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P-R-O-C-E-E-D-I-N-G-S

(5:30 p.m.)

1
2
3 CHAIRMAN FARRAR: Good evening. We are
4 here to hear oral argument of counsel on several
5 questions related to the petition of certain named
6 citizens of Milford Township for an evidentiary
7 hearing for which they would challenge CFC Logistics'
8 application for an NRC license for a cobalt-60
9 irradiator.

10 Two of us here are Judges from the Nuclear
11 Regulatory Commission. My name is Mike Farrar, and I
12 am the presiding officer, and my colleague, Judge
13 Charles Kelber, who has a doctorate in physics is here
14 as my special technical assistant. The third person
15 is Susan Lin, who is our law clerk.

16 Would counsel introduce themselves,
17 please. For the petitioners.

18 MS. CURRAN: Diane Curran, co-counsel for
19 the petitioners.

20 MR. SUGARMAN: Rob Sugarman, co-counsel
21 for the petitioners.

22 CHAIRMAN FARRAR: For the company.

23 MR. THOMPSON: Anthony Thompson, counsel
24 for CFC.

25 MR. PUGSLEY: Christopher Pugsley, counsel

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1 for CFC.

2 CHAIRMAN FARRAR: And for the NRC staff?

3 MR. LEWIS: Stephen Lewis, counsel for the
4 NRC staff.

5 MR. FARRAR: Karl Farrar, co-counsel.

6 CHAIRMAN FARRAR: All right. In case
7 there is any question, Mr. Farrar and I are not
8 related. Before we start, I want to thank the judges
9 of the Lehigh County Court of Common Pleas,
10 particularly the President Judge Platt, and Judge Ed
11 Readman, whose courtroom this is, for making this
12 magnificent and spacious facility available to us.

13 And a particular note of thanks to the
14 deputy court administrator, Bill Burnt, who has been
15 not only helpful and efficient, but extraordinarily
16 gracious. So much so you wonder why can't everybody
17 treat everybody else like he treated us. And thanks
18 to the Sheriff's Department for providing their usual
19 support to the courtroom.

20 Before we start, let me cover three
21 preliminary matters that may you in the audience
22 understand exactly what is happening here tonight.
23 The first is the role of the NRC staff and Mr. Lewis,
24 and our role.

25 The NRC as you may know is headed by five

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1 Presidentially-appointed and Senate-confirmed
2 Commissioners. On the one hand, they have working for
3 them a large regulatory staff. It is those people who
4 have processed the company's application, and in fact
5 awarded the license recently.

6 Our role is entirely different. We are
7 employed for the sole purpose of being independent and
8 impartial judges, with no allegiance to the staff, and
9 for that matter, to the citizens, or to the company.

10 We have nothing to do with the staff. We
11 have no communication with them or with any of the
12 parties other than through the formal papers that pass
13 in the proceeding.

14 We work for the Commissioners. They don't
15 give us performance reviews, and they can't fire us
16 for what we do. They can affirm, just like the
17 Supreme Court can do, they can affirm or reverse our
18 decisions, but they don't talk to us in advance or
19 afterwards about the content of those decisions.

20 So that is to help us be independent.
21 Counsel will as you hear them argue tonight, they will
22 use words NRC staff, referring to the regulatory
23 people; the licensing board referring to us; and the
24 Commission, or the Commissioners, referring to the
25 five people who head the agency.

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1 CHAIRMAN FARRAR: I was talking about the
2 handout which gives the order of proceeding, which
3 also includes our press release, and then at the
4 request of our security people, it gives the rules of
5 decorum that are typical for a judicial type
6 proceeding.

7 This is not a public forum or a public
8 hearing. It is for us to hear as I said oral argument
9 of counsel, and we will get right to that. Before we
10 start with the argument of the petitioners on
11 standing, in rereading all the materials last night,
12 Mr. Lewis, I thought at first that the NRC staff was
13 on the petitioner's side on standing.

14 But I am not sure if that comes through at
15 every part of your brief. Do you or do you not favor
16 their standing?

17 MR. LEWIS: We do.

18 CHAIRMAN FARRAR: On which theory, the
19 proximity presumption, or on the causation?

20 MR. LEWIS: Not solely on the proximity
21 presumption. Also on injury in fact.

22 CHAIRMAN FARRAR: Then for this purpose,
23 you are on as we indicated in the original allocation
24 of time, you are on their side, and so we will have 10
25 minutes for the petitioners and 10 minutes for you to

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1 support them, and 20 minutes for the company in
2 opposition.

3 Mr. Sugarman, or you or Ms. Curran going
4 to argue?

5 MR. SUGARMAN: I am going to handle this
6 or try to.

7 CHAIRMAN FARRAR: All right.

8 MR. SUGARMAN: Your Honor, I am going to
9 go right the point that Your Honor discussed with Mr.
10 Lewis. While I appreciate the staff's statement that
11 he support us in standing, I understand the argument
12 to be of an obvious potential for significant harm to
13 be set forth as a claim or an objection to our claim,
14 partially on the basis that it denies standing.

15 That is, that there is no standing if
16 there is no obvious potential. We don't agree with
17 that characterization. We don't think there is any
18 such standing, but the staff in its supplemental brief
19 said that we have not shown obvious potential of
20 significant harm.

21 I don't see how they can support our
22 standing and at the same time that we have an obvious
23 potential of significant harm. That's why I took the
24 position that they don't really support us. On the
25 one hand, they say that they support us, but on the

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1 other hand, they take it away.

2 So that is why I raised the issue that I
3 did. I am glad the staff sees it differently, and as
4 to the fact that we have standing, and I hope that the
5 board won't follow my logic.

6 I hope that the Board will follow the
7 staff's logic that we have standing, and that the
8 obvious potential issue doesn't diminish our standing.
9 The obvious potential issue was raised by the
10 applicant as a -- yes, initially raised by the
11 applicant, and the Board properly put it to the staff
12 to take a position on it.

13 The obvious potential issue gets us right
14 to the heart of what you have to do both in terms of
15 standing and germaneness, and there is no such
16 standard as far as establishing standing or a right to
17 a hearing.

18 If you look at the Georgia Tech case,
19 which is the most recent case that refers to that
20 standard, it simply says that it is a threshold issue
21 as to whether there is standing, and the Board has to
22 find that the claim of the petitioner-intervenor is,
23 quote, extravagant; quote, a stretch of the
24 imagination; quote, incredible; quote, irrational, on
25 page 117 of the Nuclear Regulatory report quoted in

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1 our reply brief.

2 CHAIRMAN FARRAR: There was, however, a
3 reactor case, even though it was only a research
4 reactor, it was not an irradiator.

5 MR. SUGARMAN: That is the case that the
6 applicant cites that we have to adhere to that
7 standard, and so that case does not support the
8 applicant at all. It supports us, because it says
9 that if the claim is rational, and if the claim is not
10 a stretch of the imagination, or extravagant, then it
11 is a claim that both confers standing and is also
12 germane.

13 And again taking the applicant's standard
14 from the Georgia Institute supports us. So the --

15 CHAIRMAN FARRAR: But even in that case
16 there was an obvious pathway to the dispersion of
17 Noble gases that you don't have present in this case.

18 MR. SUGARMAN: Yes, and there is an
19 obvious pathway here to it. The issue is not whether
20 there is a pathway that is propounded. The issue is
21 whether we have to prove our case at this stage. We
22 don't have to prove our case at this stage.

23 By obvious pathway, we have to articulate
24 a pathway which could occur, and which would involve
25 significant dispersion. Just to give you one

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1 illustration, the crashing of the load, the cast,
2 would be an obvious potential incident that would
3 create a significant risk.

4 That would be a risk potentially to the
5 air, and potentially to the water. It is an obvious
6 potential that can happen. All we have in the final
7 briefing by the NRC staff is a document that we have
8 never seen before.

9 It is an in-house e-mail memorandum
10 talking about how much they estimate the strength to
11 be and what they think, and we know the name of the
12 author, but we don't know his qualifications, and we
13 don't know the adequacy of his study.

14 We don't know whether the tests described
15 a fail safe condition. Clearly they don't describe
16 the fail safe condition. They describe what the
17 engineer estimates is a satisfactory situation, and
18 that that estimate may or may not be true. Our expert
19 says that it is not true.

20 CHAIRMAN FARRAR: Let me ask you this.
21 How close is your nearest petitioner? Is it a third
22 of a mile?

23 MR. SUGARMAN: How close is what?

24 CHAIRMAN FARRAR: The residence of the
25 nearest of your clients.

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1 MR. SUGARMAN: Well, there are residences
2 within a mile-and-a-half, or I'm sorry, a half-a-mile
3 approximately. Less than a half-a-mile.

4 CHAIRMAN FARRAR: And given that closeness
5 don't we still have to envision some pathway that this
6 material can get to them for them to have standing?
7 I didn't say prove it. I said don't we need to be
8 able to at least envision it?

9 MR. SUGARMAN: Well, that is what I am
10 about to say. Unless somebody establishes that there
11 is an air pocket, a vacuum tube, and then it is not in
12 his pathway, and the terms of obvious potential apply.

13 Let's say you have a big gust of wind that
14 actually causes the roof of the building to blow off
15 and causes the cast to drop, and causes the cast to
16 break, and causes the materials to fly out in a
17 hundred mile an hour wind.

18 And that part of the hurricane that caused
19 the roof to blow off and caused the cast to crack,
20 that hundred mile an hour wind is going to blow out a
21 heck of a lot of radioactive material for a long
22 distance.

23 Colorado is a heck of a long distance, and
24 it might be down in Philadelphia. That is 30 miles
25 away. It might be 5 miles, or it might be 40 miles.

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1 It might be to New York City, but it sure as heck is
2 an obvious potential for a third-of-a-mile or a mile.

3 Where is the analysis that shows that it
4 is not? It is an obvious potential in the sense that
5 you and I would be concerned. I can envision the
6 Emergency Management personnel, if and when they found
7 out about that type of incident, evacuating.

8 Where would they stop the evacuating?
9 Would they stop it at a third-of-a-mile, or would they
10 stop it at a mile? I suggest that they wouldn't.
11 They wouldn't have that assurance, and they wouldn't
12 say there is no obvious potential. They would say
13 there is an obvious potential.

14 And if the Emergency Management people
15 would do that, why shouldn't we? Over at Limmerick,
16 they have sirens that are 10 miles away. Now that is
17 a nuclear plant, but who is propagating that a 30 mile
18 radius of Limmerick shouldn't be at least a mile in
19 this case?

20 So is there an obvious potential from that
21 type of an accident? Of course, there is.

22 CHAIRMAN FARRAR: Well, let me ask you
23 this. Do you read the words in the Commission's
24 standard in any of the cases, where it talks about the
25 significant source of radioactivity producing an

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1 obvious potential for off-site consequences?

2 Do you see that as two different factors
3 and that you have to have a large enough source, and
4 you have to be able to envision a pathway, or do you
5 think that obvious potential means just from the size
6 of the source itself?

7 MR. SUGARMAN: Just in the eyes of who?

8 CHAIRMAN FARRAR: Just in the size of the
9 source itself.

10 MR. SUGARMAN: No, it relates to the fact
11 that almost any sized source can have an obvious
12 potential for significant dispersion, and a
13 significant source is one that produces radiation.
14 There is no -- I mean, you don't have to certainly
15 agree with me on this in order to decide my way, but
16 there is no such thing as an insignificant source of
17 radioactivity with a Cobalt-60 facility.

18 I mean, I grant you that there could be an
19 insignificant source and there probably are sources,
20 but when you are talking about Cobalt-60, the
21 Commission itself treats Cobalt-60 as a significant
22 source.

23 And this is a 2 million curies max, and 2
24 million curies is a lot of curies. You know, I have
25 not seen anything to suggest that this is not a

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1 significant source. So again our burden at this age
2 is to formulate something, and in the words of Georgia
3 Tech, which is not extravagant, and not a stretch of
4 the imagination, and ont irrational.

5 In Georgia Tech, the Commission said that
6 a triple safety factor, a double redundancy, three --
7 well, I will read the Commission's words. "Three
8 independent, redundant safety systems would be
9 required to fail."

10 And that is one, plus two, redundancy.
11 But apparently there were three independent
12 redundancies, and the Commission said that it does not
13 strain credibility, nor is it irrational, to say that
14 they could all fail, all three.

15 CHAIRMAN FARRAR: Okay. Well, for this
16 irradiator, is your principle obvious pathway that you
17 are talking about, a cast drop accident under the
18 material that is in the pool, or are you concerned
19 about the material in the cast?

20 MR. SUGARMAN: No, that is certainly --
21 the cast drop failure, it was my illustration for
22 example, because having only 10 minutes, I can't
23 describe all the myriad failures that we have
24 described in our eight pages. I had to be selective.

25 That was a fairly obvious one and so I

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1 chose it. Another one would be corrosion, undetected
2 corrosion, and that would be a longer source, a longer
3 pathway production, together with the fact that the
4 irradiator facility is located within the ground
5 water, would result in an off-site source, off-site
6 consequences, that could not be reasonably confined
7 because of the nature of the aquifer which we know and
8 we have alleged.

9 And we could prove that it is going to
10 travel to drinking water wells that are within a mile
11 or two miles, and there is no way of preventing that.
12 So that is another one.

13 The third one is the security concerns of
14 illegal parties. I mean, lately we had somebody that
15 was arrested for trying to export unsafe or weapons of
16 mass destruction from the United States.

17 Not a terrorist, but a businessman, who
18 wanted to supply terrorists. So we don't have to
19 actually talk about terrorists, but we could talk
20 about terrorists and we see it every day.

21 We pick up the newspaper and see it, and
22 we watch it on television, and is a terrorist an
23 irrational source? And could a terrorist destroy this
24 facility, Your Honor, today? It is no more than a
25 repair bay in an automobile garage in terms of its

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1 security.

2 CHAIRMAN FARRAR: Let's do this. You have
3 used more than your 10 minutes, and I will let you
4 come back in rebuttal, but let's hear from your --

5 MR. SUGARMAN: I was going to ask for some
6 rebuttal time, and if my time is up, I will save what
7 I can, and certainly I have more to say on this
8 subject.

9 But I will say this. That the issue of
10 standing and germaneness are obviously somewhat
11 overlapping and so I will cover it there.

12 CHAIRMAN FARRAR: Mr. Lewis.

13 MR. LEWIS: I appreciate the opportunity
14 to try to clarify for you the staff's position on
15 standing. We have found that there are -- that the
16 standing issue in NRC proceedings has been addressed
17 by the Commission, and by licensing boards, and appeal
18 boards until they went out of existence in a variety
19 of manners.

20 And which are not totally -- which are not
21 easily reconcilable. Now on the one hand, we have
22 this test of obvious potential significant source,
23 with obvious potential for off-site impacts.

24 The staff in particular had a problem
25 intellectually in terms of the concept of obvious

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1 potential. I don't know. They almost seemed a little
2 bit self-contradictory to us, but we dealt wit it,
3 okay?

4 CHAIRMAN FARRAR: Except that has been the
5 test that has been repeated over and over in these
6 different decisions.

7 MR. LEWIS: And it is Commission case law,
8 and I am bound by it. There is also other Commission
9 case law -- Georgia Tech, APRI -- which suggests a
10 standard that is somewhat more liberal. I don't know
11 what the right word is. I will use liberal -- in
12 saying that as long as a petitioner who has close
13 proximity to the facility in one manner or another
14 puts forward areas of concern -- well, puts forward
15 impacts, injury in fact, redressability, and puts them
16 forward in a manner that is rational, and can be
17 considered a reasonable possibility.

18 CHAIRMAN FARRAR: Why isn't this in the
19 Armed Forces Irradiator? What isn't that case begin
20 and end the discussion here? The people live thee
21 times as far away as these people do, and the
22 irradiator was only a third as big, and I believe that
23 the appeal board said that's it. Okay. So now you
24 have people living only --

25 MR. LEWIS: Well, even though that case

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1 had significant factual similarities to this case, we
2 can't ignore the other cases simply because they were
3 dealing with other types of facilities.

4 We have research reactors, and we have
5 power reactors, and I admit that APRI is a case that
6 is strongly in support of the petitioner getting
7 standing here.

8 I do think that the significant proximity
9 of a number of the petitioners is an important factor,
10 but we do not rely on it in its entirety. Later when
11 I have a chance to address areas of concern, and as
12 Mr. Sugarman said, I will pick up on some points that
13 I think also cut in favor of the petitioner getting a
14 hearing.

15 CHAIRMAN FARRAR: Let me ask you this. If
16 the petitioners for some reason don't get the benefit
17 of that proximity presumption have they put forward
18 enough to come in under the classic standing theory,
19 where you have to show injury in fact, causation, and
20 redressability.

21 MR. LEWIS: I think not. I think the
22 proximity is an iatrical part of their case, and
23 colors the nature of what they have to say in all of
24 these things. I think that it is a strong
25 contributing factor to their claim of injury in fact,

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1 and I think our argument is really based on the
2 totality of those considerations.

3 I don't think we could come to that same
4 conclusion if they were much more distant from the
5 facility.

6 CHAIRMAN FARRAR: Do you think that I read
7 the company's briefs correctly in saying that because
8 of their belief in the elegance of the design of their
9 facility that no one has standing, no matter how close
10 they live?

11 MR. LEWIS: It sort of seems -- my
12 reaction and my reading of the company's pleading is
13 close to that, although I would not necessarily want
14 to speak for them as to what they were trying to say.

15 CHAIRMAN FARRAR: They will get their
16 chance.

17 MR. LEWIS: Yes. That would be an extreme
18 claim, and I don't know that that is what they
19 intended. That does not mean that the specifics of
20 this facility do not have to be completely recognized
21 by the petitioners, and they have to address it.

22 CHAIRMAN FARRAR: And that is what I think
23 this case is all about. Do the words of obvious
24 potential mean just to some casual person thinking
25 about it, or do you have to take into account the

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1 design of the specific facility which may be different
2 from the design of the Armed Forces Irradiator from 20
3 years ago?

4 MR. LEWIS: Well, I think that we are
5 talking about an improved facility, and safety
6 thinking has progressed during those years, and there
7 are many irradiators in the country, and so there has
8 been ample opportunity for safety thinking to progress
9 in that area.

10 CHAIRMAN FARRAR: Excuse me. Off the
11 record, Mary Ann.

12 (Whereupon, at 5:57 p.m., the oral
13 arguments were recessed and resumed at 6:00 p.m.)

14 CHAIRMAN FARRAR: All right. Sorry for
15 the delay.

16 MR. LEWIS: Your Honor, where do I stand
17 on my time?

18 CHAIRMAN FARRAR: It got all used up with
19 the microphone problem. Go on for 2 or 3 more
20 minutes, and we were in the midst of asking has safety
21 has progressed through the years is there an obvious -
22 - is this a significant source, which so far you and
23 the petitioners agree on, and is there an obvious
24 potential.

25 And the question is that as you are

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1 envisioning a pathway do you have to have as part of
2 your vision the specific safety features of this
3 particular facility, or do you just kind of envision
4 it without taking into account those features?

5 MR. LEWIS: You have to be addressing this
6 specific facility, and I think that one thing that the
7 staff has noted in the progression of pleadings by the
8 petitioners is an increasing awareness of this fact.

9 We found there their statement of concerns
10 most recently filed to be a significant progression
11 from their earlier statement of concerns. And I think
12 that there is a recognition on the part of the
13 petitioners that they do have to deal with this
14 facility.

15 They simply cannot cite to the fact that
16 Davis-Besse had a nuclear power reactor head corrosion
17 problems, or some other problem that happened
18 someplace else.

19 CHAIRMAN FARRAR: They have to take into
20 account the passive safety features?

21 MR. LEWIS: That is an important part of
22 this facility, yes.

23 CHAIRMAN FARRAR: Mr. Lewis, in the
24 interest of time, unless you have something to wrap up
25 with, let's hear from the Company.

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1 MR. LEWIS: That would be the Staff's
2 position.

3 CHAIRMAN FARRAR: Mr. Thompson.

4 MR. THOMPSON: Thank you, Judge Farrar,
5 and Judge Kelber. My understanding, Judge Farrar, of
6 the standard that is applied when originally it was
7 alleged that mere proximity was enough. That standard
8 changed aft the Air Force Institute case by Commission
9 policy.

10 And There are a number of cases which
11 discuss this standard of a significant source, with an
12 obvious potential for off-site consequences.

13 CHAIRMAN FARRAR: But the Armed Forces
14 case is still applicable, and you lose on standing,
15 right?

16 MR. THOMPSON: No, because I think that
17 the other thing that you have to look at, Your Honor,
18 and I am going to get to that, is that we are not
19 going to argue that the source up to a million curies
20 wouldn't be considered significant.

21 It is not as the petitioners' brief seems
22 to suggest something outlandish or a huge wrap-up.
23 The average is about 4 million curies, and so we are
24 at about 25 percent.

25 CHAIRMAN FARRAR: Well, let's talk about

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1 that, because there is some conflict in the different
2 briefs. The petitioners -- and I am exaggerating
3 slightly, but they think this is the largest thing
4 they have ever seen, and you are telling us how small
5 it is.

6 How many irradiators are there in the
7 United States?

8 MR. THOMPSON: I think there are about 10.
9 One is 10 million curies, and the average is about 4
10 million curies. Now, we are not arguing that this is
11 insignificant. We are just saying that it is not some
12 great --

13 CHAIRMAN FARRAR: Okay. And the license
14 that you are asking for is for 1 million?

15 MR. THOMPSON: Yes, 1 million, or up to a
16 million.

17 CHAIRMAN FARRAR: Right. But how many
18 commercial irradiators are there?

19 MR. THOMPSON: Mine understanding is that
20 there are 15. If you would like, we can supplement
21 with something.

22 CHAIRMAN FARRAR: And from the staff, I
23 got the notion in one of their papers that there are
24 60. Let me hear from that.

25 MR. LEWIS: That is the information that

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1 our expert has provided to us.

2 CHAIRMAN FARRAR: Sixty. From what size
3 to what size or what radioactivity level?

4 MR. LEWIS: I don't know the range, but I
5 do know that Mr. Thompson is correct when he says that
6 there are a number of such facilities that have
7 authorized capacity higher than this facility.

8 CHAIRMAN FARRAR: But you are not saying,
9 and I don't know that you can say in light of the
10 Armed Forces case, that 1 million is not a significant
11 source --

12 MR. THOMPSON: We are not trying to say
13 that. Well, we do believe that you have to look at
14 whether there is a significant potential for off-site
15 consequences, and when you do that, you have to look
16 at the licensed facility that is in question here, and
17 the licensing action that is being addressed.

18 And you have to look at the Commission's
19 ruling in the proceeding and developing the
20 requirements that this licensee had to fulfill to get
21 a license.

22 And in that licensing procedure the Commission said in
23 several different ways that you can put an irradiator
24 any place that you can put an industrial facilitator.

25 You can put it near an airport if you

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1 allow people to live there. They said there is little
2 likelihood of such an irradiator causing radiation
3 exposures off-site in excess of Part 20 limits. And
4 irradiator experience today indicates that irradiators
5 do not present a threat to people outside the
6 facility.

7 Now, given those findings by the
8 Commission, which are reflected presumably in the
9 regulatory requirements that they passed, if we
10 satisfy those requirements, they must show that we
11 don't satisfy. Because if we do, then presumably --

12 CHAIRMAN FARRAR: But that is what they
13 are trying to show. They want a hearing to try to
14 show that you don't satisfy the requirements, and I
15 guess the tone through your brief that since you filed
16 -- and I know that your client is very proud of this
17 facility.

18 But because your client is proud of it,
19 and the staff has blessed it, it is as though that
20 there is nothing left possibly to do. You two have
21 decided, and I am getting the flavor that in your mind
22 no one could ever challenge this because you all are
23 all very proud of it.

24 MR. THOMPSON: No, that is not really the
25 point. I mean, we do say that we comply with all the

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1 requirements to the regulations, and if we comply with
2 that, then they would have to show how we don't comply
3 or allege.

4 CHAIRMAN FARRAR: They don't have to show
5 it to say that they have standing. If they get a
6 hearing, then they have to show it or they lose at the
7 hearing.

8 MR. THOMPSON: Don't they have to allege
9 a reasonably viable threat or failure on our part to
10 satisfy the regulations? At least to satisfy the
11 regulations, it seems to me that they have to say,
12 okay, you did something that the NRC didn't address in
13 the past, or here is why the hazard is greater.

14 They can't just say, well, you know, you
15 can have a 25 ton cast, which won't fit anyway. I
16 mean, those are --

17 CHAIRMAN FARRAR: Well, how do you explain
18 the Armed Forces case, which had the appeal board, and
19 one of its members was Reed Johnson, who was a
20 respected professor of nuclear engineering, who knew
21 his way around this field, and he said that it was
22 almost like a given.

23 If you have a source that big, and your
24 source is three times bigger, and you had people
25 living that closely, and these people only live --

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1 they live three times closer, and they live a third as
2 far away, why --

3 MR. THOMPSON: Well, we had a rule making
4 proceeding.

5 CHAIRMAN FARRAR: Yes, but that rule
6 making proceeding as I look at it -- and tell me if I
7 am wrong -- indicated or was concerned about locale.
8 In other words, are these things generally safe enough
9 that you can put them in an industrial park or
10 wherever.

11 And the Commission said yes, but that does
12 not mean that in a specific case that the citizens
13 don't have a right to try to show that that particular
14 facility does not comply with the regulations that
15 enabled the Commission to say put it wherever you
16 want, because if it is done right, it is going to be
17 a safe facility.

18 MR. THOMPSON: Well, the Commission does
19 a lot more than that. I mean, they go in and they
20 discuss airplane crashes, and they discuss seismic
21 events, and they discuss the fact that, for example,
22 talking about the cobalt water. It is insoluble.

23 CHAIRMAN FARRAR: Well, let's talk about
24 airplane crashes, and let's not get into the
25 probability, and I will get to that question which I

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1 am dealing with in another case. Let's just take or
2 let's just assume for the purposes of this discussion
3 that a plane, a large plane, accidentally crashes into
4 the facility.

5 Are you saying that there is no -- that if
6 that happens that there is no obvious pathway, and
7 that anyone drawing well water a third --

8 MR. THOMPSON: Yes, that is what the
9 Commission rule making said. It is right in there.
10 It said if a plane crashed, and a building roof falls
11 in, there is no obvious pathway.

12 CHAIRMAN FARRAR: Where did the rule
13 making say that? Because one thing that you cited
14 from the rule making was somebody with a comment said
15 that they wanted to have a negative proximity
16 presumption that anyone living further than 5 miles
17 away necessarily did not have standing, and the
18 Commission rejected that negative proximity, which
19 says to me that they were in favor and not rejecting
20 positive proximity.

21 MR. THOMPSON: I don't have the -- it says
22 aircraft crashes, and whether there should be a
23 prohibition against irradiators

24 MR. SUGARMAN: What page is that?

25 MR. THOMPSON: I can't tell from this.

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1 CHAIRMAN FARRAR: That was a prohibition -

2 -

3 MR. THOMPSON: Well, wait a minute. They
4 say that with this protection, and they are talking
5 about the type of protection the regulatory
6 requirements provide, the radiological consequences of
7 an airplane crash, an irradiator would not
8 substantially increase the seriousness of an accident.
9 And all I am saying is that --

10 CHAIRMAN FARRAR: Is that the regulation
11 or is that part of the comments on the document?

12 MR. THOMPSON: That is part of the
13 discussion of why the Commission said that we don't
14 think there are likely to be large off-site
15 consequences, and if you accept that, then I believe
16 the test is that you have to show injury in fact.

17 And I think that the staff's position is
18 in conflict, because they have said that you have to
19 show -- or that they have not shown that there is an
20 obvious potential for off-site consequences, and if
21 that is the case, then the positive proximity argument
22 doesn't work and they have to show injury in fact.

23 CHAIRMAN FARRAR: The material that you
24 just cited, do they say that we are not generally
25 worried about aircraft crashes, and so you can put

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1 these anywhere you want; or does it say nobody, no
2 matter what the air traffic situation is, nobody can
3 ever raise an aircraft issue in this kind of
4 proceeding?

5 MR. THOMPSON: No, of course it doesn't
6 say that. I am saying --

7 CHAIRMAN FARRAR: Well, if it doesn't say
8 that, then how can I say that these people can't walk
9 in the door and try to make that claim? Now, they may
10 lose that claim on the merits. Take my case out in
11 Utah that you probably are familiar with.

12 MR. THOMPSON: Yes, I am familiar with it.

13 CHAIRMAN FARRAR: It is a private fuel
14 storage case, where the electric utility industry
15 wants to put the spent nuclear fuel from around the
16 country on an Indian reservation until it goes to
17 Yucca Mountain.

18 We had a major aircraft issue there as you
19 know, and we held that the probability of a crash was
20 too high to permit licensing on that basis. But let's
21 back off from that probability finding that we made.

22 You are a rancher living a half-a-mile
23 from the site in Skull Valley, and you say what if a
24 plane -- what if one of the F-16s from Hill Air Force
25 Base hits these casts. There is an obvious pathway

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1 you say, trying to get standing, and I want to come in
2 and litigate that aircraft issue.

3 Now you may lose that issue because the
4 facts may prove that there is not a high probability
5 for the benefit of the audience, and --

6 MR. THOMPSON: Well, we are not just
7 talking about probability here.

8 CHAIRMAN FARRAR: And there may be no
9 consequences, but why is a plane hitting the cast an
10 issue that we are trying to be trying later this year,
11 why is that issue not sufficient to get you in the
12 door to try to raise your complaint, or raise your
13 claim?

14 MR. THOMPSON: Well, all I can say is that
15 the Commission says that there is no volatility in
16 this source term. You have got to look at this source
17 term. These source terms are double-encapsulated.
18 They keep talking about the fact that it could get in
19 the water, and it could get out.

20 It is that sort of general accusations
21 that don't have any basis in fact, and they are not
22 credible. None of them are credible.

23 CHAIRMAN FARRAR: Okay. We were --
24 counsel and the board took a site visit today per a
25 conference call arrangement to the site. Suppose,

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1 which there isn't, that there was a house right
2 outside your fence, and that person said, wow, I am
3 worried because if a plane hits this facility, I am
4 only a hundred yards away from it.

5 You are saying that what the Commission
6 said in the document that you cited to us says that
7 person, even though he is only a hundred yards away,
8 an airplane crash destroying that facility cannot
9 possible -- there is no viable pathway for that to
10 affect that person's well water or whatever.

11 CHAIRMAN FARRAR: Basically, I am saying
12 yes, that's right. There is no volatility in this.
13 This is Cobalt metal. It is not powder or anything
14 that can disperse.

15 They talk about it dispersing in the air.
16 How is it going to disperse in the air? It is 20 feet
17 below the surface. It is in a armored -- and that is
18 the point that the Commission is making, is that it is
19 in an armored pool, and it is not volatile.

20 It is in sealed sources, and it is not in
21 contact with the water. I suppose -- well, maybe if
22 the nose of the plane landed right in it, I suppose
23 you could -- but is that really -- is that --

24 CHAIRMAN FARRAR: Is that really likely?
25 The answer may be no, and they may lose at the trial

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1 of that issue, but is it sufficiently plausible that
2 it gets them in the door?

3 Now, they may fail on the merits and for
4 the benefit of the audience, all of this that we are
5 arguing about tonight is there going to be an
6 evidentiary hearing.

7 The Georgia Tech case talks about it was
8 not being -- it was too great a stretch of the
9 imagination. Why is a plane crash not to great a
10 stretch of the imagination?

11 MR. THOMPSON: We are talking about
12 obvious potential consequences, and not any possible
13 theoretical -- it is not supposed to be theoretical.
14 There is supposed to be -- if you can't show that
15 there is some obvious potential, and it seems to me
16 that you are going uphill on that with the nature of
17 the source and the facility, and what the conditions
18 found --

19 CHAIRMAN FARRAR: But if I go too far with
20 that argument, then I get into the -- then I have
21 moved out of the proximity presumption and into the
22 injury in fact?

23 MR. THOMPSON: Yes, and I think that is
24 what you have to do.

25 CHAIRMAN FARRAR: But aren't these two

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1 different tests?

2 MR. THOMPSON: No, the proximity
3 presumption is only going to work for you if you can
4 show the obvious potential consequences off-site, and
5 we have established that.

6 CHAIRMAN FARRAR: I was surprised to read
7 those old cases because the obvious potential assumed
8 three dramatic, independent failures that nobody ever
9 expected to happen, and --

10 MR. THOMPSON: But it also, Your Honor, it
11 dealt with a reactor, and the Commission has said in
12 this Part 36 rule making that you don't have the high
13 beans and the noble gases, and you don't have the heat
14 source that creates the kind of energy that would
15 force stuff out of the facility.

16 That is part of the point why the
17 Commission made the findings that they made.

18 CHAIRMAN FARRAR: Okay. But how do you --

19 MR. THOMPSON: So if you say there are no
20 obvious potential off-site consequences --

21 CHAIRMAN FARRAR: But what do you do with
22 the appeal board in the Armed Forces case, where some
23 respected people on a case that is one-ninth of what
24 you are dealing with --

25 MR. THOMPSON: Well, I think that the case

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1 law has progressed, and I think the standard is that
2 no obvious potential consequences, and if you can't
3 show that, then you don't get the proximity
4 presumption. Then you must show injury in fact.

5 And if you show injury in fact, then you
6 have to allege some reasonably possible path. It does
7 not have to be certain, but it can't be speculative,
8 and it can't be abstract.

9 CHAIRMAN FARRAR: What can of irradiator
10 was the Armed Forces one?

11 MR. THOMPSON: Panoramic? The source of
12 that water.

13 CHAIRMAN FARRAR: Is that your answer? Is
14 that it?

15 MR. THOMPSON: I don't know.

16 CHAIRMAN FARRAR: Is that the distinction
17 between those two cases; that if we look at the design
18 that one had a source in the air, and yours is a
19 source of water?

20 MR. THOMPSON: A source of water, whatever
21 comes out in the water. I actually don't know if it
22 was Panoramic, and I am not positive.

23 CHAIRMAN FARRAR: Okay.

24 MR. THOMPSON: But that is a very distinct
25 difference. It is a totally different kind of

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1 irradiator.

2 CHAIRMAN FARRAR: Okay. Well, I know that
3 your company does not make this irradiator. It is
4 supplied by a company called Grey Star?

5 MR. THOMPSON: Right.

6 CHAIRMAN FARRAR: What do I do with a case
7 2 years ago where Grey Star wanted to have a cesium
8 reactor. The staff said no.

9 MR. THOMPSON: Right.

10 CHAIRMAN FARRAR: Grey Star brought a
11 proceeding in front of a Board like ours and said the
12 staff is wrong, and that cesium is bad. The staff
13 wants us to use cobalt, and they gave a whole bunch of
14 reasons why cobalt irradiators are not a good thing.
15 What do I do with that case?

16 MR. THOMPSON: Well, I will tell you what
17 you do with that case. You got back and look at what
18 they said, and I know -- because I was representing
19 them, but what they said was that one of the things
20 about a cobalt irradiator that differs from the
21 proposed cesium irradiator was that the cobalt had
22 higher activity, but it has to be changed out more.

23 So to the extent that you think changing
24 things out poses potentially an occupational safety
25 risk to workers who are doing the changing out. That

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1 is one aspect of a cobalt irradiator that is not as
2 efficient as putting one in there and leaving it
3 forever.

4 CHAIRMAN FARRAR: Now let's leave out the
5 workers for the moment, even though the petitioners
6 are attempting to raise concerns on behalf of the
7 workers. So let's leave them out for the moment.

8 One of the strong points in the
9 petitioner's papers, standing, germaneness, and maybe
10 the stay motion, is the problems that happen in your
11 irradiator when the sources are changed. So why isn't
12 what you just said about the previous Grey Star case
13 something that we should take into account here?

14 MR. THOMPSON: I was explaining to you why
15 they were saying what the difference was between a
16 cesium-137 source term and a cobalt irradiator. All
17 I can say is that the staff evaluated, and it was
18 referenced, that those were not credible scenarios to
19 product a radiological threat.

20 CHAIRMAN FARRAR: And I know that Grey
21 Star is not your client in this case, and so I am not
22 trying to raise some estoppel arguments, but it still
23 concerns me that the manufacturer was talking about
24 the problems of cobalt irradiators, and you are
25 telling me that these people can't come in and even

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1 try to raise a case about the problems with cobalt
2 irradiators.

3 MR. THOMPSON: I didn't say that. I just
4 said that we are talking about standing in general.
5 I am not saying that if they got in that they couldn't
6 raise an issue, but I don't believe that the rules
7 that exist now don't raise those questions about
8 cobalt irradiators.

9 They say in Part 36 that if you do this
10 and you do that, it is okay. And they don't even cite
11 rules. They don't go to any of this stuff that is in
12 the Part 36 rule making context. They don't address
13 the rules.

14 The fact, for example, that a sealed
15 source is not the licensee's responsibility during
16 transport, and that the sealed source is registered,
17 and thereby approved by the NRC. It goes through all
18 kinds of tests. It is by definition as insoluble and
19 non-disperable as practical. It is a registered
20 sealed source.

21 CHAIRMAN FARRAR: Okay. But here is a
22 problem here that I have with what runs through all of
23 your papers. Your view that because your client
24 thinks they have complied with the regulations, and
25 the staff has agreed that they have complied with the

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1 regulations, that is the end of the case.

2 But that would mean that every case is the
3 end of the case, and we would never have a hearing on
4 anything.

5 MR. THOMPSON: No, it would just mean that
6 somebody has to come in and make some sort of a
7 credible allegation that either there is some failure
8 in what we have done that is not addressed by the
9 regulations, or if there is some incremental hazard
10 because of the way that we are proposing to operate,
11 that raises an issue it seems to me.

12 Otherwise, all you have to do is come in
13 and say, well, you know, we don't even address the
14 regulation. Then you raise some general allegations,
15 and that means that everybody gets a hearing in every
16 case, and that can't be right either.

17 CHAIRMAN FARRAR: Well, does everybody get
18 a hearing in every case or are we looking at it is
19 very easy to get a hearing in a materials license
20 case? Now, you know some of the other cases, and you
21 have been practicing in this area for a long time.

22 In the reactor cases, in the spent fuel
23 storage cases, we have the contingents rule. I thin
24 that it is Section 2.714, where to get into a hearing
25 you have to -- I won't characterize what you have to

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1 do, but you have to even go so far as to put in the
2 technical basis.

3 There is a whole lot that you have to put
4 in, and I thought that materials license cases were
5 deliberately drawn exactly the opposite. So that you
6 can come in with a very flimsy showing and the reason
7 that you can come in with a very flimsy showing in a
8 materials license case is that there is no -- that the
9 burden on the company, if we allow a hearing, is very
10 minimal because there is no discovery allowed; no
11 depositions, no document discovery.

12 There is not a trial with cross-
13 examination, and there are written evidence
14 presentations, unless we decide to ask questions. So
15 it seems to me that there is a flavor in your case
16 that you are trying to import into the informal
17 materials license cases, where the rule is written
18 that says, hey, you can come in pretty easy.

19 But then the company gets protected,
20 because you then have to prove your case. You are
21 trying to import into a materials license case some of
22 the requirements of the contingency cases for
23 reactors.

24 MR. THOMPSON: Well, I think where there
25 is less risk involved, and the regulations are clear,

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1 if you are going to be an intervenor, you have got to
2 point to something about it.

3 I mean, for example, it sounds like sort
4 of what you are suggesting, Judge Farrar, is that if
5 somebody comes in and makes an allegation based on
6 misinformation, that that can get you into a case, and
7 I just don't think that is what is meant.

8 CHAIRMAN FARRAR: Well, let's take a
9 frivolous example. If someone came in here and said
10 that we live a hundred yards away, and we are afraid
11 that the hydrogen will escape from the irradiator.

12 And you come back and you say there is no
13 hydrogen in this irradiator. Then that concern is not
14 -- you win on germaneness or a lack of germaneness.

15 But that is not what we are facing here.
16 These people live very close, and you conceded that
17 this is a significant source.

18 MR. THOMPSON: It is. But, for example,
19 if you allege that there is a threat to the people
20 living close by because the cooling water in the pool
21 isn't going to cool it enough, and it is going to
22 cause an explosion of some sort, then that is just
23 plainly inaccurate, incorrect. There is no
24 possibility of that.

25 There is no cooling pool and the

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1 Commission itself said that there is no heat generated
2 source to result in that sort of explosion. So that
3 is not the --

4 CHAIRMAN FARRAR: What would a person
5 living a hundred yards away have to say in your
6 judgment to have standing in this case? I think you
7 are telling me that there is nothing that they can say
8 about this.

9 Your supplier has made an elegant
10 irradiator, and the staff has said it is all right,
11 and that is the end. I am afraid that is where you
12 are trying to take us.

13 MR. THOMPSON: No, no, I think there has
14 to be some viable pathway so that if you come in and
15 say, look, if it can get to the ground water -- I
16 mean, you can't just say, well, there is ground water
17 here.

18 You have to say, well, if such and such
19 happens, and it got into the ground water, then how do
20 you deal with the fact that cobalt is insoluble? I
21 mean, frankly, the Commission has buckled this up
22 quite a bit if you read the Part 36 materials.

23 It really has. It has addressed a lot of
24 these issues. They are not worried about
25 sophisticated radiological monitors in the water

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1 because they say that cobalt is inside it.

2 Plus, it is in sealed sources, and even if
3 it was leaking, it is inside of it. So there are a
4 lot of issues that frankly have already been
5 addressed.

6 CHAIRMAN FARRAR: And you say that is not
7 the merits? Them saying that things could go wrong,
8 and maybe the source that is certified by somebody
9 comes in here, and even though it is doubly
10 encapsulated, it was manufactured incorrectly.

11 And if that happens, and the material
12 leaks, and the plane hits it -- now these are all far-
13 fetched, but the Armed Forces case or the Georgia Tech
14 case says, yes, you could have three of these far-
15 fetched failures, and that is sufficient not to win
16 the case, but to come in and get a hearing to try to
17 prove it.

18 MR. THOMPSON: They did at least in the
19 Armed Forces case, they addressed a potential pathway.
20 So tell me what the pathway is that is associated with
21 a particular allegation, and then maybe we are
22 narrowing the field a bit.

23 Because if you can come in and make any
24 kind of allegation based on a total lack of knowledge
25 of anything about the irradiator or the source term,

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1 or how it behaves and how it is protected, and that it
2 is certified by the NRC to put it in the reactor, then
3 anytime anybody has a license application, or a
4 license amendment, all you have got to do is say that
5 could be a problem, and I have got standing.

6 CHAIRMAN FARRAR: All right. I think that
7 your time has expired. If you have no wrap up, I will
8 hear from --

9 MR. THOMPSON: No, I think we have covered
10 everything.

11 CHAIRMAN FARRAR: All right. I understand
12 your position. Mr. Sugarman.

13 MR. SUGARMAN: Thank you, Your Honor.
14 When I exceeded my time before, I was in the process
15 of referring to the security concern pathway, and I
16 would like to complete that thought and then go on to
17 rebuttal.

18 Clearly there are terrorist threats. The
19 security regulations that have been adopted by the
20 Commission, which we have not -- which we believe
21 leads to some kind of a plan that has not been shared
22 with us, and I am sure Your Honor knows that the
23 September 5th release by the Commission to Your Honor
24 talked a lot about different things, but did not
25 provide us with a security clearance for this project,

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1 and said we can't talk about through the security.
2 That is on page 2 of the September 5th memorandum to
3 you.

4 I find that to be totally contrary to Your
5 Honor's ruling that we could not be excluded on the
6 basis of information that we don't have.

7 CHAIRMAN FARRAR: Mr. Lewis, what do we do
8 about that? The precise security plan, the details of
9 the security plan for this facility are what we called
10 safeguards information.

11 MR. LEWIS: Yes. Your Honor, why don't I
12 address that when I get into those areas of concern,
13 and I can address it rather --

14 CHAIRMAN FARRAR: Well, no, I want to deal
15 with it now.

16 MR. LEWIS: Okay. If you want to hear
17 about it now.

18 CHAIRMAN FARRAR: And here is all that I
19 want to know. Number 1, are the details of the
20 security plan safeguards information?

21 MR. LEWIS: Yes.

22 CHAIRMAN FARRAR: Then why can't we just
23 like we did in the Utah case pass this safeguards
24 information around to counsel and their experts, and
25 not to the public.

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1 And the reason that the public doesn't get
2 to see this is the classic -- that if you are trying
3 to protect against terrorism, you can't have the plans
4 for how you are protecting against terrorism out
5 there.

6 So I am not trying to keep things -- yeah,
7 I am trying to keep things secret from you, but what
8 we do -- well, that doesn't mean that Mr. Sugarman
9 doesn't get it. It means that he gets it under severe
10 protections.

11 And anybody who gives it away, they are
12 subject to criminal charges, and we have a closed
13 hearing back at our headquarters, from which the
14 public is excluded.

15 But how can we say that he doesn't have
16 standing to raise security plan issues if he hasn't
17 gotten the documents?

18 MR. LEWIS: Your Honor, there is a
19 significant impediment to proceeding in the way that
20 you are suggesting. The safeguards procedures, the
21 so-called compensatory measures for this facility, are
22 safeguards, and they were implemented deliberately by
23 the commission as it has with respect to all
24 compensatory measures by an order.

25 If we proceed in a licensing proceeding,

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1 with the standards of standing for a licensing
2 proceeding, and into the realm of an order, we are
3 obviating the standards for intervention on an order,
4 which are different. Now --

5 CHAIRMAN FARRAR: Well, he is not
6 intervening. He said my people are nervous about the
7 security plan. So we send him the security plan under
8 the proper protections, and he can't challenge as I
9 understand the Commission's decisions, is that we are
10 not going to hold a hearing on whether that order that
11 you have given them is the right order.

12 The Commission has said that is not a
13 matter for licensing. But we can hold a hearing on
14 whether this company is in fact preparing to, and is
15 equipped, to comply with that order can we not?

16 MR. LEWIS: Not as part of the licensing
17 basis of this plant. The order does not change the
18 licensing basis for this plant, and deliberately so by
19 the Commission.

20 It is interim and it is something that the
21 Commission has done as a step in advance of deciding
22 what the regulations should look like.

23 CHAIRMAN FARRAR: But the company has to
24 comply with it today?

25 MR. LEWIS: It is immediately effective,

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1 and the date for compliance is December 3rd, 2003.

2 CHAIRMAN FARRAR: But they will comply
3 before the source material is in there, but why is
4 this not just a classic case, where Mr. Sugarman is
5 entitled to say that I don't think they are complying.

6 He can't say as I understand the
7 Commission precedence, he can't say I don't like that
8 plan, because the Commission has said that is not
9 something that we will deal with.

10 But why can't he say that I don't think
11 they are up to compliant with it? Why is that not
12 just a classic issue that we have always dealt with?

13 MR. LEWIS: Okay. Let me come at it from
14 this point of view. There are ways in which if the
15 presiding officer orders the staff to make the order
16 or the compensatory measures order available to the
17 parties to the proceeding, and the staff will deal
18 with that order, and we will develop the kinds of
19 protections that are necessary.

20 They are actually fully set forth in the
21 materials that I have already provided, the so-called
22 safeguards information modified handling, which --

23 CHAIRMAN FARRAR: And we have dealt with
24 that in the Utah case. It is a big deal, but it is
25 manageable.

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1 MR. LEWIS: It is more manageable than it
2 was now that they call it modified handling.

3 CHAIRMAN FARRAR: But meanwhile Mr.
4 Sugarman was about to say to me how can you tell me
5 that I don't have standing to raise an issue that I
6 don't have the documents to raise the issue about? If
7 you were sitting here what would you tell him? Don't
8 worry about it?

9 MR. LEWIS: I would say that if the Board
10 directs us to make that order available, we will do
11 so.

12 CHAIRMAN FARRAR: Answer my question. The
13 question is can I say to Mr. Sugarman you have no
14 standing, your people have no standing to raise this
15 issue, and it is too bad that you didn't get to see
16 the documents by which you could have raised that
17 issue?

18 MR. LEWIS: No, you cannot say that. You
19 can order us to make it available.

20 MR. SUGARMAN: I have a problem with it,
21 Your Honor. We are here on September 10th, and the
22 proposal to deliver the material on September 22nd,
23 and they have known this for some period of time, and
24 it is another case where they have deliberately
25 withheld material from us.

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1 Now, if you look at the memo of September
2 5th, and it was sent regular mail, and so it arrived
3 on the eve of this hearing, and not sent e-mail like
4 they are supposed to, and it says that the information
5 is considered potentially relevant and material to the
6 above proceeding, because the question of adequate
7 security from a terrorist threat at the subject
8 facility is an issue before the presiding officer.

9 That is right here in this memo, and I
10 think that the casual way that they have done this
11 will be relevant to a number of considerations, but
12 one of them is the fact that it is standing and it is
13 also germaneness.

14 This is a germane issue, and I will talk
15 about that when we get to germaneness, but the point
16 that I wanted to make at this point is that the
17 Commission statement that I just read to you from that
18 September 5th memorandum makes it clear that it is an
19 issue which has obvious potential for significant
20 releases.

21 And if the terrorists choose -- and there
22 are people in this vicinity who have family who were
23 in the World Trade Center on September 11th. This is
24 not the central part, but especially around here,
25 these are people who will commute to New York.

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1 And these are people who were in the World
2 Trade Center, and to suggest that this not an obvious
3 potential for significant release is offensive,
4 especially when this memo comes out and deliberately
5 withholds relevant information.

6 So, Your Honor, I think you were
7 indicating your concern, but as you said, I am not to
8 interpret your questions as opinions. So I feel it
9 necessary to drive that point home, because it is such
10 a serious point.

11 CHAIRMAN FARRAR: Let me interrupt. Mr.
12 Thompson, do they have standing to raise terrorist
13 concerns, or to raise inadequacies in your client's
14 ability to comply with the measures that the
15 Commission has ordered?

16 MR. THOMPSON: If you follow my line of
17 reasoning, I would have to say that was not something
18 that was dealt with in the Commission proceeding, and
19 is a new issue, and therefore I would have to probably
20 acknowledge on that issue given what has happened
21 certainly that that makes some sense.

22 MR. SUGARMAN: Now I would like to address
23 the regulations that Mr. Thompson was referring to,
24 and I would like to direct Your Honor's attention to
25 page 58, Federal Register 7715, on page -- I am giving

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1 you 775, on page 28, and a line printout of 65 pages.
2 So it may not be the same.

3 And 7726 is the Federal Register page, and
4 the theory that the Commission is discussing --

5 CHAIRMAN FARRAR: What is the date of
6 that?

7 MR. SUGARMAN: That is February 9th, 1993,
8 Your Honor, release. And there the Commission is
9 discussing the intent of the regulations, and what it
10 is saying is quite the opposite of what Mr. Thompson
11 said, and much more like the questions that you were
12 asking.

13 That these are indeed performance
14 standards, but these are not the only issues. First
15 of all, you have the issue does the facility meet the
16 performance standards, and we have raised that issue
17 on a number of occasions.

18 Secondly, you look at the standards and a
19 lot of them are general. The facility shall meet a
20 safety and adequate safety standard with respect to
21 certain features.

22 Now, some of them are quantitative, and I
23 will acknowledge that. But they are not quantitative
24 taking the design of this facility into mind. You
25 will remember that the staff determined that the

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1 features of this facility were trade secrets because
2 they were proprietary.

3 It is our point that there has never been
4 a construction of a facility like this at a commercial
5 site. They have not answered that. They have said,
6 yes, there are facilities of this size, but are they
7 constructed like this one.

8 And that brings us to their presentation
9 to the Commission of Grey Star, which is after all the
10 source of this facility, and the one whose integrity
11 in terms of design is at issue here, much more so than
12 CFC.

13 And Grey Star, and Your Honor asked about
14 that, but Grey Star made all these points about the
15 dangers of cobalt. One was weight, and another one
16 was entry into the chamber, which Your Honor could see
17 today as totally -- well, not totally, but relatively
18 available. The higher amount of strength of the --

19 CHAIRMAN FARRAR: Wait, wait, wait. I
20 thought that one of the features of this facility is
21 there is not a chamber that the material could be
22 irradiated and a source as the operations proceeding,
23 and there is no chamber.

24 It is in the bottom of a pool, and that is
25 one of the protections to both the source and the

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1 food, is at the bottom of a pool, and so there is no
2 chamber.

3 MR. SUGARMAN: You are saying that they
4 can't use the controls to access the material. Well,
5 how are they going to change it when it wears out?
6 They are going to use the controls to access it.

7 CHAIRMAN FARRAR: Okay.

8 MR. SUGARMAN: They are going to use the
9 controls to access it, and I saw those controls there,
10 and of course they would have to access it. They
11 can't change it without accessing it.

12 So, yes, they might have a pathway where
13 they put it into -- where they purportedly put it into
14 a closed chamber in order to remove it. But suppose
15 the control system doesn't work, and I heard them say
16 there is going to be a computer, and we all know how
17 computers handled the blackout last month.

18 CHAIRMAN FARRAR: Well, after you left,
19 they did explain how the materials changed out with
20 hand tools. Well, let's do this. We have spent over
21 an hour on this issue which is much longer than we
22 could.

23 MR. SUGARMAN: Well, our expert is of the
24 opinion based on his analysis of the application,
25 including the confidential portions, that this is not

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1 a fail safe system in that regard, and that there can
2 be access to the source materials.

3 But again the time to prove that is after
4 we get to a hearing tonight, and not based on what
5 they told me this afternoon. And I certainly don't
6 doubt the good faith of the young lady who conducted
7 the tour, but there is a lot more to it, and I don't
8 know that she had the credentials or did the analysis
9 to be able to reassure you.

10 CHAIRMAN FARRAR: Wait. Nothing that was
11 -- that tour was for the purpose of counsel and the
12 board, and making sure that they saw what this device
13 looked like. It was not -- we did not take from it
14 any reassurance. All we saw is what we saw.

15 MR. SUGARMAN: Thank you. I understood
16 that to be the case, but I thank you for saying that.
17 As to Grey Star --

18 CHAIRMAN FARRAR: Mr. Sugarman, let me
19 give you -- well, go ahead with Grey Star, and then
20 wrap up.

21 MR. SUGARMAN: Well, that goes to one of
22 two issues, or maybe both. I was astounded to hear
23 Mr. Thompson confess that Grey Star has not
24 credibility. But I don't think he quite meant to make
25 it that broad.

1 But what he said was that the Commission
2 found in Grey Star's contentions the lack of
3 credibility. So how can the board determine tonight
4 that Grey Star's contentions as to safety have
5 credibility.

6 This is an operator who has made serious
7 allegations to the Commission as to the lack of safety
8 at Caldwell, and Mr. Thompson says that the Commission
9 decided they don't have credibility.

10 Well, I know as a rule of evidence that
11 says the failure to tell the truth in one thing allows
12 you to assume that they are not telling the truth
13 about other things.

14 CHAIRMAN FARRAR: Mr. Sugarman --

15 MR. SUGARMAN: It is so simple in such a
16 complex area as nuclear to say that somebody who makes
17 these allegations against cobalt, and then says that
18 they weren't credible, and then says that you should
19 believe them in making opposite claims, is all very
20 well and good.

21 But I want to go back to the regulation
22 for just one sentence, and then I will finish. If you
23 read the regulation as a whole. Your Honor will see
24 that it does not support Mr. Thompson's claim that the
25 Commission established performance standards and

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1 eliminated the case by case determination.

2 Yes, they did establish a performance
3 standard. Yes, we do contest whether Grey Star met
4 them, but beyond that the Commission also -- and, for
5 example, airports.

6 The Commission at page 7726 says that in
7 general irradiators can be located anywhere that local
8 governments would permit an industrial facility to be
9 built.

10 They did not put in the regulations that
11 the board should not consider specific cases where
12 airports may be a problem.

13 CHAIRMAN FARRAR: It seems that the
14 Commission in the comments said in general that they
15 can be located?

16 MR. SUGARMAN: Anywhere.

17 CHAIRMAN FARRAR: Anywhere, and you don't
18 read that, and so you are saying that did not mean to
19 exclude specific attacks, challenges to specific
20 facilities?

21 MR. SUGARMAN: That's exactly what I am
22 saying, because what they are saying, what the
23 Commission is saying is that they are refusing to
24 issue a rule prohibiting irradiators near airports.

25 And what they are saying is that in

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1 general -- and that sentence that I read to you was in
2 their general description of sitting. And then they
3 repeat the sentence in their discussion of airports,
4 but they dropped the phrase, "in general."

5 So what they are saying -- but if you read
6 the whole thing and taken as a whole, what they are
7 saying is that they are not going to enact any blanket
8 prohibition on sitting near airports, or other
9 features, because in general it can be done.

10 But obviously the Commission could not
11 have had in mind the design of this facility, since
12 this facility is a proprietary design that didn't
13 exist in 1993.

14 CHAIRMAN FARRAR: All right.

15 MR. SUGARMAN: So therefore whether the
16 design of this facility meets the standards, and
17 whether the standards allow for questions about things
18 like airports is a question that needs to be addressed
19 in the hearings and not at the standing stage.

20 CHAIRMAN FARRAR: Thank you, Mr. Sugarman.
21 Mr. Thompson, I will give you 10 seconds if you wish
22 to point out that you did not concede that one of your
23 clients lack credibility.

24 MR. SUGARMAN: Thank you, Your Honor. So
25 said.

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1 CHAIRMAN FARRAR: We will look at the
2 record of exactly what it was that you said. It would
3 surprise me if you had said that. Let's -- we had
4 planned to take a break after the next session of
5 argument. Let's keep on that plan, and we will try to
6 make things -- and if we don't have the microphone
7 problems, we will try to keep better to the time.

8 In terms of germaneness, Mr. Lewis, I put
9 you on the side of the petitioners in terms of the
10 time allocations, and reading the papers more closely
11 last night, you are right in between, right?

12 MR. LEWIS: Yes.

13 CHAIRMAN FARRAR: They think that all
14 their areas are germane, and the company thinks none
15 of them, and you think half of them.

16 MR. LEWIS: I think some of them. I don't
17 know whether it is half exactly or not.

18 CHAIRMAN FARRAR: Okay. Then why don't we
19 give each side -- and we have three sides now, and
20 let's give each side 15 minutes. No, let's give each
21 side 10 minutes, because we have got to make up some
22 time here.

23 Let's give each side 10 minutes. Are you
24 doing this, Mr. Sugarman, or is Ms. Curran?

25 MR. SUGARMAN: Yes, Your Honor. Before

1 I forget, may I reserve two minutes?

2 CHAIRMAN FARRAR: Yes.

3 MR. SUGARMAN: Thank you.

4 CHAIRMAN FARRAR: Well, let me clarify a
5 couple of things at the beginning. In your latest
6 filings, you are no longer raising as an area of
7 concern the question of whether irradiation of food is
8 a good thing for the country; is that correct?

9 MR. SUGARMAN: Whether irradiation of
10 what?

11 CHAIRMAN FARRAR: Whether irradiation of
12 food is a good thing for the country.

13 MR. SUGARMAN: Oh, I don't intend to argue
14 that here.

15 CHAIRMAN FARRAR: In other words, that may
16 be germane in a proceeding in front of the Food and
17 Drug Administration, or germane in a proceeding in
18 front of the Department of Agriculture's Food Safety
19 Inspection Service, but can we agree that is not
20 germane to a Nuclear Regulatory Commission proceeding?

21 Whatever people may think about the
22 irradiation of food, can we agree that that is not our
23 business?

24 MR. SUGARMAN: The only area that I
25 suggested that it was germane, and I would

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1 respectfully just say one sentence and leave it at
2 that, is that the questions that have been raised
3 about germaneness create a doubt as to the long term
4 commercial viability of irradiation; and therefore, it
5 would create a decommissioning issue.

6 CHAIRMAN FARRAR: Okay.

7 MR. SUGARMAN: That's all.

8 CHAIRMAN FARRAR: But as far as whether --
9 you are not asking us to have a hearing on the wisdom
10 of irradiating food?

11 MR. SUGARMAN: No, sir. I would not be
12 competent to participate.

13 CHAIRMAN FARRAR: How about the worker
14 exposure issue that you still are raising? Can we get
15 a concession that neighbors have no standing to raise
16 issues about worker safety?

17 MR. SUGARMAN: Yes, because workers are
18 carriers, and secondly sources, but again I don't want
19 to emphasize that. I don't want to take my limited
20 time to discuss that issue. I just put it there that
21 they are secondary sources if they walk out with
22 irradiation.

23 CHAIRMAN FARRAR: Okay. So you are not
24 making the concession? I asked you if you would
25 concede that they --

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1 MR. SUGARMAN: Well, I don't want to
2 concede it, but I am not pressing it as a primary
3 point. If you twist my arm, I might -- my arm might
4 break.

5 MS. CURRAN: We don't concede that.

6 MR. SUGARMAN: We don't concede it. My
7 wise advisor is talking and we don't concede it; and
8 if Your Honor asks her that question when she gets up
9 to discuss the stay, I am sure that she will be able
10 to articulate it.

11 CHAIRMAN FARRAR: Well, Ms. Curran, for
12 some reason or another, has been at every proceeding
13 that I have been in, and she knows that we don't allow
14 any tag team matches here.

15 MR. SUGARMAN: Your Honor, on the issue of
16 germaneness, I have already spoken to security, and I
17 just have I think basically -- well, I think that I
18 dealt with that as much as I need to do, bearing in
19 mind that is a primary issue in the stay motion and so
20 Ms. Curran will be addressing that.

21 But I don't want to be taken as suggesting
22 that security is not a critical area that is an issue
23 of concern. It is germane.

24 CHAIRMAN FARRAR: Let me ask you about
25 your other issues generally. If you raise a concern

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1 that doesn't fit with this irradiator's design, then
2 by definition that is not germane. In other words, I
3 am not getting yet to --

4 MR. SUGARMAN: Well, Your Honor, I would
5 agree with that to this extent; to the extent that our
6 concern depends on irradiator design. Many of our
7 concerns have nothing to do with irradiator design.

8 For example, the seismic. An earthquake
9 affects almost any irradiator, and when they are
10 talking about the regulations, the Commission's
11 regulations recognize the need to require special
12 protections in seismic zones.

13 Seismic zones are defined as those that
14 are classified as such by USGS according to certain
15 degrees of horizontal movement. Well, unfortunately
16 nature does not abide by USGC classifications all the
17 time.

18 And whether or not USGS has classified
19 this area as a seismic area, nature has, and we had a
20 3.5 magnitude quake about 2 weeks ago, and I attached
21 that to our documents, to our reply.

22 So I think that the seismic episode is one
23 that also has to be considered, along with security,
24 and along with the drop of the cast, and
25 transportation is another major pathway.

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1 CHAIRMAN FARRAR: Hold on. Mr. Lewis, do
2 these have to be designed like other facilities to
3 withstand earthquakes? Do you do the same type of
4 earthquake analysis that we do on reactors?

5 MR. LEWIS: There is no specific
6 requirement that they be seismically designed.

7 MR. SUGARMAN: The regulation says that
8 there is, but if it is in a seismic zone, I don't know
9 whether this is classified as a seismic zone by USGS,
10 but depending on when you ask the USGS, and if you ask
11 them this week after the 3.5, they might classify it
12 as a seismic zone.

13 And obviously the Commission did not mean
14 to freeze the seismic zones, despite the fact that
15 nature changes earthquake zones from time to time. So
16 therefore to say that -- well, I don't know what Mr.
17 Lewis means.

18 There clearly is a requirement for
19 additional protection in seismic zones and it is in
20 the regulations, and in my reply I will give you the
21 citation.

22 And it is defined according to the
23 regulation, but going on from seismic to -- I wanted
24 to go to transportation, and clearly the
25 transportation is an area of high vulnerability to

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1 accidents or whatever because the material goes out
2 and it is moving, and it is not passive, and it is
3 active.

4 CHAIRMAN FARRAR: But your clients can
5 only raise the transportation issues to the extent
6 that they are local. In other words, you are raising
7 transportation in the sense of once it gets in the
8 neighborhood --

9 MR. SUGARMAN: That's correct. In that
10 case, I agree, and Ms. Curran is overruling me, and I
11 agree that we are talking about local transportation.
12 But local is very important, and Your Honor was out
13 there with where is the nearest railroad sitting and
14 there wasn't.

15 What are they going to do, move it on a
16 truck? Every day, we have on either one part or the
17 other of the Pennsylvania Turnpike jammed up because
18 of trucks or cars banging into each other, and turning
19 upside down.

20 How are they going to prevent that here?
21 I will grant you that the probability of all these
22 things is small fortunately. But small is not a
23 synonym for none.

24 And small is a synonym for areas of
25 concern when we are talking about multiplying these

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1 areas of concern especially. So we have something to
2 which a large number of things can happen, and again
3 I go back to Grey Star saying that one of the problems
4 of cobalt was that it required more often and more
5 frequent movement, and more transportation.

6 CHAIRMAN FARRAR: One of the area that you
7 mentioned is the loss of electricity, but the company
8 says that a loss of electricity for a passive sort of
9 facility like this is inconsequential.

10 MR. SUGARMAN: Well, again I heard the
11 word computer today right before I left, and as far as
12 I know, computers run on electricity. So it is not
13 passive.

14 CHAIRMAN FARRAR: Well, it is passive in
15 the sense that if the computer stops, and the food is
16 in there, nothing happens.

17 MR. SUGARMAN: What about he controls?
18 How do the controls operate?

19 CHAIRMAN FARRAR: They don't. The food
20 just sits wherever it is, and the sources keep
21 emitting radiation, and nothing happens.

22 MR. SUGARMAN: Well, this is not again not
23 the time to prove it, but only the time to identify it
24 as a logical or a non-irrational possibility. What
25 can happen if the lights go out? Well, a million

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1 things can happen if the lights go out.

2 And this facility is totally vulnerable to
3 the lights going out, and I just don't mean through
4 possible electricity on the grid. That happened very
5 recently and we lost power for 14 hours last weekend
6 down Central Bucks about 10 miles away.

7 And the company that operates in this
8 general area is PP&L and PP&L is tied into First
9 Energy.

10 CHAIRMAN FARRAR: Well, what I was saying
11 was that if the grid goes down, what happens? Given
12 the design of this facility, the company I think has
13 said that the grid can be down, and this thing will
14 sit there and nothing will happen.

15 MR. SUGARMAN: I understand Your Honor's
16 question, and the answer is that Dr. Resnikoff has
17 spoken to that in his declaration, and I don't
18 remember as I stand here what he said. But I will
19 give you an answer to that question.

20 CHAIRMAN FARRAR: Well, let me talk about
21 another issue. Two of your areas of concern are that
22 this is an untried installation and assembly, and it
23 is an experimental design. That is almost like an
24 anti-progress sort of area of concern.

25 In other words, if people who have been

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1 making irradiators and they keep improving them, you
2 would say that they shouldn't. We have an area of
3 concern that they improved it and we have never seen
4 the new one work.

5 But if they kept the old one, then you
6 would say that you don't like the old one either. In
7 other words, I understand you are challenging --

8 MR. SUGARMAN: Your Honor is throwing me
9 a softball and that is easy. The answer is some
10 improvements are improvements, and some improvements
11 are not improvements.

12 When you change things, you might intend
13 to improve them, but you might intend to make more
14 money, or you might intend a lot of things. But it
15 might not improve them.

16 CHAIRMAN FARRAR: Okay. Then don't you
17 have to come in with a specific allegation that this
18 particular improvement rather than being an
19 improvement is in fact a step backwards, rather than
20 just say that generally you don't like new and
21 improved things.

22 MR. SUGARMAN: Yes, and no. Eventually we
23 do, but at this stage what we have to say is that it
24 is a legitimate area of concern that this is untried
25 system that the NRC considers to be a trade secret,

1 and at one point the applicant did as well, at least
2 verbally, in our discussions, and that they claimed
3 that this was trade secret material.

4 CHAIRMAN FARRAR: Wait a minute. I
5 thought that we had solved the trade secret problem,
6 and again for the benefit of the audience --

7 MR. SUGARMAN: Oh, we did. I don't want
8 to put too much on that, because the company did
9 change its position and say that they had never said
10 it was a trade secret, but --

11 CHAIRMAN FARRAR: Wait a minute. I
12 thought we solved that, that companies are entitled to
13 claim things are trade secrets to protect their
14 business, but then when an allegation is made, they
15 have to turn over the trade secrets under a protective
16 agreement. And I thought that they eventually did
17 that.

18 MR. SUGARMAN: Well, they tried to claim
19 it was security, and --

20 CHAIRMAN FARRAR: Never mind if they
21 tried. You now have all the material that you need.

22 MR. SUGARMAN: Oh, I have a substantial
23 amount of material for which they claim protection,
24 and that is very true, and I don't have the security
25 plan, and we talked about that before.

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1 But if Your Honor wants me to focus on the
2 material, and to be precise for everybody here, the
3 answer is, yes, I agree with Your Honor. We did
4 mention it thanks to you to get the material.

5 My only point is that the NRC staff said
6 it was trade secret, and Your Honor had to rule that
7 it was not a trade secret, or that it had to be turned
8 over, and when we got it, we got it subject to a
9 confidentiality order, because the staff had asserted
10 that it was a trade secret.

11 Now if the staff, with all of its
12 expertise, believes that this material is -- this
13 information is propriety, then it is not standard. If
14 it was standard, it wouldn't be proprietary, and those
15 are two incompatible categories.

16 CHAIRMAN FARRAR: But if I am an inventor,
17 and I come up with something new and different, of
18 course that doesn't mean that is bad, but it does mean
19 that I am going to try to protect the world from
20 finding out about it.

21 MR. SUGARMAN: I don't argue that it is
22 necessarily that. I do argue that we have various
23 concerns about it that we would show at a hearing, and
24 Dr. Resnikoff again in his affidavit points out some
25 of those areas of concern.

1 Just looking at the facility this
2 afternoon, I can see areas of concern about it. I am
3 not expert enough to know where it is different from
4 the standard irradiator, if there is such a thing.

5 But I can see that there are areas of
6 concern about that design, and the staff also had
7 areas of concern about the design, and went back and
8 asked questions more than once, and when you read the
9 reports written by the staff that were attached to
10 their latest brief in response to the stay motion, you
11 see that they had questions that had to be addressed.

12 And at the public hearing on August 21st,
13 they admitted, for example, that they didn't do any
14 drop tests. They relied on engineering judgment, and
15 when you look at the memo of July 29th, which was
16 released by the staff yesterday, and that was never in
17 the file as far as I know available to us or the
18 public.

19 And you will see that there a very
20 informal review of the cast handling that was done by
21 somebody named Russell, and I don't know -- and in fact
22 it appears to be a review or appears to be a
23 submission by CFC when you look at it carefully, but
24 I can't tell.

25 But in any event, there is no other

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1 description by the Commission staff. Then you look at
2 the letter to Mr. Turner, or Ms. Turner rather, from
3 CHL, and you see two pages on discussion of how this
4 bell is going to work.

5 Now, these are all site specific and these
6 are all apparently innovator. We can't tell in a
7 short time since we just got this information, and we
8 do reserve the right -- and I think it is a normal
9 thing for us to have the right to make amended areas
10 of concern if necessary to reflect new documents that
11 we just received, including Mr. Kinnerman's affidavit
12 yesterday.

13 So we have a moving target here, but there
14 is no question that everybody is scrambling to respond
15 to a new and different, and unique facility. Now,
16 does that translate into proof that it is bad, or that
17 it is a step backward? No.

18 Does it translate into there being an area
19 of concern that it might be, or that it might have
20 unintended adverse consequences? Yes. So if there is
21 this much paper generated that was attached to the
22 staff's brief yesterday, some of which at least was
23 unavailable to us until yesterday or today.

24 And then I don't think we can or in a
25 position to exclude the unique status of the thing as

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1 an irradiator as an area of concern, and I would go on
2 to again go back to -- and I hate to do this, but go
3 back to Grey Star's previous statements in the year
4 2000 or 2001, that for all intents and purposes
5 characterized cobalt 60 facilities as dangerous.

6 And yet they are designing one and they
7 didn't want to design one. They wanted to use cesium,
8 and now they are designing one since the year 2000 is
9 certainly an area of concern.

10 CHAIRMAN FARRAR: Why don't we do this?
11 You are out of time, and take any one of the 8 or 9
12 areas of concern that the company says are not germane
13 other than the ones that we have talked about, and
14 which one is your strongest one that you need in.

15 MR. SUGARMAN: Which ones are what?

16 CHAIRMAN FARRAR: The strongest one.

17 MR. SUGARMAN: The strongest?

18 CHAIRMAN FARRAR: Yes, of the ones that we
19 have not discussed.

20 MR. SUGARMAN: Well, I was going to say
21 that I described scenarios of failure, and i have not
22 talked much about pathways because I didn't have time
23 to get to pathways.

24 When you ask which are the strongest, I am
25 really taking you as focusing on both potential

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1 scenarios of failure on the one hand, and also
2 potential for dispersion on the other.

3 And if I am dealing with both of those
4 issues, I think that it is hard to prioritize them of
5 the four that I dealt with, meaning security, cast
6 drop, seismic, and transportation.

7 I think that those are the four most
8 probable, and most serious, and most uncontrollable,
9 and most unplanned for events. And those are only the
10 four most. So I hope that I have answered Your
11 Honor's question. Thank you.

12 CHAIRMAN FARRAR: You have. Mr. Lewis.

13 MR. LEWIS: Your Honor --

14 CHAIRMAN FARRAR: By our count, Mr. Lewis,
15 there are some 16 areas of concern and you said 7 of
16 them were good and 9 of them were bad. Do you want to
17 reevaluate that in light of tonight's discussion, or
18 are we going to --

19 MR. LEWIS: Well, actually that does not
20 sound like that is a totally correct characterization,
21 because there are a number of areas of concern that I
22 said would be dependent on further information to be
23 provided under the confidentiality agreement.

24 And we should await to hear what Mr.
25 Sugarman says in regards with that.

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1 CHAIRMAN FARRAR: But if I wait too long -
2 - I mean, we have got a stay motion coming up here.

3 MR. LEWIS: You have heard it. He has
4 made his points.

5 CHAIRMAN FARRAR: Okay.

6 MR. LEWIS: We were clear as to what we
7 said was the reason why it should be dependent upon
8 this further information and he has just made his
9 presentation on areas of concern, and so I think that
10 is it, and you have heard it. The areas of concern
11 that --

12 CHAIRMAN FARRAR: One of the ones that you
13 wanted to keep out is the security plan, and the
14 terrorism. Do you still think that those should be
15 out?

16 MR. LEWIS: Well, I think that in terms of
17 licensing basis that we rely upon the affidavit of
18 John Kinnerman, which says that the regulations that
19 currently exist, and which he describes, for
20 controlling access to this facility are fully met.

21 CHAIRMAN FARRAR: Right, that is what he
22 says, but that is why we are here, to see if we are
23 going to test what he says. So he says that they are
24 fully met, and these folks say we don't know that. We
25 want to challenge that and we don't have the documents

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1 yet.

2 MR. LEWIS: Well, I have no objection to
3 their challenging the existing reg. I have no
4 problems with their challenging whether or not Mr.
5 Kinnerman is correct in his statement that the
6 existing regulations are met.

7 CHAIRMAN FARRAR: So that is his valid
8 area of concern?

9 MR. LEWIS: Sure. I mean, the concern
10 that I was raising was about the compensatory measures
11 and I will say that just to wrap up my thinking on
12 that, the only thing that I am conceding today is that
13 certainly if Your Honor directs the staff to provide
14 that document, we will provide that document.

15 I am not conceding anything at this time
16 of what the petitioners may or may not be able to
17 protest in this proceeding, or in this proceeding,
18 regarding ground water, and the main reason that I am
19 not conceding it is because I have not had a chance to
20 think about it.

21 CHAIRMAN FARRAR: Okay.

22 MR. LEWIS: Or do you want me to just
23 hypothesize about it?

24 CHAIRMAN FARRAR: Am I right that the
25 standard for letting in areas of concern as germane is

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1 far, far lower than the standard for letting in
2 contentions into the other kind of proceedings?

3 MR. LEWIS: I understand it is completely
4 different. Lower is -- I don't think in terms of
5 lower. What I would say is that the contentions are
6 a very exacting formal pleading, and I think that
7 germaneness -- I don't prefer to call it lower than
8 anything.

9 Germaneness still has to deal with the
10 specific matter for the presiding officer.

11 CHAIRMAN FARRAR: Right, but you have to
12 do precious little in terms of peaking at the merits
13 or a contention in the other kinds of proceedings, you
14 really have to begin to show your hand on the merits.

15 The germaneness and areas of concern seem
16 to have to me almost no elements of the contentions
17 rule. Am I right about that?

18 MR. LEWIS: No, I don't think you are
19 completely right. I mean, the contentions rule does
20 require a participant to demonstrate how they are
21 going to support their case, and what expert, and
22 based upon what documents.

23 I mean, it goes far beyond what a person
24 has to do to show germaneness. But I just don't want
25 to minimize in any way the significance of germaneness

1 or standing with respect to Subpart L.

2 They are still significant standards and
3 they still have to be met. I don't want to call them
4 lower than anything else. They just differ.

5 CHAIRMAN FARRAR: All right.

6 MR. LEWIS: I think the point that I would
7 most rest on is that when the petitioners of the type
8 that we are dealing with here, and by which I mean
9 people who live very close to the facility, bring in
10 areas of concern.

11 As long as those areas of concern have or
12 meets some minimum threshold test of being related to
13 the facility in question, and being articulated
14 clearly, I think will come in. And in that sense,
15 yes.

16 MR. SUGARMAN: And how do you argue that
17 you should keep out their transportation hazard. I
18 think the transportation as an area was set forth with
19 -- well, there were two problems that I had with that.

20 It was set forth with tremendous
21 generality, and it was also set forth as to local and
22 national. So putting apart the national, I don't
23 think that is part of this proceeding.

24 But a problem that I had throughout the
25 areas of concern was the paucity of reference to the

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1 regulations. Now the reason that I say that is not
2 because I think the regulations are sacrosanct. I am
3 not suggesting that at all.

4 But I think that in many of these areas,
5 with no reference to the regulations, the area of
6 concern becomes extremely general in nature, and where
7 we found it to be so, we opposed it.

8 CHAIRMAN FARRAR: Do you give them a
9 chance to amend?

10 MR. LEWIS: That is up to the board. I
11 don't see why they should have a chance to amend. For
12 example --

13 CHAIRMAN FARRAR: Because they amended
14 once already? In other words --

15 MR. LEWIS: Well, I mean, yes. They have
16 had several chances, and as I pointed out, I think
17 that their most recent pleading was a significant
18 improvement over their earlier one. I personally
19 believe that the Board has enough before it to rule on
20 those points.

21 CHAIRMAN FARRAR: But they do get to amend
22 if they have not gotten documents that would have
23 helped them draw their pleadings properly?

24 MR. LEWIS: I think that is true always.
25 The one that that I heard that bothered me in this

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1 regard was that they felt that they had a right to
2 amend because of statements that were made by Mr.
3 Kinnerman in our response to a motion for stay.

4 And as to that I stay not necessarily. It
5 depends upon what we are using them for, and we are
6 using them at this time only to refute their motion
7 for a stay.

8 Now, I hear some laughter from counsel,
9 and I am not quite sure why. But in any event, I take
10 it as a serious point, whether he does or not.

11 CHAIRMAN FARRAR: And your point being the
12 motion for the stay gets much closer to the merits of
13 the proceeding than the standing and germaneness test?
14 In other words --

15 MR. LEWIS: Well, I think the motion for
16 a stay, as reflected in the amount of time that you
17 devoted and is set aside for does probably get to the
18 heart of things.

19 But actually the point that I was making
20 is that if we raise information for a certain purpose,
21 I don't think that automatically confers upon any of
22 the parties a chance to respond to it, unless we
23 choose to assert that that information relates to
24 germaneness and that's it.

25 CHAIRMAN FARRAR: All right. You urged

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1 that the first six of the areas of concern were in,
2 and do you still subscribe to that view?

3 MR. LEWIS: Our position is as stated. We
4 have no reason to change our position, and we are not
5 changing our position on any of those areas.

6 CHAIRMAN FARRAR: All right. Do you have
7 anything else that you need to tell us about?

8 MR. LEWIS: Well, what I would say is
9 this. That sometimes on the rhetoric on this subject
10 to me seems straight to the point, and so I will
11 emphasize what I think from the staff's point of view
12 is an essential point.

13 We are not opposed to areas of concern
14 that one can see, and that a person analyzing them can
15 see that they are logically related to the matter at
16 hand, and are understandable as to the degree to which
17 they have to be possible, probable.

18 I think that those matters really go to
19 the person addressing the facility in question, and I
20 think that is what takes care of those matters. If
21 they are addressing the facility in question, then I
22 think they are taking care of that issue.

23 CHAIRMAN FARRAR: Thank you, Mr. Lewis.
24 Mr. Thompson.

25 MR. THOMPSON: I guess I don't think that

1 the standard for getting in to a proceeding is so low
2 that if you hire a licensed attorney, and you come in
3 and you make statements, and they are based on
4 misinformation, and a total lack of understanding of
5 the regulations and the proceedings, that just because
6 you can make any statement that you could have
7 standing.

8 And then you can say, well, it is germane
9 if it is sort of generally in the area. I mean, it
10 seems to me that you can then continually amend your
11 pleading every time somebody points out that you have
12 got something sideways. That just is not right, and
13 that is not fair to the licensee and the applicant.

14 CHAIRMAN FARRAR: But you would agree
15 though that they can amend when they get new
16 documents?

17 MR. THOMPSON: Yes.

18 CHAIRMAN FARRAR: Okay. And you would
19 agree that the contentions rule has a much higher
20 threshold for getting it and we are way below that?

21 MR. THOMPSON: Yes.

22 CHAIRMAN FARRAR: Okay.

23 MR. THOMPSON: But as I said before, if
24 you are making contentions about things that simply
25 are not correct, such as the cooling water in the

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1 pool, which is not cooling water because there is not
2 a heat source.

3 The Commission has said that, and if you
4 are supposed to be a nuclear physicist, you look at
5 Cobalt-60 and you should know that it is not the same
6 thing as reactor fuel.

7 So if you look at these areas of concern
8 that are raised, transportation, first of all, IC does
9 not have transportation, and it is not under the --
10 the licensee doesn't do the transportation. It is
11 done pursuant to DOT and NRC regulations by the
12 licensee, who is the manufacturer of the seal source
13 in this case.

14 There are no allegations of accidents
15 involving transportation of cobalt-60 sources that I
16 am aware of, and so there has to be -- I mean, you
17 can't just say transportation. If you are going to
18 stay in the local area, you have to say, well, we are
19 going to have more trucks.

20 You can't just say that the truck is
21 carrying the cast and it is coming in that
22 neighborhood. That is not good enough. It is in a
23 cast that is designed to prevent any radioactive
24 exposure to the person driving the truck, much less
25 anybody in the neighborhood. So there has to be some

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1 plausibility.

2 CHAIRMAN FARRAR: Assume for the moment
3 that there is some plausibility, and you weren't just
4 suggesting that there is no law of agency going on
5 here?

6 In other words, if they are saying that
7 these things are coming in, you can't escape that by
8 saying, yeah, but it is not us bringing them in. That
9 is somebody else.

10 MR. THOMPSON: But they would have to say
11 that the regulations that apply to people bringing
12 them in somehow are not protecting them, and to do
13 that just by saying you are transporting radioactive
14 material, well, that doesn't fly.

15 I mean, Part 51 of the -- the preamble of
16 Part 51 says DOT and the NRC have looked at the
17 transportation of spent nuclear fuel, and it is not an
18 environmental hazard.

19 You have had a FONZI (phonetic) finding
20 here in this rule making addressing issues like
21 transportation, and you pointed out that if you are
22 going to say that this is a new design, it seems to me
23 that you need to say how it is new. This is an
24 underwater reactor or irradiator.

25 CHAIRMAN FARRAR: And how it is new and

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1 how it is bad.

2 MR. THOMPSON: And how it is bad. You
3 have got to say something. You have got to say, well,
4 there is a computer involved if the electricity goes
5 off, because as was pointed out, if the electricity
6 goes off, it just stops.

7 If it is down there, it stays down there,
8 and if it is over there, it doesn't get there. You
9 are not bringing the source. And the question of
10 dispersion in air and water, it seems to me that you
11 have to be able to say, like the mishandling of cobalt
12 rods could emit radiation into the air.

13 Now, what are we talking about here with
14 radiation? Are we talking about gamma rays from the
15 sealed source, or are we talking about radioactive
16 material in the form of cobalt.

17 Now, a worker who gets exposed to gamma
18 radiation can go off the site and won't expose anybody
19 any more than you do if you get a dental x-ray and you
20 go home.

21 If a worker somehow got into a sealed
22 source and contaminated material went out that is
23 another matter, but you have got to pose some sort of
24 credible or reasonably believably, and reasonably
25 plausible, thought about how this material is going to

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1 get out when it says non-dispensable and insoluble as
2 possible by definition.

3 CHAIRMAN FARRAR: Let me shift gears here,
4 and this would be a long and perhaps rambling question
5 and I apologize to the audience. Throughout your 50
6 page brief, you had enumerable references to why this
7 is not germane, that different issues are not germane,
8 because they don't pose a significant incremental
9 threat above and beyond previously approved R-36
10 activities.

11 MR. THOMPSON: Right.

12 CHAIRMAN FARRAR: And I think the only
13 citation you give us for that proposition is the White
14 Mesa case.

15 MR. THOMPSON: Yes.

16 CHAIRMAN FARRAR: Let me tell you how I
17 analyze the White Mesa case, and you tell me how I am
18 wrong, okay?

19 MR. THOMPSON: Okay.

20 CHAIRMAN FARRAR: And that was your case.

21 MR. THOMPSON: Yes.

22 CHAIRMAN FARRAR: Or of your 10 cases.

23 MR. THOMPSON: Yes.

24 CHAIRMAN FARRAR: And that was Judge
25 Rosenthal's case.

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1 MR. THOMPSON: There were a number of
2 cases.

3 CHAIRMAN FARRAR: Okay. But it was mostly
4 Judge Rosenthal.

5 MR. THOMPSON: Yes.

6 CHAIRMAN FARRAR: This is your client who
7 has a uranium recycling operation in Southeast Utah,
8 where he brings in waste streams containing uranium
9 for recycling purposes.

10 MR. THOMPSON: Yes.

11 MR. SUGARMAN: And the people in Utah hate
12 this, at least according to the press up there. They
13 don't like this. So every time your client brings in
14 a new waste stream, the people in Utah say, un-huh,
15 let's challenge not only the new waste stream, but the
16 whole operation of this facility.

17 MR. THOMPSON: Right.

18 CHAIRMAN FARRAR: And Judge Rosenthal, if
19 I am not mistaken, has said any number of times that
20 all they are talking about in this proceeding is the
21 incremental waste stream.

22 MR. THOMPSON: Yes.

23 CHAIRMAN FARRAR: I am not going to reopen
24 all the things that have been previously approved
25 about this operation.

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1 MR. THOMPSON: Yes.

2 CHAIRMAN FARRAR: Citizens may not like
3 them, but that has been approved.

4 MR. THOMPSON: Yes.

5 CHAIRMAN FARRAR: So we have the same
6 understanding of that case. How do you get from that
7 to calling what has happened here with this irradiator
8 previously approved, because the only people who have
9 been previously approved by is our client, who wants
10 to buy it from Grey Star, the staff, who has approved
11 it, but it has never been approved by us. So how do
12 you get previous approval out of it?

13 MR. THOMPSON: Well, it is my view that --
14 well, I recognize that there is a very narrow
15 distinction in the White Mesa case with the serious
16 things that we were dealing with, license amendments.

17 CHAIRMAN FARRAR: Right.

18 MR. THOMPSON: But it does not seem to me
19 that it is very differently. If you are talking about
20 a fundamental licensing action that does not -- that
21 addresses the fundamental requirements in the
22 regulations, and unless you are going to say that this
23 somehow is different in a way that poses an issue,
24 then I don't see how it is any different.

25 CHAIRMAN FARRAR: But rather than the

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1 petitioner's saying -- isn't all that they are saying
2 is that this does not comply with Part 36?

3 MR. THOMPSON: No.

4 CHAIRMAN FARRAR: Now, they may never
5 being able to prove that.

6 MR. THOMPSON: But they are not saying it.
7 They don't say it. They never say it. They just
8 through a whole bunch of stuff up against the wall and
9 see what sticks.

10 CHAIRMAN FARRAR: But one of the things
11 that you are entitled to do here is say that you can't
12 attack the Commission's regulations, but you can say
13 that this facility is faulty, and it is a defense for
14 you to say, but it complies with the regulation.

15 And I think the staff has said on the
16 decommissioning, the petitioners have made a
17 decommissioning argument, and the staff has said or
18 the regulation says come up with \$75,000 and that is
19 the regulation and that is all you have to do.

20 MR. THOMPSON: Right.

21 CHAIRMAN FARRAR: But other than the
22 things that you would throw out, I don't see how you
23 get there.

24 MR. THOMPSON: Well, I don't know how you
25 can allege dispersion in the air of solid metal that

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1 is doubly encapsulated without some plausible force
2 that creates this.

3 CHAIRMAN FARRAR: Do we have to assume
4 that the double encapsulation exists, and that there
5 is no possibility those welds could be faulty?

6 MR. THOMPSON: No, I wouldn't say that you
7 don't have to, but you have to come up with something
8 and say -- you just can't say it can disperse it in
9 the air. I mean, that's all we are getting; it can
10 disperse in the air and it can disperse in the water.

11 CHAIRMAN FARRAR: So unless they say we
12 want to challenge the -- even though these are
13 certified sources, we want to challenge -- we have a
14 whistleblower who told us that these welds are badly
15 done.

16 MR. THOMPSON: Well, that would certainly
17 be one example. Now on the other hand, we have agreed
18 here that an issue that was not really addressed in
19 the rule making was the terrorists, and I acknowledged
20 that was not addressed in that ruling.

21 Now, when you are talking about
22 electricity, you have to look at the irradiator that
23 we are talking about. We are not talking about an
24 irradiator where you lift the irradiator out of the
25 water in a room, and that is a panoramic irradiator.

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1 The Grey Star was ruled a panoramic
2 irradiator because you could technically get a man
3 into the radiation chamber, okay? Now if the
4 electricity goes off then, you have got the source out
5 of the water unprotected, and you have to have some
6 fail safe mechanisms.

7 But as you observed earlier, if the
8 electricity was off and the thing was in the source or
9 the plenum, nothing happens, whether that bell is down
10 there or on its way. It just stops.

11 So just to say the electricity, they have
12 not provided it, that is just a general conclusionary,
13 and it is not fair to subject somebody to that kind of
14 generalized allegation. You have got to have
15 something out of it.

16 And even if germaneness is a much lower
17 standard, or a different standard than contentions in
18 reactor proceedings, the risk is lower, too, because
19 you are not dealing with the same kinds of issues.

20 And I always thought that germaneness as
21 an issue before in reactor proceedings was because you
22 had proximity. So you got standing right away, and if
23 someone came in and say that I don't like nuclear
24 reactors, that was not germane.

25 CHAIRMAN FARRAR: Let me ask you this

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1 question, and in my opening remarks, which the
2 audience was polite enough not to say that they
3 couldn't hear, I pointed out the difference between us
4 and the staff and our independence from them.

5 MR. THOMPSON: Yes.

6 CHAIRMAN FARRAR: But what you are faced
7 with in this case is the petitioners have come up with
8 a number of areas of concern, and here is the staff,
9 which has approved your license, and yet the staff has
10 said that 6 or 7 of these areas of concern are valid.
11 And that is kind of what we would call in law an
12 admission against interests.

13 MR. THOMPSON: Right.

14 CHAIRMAN FARRAR: You say that your
15 irradiator is fine, but it looks to me like these are
16 valid challenges, and why shouldn't we put special
17 stock in that.

18 And not because they are the staff, but
19 because they are admitting something against their own
20 interests.

21 MR. THOMPSON: Well, I wondered when I saw
22 some of these things that the staff had run this
23 through technical review to be quite honest. Let's
24 take one. The cracking of the vessel containing
25 Cobalt-60; what is the vessel?

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1 It is asserted that the vessel containing
2 the Cobalt-60 would require continual water cooling
3 and may crack from loss of cooling. I don't know how
4 the staff could say that is germane.

5 It is so utterly based on misinformation.
6 It has absolutely no validity to it at all on its face
7 and it is clear.

8 CHAIRMAN FARRAR: And we should not read
9 into that what vessel they might be meaning?

10 MR. THOMPSON: Well, it would be nice if
11 they explained what vessel, but that is a reactor
12 term.

13 CHAIRMAN FARRAR: Right.

14 MR. THOMPSON: And that is continually be
15 confused here, and so that seems to me to be a perfect
16 example of one that as a technical matter has no
17 validity on its face, and therefore it is not germane.

18 CHAIRMAN FARRAR: And you also say on the
19 loss of electricity that is not germane because it
20 does not cause anything?

21 MR. THOMPSON: Right, and on the storage
22 of radioactive waste. We don't store any radioactive
23 waste at the facility. They don't explain where the
24 waste is generated and who is storing it. You can't
25 just make a statement like that.

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1 CHAIRMAN FARRAR: How about this notion
2 that either through some one or another mishap the
3 food that you are irradiating is lost into the pool
4 and clogs it up, and causes --

5 MR. THOMPSON: Well, first of all, I don't
6 know what clogging it up is. There are no drains and
7 there is nothing in the pool, and the bell has about
8 that much clearance all around, and once it goes down
9 there with the air, it is not going to.

10 And in fact what we have here is a little
11 difference in the pleading between what the
12 petitioner's experts have said, which is that the
13 cobalt in the plenum, that things could get messed up
14 because the product would -- you know without saying
15 what the product is or what form it is in the bell, it
16 could clog up, and I don't know what it could clog up.
17 But it could clog up something.

18 Whereas, the petitioners plead it as the
19 Cobalt 60 in the bell in both cases. Clearly the
20 Cobalt-60 is not in the bell, and that is not a valid
21 concern on its face.

22 I think there is still -- and I will
23 finish because I don't want to dress this out, but I
24 think that there has to be some -- and as Mr. Lewis
25 has suggested, some minimal level of specificity, of

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1 plausibility associated with these fundamental
2 standing and germaneness being shown, because it just
3 can't be anything that somebody throws up and says.

4 CHAIRMAN FARRAR: But the first thing you
5 have to do, even though the germaneness standard is
6 much relaxed from the contention standard, is to make
7 sure that the area mentioned fits with your facility.

8 MR. THOMPSON: Yes.

9 CHAIRMAN FARRAR: And you just used the
10 example of the Cobalt-60 and the bell, and that ain't
11 what happened.

12 MR. THOMPSON: That ain't what happened.

13 CHAIRMAN FARRAR: Okay.

14 MR. THOMPSON: And I might say that if you
15 go back and look at a number of these Subpart L
16 proceedings, there have been a number of them were
17 people were not granted standing or that all of their
18 issues were germane. So there clearly is and has been
19 a level above sort of thrown out on the table, and
20 let's roll.

21 CHAIRMAN FARRAR: And you would take
22 offense if we said to the petitioners, okay, you have
23 heard all these arguments, and now and then --

24 MR. THOMPSON: Yes.

25 CHAIRMAN FARRAR: That historically in

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1 these cases the petitioners get a second filed
2 document, and then they come in and they find out what
3 the proceeding is, and I think that Mr. Sugarman was
4 hired 2 days before he had to file his first document.

5 So they come in and historically Judges
6 have allowed them to amend once, but you are saying
7 they had that chance other than for new documents.

8 MR. THOMPSON: Right. Because there is a
9 fundamental fairness issue here for the licensee, and
10 it is also quite different, too, Your Honor, in some
11 of the cases that we were dealing with on some of the
12 other Subpart L things, where they were pro se.

13 And the Judges actually went way out of
14 their ways and said, look, here is what you have got
15 to show, and here is what you have got to plead, and
16 if they didn't plead it, they said you don't get it.
17 But here there is competent counsel, and they can't
18 keep amending. It is not fair.

19 CHAIRMAN FARRAR: Mr. Sugarman, I will
20 give you 5 minutes.

21 MR. SUGARMAN: I appreciate the suggestion
22 of the company, Your Honor, but I would refer to the
23 fact that I don't claim the physics degrees that Mr.
24 Thompson apparently has, and I make the point because
25 Mr. Thompson is telling you that Dr. Resnikoff, as a

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1 physicist, should know better. Well, who is Mr.
2 Thompson to tell Dr. Resnikoff that?

3 Dr. Resnikoff is a physicist, and this
4 Board has to at least deal with areas of expertise and
5 acknowledged expertise as maybe having something to
6 say that is worthwhile, and not being subject to
7 contradiction by a mere lawyer saying that it doesn't
8 make sense. Mr. Thompson reminds me of
9 my --

10 CHAIRMAN FARRAR: Wait, wait. Surely
11 after reading the plans that have been provided and
12 after being on the tour, I would have to throw out an
13 area of concern that says that cobalt in the bell
14 would be a problem, because there is no cobalt in the
15 bell.

16 MR. SUGARMAN: That's correct.

17 CHAIRMAN FARRAR: I don't have to be a
18 physicist to understand that.

19 MR. SUGARMAN: We are not saying that we
20 are error-proof, especially given the fact that they
21 withheld the documents until the very last minute and
22 we are operating on a moving train here.

23 So it really angers me to hear fairness
24 talked about when they still are not producing
25 documents and asking us to be specific. It reminds me

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1 of my daughter when my wife goes into the room and
2 says this room is a mess, and my daughter says prove
3 it.

4 You know, which article of clothing are
5 you pointing to to prove that this room is a mess. We
6 have an unavoidable mess. I say that non-
7 pejoratively, because anything of this complexity has
8 many, many aspects.

9 And so anybody, like my daughter, can
10 stand up and say give me a specific. Tell me which
11 article of clothing you are referring to. So what I
12 am saying to Your Honor is that Mr. Thompson does not
13 want Your Honor to see anything specific enough.

14 So that as an advocate, he simply is
15 saying that he does not see anything specific. But
16 the point that I -- well, where I do agree with him is
17 that there has to be something that is plausible. I
18 think that is a good test, and I think we meet that
19 test in all of our contentions.

20 And in talking about the effect of the
21 regulations, I want to get to that, and I don't have
22 much time, and Your Honor has been very patient. But
23 I want to point out a couple of things about the
24 regulations because they are very germane to some of
25 the questions that were raised.

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1 First off, the page where the reference is
2 to seismic regions requiring greater protection is the
3 same page, and it is down at the bottom, page 7726.

4 "The NRC decided that irradiators could be built in
5 any area of the country, but that irradiators in
6 seismic areas as defined in 36.2 would need" -- and I
7 don't have the next page, but it basically says
8 additional shields.

9 So I was right and they were wrong. So it
10 is their regulations and they work with them every
11 day. And if they meant to say that this is not a
12 seismic zone as defined in the regulations, and I have
13 addressed that issue, but that is not what they said.

14 They said there is no requirement for
15 seismic, and it is in the section under other
16 criteria, and it refers to page 7726. Now I would
17 like to turn to the electricity issue, and I promised
18 Your Honor that I would get back on that.

19 And Dr. Resnikoff addressed that at
20 paragraphs 21 to 24 of his affidavit in support of the
21 stay, and that was filed on September 4th. The dog
22 didn't bark. CFC did not respond to that allegation;
23 paragraphs 21 to 24, the effects of loss of
24 electricity in the stay motion were not responded to.

25 So where is their proof that Dr. Resnikoff

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1 is off-base? Dr. Resnikoff, in paragraphs 21 to 24,
2 expressly explains how the loss of electricity can be
3 a problem.

4 Now, in their reply brief to the staff,
5 CFC had several pages about loss of electricity, but
6 what they pointed to at one point was the fact that
7 they have complied with the emergency procedures in
8 paragraph 36.37, I think it is, in the regulations.

9 But in fact 36.37 of the regulations is
10 the section -- and if I have the right number -- that
11 says that you have to have a backup electrical source
12 for a prolonged outage, and that is what Dr. Resnikoff
13 cites, and they don't respond to that.

14 They simply don't respond to that. They
15 cite another section of the regulations that says you
16 don't need a backup electrical source to deal with
17 short term power failure, and that is 36.37. What I
18 should have said was 36.57, emergency procedures. It
19 is either 53 or 57.

20 Well, it is 36.53(b)(6); shall have
21 emergency or abnormal event procedures appropriate for
22 the irradiator type for Item 6, a prolonged loss of
23 electrical power. They say that it is not appropriate
24 to this irradiator type, but they have not shown that.

25 They have not shown that and that is a

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1 matter of proof. The issue is not whether they have
2 proved it, but whether we have enunciated a plausible
3 problem, and if you look at paragraphs 21 through 24
4 of Dr. Resnikoff's affidavit, you will see a plausible
5 scenario that would result from a loss of electricity,
6 namely the gradual heating up of the material,
7 including the so-called shield, which is the water,
8 through the eventual or the gradual build up of heat.
9 And then the risks that are associated with heat.

10 So there is your electrical scenario that
11 you asked me about before. Your Honor may disagree,
12 and I have no basis to disagree. I have to accept
13 what Dr. Resnikoff says, at least for purposes of
14 stating a plausible argument, and a plausible
15 pathway, and a plausible scenario.

16 So there it is. It is right there in
17 paragraphs 21 through 24 of his affidavit. They never
18 respond to it, and what they cite does not apply to
19 it.

20 The last point that I would make is the
21 FONSI policy. Mr. Thompson points out that there is
22 a FONSI on the regs. Yes, there is a FONSI on the
23 regs, and it goes right to the point that Your Honor
24 made to him earlier.

25 In the FONSI, they said this is not a

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1 procedure that determines the granting of any
2 licensees. We need not have an EIS, and we need not
3 have an EA, because this is not a procedure that
4 grants a license.

5 Well, that goes right to Your Honor's
6 point. The regulations were not meant to preclude
7 site specific issues, and Your Honor goes back to the
8 question, and I do have to remind you, that when you
9 say fit with the facility, most of the scenarios here
10 are a combination of facility design and outside
11 factors.

12 You can't isolate the facility in most
13 situations from the environment, and for example, the
14 accident, and for example, the transportation, and for
15 example, the terrorists.

16 The design of the facility is a relevant
17 factor, but it is not a sufficient factor to exclude
18 an area of concern in 99 percent of the cases. And
19 the last thing I want to say is that in regard to the
20 incremental point that Your Honor made.

21 I read that case and, yes, it does deal
22 with a change in the license of an already existing
23 facility, and it comes back to the point that I made,
24 and that Your Honor raised in questioning me, that it
25 is one thing to talk about incremental harm from a

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1 facility that has already gone through a licensing
2 proceeding.

3 It is nothing thing to talk about abstract
4 regulations and say that there has to be some
5 incremental harm, especially when there is not a
6 single word from the Commission that says that. Thank
7 you.

8 (Whereupon, at 7:47 p.m., the oral
9 arguments were recessed and resumed at 7:49 p.m.)

10 CHAIRMAN FARRAR: I will allow 60 minutes
11 for argument by the parties on the motion to stay. We
12 will keep to the times and I think I asked once for at
13 least a general statement of when these shipments are
14 coming in, and so we will start off with that, a brief
15 statement from you, and then, Mr. Curran, you can
16 argue the stay motion. So let's do a 5 minute break.

17 (Whereupon, the oral arguments were
18 recessed at 7:49 and resumed at 7:55 p.m.)

19 CHAIRMAN FARRAR: We have allowed 60
20 minutes for this portion of the argument. For the
21 benefit of the audience the next part of the argument
22 on the motion for stay, the classic standards are that
23 whoever is asking for a stay has to show a likelihood
24 of success on the merits, meaning that in this case
25 that they would ultimately win at the hearing.

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1 Second, that there is irreparable injury
2 to them if they don't get a stay. Third, you discuss
3 the injury to the company if a stay were granted; and,
4 fourth, you consider the public interests, which is
5 not what you the public think, but is there an
6 overriding public policy interest that would be
7 served.

8 So that is to help you understand the
9 argument that you will hear for the next 60 minutes.
10 Mr. Thompson, you had previously indicated that the
11 first shipment of source material in would not be
12 until the week of -- beginning Monday, September 22nd.
13 Can you fill us in then on some more detail on the
14 schedule without being so specific as to give away
15 information that we don't want to talk about?

16 MR. THOMPSON: All I can say is that at
17 this point is that I don't believe we have received
18 notice as to a specific date. They will notify the
19 NRC staff as soon as they receive that notice, and we
20 will make sure that the Board is notified.

21 As far as I know, the most specific
22 information I have is that it will not start out of
23 there until that week.

24 CHAIRMAN FARRAR: But are you bringing in
25 a million curies in the first week, or are you

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1 bringing in 17,000 per week? What are we dealing
2 with?

3 MR. THOMPSON: I have no idea.

4 CHAIRMAN FARRAR: Well, if I don't know
5 that, it makes it kind of hard to deal with a stay
6 motion if I don't know what we are trying to stay.

7 MR. THOMPSON: There will be one single
8 shipment, and it will be less than 1 million curies.

9 CHAIRMAN FARRAR: Less than a million?

10 MR. THOMPSON: Yes.

11 AUDIENCE: How much less?

12 CHAIRMAN FARRAR: I will ask the
13 questions. I know the next question and I don't need
14 the audience's help. How much less, because it makes
15 a difference. If we have got 17,000, then the injury
16 to the petitioners is less. If we have a million --

17 MR. THOMPSON: A third of a million.

18 CHAIRMAN FARRAR: Okay. All right. Ms.
19 Curran, let's cut your time down to 25 minutes, and we
20 will cut the others accordingly. In fact, if you can
21 do it faster, we would appreciate it.

22 MS. CURRAN: I will try. We believe that
23 the petitioner has satisfied all of the elements
24 required for a stay. The two most important of course
25 are the likelihood of success on the merits and

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1 irreparable harm.

2 And I just want to -- I would like to just
3 emphasize what I think is the relevance of the case of
4 the State of Ohio and Celebrasi versus the NRC, as it
5 is a very similar case to ours. The petitioner was
6 the State of Ohio, who wanted an opportunity to have
7 the impact on emergency plans that were being prepared
8 in the wake of Chernoble and an earthquake in Ohio.

9 And apparently the NRC had not provided
10 that opportunity and the court said that the affidavit
11 submitted by the State had listed deficiencies in the
12 emergency plan. The court found that, yes, indeed,
13 this is the kind of likelihood of success on the
14 merits that we are looking for, and we think we have
15 that here.

16 And I would also like to just jump to the
17 irreparable harm standard for a minute, because CFC
18 gave a quote --

19 CHAIRMAN FARRAR: What court was that?

20 MS. CURRAN: That wa the Sixth Circuit.

21 CHAIRMAN FARRAR: The Sixth Circuit.

22 MS. CURRAN: The CFC gave a quote from a
23 Wisconsin Gas Company versus FERC, and I can't
24 remember which circuit it is in, but 758 Activity 669
25 on irreparable harm, saying that the movant must

1 provide proof that the harm has occurred in the past,
2 and is likely to occur again.

3 The rest of that sentence reads, "or proof
4 indicating that the harm is certain to occur in the
5 near future." And as I think the court explained in
6 Celebrasi, the harm in this case is the risk.

7 We don't have to prove that there will be
8 an accident. We have to prove that there will be an
9 increased imminent risk, and I think that we have done
10 that here. So now I would like to move to the
11 substance of what we have to say.

12 First, I think there are three issues that
13 stand out for us in terms of our likelihood of success
14 on the merits, and in which CFC has made important
15 concessions or failed to address important issues, and
16 where the staff has also made concessions.

17 The first issue is security. We know that
18 the staff told the public in a meeting a couple of
19 weeks ago that the current situation with respect to
20 security at this facility is not adequate, and that
21 the NRC needed to impose better measures.

22 There has been a discussion about that so
23 far a little earlier, and I want to clarify my
24 understanding of this, because I think it runs a
25 little deeper than what you think, Judge Farrar.

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1 I think what is going on here is that the
2 access control regulations in Part 36 are not very
3 stringent, and it may be, and I don't know, but it
4 certainly is possible that CFC needs them, because
5 they are very limited in their scope.

6 They have to do with alarming the doors,
7 and making sure that someone finds out that there is
8 someone is coming in. And I think that everyone would
9 agree after September 11th that just doesn't do it
10 anymore.

11 And I am not privy to what has been
12 imposed by the NRC, but I would guess that whatever
13 measures there are probably envision a greater force
14 and more sophisticated situations.

15 So that is in the nature of amending the
16 license, and I think it is very notable that before
17 the license was issued the NRC staff acknowledged that
18 the license application was not sufficient to protect
19 against a 9/11 or post-9/11 threat.

20 They nevertheless granted the permit, and
21 then the day after they granted the permit, they sent
22 CFC a letter modifying CFC's license to impose new
23 requirements.

24 We think that is circumventing the public
25 participation requirements of the Atomic Energy Act.

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1 We think that we have a right to a hearing on whether
2 the security measures for this facility provide
3 adequate protection against a terrorist threat, and I
4 think that we have a likelihood of success on the
5 merits on that, a very strong likelihood.

6 CHAIRMAN FARRAR: A likelihood of success
7 in showing that the company has not measured up, or
8 there is likelihood that you can show enough that you
9 ought to get a hearing?

10 MS. CURRAN: Well, certainly that we ought
11 to get a hearing.

12 CHAIRMAN FARRAR: In other words, as I
13 understand it, the Commission itself is setting the --
14 at least that is what they said in the decision, that
15 they were going to set the terrorism related
16 requirements themselves.

17 I assume that the staff takes those
18 requirements seriously, and would therefore enforce
19 them fairly rigorously, and so given that, why should
20 we assume that you will meet your burden of succeeding
21 on the merits, and that these things that are supposed
22 to be done aren't being done.

23 And you can see where I am going here.
24 The first half of tonight's argument, your burden was
25 very light. You come in and you show that there is

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1 some germaneness, and this fits, and you kind of get
2 in.

3 Now the company says you don't get in, but
4 the test is pretty -- there is a low threshold for you
5 to get an area of concern admitted. It seems to me
6 reading the standards for a stay that now the burden
7 has shifted, and there is a very high burden on you to
8 show that not only will you get in and get a hearing
9 on this, but you are going to win that hearing.

10 Now, I know that you are at a disadvantage
11 because you have not seen these plans yet, but you are
12 almost asking me to assume that this is going to --
13 that the staff is not really going to enforce this.

14 MS. CURRAN: If you want to label this as
15 success on the merits by default, the staff and the
16 applicant have defaulted their obligations to handle
17 this matter in a licensing context in which we can
18 participate. And I think that --

19 CHAIRMAN FARRAR: Well, you still have an
20 opportunity to come in with an area of concern here, a
21 nd so I don't know how they have --

22 MS. CURRAN: Okay. Well, let's talk about
23 that, all right? The way the situation is right now,
24 this is being handled as an enforcement matter and
25 that is not at the same proceeding as this one.

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1 That's what I am guessing, is that this was done this
2 way.

3 So the first thing that we have to prevail
4 on then on the merits is --

5 CHAIRMAN FARRAR: Hold on. Is that right,
6 Mr. Lewis?

7 MR. LEWIS: Yes. It is an enforcement
8 proceeding, yes. It is an enforcement order.

9 MS. CURRAN: So the first thing we have to
10 prevail on is reversing that, and we can't go past
11 that for a little while. So I think that it is
12 appropriate to judge the likelihood of success on
13 that.

14 CHAIRMAN FARRAR: I don't get it, Mr.
15 Lewis. Help me out here. Why is this not -- I
16 understand that we are not going to deal with setting
17 these standards in these plans in a licensing
18 proceeding. But why was this not part of the
19 licensing basis for this facility that there be
20 compliance with whatever the Commission says the plans
21 ought to be?

22 MR. LEWIS: I am prepared to argue that,
23 but I do want to point out to Your Honor that I think
24 what Ms. Curran is referring to in terms of
25 probability of success on the merits is that she

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1 believes that she is going to win --

2 CHAIRMAN FARRAR: No, no, no, that is your
3 argument. I want to know why this was not part of the
4 licensing basis.

5 MR. LEWIS: Because the Commission has not
6 changed the licensing basis for this facility. The
7 Commission has articulated, and I don't have the
8 papers in front of me to quote to you, that until it
9 changes the regulations, it is taking interim steps
10 through orders, and those orders --

11 CHAIRMAN FARRAR: This is the Commission
12 and not the staff?

13 MR. LEWIS: The Commission, and the
14 Commission is the one that is making the
15 determinations category by category of facilities, and
16 so stating, and then orders are issued.

17 CHAIRMAN FARRAR: Okay. But if some
18 citizen says, un-huh, I can't challenge what the
19 Commission has done. The Commission has issued this
20 order, and this is going to be the Anti-Terrorism Plan
21 at this facility. Why can't a citizen come in and say
22 that is a great plan, but they are not following it?

23 MR. LEWIS: Well, they probably could say
24 that.

25 CHAIRMAN FARRAR: But not in this

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1 proceeding? They have to bring it in another
2 proceeding?

3 MR. LEWIS: Well, you know, I just don't
4 think that this proceeding -- I had not anticipated
5 that this proceeding today on whether or not the stay
6 should be granted would get into that point, and I
7 have to tell you that I am not prepared to argue it.
8 It seems to me that the motion --

9 CHAIRMAN FARRAR: Wait a minute. Of all
10 the claims in this case, Mr. Thompson has done a good
11 job of representing his client and saying those things
12 are not going to happen. We have this elegant design
13 of our facility, and those things you might have
14 worried about with a different irradiator aren't going
15 to happen.

16 But it seems that anti-terrorism concerns
17 are not something that the design of the reactor takes
18 care of, or I'm sorry, the design of the irradiator.

19 MR. LEWIS: The position that we have
20 taken is that we are asking the Board to rule on the
21 basis of what is set forth in our affidavit, and is
22 reflected in our response to the motion for a stay,
23 which is that the current regulations require certain
24 things related to access control. They are basically
25 in Part 20.

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1 And that is what we are asking the Board
2 to rule upon in this proceeding. Now, we are not
3 blind at all to the relevance of the order, and that
4 is why we made a Board notification. I am going to
5 stop right there and see what exactly it is that you
6 are asking me to comment on.

7 CHAIRMAN FARRAR: Go ahead, Ms. Curran.

8 MS. CURRAN: I would like to say one more
9 thing about that topic and move on. There is an
10 overall statutory standard, and I can't remember
11 exactly what it is for byproduct facilities. They are
12 all fairly similar.

13 But the NRC has an obligation not to
14 license a facility unless it finds that it can provide
15 protection of the public health and safety, and
16 protect the common defense and security.

17 We have got a case here where before
18 licensing this facility, the NRC said that it is not
19 a good enough license application, and gave it a
20 permit anyway.

21 If we are going to put our blinders on and
22 look at this application as it relates to the current
23 terrorist threat today, we are going to prevail on the
24 merits. There is no doubt about it.

25 And there is some finagling of the

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1 procedures going on here that I would like to get to
2 and straighten out, because this is not the only case
3 where it is happening. This is not the only case
4 where the NRC says an applicant has worked together to
5 remove security issues from the licensing hearing.

6 It is happening in the LTA proceeding for
7 Metag (phonetic) and McGuire, in which the applicant
8 says we are going to put in our revised security plan
9 on the side, even though we are going to be handling
10 plutonium.

11 CHAIRMAN FARRAR: You are not going to
12 cite the Private Fuel Storage case in Salt Lake?

13 MS. CURRAN: I know that it was happening
14 there, but we could mention another one.

15 CHAIRMAN FARRAR: Well, there we through
16 out a State contention because they said their
17 security plan was not adequate, and we said there is
18 not going to be any spent fuel there for a year-and-a-
19 half.

20 MS. CURRAN: Well, that is a little bit
21 different issue, I think.

22 CHAIRMAN FARRAR: Yes.

23 MS. CURRAN: In the Moux case, for
24 example, and which involves handling plutonium, the
25 staff said originally that we are going to judge the

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1 application against the revised design basis threat,
2 which has come out in the last year.

3 And then a couple of weeks ago, they made
4 an announcement in an oral argument that we are not
5 going to judge it against a revised design basis
6 threat. We are going to judge it against the previous
7 outdated regulation 73.1, and then later on we are
8 going to issue an order modifying their license.

9 So that is a practice that is going on
10 throughout the agency, and it is not just in this
11 case.

12 CHAIRMAN FARRAR: Oral argument in front
13 of whom?

14 MS. CURRAN: This was in front of Judge
15 Moore on August 5th. Okay. I would like to move on.
16 Another issue is the issue of a cast dropped accident.
17 I think that it is important to note there is no cast
18 dropped accident analysis in the application. None
19 has been done by the NRC staff.

20 There is or apparently there was an
21 analysis of a bell drop. A bell weighs about 4,000
22 pounds and a cast weighs 12,000 pounds, and another
23 difference is that the bell drop accident that was
24 looked at involved where the plenum was in the pool,
25 and we saw this today.

1 The source is in the plenum in the pool,
2 and the bell drops. We are talking about a different
3 accident here, where the plenum is empty and it is out
4 of the pool. And on one side of the pool is the
5 source, which is in -- I think they call it being in
6 a table.

7 Now, the cast can move over that source,
8 and the person who led the tour said that she would
9 never let it go there. But there is no physical
10 impediment to the cast going there. There is no
11 analysis of the potential that that cast could drop on
12 to the source.

13 CHAIRMAN FARRAR: And you are saying that
14 these should be just like reactor cases, where you
15 analyze all the possible accidents?

16 MS. CURRAN: Well, we analyze some
17 credible events, right? You don't analyze everything
18 that could happen. But certainly the did claim that
19 they analyzed a bell dropping, and they analyzed,
20 well, what if one of cables failed and the bell
21 dropped.

22 CHAIRMAN FARRAR: Okay. In reactor cases,
23 you analyze things with a certain probability of
24 happening, and we got into that in the BFS case that
25 you analyze things, and you don't worry quite so much

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1 about things, because the risk is lower with a spent
2 fuel facility than with a reactor.

3 And wouldn't it be infinitely lower here
4 than with a spent fuel facility?

5 MS. CURRAN: You know, I wish that Dr.
6 Resnikoff were here. He happens to be in Florida on
7 a family emergency and he would have been here if he
8 could have, but I think it certainly appeared
9 significant to me that the staff relied on a bell drop
10 analysis that they did, and a bell weighs 4,000
11 pounds.

12 Why they didn't do an analysis of a case
13 that weighs 12,000 pounds and it could actually fall
14 on the source, because an empty cast might be carried
15 over the source, and to me it seems like a very
16 significant question.

17 And also I don't know if the single
18 failure criterion applies, but I think it does. It
19 may apply to the cranes that handle casts, and so they
20 still need to do an analysis for that.

21 CHAIRMAN FARRAR: I think you said you had
22 three key points on probability of success on the
23 merits?

24 MS. CURRAN: Yes. Okay.

25 CHAIRMAN FARRAR: You have given us two of

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1 them.

2 MS. CURRAN: All right. The other one is
3 the loss of electricity accident. We strongly
4 disagree with Mr. Thompson that the heat up of the
5 source is not an issue, and I want to point to
6 paragraph 28 of Mr. Stein's declaration, where he
7 says there is no overheating of the sources under any
8 circumstance.

9 And I believe that CFC claims to rely on
10 the analysis that they did to support that. In fact,
11 the calculation that CFC did was based on 17,000
12 curies in 6,300 gallons of water. That does not even
13 pertain to the situation here.

14 The situation here involves a million
15 curies and air, and there is not an analysis of that.
16 Dr. Resnikoff set out a --

17 CHAIRMAN FARRAR: Say that again? You
18 just said a million curies in air?

19 MS. CURRAN: Right. If there is a loss of
20 electricity, the source is inside the plant in air,
21 and it is not in water.

22 CHAIRMAN FARRAR: Right.

23 MS. CURRAN: And there is a question as to
24 how long if there is no air circulating there, how
25 long it would take to begin to degrade.

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1 CHAIRMAN FARRAR: Degrade meaning?

2 MS. CURRAN: To eat up, I believe, and I
3 believe that this is addressed in Dr. Renikoff's
4 declaration.

5 CHAIRMAN FARRAR: Okay. Well, we will --

6 MS. CURRAN: And if you would like for me
7 to provide you with a citation of where this analysis
8 is by CFC of a source in water, the 17,000 curies in
9 water, I would be glad to provide that. I spoke to
10 him in Florida and he did not have it with him, and he
11 couldn't give me a page.

12 CHAIRMAN FARRAR: But it is somewhere in
13 the record of their application?

14 MS. CURRAN: Yes.

15 CHAIRMAN FARRAR: Yes, why don't you send
16 us that by Friday night if you could.

17 MS. CURRAN: By Friday night?

18 CHAIRMAN FARRAR: Yes.

19 MS. CURRAN: Okay.

20 CHAIRMAN FARRAR: Just the citation.

21 MS. CURRAN: Okay.

22 CHAIRMAN FARRAR: So these are your three

23 --

24 MS. CURRAN: Well, there were three things
25 -- security, accidents, and the final thing is lack of

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1 emergency procedures.

2 CFC concedes that they do not have
3 emergency procedures. There is two paragraphs in
4 which they say we do not have specific emergency
5 procedures.

6 CHAIRMAN FARRAR: And they say it where?
7 Find it and tell me on rebuttal.

8 MS. CURRAN: Okay.

9 CHAIRMAN FARRAR: Let's do the other
10 factors. You said the irreparable injury is
11 subjecting your clients to the risk.

12 MS. CURRAN: Well, they are related.
13 Taking into account the potential security threat,
14 first of all.

15 CHAIRMAN FARRAR: I thought there were
16 cases that said you have to have something more
17 substantive than a risk. It has to be something that
18 is going to happen to you. The highway comes through
19 and it is going to be there, and it is going to be
20 noisier, and they are going to take your house or
21 something.

22 MS. CURRAN: Well, if you look at the
23 State of Ohio, it says that the harm is the increased
24 risk, and I think that we have given you several very
25 concrete examples of an increased risk posed by this

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1 facility because it doesn't have adequate measures.
2 The analyses have not been done and security measures
3 have not been demonstrated.

4 CHAIRMAN FARRAR: Now, in the third
5 factor, you will concede if they make a case that
6 there will be some economic harm if the stay is
7 granted, and that is a factor we can consider?

8 MS. CURRAN: I think it is very limited,
9 the degree to which you consider it in general, and
10 the courts do not favor considering economic harm. I
11 believe CFC cited a case saying that the NRC does
12 consider it, but I think that you should also take
13 into account that it is generally disfavored, because
14 it is something that can be cured.

15 CHAIRMAN FARRAR: Well, cured by them
16 suing your clients for getting a stay that was
17 undeserved? I mean, suppose you get a stay, and then
18 you lose on the merits, and they said, wow, we lost
19 four months. We had to pay some forfeitures because
20 we couldn't meet our obligations, and then we lost
21 business.

22 That is remediable only if they turn around and sue
23 your clients for some kind of damages.

24 MS. CURRAN: Well, that was not the kind
25 of remediation that I had in mind.

1 CHAIRMAN FARRAR: I didn't think so.

2 MS. CURRAN: But the idea is that you can
3 recoup economic losses, but if you die, or if you get
4 sick, you can't fix that.

5 CHAIRMAN FARRAR: Okay. All right. And
6 public interest, there is no public -- well, I am not
7 talking about these good people and their interests,
8 the public interest in the case. There is no public
9 interest factor one way or another.

10 In other words, we don't have a plague of
11 bad food that the Food and Drug Administration is
12 saying we have got to get these irradiators up and
13 running as far as we can.

14 MS. CURRAN: No, I certainly don't.

15 CHAIRMAN FARRAR: There is a citizen's
16 interest. They don't want this for the reasons that
17 have been stated. There is the company's interest in
18 having it, but there is no overriding public policy
19 interest one way or the other on this is there?

20 MS. CURRAN: Well, if you look at the
21 cases involving NRC stay cases when they go up to the
22 courts, I think they tend to say that the public
23 interest is really the safety, which is protected by
24 the Atomic Energy Act. They are one and the same.

25 CHAIRMAN FARRAR: But if you are right

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1 that you have a probability of success on the merits,
2 that subsumes --

3 MS. CURRAN: They kind of blend together.

4 CHAIRMAN FARRAR: Right. But there is no
5 outside public policy that we are worried about?

6 MS. CURRAN: We have not raised that.

7 CHAIRMAN FARRAR: Okay. Ms. Curran, I
8 will give you a few minutes for rebuttal. Mr. Lewis.
9 Is Ms. Curran right that these accidents have not been
10 analyzed?

11 MR. LEWIS: I don't think that that is
12 correct. I think that the administrative controls
13 have been relied upon, and I think that accident
14 scenarios have been analyzed as the outlook had
15 considered to be appropriate.

16 CHAIRMAN FARRAR: Now we don't have --

17 MR. LEWIS: Well, outlook, that is not a
18 good word. That is not the word I even mean. There
19 are accident considerations, and there are emergency
20 procedures.

21 CHAIRMAN FARRAR: Where would we find in
22 the record that there are analyses? In other words,
23 over the last few months, you and the applicant have
24 had a lot of interchange of documents and information
25 requests.

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1 We don't have it in front of us, and we
2 would not necessarily have it in front of us at this
3 stage any of the countless analyses you or they did
4 would we?

5 MR. LEWIS: Well, can I have until Friday,
6 just as Ms. Curran did, to give you those exactly,
7 because I could spend my time trying to find them
8 right now.

9 The point about security is a point that
10 I want to emphasize, that a lot turns upon the fact
11 that there has been a lot of argument here based upon
12 a public meeting, where we can see such and such, and
13 such and such, which I was there and I don't think we
14 did. So to the best of my recollection --

15 CHAIRMAN FARRAR: I don't care what you
16 said at a public meeting. I want to know about the
17 merits of this case and whether it is in front of me.

18 MR. LEWIS: And that's right. And even if
19 we said it, the merits are addressed in Mr.
20 Kinnerman's affidavit, which is a matter of record.

21 CHAIRMAN FARRAR: But that is subject to
22 challenge.

23 MR. LEWIS: Of course it is subject to
24 challenge. but we have addressed it. And what we have
25 said is that the security requirements are X, and they

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1 are met.

2 CHAIRMAN FARRAR: And you are going to
3 check that they are met before any shipments come? I
4 know that some when you are an applicant that you
5 don't have a security claim, because there is nothing
6 happening.

7 If you have a license and they are telling
8 me that they may bring in whatever they said they
9 would bring in next week, or the week after next.

10 MR. LEWIS: We required in the licensing
11 that we get 5 days advanced notice.

12 CHAIRMAN FARRAR: No, no, at one point it
13 looked like they weren't going to have to comply with
14 the security plan until December, and counsel for the
15 petitioners said wait a minute. If they are going to
16 have stuff on site in September how can they not
17 comply with the security plan until December, and now
18 the company said we will comply by next week or
19 whenever.

20 MR. LEWIS: I'm sorry, Your Honor. I
21 misunderstood your question. I thought that you were
22 talking about compliance with the existing
23 regulations, but now I understand that you are talking
24 about compliance.

25 There will be NRC inspection of compliance

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1 with the compensatory measures in the order. I cannot
2 represent to you right now exactly what the date of
3 that inspection will be. But there will be an
4 inspection of it.

5 CHAIRMAN FARRAR: Don't give me the date,
6 but tell me whether it is before or after they start
7 bringing stuff in.

8 MR. LEWIS: I mean, I don't know the
9 answer.

10 CHAIRMAN FARRAR: Well, I have a stay
11 motion in front of me.

12 MR. LEWIS: Well, I will go back to my
13 Friday request. I mean, on things that I don't have
14 the answer, I will --

15 CHAIRMAN FARRAR: I understand that you
16 don't have the answer, but --

17 MR. LEWIS: Are you granting me that time?

18 CHAIRMAN FARRAR: Yes.

19 MR. LEWIS: Thank you. Let me go back to
20 my notes. I left my notes over here.

21 CHAIRMAN FARRAR: I guess while you are
22 walking away I will ask you this question. I don't
23 understand what is going on here. I went on vacation
24 a couple of weeks ago, and I knew that this case was
25 hot, and so I issued an order saying nothing happens

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1 in this case while I am on vacation unless you give us
2 24 hours notice so I can get my colleagues to help me
3 deal with it while I am away.

4 And all of a sudden the staff announces
5 without telling me that they are going to issue a
6 license the next day. Does anyone here read our
7 orders and know what is going on?

8 MR. LEWIS: Well, that was the one that
9 was addressed in the --

10 CHAIRMAN FARRAR: No, the staff was going
11 to issue the license, and they told the people we are
12 issuing the license tomorrow, in blatant disregard of
13 our order saying nobody does anything without giving
14 us 24 hours notice.

15 And I found out about that by -- well, I
16 don't know how I found out about it.

17 MR. SUGARMAN: There was a conference call
18 and I asked the question.

19 CHAIRMAN FARRAR: Right. Right.

20 MR. LEWIS: There was a conference call
21 and we said that the license was going to be issued --

22 MR. SUGARMAN: That is accurate.

23 MR. LEWIS: Let me finish. It was issued
24 the next day.

25 MR. SUGARMAN: Because His Honor told you

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1 to.

2 CHAIRMAN FARRAR: Okay. In the meanwhile,
3 now I have a stay motion in front of me, and the
4 staff isn't saying, wow, we have a stay motion here
5 and the company is starting to bring in stuff, and we
6 had better get that security plan in place and
7 inspected.

8 MR. LEWIS: Your Honor, we have not
9 accepted the argument, which is simply an argument, by
10 the petitioners that in order for these sources to be
11 brought in safely that order has to be in compliance.

12 In fact, the order allowed this licensee
13 until December 3rd, and all other licensees, until
14 December 3rd of 2003, to meet the requirement. Now
15 that was a considered decision by the Commission.

16 I would suggest to you that that meant
17 that they were willing to allow an implementation
18 period.

19 CHAIRMAN FARRAR: So if you were an
20 existing licensee doing business, you are complying
21 now with a previous Commission order, and the
22 Commission said here is a new order, all of you, even
23 though those of you who now have material on site have
24 a certain period to comply with it?

25 MR. LEWIS: Correct.

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1 CHAIRMAN FARRAR: So you are arguing that
2 we should say even though these people are just
3 starting out, they get the same implementation period
4 that the Commission gave everybody else, and that is
5 the answer to my question a moment ago that I didn't
6 understand?

7 MR. LEWIS: That is the answer to your
8 question.

9 CHAIRMAN FARRAR: But they have come back
10 and said we will be in compliance?

11 MR. SUGARMAN: Your Honor, at this point,
12 we don't know what they are going to be in compliance
13 with.

14 CHAIRMAN FARRAR: Well, in any --

15 MR. LEWIS: I believe I am the one who has
16 the podium.

17 CHAIRMAN FARRAR: Yes, that's correct.
18 But now Mr. Sugarman reminds me --

19 MR. THOMPSON: We are jumping all around
20 and this is getting out of hand.

21 CHAIRMAN FARRAR: Well, that is because I
22 am running it the way that I want to in order to get
23 the most information that I can, rather than the
24 classic oral argument where you listen to one side,
25 and then you have a question and you have to wait a

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1 half-an-hour to ask the other side. So I will run
2 things if that is all right with you.

3 MR. THOMPSON: Yes, sir.

4 CHAIRMAN FARRAR: It seems to me that if
5 the company can say that we are not going to take the
6 two months to get this done that the Commission has
7 allowed us to do in these documents that Mr. Sugarman
8 has not seen, and that the staff can get over there
9 and see if in fact that they have done it.

10 MR. LEWIS: And we may very well be able
11 to do all of that.

12 CHAIRMAN FARRAR: Well, I have a stay
13 motion, and I can't take what we may very well do.

14 MR. LEWIS: And I can't make statements to
15 you that I cannot state with confidence. I'm sorry,
16 Your Honor, but that is all I can do, and I will give
17 it to you as promptly as I can.

18 CHAIRMAN FARRAR: Okay. Go ahead.

19 MR. LEWIS: Thank you. There are two
20 other points that were emphasized, and I believe they
21 were the cast drop and the heat up of the water. As
22 to the heat up of the water, the staff has addressed
23 this to some extent in the affidavit of Mr. Kinnerman.

24 We would not take the position that there
25 is not going to be some heat up of water, and when I

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1 say some, the reason that I am emphasizing that so
2 much is that we are not to the best of my knowledge
3 talking about anything approaching a spent fuel rod
4 which has to cool for 5 years in a spent fuel pool
5 before it is considered for moving to a dry cast
6 storage.

7 We are talking about a cobalt source that
8 because it is so intense in terms of the radioactivity
9 that it gives off does have some residual heat
10 associated with it.

11 But we are now in the mode of considering
12 a motion for a stay. So the question becomes has the
13 petitioner provided information that shows that there
14 is a substantial likelihood that that water is going
15 to heat up in such a degree that there is irreparable
16 harm during this period of time.

17 CHAIRMAN FARRAR: Hold on one second.

18 (Brief Pause.)

19 CHAIRMAN FARRAR: Mr. Lewis, what do you
20 think about the petitioner's allegation that if these
21 analyses have not been done, and if plans have not
22 been implemented, that the risk alone is sufficient
23 irreparable injury? Not proof that something dreadful
24 will happen, but the risk.

25 MR. LEWIS: No, I do not agree. I think

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1 that --

2 CHAIRMAN FARRAR: Did they misread that
3 State of Ohio case?

4 MR. LEWIS: I am not going to specifically
5 address that case, but I am going to say that in this
6 area I think, as opposed to germaneness, the
7 probability of any particular thing occurring becomes
8 central.

9 I mean, I just don't think that you can
10 dismiss it in the area of a motion for a stay, and
11 with respect to heat up, the technical analysis that
12 is given in our affidavit indicates that we are
13 talking about months, and perhaps years, that you can
14 go without a source of electric power, and the heat up
15 can be readily addressed.

16 CHAIRMAN FARRAR: So they don't need
17 diesel generators?

18 MR. LEWIS: No. No, they need a garden
19 hose. The cast drop analysis, the information that we
20 have been provided on this -- and once again I think
21 that this is in Mr. Kinnerman's affidavit, but the
22 record will show if it is there or not. I don't have
23 that right in front of me -- is that the analyses that
24 were done by the licensee were driven by the operating
25 procedures they were going to use.

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1 And the operating procedures that they
2 were going to use per event, the cast, with the
3 replacement sources in it or new sources in it, from
4 moving over the sources, and that was discussed in
5 today's site visit.

6 Could something happen that resulted in
7 that not being met? Yes. Does it rise to the level
8 of believing that there is irreparable harm associated
9 with that event? I think not.

10 In order for that to have to happen, I
11 think that there would have to either be a serious
12 mechanical background, which could happen, or the
13 operators, whom we met today, would have to somehow
14 not properly stop the cast motion where it was
15 supposed to.

16 CHAIRMAN FARRAR: Let's jump to the third
17 factor. Do we consider in balancing this economic
18 harm to the company?

19 MR. LEWIS: Yes. And I believe they have
20 stated in documents on the record, but once again the
21 record will stand on those points.

22 CHAIRMAN FARRAR: And is there a public
23 interest factor different from the factors that we
24 have talked about so far?

25 MR. LEWIS: Not much. We basically

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1 analyzed the public interest factor with the --

2 CHAIRMAN FARRAR: But there is no separate
3 public policy implications that we are dealing with?

4 MR. LEWIS: The answer is that I will
5 agree with Ms. Curran's statement that I think
6 basically the public policy issues, when you were
7 talking about NRC actions, are driven by the
8 protection of public health and safety.

9 CHAIRMAN FARRAR: But we don't need this
10 irradiator to save the Nation from foul food?

11 MR. LEWIS: Well, I don't know whether we
12 need that or not. That may or may not be so.

13 CHAIRMAN FARRAR: That is enough of an
14 answer.

15 MR. LEWIS: And I was going to get into
16 other things, but I think we are totally beyond the
17 NRC's --

18 CHAIRMAN FARRAR: Well, we are running out
19 of time. Mr. Thompson.

20 MR. THOMPSON: I believe Your Honor hit it
21 on the head when you say that there may be a lower
22 threshold or a very low threshold, and I think that
23 there is a threshold, and I am sort of not getting the
24 feeling that you think there is a threshold.

25 But there certainly is a difference here.

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1 The burden of persuasion is on them, and it is a merit
2 space batter, and so making vague claims about 25 ton
3 casts that wouldn't fit there anyway, and that there
4 aren't any of, and that it is not a 12,000 pound cast,
5 all this stuff doesn't cut it.

6 You are going to have to show the
7 likelihood of winning on the merits, and now you have
8 got to at least show why you are not satisfying the
9 licensing requirements in the construction of this
10 facility.

11 For example, one of the licensing
12 requirements is the pool, and the pool has to have a
13 liner, a metal liner, and other design features.
14 Well, this pool has got a metal liner, 6 inches of
15 concrete and another metal liner; 3 feet of concrete
16 around that.

17 CHAIRMAN FARRAR: How is heat removed from
18 the facility during normal operation?

19 MR. THOMPSON: There is not any heat
20 generated. You just filling the pool. There is not
21 any significant amount of heat generated by this type
22 of source. It is under water, and if the source -- if
23 you ran out of water or something, that might be a
24 problem

25 CHAIRMAN FARRAR: So there is no

1 electricity needed to remove the heat?

2 MR. THOMPSON: No, and in fact, although
3 we did not address that, they were reporting from Dr.
4 Resnikoff's affidavit, and Mr. Stein's affidavit
5 addresses that issue and that was attached to our
6 brief.

7 CHAIRMAN FARRAR: Before I forget, let's
8 turn quickly to the last two factors. You are not
9 arguing that there is any public interest --
10 overriding public interest factor?

11 MR. THOMPSON: No, I would not say there
12 is an overriding public interest. I would say that
13 there appears to be a policy that the Department of
14 Agriculture is very much in favor of food irradiation
15 to help protect the public against E-coli and other
16 things.

17 People can have a choice between whether
18 they want to buy food that has been irradiated or not,
19 and so I am not going to dwell on that. I do believe
20 that we have set forth that there will be economic
21 harm.

22 CHAIRMAN FARRAR: Well, the economic harm
23 I found was a little vague. You said that because you
24 didn't, there are only a couple of suppliers who made
25 these sources.

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1 MR. THOMPSON: Right.

2 CHAIRMAN FARRAR: Because you could not
3 take them when you wanted to, they sold them to
4 somebody else.

5 MR. THOMPSON: Right.

6 CHAIRMAN FARRAR: But it was unclear to me
7 from the next sentence whether you were going to have
8 to wait a week to get some new ones or weeks, or 6
9 months.

10 MR. THOMPSON: We will not get our full
11 supply -- my understanding is that a full supply would
12 not be forthcoming for perhaps between 4 and 6 months.
13 It could be that long.

14 And of course that impacts what you can do
15 in the irradiator when you are operating. Now, I
16 think the test on irreparable harm -- and actually I
17 was going to add on as Ms. Curran did that the
18 Wisconsin Gas Standard, you have got to show that it
19 has happened before and it is likely to happen again,
20 or that it is certain to happen in the near future.

21 I mean, this is a whole another standard
22 of proof, and just questions about -- for example,
23 cast drops, Your Honor. Cast drops. There are under
24 water irradiators where casts have been loaded
25 regularly using similar procedures and if there had

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1 been all kinds of accidents, presumably there would
2 have been all kinds of analyses. These are regularly
3 done.

4 And by the way also I would mention that
5 with respect to casts loading into that pool, it is
6 not done from a computer console. The operator has
7 those controls right on the voice mechanism, and he is
8 standing -- he or she is standing right by the pool.

9 CHAIRMAN FARRAR: Let me ask you this.
10 No, go ahead.

11 MR. THOMPSON: I am just saying that it is
12 -- you know, now the time has come to show where we
13 fail on the regulatory requirements, and that there
14 really is a likelihood of winning this on the merits.

15 And if the regulations say that we satisfy
16 the requirements, and you find that we do, or it is
17 found that we may need to change something and that
18 license is conditioned on that, then we win, and they
19 don't win, and we get the license.

20 CHAIRMAN FARRAR: Let me ask you a couple
21 of questions. For purposes of our ruling on the stay
22 motion, we should go ahead -- it does not hurt you if
23 we go ahead and assume they have standing and that
24 some of their areas of concern are germane because
25 that does not get them where they need to get.

1 So if we assume that, they have the
2 heavier burden of saying and we are going to win on
3 some of those.

4 MR. THOMPSON: Yes.

5 CHAIRMAN FARRAR: Second, if the stay
6 motion is denied, you and your client understand that
7 anything you do is at your own risk? That is, if we
8 were to deny the stay motion, and you bring in the
9 source and you start operating it and irradiating
10 things, and 6 months down the road we have our hearing
11 and say that the petitioners win, you understand that
12 stuff comes out?

13 MR. THOMPSON: Of course.

14 CHAIRMAN FARRAR: Meaning that you don't
15 gain any credit by coming in now in the absence of the
16 stay and saying, oh, gee, can't make a stay, and get
17 out, because you let us bring it in. That is all at
18 your own risk; am I correct?

19 MR. THOMPSON: Yes. But if we are filing
20 a license application and following the rules and
21 convincing the staff, then 36.13 says if we satisfy
22 these requirements, we get a license.

23 CHAIRMAN FARRAR: Right, but we can stay
24 the effectiveness of it, or -- and we have two
25 choices. We can stay the effectiveness of it.

1 MR. THOMPSON: Yes.

2 CHAIRMAN FARRAR: We could stay the
3 effectiveness of it pending the outcome of our entire
4 proceeding. We could stay the effectiveness of it
5 temporarily until they bring in their evidence.

6 Or we can then let you move to dissolve
7 the stay if you felt that that evidence was not
8 substantial, or we could deny the stay, and you go
9 ahead, but then --

10 MR. THOMPSON: Yes, I understand that, but
11 it seems to me that it is tremendously prejudicial to
12 a licensee to temporarily stay it without a strong
13 showing that they are going to win on the merits, and
14 that it is going to happen, and there is a strong
15 likelihood -- it has happened before and it is going
16 to happen again.

17 And again we would point to the fact that
18 there is nothing in the record from them or anybody,
19 the NRC staff or anybody, pointing to a whole lot of
20 accidents involving casts and underwater irradiators,
21 and overheating, and electricity out, et cetera, et
22 cetera.

23 So as far as I am concerned, it would be
24 a grave injustice, and we would be in keeping with the
25 law of stays to grant a temporary stay unless they

1 really have satisfied this burden.

2 And based on what he has offered, a lot of
3 generalized and conclusionary statements, I don't see
4 how they possibly could satisfy either of the burdens,
5 the first two.

6 CHAIRMAN FARRAR: What do we do with the
7 stay motion if one of the reasons -- and assuming that
8 they have not met their burden, and one of the reasons
9 that they have not met their burden is they have not
10 had documents on time?

11 MR. THOMPSON: Well, first of all, I don't
12 know what documents we are talking about. The
13 Commission has made a decision to apply this not just
14 to this irradiator, but to all irradiators, and the
15 Commission says right in there in these materials what
16 do we do with new applications.

17 When they become a licensee, we issue new
18 safeguard orders, and they said they must think there
19 is adequate protection of public health and safety to
20 allow them this time until December 3rd to comply,
21 whether you are new or old.

22 And as we said, we will comply by Friday,
23 and we welcome the NRC to come by on Saturday and take
24 a look. And if we are deficient somewhere, then we
25 will fix it, and we will fix it before they bring the

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1 stuff in.

2 CHAIRMAN FARRAR: Okay. Thank you, Mr.
3 Thompson. Ms. Curran, I will give you about 2 or 3
4 minutes.

5 MS. CURRAN: Okay. I will be quick. First
6 of all, I think Mr. Thompson was making fun of us for
7 asserting about he 25 ton cast. The reason why we
8 said 25 tons is because the application says nothing
9 about specifications for the cast.

10 What kind of cast is going to be allowed
11 in here, nothing, and so Dr. Resnikoff, based on his
12 expertise, said 25 tons. It doesn't make much
13 difference. There is still nothing in the application
14 that says this cast is limited to 12,000 pounds, and
15 there is no analysis of the 12,000 pound cast either.

16 Okay. I think that by itself the security
17 threat here constitutes irreparable harm without
18 question.

19 CHAIRMAN FARRAR: But as I now understand
20 it, I have got a problem accepting your argument
21 because there is apparently a Commission order that
22 says here is how we are going to do it, and you know
23 after September 11th there was a big issue about what
24 we bring into licensing hearings, and the Commission
25 said we will handle this ourselves.

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1 This is not a subject for individual
2 proceedings, and for everyone to try to be dreaming up
3 what the terrorists will do, and so the Commission
4 says that they will do it.

5 Now, what I am told, if it is true, is
6 that they said here is what we will do. Existing
7 licensees and new ones have until December to get
8 their act in order, in terms of these new proceedings.

9 MS. CURRAN: Well, the question is this
10 question of likelihood of success on the merits, and
11 we may not succeed on the merits until we get to the
12 Court of Appeals. We anticipate that. Then there is
13 the question of irreparable harm.

14 CHAIRMAN FARRAR: Right.

15 MS. CURRAN: You were at that facility,
16 and that facility is right on the turnpike. It is
17 very vulnerable and it is very open, and there was no
18 sign of activity there to upgrade the old cyclone
19 fence around it. There was nothing. There was not
20 any kind of upgrade and that is irreparable harm to
21 us. We have no idea of --

22 CHAIRMAN FARRAR: Irreparable harm being
23 the risk to your petitioners who live near there?

24 MS. CURRAN: My clients' safety, and here
25 is another issue. Okay. We are all kind of assuming

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1 that these compensatory measures are very
2 prescriptive.

3 You know, thou shalt build "X" or "Y" and
4 very specific. Well, what if it is that you must
5 protect against "X" threat; and then there is a
6 question of, well, did they do what they needed to do
7 to protect against "X" threat.

8 You know, there is no way for us to
9 determine whether we are being protected or that my
10 clients are being protected in that event.

11 CHAIRMAN FARRAR: Ms. Curran, take about
12 30 seconds and wrap up.

13 MS. CURRAN: Okay. The Stein affidavit,
14 paragraphs 23 and 28, concede a lack of emergency
15 procedures, and also I found in Dr. Resnikoff's
16 declaration that Footnote 5 gives a citation to the
17 document, where CFC did the analysis of the 17,000
18 curies under water, and whether there was a heat
19 upburst.

20 CHAIRMAN FARRAR: All right. Thank you.
21 Here is what we will do. I will give everyone until
22 Friday to file with us and opposing counsel any
23 answers to factual questions that were asked tonight.

24 It would aid our deliberations if the
25 staff would see if Mr. Thompson's client does by

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1 Friday what he says he is going to do by Friday. I
2 don't know what -- and if he can't do that, then that
3 puts a different light on things.

4 The material is coming in beginning -- the
5 week beginning Monday, September 22nd, and I usually
6 don't make these kinds of promises, but we will have
7 a ruling on the stay motion by next Friday night. Not
8 2 days from now, but 9 days from now.

9 And we will not have our ruling on
10 standing and germaneness that quickly because we will
11 focus on the stay motion. I want to thank counsel for
12 their excellent presentations and their willingness to
13 handle things.

14 And for the extraordinarily good work that
15 you have done in filing an awful lot of papers quickly
16 the last 2 weeks. I thank the audience for their
17 coming up the road 20 miles to observe this
18 proceeding, and for their courtesies and decorum, and
19 we will have in 9 days a ruling on the stay motion.
20 Thank you.

21 (Whereupon, at 8:52 a.m., the oral
22 arguments were concluded.)
23
24
25

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CERTIFICATE

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

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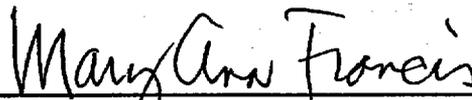
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Oral Argument of Counsel

Docket Number: 30-36239-ML

Location: Allentown, PA

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.



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