed on the basis that like the County of Erie,
19 there's not much of an excuse, if any, for the
20 lateness here? I'm not saying that's --

21 MS. KOHN: I'm not going to admit that.
22 We do feel that, you know, there is an excuse. We're
23 not as familiar with the rules of the proceedings,
24 obviously, as the people who deal in this area all the
25 time are. We had a new administration.

1 I can tell you that researching the
2 motion, from my own personal point of view, was quite
3 difficult. A lot of the documents weren't available
4 on the website for security reasons. And I think we
5 did the best we could. And I think that given the
6 strength of our interest in this proceeding, that that
7 outweighs the lateness factor.

8 And I think we have a very clear
9 cognizable interest here that wouldn't otherwise be
10 represented.

11 ADMIN. JUDGE FARRAR: All right. Well, I
12 think we have an understanding of where we start from
13 here. I think with that -- or unless you have
14 something to add, Ms. Kohn, on this point, I was going
15 to move into the factors. But I didn't want to cut
16 you off.

17 MS. KOHN: Well, just that, you know, I do
18 feel that the time in between the -- should the county
19 be allowed to intervene, I think that Dominion does
20 have sufficient time to continue without interrupting
21 electric service to the population of Connecticut.

22 ADMIN. JUDGE FARRAR: All right. I think
23 then -- I don't think there's any need from the
24 company or the staff for rebuttal on that.

25 Let's move into the factors. I'll let --

1 and the company says it has to be a compelling showing
2 on the other factors to outweigh the lack of good
3 cause. So, Mr. Travieso-Diaz, let's go through those
4 factors. And I'd like you to discuss those factors on
5 the following assumption. There's an argument here
6 that the contention is outside the jurisdiction of
7 this kind of proceeding.

8 If you're right on that, and I know the
9 county has a request for an exemption, but if you are
10 right on that that it is outside the jurisdiction,
11 then you necessarily win and we wouldn't allow the
12 county to intervene.

13 Let's discuss the factors then on the
14 assumption that the contention is within our
15 jurisdiction. In other words if we, because, as I
16 said, the alternative is if it is not within our
17 jurisdiction, the company wins and the county gets
18 dismissed.

19 If it were within our jurisdiction, how
20 would the factors weigh? Is that clear, Mr. Travieso-
21 Diaz, the hypothetical I'm asking you?

22 MR. TRAVIESO-DIAZ: It is very clear. Let
23 me fight with your hypothetical for just one second
24 and you'll understand why. Some of the factors that
25 go to determining whether a later intervention

1 petition should even be considered relate to what kind
2 of case does the petitioner want to make.

3 ADMIN. JUDGE FARRAR: Yes.

4 MR. TRAVIESO-DIAZ: So if you are going
5 to, for example in West Valley, one of the factors, an
6 important factor in letting Erie County in is that
7 they had proffered an admissible contention.

8 So I need to fight your hypothetical only
9 in the limited sense of showing to you how the fact
10 that they do not have an admissible contention effects
11 even the factors to be admitted to be considered with
12 respect to lateness.

13 Let me explain. For example, the county
14 just made a big argument that their interest in this
15 proceeding outweighs lateness and other factors of the
16 law. The law on point is that that factor is
17 relatively minor compared to the others.

18 But more importantly, the interest that
19 they are citing here, and this goes to (ii) and (iii)
20 on 309(c) (1), the interest they are citing here is the
21 interest in protecting their citizens against
22 emergency preparedness deficiencies.

23 That is an interest only so in this kind
24 of proceeding. Therefore, even the admin that they
25 have a protectable interest is tainted by the fact

1 that the interest they're trying to raise is not one
2 that should be raised or can be raised in this
3 proceedings. That's why I'm fighting your
4 hypothetical a little bit.

5 ADMIN. JUDGE FARRAR: Right. And I
6 understand that. And we certainly don't want to take
7 that argument away from you ultimately. But in order
8 for us -- you know, this is our first contact with the
9 case. In order for us to understand clearly the
10 different arguments, we'd like to see how that shapes
11 up if this were an admissible contention.

12 MR. TRAVIESO-DIAZ: Okay. Let me go on.

13 ADMIN. JUDGE FARRAR: And, you know, we're
14 not intending to deprive you of that argument. And
15 that's a very -- obviously a very forceful argument.
16 The problem is for purposes of the eight factors, it's
17 almost too strong because if you are right on that,
18 then they have nothing on the eight factors, and so --

19 MR. TRAVIESO-DIAZ: I understand. But let
20 me just go through them --

21 ADMIN. JUDGE FARRAR: Right.

22 MR. TRAVIESO-DIAZ: -- and you will see.
23 And I'm not going to do them in the order in which
24 they are listed because the Commission has, in other
25 decisions, stated which are the most important ones,

1 okay?

2 ADMIN. JUDGE FARRAR: All right.

3 MR. TRAVIESO-DIAZ: And, in fact, let me
4 go back to Comanche Peak. One of the factors that the
5 Commission said in Comanche Peak was the most -- or
6 most greatest weight, or most important, is the
7 ability that can be expected the petitioner will make
8 to the developing of a sound record.

9 The Commission said in Comanche Peak there
10 appears to us to be no reason to allow an inexcusable
11 belated petition particularly to trigger a hearing.
12 It is cause to believe that a petitioner not only
13 proposes to raise at least one substantial safety or
14 environmental contention, but as well is equipped to
15 make a worthwhile contribution to it. I'm reading
16 from 37 NRC 166.

17 Now here we have a situation which unlike
18 in West Valley where the county had raised at least
19 one, maybe more than one valid contention. The
20 contentions that are raised here are inadmissible for
21 two different reasons. One, the one that I just said
22 before and I'm not going to dwell on it, is the fact
23 that emergency response contentions are admissible.

24 Second, if you look at the contentions in
25 supps and, again, we'll talk about that when we

1 examine, assuming that you go past the lateness, how
2 do you go about meeting the burden of having
3 admissible contentions and actually having the right
4 to have a hearing on them?

5 There is no evidence to show that the
6 county is prepared to make a contribution to
7 developing a more stronger or a sound record even in
8 emergency response. There is not a single -- a
9 specific Millstone-related document that has clearly
10 supported the contention they're making. There is not
11 a single expert that they have said they are going to
12 retain that is going to testify or what he is going to
13 say.

14 ADMIN. JUDGE FARRAR: Okay. Let me
15 interrupt you there. I guess I have problems with the
16 direction of your argument because it would seem to me
17 that if I am worried about emergency planning then the
18 people who without any question are the experts are
19 the people in the county.

20 And they have the information on how they
21 do emergency planning. They have information on
22 population. They have information on projected
23 population growth. They know how their resorts work
24 on the weekends.

25 And how can you make an argument that a

1 county is not the outfit that knows the most about
2 emergency planning?

3 MR. TRAVIESO-DIAZ: Well, the question is
4 not whether they have expertise. It is whether their
5 contentions are supported by the statements as to what
6 the basis for the contentions is, what evidence they
7 intend to provide, what the experts will testify
8 about.

9 I'm not here, of course, this is too early
10 in the day to talk about the expertise and
11 qualifications of the potential witnesses. I'm
12 talking about the quality, the basis, the specificity
13 of the contentions. They have done nothing to show
14 that A, they have a big problem and that they can
15 provide very strong evidence on the record to show the
16 developing of that particular thought. That's my
17 point.

18 It's not evidentiary. It is just they
19 have failed to comply with the requirements that would
20 determine to the satisfaction of the Board that they
21 come prepared that they can make a strong showing.

22 ADMIN. JUDGE ROSENTHAL: I thought -- this
23 is Alan Rosenthal. I thought that Judge Farrar asked
24 you to assume for the purpose of this discussion that
25 there was a valid contention on the table.

1 MR. TRAVIESO-DIAZ: Yes.

2 ADMIN. JUDGE ROSENTHAL: And he asked you
3 to consider the factors on that premise. Now we
4 appreciate the fact that you do not think that this
5 issue is within the Board's jurisdiction although the
6 county, as you know, has requested us to certify to
7 the Commission or request the Commission to grant an
8 exemption, which is an entirely separate issue.

9 But what I'm interested in hearing from
10 you is an answer to Judge Farrar's question as posed.
11 And that is assuming that there is a valid contention
12 on the table, how do these other factors play out.

13 And I can tell you from my standpoint that
14 I'm not prepared to get into, at this juncture,
15 whether the county has the expertise or doesn't have
16 the expertise, or whether it appears from what has
17 been presented that there is that expertise.

18 MR. TRAVIESO-DIAZ: Well, I'm sorry, first
19 to clarify, I thought that Judge Farrar hypothetically
20 said assume that, in fact, emergency preparedness is -
21 -

22 ADMIN. JUDGE ROSENTHAL: All right. All
23 right. Now --

24 MR. TRAVIESO-DIAZ: So, now you are asking
25 a different question. Do they have an admissible

1 contention?

2 ADMIN. JUDGE ROSENTHAL: No, I'm not
3 getting into the contention. What I want to know from
4 you is how these other factors play on the assumption
5 that there is an admissible contention. Now you have
6 suggested that they can't make a contribution to the
7 record. Or at least that they haven't demonstrated
8 that they can make that contribution. Okay, that
9 addresses one factor.

10 Now let's get into the other factors as
11 you see them bearing upon this.

12 MR. TRAVIESO-DIAZ: All right. But again
13 with respect to these factors, again my point is
14 assuming that emergency preparedness is a valid
15 subject, the contentions that they have raised don't
16 demonstrate that they can make a strong contribution
17 to the record.

18 ADMIN. JUDGE FARRAR: All right. So
19 you're saying there is a failure of pleading --

20 MR. TRAVIESO-DIAZ: Exactly.

21 ADMIN. JUDGE FARRAR: -- in other words,
22 whether or not we think counties are generally the
23 right kind of people to be in on this kind of issue,
24 you're saying that looking at their pleading, we can't
25 draw that conclusion.

1 MR. TRAVIESO-DIAZ: That is the point I
2 was making.

3 ADMIN. JUDGE FARRAR: All right.

4 ADMIN. JUDGE ROSENTHAL: Let's go on to
5 the other factors.

6 MR. TRAVIESO-DIAZ: Another very important
7 factor that has been determined by the Commission in
8 a number of cases that is important is whether an
9 unjustifiably late intervention creates the potential
10 for delay if it is granted. And that's Factor No. 7.

11 In Comanche Peak, the Commission ruled
12 that this factor weighs heavily against the petitioner
13 because granting the petition will result in the
14 establishment of an entirely new pro forma proceeding,
15 just as we have here. And this would force broad
16 existing regulatory issues and delay proceeding.

17 I'm reading 37 NRC at 167, quoting you,
18 Judge Rosenthal, from your decision in Jamesport, CLI-
19 292, 2 NRC 631 at 650. There is no way that anybody
20 can argue that the county coming in now and
21 establishing a new proceeding is not going to
22 introduce delay.

23 ADMIN. JUDGE FARRAR: And from what you
24 said earlier in this argument, you don't want us
25 concluding don't worry about the delay. We've got ten

1 years to spare.

2 MR. TRAVIESO-DIAZ: Right. The Commission
3 told you you cannot say that. That that is not a good
4 argument to make.

5 ADMIN. JUDGE FARRAR: Okay.

6 MR. TRAVIESO-DIAZ: That's my point. I
7 mean that's why the Commission said when they passed
8 license renewal as a proceeding.

9 And, in fact, the staff, if you take a
10 look at the website, you will see that the inevitable
11 consequence of having a new proceeding started now is
12 to add a minimum of eight months to the staff's
13 approval or the NRC's approval of the license renewal
14 application.

15 So there is going to be significant delay
16 if this petition is granted. And that's a very
17 important factor.

18 ADMIN. JUDGE FARRAR: Okay. So you'd say
19 factors --

20 MR. TRAVIESO-DIAZ: Seven and eight, in
21 addition to one, which we started from by saying it is
22 very important is the unjustifiable nature of the
23 delay.

24 ADMIN. JUDGE FARRAR: Now would you
25 concede on two -- you'd say these are less important,

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1 Factors Two and Three, they're all right on those?

2 MR. TRAVIESO-DIAZ: Well, I told you they
3 are not because --

4 ADMIN. JUDGE FARRAR: No, no, no, under my
5 hypothetical.

6 MR. TRAVIESO-DIAZ: Oh, yes, yes, under
7 your hypothetical.

8 ADMIN. JUDGE FARRAR: Under the
9 hypothetical, they're all right on two, three, and
10 four presumably?

11 MR. TRAVIESO-DIAZ: Yes.

12 ADMIN. JUDGE FARRAR: Wait a minute.
13 They're all right under two, three, four, and six?

14 MR. TRAVIESO-DIAZ: Let me see four and
15 six. Six, of course, it is met because there are no
16 other parties. I mean that assumption applied in West
17 Valley but it doesn't apply here because there are no
18 other parties in the existing proceeding because of
19 the existing proceeding. However, I do not concede on
20 Factor Five.

21 ADMIN. JUDGE FARRAR: Right. I didn't
22 mention five yet.

23 MR. TRAVIESO-DIAZ: Okay. But five -- I
24 know you're going to be asking the county about five
25 but I'm going to tell you about five.

1 ADMIN. JUDGE FARRAR: All right.

2 MR. TRAVIESO-DIAZ: Five says if there is
3 any other way to protect the petitioner's interest.
4 The county has told you there are ways they intend to
5 use them. In fact, there is a very simple one. They
6 can file a 2.206 petition, for which there are many
7 petitions that have been filed on this very subject of
8 emergency preparedness.

9 ADMIN. JUDGE FARRAR: Let me ask you a
10 question.

11 MR. TRAVIESO-DIAZ: Yes?

12 ADMIN. JUDGE FARRAR: And let me see, I
13 don't want to overstate this. It's my impression
14 through the history of the Atomic Energy Commission
15 and the Nuclear Regulatory Commission there have not
16 been -- the 2.206 petitions have -- how can I say this
17 -- not be granted with great frequency.

18 MR. TRAVIESO-DIAZ: That is -- well, I
19 don't know the statistics. They are very often denied
20 simply because the basis for filing the petition is
21 not meritorious.

22 ADMIN. JUDGE ROSENTHAL: Would you
23 disagree with my statement that in the last 30 years
24 or so, there have been no more than one or two
25 granted?

1 MR. TRAVIESO-DIAZ: I don't have the facts
2 on that.

3 ADMIN. JUDGE ROSENTHAL: Would you be
4 surprised if I told you that?

5 MR. TRAVIESO-DIAZ: Well, again, I don't
6 have any facts.

7 ADMIN. JUDGE ROSENTHAL: Well, if that is
8 the case, would you still insist that 2.206 is a
9 meaningful remedy in reality as opposed to in theory?

10 MR. TRAVIESO-DIAZ: Yes. Because if you
11 assume, as you must, that the NRC staff is going to do
12 its job, if a meritorious 2.206 petition is filed,
13 they will grant it and they will take action and do
14 the 2.202 proceeding.

15 The statistics on which have been denied
16 doesn't go to whether it is a meaningful avenue. It
17 goes to whether the petitions that have been have had
18 merit. If, in fact, the county believes that the
19 claims they're making with respect to emergency
20 response have merit, let them file a 2.206 petition
21 then and we'll see what the staff does.

22 I'm not recommending that they do. But
23 I'm saying this is an avenue. That is available in
24 the regulations, available to them. And they can file
25 for it if they so choose. So they are not without a

1 remedy.

2 ADMIN. JUDGE ROSENTHAL: All right. I
3 think you were going to say there were two reasons.

4 MR. TRAVIESO-DIAZ: I'm sorry?

5 ADMIN. JUDGE ROSENTHAL: I think you said
6 there were two other ways their interest could be
7 protected.

8 MR. TRAVIESO-DIAZ: Well, again, without -
9 - I don't want to either put ideas in their minds or
10 go into the details of the factual sessions which are
11 not before us now. But you can file a petition.
12 There is a way of doing business by the staff and the
13 applicant or the licensee that is commonly accepted
14 and they don't think it is adequate.

15 One of the contentions seems to have
16 problems with the entire way that emergency response
17 is handled. That is the kind of thing that is ideally
18 suited for a rulemaking petition. So that's another
19 way they have.

20 ADMIN. JUDGE LAM: Now perhaps the barrier
21 or the successful outcome for rulemaking petition is
22 even smaller than what Judge Rosenthal was talking
23 about.

24 MR. TRAVIESO-DIAZ: Well, you know, we
25 can't prejudge here A, what they will do, or B, how

1 successful they will be. I think that that entirely
2 depends on the merits of what it is that they are
3 asserting and whether there are facts to support it,
4 and there is already a decision saying the issue has
5 been raised.

6 I don't think that we can sit in here
7 judging those things. But the procedures are
8 available.

9 ADMIN. JUDGE FARRAR: Mr. Travieso-Diaz,
10 it strikes me, as you mentioned, that there are two
11 ways they could proceed. Maybe I'm naive here but it
12 seems to me there's a third way they could proceed.
13 And that's to sit down and work with you all and help
14 you with your emergency plan.

15 And the reason I say that there's a
16 history at the Commission and Seabrook comes to mind
17 where the State of Massachusetts tried to block the
18 plant in New Hampshire saying we're not going to work
19 with you on the emergency plan. And I think that led
20 to the realism rule.

21 MR. TRAVIESO-DIAZ: Mr. Chairman, I
22 couldn't agree with you more. But here is what is
23 happening.

24 ADMIN. JUDGE FARRAR: Wait a minute. Wait
25 a minute. And closer to home, I believe this very

1 county put a roadblock in front of the Shoreham
2 facility by saying they would not work with Long
3 Island Lighting.

4 And now as I read their papers, they're
5 saying we have all this information. We want to have
6 it in there. We want to participate. Why isn't that
7 the third remedy. And why doesn't that make the case
8 go away.

9 MR. TRAVIESO-DIAZ: Well, in fact, Mr.
10 Chairman, what you're pointing out, which I agree
11 entirely, just evidence there is a good example or a
12 good way to cast the normal situation with this
13 petition.

14 If, as the county appears to have, there
15 are concerns about the way emergency preparedness is
16 being handled today, the way to address them is to
17 work with the licensee and with FEMA and with the NRC
18 staff today to get those problems resolved not to try
19 to deny a license that won't be in effect for 10, 20
20 years when we don't know even what the conditions are
21 going to be.

22 The reality is, and I need to, since you
23 brought it up, make reference to it, what the county
24 is seeking to do here, and let's be honest about
25 what's going on, and they say it on the pleadings.

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1 I'm talking about page 6. What they want to do is use
2 these license renewal procedures as a way to put
3 pressure on a licensee to look at the issues that they
4 are concerned about.

5 Here what they say I'm only denying the
6 renewal until the emergency planning deficiencies are
7 corrected. They would have great impact on public
8 health and safety and would, perhaps, push the
9 applicant to examine the issue now during the current
10 licensing period.

11 Let them do that. Let them talk to the
12 applicant, I mean the licensee, let them talk to FEMA
13 and the NRC, to see if the concerns, in fact, have
14 basis and can be addressed. Don't bring it up in a
15 proceeding that has nothing to do with it.

16 ADMIN. JUDGE FARRAR: I take it then by
17 what you, in effect, have done here is represent that
18 your client is ready to do that?

19 MR. TRAVIESO-DIAZ: I think our client is
20 always ready to talk to all effected organizations
21 about issues that might be a concern to them.

22 ADMIN. JUDGE FARRAR: All right. Then I
23 think on your behalf, Mr. Travieso-Diaz, you've
24 covered all the factors. And to keep things moving
25 along, let me ask the staff -- unless you have

1 something you need to add on these points, the factors
2 themselves. Let me -- do you have anything to add?

3 MR. TRAVIESO-DIAZ: I'm sorry. Are you
4 talking to me? Or to --

5 ADMIN. JUDGE FARRAR: Yes, do you have
6 anything you need to add on this point because I'd
7 like to move to the staff to keep the proceeding
8 moving along in good time here.

9 MR. TRAVIESO-DIAZ: Yes, I addressed the
10 four significant factors which I think weigh very
11 heavily against, in addition to the first one that I
12 said.

13 ADMIN. JUDGE FARRAR: Okay. Thank you.
14 Ms. Poole?

15 MS. POOLE: Thank you. Under the scenario
16 hypothesized by Judge Farrar, just looking at the
17 other seven factors, if there is a robust and
18 admissible contention, then we think Factors Two,
19 Three, Four, and Six would certainly weigh in favor of
20 the county.

21 ADMIN. JUDGE FARRAR: All right. What
22 about Seven and Eight?

23 MS. POOLE: Well, as Mr. Travieso-Diaz
24 noted, the Commission has accorded Factor Eight a
25 little bit more weight, the extent to which the

1 petition's participation may reasonably be expected to
2 assist in developing a sound record. The staff is of
3 the view -- now not saying anything about the
4 country's ability to contribute in an emergency
5 planning capacity, we're not disputing that at all.

6 But we do think that there has been a
7 pleading deficiency in this factor in the papers that
8 are set out in this proceeding because it is the
9 staff's view looking at the Commission's decisions in
10 State of New Jersey, that's CLI-93-25, and an earlier
11 Comanche Peak decision, CLI-92-12, that in order to
12 set forth -- to satisfy this factor, a petitioner must
13 set forth with particularity the precise issues it
14 plans to address and "identify potential witnesses and
15 summarize their proposed testimony."

16 And it is true that this is a high burden.
17 But we just don't think that the county has satisfied
18 that in this case. And that that factor is accorded
19 a bit more weight than the others.

20 ADMIN. JUDGE FARRAR: So you're saying
21 that even though the Board might assume they have the
22 people there, you're saying the pleading deficiencies
23 should make us question whether at a hearing, for
24 example, that the sound record would be forthcoming?

25 MS. POOLE: We do because we think the

1 Commission requirements, you know, the Commission case
2 law requires greater particularity than has been
3 provided here.

4 ADMIN. JUDGE LAM: Ms. Poole?

5 MS. POOLE: With respect to --

6 ADMIN. JUDGE LAM: May I interrupt you?
7 Ms. Poole?

8 ADMIN. JUDGE FARRAR: Ms. Poole, Judge Lam
9 has a question.

10 MS. POOLE: I'm sorry. Go ahead.

11 ADMIN. JUDGE LAM: Ms. Poole, yes. Go
12 back to Factor Eight. What would prevent the county,
13 if and when the hearing does take place, for them to
14 acquire the expertise and expert witnesses to help
15 develop a sound record?

16 MS. POOLE: Well, nothing would prevent
17 them from doing it. But the requirements mandate that
18 that information be provided now. You know the
19 requirements don't state that every affidavit must be
20 filed with particularity. Just a summary of
21 testimony, just something more than what has been done
22 here.

23 ADMIN. JUDGE FARRAR: All right. How
24 about Factor Seven?

25 MS. POOLE: With respect to Factor Seven,

1 we think that factor clearly weighs against granting
2 the petition.

3 ADMIN. JUDGE FARRAR: Do you buy the
4 company's argument that time is of the essence even
5 though we're talking about licenses that don't expire
6 for a considerable period?

7 MS. POOLE: Yes, I think we do. I think
8 that that was explained well in the 96 rule for
9 license renewal.

10 ADMIN. JUDGE FARRAR: All right.

11 MS. POOLE: And I wanted to say a word, if
12 I may, about Factor Five. It's true that no other
13 participant with an identical contention has been
14 admitted in this proceeding. But it is also true that
15 the factor says its availability of other means
16 whereby a petitioner's interest is effected.

17 We're really not litigating the
18 effectiveness of the Section 2.206 process. What
19 matters is that 2.206 process is available.

20 ADMIN. JUDGE FARRAR: Wait, wait, wait.
21 If I'm not mistaken, you all didn't mention 2.206 in
22 your brief.

23 MS. POOLE: Oh, no we didn't. I just
24 wanted to raise it now since it has been discussed.

25 ADMIN. JUDGE FARRAR: Okay.

1 MS. POOLE: But we do think that the 2.206
2 process is a robust process, that each petition is
3 considered on its individual merit, and each gets the
4 full attention of the staff individually.

5 ADMIN. JUDGE ROSENTHAL: Well, I don't
6 want to prolong the discussion on that point. But I
7 have to tell you, Ms. Poole, that that falls on deaf
8 ears in my case. I cannot believe that in the last 30
9 to 35 years there have been only one or two 2.206
10 petitions that have had colorable merit. I just
11 believe it.

12 And every time there is the suggestion of
13 2.206 as an alternative remedy, I shudder. But that's
14 only my view. I realize it is on the books. Just
15 from my perspective, it is a -- in the vernacular,
16 rubber sandwich. But let's go on.

17 MS. POOLE: We won't say anything more
18 then about that.

19 ADMIN. JUDGE FARRAR: All right. How
20 about the company's suggested rulemaking?

21 MS. POOLE: That opportunity is there.
22 That process exists. And it is open to any MEMBER of
23 the public. It is, perhaps, another means by which
24 the interests could be protected.

25 I guess summing up --

1 ADMIN. JUDGE FARRAR: Well, don't sum up
2 before you get to the suggestion that seemed to emerge
3 on its own here. Why isn't everybody just working
4 together?

5 MS. POOLE: Well, the staff is always open
6 to meeting with government agencies or other
7 interested stakeholders.

8 ADMIN. JUDGE FARRAR: I mean I can't help
9 but be struck, and perhaps, you know, I'm mistaken,
10 but struck by the fact that through the history here,
11 we've had local and state governments saying they
12 won't work with the company. And maybe I'm misreading
13 their papers but I think these people are saying
14 please let us work with you.

15 MS. POOLE: Well, we're absolutely open to
16 that. And we're happy to meet.

17 ADMIN. JUDGE FARRAR: All right. Then
18 let's -- did that cover the factors from your point of
19 view, Ms. Poole?

20 MS. POOLE: That covers the factors from
21 our point of view. I guess I would just say with
22 respect to compelling circumstances, as has been
23 stated, you know, there is no specific regulatory
24 meaning for compelling factors.

25 But we do think a situation where you have

1 two or three factors, especially those that have been
2 accorded conditionally more weight by the Commission
3 and the Licensing Board, that that does not create a
4 compelling showing that would justify granting the
5 petition. And that's all we'll say about that.

6 ADMIN. JUDGE FARRAR: All right. Thank
7 you.

8 Ms. Kohn, let's -- you've heard what the
9 two other parties have said about the factors. Let's
10 hear your view on them.

11 MS. KOHN: Well, the strongest factor is,
12 we believe, in favor of the county's petition is the
13 clearly cognizable interest that the country has.
14 There is a proximity presumption. Part of Suffolk
15 County is within the current emergency planning zone.
16 The county is responsible under state law for
17 protecting the health and safety of their citizens and
18 residents.

19 We have a very broad interest. We are a
20 provider of emergency services. I have sitting around
21 the table here, I have some of the people who are
22 responsible for doing that. We have representatives
23 from Health Services, from Fire, Rescue, and Emergency
24 Services. The county also has the police department
25 so that the county does -- I think the county's

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1 expertise I in this area really is unquestioned and
2 unquestionable.

3 And --

4 ADMIN. JUDGE FARRAR: So you're saying
5 that on Factor Three where we usually would say in the
6 case of a private intervener or a group intervener,
7 yes, yes, they have an interest, you're saying this
8 one really -- I mean this really counts heavily in
9 your favor. It's not just that you have an interest -
10 -

11 MS. KOHN: Yes.

12 ADMIN. JUDGE FARRAR: -- you have more
13 than an interest. You have something really to
14 contribute.

15 MS. KOHN: Right. That's right. And
16 we're also -- the county has the elected
17 representatives of the citizens and the residents
18 here. And we feel that they are raising issues that
19 need to be heard and by granting this petition, that
20 would be one way. We feel the best way at the current
21 time to hear those concerns heard. There is no one
22 else in the proceeding that really can represent the
23 county's interest.

24 We feel that under the West Valley case,
25 the Commission has a well-established duty to consider

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1 the strong cognizability of the county's interest.

2 I'd just like to go back for one minute to
3 the question of the delay which is just to point out
4 that there was a change in administration with a large
5 turnover. It's a different party. And the county
6 really is trying to have an opportunity to address
7 these issues. So, you know, I think that is a factor
8 in our favor.

9 As far as alternative ways, while I'm not
10 prepared to outline the county's legal strategies here
11 or foreclose any options, you know I am kind of
12 surprised the Dominion has suggested -- Dominion's
13 counsel is suggesting that we should maybe bring a
14 petition to modify or revoke the current Millstone
15 license. That's not what we're seeking to do in this
16 proceeding.

17 ADMIN. JUDGE FARRAR: What are you seeking
18 to do?

19 MS. KOHN: We're seeking to have these
20 issues of emergency planning addressed with respect to
21 the areas of the county that are in close proximity to
22 the plant.

23 ADMIN. JUDGE ROSENTHAL: Well, let me ask
24 you this, Ms. Kohn, I have been struck over the years
25 by the number of cases that I have been involved in in

1 which a governmental body, in many instances a state,
2 has been at loggerheads with a licensee over
3 frequently decommissioning plants. They want to come
4 in and challenge the licensing plant in an
5 adjudicatory proceeding.

6 What struck me in those cases was that it
7 seemed to me it would have made a great deal more
8 sense if the governmental body, be it a state, be it
9 a county, be it a municipality, sat down with the
10 Commission staff and with the licensee and endeavored
11 to work these matters out in a non-adjudicatory
12 setting.

13 Now licensee's counsel has represented
14 this afternoon that his client is perfectly prepared
15 to sit down with the county and I take it would be
16 perfectly prepared to take into account the county's
17 concerns and to make a good faith effort to resolve
18 those concerns.

19 I think it is also -- I heard I think the
20 staff counsel indicating that her client would be
21 willing to participate in that.

22 It seems to me that in the totality of
23 these circumstances, where at the very least you're
24 coming in very late, where there is a claim by the
25 licensee that seems to me to have at least some facial

1 merit, that an adjudicatory proceeding would present
2 unreasonable and harmful delay, that the solution to
3 this matter, the best course of proceeding would be
4 for all of these officials that you have referred to
5 sitting down with the licensee, with perhaps also the
6 involvement of the NRC staff members that are
7 concerned with emergency planning, and endeavoring to
8 work this out in a non-adversarial, non-adjudicatory
9 context.

10 Now what's wrong with that?

11 MS. KOHN: We're certainly willing to sit
12 down in a non-adversarial process. But I think having
13 the county as an intervener would ensure that these
14 concerns are addressed. In the Dominion's papers on
15 this motion, they have indicated that the cost for
16 considering these issues would be too great. So
17 they've already kind of put their cards on the table
18 in that regard. And --

19 ADMIN. JUDGE FARRAR: Were they not just
20 suggesting it would be too great in the context of an
21 adjudicatory hearing at this stage? And let me add to
22 that, suppose we had an adjudicatory hearing now and
23 you won --

24 MS. KOHN: Yes.

25 ADMIN. JUDGE FARRAR: -- and you had an

1 adversarial relationship with them --

2 MS. KOHN: Right.

3 ADMIN. JUDGE FARRAR: -- then you're going
4 to be -- we're going to have this same fight every
5 year -- assuming they get the license, we're going to
6 have the same fight every year for the next 40 years.
7 Why does that not make this a classic case where you
8 all need to develop a working relationship that's good
9 for 40 years?

10 You all are concerned about growth out on
11 Long Island. And that seems like a legitimate
12 concern. And, again, if I were a company and the
13 county came and said we'd like to work with you, given
14 the history of counties that wouldn't work with them,
15 I think there may even be other counties in New York
16 State right now in other facilities that are not
17 willing to work with companies, why is this not the
18 solution?

19 MS. KOHN: Well, I think given the length
20 of time that the licenses are being extended for, I
21 mean we're talking about what the applicant is seeking
22 is going to 2035 and 2045, I really think that the
23 county would be remiss if it didn't take this
24 opportunity here in this proceeding.

25 ADMIN. JUDGE FARRAR: No, we're not saying

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1 you should not have tried to come in here. We're
2 saying that now having tried to come in here and
3 seeing where the parties' real interests seem to lie,
4 why is the solution not to use this proceeding as a
5 springboard to develop the long-term relationship you
6 all need?

7 MS. KOHN: Well, I mean we're willing to
8 sit down with the operator and the NRC staff to
9 discuss this issue. The problem is, though, that if
10 the county's petition isn't granted in this instance,
11 that we lose this opportunity.

12 And if the counties are unable to come to
13 an agreement about what the plans should be and how
14 the plans should be funded and whatever other fact
15 that, you know, whatever needs to be taken into
16 account, that then the licensing renewal proceeding
17 will be over. And the county won't be able to come
18 back.

19 If the applicant is willing to adjourn the
20 proceeding and put a moratorium on the proceeding and
21 try and sit down with the county and work things out,
22 that would be one thing. But I don't know if they
23 would be willing to do that. Is he willing to let
24 this opportunity go?

25 ADMIN. JUDGE LAM: Ms. Kohn, this is Judge

1 Lam?

2 MS. KOHN: Yes?

3 ADMIN. JUDGE LAM: May I ask you, has the
4 county ever worked with the licensee or the Commission
5 staff before? Do you have a working relationship with
6 the licensee and the Commission staff?

7 MS. KOHN: This is a new administration
8 that just came in this year -- I'm sorry, the past
9 year. So I don't think that they've had the
10 opportunity to work with the staff and the operator
11 previously.

12 ADMIN. JUDGE LAM: I see. So without a
13 working experience in relationship with the staff nor
14 the licensee, it appears to me now you're saying that
15 the county's administration's preference is to
16 adjudicate this matter in order to obtain a
17 satisfaction in resolving your concern. Am I correct
18 to assume that?

19 MS. KOHN: Well, I'm sorry. Could you
20 clarify? I'm not sure exactly what you're asking.

21 ADMIN. JUDGE LAM: It appears to me that
22 the county now prefers adjudicating this matter in
23 order to obtain satisfactory resolution of the concern
24 instead of what Judge Rosenthal and Judge Farrar were
25 suggesting.

1 MS. KOHN: You know again, the county is
2 willing to explore the options that the Judges are
3 suggesting here and that Dominion has suggesting if
4 Dominion is willing to hold the proceeding in abeyance
5 while the issues are explored. We need to --

6 ADMIN. JUDGE ROSENTHAL: Why do you think
7 that Dominion should or would agree to that? I mean
8 Dominion's position is look at, you folks are
9 considerably late without, according to what they have
10 suggested, any excuse. And that a number of these
11 other factors, they say, weigh against you.

12 Now if we were to determine that there's
13 merit to that position, it seems to me that your, as
14 a practical matter, your recourse is to work with
15 them. And it seems to me offhand that, again, you are
16 a new -- apparently a new administration. You have a
17 licensee that has indicated a willingness to work with
18 you. The NRC staff has an obligation, in my view, to
19 work with you and the licensee in these circumstances.

20 And it seems to me that you would be
21 jumping on this possible remedy irrespective of
22 whether the licensee would agree, as I'm sure it
23 wouldn't, to somehow putting your belated petition in
24 the icebox to wait and see how things worked out.

25 But it seems to me in this situation where

1 you are talking about something that is over a course
2 of 30 or 40 years and where there is going to be a
3 dynamic situation in terms of population development
4 and other factors that go into emergency planning,
5 that the most sensible approach is not an adversarial
6 -- it isn't where you put up contentions and the
7 licensee responds to them and you're battling each
8 other in a courtroom before the three of us.

9 But rather in sitting down with that
10 licensee, identifying the problems that you see over
11 the course of the coming years, and perhaps, again,
12 with the staff's intervention, endeavoring to work
13 them out.

14 MS. KOHN: You know, again, we have no
15 objection to working with Dominion. But once this
16 licensing proceeding is over, Dominion really has no -
17 - however, I'm not suggesting any bad faith there, but
18 they really don't have an incentive to work with us
19 after the licensing proceeding is over.

20 They've said we have no standing. They've
21 already said, you know, taken the position that the
22 ten-mile limit is sufficient. So, they've taken
23 positions in this proceeding that are inconsistent
24 with them working these problems out.

25 ADMIN. JUDGE FARRAR: Well --

1 MS. KOHN: And, you know, as you say, the
2 fact that we're talking -- going 30 to 40 years into
3 the future in a dynamic situation where the population
4 is growing and there are other factors coming in to
5 play, only makes it even more important that these
6 issues are resolved, not, you know, 20 or 30 years
7 from now but now.

8 ADMIN. JUDGE ROSENTHAL: Well, you'd be in
9 a stronger position in advancing that if the petition
10 of the county had been filed on time. Or if there was
11 what's a better excuse than it seems to me to exist
12 for the late filing.

13 I mean the fact of the matter is that
14 we've held time and time again that Federal Register
15 notice is notice to the world. And I mean just, I
16 think, a year or so ago in a case involving the State
17 of Oklahoma, I was constrained to reject as untimely
18 a petition filed by the state in which, again, the
19 argument was advanced gee, we just didn't know about
20 the Federal Register notice. And that just doesn't
21 cut the mustard.

22 MS. KOHN: Well, I understand your doing.
23 I think we did the best we could under the
24 circumstances.

25 ADMIN. JUDGE FARRAR: Let me do this in

1 the interest of moving on. Did we cover all the
2 factors either directly or indirectly?

3 MS. KOHN: Yes. I would, though, like to
4 just address for a minute again the issue of the
5 county's ability to help develop a sound record
6 because I really feel that that is something that
7 can't be disputed, you know. We're providers of
8 emergency services. And we have the information
9 available to offer to Dominion and to the Commission
10 to help develop these plans.

11 So, you know, I just would like to say
12 that I also feel we have very strong -- that that
13 factor also weighs very strongly in our favor.

14 ADMIN. JUDGE FARRAR: All right. We've
15 heard each of the three parties on the factors. Let's
16 now talk about the -- fairly briefly about the --
17 whether this contention is within our jurisdiction.

18 And I think the -- correct me if I'm wrong
19 -- but the staff and the company have made a strong
20 argument that the Commission has said -- I think even
21 in this very case that license renewal proceedings
22 essentially deal with aging of equipment. And that
23 emergency planning is outside of that.

24 But the county has asked for -- that we
25 put their request for a waiver or exemption of that

1 rule in front of the Commission.

2 Let me ask the company what its view on
3 the county's request is.

4 MR. TRAVIESO-DIAZ: Yes, Mr. Chairman,
5 thank you.

6 Before I do that, though, there is an
7 error on the record given by county's counsel that
8 needs to be corrected. They have said that Dominion
9 will not talk to them because the cost of addressing
10 their concerns would be too great. In fact, what we
11 said on page 11 of our response was the cost
12 associated with having a licensing proceeding of the
13 type they want will be high.

14 It has nothing to do with talking to them.
15 It has to do with exactly what they want to do which
16 is essentially use this proceeding as leverage so they
17 can get whatever remedy they want.

18 Going to your question or to this second
19 part of the conversation, a party like the county, as
20 I said earlier, has two burdens that it needs to meet
21 or overcome.

22 First the burden of the lateness which we
23 were just talking about. Second, they have to
24 overcome the burden that every petitioner has which is
25 to comply with the requirements which are very well

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1 set out explicitly in 10 CFR 2.309(f) which are six
2 factors, six requirements that any petition for
3 intervention must meet with respect to the contention
4 it raises.

5 And it doesn't meet any of the six. I'm
6 going to start with (f)(iii) because (f)(iii) talks
7 about the most direct of the issue they want to raise
8 which was the scope.

9 There is regulations, there is prior case
10 law, an on point case at CLI-117, 54 NRC 3 at 9.
11 There is the decision by the Abramson Board in this
12 proceeding with respect to the prior application which
13 raised an emergency planning contention.

14 There is the Commission's decision
15 upholding the decision by Judge Abramson's Panel, CLI-
16 4-36, 60 NRC 631-640, all of which say unequivocally,
17 without any ifs or buts, emergency preparedness
18 contentions are outside the scope and they are not to
19 be raised in the context of the license renewal
20 proceedings.

21 ADMIN. JUDGE FARRAR: So even if this was
22 a very well-articulated contention, you're saying it
23 is outside the scope. And we're not surprised you
24 would say that. But what about their request for an
25 exemption?

1 MR. TRAVIESO-DIAZ: You want to talk about
2 the waiver request? We can talk about that.

3 ADMIN. JUDGE FARRAR: Yes.

4 MR. TRAVIESO-DIAZ: Let's catapult to
5 that. But I would like to come to the other five
6 factors in 2.309(f) if I could.

7 But with respect to the waiver request,
8 the Commission has announced very explicitly on the
9 high burden that a party must meet in order to have a
10 regulation waived. And this high burden is expressed
11 in 10 CFR 235(b). And, quite frankly, the county here
12 doesn't even begin to meet that burden.

13 The most important --

14 ADMIN. JUDGE FARRAR: Hold on. Let me ask
15 you this --

16 MR. TRAVIESO-DIAZ: -- thing, I think,
17 that the county said about the waiver of the petition
18 is that the arguments that they are making are not
19 unique. They weren't specifically and exactly made by
20 the people who were commenting on the rule as it was
21 being formulated.

22 And the NRC rejected those arguments
23 expressly saying that, in fact, the management of
24 emergency preparedness is the kind of ongoing
25 regulatory oversight activity by NRC staff that is

1 independent of the issues that are to be considered
2 license renewal. And that, therefore, there is no
3 reason why there should be consideration of those
4 issues in your license renewal proceedings.

5 ADMIN. JUDGE FARRAR: So let me see if I
6 get your position. You're saying that even if this
7 contention were beautifully pleaded and even if the
8 waiver request was as powerful as you can make it,
9 you're saying no waiver -- well, let's not say never
10 but essentially there would never be a waiver request
11 in this particular subject matter area that would ever
12 be granted.

13 MR. TRAVIESO-DIAZ: Because the NRC
14 specifically considered emergency preparedness in
15 enacting 50.47(a)(1) and considered the factors that
16 were raised, which are the same, saying, you know,
17 emergency preparedness is sufficient. They're forcing
18 the various kinds. It's exactly the kind of thing
19 that the NRC has determined, has looked at, and has
20 ruled that it falls totally within the purview of what
21 the NRC staff regulates today. It is an operational
22 issue.

23 It is not an issue that relates to the
24 effects of aging. It is not an issue that operation
25 of the facility as such. So it is totally moot in

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1 that respect.

2 ADMIN. JUDGE FARRAR: All right. Let me
3 ask the staff if they agree with the company's
4 approach on that.

5 MS. POOLE: Yes, Your Honor, I think that
6 we do. But mostly, I won't say anything more about
7 admissibility of the contention because I think we
8 briefed it pretty thoroughly in our papers.

9 ADMIN. JUDGE FARRAR: Right.

10 MS. POOLE: As for the substance of the
11 waiver request, I would just underscore that the most
12 important factors and circumstances, the Commission in
13 Seabrook, CLI-88-10 stated that special circumstances
14 are present only if the petition properly pleads one
15 or more facts not common to a large class of
16 applicants or facilities that were not considered
17 either explicitly or by necessary implication in the
18 proceeding leading to the rule sought to be waived.

19 And in this case, the Commission
20 specifically considered issues regarding the adequacy
21 of existing emergency preparedness plans in the 1991
22 license renewal rulemaking. Therefore, special
23 circumstances simply don't exist in this circumstance
24 in this waiver request.

25 ADMIN. JUDGE FARRAR: And that's, as I

1 understand your argument, that's not just a pleading
2 deficiency. You're saying no waiver request could
3 ever be written that could get over the hurdle as to
4 this issue.

5 MS. POOLE: That's correct. That's our
6 view.

7 ADMIN. JUDGE LAM: Ms. Poole, but the
8 county does have the right to request a waiver though.

9 MS. POOLE: The right to request it?

10 ADMIN. JUDGE LAM: Yes.

11 MS. POOLE: Well, it's our view that if
12 the county wanted to request a waiver, the proper
13 place to do it was in its original petition. By
14 raising it in the reply, the staff is of the view that
15 the reply was really tantamount to an attempt to amend
16 the original petition, which is not countenanced under
17 the new Part 2 rules.

18 So while we don't -- while we think a
19 waiver request is acceptable under 2.335, in the way
20 that it was raised in this proceeding, it is
21 procedurally defective in that regard.

22 ADMIN. JUDGE FARRAR: But you could make
23 an argument that they filed a contention, you came
24 back and said sorry, that's outside jurisdiction. And
25 they said well, then we want a waiver. I mean that

1 could be a natural progression.

2 MS. POOLE: We would argue not. I mean
3 the county cited 50.47(a)(1) in its original petition
4 and simply left out that portion which says that
5 emergency planning is not considered in license
6 renewal. It was an argument that reasonably could
7 have been anticipated.

8 ADMIN. JUDGE FARRAR: Oh, so they didn't
9 have to wait for you to alert them that they had a
10 problem?

11 MS. POOLE: We think it's improper. Their
12 reply pleading is really a form for unanticipated
13 arguments. And that's really something that could
14 have been raised initially and should have been.

15 ADMIN. JUDGE FARRAR: All right.

16 Let me then ask the county to address
17 this. You have the applicant and staff lined up with
18 a pretty forceful position here. How do you address
19 that?

20 MS. KOHN: Well, the county believes that
21 its request for a waiver is supported by the papers.
22 We believe that there are unique facts here related to
23 Suffolk County specifically that are not common to any
24 other party.

25 ADMIN. JUDGE FARRAR: Is this a different

1 case because -- well, of course, in Seabrook, you had
2 the 12-mile New Hampshire shoreline in Massachusetts
3 effected. But here you have rate-payers or citizens
4 who are not served by the Millstone facility, okay,
5 and I can remember the details on that cable under the
6 Sound.

7 But you are not served by Millstone. And
8 yet you are one of these geographically -- a
9 geographical set up that is ill suited to evacuation
10 just like your barrier islands are. You've got a
11 problem there and you're not served by this. Is that
12 why you're saying it is unique to you all? Or am I
13 missing something?

14 MS. KOHN: I think while part of it is the
15 geography, I think the road system is a factor here.
16 And the water, the fact that the -- and I'm not a
17 radiation expert but we would certainly, you know,
18 provide one if we were going to intervene, that the
19 idea of how radiation might travel over water may be
20 different because of the circulation patterns and the
21 wind.

22 I think there are many factors which
23 suggest that citizens of Suffolk County could be
24 effected by an emergency situation. And those
25 factors, you know you can consider something

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1 generically. But in this particular situation, I
2 don't believe that the factors addressing Long Island
3 were addressed previously, at least to my knowledge.

4 ADMIN. JUDGE FARRAR: But isn't every one
5 of these situations unique in its own way? The people
6 up in Ossining and north of there will say there are
7 too many people near Indian Point. And the people in
8 Massachusetts will say in the summer you can't get
9 away.

10 I mean every reactor is surrounded by
11 some, you know, population and some geography that you
12 could say well this is unique. There's none other
13 like it. But they all are common in the sense that
14 you may have an evacuation problem.

15 So, you know, what's unique about your
16 situation that's --

17 MS. KOHN: Well, I think we have more
18 factors that are unique here and they are more severe.
19 In terms of the alternatives for evacuating, there
20 certainly aren't a lot of alternatives available. In
21 terms of the geography, that really is different from
22 somebody who is up in Ossining or somebody who is on
23 the Massachusetts coastline.

24 ADMIN. JUDGE ROSENTHAL: Are you talking
25 about Fishers Island?

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1 MS. KOHN: You know I feel that there are
2 a lot of factors here that are unique to Suffolk
3 County.

4 ADMIN. JUDGE ROSENTHAL: Are you talking
5 about Fishers Island? I take it you're talking about
6 Fishers Island?

7 MS. KOHN: Fishers Island, Plum Island,
8 and the North Fork which is, you know, within the 50-
9 mile zone and it's only 11 miles. The 10-mile
10 guideline that the NRC regulations provide is only a
11 guideline. It says it is supposed to take into
12 account local factors such as tomography and
13 topography. And we feel that hasn't been done here.

14 Yes, and, you know, we have experiences --
15 our citizens have concerns that may have been effected
16 by our history here. That, you know, and concerns
17 that haven't been addressed. So I think that we do
18 have unique factors.

19 Another criteria to consider in whether to
20 grant a waiver is whether the rule serves the purpose
21 for which it was promulgated. And in this instance,
22 I don't believe that the rule does.

23 On the initial licensing proceeding, a
24 Commission would look to see whether there is a
25 reasonable assurance that adequate protective measures

1 can and will be taken in the event of an emergency.
2 And in this particular case, I feel that it almost
3 sets up a presumption that we've rebutted.

4 I don't feel that there is that kind of
5 reasonable assurance that would give the residents and
6 citizens comfort here. And in terms, again, of the
7 uniqueness of the factors, Southold Town is surrounded
8 by water. The only exit is to go west.

9 Fishers Island, Plum Island, and Shelter
10 Island are only accessible by ferry. We also have a
11 very large number of farms in this area that would be
12 effected by an emergency. We have tourists, which
13 it's true that other areas do have tourists. But we
14 really have an unusual number of unique factors.

15 ADMIN. JUDGE FARRAR: So you're saying it
16 is the number? For example, Judge Rosenthal, back in
17 the days when we were both on the Appeal Board, he and
18 I sat on San Onofre where you had a beach right next
19 to the reactors.

20 That was an unusual factor but you would
21 say okay, that was just one factor. And worry about
22 those people somehow and you don't have all the other
23 problems you're talking about?

24 MS. KOHN: Yes, that's true. And I also
25 believe that the citizens here have concerns because

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1 of the history.

2 ADMIN. JUDGE FARRAR: This history?
3 Forgive my -- the history where they defeated another
4 reactor?

5 MS. KOHN: You know, that is part of the
6 history. You know we learned something from that.
7 You know the fact is that to say that these issues
8 were addressed in 1991, even if they had been
9 addressed adequately, which we don't believe they
10 were, it's kind of weak because the world has changed.
11 The population has changed. The congestion has
12 changed. You know the possible circumstances have
13 changed.

14 And the fact is that there is no
15 evacuation plan in place for most of these areas that
16 I've referenced. I believe the plan does talk about
17 part of Fishers Island. They say that they could walk
18 to the other side of the island and then they'd be
19 outside the 10-mile zone. I don't think that would
20 give the --

21 ADMIN. JUDGE FARRAR: Wait. Didn't they
22 have a special plan for Fishers Island where they'd
23 ferry the people off to Connecticut or Rhode Island?

24 MS. KOHN: Connecticut. In the direction
25 of the contamination I would think.

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1 ADMIN. JUDGE FARRAR: No, I thought they
2 were going to take it -- I thought that was going to
3 be well east of New London.

4 MS. KOHN: Well, I'm not that conversant
5 with the details. I have been informed that the Plum
6 Island evacuees would come through Suffolk County.
7 And there's no plan in place for those. There's no
8 plan in place for the North Fork for Southold Town.

9 So, you know, there really are factors
10 here that need to be addressed. And the county is
11 serious about addressing them.

12 You know our Shoreham experience taught us
13 a lot about what communities should be aware of and,
14 you know, and the degree of comfort that people have
15 with nuclear power generation and possible emergency
16 circumstances. And I think that because of that, we
17 have a special interest in having those concerns
18 addressed.

19 ADMIN. JUDGE FARRAR: Let me ask you this.
20 Let me make sure we understand your position. You're
21 looking to be a part, a bigger part than you have been
22 of the emergency planning. You don't -- you're not
23 using this just to try to keep the facility from
24 getting its license renewal.

25 Your real interest here is having all

1 these factors taken into account and coming up with an
2 evacuation plan that the county could go back to its
3 citizens and say we've done right by you. We've taken
4 care of these concerns that we know you have. Is that
5 -- or am I --

6 MS. KOHN: Yes. Our position is that
7 we're looking to protect the health and safety of the
8 people in the county and the visitors to the county.
9 And, you know, we're not -- what happens after that I
10 can't really speak to, you know. But right now we
11 really would just like to see these concerns
12 addressed.

13 ADMIN. JUDGE ROSENTHAL: All right. In
14 light of that, I would like to ask Ms. Poole a
15 question. And this is -- I want to get some
16 information.

17 I expressed a while ago my skepticism
18 about 2.206 as a viable remedy. I assume, however,
19 and you can correct me if I'm wrong, that the staff
20 has an ongoing responsibility to be monitoring
21 emergency planning concerns, problems with respect to
22 reactors.

23 And that, therefore, if a sovereign unit,
24 in this instance a county, comes to it informally,
25 doesn't file a 2.206, but comes to the state -- the

1 staff rather, as a governmental body with concerns
2 coming to another governmental body that has
3 regulatory responsibilities and says look it, these
4 are our concerns.

5 We're not in an adjudicatory context.
6 We're not in a 2.206. We're just government body
7 coming to another government body informally and
8 saying we've got these concerns and all of this.

9 Is the staff prepared, on an ongoing
10 basis, whenever it might be, this year, next year, the
11 year after, as part of an ongoing regulatory
12 responsibility, prepared to entertain those concerns
13 seriously?

14 Now I raise that because you heard the
15 county's lawyer say that in terms of the licensee,
16 once this proceeding is over, the licensee has no
17 ongoing reason to deal with the county. That may or
18 may not be the case. I mean I would hope certainly
19 that this licensee would act in good faith in working
20 with the county.

21 But now I'm focusing on the staff. And
22 that's my question. Is can this county count on at
23 any time, five years, ten years, 15 years, if it sees
24 a problem, can it count not on 2.206, not a formal
25 request for a Director's opinion, but is it free to

1 come to the appropriate officials in NRR or wherever
2 they are who deal with emergency planning, lay on the
3 table their concerns, and get not only a sympathetic
4 audience but get a cooperative environment in which to
5 resolve those problems?

6 MS. POOLE: Your Honor, I feel confident -
7 - and this is Brooke Poole -- I feel confident in
8 saying that any government entity or, in fact, any
9 letter that we get, any phone call that we get, we
10 will respond to and they will have not only a
11 sympathetic ear but a cooperative --

12 ADMIN. JUDGE ROSENTHAL: Well, I know, I'm
13 not talking about -- look it -- excuse me a second.
14 I'm not interested in what you guys do with citizens'
15 mail.

16 MS. POOLE: No, no, no.

17 ADMIN. JUDGE ROSENTHAL: I'm sure you get
18 a lot of it and it probably just -- I'm talking now if
19 a governmental body -- we're not talking about some
20 local organization that tend, I think more often than
21 not, not to be taken that seriously.

22 But I'm talking about when a governmental
23 body such as Suffolk County comes in, is there then
24 the feeling okay, these are two governmental bodies.
25 One of the bodies has a concern. And we have a

1 responsibility to really seriously working with them.

2 MS. POOLE: Yes. Staff will work with any
3 government, including the county, that comes to us
4 with concerns. And also, where applicable, we also
5 will coordinate with FEMA because some of these
6 concerns that are raised, you know, fall into the egis
7 of FEMA's responsibilities as well.

8 ADMIN. JUDGE ROSENTHAL: So they don't
9 need to file a 2.206 to get to you?

10 MS. POOLE: No, not at all.

11 ADMIN. JUDGE ROSENTHAL: Thank you. That
12 is all.

13 ADMIN. JUDGE FARRAR: Let me ask if, as I
14 said, this was not -- we wanted to gather some
15 information here not precisely in the nature of a
16 formal oral argument.

17 I think that we're satisfied that we've
18 gathered the information we need. But do any counsel
19 want a last minute chance to address something?

20 Judge Lam has a question.

21 ADMIN. JUDGE LAM: I had a question for
22 Ms. Kohn. Earlier the staff counsel was saying this
23 waiver request was improperly raised in your reply.
24 So it was somewhat a procedural deficiency.

25 I'd like to hear your response to that.

1 MS. KOHN: I think that the argument that
2 the regulation should be -- was not protecting the
3 public safety was raised in the initial papers. It's
4 true that I didn't cite the regulation for the waiver
5 until the reply.

6 ADMIN. JUDGE LAM: So what you're saying
7 is --

8 MS. KOHN: But the argument was raised --
9 I do believe that the substance of the argument was
10 raised earlier.

11 ADMIN. JUDGE LAM: I see. Thank you.

12 ADMIN. JUDGE FARRAR: Do any of the
13 counsel -- we'll give the county the last word since
14 it is their motion.

15 Mr. Travieso-Diaz, is there anything.

16 MR. TRAVIESO-DIAZ: In a minute and a
17 half, I think I will be able to raise the two points
18 I want to make.

19 ADMIN. JUDGE FARRAR: All right.

20 MR. TRAVIESO-DIAZ: My first is I think we
21 didn't properly focus on the facts. Now on the
22 2.335(b), the sole grounds for the petition for waiver
23 exception is that there are special circumstances with
24 respect to the subject matter or the proceedings so
25 that the application with the rule would not serve the

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1 purposes for which the rule was adopted.

2 Two things on this. First, the Rule
3 50.47(a)(1) was written specifically to exclude
4 emergency response for license renewal. It is working
5 beautifully here. That's exactly what it does. So
6 the rule is achieving its intended purpose.

7 Second, on that very same line, it talks
8 about the subject matter of the proceeding. It is not
9 the subject matter of the concerns that the county may
10 have. This proceeding is about license renewal. It's
11 about aging of equipment.

12 It has nothing to do with the concerns
13 that they are raising which, by the way, were exactly
14 the same things, demographic, growing population,
15 immigration, and so on that the NRC considered in
16 adopting the rule and rejected.

17 The second point that I want to make, and
18 I'm not going to spend any time on this, is that in
19 order to be able to be admitted as a party, a
20 petitioner has to meet all the six subparts of
21 2.309(f)(1) with respect to their contentions. I only
22 talked about three but they, in fact, have not met any
23 of them.

24 And rather than prolonging this
25 conversation, I refer you to pages 14 to 17 of our

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1 February 28th filing which shows why even if emergency
2 response was a proper subject and even if they had
3 overcome the burden of the lateness, they still
4 haven't come up with a contention that is admissible.
5 Therefore, they cannot be made a party in this
6 proceedings.

7 ADMIN. JUDGE FARRAR: All right. Hold on
8 one second. I want to confer with my colleagues here
9 so we'll go off the record. We'll be back in just a
10 minute.

11 (Whereupon, the foregoing
12 matter went off the record at
13 3:45 p.m. and went back on the
14 record at 3:46 p.m.)

15 ADMIN. JUDGE FARRAR: We're back on the
16 record.

17 Thank you, Mr. Travieso-Diaz.

18 Ms. Poole, do you have anything to add?

19 MS. POOLE: Nothing further. Thank you.

20 ADMIN. JUDGE FARRAR: All right.

21 Ms. Kohn?

22 MS. KOHN: I have just a few comments and
23 then I'm going to let the Chief Deputy County
24 Executive Sabatino would like to put in a comment.

25 First of all, just going back for the

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1 moment to your question about the waiver, I'd like to
2 say that all the parties at this point have had a
3 chance to address the argument so that there was no
4 prejudice by when it was brought. Both Dominion and
5 the staff have addressed the issues.

6 Also, with respect to -- and we certainly
7 appreciate Ms. Poole's representation that the staff
8 will provide a cooperative environment when Suffolk
9 County comes calling to discuss its concerns, I just
10 would like to -- I hope that that environment is
11 extended to us although we are not within the ten --
12 most of Suffolk County is not within the ten-mile zone
13 because that's the whole issue that we're raising
14 here.

15 And if the reception is going to be that
16 we're only -- that we're not entitled to participate
17 in the planning because we're beyond the ten miles,
18 then it's not really going to resolve the issues.

19 ADMIN. JUDGE FARRAR: Let me ask Ms.
20 Poole. Do you do beyond ten miles in Connecticut?

21 MS. POOLE: I'm sorry?

22 ADMIN. JUDGE FARRAR: Ms. Poole, do you do
23 beyond ten miles in Connecticut?

24 MS. POOLE: Oh, one moment please. I'm
25 not sure. I think so. But hold on one moment.

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1 ADMIN. JUDGE FARRAR: Because it seems to
2 be whatever you do in Connecticut, you ought to be
3 doing on Long Island. And I know there are Commission
4 rules which I haven't been involved in in some time,
5 probably since Seabrook, about the different sizes of
6 different zones and different degrees of planning.
7 But seems -- it would seem fairly obvious that that
8 whatever circles you draw shouldn't stop at Long
9 Island Sound.

10 MS. POOLE: We have evacuation plans to
11 ten miles.

12 ADMIN. JUDGE FARRAR: Well, that's all
13 right. If there is not a ready answer, that's okay.

14 MS. POOLE: It doesn't change my answer
15 that we are going to provide a welcoming environment
16 to the county when we hear from them.

17 ADMIN. JUDGE FARRAR: All right. Ms.
18 Kohn, go ahead.

19 MS. KOHN: Okay. Well, I thank you for
20 that. And I also would just like to -- I'm not going
21 to go into them now but we did, as part of our papers,
22 attach comments that the County Executive had -- the
23 Suffolk County Executive had raised regarding the EIS,
24 such as the effects of an aging plant and so forth.
25 And I won't repeat those but they are addressed in our

1 papers.

2 And now I'd like to move the phone over to
3 Chief Deputy County Executive Sabatino.

4 ADMIN. JUDGE FARRAR: All right. We'll be
5 happy to hear from him.

6 MR. SABATINO: Just a few closing comments
7 if you permit.

8 Number one, I've heard a lot of emphasis
9 placed on this issue of why the county was late. It
10 may sound somewhat mundane but the fact that a new
11 administration from a different political party
12 replaced an entire administration and we have a county
13 legislature that's run by a different political party
14 does result in a more difficult transition period in
15 terms of putting a government together and trying to
16 address the issues.

17 There are a lot more personnel changes, a
18 lot more policy changes that occur when you go from
19 one political party to another political party and you
20 have divided government. I think that should weigh
21 heavily in your consideration of why there was delay
22 in terms of the filing.

23 Number two, with this issue of a
24 willingness to sit down and talk and discuss and
25 dialogue and be cooperative, again, I go back to the

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1 point that you have to be in a position of strength,
2 though. We need to be able to deal with these parties
3 as co-equals. We're only get to that status if we are
4 in a situation where the other party is going to have
5 the incentive that our counsel mentioned before to
6 take us seriously.

7 Number three, in Suffolk County we have a
8 million and a half people. We bring resources and
9 expertise and countywide perspective to the issue
10 which a small group or a smaller organization that may
11 have made some of the presentations in the past
12 wouldn't have the capability or the perspective to
13 bring to the table.

14 Another point is even in terms of this
15 idea of working together in cooperation, remember
16 Suffolk County is not only just a county, not the
17 state. But we're in an entirely different state.

18 So the kind of interaction you might have
19 with the state in which you are a county isn't going
20 to apply here because the State of Connecticut's
21 interests may not be the same as the State of New
22 York's interests let alone the County of Suffolk.

23 So the normal interaction that you would
24 have as a county with your state elected officials and
25 your Governor isn't going to be at play here.

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1 And then lastly, the comment that was made
2 about the Shoreham situation wasn't meant to portray
3 an unbending opposition to a nuclear power plant.

4 It was meant to put on the record that our
5 circumstances are unique in many, many respects. Not
6 just geography. Not just the concerns that were
7 raised by our counsel with regard to the body of water
8 and the migration of the radiological, you know,
9 plumes that may result.

10 But also the fact that we learned in the
11 course of that 20-year experience a lot of things.
12 Some things we thought at the beginning turned out not
13 to be true at the end.

14 But we understand how highly complex the
15 issues are and how things can be a lot different as
16 you progress along those proceedings than perhaps
17 other communities would be aware of.

18 So I think in summary, those are a lot of
19 powerful arguments that differentiate us from maybe
20 the rest of the world in terms of other communities
21 that have raised opposition in a similar circumstance.

22 ADMIN. JUDGE FARRAR: All right, Mr.
23 Sabatino, we appreciate your remarks.

24 Rather than have anyone respond, this call
25 was set for two hours. And we're getting close to the

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1 end both in terms of when the operator will cut us off
2 but also in terms of plans people may have made.

3 Let's do this. And, Mr. Travieso-Diaz, I
4 will not ask you to tell us which of your clients you
5 love the most. But you are aware that in the Private
6 Fuel Storage case, Judge Lam and I have a motion for
7 reconsideration that was argued for seven hours the
8 other day from the State of Utah.

9 And that, without asking you, as I said,
10 to say where delay is more important, we are going to
11 be working on that case the next few weeks and not
12 turning to this case.

13 I mention that because that may set up a
14 happy confluence of circumstances. What my colleagues
15 and I, based on the discussion today, would like you
16 all to do is say in the next three weeks, by Friday,
17 May 6th, try to sit down amongst yourselves and see if
18 you can't work out some memorandum of understanding
19 that might say here is how we're going to work on the
20 issues today, the issues next week, and if the company
21 gets its license renewal, on the issues over the next
22 40 years.

23 Maybe we're wrong. But it seems that's
24 the way to proceed, in a cooperative manner. It
25 doesn't mean you're going to agree on everything as

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1 you go out those 40 years. But you can -- I would
2 think you could agree on how you're going to work
3 together.

4 So that will not delay the outcome of this
5 case. We've got your papers. We've got the
6 arguments. But Judge Lam and I are simply not going
7 to be able to turn to this for some time until we get
8 the Private Fuel Storage decision out.

9 MR. TRAVIESO-DIAZ: Mr. Chairman, just a
10 point of clarification. Are you asking for a report
11 by the parties by May 6th?

12 ADMIN. JUDGE FARRAR: Yes. Now a couple
13 of things, if you've got it done, you know, that's
14 fine. Or your report may be we've talked to each
15 other and, you know, we're making no progress at all.
16 So please write a decision.

17 Or you may say we've talked to each other.
18 We're making a lot of progress. We'd like some more
19 time.

20 I do this under 10 CFR 2.338 where the
21 Commission says -- it has said for a long time that
22 the fair and reasonable settlement and resolution of
23 issues proposed for litigation is encouraged. This I
24 see not so much as a settlement where people have
25 differing views and you try to find something on which

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1 they may agree.

2 But the three of us think we've heard here
3 is you all -- there may be a lot of agreement. Maybe
4 we're wrong but we'd like you to explore that.

5 Now if you'd like, the Chief Judge
6 Bollwerk can appoint a settlement judge, which I think
7 is not so much a settlement judge in this case but
8 just a facilitator of, you know, you all getting
9 together and if there's problems on who calls whom and
10 what's the shape of the table, could help with that.

11 Is that something you'd like to ask for
12 now? Or do you think you all, having heard from us,
13 can proceed on your own?

14 MR. TRAVIESO-DIAZ: Mr. Chairman, I will
15 need to consult with my client as to whether that is
16 something that is beneficial under the circumstances.
17 So I don't think I'm prepared to answer you one way or
18 the other right now.

19 ADMIN. JUDGE FARRAR: All right. Let me -
20 - since you're the -- Mr. Travieso-Diaz, sometimes in
21 these proceedings in settlement nothing happens
22 because as the County Executive said, you want to
23 proceed from a position of strength. And whoever
24 picks up the phone, that may be seen as a sign of
25 weakness.

1 Since you're the only counsel here that
2 I've had any dealings with, let me ask you to be the
3 person to pick up the phone. After you talk to your
4 client, if you would be good enough to call the other
5 parties, see if you do want to file a joint motion
6 under 2.338(b) to have a settlement judge or
7 facilitator appointed.

8 But even if you don't, for you to take the
9 lead in setting up the discussions where you would see
10 whether you can reach -- I call it a memorandum of
11 understanding, you all can call it whatever you want.

12 But if you would be good enough to take
13 the lead, then the other parties are instructed not to
14 take that as a sign of weakness but a sign of carrying
15 out the Board's request.

16 MR. TRAVIESO-DIAZ: Mr. Chairman, I will
17 be happy to do that. But I must say that this sounds
18 awfully familiar.

19 (Laughter.)

20 ADMIN. JUDGE FARRAR: Wait, what did I do
21 to you in the other case?

22 MR. TRAVIESO-DIAZ: We had the same
23 circumstance arise in the BFS case in the middle of
24 the hearing. And I was given the same assignment.

25 ADMIN. JUDGE FARRAR: Well, you must have

1 left a good impression with me here.

2 (Laughter.)

3 ADMIN. JUDGE ROSENTHAL: As Yogi Berra
4 said, this is deja vu all over again.

5 (Laughter.)

6 MR. TRAVIESO-DIAZ: I'm glad to hear that
7 again.

8 ADMIN. JUDGE FARRAR: And I won't hold
9 against you that you absented yourself from our seven-
10 hour party the other day.

11 MR. TRAVIESO-DIAZ: I thought there was
12 enough counsel representation that day.

13 ADMIN. JUDGE FARRAR: All right.

14 Ms. Poole, do you have any objection to us
15 proceeding in this fashion?

16 MS. POOLE: No, no objection.

17 ADMIN. JUDGE FARRAR: All right.

18 Ms. Kohn?

19 MS. KOHN: The county would appreciate
20 that if a judge were to be appointed.

21 ADMIN. JUDGE FARRAR: Well, you all talk
22 about that and either with or without a settlement
23 judge, use the next three weeks, report back to us by
24 Friday, May 6th that either it is hopeless and you
25 want the case decided, that you've settled the thing

1 and the petition can be withdrawn, or that you're
2 making progress and need more time which, of course,
3 we would grant.

4 But let's move on this quickly. And since
5 we have someone who will take the initiative, company
6 counsel, we'll proceed on that basis.

7 Anything else we need to talk about for
8 the good of the order?

9 MS. KOHN: On behalf of the county, we
10 really appreciate your time and your consideration of
11 these issues. And thank you very much for holding
12 this call.

13 ADMIN. JUDGE FARRAR: All right. We
14 appreciate you having so many of the key department
15 heads involved in this so they can have a firsthand
16 feel of the situation.

17 Company counsel, anything else we need?

18 MR. TRAVIESO-DIAZ: I only thank you for
19 your time and your attention.

20 ADMIN. JUDGE FARRAR: All right. Thank
21 you all.

22 MR. WILLIAMS: Before you close, I just
23 want to make -- Dennie Williams from the Courant, I
24 just want to make sure of just two things because it
25 will take me time to get it otherwise. Mr. Travieso-

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1 Diaz represents Dominion, is that correct?

2 MR. TRAVIESO-DIAZ: That is correct.

3 MR. WILLIAMS: Yes. And the other thing
4 is Brook Poole, is that B-R-O-O-K, Pool, P-O-O-L?

5 MS. POOLE: Es on both, Brooke with an E,
6 Poole with an E.

7 MR. WILLIAMS: Okay. And your position
8 is?

9 MS. POOLE: NRC Staff Attorney.

10 MR. WILLIAMS: Okay. Thank you.

11 ADMIN. JUDGE FARRAR: As long as you asked
12 that question, I didn't make the speech I usually make
13 at the beginning.

14 That the NRC staff and we, the Licensing
15 Board, are totally independent of each other. We, the
16 Board Members, are appointed by the Commissioners.
17 And then we act independently.

18 They don't give us performance reviews.
19 They review our decisions just like a Court of Appeals
20 or Supreme Court would.

21 But we have no contact with them other
22 than through the public process. And we have no
23 contact with the NRC staff other than through their
24 appearance in front of us. We don't work for them.
25 They don't work for us.

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1 And I usually try to make that clear
2 because that's not always clear to everybody.

3 Then we thank all counsel for the briefs
4 that they filed and the elaboration on those briefs
5 today and the answers to our questions. And we will
6 wait to hear from you.

7 Thank you all.

8 (Whereupon, the above-entitled pre-hearing
9 teleconference was concluded at 4:01 p.m.)

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CERTIFICATE

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

Name of Proceeding: Dominion Nuclear Millstone
Plant Pre-Hearing Conference

Docket Number: 50-336 and 50-423, ASLBP
No:05-837-01-LR

Location: Telephone Conference

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



Eric Hendrixon
Official Reporter
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