

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Stakeholder Meeting on a Rulemaking Plan to Reduce the Scope of Part 26 Regarding Random Drug and Alcohol Testing (SECY-00-0022)

Docket Number: (not applicable)

Location: Rockville, Maryland

Date: Thursday, March 22, 2001

Work Order No.: NRC-119

Pages 538-601

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1 UNITED STATES OF AMERICA
 2 NUCLEAR REGULATORY COMMISSION
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 4 STAKEHOLDER MEETING ON A RULEMAKING PLAN
 5 TO REDUCE THE SCOPE OF PART 26
 6 REGARDING RANDOM DRUG AND ALCOHOL TESTING
 7 SECY-00-0022
 8 + + + + +
 9 THURSDAY,
 10 MARCH 22, 2001
 11 + + + + +
 12 ROCKVILLE, MARYLAND
 13 + + + + +

14 The Public Meeting was held at 9:00 a.m. in the
 15 Auditorium of the Nuclear Regulatory Commission, Two
 16 White Flint North, 11545 Rockville Pike, Mr. Garmon
 17 West of the Office of Nuclear Reactor Regulation,
 18 moderating.

19 PRESENT:

20 GARMON WEST NRR
 21 RICHARD ROSANO NRR
 22 GARY MIZUNO, ESQ. OGC
 23 CHUCK MULLINS, ESQ. OGC
 24 NANCY DURBIN MDD
 25 EDWARD JOHNNEMANN NMSS

26
 27 ALSO PRESENT:

28 RICH ENKEBOLL
 29 LORI HAYES
 30 SUE TECHAU
 31 ROBERT SOUTHWORTH
 32 MIKE ROYAL
 33 SHERI ACKERT
 34 MIKE BURRELL
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P-R-O-C-E-E-D-I-N-G-S

(9:06 a.m.)

1
2
3 MODERATOR WEST: Good morning to everyone.
4 Good to see you again. We're shifting gears and going
5 on to yet another topic, but I'm sure it's going to be
6 a lively one as well.

7 The purpose of this meeting is to have an
8 advance look, if you will, by stakeholders, even
9 before the proposed rule is out. We're not quite
10 there yet. Just to give you a quick overview of what
11 the topic is, we have a proposed amendment before the
12 Commission to reduce the scope of random drug testing
13 for 10 CFR Part 26.

14 And in a nutshell, what this would mean
15 would be that currently we define it under the program
16 with respect to the protected area. And under this
17 proposed amendment, we would propose that individuals
18 that would be covered for random testing, only random
19 testing, wouldn't affect pre-access or for cause
20 testing. We would define it with respect to the vital
21 area. So that's the main part of it.

22 And along with that, we would, where it
23 isn't the case now, we would exclude those individuals
24 that have to report under emergency conditions to the
25 TSC and the EOF, the Technical Support Center and the
26 Emergency Operating Facility. And we can get into
27 some of the details a little bit later.

28 So with that sort of as an overview in
29 mind, whatever comments we get today, we'll treat them
30 as if they are, and they will in fact be public
31 comments, along with the other public comments that
32 we'll receive on the proposed rule once that's issued.

33 While I'm thinking of it, I might mention
34 the status of the proposed rulemaking effort.
35 Currently, we're slated to have the proposed rule
36 before the Commission in July. However, I might add,
37 we have asked for an extension of that particular
38 date. So we'll have to wait and see what management
39 decides on whether we'll actually get the extension or
40 not. That just gives you some sense of the timing of
41 all this.

42 What I'm going to do, I'm going to give a
43 rather general overview and then I'll allow -- if Dick
44 wants to make any specific comments, he can certainly
45 do that. And I'd also ask Chuck or Gary, in turn, to
46 fill in with any specifics they may want to offer.

47 But this particular rulemaking effort goes
48 back some years, and the beginning of it was an IBEW
49 Union request that was around February of 1992. And

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1 subsequent to that, there was a court denial of the
2 IBEW Union in the time frame of June of 1992. And
3 eventually, as sort of an overview here, our
4 Solicitor's Office made a recommendation in this
5 particular area, and that was still in the time frame
6 of 1992, July of that year.

7 And, ultimately, the staff received a
8 staff requirements memorandum from the Commission
9 around August of 1992. And then in December of 1993,
10 IBEW, the Union, submitted yet another exemption
11 request in December of 1993. And around 1994, the
12 staff put together a Commission paper, SECY-94-016,
13 essentially pulling together the various issues on
14 this topic for the Commission. And towards the middle
15 of that year, there was a Federal Register Notice, and
16 in effect what it did it proposed various options.
17 One of them was the option that I mentioned, namely,
18 to define random testing with respect to the vital
19 area as opposed to the protected area. And then there
20 were three or four other options. Dick might want to
21 mention some of those, and we can get into those
22 details a little bit later.

23 And then to sort of bring us up to date,
24 most recently, the Commission approved SECY-00-0022,
25 and that's the document that's out on the handout
26 table that I'm sure most of you do in fact have a copy
27 of. And that particular document, the rulemaking
28 plan, recommended the particular option that I've
29 mentioned already and along with a couple of other
30 things that the staff hadn't actually recommended,
31 like a risk analysis. We eventually got a staff
32 requirements memorandum back, essentially telling us
33 to move forward with the rulemaking.

34 So that is sort of a thumbnail sketch of
35 where we are. I have specific topics that I would
36 have us to perhaps focus on and get some feedback from
37 you on with respect to the proposed rule.

38 I'd only add one caveat, however. When
39 rulemaking is either before the Commission or about to
40 go before the Commission, it puts the staff in
41 somewhat of an awkward position in that you're dealing
42 with the issue of pre-decisional material. So if I
43 seem sort of tentative sometimes on certain responses,
44 that's essentially it. The way I tend to try to deal
45 with that is to try to frame whatever I'm going to say
46 or whatever I'm going to answer in terms of what is
47 publicly available, and that would be bounded by the
48 rulemaking plan. So most of my responses will be
49 relative to that.

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1 So we don't have a whole lot of time,
2 although we'll have whatever time we need, but we're
3 slated to devote from nine to 10:30. If it takes a
4 little bit longer than that, that's fine. So let's
5 get started. Did you want to make any -- excuse me,
6 Chuck?

7 MR. MULLINS: Let me give you a little bit
8 of a brief rundown. I argued the case in the 9th
9 Circuit in 1992. To give you a little more
10 information, the Union came with an exemption request.
11 Under 26.6, any person can request an exemption; it
12 doesn't have to be a licensee. So the Union requested
13 an exemption for several different categories of
14 workers. They requested an exemption for reactor
15 operators, maintenance workers, warehouse workers, and
16 clerical and support workers.

17 Now, you have to understand at Diablo
18 Canyon, which is where the request came from, the
19 administration building is inside the protected area.
20 In most facilities, the administration building is
21 outside the protected area. And so you've got very
22 few people who are clerical or janitorial or cafeteria
23 workers or whatever who have unescorted access to the
24 protected area.

25 The Union then later withdrew the request
26 for reactor operators. The Commission denied the
27 request, and the Union challenged that denial in
28 Court. The Court -- and I did not put a legal cite to
29 the decision, but I can get it for you at some point
30 if you want it -- the Court said -- and the decision
31 is published, by the way, in the Federal Second Report
32 -- the Court said that they upheld the testing for
33 maintenance workers, because they clearly perform
34 duties.

35 If you look at the Supreme Court decision
36 in Skinner, which was the main decision on this issue,
37 it talked about the duties of people who were subject
38 to random testing. They said the warehouse workers
39 performed duties that if other people didn't do their
40 jobs correct, bad parts, the wrong parts could slip
41 into the facility. But they said the clerical
42 workers, people who did not have any particular duties
43 which involved the plant -- and on the record before
44 them they couldn't tell the duties of the various
45 people involved -- but they said if the duties did not
46 involve sensitive work -- and I'm paraphrasing here;
47 you can read the decision for yourself -- but the
48 Court gave a clear indication that they would
49 overrule, they would throw out that part of the

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1 Commission's program when they got the case in the
2 appropriate posture.

3 The Solicitor, as Garmon said, recommended
4 it to the Commission. The Commission reviewed the
5 issue, and the Commission directed the staff to make
6 a review, and that was at some point what the onus was
7 in 1994.

8 The Union came in with another exemption
9 request, which has been on hold pending completion of
10 the review. The review went on for a couple of years.
11 It got put on the back burner. Then there was a case
12 in the Supreme Court from Georgia. The name of the
13 case is Chandler v. Miller. And OGC suggested that
14 the Commission hold up the review pending the decision
15 of that case. Chandler v. Miller sort of capped a
16 change in trends in the courts. If you look back in
17 the late '80s and early '90s, courts were pretty
18 liberal, to use a word, in allowing testing programs.
19 They pretty much approved just about anything that
20 went. Starting in the mid-'90s, the courts seemed to
21 change track and to look more closely at testing
22 programs. And in Chandler v. Miller, the Supreme
23 Court seemed to raise the bar for how we reviewed
24 testing programs. In other words, raise the standards
25 that the testing programs had to meet.

26 Garmon mentioned the case that came out
27 yesterday. While it doesn't particularly apply to our
28 situation, it does reinforce the trend that courts are
29 looking much more closely and giving much stricter
30 scrutiny to these types of programs.

31 Briefly, what was going on in South
32 Carolina was that you had a health clinic run by the
33 state for giving post-maternal care to mothers.
34 Apparently, as a -- and, again, I've only been through
35 the decision once; we'll have it hopefully outside
36 here by the end of the meeting -- as a condition of
37 attending the clinic, they had to give a urine sample.
38 Apparently -- and, again, this is not clear -- but
39 unbeknownst, at least, to some of them, the results of
40 that test were given to the police. The police would
41 then come in and arrest some of the mothers.

42 The Supreme Court, in a six to three
43 decision, said that's unconstitutional, at least if
44 it's not a voluntary situation. And they sent it back
45 for more consideration of whether or not it was a
46 truly voluntary agreement. Again, I don't think that
47 the direct ruling has direct implications for our
48 situation, but it does illustrate a trend for the

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1 courts giving stricter scrutiny to these types of
2 programs.

3 Without disclosing or without revealing or
4 waiving any attorney/client privileges, we have
5 essentially told both the Commission and the staff
6 that while we think we have -- if the current testing
7 program were challenged again on a good record, that
8 while we think we have good arguments to make, we
9 don't have significantly different arguments to make
10 than what we made before, and that we think that
11 there's a significant chance that we might lose that
12 situation, or lose that case. And that was
13 essentially the advice we gave before and essentially
14 the advice that we've given now.

15 And so that has resulted in the staff
16 going back and looking at this program and apparently
17 trying to focus it more closely on the job, the duties
18 that are involved in the case. And I'll let Mr.
19 Rosano take it from here.

20 MR. ROSANO: Actually, that's a good lead-
21 in to my comments. That sets the legal basis. And
22 just as Chuck and members of the legal community in
23 the NRC have to be concerned with the legal bases for
24 our regulations, we have to be concerned with the
25 propriety of our regulations. We can't -- we talk in
26 terms of burden and safety and things like that, and
27 everybody knows we can't establish a burden that
28 doesn't have the proper nexus of safety, but there's
29 a certain propriety issue that we have to be involved
30 with too.

31 Let me begin by saying that I recognize
32 from the public comments received on the first
33 issuance of this proposal a few years ago, that the
34 public comments are not overwhelmingly in support of
35 changing the scope of random testing, that by and
36 large, the comments recommended maintenance of the
37 current scope of random testing. I accept that, but,
38 again, I want us all to step back from it and look at
39 the propriety of the regulations and what we have to
40 concern ourselves with.

41 Probably the safest way for us to protect
42 the infrastructure of the United States or especially
43 the nuclear plants would be to randomly test everybody
44 in the country. But, clearly, that's not appropriate
45 and clearly not warranted from a safety perspective.

46 An alternative to that might be to
47 randomly test everyone who lives within a 100 miles
48 from the plant. That would also probably result in
49 quite a bit of resistance from the local community,

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1 not to mention the sheriff who might would have to
2 arrest all the people that we'd accidentally pick up
3 in this sting operation.

4 Another option is to randomly test
5 everybody who steps on-site at the plant, comes in
6 through the protected area barrier. We start getting
7 a little closer to the reason for our regulations, and
8 it's a little easier to understand, but we still have
9 to make a connection to safety.

10 The connection to safety in randomly
11 testing, again, not for cause, but randomly testing
12 everyone who sets foot on the site, is a little closer
13 but it's still not as tight as we'd like. And we're
14 bound by the same principles in regulation as the
15 licensees are. We should only establish principles
16 where we can clearly justify them on the basis of
17 safety. And it became more difficult to justify
18 randomly testing everyone who set foot inside the
19 protected area barrier on the assumption that their
20 unfitness for duty or their use of illegal drugs might
21 cause them to have a safety impact. So we considered
22 a variety of other ways to define it.

23 So we considered, for example, the type of
24 duties, whether they're safety-related duties or not.
25 There were some problems with that, because a person's
26 duties shift often, and over short or long periods may
27 change so that that individual may be working on
28 safety-related equipment for the first half of the
29 year and not the second half of the year. Also the
30 definition of "safety-related" has bedeviled us and
31 the industry for years. And so that didn't seem like
32 it was going to work.

33 We considered, instead of the term
34 "safety-related," to just take certain categories of
35 employees. But taking a category of employee didn't
36 say anything about where that person might end up in
37 the plant at any given time. So defining it by job
38 classification also gave us some problems.

39 What we leaned on was the venerable
40 tradition in the NRC of designating as vital pieces of
41 equipment that are considered vital to safety or to
42 safe shutdown of the plant. And if we have this
43 tradition of calling those pieces of equipment vital,
44 it means that they have, in some way, some
45 significance greater than the pieces of equipment
46 outside the vital area.

47 And so if we were trying to find the
48 clearest connection to safety, it appeared that one
49 option would be to say proximity to vital equipment

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1 was more safety related than your job classification
2 or whether or not your duties today involve safety-
3 related duties. So, again, we're going back to
4 principles again.

5 And so rather than randomly testing
6 everyone in the country or everyone within 100 miles
7 of the site or necessarily testing everyone simply
8 because they happen to work at the plant, one logic
9 was to find a more reasonable safety basis by testing
10 only those people whose duties brought them into
11 proximity of vital equipment.

12 It's a principle. The principle is that
13 we don't want to infringe on individuals' privacy
14 rights without just cause. In our case, the only just
15 cause has to be safety. And so we are looking for a
16 way to make sense of that and to make sense on a
17 safety basis, which is, again, as a foundation that's
18 how we arrived at this particular point in defining it
19 in terms of vital areas.

20 MODERATOR WEST: Thank you. Yes, sir?

21 MR. ENKEBOLL: Rich Enkeboll with NEI. I
22 quote from the staff requirement memorandum on the
23 SECY. "The staff should seek detailed comments on the
24 matter, and as the rulemaking proceeds, undertake a
25 careful analysis of the balance of public and private
26 interests." That's just what you said.

27 "In particular, the staff should carefully
28 assess the risks associated with unescorted access to
29 protected areas if the scope of random drug testing is
30 changed in light of the fact that some equipment of
31 safety significance may be found in the protected
32 areas outside the vital areas."

33 As you know, 7355 is under review, and in
34 that process, we understand that there's a
35 consideration to shift from a vital area concept,
36 which is more operational, to a target set concept.
37 We submit that you ought to wait for that rulemaking
38 to come to fruition which will give you good insights
39 as to whether there can be any shift in this issue.

40 I would also suggest that the industry
41 feels that having someone next to them that has not
42 gone through the wickets that they have, that there
43 are two groups. One group has got to be under random
44 testing, and another group doesn't. This will create
45 a large friction that you don't need. There is some
46 flavor that it will be less expensive to not test some
47 people.

48 The problem is you will then probably have
49 to institute some way of keeping track of these two

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1 groups, so that the untested group can find no way
2 into an area that could be a problem. You have to
3 probably worry about tailgating. You're going to have
4 to spend probably several times more money trying to
5 keep track of this separate group from a safeguard
6 standpoint than you would otherwise.

7 MR. ROSANO: Can I address these, Rich?

8 MR. ENKEBOLL: Yes. Go ahead.

9 MR. ROSANO: Let me handle the second
10 group first, what I'll call the practicality issues.
11 First of all, there is a suggestion that it will be
12 less expensive to test fewer people on a per capita
13 basis. And in fact that may not always be true. I
14 realize there are system issues involved and process
15 issues that may cost more money. But I would,
16 however, say that we are dealing with issues of
17 privacy, constitutional issues of privacy. It is
18 probably easier to remove everyone's constitutional
19 rights to privacy. It would probably be much easier
20 in society to do that. I don't think that we're
21 looking for an easy solution. We're simply looking
22 for the right solution.

23 Let me handle the other practicality issue
24 about the individual who might tailgate into vital
25 areas. If the vital area concept is used, it would
26 not suggest that everyone needs to be randomly tested
27 who violates the procedures at the plant and gets into
28 areas that they're not supposed to be in. The
29 population of those to be randomly tested would be the
30 population of those who are authorized access to the
31 vital areas.

32 There's another issue involved together in
33 the licensees being able to adequately monitor the
34 access to the vital areas and ensure that the wrong
35 people don't get in there. That's just a separate
36 issue of access.

37 As for the first question, I think I can
38 answer that fairly easily, and it's a good point that
39 you raise about the notion that vital areas might, in
40 the reevaluation of 7355, become something else. And
41 without getting too much into the Rep 73 effort, I
42 will say that one of the concepts that has survived is
43 the notion of double barriers. Just as now we have a
44 PA and a VA barrier, in the new rule we will have a PA
45 and we'll have some other barrier that will be
46 redefined hopefully more appropriately to our
47 circumstances. But that double barrier concept would
48 still be the defining factor in in this rule. And
49 although vital areas may become something else, there

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1 will still be a double barrier. And that second
2 barrier would then be the defining perimeter for the
3 testing population.

4 MR. MULLINS: One other point I want to
5 point out: Remember when you look at Part 26, what
6 does Part 26 -- what is it designed to prevent?

7 MR. ENKEBOLL: Reliability and
8 trustworthiness.

9 MR. MULLINS: It's designed to prevent
10 impairment.

11 MR. ENKEBOLL: Reliability and
12 trustworthiness, not impairment.

13 MR. MULLINS: Unless I've read something
14 wrong --

15 MR. ENKEBOLL: Reliability and
16 trustworthiness.

17 MR. MULLINS: May I finish now? Thank
18 you. The primary area is impairment, and that's the
19 first thing that I got asked in court. It's the last
20 thing I got asked in court. And if we have to go in
21 and defend it again, it will still be the first thing
22 I get asked in court. We're talking about impairment,
23 I believe, unless -- at Part 73 in the pre-employment
24 testing is more designed for the trustworthiness
25 aspect. In fact, it was interesting, I was reading
26 the comments that NEI submitted to OMB where NEI
27 seemed to say that it was the pre-employment testing
28 that was the really sine qua non of the prevention
29 aspect, and the random testing seemed to be -- it was
30 clearly a much lower priority, unless the --

31 MR. ENKEBOLL: That is not the way it was
32 intended to read.

33 MR. MULLINS: Well, that's the way it
34 read.

35 MR. MIZUNO: Well, I guess that just fits
36 into what I said yesterday about why do we have a
37 suitable inquiry. And we pointed out that the -- why
38 ask someone about their past use of illegal drugs or
39 their past terminations, and would they self-disclose?
40 And I indicated that part of the reason for doing that
41 is to see whether they're going to be acting in a
42 truthful manner. I mean you recall that discussion
43 that I had. I think this goes back. And I do recall
44 that some of the comments that we received on testing
45 refer to the fact that the suitable inquiry in and of
46 itself was more of a test for the trustworthiness.

47 MR. ENKEBOLL: One other point I wanted to
48 make was that in this proposed rule there is some
49 statements about making it voluntary, and we would

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1 suggest that there's no such thing as voluntary in
2 this business, because if it's not by regulation, it's
3 going to be very difficult for a site to pick one.
4 They're going to be stuck with whatever the rule says.

5 MR. MULLINS: Look, I keep hearing that
6 from people. I had some comment from, I believe,
7 Winston Strom on that a couple weeks ago. You know,
8 I watch TV around here, and every other day I can see
9 an ad by some company which says, "We test our
10 workers, because we don't want people to -- because
11 you, the public, doesn't want drug-impaired people in
12 your home." If private companies -- if the Roto-
13 Rooter can require their employees to undergo drug
14 testing, if the furniture store down here can require
15 their employees to undergo drug testing, I don't
16 understand why you can't inquire unless, of course,
17 you are a state. I believe TVA would have a problem.
18 If you're a state employee --

19 MODERATOR WEST: There are about three
20 states that would have that problem.

21 MR. MULLINS: But most of the rest of you
22 can require your workers to undergo testing.

23 MR. MIZUNO: Chuck's right. It changes
24 the basis for the testing from a regulatory basis to
25 an employment basis. Employers can make employment
26 decisions within the limits of the state regulations
27 that allow them, as an employer, to test. We're
28 simply removing, effectively, the regulatory shield
29 that employers have used to justify the testing in the
30 past.

31 MR. ENKEBOLL: One of the problems that
32 creates is the licensee must then negotiate with his
33 unions and pay them to do this. And I don't think we
34 should be put in that position.

35 MR. MIZUNO: If the licensees must
36 negotiation a better position within the context of
37 the right decision regarding privacy rights, then I'm
38 all for it.

39 MR. ENKEBOLL: I yield.

40 MODERATOR WEST: Thank you for your
41 comments.

42 MS. HAYES: This is Lori Hayes from
43 Progress Energy. Has the NRC looked at or done some
44 sort of analysis that we've been using 7356 and Part
45 26 as a basis that we have insider protection based
46 through those two programs. And when some of that
47 with relation to Part 26 is removed, what effect will
48 that have on the insider and our level to protect

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1 against the facility, as we've claimed that we've been
2 able to with those programs in place?

3 MODERATOR WEST: This is not a specific
4 answer to the aspect of your question in terms of the
5 insider, but generally speaking, what was previously
6 mentioned as far as the staff requirements memorandum,
7 the aspect in terms of a risk analysis, we are in fact
8 obliged to do a risk analysis. And that will speak to

9 --

10 MS. HAYES: So that's ongoing?

11 MODERATOR WEST: Yes. And that will be a
12 part of the proposed rule.

13 MR. ROSANO: Also, I think that this is
14 important that we should remember the 7356 is a pre-
15 employment issue. It's about background -- it's
16 access authorization, some access controls. And pre-
17 employment screening for drugs will still be part of
18 the rule. This only handles random testing which is
19 post-employment, and that's not what's covered by 7356
20 anyway.

21 MS. TECHAU: Sue Techau, Excelon. I'm
22 going to be reiterating and talking about a couple of
23 the samples that were just cited, but it goes along
24 with the whole philosophy of my statement.

25 10 CFR 7355 talks about a design basis
26 threat and what we have to do to defend against
27 somebody who would try to attack a nuclear station.
28 Within the design basis threat, we have to consider an
29 insider threat, and that's what we're talking about,
30 how we protect against it. We use 10 CFR 7356 to
31 determine whether a person is trustworthy and reliable
32 and 10 CFR Part 26. Now, within those rules, it also
33 talks about for somebody to -- it doesn't designate
34 between protected area and vital area. Once you're
35 trustworthy, you're trustworthy.

36 And then it also talks about for somebody
37 to continue to maintain their unescorted access, they
38 have to be, one, in a CBOP, Continued Behavior
39 Observation Program, and, number two, in a random
40 testing program. So those are already in those rules
41 that they have to be to continue unescorted access,
42 that they have to have both those two elements.

43 And I believe that it would create an
44 administration burden by us trying to have to evaluate
45 whether or not a person gets upgraded to a vital
46 access level or removed. Because our security control
47 room areas are in the vital areas, and the actual
48 control rooms are in vital areas. Maintenance people
49 that go in to clean those areas get upgraded on a

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1 daily basis. Are we going to be putting in the pool,
2 taking them out, putting them in, taking them out?
3 That's an administrative burden that we're all going
4 to be affected by.

5 The security organizations and the
6 utilities in the industry have based their design
7 basis threat from guidance from the Regulatory
8 Effectiveness Review and the Operational Safeguards
9 Readiness Evaluations. And we use target sets to
10 defend against a design basis threat. There are
11 target sets within the protected area, not the vital
12 area. And how are we going to protect against an
13 insider that only has access to a protected area to be
14 able to defend that, that that person continues to
15 maintain their trustworthiness and reliability?

16 There was a rule change back in 1997. It
17 was Federal Regulation -- Federal Register, Volume 62,
18 Number 231, Section Number 4. It talks about
19 maintenance of access levels, that we only have to go
20 down to one access level. We don't have to break them
21 up and have to administratively -- because I think
22 there was a comment earlier that we could
23 administratively break them down, separate the
24 different one based on the more vital equipment that
25 we're trying to protect against. And that rule
26 applied to 7355-D7IA.

27 And under the Statements of Consideration,
28 it also talks about separate access lists that we had
29 -- and this is what the whole thing was all about --
30 that we didn't have to keep them. And it said that
31 there was no value added by keeping separate lists.

32 Now I know that the NRC is currently
33 working with the industry to redo 7355. And within
34 that effort, they're trying to reduce vital areas and
35 eliminate those and say, "Let's defend against target
36 sets." That's the industry's stand, and that's what
37 they want to do.

38 MR. ROSANO: That may be the industry
39 stand, but I don't want the public here to confuse
40 that with the NRC's stand, okay?

41 MS. TECHAU: That's what the industry is
42 working towards, because it was the guidance that was
43 provided by RER and OSRE to defend against design
44 basis threats. And it's not all areas that are within
45 a vital area. There are some within a protected area.
46 One in particular is the CSTs, or the condensate
47 storage tanks. They're outside our vital areas;
48 they're within our protected areas.

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1 And another statement is that Diablo
2 Canyon may have their administrative building outside
3 the protected area, but I can think of one of our 11
4 that have it outside. Everyone else is inside our
5 protected area.

6 MODERATOR WEST: I'm sorry, what was that
7 last point? Everything else, what was that?

8 MS. TECHAU: All of the administrative
9 buildings are within our protected areas, except for
10 one.

11 MR. MULLINS: Question: I know that
12 there's at least one plant that has the turbin
13 building outside the protected area. Do you find a
14 significant threat there?

15 MS. TECHAU: What utility is that?

16 MR. MULLINS: It's in Michigan, I believe.
17 I know that there is one. Because there was a
18 discussion of that back in about '95 to '96, and it
19 was at that point that there was -- the question was
20 raised in this ongoing discussion, and that there was
21 --

22 MR. ROSANO: All right. Who out there is
23 ready to come clean? Who's got their turbine outside?
24 (Laughter.)

25 I got some inspectors in the back of the
26 room. We'll send them out.

27 MS. TECHAU: I'm not aware of -- I don't
28 have that knowledge to respond to that question.

29 MR. MULLINS: I know that one point back
30 in the early '90s, when this was going on, there was
31 a move -- there was discussion of eliminating the
32 vital areas designation all together, and we said,
33 "Gee, if you do that, then the current rule clearly
34 would pass muster." The problem is, of course, that
35 that's not been done. And as long as you've got a
36 two-level area where you've got people whose normal
37 duties have no conceivable relationship to the
38 operation of the plant, people like secretaries,
39 janitors, cooks, cafeteria workers, it's
40 counterintuitive, especially trying to explain that --
41 it's kind of hard to explain that to a group of
42 federal judges that, "Gee, these people can bring down
43 the plant."

44 The other thing is you're talking about
45 the insider threat. I am apparently not cleared for
46 that kind of information, but I was told a couple of
47 years ago by Bill Olmsteade, who was a Deputy General
48 Counsel at the time and who handled, in fact, did the
49 litigation on the security issues at Diablo Canyon

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1 back in the '80s, that under the insider threat, as he
2 understood it, you could not have one person in the
3 protected area bring down the plant.

4 Now, as I said, I'm not familiar with the
5 insider threat. I asked him if he could explain that
6 to me, and he said, no, if he explained it to me, he'd
7 have to shoot me.

8 MR. ROSANO: He might have wanted to
9 anyway, Chuck.

10 MR. MULLINS: He might have wanted to
11 anyway.

12 MS. TECHAU: But the insider could assess
13 somebody else.

14 MR. MULLINS: But in other words, at some
15 point, I wouldn't need to see that addressed.

16 MS. TECHAU: Yes, it's definitely a
17 concern.

18 MR. ROSANO: Yes. You've raised a lot of
19 good points. And, actually, I won't presume to be
20 able to answer all of them, not because I lack the
21 knowledge but perhaps I lack the memory. I couldn't
22 remember all the things you brought up. But let me
23 try to address some of them sort of in scope.

24 First of all, we admit that there are some
25 problems with the concept of vital areas. And in fact
26 I think that the RER and OSRE programs have helped us
27 better understand that there are problems with
28 conceptualizing things, such as vital areas, that
29 there's equipment outside the vital areas that's
30 important. Similarly, there's equipment inside some
31 of the vital areas that may not be as important,
32 because there are redundancies available.

33 And then, to lead to the next point, that
34 there are a variety of vital areas in a lot of plants,
35 several different vital areas, and we have tackled
36 that problem that the Fed Reg Notice has generally
37 called the insider rule that you referred to, and that
38 was to provide greater flexibility for the licensees
39 and less burden by allowing them to do some things,
40 such as have universal vital area access.

41 That's actually what it meant, and I'm not
42 sure, you understood it -- I'm not sure that I
43 understood it from your comment, though. What the
44 insider rule said was that you could -- the licensees
45 could establish protected area access and vital area
46 access and that someone granted access to a single
47 vital area could be generalized to all vital areas.
48 But it's still holds true that someone who has access

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1 to vital equipment then would be in this population of
2 those tested.

3 Let me address another point, and then
4 I'll get away from the microphone. You mentioned, for
5 example, even some of your admin buildings are in the
6 PA. Well, that's precisely the point. What we're
7 trying to do is get away from the notion that
8 everybody who works inside the protected area has some
9 impact on safety and should be tested, because a lot
10 of people in the admin building just simply don't need
11 to be tested, and we're trying to respect their right
12 to privacy and not drive them down to the urinalysis
13 lab every couple of months just because it's the easy
14 thing to do.

15 MS. TECHAU: Well, then how are we going
16 to be able to maintain Part 26 and 7356 that require
17 someone to have unescorted access to be in a random
18 pool and under a Continual Behavior Observation
19 Program?

20 MR. ROSANO: I don't think that's what it
21 requires --

22 MS. TECHAU: Yes, it does.

23 MR. ROSANO: -- but I'd be willing to read
24 it again. I'd be willing to say that that's not in
25 fact how it's implemented.

26 MS. TECHAU: NUREG 1385 talks about that.

27 MR. ROSANO: I absolutely know the NUREGs;
28 in fact, I helped write most of them. I will look
29 into that. I'm trying my best to get you an answer
30 right now, but I'll look for that.

31 MS. TECHAU: Okay.

32 MR. MULLINS: You mentioned the problem
33 with people in protected areas. That's what we argued
34 in the courts. We said, and I think the copy -- I
35 don't know if I've got a copy of the brief left or
36 not. If I can find one, you can leave me your
37 address; I'll send you one.

38 MS. TECHAU: Well, wasn't Diablo Canyon
39 basing part of their case that their admin building
40 was outside of the protected area?

41 MR. MULLINS: No. In Diablo Canyon, the
42 admin building is inside.

43 MS. TECHAU: Okay. Then I misunderstood
44 the comment.

45 MR. MULLINS: Yes. That's the issue. In
46 other words, what we argued in our brief, we went in
47 the brief -- we gave several examples. I think down
48 in Vogel there was a situation where somebody backed
49 a truck into a lightpost. Lori, remember that?

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1 MS. HAYES: It was Vogel.

2 MR. MULLINS: It was Vogel. There were
3 several situations where you had accidents in a
4 protected area which have, quote, "stressed" the
5 safety systems, and that's what we argued to the
6 court. But what we found ourselves doing was sort of
7 we had to construct, for lack of a better term, a Rude
8 Goldberg type of effect. This happens, then this
9 happens, this happens, and in all three of the steps,
10 or four of the steps, the safety system don't work.

11 Now, on one hand, what we are doing is we
12 are going into court and saying, "Gee, the sky can
13 fall and the sky will fall." On the other hand, we're
14 trying to tell the public, "Nuclear power is safe,
15 efficient, no problem. You don't have to worry."
16 Now, I don't know about you, but I see something of a
17 disconnect there.

18 First of all, it's kind of hard to explain
19 to a court that when you put all of this effort and
20 money into constructing this plant with all of these
21 backup systems that are going to work and they're
22 wonderful to work and they will work, trust us,
23 there's no problem here, and then on the other hand
24 saying, "Yes, but we can't invade your constitutional
25 privacy, because we're afraid they won't work." Think
26 about that. That's what I have to argue. Remember,
27 I'm the one who's got to stand up and defend it.

28 MS. TECHAU: We want to make sure that it
29 continues to be safe, so that's why we want to
30 continue with the random testing.

31 MR. MULLINS: So do I.

32 MODERATOR WEST: I want to ask for
33 clarification -- excuse me, go ahead.

34 MS. TECHAU: And something else I'd like
35 to mention is that the clerical and the administrative
36 people do work on safety-related procedures. And
37 there are people that would approve those procedures
38 all the way up to the top that would not have vital
39 area access. So now you've got people that are
40 working in a vital area on procedures that could be
41 altered, generated to cause something.

42 MR. MULLINS: You have that now. You've
43 got people in headquarters downtown who are outside
44 the protected area. You have people typing computer
45 codes. For example, at Diablo Canyon, PG&E has people
46 in downtown San Francisco who prepare computer codes
47 or who have other duties. I suspect if I go down, for
48 example, to North Carolina, Carolina Power and Light,
49 I can go down to Raleigh and find people who have a

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1 significant amount of access to the computer codes, to
2 various other procedures, who are not subject to Part
3 26. Lori, am I right on that?

4 MS. HAYES: That is true.

5 MR. MIZUNO: In fact, I believe that that
6 -- the fact that the Fitness for Duty rules do not
7 cover those kinds of employees also poses a
8 significant -- well, in my view, it raises a concern
9 about the validity of the rule as we currently
10 structured it. And, certainly, if we get into the
11 concept here of trying to narrow the scope down and
12 doing it on the basis of the functional --

13 MR. ROSANO: Access.

14 MR. MIZUNO: -- access or the functional
15 nature of the employee's job, we are going to
16 immediately get into the subject of functionality as
17 applied to people who are off-site and whether they
18 should also be tested. So I think that as you
19 consider your comments -- and as you submit your
20 comments -- and please provide us information that
21 tells us about the practical nature of the impacts
22 based upon whatever proposal that comes out. I think
23 that that's something that we really need to know.

24 Also consider, however, that your comments
25 will -- if they do raise issues, we will have to
26 address them, and we have to have a consistent story
27 with respect to how we deal with the issues. We
28 cannot say, for example, "Here is an important set of
29 people who need to be tested" and say, "Here's a set
30 of people in a different location who perform
31 essentially the same -- have the same kind of
32 potential impacts upon radiological health and safety
33 and we aren't testing them." We need to have some
34 kind of basis for -- if we are going to have a
35 distinguishing -- you know, in terms of the way we're
36 going to test them, then we're going to also have to
37 be able to distinguish why it is that one population
38 is different from the other.

39 MODERATOR WEST: Would you like to
40 continue with your comments, and then we'll take a
41 comment to the left.

42 MS. TECHAU: Okay, just one more
43 statement. I just wanted to stress that it's going to
44 cause an administrative burden to be moving people
45 within and out of our pools based on their access to
46 vital areas and not -- could be on a one-day basis
47 that could lead to potential violations. They're
48 unnecessary violations that we would incur.

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1 MODERATOR WEST: Okay. Thank you for your
2 comments. Please.

3 MR. SOUTHWORTH: Bob Southworth from PPL.
4 On one hand you're making a statement here that one
5 individual could not cause the plant, as you quote,
6 come down. I don't think the plant coming down is the
7 issue. It's a risk to the public, whether the plant
8 comes down or there's a radiological release,
9 whatever. And you're saying that one person couldn't
10 do that, so why test the people in the control room?
11 That one person can't do anything. What about the
12 cafeteria work who's on drugs or something like that
13 and puts some of the drugs in food or something,
14 contaminates everybody on site?

15 Anybody on the site that's inside a
16 protected area has a higher risk of impacting the
17 safety. I'm not saying test everybody in the
18 neighborhood or anybody outside this protected area,
19 but once you're inside a protected area you have a
20 higher risk of affecting the safety of the plant.

21 MR. MULLINS: How about the people
22 downtown?

23 MR. SOUTHWORTH: Well, my opinion is,
24 anybody that could have any effect on how the plant
25 operates should be tested. I would test everybody in
26 our company that could have any influence of what goes
27 on at the plant.

28 MR. MULLINS: Why don't you do it now
29 voluntarily?

30 MR. SOUTHWORTH: Well, I can't make them
31 do it.

32 MR. MULLINS: Oh, okay.

33 MR. SOUTHWORTH: I'm down at the bottom.
34 I'm at the bottom.

35 (Laughter.)

36 But, anyway, another issue is access to
37 safeguards information. Is that an issue here?
38 There's so many issues that come up here with once you
39 start separating who is going to be tested and who's
40 not, as she stated here, there's a burden here that I
41 don't even know how we'd manage it. Every
42 individual's got to be looked at. Every single job,
43 everything they do is going to have to be looked at,
44 and we're going to have to defend why we did or why we
45 didn't test an individual. And God forbid if there's
46 somebody we didn't test and something does happen with
47 that information, we'll be under microscope as to why
48 we didn't test that person.

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1 MR. ROSANO: Access to safeguards
2 information is not determined by PA access. So to
3 answer that issue, a lot of people have access to
4 safeguards information outside the site, and a lot of
5 people inside don't. That's purely job related. And
6 in fact, as I mentioned earlier, job relationship and
7 job duties is one possible alternative to VA access.
8 But, anyway, to answer that point, that's really not
9 decided on the basis of PA access.

10 MR. SOUTHWORTH: There's just other issues
11 that could be brought into this. Once you start
12 separating these few people -- and, to me, if you were
13 an individual -- say you have two clerks working side
14 by side. That clerk happens to have to go to the
15 control room once a month to do something. That
16 person's got to be in the random pool. I don't have
17 to be. I can go do whatever I want, because I know
18 nobody's going to come test me.

19 MR. ROSANO: Let me try to address that.
20 Let us not forget that testing for cause is still
21 going to be a part of the program, and you can't do
22 anything you want. Behavior observation would still
23 be required of all employees inside the site, and a
24 supervisor who witnesses an employee acting in an
25 abhorrent manner can still request a test. It's just
26 the unauthorized and unsuspecting activity, the
27 individual who has no cause to be suspected. That
28 would be removed.

29 MR. SOUTHWORTH: I understand what you're
30 saying there, but I also know from personal experience
31 numerous times that an individual has observed this
32 abhorrent behavior, this unusual behavior, but because
33 he's my buddy, I'm not turning him in. Let somebody
34 else figure it out. That happened -- can anybody here
35 -- I'm sure they've all experienced what I have. "I
36 thought I smelled alcohol on his breath when he came
37 in this morning, but, oh, I didn't want to turn him
38 in. It's not my job. I'm a union worker. I can't
39 turn him on." So then --

40 MR. ROSANO: I agree with you. We've had
41 cases before us just like that. But we have to make
42 sure that we have the right fix for the right problem.
43 If the problem is that people are not, especially
44 supervisors, reporting issues that they believe are
45 credible, then we've got to fix that problem, not just
46 test everybody that we come across in order to make
47 sure we don't miss anybody.

48 MR. SOUTHWORTH: This is just a tool. The
49 randomness of the testing is just one of our tools we

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1 use to catch these things that get through, like the
2 example I just gave. And it looks to me like -- I
3 know you tried to defend our position in court, but I
4 don't think -- maybe you need somebody else to help
5 defend it, not just -- I don't know.

6 (Laughter.)

7 Maybe somebody in the industry can help
8 you.

9 MR. MULLINS: That's all right. My boss
10 doesn't think I do a good job sometimes either.

11 (Laughter.)

12 MR. SOUTHWORTH: I'm not saying that. I
13 do know, depending on who the opposition is who is
14 against you, who is defending the other position,
15 sometimes you need help. That's why some people get
16 out of their arrests, and some people don't get out of
17 things. There's maybe other points that somebody
18 could bring up in defense of what we're expressing
19 here.

20 MR. MIZUNO: As I said, I think it's
21 important that you identify in your public comments,
22 submitted when the proposed rule gets out, on the
23 practical -- and be very precise -- on the practical
24 implementation issues and difficulties that you are
25 going to have in implementing whatever it is that the
26 Commission may decide to propose in the proposed rule.
27 Because those things are going to be the basis that we
28 are going to rely upon in ultimately deciding what
29 direction we're going to take in the final rule, which
30 -- or if there is any rule at all, whether the
31 Commission may ultimately decide that there's no other
32 practical approach other than what we have now.

33 And so, therefore, I can't emphasize that
34 you people are in the know. You are directly there.
35 You are going to know how your systems work, what the
36 practicalities are. You need to come and provide that
37 information to us, because that's going to be the
38 basis for decisionmaking by the NRC and ultimately
39 what we are going to use as a basis for defense of our
40 ultimate decision.

41 MR. MULLINS: I would point out that the
42 brief, whenever we filed it, we coordinated it with
43 the company, with PG&E, and they seemed to like what
44 we argued. And as I said, we're not that incompetent.

45 MR. SOUTHWORTH: I'm not saying that at
46 all. You know what I'm saying. I'm just saying that
47 sometimes there's other points, and it only takes one
48 other position to come up that may word it
49 differently. It's all in how you word everything.

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1 And maybe somebody else might help. It's just a
2 suggestion, okay?

3 The other thing is, I just want to get
4 this clear in my where we're hinging this whole thing
5 on. We're hinging this statement on what is vital and
6 what is not vital; is that correct?

7 MODERATOR WEST: Correct.

8 MR. SOUTHWORTH: Okay. And that's been
9 brought up several times here about that's in flux
10 right now as far as what is going to be, in the near
11 future, vital or important to the safety operation of
12 the plant. So it seems to me that there could be,
13 like somebody was saying, I know that there are
14 transformers outside of the vital areas that are
15 sitting out -- you can walk right up to them -- that
16 are considered safety-related items. You could walk
17 right up to the thing and throw the switch. How
18 you're going to manage that, I don't know. I heard
19 somebody say something about additional barrier or
20 something. But, right now, vital areas -- there are
21 certain descriptions in how a vital area has to be
22 protected. If you have a transformer sitting out in
23 the middle of a field, I'm not sure how you're going
24 to meet that criteria.

25 MODERATOR WEST: Thank you for your
26 comment; appreciate it. Take a comment over here.

27 MR. ROYAL: Mike Royal, Conservation
28 Energy. In the sake of brevity, I'll just have a
29 couple of things I want to say. I think that the
30 testing of those people that have access to the vital
31 areas, the protected area, that have access to our
32 plant proper, needs to continue. I think it dovetails
33 nicely with the minimization of the insider threat
34 issues.

35 I respect the comments, Gary, that you and
36 Chuck have made, carefully couched as they are, about
37 the global issues that present themselves here. And
38 I'm happy to hear that you are very cognizant of those
39 global issues. And I would ask that because you are
40 so cognizant of those, that we really not go forward
41 with this, because you do understand the global
42 issues. I might ask that you consider that the
43 application of the Fitness for Duty rule point itself
44 to those who could gain proximity to or have impact on
45 vital equipment. Now, that's a little more global
46 definition.

47 And, Chuck, I understand how difficult it
48 is dealing with the courts with the law enforcement
49 background that I have myself, but certainly while

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1 it's hard to explain, it's necessary to provide that
2 explanation in sufficient detail that the court can
3 make a good decision. So I'd ask that you entertain
4 that concept.

5 MODERATOR WEST: Thank you for your
6 comment. Please.

7 MS. ACKERT: Sheri Ackert from Argenti. I
8 understand your position, and I guess all along I've
9 always been told or informed that working in a nuclear
10 plant is a privilege, it's not a right. You don't
11 have to have unescorted access. You may move down on
12 the road if you choose not to sign the consent form to
13 have the background investigation elements and
14 everything completed.

15 An individual, when they sign --
16 voluntarily sign that consent form, waive many of
17 their personal privacy rights right at the very
18 beginning anyways. So my question being if in fact we
19 do concede that individuals who have non-safety-
20 sensitive positions do not have to be in the random
21 pool, what would be the next step? That if they're
22 saying safety-sensitive, they don't need to be pre-
23 accessed, they don't need to have a background?
24 That's just a thought. I just was wondering about
25 your comment on that.

26 MODERATOR WEST: Can I -- I think -- just
27 a quick response. I think part of even the notion of
28 being able to entertain disallowing random testing for
29 that group is couched with the fact that you would in
30 fact still have pre-access and you would in fact still
31 have full cause testing.

32 MS. ACKERT: I understand. My thought
33 being if in fact the IBEW does go forward with this
34 and then basically win that fight, will they go for
35 the next step of saying, "Well, gee, if that's the
36 case, if they're safety sensitive, we don't need to
37 have the other tests done either." And that was just
38 my thought.

39 MODERATOR WEST: I understand your point.
40 Thank you.

41 MR. ROSANO: I think the comment about
42 employment being a privilege and not a right is an
43 important, and it's one that we talk about often. But
44 it also clearly captures this issue in terms of
45 employment versus regulation. Because it's a
46 privilege not a right, it casts it in terms of the
47 rules that employer would have an opportunity to set
48 for that area.

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1 Regulatory rules, if you'll excuse the
2 redundancy, as opposed to employment rules, have to
3 set a different standards. The regulations have to be
4 based on something different. They have to be based
5 on safety.

6 And I would like to take this moment also
7 to add that this is not an easy subject. It's not one
8 that is well understood, clearly understood or even
9 with any great harmony. But that's the principle
10 behind it, the issue of trying not to write
11 regulations that require more than those that are
12 necessary for safety. And if there's an alternative
13 way to find that, that's what we ought to search for.

14 MS. ACKERT: Thank you.

15 MR. MULLINS: One, I would point out that
16 we argued that in the court, that in the published
17 part of our argument that it's not a right.

18 MR. MIZUNO: That was a loser.

19 MR. MULLINS: Yes. It was a loser.

20 MR. MIZUNO: But you can't waive away your
21 rights.

22 MR. MULLINS: I invite you to read the
23 court's opinion. In fact, the court issued an
24 opinion. The majority opinion was written by a fairly
25 liberal judge who wrote a fairly moderate opinion.
26 Then there was a screaming opinion denouncing the NRC
27 written by the Republican judge on the panel. Like I
28 said, we raised all of those issues.

29 MR. MIZUNO: From the constitutional
30 standpoint, okay, I have not yet seen a Supreme Court
31 opinion that says that an individual may waive their
32 constitutional rights vis-a-vis the government. I
33 mean if that were the case, I mean there would be
34 nothing to prevent any regulatory agency from, or
35 indeed the government, from saying -- from requiring
36 a -- I mean given the pervasiveness of government
37 action throughout our lives, to require you to waive
38 your rights to just about everything as soon as you
39 end up dealing with the government. I mean I've never
40 seen anyone that suggested that.

41 I mean that's why we say that our
42 regulatory requirements must be focused with a nexus
43 on radiological health and safety, and that's what
44 we're trying to do. You, as a private employer, can
45 impose whatever requirements you want to do, but it's
46 going to be within the context of the
47 employer/employee relationship, and you deal with that
48 within that context.

49 MS. ACKERT: Okay. Thank you.

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1 MODERATOR WEST: Thank you. Please.

2 MR. BOISMENU: Brett Boismenu, Namo Point
3 Nuclear, Fitness for Duty. My comment on
4 functionality of the job task. We have our
5 engineering group or badging personnel who would be
6 issuing and changing the vital area access. They
7 don't need vital area access. Is there a concern
8 there that you would not have people to base on the
9 integrity of the program or the trustworthiness or
10 reliability? Is there a concern there for some
11 subversion of testing?

12 As we spoke yesterday, and for the past
13 two days, there seems to be a huge emphasis now on
14 subversion of testing. To allow somebody to go back
15 and forth between vital and protected area, does that
16 create in itself a chance for subversion of testing,
17 for people to say, "I may be an engineer working on
18 design bases, but I'm not going to get myself into a
19 random selection process."

20 MR. ROSANO: Let me ask a question of you,
21 sir, and some others who'd like to chime in. This
22 list of vital area -- now we're talking about the
23 authorized access list for vital areas. We're not
24 talking about daily duties, whether you go into a
25 vital area today or not. Does your list of authorized
26 access to vital areas, does it change as often as what
27 you've been telling me today. Does it change daily
28 and hourly? No. I hear some yes's, some noes.

29 My point is that my experience has been
30 that the list is fairly static, with some migration
31 due to changing duties, but that it doesn't change
32 that often. You said --

33 PARTICIPANT: Sometimes they change every
34 day because we do have requests for a change in
35 purpose.

36 MR. ROSANO: And they need it the next
37 day, but then it's removed again the day after? Okay.

38 I would hazard to say, with all due
39 respect, though, that that's an unusual circumstance.
40 I still believe that most of the vital area access
41 lists are relatively static.

42 MODERATOR WEST: Would it make a
43 difference during an outage?

44 MR. ROSANO: Yes, yes.

45 MR. BOISMENU: I'm not aware of it.
46 That's why I touch base with our access folks. From
47 a fitness for duty standpoint, as long as they do the
48 drug test, they can bop between areas, and that's in
49 access control. So I wouldn't be able to answer that,

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1 but I did touch base with them, and they said, people
2 may get vital area access for one day or one job, and
3 then jump themselves our be taken out. So I guess
4 what Sue was saying earlier, it comes down to the
5 administrative burden.

6 MS. TECHAU: Sue Techau with Excelon.
7 We've been beeped so much by the NRC inspectors that
8 we need to maintain those vital areas. And if they
9 don't need access or they don't have a need to that
10 vital area, they shouldn't have it. And so that's why
11 we're doing this daily thing.

12 MODERATOR WEST: Thank you for your
13 comment. Please.

14 MS. HAYES: As part of the -- this is Lori
15 Hayes, Progress Energy -- as part of the risk analysis
16 with respect to the insider, is someone looking from
17 a more technical or medical standpoint, and this might
18 be a question for Nancy -- the effects that it might
19 have on deterrent -- since you're not going to be in
20 a random program, although you may not have safety-
21 related duties, the deterrence effect is gone, so is
22 someone looking at that to see that would actually
23 increase more positive tests due to the fact that
24 there is o deterrent level? Or is the NRC basing it
25 on that we really don't care if there's more positive
26 tests there, because they're not working on safety-
27 related equipment?

28 MODERATOR WEST: I can't be too specific
29 on the risk analysis, namely because I haven't
30 received it yet, but I guess the only -- I don't
31 really have anything to add. I think your insights
32 are good, though; certainly, the kinds of things that
33 we should, perhaps, have in mind. I can't really say
34 that it gets down to that level of detail. It's not
35 to say that it shouldn't. So I appreciate your
36 thoughts on that.

37 MR. ROSANO: Let me respond. I don't
38 think it's true that NRC doesn't care if there are
39 more positive tests. Or extrapolating from that, I
40 don't think it's true the NRC doesn't care there's
41 more drug use, say, on the site. And excuse me for
42 referring just to drugs; I know alcohol is part of it.

43 But it would be true to say that the NRC,
44 in its regulatory capacity, may feel constrained to
45 being concerned only with the drug tests or drug use
46 related to, let's just for the moment say, vital
47 areas, because that's what we're talking about. It's
48 not that we don't care. It's just that we do have

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1 some limits on what we're authorized to be concerned
2 with.

3 MR. JOHNNEMANN: In addition to alcohol,
4 Part 26 also mentions fatigue. And one of the
5 questions that we've recommended that the staff put in
6 the proposed rulemaking points out that licensees
7 frequently require a lot of overtime work. How does
8 the risk from fatigue accidents compare with the risk
9 of accidents from impaired workers as well?

10 MS. TECHAU: Sue Techau, Excelon. I just
11 wanted to quote 10 CFR 26.2A states that "The
12 provisions of the Fitness for Duty Program must apply
13 to all persons granted unescorted access to protected
14 areas." And then also in NUREG 1385-7.1, it talks
15 about contractor and vendors specifically for
16 infrequent access and whether or not we can transfer
17 them or accept their programs. And within the content
18 of that, it says that in order for us to be able to do
19 that, they have to be in a Fitness for Duty Program
20 and under a CBOP.

21 And then under 7.2, it talks about other
22 licensees accepting other people's programs. So we're
23 getting into the transferring of people from one
24 utility to another. We're going to have to start
25 working on the burden of whether or not they were in
26 a random testing pool, what type of access they had.
27 It's just going to create all of these other
28 administrative burdens.

29 MR. ROSANO: I don't have the document in
30 front of me as you do, and I agree that the people
31 have to be in CBOP, but does it -- and I'm sorry that
32 I was --

33 MS. TECHAU: Do you want me to read it?

34 MR. ROSANO: Well, I don't -- my
35 recollection is that it not require that they be in a
36 random testing program but that they be in a chemical
37 testing program for drugs. We're not talking about
38 people being removed from the chemical testing
39 program, because there's still for cause testing,
40 there's still pre-employment.

41 MS. TECHAU: Random is part of the
42 program. It's part of the --

43 MR. ROSANO: I know random -- but I don't
44 know if you get my distinction. What I'm saying is
45 that -- and I appreciate the need to be able to
46 transfer employees and that there be some consistency
47 among licensees and their programs in order to do
48 that. And that the two key parts of the program is
49 CBOP and a chemical testing program. But the chemical

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1 testing program is made up of three parts. One is
2 pre-employment, one is random, and one's for cause.

3 MS. TECHAU: You keep on using the term
4 "pre-employment." It's not pre-employment.

5 MR. ROSANO: It's pre-access.

6 MS. TECHAU: Thank you.

7 MR. ROSANO: You're right. Okay, so pre-
8 access and random and for cause. My point is that I
9 believe that the expectation is that those two key
10 elements will be part of every program, CBOP and a
11 chemical testing program, not just that the random
12 testing program be a part of it. So if we transform
13 the chemical testing program such that now random
14 testing only applies to a certain category of workers,
15 all employees would still have to be a member of the
16 chemical testing -- or be part of the chemical testing
17 program. The program has simply been redefined. So
18 I don't think that that violates that.

19 MS. TECHAU: Does that mean they're going
20 to rewrite Part 26 again?

21 MR. MIZUNO: Yes. The bottom line is yes.
22 Clearly, there are going to have to be some conforming
23 changes to assure that -- yes, there's going to be a
24 rewrite of Part 26.

25 (Laughter.)

26 MS. TECHAU: And then also people are
27 granted unescorted access to maybe just protected
28 areas that have a history of substance abuse and need
29 a medical determination of fitness, and based on that
30 they're going to be put in a follow-up program, and
31 they are going to be subject to random testing. And
32 then we're going to have to differentiate between all
33 of that. I mean it just goes on and on and on.

34 MR. ROSANO: Protecting privacy rights is
35 a very difficult thing.

36 MS. TECHAU: Yes.

37 MODERATOR WEST: Thank you again for your
38 comment. Please.

39 MR. MORIARTY: Good morning. John
40 Moriarty from Vermont Yankee. I'd like to wear three
41 hats today. I am Security Manager there. I'm also a
42 resident of the town in which the plant is located.
43 And I'm also a School Board Director. So I'll kind of
44 wear each of those hats.

45 My first comment as manager is to echo the
46 comments that have been made about the system
47 structures and components that lie outside the vital
48 areas in the protected area, that were they
49 compromised would certainly challenge those systems

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1 that are in the vital ares. So not going into too
2 much detail, that line begins right at the fence,
3 right before you get your badge.

4 The other thing is this seems to be
5 premised on that somehow vital area access controls
6 are going to keep somebody physically out of a vital
7 area if they don't have access. Vital area access
8 controls are premised today in most plants more on the
9 trust and reliability we place on people, not to
10 piggyback in behind somebody. I think the public
11 might get the wrong idea that somehow if you don't
12 have access into a vital area, there's no way you can
13 get in there. I'll say it again: We trust and rely
14 on people past all the screening requirements that
15 when we tell them to stay out of an area that the
16 won't go in there.

17 The other issue I'd like to point out is
18 that the access rule -- that this would, I believe,
19 open the door to eroding the access rule, if you
20 create a double standard or a lesser standard for a
21 certain population of people.

22 MODERATOR WEST: Could you clarify that.

23 MR. MORIARTY: Well, quite simply, if
24 you're going to create within the protected area a
25 two-tiered system of trust and reliability so that if
26 you have a certain job you don't have to meet a
27 certain standard, the logic would say, and it would be
28 hard to argue, that in the access authorization
29 requirements, well, why then must I go through the
30 same access requirements that the senior control room
31 operator has to meet if I am one of these clerical
32 maintenance types?

33 Right now, regardless of what your job is,
34 whether you are the service master person or you're
35 the shift supervisor, you meet the same level of
36 trustworthiness and reliability before you get to come
37 in through the gate. If we start now with saying,
38 well, yes to this one, no to that one, it is just a
39 matter of time before that will be the next step that
40 the union or somebody else will say, "Gee, if this
41 makes sense, why am I being held to this other
42 standard."

43 The other part of this is the logic for
44 this accommodation, kind of, I find interesting.
45 Instead of taking Moses to the mountain, we're taking
46 the mountain away in order to relax this rule to make
47 this accommodation for this small population of
48 people. Issues were made about -- or points were made
49 about the privacy expectations that we give up. This

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1 is just one small one. There are some -- every day,
2 we give up our constitutional rights to search and
3 seizure without probable cause just to get into the
4 plant. So, for me, the privacy issue really doesn't
5 hold a lot of merit, because we're already giving up
6 an enormous amount of them anyway.

7 I'd like to speak to random testing as a
8 form of behavior observation. It's probably one of
9 our best forms of behavior observation, because when
10 somebody's behavior comes into question, the question
11 that often gets asked is, "Well when was the last time
12 they had a random? Was it positive, negative or have
13 they have ever tested positive?" It also speaks to
14 the issue back to trust worthiness and reliability.

15 By the way, I would love to have an access
16 rule that was made up of the elements of the Fitness
17 for Duty rule in one rule. I mean one thing we
18 learned yesterday and throughout this is that they are
19 oftentimes out of step with one another. Qualifying
20 as being fit for duty is an element of obtaining
21 access. Why it isn't in one master rule that's
22 consistent is just an observation. I would like to
23 see that.

24 The issue, if I haven't already made it,
25 about random drug and alcohol screening as an
26 indication of trustworthiness and reliability. If
27 you're screening for illegal substances, that
28 certainly speaks to the use and abuse of an illegal
29 substance as unlawful behavior as somebody that you
30 would want or not want in certain places or certainly
31 not inside the protected area of a nuclear plant. I
32 think the protected area would be less protected if
33 this went through. As the manager, I'm speaking for
34 keeping the status quo.

35 Now as a resident of the town and School
36 Board Director, I direct your attention to page 3 in
37 your bullet where it says, "The public confidence
38 issue may be raised regarding relaxation of random
39 drug testing requirements against a background of
40 congressional focus on reducing drug usage." Well, if
41 it hasn't been changed already, I'd like to change
42 that today to tell you that public confidence will be
43 eroded if you do relax this rule. And I speak as a
44 resident and a School Board Director.

45 Our elementary school is literally across
46 the street from the plant, and I know the folks in
47 town don't want to hear that you're relaxing any of
48 these rules to make an accommodation whose logic just

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1 seems to be coming at it from the wrong end. Thank
2 you.

3 MODERATOR WEST: Thank you. Please.

4 MS. MATULA: Lisa Matula, STP Nuclear
5 Operating Company. This may have been answered
6 already, but is this voluntary, this new rule that you
7 have to only do that testing?

8 MR. ROSANO: It is currently structured so
9 that from a regulatory perspective that would be all
10 that would be required, but that utilities, just like
11 other employers, could choose --

12 MS. MATULA: Just like 10 CFR 26, we could
13 have it more restrictive if we so desire.

14 MR. ROSANO: That's right.

15 MS. MATULA: Because, currently, we test
16 everybody inside or outside. We have a drug-free work
17 environment. Okay. So that is not going to force us
18 into this.

19 MR. ROSANO: It will not.

20 MS. MATULA: Okay. Thank you.

21 MODERATOR WEST: That's an important
22 point. Thank you. Please.

23 MR. BUSH: Loren Bush, currently self-
24 retired.

25 (Laughter.)

26 I seem to recall -- I think Chuck made a
27 point that the courts tend to change, and they're
28 going in a certain direction now. But I would like to
29 point out, to emphasize that point, that when the
30 current Fitness for Duty rule was being developed back
31 in the mid-'80s, there were a couple of court cases
32 that took a look at discriminatory practices and
33 random testing. And I know that the court in
34 California is quite liberal, and my recollection was
35 that these cases were in the South where they're
36 usually a little more conservative. I don't think
37 they were from Texas where they fry you before they
38 test you.

39 (Laughter.)

40 But at any rate, the point was that the
41 courts said that these companies had decided that
42 certain portions of the company employees would not be
43 tested. And the others that were being tested said,
44 "How come I'm being tested and these others aren't?"
45 And the court said, "That's discriminatory. If you're
46 going to test, you've got to test everybody."

47 And in one case in particular, it was
48 management who decided they didn't need to be tested,
49 because they weren't driving the trucks or something

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1 of that nature. Management had no impact on public
2 safety, and they had exempted themselves from testing.
3 And the court said, "No, no. Management has to be
4 tested also."

5 So the fundamental point I'm trying to
6 make is that courts at one time said it would be a
7 discriminatory practice to say that secretaries or
8 people doing some kind of functions don't have to be
9 tested but everybody else does, okay? Thank you.

10 MR. MULLINS: I'm not familiar with the
11 case, Loren, you're talking about. I have read the
12 Supreme Court cases which, of course, cover the whole
13 country. And the case that came out yesterday, of
14 course, was from South Carolina, which the Supreme
15 Court overturned.

16 MODERATOR WEST: I have a few quick items
17 just to offer for your consideration. But before I do
18 that, could we have a show of hands of those that
19 would be in favor of the proposed rule?

20 (Laughter.)

21 MR. ROSANO: I had talked to Garmon about
22 that. And because we -- this is our opportunity to
23 learn from you; hopefully you from us. We can share
24 information. And I thought it might be interesting
25 that if the rule were to go forward today, how many
26 utilities there in the audience today would feel that
27 it was a good idea to support?

28 MODERATOR WEST: One point that I'm not
29 crystal clear on. I know there's been some discussion
30 of target set areas. Would this proposal make a
31 difference if it was couched in terms of our target
32 set areas, rather than vital areas?

33 Are there any particular options that we
34 haven't considered? What I'm really saying is that
35 we've essentially considered at this point the notion
36 of the vital area as opposed to the protected area
37 against the status quo. But are there other options
38 that we haven't considered that might be worth
39 entertaining?

40 MR. BURRELL: Garmon, the only option that
41 I'd ask you to entertain, certainly based on the
42 comments by Gary and Chuck about significant changes
43 in the rule that would be required to implement this
44 beyond what just appears here, is that you withdraw
45 the current change and incorporate this along with the
46 significant number of comments that we've wrote over
47 the past couple of days and make certain that whatever
48 moves forward is exactly what's needed, both to meet
49 regulatory expectation as well as utility need to

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1 protect the public health and safety so that we get
2 published what really works, what meets the intent, as
3 opposed to doing this a couple of times. Let's spend
4 the time to get it right the first time instead of
5 doing it over.

6 MODERATOR WEST: Okay. Thank you for your
7 comment.

8 (Applause.)

9 MR. MULLINS: Should we worry about the
10 constitutional questions while we're at it?

11 MR. BURRELL: Say again?

12 MR. MULLINS: Should we worry about the
13 constitutional questions while we're at it?

14 MR. BURRELL: Absolutely.

15 MODERATOR WEST: I don't have any
16 additional items. Unless there's something either
17 someone at the table would like to add or someone from
18 the floor, I'd like to thank you yet again for all
19 your thoughts and your input and look forward to your
20 formal comments as well on the proposed rule. Thank
21 you.

22 (Whereupon, at 10:27 a.m., the Public Meeting
23 was concluded.)
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