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

2 1:30 p.m.

3 ADMINISTRATIVE JUDGE FARRAR: Good
4 afternoon, everyone. We are here for a pre-hearing
5 conference in the CFC Logistics proceeding.

6 I'm Mike Farrar, the presiding officer.
7 With me is my technical assistant, Dr. Charles Kelber.
8 And if you are wondering how Amy got to be a Judge at
9 this age, she is not, she is our law clerk, Amy Roma.

10 We are here at the Hampton Inn for a
11 proceeding similar, Hampton Inn, very close to the
12 facility, for a proceeding similar to what we had in
13 the Allentown Courthouse. I see some familiar faces.
14 How many of you were there, in Allentown, three months
15 ago?

16 Glad to have you back again. Before I go
17 any further let me have the parties introduce
18 themselves. Mr. Sugarman?

19 MR. SUGARMAN: Robert Sugarman for the
20 Intervenor/Protestants. And I have with me Marvin
21 Resnikoff, as our scientific advisor.

22 ADMINISTRATIVE JUDGE FARRAR: All right.

23 MR. THOMPSON: Anthony Thompson, for CFC
24 Logistics, and Christopher Pugsley.

25 ADMINISTRATIVE JUDGE FARRAR: All right,

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1 thank you. A couple of procedural items to start
2 with. You will notice that the NRC regulatory staff
3 people are not here.

4 Under our rules they are permitted not to
5 participate in proceedings of this nature, and I'm
6 permitted to direct them to participate. They had
7 opted out early on in the proceeding. We directed
8 them to participate for the part of the proceeding
9 that went through, up to the arguments in Allentown.

10 They are participating in a couple of
11 issues, but the matters we will be discussing today
12 they are not participating in, and we will get to some
13 of that later.

14 I will repeat, those of you who were with
15 us in Allentown, I think I explained our role to you.
16 But when you think of the Nuclear Regulatory
17 Commission there is three different groups of people
18 you need to think about.

19 One is the five presidentially appointed
20 commissioners who run the agency. They have, working
21 for them, the large regulatory staff. Those are the
22 people who reviewed the company's initial application,
23 and issued the license.

24 We work for the Licensing Board Panel,
25 that is an entirely separate operation from the Staff.

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1 We are appointed by the Commissioners. They can
2 affirm, just like a court can, whatever we decide they
3 can affirm or reverse. They make the rules that
4 govern the proceedings, but they do not -- my pay
5 doesn't depend on what they think of me, they don't
6 give me performance reviews.

7 We are hired to be independent and
8 impartial, and to have no allegiance to the Staff,
9 much less to the company or the citizens.

10 Earlier today the company hosted a second
11 facility visit, in which some of the people in the
12 audience attended. We had had one of those early on,
13 but Dr. Resnikoff was unable to be there for that one,
14 and so we asked that the second one be hosted for his
15 benefit because, after all, he is the expert
16 representing the citizens, and we wanted to be sure he
17 had as much information as possible.

18 So we thank the company for hosting it,
19 and those of the Intervenors who were able to
20 participate. There was considerable conversation on
21 that site visit. I want to assure everyone,
22 particularly the people who were there, that our
23 ultimate decision in the case will be based on the
24 formal evidence that is put in before us, and not on
25 anything that was said today.

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1 Particularly I want to, Mr. Sugarman was
2 unable to be there, I usually don't like to proceed
3 with one side's lawyer and not the others, but I think
4 I appointed Kim to keep a good eye on things to make
5 sure that nothing untoward happened. And we are
6 delighted Mr. Sugarman was able to make it this
7 afternoon, and Dr. Resnikoff had his full opportunity
8 to see what he needed to see.

9 We are going to do, essentially, three
10 things today. First, just like we did in Allentown,
11 we are going to have oral arguments of the lawyers on
12 two different pending matters.

13 One is the renewed Stay Motion by the
14 Petitioners, and the second is a matter also raised by
15 the Petitioners, involving the discovery of certain
16 documents.

17 I had set each of those for ten minutes a
18 side. Mr. Sugarman, if you had been there today I was
19 going to give you both fair notice, but I didn't want
20 to give Mr. Thompson undue advantage. I think on the
21 Stay Motion we will up that to 20 minutes a side, much
22 of which, if you watched in Allentown, will be taken
23 up with my questions.

24 But we are the people who have to write
25 the decisions, and it is important for us to have a

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1 full understanding of it.

2 Second thing we will take up is the matter
3 of possible settlement of the case. And I know both
4 sides are saying how can you possibly settle this
5 case, the citizens don't want the irradiator, the
6 company does want it. I broached, with the parties,
7 in the last pre-hearing conference, an idea which I
8 would like to talk about further today.

9 Third thing, then we will take a break,
10 and then the third thing will be, those of you who
11 have been following the case know that we wrote an
12 opinion, back at the end of October, that set a number
13 of the areas of concern that the citizens had raised
14 did, indeed, warrant a hearing.

15 And so we will spend some time, after the
16 break, talking about those areas of concern, and
17 seeing if we can focus and narrow them, make sure both
18 parties know where we are going, so that the evidence
19 will be focused. That will probably be the least
20 interesting part of the proceeding for most of you.
21 That will get into a lot of technical issues.

22 And then at the end we will just make sure
23 there aren't any other open items that we have to
24 discuss. One further thing, I'm sure that even though
25 they are being as unobtrusive as possible, you notice

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1 the presence of the two state police officers. Sad to
2 say we all know that this is a different country than
3 it was a little over two years ago. And those are our
4 security people at headquarters, are the ones who set
5 up what our security is going to be, and I don't
6 second guess them. So we thank the officers for being
7 here, and we are sure at the end of the day we will
8 have had no need for them.

9 Any preliminary matters before we get
10 started, Mr. Sugarman?

11 MR. SUGARMAN: Nothing, Your Honor.

12 MR. THOMPSON: Are you going to address
13 the decommissioning and financial assurance issue? Or
14 we can do that in conjunction of what is germane.

15 ADMINISTRATIVE JUDGE FARRAR: No, that is
16 one of the issues that the Staff is involved in. So
17 I anticipate having a separate telephone pre-hearing
18 conference on that one, and on the security question.

19 At this point the Staff is participating
20 in the decommissioning bond issue, and in the security
21 plan issue. They couldn't be here today so we will
22 leave those, further discussion of those, to a
23 telephone pre-hearing conference, at a later point.

24 Mr. Sugarman, why don't you start with the
25 argument on the renewed Stay Motion?

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1 MR. SUGARMAN: Thank you, Judge Farrar.
2 We are approaching our renewed Stay Motion in the
3 context of your previous decision on the Stay Motion,
4 and the law that you set forth, and taking that as a
5 given, so that there is no need for us to brief the
6 legal standards for a stay.

7 We agree, or we accept the Board's
8 requirement that there be, primarily, an issue of
9 irreparable harm that is demonstrated as something
10 more than a theoretical risk, or a simple Cincinnati
11 analysis.

12 Rather we have here a concrete
13 manifestation of a serious potential for adverse,
14 substantial adverse effect on the public, and that is
15 what we are talking about in this case.

16 And, unfortunately, at an earlier stage we
17 didn't have the concrete evidence that raises the
18 risk, here, to a level that is a -- constitutes
19 irreparable harm.

20 Let me say this about the risk issue,
21 though. Obviously any stay implies that we are
22 protecting against something that hasn't happened. If
23 it had already happened we wouldn't have to have a
24 stay.

25 If the plant had already, you know,

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1 achieved a scenario by which there was considerable
2 dispersion and contention in the area, we wouldn't be
3 talking about potential, or likely, or probable
4 irreparable harm.

5 So we have to start with the proposition
6 that the harm has not yet occurred, otherwise we
7 wouldn't be talking about a protective stay. Now,
8 having said that, though, we are dealing with a
9 situation where harm is a reasonably anticipatable
10 event in this case.

11 And what do we have to support that beyond
12 the inherent risks of the facility, which we pointed
13 to earlier? One is we have the fact that this is a
14 developmental facility, it is a work in progress. And
15 we have, and it is really perhaps not germane to this
16 argument, but hard to avoid the fact that it is
17 incredible that the Commission staff never reviewed
18 that fact, by any document that is in the record.

19 And, therefore, we have to assume that
20 they didn't.

21 ADMINISTRATIVE JUDGE FARRAR: Do they have
22 the sales agreement in front of them?

23 MR. SUGARMAN: There is no evidence that
24 they had it. It is not produced either by way of the
25 ADAMS system, or by way of the confidential documents.

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1 And I did have the opportunity to ask Mr. Lewis that
2 question and he said to the best of his knowledge the
3 Staff never had the sales agreement.

4 If they had it they could not have reached
5 the conclusions that they did. And, in any event, the
6 status of this case is that there is no record that
7 the fact that this is an unfinished design has ever
8 been considered.

9 ADMINISTRATIVE JUDGE FARRAR: What do you
10 do with the company's argument that it is
11 developmental from a commercial standpoint, not a
12 safety standpoint? In other words, that it meets the
13 safety criteria but that in terms of how it is going
14 to function on a commercially profitable basis, that
15 is in flux, and that is why they call this
16 developmental or experimental.

17 MR. SUGARMAN: Well, that is simply
18 contrary to reality. The sales agreement is very
19 clear that this is a new type of irradiator developed
20 by Gray Star, and will require developmental
21 cooperation between the parties. That the exact
22 performance and specifications of the unit will not be
23 known until the prototype is installed and
24 operational.

25 Now, if the specifications are not even

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1 going to be known, until the prototype is installed
2 and operational, then there is no end date that is
3 defined for when the specifications will be known, let
4 alone conformance to the specifications.

5 The specifications of the unit is simply
6 not a term that can be confined to commercial
7 efficiency, or productivity.

8 ADMINISTRATIVE JUDGE FARRAR: But didn't
9 the Staff have, in front of it, plans and designs, and
10 drawings?

11 MR. SUGARMAN: Absolutely. And they are
12 defined as not yet final. They were preliminary
13 plans. We have a thing we call design build. Design
14 build --

15
16 ADMINISTRATIVE JUDGE KELBER: Do you mean
17 that the installation that is there now is not what
18 was licensed, is that your charge?

19 MR. SUGARMAN: Well, do I mean -- the
20 installation that is there now is a -- is
21 developmental.

22 ADMINISTRATIVE JUDGE KELBER: It doesn't
23 conform to the plans given in the license application?

24 MR. SUGARMAN: It conforms to the plans
25 that were presented in the license application but

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1 what the license application does not say is that
2 those plans are not final.

3 We don't have any evidence, when I say it
4 conforms, we don't have any evidence at this time.
5 Let me amend what I said. We don't have any evidence,
6 at this time, that it has yet -- that as of this
7 moment it deviates.

8 But, remember, it has deviated. We all
9 know that they modified the design to take out the
10 purge valve. So, yes, it may be back to where it was.
11 But it has already been modified. And that is further
12 proof of the fact that this is not a final design.

13 Now, if you want --

14 ADMINISTRATIVE JUDGE FARRAR: Let me
15 follow up on the point behind Dr. Kelber's question.

16 MR. SUGARMAN: Yes.

17 ADMINISTRATIVE JUDGE FARRAR: Assuming you
18 were correct that this is a changeable design and
19 plan, if in fact it was built to the specifications
20 the Staff reviewed, then you have, then whatever
21 people contemplated before hasn't happened.

22 And when they did do the business with the
23 valve it seems to me that the Staff landed on the
24 company and said, hey you can't do that.

25 MR. SUGARMAN: Yes, but --

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1 ADMINISTRATIVE JUDGE FARRAR: But the
2 thought now that this company is going to change the
3 design without staff approval, that is a -- that
4 previous change --

5 MR. SUGARMAN: No, it is -- we win either
6 way. We have to win either way. If the design change
7 was a bad change, then you've got proof that the
8 developmental status is going to entail
9 experimentation by the Applicant, or the licensee,
10 without approval of the Commission, because it has
11 already happened once.

12 ADMINISTRATIVE JUDGE KELBER: Did the
13 Staff say it was a bad change, or a good change, or
14 did the NRC Staff simply say you didn't follow the
15 right procedure?

16 MR. SUGARMAN: The NRC Staff, what they
17 said is a matter of record. And what they said is you
18 didn't submit an adequate justification for what you
19 did.

20 So you can call that procedural, I
21 wouldn't call it procedural. I would call it that
22 they don't have the homework to justify the change.
23 But let me --

24 ADMINISTRATIVE JUDGE FARRAR: What made me
25 more nervous about that change is that someone working

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1 on the company's side of things, subcontractor or
2 whoever it was, said, double hearsay, reported that he
3 said that the current design is not a good one, we
4 need this other one.

5 The company tried to put in that change
6 and the Staff says you haven't justified it, so now we
7 are back in the design and somebody is reported to
8 have said it is not adequate.

9 MR. SUGARMAN: Yes. The plenum supplier
10 stated that the damage that the proposed, that the
11 existing -- sorry, strike, let me start again.

12 The plenum supplier stated, and we know
13 this by report from the company, that the plenum
14 supplier stated that the existing present design that
15 is there today is unsafe, that it could cause
16 degradation of the plenum.

17 And they were worried about it causing --

18 ADMINISTRATIVE JUDGE KELBER: Do they use
19 the term unsafe, how did they describe it, would you
20 repeat that?

21 MR. SUGARMAN: They said degradation of
22 the plenum. Now, is that safe, or is it unsafe?

23 ADMINISTRATIVE JUDGE KELBER: Could you
24 give the whole context of that statement?

25 MR. SUGARMAN: They said it could cause

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1 degradation --

2 ADMINISTRATIVE JUDGE KELBER: I don't
3 remember the statement degradation of the plenum.

4 MR. SUGARMAN: If somebody can find it for
5 me, it is --

6 (Pause.)

7 MR. SUGARMAN: Oxidation of the sources.

8 ADMINISTRATIVE JUDGE KELBER: If somehow
9 stainless steel gets oxidized, and if the source
10 should then leak some radioactive material into the
11 air stream, or into the water for that matter, is
12 there a monitor to pick this up?

13 MR. SUGARMAN: Is there a monitor to pick
14 it up? There is a monitor, the monitor may or may not
15 be adequate.

16 ADMINISTRATIVE JUDGE KELBER: Why not, why
17 wouldn't it be?

18 MR. SUGARMAN: Monitors fail, they fail
19 routinely.

20 ADMINISTRATIVE JUDGE KELBER: I see, so
21 you have a sequence -- can you cite statistics that
22 radiation monitors fail routinely?

23 MR. SUGARMAN: They fail. I didn't say
24 radiation monitors fail routinely. But radiation
25 monitors have failed.

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1 ADMINISTRATIVE JUDGE KELBER: But that is
2 what I'm referring to, is radiation monitors.

3 MR. SUGARMAN: Well, how do we know that
4 this is -- radiation monitors fail. If you want to
5 confine it to radiation monitors, radiation monitors
6 I wouldn't say they fail routinely, but I would say
7 they fail, like any other mechanical system, they are
8 capable of failure.

9 They may also not be picked up on.
10 Suppose the monitor reports when there is nobody
11 there.

12 ADMINISTRATIVE JUDGE KELBER: We will get
13 to that. But what --

14 MR. SUGARMAN: Let me say this --

15 ADMINISTRATIVE JUDGE KELBER: -- is the
16 danger if the radiation monitor suddenly reads 1 MR
17 per hour?

18 MR. SUGARMAN: I don't know. It is a
19 danger, and if 1 is a danger, if 1 is not a danger,
20 then suppose it is 2? And if 2 is not a danger, then
21 suppose it is 3? At what point do we have to assume
22 that we are going to know exactly how much of a
23 malfunction it is going to be?

24 ADMINISTRATIVE JUDGE KELBER: Is there not
25 an NRC regulation as to the level of radiation that is

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1 permitted?

2 MR. SUGARMAN: Sure. But we are talking
3 about a possible accidental condition that causes that
4 level to be exceeded.

5 ADMINISTRATIVE JUDGE KELBER: What I'm
6 trying to understand is why you say this is an
7 accident. An accident, to my mind, is something that
8 develops rather rapidly, and requires immediate
9 attention.

10 And you are talking irreparable harm.
11 Now, it seems to me the situation that was discussed
12 here is one akin to what happens in nuclear power
13 plants, where some kind of fuel element starts to
14 leak.

15 And there are regular procedures, and it
16 is a reportable incident, but it is not an emergency.
17 There are procedures to isolate those fuel elements
18 and remove them.

19 I don't see the connection between this
20 and irreparable harm. That is the chain that I'm
21 looking for, and I'm not seeing.

22 MR. SUGARMAN: Well, I can't help what you
23 see or don't see. I mean --

24 ADMINISTRATIVE JUDGE KELBER: Can you make
25 it just a little clearer?

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1 MR. SUGARMAN: Well, if you look at Dr.
2 Resnikoff's affidavit in support of our second Stay
3 Motion, let me get my hands on it, dated November 6th,
4 2003, he is telling you that the, on paragraph 10, the
5 letter from CFC to the NRC dated September 24th raises
6 an issue not considered in my previous declaration.

7 The letter from Marie Turner to Mr. Lodhi
8 request modification to the plenum. The requested
9 change addresses the concerns that water may enter the
10 plenum. This would be a serious matter.

11 If the temperature of the source material
12 within the plenum, water would form steam, and would
13 carry out cobalt 60 part particulates. Steam could
14 degrade the HEPA filter allowing cobalt 60 to enter
15 the external environment.

16 These particulates would be caused, would
17 be inhaled by local residents, or deposited on
18 surfaces, causing a high direct gamma exposure.

19 ADMINISTRATIVE JUDGE KELBER: There is a
20 lot of coulds in there, but we will get --

21 MR. SUGARMAN: Well, I don't understand
22 what you want, what degree of certainty you want.

23 ADMINISTRATIVE JUDGE FARRAR: Well, what
24 we want is, to get a stay there has to be, one, a
25 probability of success on the merits. Let's assume,

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1 for the moment, that you are getting to that point.

2 But it also has to involve irreparable
3 injury. And as I read this double hearsay report, the
4 gentleman from Reviss was saying that under the
5 current situation a small amount of water on the
6 sources could lead to deposits that could possibly
7 affect the cladding of the sources.

8 As I read that, my understanding is that
9 is a long term situation that probably would not
10 transpire in the time it is going to take us to
11 resolve this issue on the merits in the ordinary
12 course.

13 So even if you are on the right track what
14 is the irreparable injury, the immediate danger, that
15 would require us to take action?

16 MR. SUGARMAN: Well, I have said what I
17 can say on that subject. It would certainly be
18 helpful, and relevant -- I would add this, it would be
19 helpful, relevant and possibly dispositive to know
20 what Reviss actually said, to CFC Logistics, and what
21 CFC Logistics said back.

22 ADMINISTRATIVE JUDGE FARRAR: I already
23 planned to ask that question.

24 MR. SUGARMAN: Well, as you know, I have
25 asked it several times, verbally and in writing, and

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1 I have been stonewalled by the company. And you have
2 properly said that you are not going to hold against
3 us the inability to know what we are not being told,
4 because documents are being withheld.

5 And to deny us the opportunity to know
6 what, in response to your question, and Dr. Kelber's
7 questions, as to what the precise scenario that Reviss
8 articulated, and stood behind. And, apparently, stood
9 behind fairly strenuously to require a change.

10 What that scenario was, and how fast it
11 would occur, is something that we are entitled, and
12 the Board should stay the license until it knows what
13 Reviss said.

14 Because you are being denied information,
15 and we are being denied information, it goes directly
16 to the point that you just are making, and Dr. Kelber
17 is making.

18 I don't understand why the NRC Staff
19 hasn't asked for that information. What is going on,
20 is everybody closing their eyes, sticking their head
21 under the sand? This is, among, besides there is
22 another statute involved here besides the Nuclear
23 Regulatory Act.

24 And that is National Environmental Policy
25 Act. And that applies to the NRC.

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1 ADMINISTRATIVE JUDGE FARRAR: Don't get to
2 that point, I want to follow-up on your previous point
3 and ask why hasn't the Staff asked for this info, can
4 I take that as an oblique suggestion that maybe for
5 this part of the case we should opt the Staff back in?

6 MR. SUGARMAN: Absolutely not. The Staff
7 is adding nothing to this situation. The Staff is
8 already showing an absolutely determined lack of
9 concern. And I would expect nothing from the Staff,
10 if they come in, other than to negate whatever the
11 serious concerns are.

12 I have no confidence in the Staff on this
13 matter. They've known about this for over two months
14 now. They have never reviewed whether the current
15 design is safe, let alone ask for the information from
16 Reviss.

17 ADMINISTRATIVE JUDGE FARRAR: You don't
18 want them in here so I can ask them that question?

19 MR. SUGARMAN: Absolutely not. Excuse me,
20 but I have no confidence in them, I think that they
21 are totally biased, they have made up their minds,
22 this is a facility that they are going to approve.

23 They have had every opportunity, they
24 don't need you to come in here, excuse me with all
25 respect to you, they don't -- speaking

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1 institutionally, they don't need you to come in, to
2 bring them here and ask them the question. They are
3 paid to ask that question on their own.

4 The fact that they haven't even expressed
5 any interest in the question, the fact that they
6 haven't taken any action in response to our producing
7 a copy of the sales agreement, shows that there is no
8 reason to have any confidence in the Staff.

9 ADMINISTRATIVE JUDGE FARRAR: I would have
10 thought they would have taken a position, leaving the
11 sales agreement aside for a minute, that when the
12 company made the change for the reasons Reviss said,
13 and then the Staff said no, you can't do that without
14 our permission, so the company undid the change, that
15 the Staff wouldn't have looked more closely at what
16 Reviss said and said, hey, that is a problem.

17 MR. SUGARMAN: Well, that is my point. So
18 why ask the Staff now to come in and say what they
19 have already implicitly said, which is we don't give
20 a damn.

21 ADMINISTRATIVE JUDGE FARRAR: In the
22 interest of time, I understand this part of the
23 argument. There are two other factors to get a stay.

24 MR. SUGARMAN: Right.

25 ADMINISTRATIVE JUDGE FARRAR: One is what

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1 is the injury to the opponent. And let's leave that
2 aside for a moment, because I will talk to them about
3 that.

4 The last one is what is the public
5 interest. The last time we talked about there being
6 no particular public interest factor extraneous to the
7 case. And so we didn't decide that one way or the
8 other.

9 Since then the company has put in
10 documents pointing out that other agencies of the
11 federal government, who have some degree of
12 responsibility for the nation's food supply, think
13 that getting some irradiators up and running is a good
14 way to improve the public health of the country.

15 Now, that is not for us to debate. But --

16 MR. SUGARMAN: Well, but I think it is, it
17 has to be debated to some extent in order for you to
18 pass on it.

19 ADMINISTRATIVE JUDGE FARRAR: That is not
20 within our jurisdiction to talk about. Yet if other
21 federal agencies with responsibilities for the food
22 supply are saying this would be good for the safety of
23 the food supply, can we give that any weight on the
24 Stay Motion?

25 MR. SUGARMAN: No, and I will tell you

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1 why. There is no indication, whatsoever, that there
2 is any shortage of capacity in the irradiation
3 industry to handle whoever wants to have their food
4 irradiated. That subject is not addressed.

5 Even if you assume that irradiation is a
6 good thing, there is no indication that there is any
7 shortage. And in any event it speaks to the process,
8 that is to say, the documentation is speaking to the
9 process of meat production, not to the need for this
10 irradiator.

11 There is no showing that there is any need
12 for this particular irradiator.

13 ADMINISTRATIVE JUDGE FARRAR: On that note
14 let's reserve you, you've used all your time.

15 MR. SUGARMAN: Well, can I just say
16 something about our chances of success on the merits?

17 ADMINISTRATIVE JUDGE FARRAR: Yes.

18 MR. SUGARMAN: Because that is one of the
19 criteria. This irradiator, I want to come back to
20 your point, because it is a crucial point, that the
21 company is making that this is an experimental, or
22 prototype, or developmental facility only
23 economically.

24 There is nothing, in here, that suggests
25 that. In fact we all know that there has never been

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1 an irradiator that has been built that operates like
2 this one does.

3 So to say that it is commercially, that
4 its only innovation is commercial, is to ask you to
5 close your eyes to the clear facts. This one operates
6 by virtue of the material moving around, and moving
7 bells around that casks around the material all the
8 time, and involves a lot more and different movement
9 than other irradiators.

10 It also involves a higher degree of curies
11 necessary to do the same amount of work because of the
12 water screen between the source and the move, and the
13 irradiated material, whatever it might be.

14 So there are clearly unique features of
15 this equipment. And the fact that the parties
16 themselves have provided for continuing modification
17 after installation shows that this is something that
18 is not final.

19 And that brings me back to the point that
20 I was on when I got off onto the valve change, which
21 is an excellent example of the point. But the fact is
22 that the Staff, whether it knew it or not, and it
23 doesn't really matter whether they knew it or not,
24 they approved something that was less than final.

25 And it may not have said on the plans this

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1 is less than final. And it may have looked like a
2 final plan, but it wasn't a final plan. And the final
3 plan says, the final plan is yet to be produced.

4 The company is still talking about what
5 the final plan is going to be. So why should we have
6 the community exposed to the unknown risks of an
7 unfinished design, in a situation where there is no
8 need for it?

9 So that goes not only to the issue of
10 irreparable harm, but it goes to our success on the
11 merits. And there is a lot of details to that, which
12 we will talk about when we talk about narrowing the
13 issues of why we are going to be successful on the
14 merits, because there are several scenarios that
15 derive from the fact that this is an unfinished
16 design.

17 ADMINISTRATIVE JUDGE KELBER: I have just
18 one more, not a question, but more of a comment. In
19 your written submission, I'm going back to the chain
20 of causality here --

21 MR. SUGARMAN: I'm sorry, sir?

22 ADMINISTRATIVE JUDGE KELBER: I'm going
23 back to the chain of causality.

24 MR. SUGARMAN: Yes, sir.

25 ADMINISTRATIVE JUDGE KELBER: In your

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1 written submission please explain the effects, you
2 said the steam might degrade the hepa filter. Please
3 discuss the effects on the hepa filter that is
4 installed, also on the pre-filter, and would not --
5 and discuss the extent to which the steam would be
6 condensed in traveling up the ventilation tube, and
7 the condensed, and the pre-filter.

8 MR. SUGARMAN: You are asking me to
9 address that?

10 ADMINISTRATIVE JUDGE KELBER: You can do
11 that in the written submission.

12 MR. SUGARMAN: Okay.

13 ADMINISTRATIVE JUDGE KELBER: Please cover
14 that, it will help me immensely.

15 MR. SUGARMAN: I appreciate that. Can
16 you, Dr. Resnikoff, can you get everything that Dr.
17 Kelber has said? Okay, great.

18 ADMINISTRATIVE JUDGE KELBER: Thank you,
19 sir.

20 ADMINISTRATIVE JUDGE FARRAR: Then let's
21 give you some time for rebuttal, Mr. Thompson.

22 MR. THOMPSON: Your Honor, as we, I think,
23 set forth in the affidavits attached to our response,
24 indeed this is a prototype in the sense that it is the
25 first one of these that has been built. We don't

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1 disagree with that.

2 But as we have indicated this machine and
3 all of the relevant respects of category 3
4 irradiators, meets the criteria for a category 3
5 irradiator. Do you have the irradiation alarms, do
6 you have the pool?

7 And as we have indicated in past
8 arguments, there are actually redundant features here
9 that many category 3 irradiators may not have. The
10 primary difference for this particular irradiator is
11 the plenum. And the plenum is designed to take the
12 sealed sources, which cannot be attacked in this
13 proceeding, because they are subject to certification
14 under rules, and so forth.

15 The plenum is designed to make this
16 irradiator more efficient by not leaving the source
17 array in the water, so that the water cuts down on the
18 ability, or the power to irradiate.

19 Now, during the presentation today, the
20 point was made that the top of the bell, and the
21 bottom of the bell are thick, but the sides of the
22 bell are not. And that is because they slide down
23 right next to the plenum.

24 There is no water in the plenum so that
25 doesn't degrade the irradiating capacity, and it

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1 provides a mean of irradiating commercial bulk
2 materials, which a typical category 3 irradiator, with
3 the array just sitting in the water down there, can't
4 do.

5 That is really the only difference. Now,
6 it doesn't change the fact that the seal sources are
7 the same ones that are used, and the same ones that
8 are used in category 4 irradiators, which are
9 routinely taken in and out of the water. And in other
10 category 3 irradiators these same types of sources are
11 in the water at all times.

12 What it does do is it actually provides an
13 ancillary benefit. And that ancillary benefit is it
14 actually provides an armor protection to the source
15 arrays that are stacked in the plenum.

16 The plenum is a heavy duty stainless steel
17 piece of material that is enough, you can drive, as
18 indicated today, you can drive a truck over it, and it
19 wouldn't even dent it.

20 So not only -- so the only real difference
21 is with respect to operating specifications, not
22 specifications of Part 36, or Part 32.10. It is
23 operating specifications because it is going to
24 operate in a plenum, it is going to be dry, it is
25 going to maximize the ability to irradiate bulk

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1 material.

2 ADMINISTRATIVE JUDGE FARRAR: Okay, so you
3 are saying that as you read this contract, and the
4 ancillary documents, the matter precise operating
5 specs are still for the company and the manufacturer,
6 and other subcontractors to work out, but that the
7 basic design was what was given to the NRC staff, and
8 blessed by the NRC staff?

9 MR. THOMPSON: That is correct.

10 ADMINISTRATIVE JUDGE FARRAR: I could
11 almost stop my thinking with that answer but for the
12 fact that we have this document from Reviss. Now,
13 granted, it is a double hearsay --

14 MR. THOMPSON: Right.

15 ADMINISTRATIVE JUDGE FARRAR: -- it is a
16 double hearsay document, it is the NRC Staff reporting
17 what one of the, Mr. Stein reported to them, about
18 what a guy from Reviss said. But he said that it
19 could possibly affect the cladding, and the system
20 without that valve is much better and safer.

21 Now, that may be an inaccurate
22 representation of what he said, he may not know what
23 he is talking about. But nowhere in your affidavit
24 were we able to find that you -- that your people were
25 able to dismiss that and say, don't pay any attention

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1 to it because --

2 MR. THOMPSON: Well, we don't believe that
3 is an accurate representation of what was said.

4 ADMINISTRATIVE JUDGE FARRAR: Okay. But
5 that is all I have in front of me.

6 MR. THOMPSON: Well, but as you said, it
7 is double hearsay. What use is that? You can't fly,
8 you can't use that.

9 ADMINISTRATIVE JUDGE FARRAR: Wait, wait,
10 wait --

11 MR. THOMPSON: You can't rely on that,
12 sir.

13 ADMINISTRATIVE JUDGE FARRAR: Wait.

14 MR. THOMPSON: Yes.

15 ADMINISTRATIVE JUDGE FARRAR: Mr.
16 Sugarman, are you going to respond?

17 MR. SUGARMAN: I'm going to object. I
18 don't know if your procedures allow for an objection,
19 but I can't believe that Mr. Thompson wants to ask you
20 to accept the factual representation by him, when he
21 has the document that would allow you to determine
22 whether it is true.

23 ADMINISTRATIVE JUDGE FARRAR: Mr.
24 Sugarman, this is oral argument, you have been in many
25 oral arguments, and it is not evidence. I'm asking him

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1 questions and --

2 MR. SUGARMAN: Yes.

3 ADMINISTRATIVE JUDGE FARRAR: -- he gave
4 you the courtesy.

5 MR. SUGARMAN: Absolutely.

6 ADMINISTRATIVE JUDGE FARRAR: You said
7 what you wanted to, so we are going to give him the
8 same --

9 MR. SUGARMAN: If I'm out of order, I will
10 wait. Thank you.

11 MR. THOMPSON: I believe we addressed it
12 in one fashion, in saying that the question that
13 Reviss raised was a warranty question about whether to
14 characterize it as a dry or wet environment, okay?

15 ADMINISTRATIVE JUDGE FARRAR: And that
16 part, as far as it went, that made sense to me. But
17 that doesn't take away from what the fellow actually
18 said.

19 MR. THOMPSON: But where is the --

20 ADMINISTRATIVE JUDGE FARRAR: This is --

21 (PaUse.)

22 ADMINISTRATIVE JUDGE FARRAR: Sattar
23 Lodhi, that is how he pronounced his name, did a memo
24 of phone calls he had where Mr. Stein reported to him
25 that somebody from Reviss said the following. That is

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1 characterized as double hearsay.

2 It may not be true, but I can't decide a
3 case with something like, with a red flag like that
4 sitting there and say, well maybe it is not true. I
5 need somebody to --

6 MR. THOMPSON: Well, what --

7 ADMINISTRATIVE JUDGE FARRAR: -- tell me
8 it is not true.

9 MR. THOMPSON: No, back up one second,
10 sir. Let's take a look at what the specifications are
11 for the sources, okay? We are using exactly the same
12 kinds of sources, correct?

13 ADMINISTRATIVE JUDGE FARRAR: Right.

14 MR. THOMPSON: And in other category 3
15 irradiators they are under water all the time. Now,
16 whatever that guy from Reviss said, it doesn't make
17 any sense, it doesn't make any sense at all --

18 ADMINISTRATIVE JUDGE FARRAR: Okay. But
19 I would have preferred, instead of you telling me here
20 today that it makes no sense, that one of your experts
21 have said we have analyzed that statement, we have
22 talked to the gentleman, he says he didn't make the
23 statement. Or, in fact, he made the statement, but it
24 is not true, because here is what our expert says.

25 Now, this may not be true but as we review

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1 the record it is a red flag.

2 MR. THOMPSON: We have letters from Reviss
3 saying they are satisfied that the sources will
4 operate in a dry environment.

5 ADMINISTRATIVE JUDGE FARRAR: I have no
6 doubt about that, and we knew some time ago they can
7 operate dry, they can operate wet. But this fellow is
8 making a statement that he is concerned, and somehow
9 we have to clear this up.

10 And as I said to the people before, we are
11 impartial, we don't care which way it is. If it is
12 true we are fine, if it is not true, we are fine. But
13 we can't leave a statement like this sitting here
14 unaddressed.

15 Well, maybe there is a reason that we can
16 leave it unaddressed, which you are welcome to tell
17 us.

18 MR. THOMPSON: Well, I think I just said
19 why you can leave it unaddressed, because these people
20 sell these sources, and they are designed to operate
21 in water, and in air. And so that statement makes no
22 sense.

23 ADMINISTRATIVE JUDGE FARRAR: So you are
24 saying that even though the statement isn't attached
25 directly, there is other evidence in the case that

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1 said this fellow maybe had dealt with other systems,
2 but he didn't know what he was talking about with this
3 system?

4 MR. THOMPSON: Whatever, he didn't know
5 what he was talking about with the sealed sources,
6 because they have to go through all the tests, and
7 they are created to be able to survive in both a wet
8 and a dry environment.

9 ADMINISTRATIVE JUDGE FARRAR: Okay. But
10 why doesn't that give me pause, because here is a
11 fellow from Reviss, and Reviss is a key player in the
12 continuing operation to get this irradiator up and
13 functioning?

14 You know, this is not a person who came in
15 off the street and said, here is what I think. Well,
16 we don't care what he thinks. This is a person with
17 a reputable organization that is a key player in this
18 whole set up. That is my problem.

19 MR. PUGSLEY: Could I have a moment, sir?

20 ADMINISTRATIVE JUDGE FARRAR: Yes. And
21 while you are taking that moment, I forgot to, at the
22 beginning thank Martin Russel Stein from the
23 irradiator manufacturer, Gray Star, who were there on
24 the site visit. He was very helpful.

25 And I also forgot to introduce our

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1 administrative support person, Karen Valloch over
2 here.

3 MR. THOMPSON: Mr. Stein can address this
4 issue, if you wish.

5 ADMINISTRATIVE JUDGE FARRAR: Yes, but the
6 time -- we are not taking live testimony today.

7 MR. THOMPSON: So we can file an
8 affidavit?

9 ADMINISTRATIVE JUDGE FARRAR: You
10 understand my problem? I have a statement here that
11 Mr. Stein can look at and say, that is crock. I'm not
12 supposed to say that in the hearing. But until he
13 says it, I don't know it.

14 And if you can't point to some evidence,
15 or an affidavit, I'm sure Mr. Sugarman is right, I
16 can't take it from you. So we need that in the
17 record, somehow.

18 This gets to my further question. I will
19 ask you the same question I asked Mr. Sugarman. Is it
20 time for us to opt the Staff back in here? Because,
21 frankly, I'm concerned that a document like this
22 exists in the file, and just sits there, and the Staff
23 does nothing with it.

24 Is it time we get them in here and --

25 MR. THOMPSON: We don't have a problem

1 with the Staff coming back in.

2 ADMINISTRATIVE JUDGE FARRAR: Go ahead.
3 So your position on this, even though you don't have
4 legally -- well, no, your point is I can read other
5 things in the formal evidence, and conclude that this
6 guy didn't know what he was talking about?

7 MR. THOMPSON: Yes.

8 ADMINISTRATIVE JUDGE FARRAR: Okay.

9 MR. THOMPSON: And there is nothing new,
10 essentially, other than raising the question of the
11 prototype, which they also raised in the last
12 statement. They said it was new, untested, untried.

13 So that has already been looked at. All
14 he did was harp on the contract language now, and
15 raise it again. The rest of the issues that they've
16 raised here are the issues that in Dr. Resnikoff's
17 affidavit, are all essentially the same issues that
18 were raised in the last statement, there is nothing
19 new.

20 In fact I'm not even sure why they got a
21 chance to file the second Stay Motion, because it
22 doesn't seem to me that Subpart L, during the pendency
23 of adjudication, gives them the opportunity to file
24 the second Stay Motion.

25 ADMINISTRATIVE JUDGE FARRAR: I think in

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1 denying the first Stay Motion we had said that it goes
2 without prejudice to them filing a new one if
3 circumstances changed, or at the time they filed their
4 written evidence, which has not happened. I think
5 they are coming in under a change of circumstances,
6 discovery of these documents.

7 MR. THOMPSON: But I guess I'm a little
8 confused because I don't see anything in the
9 regulations that references changed circumstances.
10 Now you denied their initial motion and --

11 ADMINISTRATIVE JUDGE FARRAR: Right.

12 MR. THOMPSON: -- and said, okay, file
13 again after the license is issued, which they did.
14 And they get to file, at the time the hearing request
15 is filed, or within ten days of the Staff's action.

16 And you are granting a hearing in
17 standing, and your decision to grant a hearing and
18 give them standing on certain issues, and germainess
19 on certain issues, doesn't seem to me to be a Staff
20 action that is covered by 2.1263.

21 ADMINISTRATIVE JUDGE KELBER: You made a
22 statement before about category 3 irradiators. Do you
23 happen to know how many there are in the United States
24 that are category 3 irradiators, where the sources are
25 in the water all the time?

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1 MR. THOMPSON: I do not, but we will be
2 happy to provide that information: We can check on
3 it.

4 Let me just address the check valve issue,
5 too, since it seems to be a point of substantial
6 contention.

7 ADMINISTRATIVE JUDGE FARRAR: Let's get
8 back to that Stay Motion that you just cited. You
9 think that is not just a general rule, you think that
10 is intended to -- no matter what facts emerge, that is
11 intended to foreclose the Stay Motions?

12 My impression of Stay Motions, generally,
13 is you can file them whenever you have grounds for
14 them, if you meet the four criteria which are hard to
15 meet. But do you think that is a limitation that we
16 get one shot at a Stay Motion --

17 MR. THOMPSON: In a subpart L hearing.
18 And I don't know what changed circumstances are and I
19 suppose, Your Honor, we could think up that there was
20 some cataclysmic event, or something, that would --
21 that could probably provoke regulatory action, and you
22 wouldn't need a stay to have intervention by the NRC.
23 That is a question that we had.

24 On the check valve, I think it is
25 important to understand that the valve was removed

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1 prior to the license being granted. They wanted to
2 see if they could get this changed and the Staff said
3 we don't have time to do it.

4 The check valve was replaced prior to the
5 time when the AEA nuclear materials arrived at the
6 site. Now, even though the license had been issued,
7 there was nothing at the site for NRC to regulate
8 until the source materials got there.

9 And, therefore, that is why there wasn't
10 any violation.

11 ADMINISTRATIVE JUDGE FARRAR: Right, I
12 understand that there may not have been a violation.
13 I understand there were no materials on site. But it
14 doesn't fill me with confidence about the process that
15 is being followed, that somebody thought that after
16 submitting plans, and getting them approved, you could
17 change parts without Staff approval.

18 Because, as you know from your experience,
19 somebody may say it is a great idea to change this
20 part, but they don't follow through what all the
21 ramifications of that can be. And the fact that the
22 company went ahead and did this --

23 MR. THOMPSON: They did some
24 experimentation without any materials on site. I
25 don't characterize it the same way you do. They

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1 wanted to see if the Staff had enough time to address
2 a potential change. The Staff said we don't have
3 time, we don't have enough information, fine.

4 Before any materials got there --

5 ADMINISTRATIVE JUDGE FARRAR: Or they had
6 to do the change to see if, in fact, they wanted to do
7 the change?

8 MR. THOMPSON: Yes, they wanted to
9 experiment. And there is nothing that says that --

10 ADMINISTRATIVE JUDGE FARRAR: Because
11 thank you might have done the change and said, this
12 doesn't make any sense --

13 MR. THOMPSON: It doesn't make any sense
14 at all.

15 ADMINISTRATIVE JUDGE FARRAR: -- and it
16 never applied to the --

17 MR. THOMPSON: Exactly. And Mr. Sugarman
18 says experimentation involves unknowns. That is true,
19 but different kinds of experimentation involve
20 different unknowns. The unknowns are pretty well,
21 pretty narrow here, when you are just talking about a
22 valve that is a way to purge water from the system, or
23 something that plugs it up and you purge it through
24 the top.

25 I mean, it wasn't changing the plenum, it

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1 wasn't changing the sources, or anything of that
2 nature. It was merely some experimentation. And they
3 could have determined this was not a good idea.

4 So I don't think they were flying in the
5 face of the Staff. They did contact the Staff. So I
6 don't want it to be characterized as some sort of
7 middle of the night messing around.

8 And I don't believe and I think, frankly,
9 that licenses are living things. I mean, I would
10 suspect that over time they may find other things that
11 they want to do to the design, which if there is
12 another irradiator someplace else, they may come in
13 with slight differences to the design, they may want
14 to come back and modify something here.

15 They will have to get approval, but
16 licenses are living things. And if you can increase
17 your efficiency without decreasing safety, or in fact
18 if you can increase safety, NRC wants you to do it.

19 ADMINISTRATIVE JUDGE FARRAR: Let me,
20 before I ask you the next question, let me ask Mr.
21 Sugarman something.

22 What precise remedy, when you ask for a
23 stay, in the peculiar circumstances we have here, what
24 is the precise remedy? Don't argue in favor, just tell
25 me what the precise remedy you are asking for is.

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1 MR. SUGARMAN: Well, we ask for a stay of
2 the license.

3 ADMINISTRATIVE JUDGE FARRAR: Suppose we
4 granted that, what would the company have to do? The
5 radioactive material is on site, it is in place. And
6 whether or not they are passing product past it, it is
7 continuing to emit radiation.

8 MR. SUGARMAN: What we asked was that
9 deliveries and use of cobalt be stayed. Now, I
10 understand your question to be what else would we
11 suggest be added to that. Which we didn't exactly
12 propose.

13 And what we would propose is that the
14 company disclose the reasons why Reviss requested --

15 ADMINISTRATIVE JUDGE FARRAR: No, no. If
16 I grant you a stay, which --

17 MR. SUGARMAN: Right.

18 ADMINISTRATIVE JUDGE FARRAR: -- the
19 company shall not do this, and they shall do this.

20 MR. SUGARMAN: Right. Well, we only ask
21 what they shall not do. But I'm responding to your
22 question.

23 ADMINISTRATIVE JUDGE FARRAR: No, no, you
24 are saying they shall not receive additional cobalt?

25 MR. SUGARMAN: Right, and shall not use

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1 it.

2 ADMINISTRATIVE JUDGE FARRAR: Well, shall
3 not use it can be like a vain act. In other words, if
4 we tell them you can't pass product past it, that
5 doesn't change the fact that the cobalt is there
6 emitting radiation.

7 MR. SUGARMAN: No, it doesn't. But what
8 it does do is it reduces the potential for operational
9 incidents, or occurrences. Because one of the
10 scenarios would be that the clogging of the air
11 filters would entail the potential for water into the
12 plenum.

13 ADMINISTRATIVE JUDGE FARRAR: Well, then
14 the answer to my question is you are not asking them
15 to remove the cobalt that is on site? Or you did not
16 ask in this document for them to do that?

17 MR. SUGARMAN: Well, that would be an
18 option.

19 ADMINISTRATIVE JUDGE FARRAR: Well, you
20 didn't ask --

21 MR. SUGARMAN: To remove the cobalt would
22 be an option. And we would leave that to the Board as
23 to whether the cobalt should be removed, or whether it
24 should be deactivated and inactivated, so that it is
25 effectively in a storage condition.

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1 ADMINISTRATIVE JUDGE FARRAR: I tend not
2 to do things if the other side has not had an
3 opportunity to respond to it. So at this point what
4 you will ask for is no more cobalt coming in, and
5 cease operations with the cobalt that is in place.

6 But you didn't ask that they remove the
7 cobalt to some place?

8 MR. SUGARMAN: Well, again, we would ask
9 leave to include that, if the Commission, meaning
10 yourself, the Board, decides that the stand-down
11 condition does not achieve safety.

12 And it --

13 ADMINISTRATIVE JUDGE FARRAR: Okay, I have
14 the answer I need.

15 MR. SUGARMAN: Okay.

16 ADMINISTRATIVE JUDGE FARRAR: Mr.
17 Thompson, let me ask, in light of the request for
18 relief that is in front of us, you may recall in
19 Allentown arguing about whether there should be an
20 initial stay of the license.

21 You and I agreed that you moving forward
22 under a license, while it was under contest, was at
23 the company's risk. If that is the case, does that
24 mean you are not entitled to argue, now, that there
25 would be harm to the company from the grant of the

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1 stay?

2 Do you follow me? There are a couple of
3 negatives in there. In other words, if --

4 MR. THOMPSON: No, I don't think -- no, I
5 don't think -- I mean, I understand. I think it would
6 cause harm to the company. And I don't think a stay
7 ought to be granted.

8 Now, obviously, we move forward at our own
9 risk. But somebody has to show that there is some
10 hazard here, and there has been precious little of
11 that.

12 ADMINISTRATIVE JUDGE FARRAR: So even
13 though you -- unless you have someone in your family
14 with a medical emergency, that you are waiting to hear
15 about, to turn off your cell phones? Thanks.

16 Okay, so you are saying even though you
17 conceded that moving ahead was at your own risk, that
18 doesn't preclude you from saying hey, there is no
19 reason to do this to us, particularly because doing
20 this to us will cause us the things that you laid out
21 in your --

22 MR. THOMPSON: Yes.

23 ADMINISTRATIVE JUDGE FARRAR: Okay.

24 MR. THOMPSON: And because, again, there
25 is -- I mean, the idea that the steam is going to

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1 form, and all that, is frankly ludicrous, if you
2 actually look at the way that the irradiator
3 functions, and what the temperature of the water is,
4 and all of this.

5 It is all speculation. There is just,
6 simply, nothing in the record that says that this
7 plenum, whether wet or dry, whether with a plug or a
8 check valve, presents any particular problems. And
9 certainly no particular problems for the release of
10 metallic, non-dispersable as practicable, insoluble
11 cobalt metal nickel-plated, doubly encapsulated, and
12 then all of those, in turn, encapsulated in a plenum.

13 And the plenum is not provided by Reviss,
14 the sources are.

15 ADMINISTRATIVE JUDGE FARRAR: The public
16 interest factor you talked about, that you provided
17 the material about the federal agencies wanting
18 irradiated food --

19 MR. THOMPSON: Yes.

20 ADMINISTRATIVE JUDGE FARRAR: -- and Mr.
21 Sugarman says even if that is true the country doesn't
22 need this particular irradiator at this time.

23 MR. THOMPSON: Well, one of the things,
24 Your Honor, as I understand it and I'm no expert in
25 the food area. But one of the benefits of food

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1 irradiation is, clearly, destruction of pathogens and
2 parasites. Another is extension of shelf life.

3 Food has a very narrow profit margin, and
4 very narrow windows, in terms of it being fresh enough
5 to go to market, or to go to consumers. So that means
6 that for an irradiation facility to be useful to food
7 suppliers it has to be readily available to people, so
8 that it doesn't add to the transportation costs
9 dramatically, or to the overall costs of marketing the
10 food.

11 So this one seems to be located right on
12 a main highway, and with a cold storage facility, so
13 it would seem that this provides an excellent
14 opportunity for people to cost-effectively bring their
15 materials here to be irradiated.

16 If you have to drive 500 miles to get it
17 there, and add five more days and costs to your profit
18 margin, it isn't going to work. And that is why food
19 irradiators need to be nearby where the distribution
20 center is.

21 ADMINISTRATIVE JUDGE FARRAR: Mr.
22 Sugarman, we are already way behind ourselves, so I
23 will give you a couple of minutes for rebuttal.

24 MR. SUGARMAN: Thank you. A couple of
25 points. This is all being discussed on the assumption

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1 that this issue of the valve changes is all being
2 discussed on the assumption that the only thing that
3 happened was that an observation was made by Reviss.
4 That is far from the only thing that happened.

5 The Applicant, or the Licensee CFC, made
6 a physical modification without any notification,
7 without any prior notification to the Commission.
8 They changed it.

9 This thing that Mr. Thompson would have us
10 believe that it is not an accurate statement, or the
11 fellow made a statement that doesn't make sense, as he
12 said over and over again, CFC acted on it, they
13 changed the facility. And they filed an application
14 with the Commission after the fact, to make the
15 change.

16 And when you read the application it
17 doesn't look anything like Mr. Thompson's description
18 of what the purpose of the change was. The purpose of
19 the -- I'm reading from their letter of September
20 24th, 2003.

21 This is entirely consistent with the
22 fellow that supposedly didn't know what he was talking
23 about.

24 ADMINISTRATIVE JUDGE FARRAR: So
25 you are saying when I say that I can determine from
other evidence that he didn't know what he was talking

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1 about, if he didn't, why did they act on his
2 recommendation?

3 MR. SUGARMAN: Exactly. Why did CFC do
4 it, and why did Mr. Stein defend it in his affidavit?
5 He defended the change. So if this guy didn't know
6 what he was talking about, then again we win either
7 way.

8 Either they are doing things that are
9 crazy, or they are doing things that are necessary to
10 deal with the problem. If they are doing things that
11 are crazy, then they don't have the credibility. And
12 that goes back to Mr. Thompson's characterization of
13 Mr. Stein and his application on the cesium 133, where
14 Mr. Thompson said the Commission found they weren't
15 credible.

16 Well, who wasn't credible in that
17 proceeding, the cesium 133 proceeding? Mr. Stein.
18 Whose affidavit are they depending on at this time?
19 Mr. Stein. What is the issue? The same issue, the
20 relative safety of cobalt 60 versus other -- or this
21 facility versus other facilities.

22 ADMINISTRATIVE JUDGE FARRAR: That cesium
23 case, is that the one my colleague, Judge Young --

24 MR. SUGARMAN: Denied the application to
25 use cesium 133. It was cited in our previous briefs,

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1 and you addressed it at some length in Allentown.

2 So before they said that cobalt 60 was
3 unsafe, or less safe, and cesium --

4 ADMINISTRATIVE JUDGE FARRAR: Well, don't
5 argue that, I can go back and review that.

6 MR. SUGARMAN: All I'm saying is that this
7 Mr. Stein that they are asking you to rely on today is
8 the same Mr. Stein that Mr. Thompson characterized as
9 having been found incredible by the Commission in the
10 previous proceeding.

11 MR. THOMPSON: What, where --

12 ADMINISTRATIVE JUDGE FARRAR: Yes, I will
13 go read that.

14 MR. SUGARMAN: When you read it you will
15 see, it is the application of Gray Star, the same
16 people that are here today.

17 But let me come back to the letter from
18 Ms. Turner. It specifically says these changes to
19 address the concerns of Reviss with water entering the
20 plenum due to the plenum having a lower pressure than
21 the surroundings. This change will give a conclusive
22 way of knowing whether there is water in the plenum.
23 We will no longer need to rely on the moisture probe.

24 Now, that change has not been made. We
25 are sitting with a facility where this necessary

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1 change, that they proposed on September 24th, has not
2 been made.

3 ADMINISTRATIVE JUDGE FARRAR: Yes, I
4 understand that, I appreciate the arguments on both
5 sides, and let's move on to the next issue.

6 MR. SUGARMAN: I want to make -- may I
7 make one more comment, just one more sentence? And
8 that is, let's get -- my solution to the problem, and
9 I don't want an affidavit from Mr. Thompson's side, I
10 don't want the Staff in, I would like to have Reviss
11 here.

12 You have the authority to call witnesses
13 in. I would like to have Reviss here and let them
14 explain what they said, and why they said it, and why
15 the person that made the statement had the expertise
16 to, and the competence, to know what he is talking
17 about.

18 ADMINISTRATIVE JUDGE FARRAR: Okay. Thank
19 you folks --

20 MR. SUGARMAN: But, in the meantime, let's
21 have a stay.

22 ADMINISTRATIVE JUDGE FARRAR: Wait, I gave
23 you one sentence.

24 MR. SUGARMAN: Thank you. That was a
25 semicolon.

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1 ADMINISTRATIVE JUDGE FARRAR: Let's move
2 on to the second issue. And for the --

3 MR. THOMPSON: Can I just ask one thing?

4 ADMINISTRATIVE JUDGE FARRAR: Sure.

5 MR. THOMPSON: I don't know what on earth
6 he is talking about. And so I want to note, for the
7 record, I object to that characterization.

8 ADMINISTRATIVE JUDGE FARRAR: I think we
9 went through that back in Allentown, and --

10 MR. THOMPSON: I mean, I never said that
11 Mr. Stein was not credible.

12 MR. SUGARMAN: No, just Gray Star.

13 MR. THOMPSON: I never said that, either.

14 ADMINISTRATIVE JUDGE FARRAR: Whatever was
15 said, was said. I will check it out.

16 The second issue deals with the
17 Intervenor's request that we send an issue up to the
18 five Commissioners, whom I spoke of before. Under our
19 rules, in this type of proceeding, as opposed to a
20 reactor licensing proceeding, there is no discovery of
21 documents allowed.

22 What you do is the Staff files whatever
23 documents they have, and that is the record. And
24 unlike a typical tort case you don't get to ask the
25 other side for other documents, you don't get to take

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1 their depositions.

2 So the citizens have asked that under the
3 peculiar circumstances of this case we go around that
4 rule, in some fashion, and allow discovery. Mr.
5 Sugarman, let's keep this to ten. This is a fairly,
6 simple, straightforward issue, let's keep this to ten
7 minutes.

8 MR. SUGARMAN: We've had a history of not
9 being able to get the relevant documents. Perhaps the
10 most dramatic example of that is the fact that when
11 CFC wanted, in an Order from Bucks County Court, they
12 produced a document which they had never produced to
13 the Commission, apparently, and have refused to
14 produce to the Commission when we asked them to.

15 After it was produced in court we asked
16 them to deliver it to the Commission, they refused to
17 deliver it to the Commission. We had -- they refused
18 to agree that we could use it, even though they had
19 given it to us in Bucks County Court.

20 And the Bucks County judge had to issue an
21 order authorizing us to give it to the Commission.

22 ADMINISTRATIVE JUDGE FARRAR: But now you
23 want some other documents?

24 MR. SUGARMAN: Right. Well, my point is
25 that that document is extremely relevant.

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1 ADMINISTRATIVE JUDGE FARRAR: Okay. What
2 document do you want?

3 MR. SUGARMAN: What do I want now?

4 ADMINISTRATIVE JUDGE FARRAR: Right.

5 MR. SUGARMAN: Now I want the heat
6 calculations because they never did a heat
7 calculation, that we have seen, with all of the
8 sources in place, in the plenum.

9 ADMINISTRATIVE JUDGE FARRAR: Wait a
10 minute. The November 24 memo you sent to Counsel for
11 the company, asked for underlying contractual
12 documents, design memoranda, reviews of design, and
13 other interaction regarding design implementation.

14 MR. SUGARMAN: Right. And design
15 memoranda, reviews of design, would include that -- I
16 was just giving you a concrete example of the reviews
17 of memoranda, and other interaction.

18 I thought you were asking me for concrete
19 examples. Let me reanswer your question. I'm sorry,
20 withdraw that answer. What we are asking for is the
21 underlying contractual documents, design memoranda,
22 reviews of design --

23 ADMINISTRATIVE JUDGE FARRAR: Are these
24 underlying contractual documents, underlying the sales
25 agreement, which you do have?

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1 MR. SUGARMAN: That is correct. And that
2 would include the exhibits to the sales agreement
3 which we don't have.

4 ADMINISTRATIVE JUDGE FARRAR: Now, let's
5 see this classic discovery. Say there is a tort
6 claim, and the airplane was designed a certain way,
7 you go in the discovery and you would want all the
8 engineering drawings ever made, that led to that
9 design, because possibly somewhere in those
10 engineering drawings that weren't adopted, is
11 something that indicates the plane was badly designed.

12 So we are in a classic discovery situation
13 here, right?

14 MR. SUGARMAN: No. Well, yes and no. Let
15 me put it to you this way. Discovery in the classic
16 situation would include a lot more than what you have
17 just described.

18 ADMINISTRATIVE JUDGE FARRAR: Okay. It
19 would include a lot more. The problem I have here is
20 that there is a rule that is about as plain as
21 anything I have ever read that says, in this Subpart
22 L proceedings there shall be no discovery.

23 MR. SUGARMAN: Well, unless the Commission
24 otherwise orders. I mean, that is what the reference
25 is for. The Commission always retains the right to,

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1 as you pointed out repeatedly, I might say, to us and
2 it got into my head, the Commission always reserves
3 the right to vary from the regulations.

4 ADMINISTRATIVE JUDGE FARRAR: But with the
5 basic regulation itself, which number I can't put my
6 finger on --

7 MR. SUGARMAN: It is 1231, I believe.

8 ADMINISTRATIVE JUDGE FARRAR: The basic
9 regulation, itself, --

10 MR. SUGARMAN: Says no discovery.

11 ADMINISTRATIVE JUDGE FARRAR: No, it even
12 says more than that. It may not seek discovery from
13 any other party, whether by document production,
14 deposition, interrogatories, or otherwise. How many
15 times, since that regulation was adopted, has the
16 Commission allowed any kind of discovery in a Subpart
17 L proceeding?

18 MR. SUGARMAN: I don't believe, to my
19 knowledge, and we did make a brief enquiry, a very
20 brief enquiry into it, so we may have missed
21 something. But, to my knowledge, nobody has ever
22 requested it.

23 ADMINISTRATIVE JUDGE FARRAR: I know
24 people have requested it a dozen times and never
25 gotten it. Am I right. Amy?

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1 MR. SUGARMAN: You may be right. As I
2 say, we didn't find it. I don't know where it would
3 be reported, but we didn't find it.

4 ADMINISTRATIVE JUDGE FARRAR: Right. PP
5 have asked for it and have never gotten it.

6 MR. SUGARMAN: Asked in reference to the
7 Commission, and gotten reference to the Commission?

8 ADMINISTRATIVE JUDGE FARRAR: Right, no
9 one has gotten discovery, and no one has ever gotten
10 it referred to the Commission.

11 MR. SUGARMAN: Has anybody -- I thought
12 your question was, has anybody ever asked for it to be
13 referred to the Commission? That is what we couldn't
14 find. I know people have made discovery requests, and
15 I know they have been routinely rejected.

16 I don't know that anybody has ever put it
17 before the Commission. That is what I thought you
18 were asking me. If I misunderstood you, I apologize.
19 But my point is we are asking for it to be put to the
20 Commission.

21 The question that you are addressing at
22 this point is whether the regulation bars that
23 request, categorically.

24 ADMINISTRATIVE JUDGE FARRAR: And you
25 would point to -- even though the discovery, the anti-

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1 discovery regulation is plain on its face, you would
2 point to 1239B and say we can send this to the
3 Commission on the sole grounds that special
4 circumstances exist, so that application of that no
5 discovery rule would not serve the purposes for which
6 the regulation was adopted?

7 MR. SUGARMAN: Exactly.

8 ADMINISTRATIVE JUDGE FARRAR: Now, as I
9 understand the purposes, and Mr. Thompson you will
10 have your chance on this, for which the regulation is
11 adopted, is these are going to be simple proceedings,
12 and we are not going to have discovery.

13 MR. SUGARMAN: Well, and the problem is
14 that this is a perfect example of unintended
15 consequences. The Commission thought that there was
16 a well established technology for building irradiators
17 and, therefore, they didn't need to see the details of
18 any irradiator, and neither did any objectors.

19 This is not a well established technology.
20 The Commission regulations never contemplated that
21 there would be an innovative, developmental,
22 prototypical, incomplete, subject to change technology
23 that would be put forth as complying with the
24 regulations.

25 That was an unintended consequence to the

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1 regulation. I'm sure the Commission could not have
2 meant to qualify unreviewed and unproven design,
3 without an opportunity for full exploration. They
4 could not have done that. That would have been a
5 silly thing for the Commission to do, it would be
6 contrary to the statutory purpose. It would be
7 contrary to the statute, it would be contrary to all
8 the regulations for all the Commission to give a blank
9 check.

10 ADMINISTRATIVE JUDGE FARRAR: Let's, for
11 a moment, put you in charge of the Staff.

12 MR. SUGARMAN: Now I reverse my position
13 on whether the Staff should be involved.

14 ADMINISTRATIVE JUDGE FARRAR: You are in
15 charge of the Staff and in comes this application, and
16 the Staff gets an application and says, okay, we look
17 at it and we say yea or nay.

18 Are you suggesting that in this case, if
19 you were heading the Staff you would have said, after
20 you saw the sales contract, let's not just have the
21 application in front of us, let's have some of the
22 background documents that went into the formation of
23 the application, because this is the unusual case
24 where we need it?

25 MR. SUGARMAN: Exactly. This is the case

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1 that we never anticipated. We never anticipated that
2 someone would take a performance type regulation and
3 use it to establish a new technology whereby the
4 performance type regulation assumed an established
5 technology.

6 So I would say this is -- I can't have
7 some cockamamie technology out there that nobody has
8 ever proven without making a full review. I'm the
9 Staff, and I protect the public, and I protect the
10 integrity of the nuclear industry as well.

11 And the protection of both of those
12 interests requires that the Commission, when there is
13 new technology involved, have all the information
14 before it, so the Staff is going to get all that
15 information.

16 And if I wasn't going to do that, just
17 based on the sales contract, when I saw that
18 modification, and I saw what Reviss was saying on
19 September 24th, I sure as heck would want to see the
20 underlying documentation, why is all this going on,
21 why is CFC making an application for a modification,
22 what is going on here?

23 Now, Mr. Thompson is telling me that it is
24 double, not only is it double hearsay, but that the
25 fellow from Reviss doesn't know what he is talking

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1 about. Am I going to let the public have 100 of these
2 facilities around the country, without ever having
3 reviewed why Revis is saying this?

4 So, no, I'm going to see the history, I'm
5 going to establish that the technology is good. I'm
6 probably going to want to see an experimental proof of
7 the success of the technology, before I'm going to
8 license one.

9 But put that aside, that we are not at
10 that place, in this case, at this point. But I
11 certainly am going to want to see all that before I
12 approve it. And so this is extraordinary.

13 ADMINISTRATIVE JUDGE FARRAR: -- your
14 answer, just so the record is clear, my question did
15 not embrace the notion that this is cockamamie
16 technology.

17 MR. SUGARMAN: No, that was a hypothetical
18 statement. It could be cockamamie until I see if it
19 is proven.

20 ADMINISTRATIVE JUDGE KELBER: In the
21 statement of considerations, when the Commission
22 adopted this rule, did they indicate that they felt
23 that the industry was fully mature?

24 MR. SUGARMAN: I think they --

25 ADMINISTRATIVE JUDGE KELBER: This is the

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1 point you were making earlier, that it is an
2 unintended consequence?

3 MR. SUGARMAN: Yes, sir.

4 ADMINISTRATIVE JUDGE KELBER: I want to
5 know did the Commission, actually in its statement of
6 considerations, in adopting this rule state something
7 to that effect?

8 MR. SUGARMAN: It is implicit in the
9 regulations, and I will just go to --

10 ADMINISTRATIVE JUDGE KELBER: I'm asking
11 about the statement of considerations which says, this
12 is why we are doing this.

13 MR. SUGARMAN: No. The Commission did not
14 say --

15 ADMINISTRATIVE JUDGE KELBER: You objected
16 something to the Commission's motives in adopting this
17 rule, and I want to know whether that is indicated, in
18 any way, in the statement of considerations.

19 MR. SUGARMAN: Well, I don't have the
20 statement of considerations here, but I will be glad
21 to furnish that to you. But let me assume what may be
22 implicit in your question, that it is not in the
23 statement of considerations.

24 I say to you, sir, that if the Commission
25 is doing things other than arbitrarily, the Commission

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1 is not setting up performance standards based on an
2 assumed design, unless it has reason to believe that
3 the design is well established.

4 And, therefore --

5 ADMINISTRATIVE JUDGE KELBER: Well, let's
6 assume that the Commission, for example in the nuclear
7 power plant area anticipates that there will be design
8 changes, they have an amendment process, 50.59, it is
9 a well known process, it is undergoing some revision
10 right now. But it is a widely used process allowing
11 for the fact that taking as an example boiling water
12 reactors, designs have evolved since the days of --

13 MR. SUGARMAN: Right. Let me say, in
14 response to that, let me point out the obvious fact to
15 you that those proceedings allow for discovery and
16 testimony on the record.

17 And the question is why would the
18 Commission establish a different type of facility that
19 doesn't allow for testimony on the record?

20 ADMINISTRATIVE JUDGE KELBER: Why question
21 the one that is answered in the statement of
22 considerations?

23 MR. SUGARMAN: I don't know. If you have
24 it in front of you I would be glad to have it read to
25 me. I didn't bring it with me today.

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1 ADMINISTRATIVE JUDGE FARRAR: But the
2 point is a good one. You are trying to proceed under
3 a provision that says we have to find that it wouldn't
4 serve the purposes for which the regulation is
5 adopted.

6 We know what the regulation says, Dr.
7 Kelber's point is we don't know, at this point, why it
8 was adopted, so how can we make the determination you
9 are asking us to make?

10 MR. SUGARMAN: On the basis of responsible
11 administrative action, that is what I'm trying to say,
12 if I'm not saying it clearly enough. Let me rephrase
13 it.

14 The Commission, Mr. Thompson has argued,
15 and I take it from him, because he has argued it
16 consistently that the Commission set up performance
17 standards in these regulations.

18 And I'm saying that they did so based on
19 the assumption that the technology was well
20 established, or they wouldn't have gone on performance
21 standards.

22 ADMINISTRATIVE JUDGE FARRAR: You keep
23 saying technology being well established.

24 MR. SUGARMAN: Yes.

25 ADMINISTRATIVE JUDGE FARRAR: Here is the

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1 problem I have. As I read the company's papers,
2 throughout this proceeding, in effect they are saying
3 here is how you used to do irradiators, and they had
4 all these problems, and we have solved those problems
5 by doing the following.

6 So you can call that untested,
7 experimental design, and they might call it state of
8 the art improvements. Why do you have the better of
9 that argument?

10 MR. SUGARMAN: Only because at this point
11 I'm not asking you to decide whether they are right or
12 wrong, only whether an investigation, a normal type
13 investigation, by investigation I don't mean criminal
14 type of thing, I mean normal enquiry should be made,
15 evaluation should be made to determine whether they
16 are right or wrong.

17 When you change something that has been
18 operating well for a long time you don't, it may be an
19 improvement, but you evaluate it to determine whether
20 it is an improvement, you don't just accept that it is
21 an improvement.

22 The fact that they say it is state of the
23 art, the fact that they say it is an improvement,
24 doesn't make it either state of the art or an
25 improvement. It needs to be evaluated. You don't

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1 make changes without evaluating it.

2 ADMINISTRATIVE JUDGE FARRAR: To the
3 extent that this motion is bound up with the stay
4 motion, I will ask you the same question I asked you
5 before.

6 Is this an appropriate case for us to tell
7 the Staff they should be back in here, and I would
8 like to know --

9 MR. SUGARMAN: And I would give the same
10 answer unless I'm put in charge of the Staff.

11 (Laughter.)

12 MR. SUGARMAN: And for the same reasons.
13 But I just want to say one more thing. I mentioned
14 the heat thing. And the other thing is, of course,
15 the Reviss correspondence, as a concrete example.

16 If Reviss is putting out this information,
17 and not only is Reviss putting it out, but CFC is
18 taking action on it, and applying to the Commission,
19 and Gray Star, which is the manufacturer, is agreeing
20 with that application, apparently, from Mr. Stein's
21 affidavit.

22 Then wouldn't you, as a Commissioner, want
23 to know what Reviss' reasons are, and whether they
24 imply that the present design is unsafe, or whether
25 the fellow doesn't know what he is talking about? One

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1 way or the other you would want to put it to rest.

2 And I say to you that there is no way that
3 the Commission anticipated that that kind of
4 information, in the context of an innovation, would
5 not be made available.

6 ADMINISTRATIVE JUDGE FARRAR: I understand
7 your argument, and we have gone over our time again.
8 Mr. Thompson?

9 MR. THOMPSON: You look at his, Mr.
10 Sugarman's document on the last page, he basically
11 says refer 10CFR2.1231, to the Commission to reverse
12 it, because it is not in compliance with NEPA. That
13 is what the sentence says.

14 ADMINISTRATIVE JUDGE FARRAR: Let's not --

15 MR. THOMPSON: I understand that. And I
16 suggest to you, first of all, that the Commission may
17 not be able to reverse a regulation that it made in a
18 rulemaking, without going through another rulemaking.

19 ADMINISTRATIVE JUDGE FARRAR: I understand
20 that. But on page 1 of his document he refers to
21 1239D, where he meant B --

22 MR. THOMPSON: Or is he referring to
23 1231D? Which is what we are talking about, the no
24 discovery rule. It has a mistake, one way or the
25 other.

1 ADMINISTRATIVE JUDGE FARRAR: Now I'm
2 going to put my head down.

3 MR. THOMPSON: And let me just say, also
4 that --

5 ADMINISTRATIVE JUDGE FARRAR: Okay, but
6 let's assume he meant 1239B, you may say that is too
7 big an assumption for me to make, and that you didn't
8 get a chance to address that in your brief, because
9 you thought he meant something else.

10 But if it is 1239B, that is the one that
11 says we can refer something to the Commission because
12 the rule doesn't serve its purposes. I guess the
13 first question is, what is the purpose of this rule,
14 which is the plainest reading rule that I have ever
15 read in my life.

16 MR. THOMPSON: Well, exactly.

17 ADMINISTRATIVE JUDGE FARRAR: It says no
18 discovery, no way, no how.

19 MR. THOMPSON: Let me get --

20 ADMINISTRATIVE JUDGE FARRAR: But
21 somewhere -- what is the purpose --

22 MR. THOMPSON: Let me get to that. In all
23 of the discussion that Mr. Sugarman was engaged in was
24 directed, really, at part 36, and not at this rule,
25 okay?

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1 This rule isn't just applicable to
2 irradiators. This rule is applicable to fuel cycle
3 facilities, uranium mill facilities, etcetera,
4 etcetera.

5 In fact, the informal hearing process, and
6 there is in the statement of considerations, a
7 discussion to the fact that it is being used because
8 the facilities involved present less potentially
9 significant risk to public health and safety therefore
10 a less detailed hearing process, as opposed to for
11 reactors, is justified.

12 And, presumably, this is a reflection of
13 that statement of consideration, that there is less
14 risk associated with these other facilities, therefore
15 we have an informal proceeding.

16 Now, I also submit, if you look at the
17 statement of consideration for part 36, it is the
18 preamble to part 36, is replete with statements by the
19 Commission that these facilities, irradiators, do not
20 represent the same type of potential threat to public
21 health and safety as reactors. Replete with such
22 statements.

23 So it fits in the idea of an informal
24 hearing for other than reactors that represent less
25 potentially significant threats and, therefore, we

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1 have a less formalized, less perhaps detailed,
2 although it certainly gets very detailed when you
3 submit a lot of documents.

4 But it isn't, it doesn't have cross
5 examination, it doesn't have discovery,
6 interrogatories, and all that sort of thing.

7 ADMINISTRATIVE JUDGE FARRAR: Now, if
8 there were --

9 MR. THOMPSON: And surely -- I'm sorry, I
10 didn't --

11 ADMINISTRATIVE JUDGE FARRAR: Go on.

12 MR. THOMPSON: And surely there have been
13 other changes and innovations associated with license
14 amendments from fuel cycle facilities, or others,
15 other than reactors, that have involved potentially
16 novel questions, but they did not, as you have stated
17 and our research indicates, that did not justify an
18 exception to the very plain no discovery in Subpart L
19 Hearing Rule.

20 ADMINISTRATIVE JUDGE FARRAR: Now, if
21 there were discovery, discovery goes both ways, right?
22 You could -- could you send these good citizens -- if
23 we said this is an exception, and we want the
24 Commission to authorize discovery, I assume discovery
25 is a two way street, is one of the reasons not to have

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1 discovery is that would expose these people to the
2 endless interrogatories you would send them, and
3 stuff?

4 MR. THOMPSON: No, I don't know what I
5 would ask any of them.

6 ADMINISTRATIVE JUDGE FARRAR: Okay.

7 MR. THOMPSON: I mean, I haven't seen any
8 affidavits from any citizens who raised a question
9 that, you know, I understand their concern, and that
10 is appropriate, and they are expressing it. But I
11 don't have any reason to ask these gentlemen or ladies
12 any questions.

13 I would be happy to answer questions, but
14 I don't have any to ask.

15 ADMINISTRATIVE JUDGE FARRAR: Okay. Is
16 this like the Commission's version of small claims
17 court?

18 MR. THOMPSON: Yes.

19 ADMINISTRATIVE JUDGE FARRAR: That even --
20 that even though you set up a system that is simple,
21 so that people can take advantage of it, and even if
22 their case happens to be a really big case, you still
23 follow the rules of the small claims court, where
24 people can go and present their case in a very simple
25 fashion.

1 And that is, in effect, an imperfect one,
2 but they are saying we want to set up this simple
3 system for these less risky sort of things.

4 MR. THOMPSON: Yes.

5 ADMINISTRATIVE JUDGE FARRAR: And we
6 should stick with that system even though this case
7 has taken on a greater life than it may --

8 MR. THOMPSON: Let me recite the case,
9 Hydro Resources. Hydro Resources case involved 15,000
10 pages filed by the Intervenors. I can't tell you how
11 many different affidavits. I mean, the record in that
12 thing is -- and that same request was made and denied
13 by the judge in that proceeding.

14 Essentially can't we get more discovery
15 and he said, no, the Rule says you can't, you can't.
16 Judge Bloch. And that is, certainly, that is a
17 proceeding that makes this look like small claims
18 court.

19 ADMINISTRATIVE JUDGE FARRAR: So your view
20 would be that is the Rule, but there have to be some
21 instances, maybe you will say not, where you depart
22 from that rule.

23 Suppose Mr. Sugarman got a call from
24 somebody, the irradiator manufacturer, or some workman
25 in the chain of command. And he got a call from

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1 somebody that said, I want you to know, and this is a
2 hypothetical, and I have no facts on which I'm basing
3 this, so don't anybody take it the wrong way.

4 But I got a call from a workman and he
5 says, the company has phoned up all the tests about
6 the wells. And Mr. Sugarman has that letter. And he
7 says I want discovery. Doesn't --

8 MR. THOMPSON: No, you turn that letter
9 over to the NRC staff and they go in and they take
10 whatever action is necessary. That is their
11 responsibility, they are the regulators.

12 ADMINISTRATIVE JUDGE FARRAR: So in other
13 words we would say --

14 MR. THOMPSON: All the proceeding in
15 advance, and --

16 ADMINISTRATIVE JUDGE FARRAR: That this
17 suddenly, in our case, we thought we had a small
18 claims case, this is obviously not a small claims
19 case, send it to the Staff, rather than Mr. Sugarman
20 do discovery, the Staff get their Office of
21 Inspection, Office of Enforcement --

22 MR. THOMPSON: Absolutely.

23 ADMINISTRATIVE JUDGE FARRAR: -- whoever,
24 and they go --

25 MR. THOMPSON: That is their

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1 responsibility.

2 ADMINISTRATIVE JUDGE FARRAR: -- and then
3 we would have a different kind of proceeding?

4 MR. THOMPSON: Yes.

5 ADMINISTRATIVE JUDGE FARRAR: Rather than
6 us try to change this into an all out investigatory
7 proceeding, you would use the Staff and say, here is
8 this letter that Mr. Sugarman got, and this warrants
9 some enquiry, and --

10 MR. THOMPSON: That would be, that would
11 be --

12 ADMINISTRATIVE JUDGE FARRAR: -- hold in
13 abeyance?

14 MR. THOMPSON: -- my view of the way the
15 NRC is supposed to work.

16 ADMINISTRATIVE JUDGE FARRAR: So that is
17 not the example, so you will not concede that that
18 would be the case where I'd say we need a waiver, you
19 would say, no you need to do something else?

20 MR. THOMPSON: Right, yes sir, I would.
21 Which goes to your question to me is if I would care
22 if the Staff comes back in, and I would be happy to
23 have them come in, you know?

24 ADMINISTRATIVE JUDGE FARRAR: Is that
25 where we are headed, Mr. Sugarman?

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1 MR. SUGARMAN: No. The Staff had their
2 chance, the Staff did nothing. The Staff --

3 ADMINISTRATIVE JUDGE FARRAR: Okay.
4 Assume, and whether or not I agree with that, but the
5 Staff is the group that has a continuing obligation,
6 an oversight role over this facility, over whatever,
7 whether it is a reactor for 40 years, or this
8 facility, whatever its lifetime would be.

9 Why is this not -- where are you taking us
10 with these inquiries about these documents, both in
11 the Stay Motion -- your question, if I can paraphrase
12 it very simply is, what is going on here? Why aren't
13 the people telling us, the Staff?

14 MR. SUGARMAN: My question is that the
15 Staff has acted inappropriately, and that is why we
16 are here. And if the situation were that the Staff
17 was the sole source of relief, then we wouldn't be
18 here today, and you wouldn't be employed by the
19 Commission, at least not for Intervenor's petitions.

20 The whole process here recognizes that the
21 Staff is not to be relied upon entirely to do the job,
22 without oversight, review, and opportunities for due
23 process of law.

24 And to say that we can't do anything, that
25 we are entirely, our hands are tied, and we are only

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1 allowed to have what the Staff chooses to do, by way
2 of justice and relief, is something I submit I would
3 love to take to a court.

4 Because a court will not sit still, for
5 one minute, okay? And will not allow Mr. Thompson's
6 contention to be heard, or to be accepted, as long as
7 the Rule of Law prevails in this country. The Staff
8 is the Staff.

9 Let me just give you three --

10 ADMINISTRATIVE JUDGE FARRAR: Let me do a
11 follow-up. Suppose I took, and it is a hypothetical
12 that I said, where you have a phone call from some
13 workman that says something is really bad here. And
14 he says don't authorize discovery, send it to the
15 Staff.

16 I take it, Mr. Thompson, if the Staff sent
17 it back and said, we don't want to look at this, then
18 we would be in the situation where I would say to the
19 Commission --

20 MR. THOMPSON: You might, it depends on
21 what the Staff says. They ignored it, fine.

22 ADMINISTRATIVE JUDGE FARRAR: Right.

23 MR. THOMPSON: But if they said, for these
24 reasons --

25 ADMINISTRATIVE JUDGE FARRAR: Right. But

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1 if we did what you said, and sent it them, and they
2 did nothing, then that would be the time I would say
3 to the Commission, hey, --

4 MR. THOMPSON: Under those novel
5 circumstances --

6 ADMINISTRATIVE JUDGE FARRAR: -- the
7 purposes of your rule aren't being served.

8 MR. SUGARMAN: Then Mr. Thompson and I
9 agree because this is, precisely, that situation.
10 This is not a hypothetical, this is real. This is
11 exactly what happened.

12 You remember, you asked them in September
13 would you go and inspect to see whether they are up to
14 snuff on security, as you promised. No, said the
15 Staff. Not only will they not go, but that you have
16 no right to ask them to do it. And they haven't
17 gone.

18 Mr. Lodhi has a conversation with Reviss
19 about their concerns. And what does he do? He tells
20 them that he won't make the changes without the NRC's
21 approval. But he doesn't say whether, this is his
22 email of September 30, '03.

23 And he doesn't say whether it should be
24 changed, or it should not be changed. And I asked
25 CFC, in September, to release the documents to the NRC

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1 staff. Not only did CFC refuse, but the NRC refused
2 to take any action to get the documents.

3 How many times do we have to have the
4 Staff to fall down on the job and refuse to take an
5 interest? Why isn't the Staff participating in this
6 proceeding? How many times before we have the actual,
7 not a hypothetical situation? This is an actual
8 situation, sir.

9 ADMINISTRATIVE JUDGE KELBER: Isn't that
10 a --

11 MR. SUGARMAN: I just want to make another
12 point.

13 ADMINISTRATIVE JUDGE KELBER: -- little
14 bit dramatic characterization of someone who said, you
15 know, you might get a deposit on the cladding?

16 MR. SUGARMAN: How do you know how
17 overdramatic or dramatic it is? How do you know, sir?
18 You haven't got the information.

19 ADMINISTRATIVE JUDGE KELBER: If you have
20 stainless --

21 MR. SUGARMAN: You should have the
22 information. Then you can say it is --

23 ADMINISTRATIVE JUDGE KELBER: Excuse me,
24 let me finish. If you have stainless steel cookware
25 at home, and you boil water in it, do you sometimes

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1 get a deposit?

2 MR. SUGARMAN: Why did Reviss want the
3 thing changed? Because of a stainless steel at home
4 that got a deposit on it?

5 ADMINISTRATIVE JUDGE KELBER: I'm asking
6 you, is that a --

7 MR. SUGARMAN: I'm asking --

8 ADMINISTRATIVE JUDGE KELBER: I think you
9 are overdramatizing what is a concern about the long-
10 term resistance to corrosion, and characterizing it as
11 a safety problem needing immediate Commission or Staff
12 attention.

13 And there is a --

14 MR. SUGARMAN: Do you know why --

15 ADMINISTRATIVE JUDGE KELBER: --
16 difference between the two. If there is a long term
17 corrosion problem, that is a financial problem for the
18 company. They may violate their warranty.

19 If it is an immediate safety concern, that
20 is the Staff and the Commission, yes.

21 MR. SUGARMAN: You are a scientist, sir,
22 do you make those kind of evaluations without seeing
23 what the case is?

24 ADMINISTRATIVE JUDGE KELBER: I know
25 something about cladding.

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1 MR. SUGARMAN: I know you do. And you
2 wouldn't make that decision without seeing the case.
3 Why don't you call up Reviss and ask them why, why
4 they wanted to --

5 ADMINISTRATIVE JUDGE FARRAR: Well, that
6 is not our role.

7 MR. SUGARMAN: I understand that. But I'm
8 saying, he is asking you to make a decision based on
9 information that we don't have.

10 One other point that I want to make, I
11 want to say that --

12 ADMINISTRATIVE JUDGE FARRAR: Mr.
13 Sugarman, wait a minute, wait a minute. You have been
14 in court before?

15 MR. SUGARMAN: Yes, a few times.

16 ADMINISTRATIVE JUDGE FARRAR: A few times,
17 right. When I say wait a minute, I mean wait a
18 minute. I gave you -- we are running over our time
19 here, we think we understand the arguments.

20 I will let you wrap up very, very quickly.

21 MR. SUGARMAN: Thank you, I just want to
22 say one thing. The regulations are what the
23 regulations are. I did mean to refer to 1239B, as
24 well as 1239D, that is a typo, and they understood,
25 because they responded to it.

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1 ADMINISTRATIVE JUDGE FARRAR: No, they
2 didn't respond. I wondered why they didn't respond to
3 it, and I have the answer why they didn't respond, is
4 they read the typo one way, and I read it another way.

5 MR. SUGARMAN: They knew from the
6 verbalization what the concern was. They have the
7 Commission -- this is an exception.

8 ADMINISTRATIVE JUDGE FARRAR: If they knew
9 what it was, they have been around a long time, I
10 wondered, we wondered yesterday, and before, why they
11 hadn't addressed it. And the answer Mr. Thompson gave
12 is he read the typo one way, and we read it another
13 way, and that is a representation that he is entitled
14 to make.

15 MR. SUGARMAN: That is fine. I will ask
16 to amend the Motion to explicitly refer to 1239B. And
17 if he wants an opportunity to respond I have no
18 objection to that.

19 And the only other point that I want to
20 make is that if the regulation means what Mr. Thompson
21 says it means, then it is invalid as applied to this
22 proceeding.

23 And when a regulation is invalid as
24 applied to a proceeding, I just want to reserve my
25 rights to go to court.

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1 ADMINISTRATIVE JUDGE FARRAR: Okay. Give
2 us a moment break here.

3 (Whereupon, the above-entitled matter
4 went off the record at 3:04 p.m. and
5 went back on the record at 3:05 p.m.)

6 ADMINISTRATIVE JUDGE FARRAR: Let's take
7 a ten minute break now, and we will come back, and we
8 will talk about settlement, and we may have a decision
9 on the matters we've just argued.

10 (Whereupon, the above-entitled matter
11 went off the record at 3:05 p.m. and
12 went back on the record at 3:07 p.m.)

13 ADMINISTRATIVE JUDGE FARRAR: All right.
14 We have taken a short break and we are back on the
15 record.

16 And I said we would talk about settlement.
17 And if you have been sitting here the last nearly two
18 hours, and heard the lawyers go at each other you say,
19 how could we possibly settle this case, the feelings
20 are too strong on each side.

21 I had broached with the parties, on a
22 conference call, an idea that I had. And if it turns
23 out not to be a good idea, people are welcome to say
24 so.

25 Now, usually, if you are familiar with

1 litigation, when you talk about settlement you go into
2 a closed room, off the record, and you talk about it,
3 because neither side wants to let its bargaining
4 position be known publicly, and so forth.

5 But under the Commission's rules they
6 don't like to do closed door things. So the thought
7 I had is this. We are at the point, right now, where
8 no evidence has been submitted. We will be talking
9 about that at a later stage of this afternoon.

10 So I have nothing in front of me, I have
11 no idea which way this case is going to turn out. The
12 citizens think they have a strong case, and they will
13 win, and they will stop the irradiator.

14 The company thinks they have a state of
15 the art facility, and they have a strong case, and
16 they will proceed. So you say, how can you possibly
17 have a compromise in that position?

18 What I'm going to say is hypothetical
19 based on my experience when I was on the old Atomic
20 Energy Commission Appeal Board years ago, and we were
21 doing reactor licensing cases. It has nothing to do
22 with the evidence in this case, because I don't know
23 what the evidence in this case is, and that is exactly
24 the point.

25 You are at a point now where neither side

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1 can -- they don't know what the other side is going to
2 come up with, and when you are uncertain in
3 litigation, that is sometimes the time to settle.

4 Everyone talks about the strengths of
5 their case, but they also worry about the weaknesses.
6 One of the, what used to happen in the reactor
7 licensing cases, is citizen's groups would oppose the
8 reactor and they would say, here is five safety
9 deficiencies, and that is why you shouldn't build the
10 reactor.

11 What would sometimes happen is they might
12 win on one, or two, or five of those deficiencies, but
13 they didn't stop the reactor from being built, what
14 they got was a safer reactor. They said, you know,
15 this doesn't work, fine. We would say you are right,
16 fix it up.

17 Now, at some point when you say fix it up
18 it costs the company too much to fix it up, and they
19 may decide this project is no longer commercially
20 viable. So this thing cuts both ways.

21 But what I'm saying is it is possible our
22 ultimate decision would not be citizens win, no
23 irradiator; or company wins, everything is fine.
24 There might be something in the middle which says,
25 citizens are right to this extent.

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1 Take an example, there is an issue here
2 about the carrying capacity of the turn buckles.
3 Suppose we find they are deficient. Okay, then you
4 double their carrying capacity, so you still have an
5 irradiator next door to you.

6 It seems to me the company wants to have
7 an irradiator that works properly. I used to be in
8 the pulp and paper industry. We had an explosion of
9 a pulp and paper mill, yes, the neighborhood was
10 concerned, but you had a big commercial operation
11 down, and it cost you a lot of money.

12 So people may not believe this, but the
13 company has an interest in running a safe facility,
14 you all want a safe facility. If you were assured it
15 was safe, you might not care, you might not mind so
16 much that it was next door to you.

17 All this by way of background saying one
18 way, possibly, to settle the case, but you would have
19 to do it soon, before we get into the evidence, and
20 before it is clear that one side or the other is going
21 to win, is to negotiate conditions, things that the
22 citizens are most concerned about.

23 Some of those could be solved, perhaps,
24 just by more information, akin to what was done today
25 on the site visit. Some might be done with changes in

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1 the design, or in the operation.

2 If accompanying that could be the notion
3 of a citizens advisory committee. Assuming, deep
4 down, if this facility is going to be near you for
5 some time, you would like to make sure it is being
6 operated properly. That is a good assurance to you.

7 Citizens Advisory Committees have a
8 checkered history. Again, back to my time in the pulp
9 and paper industry. Some companies said they didn't
10 want a citizens advisory committee, it was more
11 trouble than it was worth, they do a lot of hassle,
12 people didn't have good ideas.

13 One company always favored them, and that
14 was a company much more known for other products than
15 for paper. That was the Procter & Gamble company.
16 They were a pulp and paper producer, but they also
17 were a major player in the consumer products industry,
18 and they viewed their constituents as not their
19 commercial customers, but the consumers of America.

20 And here is a company, I think that is
21 what got me thinking about it, here is a company that
22 does deal with consumer products, with food. And
23 perhaps they would be interested, for that reason, in
24 having a citizens advisory group.

25 The citizens might say, yes, but we won't

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1 go for that unless you take care of these particular
2 concerns. And that is why I was particularly happy
3 that Dr. Resnikoff was able to come today, and to see
4 the facility and, perhaps, focus his concerns more
5 precisely.

6 So this would -- I want to throw this out
7 to both sides. I will not ask the lawyers if they
8 think this is a good idea, because settlements are
9 like a game of poker, you don't give away your
10 position, that is great idea. That can be taken, by
11 the other side, as a sign of weakness.

12 What I would like to do, we have, once the
13 judge who is deciding the case gets involved in
14 settlement, there is a possibility of getting too
15 deeply involved. In other words, if I get the
16 evidence in front of me, and I'm trying to talk
17 settlement with you all, then what is the dividing
18 line, am I using knowledge about evidence to bias the
19 settlement in any way?

20 We have a procedure, under the Commission
21 rules, where I can ask the Chief Administrative Judge
22 to appoint a settlement judge who has, both, more and
23 less powers than I do. He has no power over the case,
24 he has nothing to do with the ultimate decision in the
25 case.

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1 Because of that he can exercise more power
2 in terms of settlement, because he is allowed to talk
3 to one side separately from the other. Because there
4 is a rule we call the ex parte rule. I can't call Mr.
5 Thompson without having Mr. Sugarman on the phone.

6 I never have had a private conversation
7 with either one of them, without the other being on
8 the phone. The settlement Judge can call Mr. Thompson
9 and say, what are we really talking about here? I
10 won't tell the other side, but I need to know your
11 position, and do the same thing with Mr. Sugarman, and
12 be a mediator, a negotiator who can try to bring the
13 parties together.

14 Now, both of them may say this is the
15 craziest idea they ever heard, and it won't insult me
16 if they do. But it struck me, where both sides
17 believe so fervently in their case, but where
18 everybody, you know, these people have a business to
19 run, you people have lives to lead, it is always
20 better, you know, litigation is time consuming, it is
21 uncertain, it is emotionally draining.

22 And if there is a way to save both sides
23 that, why isn't it worth trying? If it doesn't work,
24 that is fine. The company may say, look, we looked
25 into this, we really believe in it, and we are going

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1 full speed ahead.

2 The citizens may say we really don't
3 believe in this, we are going full speed ahead. But
4 maybe there is a middle ground. So I will not ask Mr.
5 Sugarman or Mr. Thompson if I have their blessing to
6 appoint a settlement judge, because they would both
7 say no, because they don't want to, in public, appear
8 to be saying that they have a weak position.

9 So what I will say is I'm about to go back
10 to Chief Judge Bollwerk and suggest that we appoint a
11 settlement judge. And I'm going to do that unless
12 either Mr. Thompson or Mr. Sugarman now speaks up and
13 says they will absolutely refuse to talk to a
14 settlement judge.

15 And since neither of them is going to say
16 that to me, we will go back -- I don't think they are
17 going to say that to me.

18 (No response.)

19 ADMINISTRATIVE JUDGE FARRAR: Good. I'm
20 not asking them whether they think this is a good
21 idea. The conversation with the settlement judge may
22 be five minutes long and they both say don't tell
23 Judge Farrar we said so, but he is nuts, this idea is
24 no good at all.

25 And you are free to say that, and by

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1 laying this out I'm willing to take that. But I will
2 go back and ask Judge Bollwerk to appoint a settlement
3 judge.

4 Have either of you been involved with
5 settlement judges before?

6 MR. SUGARMAN: Yes.

7 MR. THOMPSON: Yes, sir, I have.

8 ADMINISTRATIVE JUDGE FARRAR: Okay. And
9 the judge can do anything. Now, you people, depending
10 on what your official relationship with the case is,
11 you will hear nothing about it. People will
12 negotiate, it will be behind closed doors, the press
13 won't hear about it.

14 And one day an agreement will emerge, or
15 it won't emerge. And if it doesn't emerge, in the
16 meantime, we won't hold up the case. We will keep
17 going with the case. And so this is something that I
18 would think would happen in the next six weeks, or it
19 won't happen.

20 We don't intend to, HRI, the one where I
21 was settlement judge, that took a long time, and
22 nothing happened. That was a different case, and
23 there were -- but I envision this being a six week do
24 it or don't do it.

25 And I'm not urging either side to buy into

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1 anything that is inconsistent with your legal
2 representation, and with your clients' view point.
3 But I thought it was something that we ought to lay
4 out there, so I will do that.

5 On the, and so I will do some kind of
6 reference order to Judge Bollwerk, and he will appoint
7 somebody, and that judge will contact you.

8 On the two motions that we heard argument
9 on, on our last conference call we had directed the
10 Staff, or the Staff said they would participate on the
11 Stay Motion. Remember, they had opted out of the
12 case, we had directed them to participate up through
13 and including the Allentown matters, and then they
14 were out.

15 So I said, here is the Stay Motion, are
16 you going to participate? And they said yes. When it
17 came time to file their brief they filed a short
18 letter saying they had changed their mind. At that
19 time it appeared too late to do that.

20 On both motions we are going to direct the
21 Staff to participate. We are going to ask them to --
22 we are going to direct them to file a paper on both of
23 these.

24 And Mr. Sugarman, Mr. Thompson, how much
25 time do you need to get me a one pager saying what you

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1 would like me to tell them to address in their briefs?

2 MR. SUGARMAN: You set the time. Today is
3 Thursday, you know, Monday would be okay.

4 ADMINISTRATIVE JUDGE FARRAR: Or if you
5 want you can wait -- off the record.

6 (Whereupon, the above-entitled matter
7 went off the record at 3:31 p.m. and
8 went back on the record at 3:32 p.m.)

9 ADMINISTRATIVE JUDGE FARRAR: I will take
10 the two papers you give me and I will shape it into
11 something that accommodates both. But I think we
12 would all benefit from seeing the transcript, and the
13 arguments that were made today.

14 So how about two days after you get the
15 transcript give me a --

16 MR. THOMPSON: How do we go about getting
17 it?

18 MR. SUGARMAN: Is it available on ADAMS or
19 will it have to be shipped to us? I was informed by
20 your law clerk that it takes some time to be on ADAMS.

21 ADMINISTRATIVE JUDGE FARRAR: That is
22 right. If you don't buy it on the three day service
23 we can't send it to you, and it is not put on ADAMS
24 for several days. Then just give me your
25 recollections Tuesday.

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1 MR. SUGARMAN: I just -- I don't mean to
2 reargue the point, but I can just see the Staff is
3 just going to take this as a new opportunity to bash
4 us.

5 ADMINISTRATIVE JUDGE FARRAR: Well, you
6 haven't seen what I'm asking them to do.

7 MR. SUGARMAN: I can imagine, and this is
8 going to put them on the defensive, why haven't they
9 done anything? They are going to justify why they
10 haven't done anything.

11 So you are not going to get advice from
12 them, you are going to get an advocacy position.

13 ADMINISTRATIVE JUDGE FARRAR: Well, we
14 will get what we get, and you will both get to comment
15 on it.

16 MR. SUGARMAN: Thank you.

17 ADMINISTRATIVE JUDGE FARRAR: You give me,
18 by close of business Tuesday, a one pager. It could
19 be a one pager on each issue, but I would like to send
20 them one document saying here it is, here is what we
21 need your -- we need to know what happened here, and
22 what is going to happen in the future. It is going to
23 be that kind of question.

24 And we will hold, we will wait, I will
25 give them some time to file that brief, when they file

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1 it we will let you respond to it, and then rule on the
2 pending --

3 MR. SUGARMAN: I just think it is
4 fundamentally unfair. They had the chance to be here,
5 you had the chance to order them to be here. Now you
6 are giving them the chance to take what everybody else
7 said, and have more time to deal with it.

8 ADMINISTRATIVE JUDGE FARRAR: Mr.
9 Sugarman?

10 MR. SUGARMAN: Thank you, sir, I'm sorry.

11 ADMINISTRATIVE JUDGE FARRAR: Sometimes
12 you don't know when you've won.

13 MR. SUGARMAN: Thank you, I guess not. I
14 have been accused of stealing defeat from the jaws of
15 victory. So if that is what I've done, fine, it is
16 done.

17 ADMINISTRATIVE JUDGE FARRAR: I've asked
18 both sides some hard questions today, I intend to ask
19 them some hard questions in the future.

20 MR. SUGARMAN: Understood.

21 ADMINISTRATIVE JUDGE FARRAR: So we are
22 ruling on the two motions, our ruling on the merits of
23 them will be held in abeyance pending receipt of these
24 documents from you, our direction to the staff to file
25 a brief, and your responses to that brief.

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1 We will now move into the part of the
2 proceeding where we will deal with focusing the
3 several technical issues that we held are germane to
4 the proceeding.

5 As I think I mentioned in the beginning,
6 the Staff is involved in the decommissioning bond and
7 the security plans, so we will not be talking about
8 those today.

9 We will have a future pre-hearing
10 conference, probably by telephone, to deal with those.
11 So now we will talk about the several areas of concern
12 that we said were germane in our October 29th Order.

13 The first one, my plan on this is that we
14 will, I think I mentioned in the beginning, maybe I
15 didn't, that while we say the citizens are entitled to
16 a hearing, it is not a live hearing with live
17 witnesses, like you usually watch in court.

18 The rules call for written presentations.
19 Written presentations by, what we will do is have the
20 citizens do their written presentations first, the
21 company will do its, and then we, as the deciders,
22 have the option of saying well the written
23 presentations don't go far enough, we need to call in
24 one or more witnesses to a live hearing, with cross
25 examination.

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1 But when we talk about a hearing the
2 lawyers know we are talking about written
3 presentations. The first one was vessel cracking,
4 where -- one more point. The citizens group filed
5 these areas of concern very early in the game, before
6 they had all the documents they now have, before Dr.
7 Resnikoff had more than a passing opportunity to
8 review the documents.

9 So we are looking, today, to see if we
10 want to focus things more narrowly, or more
11 specifically. So, Mr. Sugarman, if you want Dr.
12 Resnikoff to speak with you on any of these you are
13 welcome to do so

14 MR. SUGARMAN: Thank you. You want him to
15 speak to you, or do you want me to do all the speaking
16 to you?

17 ADMINISTRATIVE JUDGE FARRAR: Either way.

18 MR. SUGARMAN: Thank you.

19 ADMINISTRATIVE JUDGE FARRAR: The first
20 one was vessel cracking, which we interpreted as
21 meaning not the vessel, since this kind of irradiator
22 doesn't have a vessel, but we interpreted it as
23 referring to the pool of water cracking.

24 And we are not here to argue the merits of
25 this, that will be for the written presentations. But

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1 we want to know how you --

2 MR. THOMPSON: Excuse me, are you talking
3 about the pool, or the plenum?

4 ADMINISTRATIVE JUDGE FARRAR: This one we
5 interpreted as the structure of the pool. Now, if --
6 we would be open to modification, if they want the
7 plenum rather than the --

8 MR. PUGSLEY: Your Honor, we just raised
9 it because I remember from the Allentown argument --

10 MR. SUGARMAN: I can't hear you.

11 MR. PUGSLEY: I asked the question, Mr.
12 Sugarman, because I remember from the Allentown
13 argument that there was a question as to whether or
14 not we read into the pleading that the vessel meant
15 the plenum, or either. That is the reason Mr.
16 Thompson raised the question.

17 ADMINISTRATIVE JUDGE FARRAR: I would say,
18 here is what I don't want to have happen. I don't
19 want these people to file a written presentation on
20 something, have you come back and say well, that is
21 not really how this works, then they want to amend,
22 and file something else.

23 I'd like to get straight, now, what we are
24 talking about. You are free to object to the extent
25 of getting straight what we are talking about, amends,

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1 you know, unfairly in your mind, amends something that
2 went before.

3 I'm just trying to make sure that the
4 written presentations are going to be on point and
5 will mesh. You are not liking that, Mr. Thompson?

6 MR. THOMPSON: No, no, no. I have not
7 done one of these before. As I said in Allentown, a
8 lot of this is just stuff that is thrown up on the
9 wall. So to the extent that we can narrow it down, I
10 think that will benefit all of us.

11 ADMINISTRATIVE JUDGE FARRAR: Right.

12 MR. THOMPSON: So I'm for that.

13 ADMINISTRATIVE JUDGE FARRAR: And it seems
14 to me we are -- there is no sense going through a
15 paper exercise where they throw some stuff up and you
16 come back and say, that is not how this irradiator
17 works.

18 We ought to talk about that now, and maybe
19 eliminate that area. Or --

20 MR. THOMPSON: That is fine.

21 ADMINISTRATIVE JUDGE FARRAR: -- if we
22 should be talking about the plenum rather than the
23 pool, that is --

24 MR. THOMPSON: They are the ones that are
25 raising the issue. So if they say it is the pool, and

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1 that is --

2 ADMINISTRATIVE JUDGE FARRAR: And that is
3 why I want, we have our option on who goes first, or
4 you go simultaneous. I think we decided, on a
5 conference call, that they would go, partly because of
6 this problem, they would go first, and you come back.

7 But I'm trying to make sure that after we
8 hear from you that is it, that we don't go back and
9 forth several more times.

10 MR. THOMPSON: Right, I'm all for that.

11 ADMINISTRATIVE JUDGE FARRAR: Any
12 thoughts, Mr. Sugarman, Dr. Resnikoff, on the vessel
13 cracking, which we interpreted as the pool structure
14 being damaged because of a cask, of one kind or
15 another, being dropped?

16 MR. SUGARMAN: We are talking about the
17 pool has to be leak resistant, and that a dropped cask
18 would not fall on sealed sources. And we are talking,
19 and crack the pool, whatever you -- and that might not
20 be the right terminology.

21 So if there is a question about what it
22 means that is why Dr. Resnikoff is here. But we are
23 talking about the source material being cracked and/or
24 degraded such that it -- the vessel cracks and
25 material is released.

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1 There are a number of scenarios by which
2 that could happen.

3 ADMINISTRATIVE JUDGE FARRAR: There is no
4 vessel.

5 MR. SUGARMAN: Well, okay. See, a
6 question about terminology, so it is semantics.

7 ADMINISTRATIVE JUDGE FARRAR: No, it was
8 semantics when we were -- I forgot to say this when I
9 was talking about settlement. And the citizens moved
10 for a stay some time ago, and they were denied.

11 It is very difficult to get a stay
12 granted. The criteria are very difficult. So the fact
13 that you didn't get a stay doesn't mean you can't win
14 on the merits. By the same token, the citizens
15 succeeded in getting their areas of concern viewed as
16 germane.

17 Getting a stay is about as high a standard
18 as you can have in the law, having a germane area of
19 concern is about as low a standard. So the fact that
20 the citizens won one, and the company won one, means
21 nothing. The merits are somewhere in between being
22 germane, and getting a stay.

23 And that was one of the reasons that led
24 to my thinking about the settlement and so far the two
25 issues we've decided with opinions don't tell you

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1 anything about the merits.

2 Your concern, but now Mr. Sugarman, when
3 you say it is just semantics, now it isn't semantics.
4 We want to know what you are going to put evidence on,
5 and vessel isn't just semantics. Are we talking the
6 pool, are we talking the plenum, or are we talking
7 nothing?

8 MR. SUGARMAN: I just want to reserve my
9 rights to the term vessel, that we are allowed to use
10 it, even though it may not conform to industry or
11 Commission terminology.

12 ADMINISTRATIVE JUDGE FARRAR: No, no --

13 MR. SUGARMAN: But wait a minute, may I --

14 ADMINISTRATIVE JUDGE FARRAR: The title of
15 the area of concern is vessel cracking.

16 MR. SUGARMAN: Correct.

17 ADMINISTRATIVE JUDGE FARRAR: We are
18 willing to read that liberally, but you have --

19 MR. SUGARMAN: Right.

20 ADMINISTRATIVE JUDGE FARRAR: -- to tell
21 us what you mean by it.

22 MR. SUGARMAN: Okay. So I've tried to say
23 what I meant, but I used the word vessel again. So
24 since I used the word vessel again, and that is
25 objectionable, I'm going to ask Dr. Resnikoff to

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1 describe, in his words, what it is.

2 And I'm conscious of the fact that it is
3 within the terms of what we said before. That is why
4 I'm being technical in insisting that I can use the
5 word vessel.

6 But since --

7 ADMINISTRATIVE JUDGE FARRAR: Wait, wait,
8 we are not trying to rule this area out of order.

9 MR. SUGARMAN: Right.

10 ADMINISTRATIVE JUDGE FARRAR: Now that
11 having gotten it admitted we are going to knock it
12 out. We just want to know what it is.

13 MR. SUGARMAN: Okay, so --

14 ADMINISTRATIVE JUDGE FARRAR: What are you
15 going to present as evidence, what are you going to
16 present evidence on.

17 MR. SUGARMAN: There you go, thank you,
18 sir. Dr. Resnikoff?

19 DR. RESNIKOFF: Well, our intention is the
20 pool. And our intention is both cracking of the pool,
21 and cracking the source material as well. That was
22 our intention.

23 And it remains our contention, in light of
24 part 36.39C, which requires the design to ensure that
25 a dropped cask would not fall on sealed sources.

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1 ADMINISTRATIVE JUDGE FARRAR: All right,
2 that is what you will be moving forward on, okay.
3 Now, this is a general question. Given the documents
4 you've had so far, about the design, and your visit
5 today, do you feel fully equipped to deal with this
6 now?

7 I don't want to hear later that you needed
8 more information.

9 MR. SUGARMAN: Well, we need the
10 discovery.

11 ADMINISTRATIVE JUDGE FARRAR: Well, there
12 is no discovery.

13 MR. SUGARMAN: The discovery that we've
14 asked you to refer to the Commission, we need that
15 discovery.

16 ADMINISTRATIVE JUDGE FARRAR: On?

17 MR. SUGARMAN: Can we --

18 ADMINISTRATIVE JUDGE FARRAR: But that is
19 on a narrow issue.

20 MR. SUGARMAN: No, it is on the history of
21 the design, showing what the design is, that will
22 allow us to ensure that the pool won't crack. For
23 example, I mentioned the heat calculations. Will the
24 heat play a role in the possible cracking of the pool?

25 I can't answer that question and Dr.

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1 Resnikoff, I don't think, should be required to answer
2 that question until he sees the heat calculations.

3 ADMINISTRATIVE JUDGE FARRAR: I thought
4 the heat calculations are in the hearing file?

5 MR. SUGARMAN: No, that is one of the
6 things I was trying to address before, and I guess I
7 didn't get to say it, and I apologize for that. No,
8 I did say it. I said that there has been no heat
9 analysis of the array of curies that are intended
10 within the plenum.

11 All there was, was a heat analysis of one
12 source --

13 DR. RESNIKOFF: The heat calculations will
14 come up under our other areas of concern, which will
15 follow shortly. But in answer to your question, there
16 is other information that we need on this particular
17 issue of vessel cracking and source damage, which we
18 will have to get from the NRC.

19 And that is the nature of the casks that
20 are used to transport the material. The company has
21 said there is a range of casks, and we need to narrow
22 that. The company was not specific in which casks
23 they were using.

24 MR. SUGARMAN: That goes to the weight and
25 the design. So what Dr. Resnikoff is saying is that

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1 the information in the file does not contain the
2 details of the cask design, including the weight of
3 the cask.

4 DR. RESNIKOFF: That is right.

5 MR. SUGARMAN: And that is relevant to
6 determine the propensity for cracking. Have I got
7 that right?

8 Now, are you saying, doctor, that the
9 information would be in the NRC files related to
10 generic, or something, related to the material, maybe?
11 Or it may not be?

12 (Off mike discussion.)

13 MR. SUGARMAN: We are going to have to
14 know what kind of casks they are going to be using.

15 ADMINISTRATIVE JUDGE FARRAR: You have to
16 know what kind of casks, or do you have to know the
17 worse case casks? Because if you do worse case casks,
18 and there is no problem --

19 MR. SUGARMAN: Yes, there is a problem,
20 because then the company comes back and says to you,
21 well we won't use that. And then we have to start all
22 over again.

23 ADMINISTRATIVE JUDGE KELBER: I think that
24 is a false issue because the company has, really, very
25 little control over what cask is used. It is up to

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1 the people who ship the source material. As long as
2 it is a type B cask.

3 DR. RESNIKOFF: But the company has to
4 ensure, by their design, that a dropped cask will not
5 fall on the sealed sources.

6 ADMINISTRATIVE JUDGE KELBER: That may
7 well be, and we are not arguing that question. The
8 discussion is information about type B casks,
9 generally.

10 ADMINISTRATIVE JUDGE FARRAR: So you are
11 saying --

12 ADMINISTRATIVE JUDGE KELBER: And the
13 question was, if you get the maximum weight of a type
14 B cask, is that enough information?

15 ADMINISTRATIVE JUDGE FARRAR: So you are
16 saying when the company orders these from the
17 supplier, the supplier sends them however they want?

18 MR. SUGARMAN: If you know the maximum
19 weight Dr. Resnikoff thinks he can -- we don't want to
20 commit ourselves, but he thinks he can find that
21 information from the docket.

22 Obviously it would be more helpful if the
23 company would give us the specifications that they
24 used to design the system, what specifications --

25 ADMINISTRATIVE JUDGE KELBER: In the

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1 interest of getting off of this, I would look, first,
2 at the specifications for type B casks, which are
3 public in the regulations. And also I would look on
4 the internet, and I think we are ready to move on.

5 MR. SUGARMAN: Well, do we know the
6 specifications that the company used to design the
7 pool?

8 ADMINISTRATIVE JUDGE FARRAR: They have
9 said here is a pool made out of the following
10 materials.

11 MR. SUGARMAN: I meant the specifications
12 of the casks, what specifications --

13 ADMINISTRATIVE JUDGE KELBER: They don't
14 specify the casks. We've said this before.

15 ADMINISTRATIVE JUDGE FARRAR: There is, in
16 the record, a description of the pool, how it is made,
17 what it is made of. I assume somebody can take the
18 largest cask of the type that might be used and do a
19 calculation.

20 If it works, if there is no problem, there
21 is no problem. If there is a problem, then that is
22 one of those things where you impose a condition that
23 says you can't have a cask weighing X over this pool.

24 MR. SUGARMAN: So then is it agreed that
25 this case will be litigated on the basis of the worse

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1 case cask?

2 ADMINISTRATIVE JUDGE FARRAR: It will be
3 litigated on whatever basis you find it most
4 appropriate to present the case you are making.

5 MR. SUGARMAN: Thank you, that is fine.
6 Is there anything else you need on that one?

7 DR. RESNIKOFF: That is it, thank you.

8 ADMINISTRATIVE JUDGE FARRAR: Next one was
9 entitled waste collection where there was concern
10 about storage of radioactive waste at the facility.
11 The company said there is no waste actually stored
12 there, but there is, we said it was broad enough to
13 cover emissions from periodic collection of materials
14 and water chemistry controls.

15 I don't know if interpreting that way
16 leaves you with the kind of issue you want to make
17 anything out of, or not.

18 MR. SUGARMAN: I wasn't aware that you
19 were going to be asking us to stipulate issues out at
20 this point.

21 ADMINISTRATIVE JUDGE FARRAR: There were
22 some of these where the area of concern was marginally
23 germane as we interpreted it. And there has been some
24 time, and some information flow since then.

25 And I'm just wondering if given the

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1 additional information you have if this is still
2 something you want to pursue. You are welcome to
3 pursue any of them.

4 MR. SUGARMAN: Well, I think at this point
5 we would pursue it as you've stated it.

6 ADMINISTRATIVE JUDGE FARRAR: Okay.

7 MR. SUGARMAN: And what we would need is
8 the company's operational plan with respect to water
9 chemistry control radioactive waste, the handling of
10 radioactive waste during water chemistry control, or
11 in connection with water chemistry control.

12 ADMINISTRATIVE JUDGE FARRAR: That is not
13 in the application?

14 (Pause.)

15 ADMINISTRATIVE JUDGE FARRAR: Mr.
16 Thompson, can you represent that that is in the
17 application?

18 MR. THOMPSON: Yes.

19 MR. SUGARMAN: Then we will litigate this
20 case on the basis of -- in this instance, if it is not
21 in the application sufficient to satisfy regulations,
22 then that will be on them.

23 ADMINISTRATIVE JUDGE FARRAR: The next on
24 is rod mishandling.

25 MR. SUGARMAN: Well, that is an easy one.

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1 ADMINISTRATIVE JUDGE FARRAR: -- talked
2 about mishandling the sources during transportation,
3 loading, and removal.

4 MR. SUGARMAN: Well, the question I would
5 have, there, relates to staffing. The application
6 doesn't specify the qualifications or security
7 clearances for the personnel that are going to handle
8 rods outside of the irradiator area.

9 And it doesn't specify, in any detail,
10 what the procedures are. So we would need to have the
11 information as to what the procedures are going to be.
12 If we are limited to the -- since obviously I don't
13 want to anticipate that they are going to say they are
14 not going to give us anything.

15 But if they are not going to give us
16 anything then we want to know about it. Now, I
17 understand that Reviss will probably be the one who is
18 going to handle that. I'm not sure if that is the
19 case. If it is the case then we need to know
20 something about the Reviss qualifications.

21 I mean, our point in the statement of
22 germaness was the concerns.

23 MR. THOMPSON: May I just interject?

24 ADMINISTRATIVE JUDGE FARRAR: Sure.

25 MR. THOMPSON: Our license requires that

1 any involvement by the Licensee has to be an approved
2 person. And whoever is doing it for Reviss has to be
3 an approved person. We don't have control over the
4 transportation, we don't have control over the casks.

5 But the Reviss people who do this for a
6 living load the stuff, and they come and take it away.
7 And that is really not part of our license
8 application. We are required to do it with approved
9 people, be they Reviss or our own.

10 ADMINISTRATIVE JUDGE FARRAR: I can
11 understand that for the transportation. But you are
12 saying even for the installation of the sources?

13 MR. THOMPSON: We are required to have
14 people who satisfy the qualifications for loading and
15 unloading. Now, if Reviss does it, it is their people
16 who are qualified.

17 ADMINISTRATIVE JUDGE FARRAR: So your
18 application doesn't say here is how we will load the
19 cobalt sources. It says we will get the right kind of
20 people who meet the criteria?

21 MR. THOMPSON: And there are, as Dr.
22 Resnikoff knows, there are security concerns, and that
23 was why they were discussed with him today.

24 ADMINISTRATIVE JUDGE FARRAR: Yes, as I
25 read this, this did not -- there is a broad security

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1 concern issue which we will get to, as a separate
2 matter. But as I read this one, it did not go to --

3 MR. THOMPSON: Loading is an issue
4 associated with security.

5 ADMINISTRATIVE JUDGE FARRAR: I thought
6 the way this was phrased was loading was an issue for,
7 concerning accidents.

8 MR. THOMPSON: It may be. But the way in
9 which it is loaded, and how it is done and so forth,
10 the explanation of that is a security matter.

11 MR. SUGARMAN: Well, this gets us into the
12 whole debate that is going on about the scope of the
13 Patriot Act, not directly, but indirectly. Well,
14 maybe directly. And how much it costs us in normal
15 civil law.

16 And I can't, I don't think that it has to
17 be read as disengaging the normal Commission process
18 from safety features. Safety and security may not be
19 completely airtight separate compartments, but they
20 are certainly, just because anything involving
21 radioaction facility involves security, does not mean
22 that it is taken out of the jurisdiction of the
23 Commission's safety responsibility, and therefore out
24 of the ability to litigate.

25 I mean, you have to make a decision --

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1 ADMINISTRATIVE JUDGE FARRAR: We are going
2 to have a separate issue involving security.

3 MR. SUGARMAN: Right, but I'm saying that
4 this isn't that.

5 ADMINISTRATIVE JUDGE FARRAR: This is not
6 that because the way it was phrased was, it looks to
7 me like you are talking about accidents.

8 MR. SUGARMAN: That is right.

9 ADMINISTRATIVE JUDGE FARRAR: Not
10 sabotage, but accidents.

11 MR. SUGARMAN: Exactly.

12 ADMINISTRATIVE JUDGE FARRAR: Someone is
13 loading the sources and they do it improperly, and
14 something bad happens to the source.

15 MR. SUGARMAN: Right.

16 ADMINISTRATIVE JUDGE FARRAR: That is what
17 this looks to be talking about. And now what I'm
18 hearing is involve the Commission, and I don't know
19 this of my own knowledge, but I think Mr. Thompson
20 said the Commission rules say, when you are loading
21 something get people who know what they are doing.

22 And if they are trained, and they meet the
23 criteria, then the company stands back and says to
24 them, have at it. The company has nothing to do with
25 it. So the burden on the company is to be sure they

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1 hire the right people and that has been, apparently,
2 compartmentalized in the regulations. If you hire the
3 right people, that is all the Commission is asking
4 for.

5 MR. SUGARMAN: I understand what you are
6 saying. But he hasn't specifically, when you asked
7 him that question, he backed away from that as it
8 related to the handling.

9 ADMINISTRATIVE JUDGE KELBER: Excuse me
10 for interrupting but I'm confused. I'm looking at the
11 original wording here and it says, mishandling of
12 cobalt 60 rods could emit radiation into the air,
13 impact emission of radiation to the air to our
14 proposed intervenors, most of whom live in a mile of
15 the facility.

16 And then you talk about an expert who
17 examined the license application found the mishandling
18 of cobalt 60 rods during transportation, loading,
19 discharge, cracking and leaks are potential sources of
20 environmental contamination.

21 Now, I think the question is do you want
22 to narrow that any? I think somehow people have
23 gotten off on a tangent here. The whole question here
24 is not the merits of it, and not even whether the
25 person handling it is blond or brunette.

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1 The question is, is there anything you
2 want to narrow this area of concern, after all you've
3 been through, knowing that the sources are loaded
4 under water and so on?

5 MR. SUGARMAN: And the answer to that is
6 no.

7 ADMINISTRATIVE JUDGE KELBER: All right.

8 ADMINISTRATIVE JUDGE FARRAR: But we will
9 read this as not involving security, because we are
10 going to do that as another issue. And to the extent
11 that you are challenging what is happening, the
12 challenge has to be within the Commission's -- it has
13 to be on all these, is the company doing what the
14 Commission's regulations say it is supposed to do.

15 Because, as I said at the outset, we are
16 governed by the Commission regulations.

17 MR. SUGARMAN: Understood. You know, we
18 always have, reserving our rights, the Commission's
19 regulations we find they are invalid or arbitrary as
20 related to this proceeding, we have our rights to
21 challenge that at the appropriate time.

22 But, certainly, we understand where you
23 are at this point. And if we have something that we
24 think is outside the regulations, that we have any
25 rights to do anything about, we will address that at

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1 another point.

2 ADMINISTRATIVE JUDGE FARRAR: All right.
3 Let's move on to the next one which is electricity
4 loss, where there was some confusion, at the
5 beginning, about how this irradiator operated in terms
6 of moving food, as opposed to moving sources like
7 other irradiators did.

8 So what we said is we found that there was
9 a broad concern, legitimately expressed here, but that
10 we wanted it to be stated more specifically since the
11 system operated differently than you believed at the
12 beginning.

13 MR. SUGARMAN: The one thing that we want
14 to clarify, or maybe elaborate on, is if the
15 electricity loss does have an air consequence, and
16 therefore -- and that does relate to the difference
17 between the way this was first presented to us and
18 what we now understand.

19 So I'm going to ask Dr. Resnikoff to
20 address why electricity loss is a concern, as related
21 to your points about the specific problem that we
22 identified earlier, that you say is not applicable or
23 relevant.

24 And as to the fact that you say that there
25 are other problems that could stem from the loss of

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1 facility electricity. And so that brings us to the
2 problems that we now believe are likely, or will occur
3 in the event of loss of electricity.

4 And I'm going to ask Dr. Resnikoff to
5 restate our concern on 1.5, as you indicated we should
6 do.

7 DR. RESNIKOFF: We are concerned about the
8 loss of electricity, and the loss of air circulation,
9 as it relates to heatup of the sources. There are
10 calculations the company has done. We don't agree
11 that those are pertinent to this case.

12 And so we feel that there is a legitimate
13 issue here. The second issue involves the loss of
14 electricity and its potential effect on food product.

15 ADMINISTRATIVE JUDGE FARRAR: Before you
16 get to that one let me, when you address the first
17 issue about heatup of sources, you weren't at the
18 Allentown argument?

19 DR. RESNIKOFF: No.

20 ADMINISTRATIVE JUDGE FARRAR: I don't know
21 if you saw the transcript, but when I asked the Staff
22 lawyer do you need a backup diesel generator, he said,
23 no you need a garden hose. Which I take it was his
24 way of saying in a clever fashion that the heat
25 buildup would be so slight that if you ran a garden

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1 hose in you could cool it down.

2 I don't know, I have no idea whether that
3 is right or wrong. But if he said it, would you be
4 sure to address that? In other words, if the heat
5 buildup is sufficient, to me --

6 DR. RESNIKOFF: We will address the garden
7 hose theory.

8 ADMINISTRATIVE JUDGE FARRAR: In other
9 words, you are not going to win a case by saying here
10 is something that happens, if the something that
11 happens is inconsequential.

12 DR. RESNIKOFF: Absolutely.

13 ADMINISTRATIVE JUDGE FARRAR: It may not
14 be perfection, but if it doesn't cause anybody any
15 problems, and I take it what he was suggesting was
16 that the heat buildup was so small that it really was
17 inconsequential.

18 MR. SUGARMAN: Not to argue the point, but
19 I would like Dr. Resnikoff to tell you what the
20 difference between the heat calculations that were
21 done, and the heat calculations that undoubtedly
22 underlay the Staff's response, versus the heat
23 calculations that should be done.

24 ADMINISTRATIVE JUDGE FARRAR: No. What I
25 would like him to do is do those calculations and

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1 submit them as part of your evidence, and here is why
2 this thing should not have been approved, because the
3 proper heat calculations show this, and then the
4 company will come back and say why they think
5 something else is correct.

6 ADMINISTRATIVE JUDGE KELBER: In doing
7 this it would be a big help to me, as well as others,
8 if you would include reference, by reference, the
9 source of all the material constants you use, whatever
10 correlations, whatever other source material.

11 In other words, just as -- well, in fact,
12 just as the company did in their heatup calculations
13 that you did refer to, where they have -- it is a self
14 contained paper, and that is what I would appreciate,
15 a self contained paper. It could be an attachment,
16 rather than inclusion in the text. But just so it is
17 self contained.

18 ADMINISTRATIVE JUDGE FARRAR: And I think
19 -- I am glad Dr. Kelber mentioned that, because that
20 was implicit, but it should have been made explicit.
21 To state an area of concern, in order to get a
22 hearing, you need to do very little. Here are some
23 things that could happen, we've done this, we've done
24 that, and you are in.

25 This stage is technical scientific

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1 testimony that doesn't say this is what could happen,
2 here is a risk, and we have established -- now we are
3 just asking for a chance to establish it. Now we've
4 come in, and now here is the extent of the problem.

5 And when you say that something is enough
6 of a concern to be germane, to warrant a hearing, you
7 are saying give us a chance to prove our case. Now is
8 your chance to prove the case, and you don't get
9 another chance.

10 MR. SUGARMAN: Since you have the
11 authority to require people to come forth and make
12 statements, I would like to ask that you, or through
13 you, I can ask the company, did they do a heat
14 calculation on the full array of sources in the
15 operation of the facility, did they do one, and do
16 they believe that they gave it to the Commission?

17 ADMINISTRATIVE JUDGE FARRAR: If they gave
18 it? Here is my understanding. Anything the company
19 supplied as part of its application made it into the
20 hearing file. If it didn't make it into the hearing
21 file someone should let me know, and we will say to
22 the Staff why didn't it make it into the hearing file?

23 If, on the other hand, the company didn't
24 submit something, and the Staff didn't require them to
25 submit it, even though you think it should be

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1 submitted, the remedy is not to ask them whether they
2 did it, the remedy is for you to show, in your written
3 presentation, that there is a deficiency in this
4 application.

5 MR. SUGARMAN: You are saying the remedy,
6 but isn't it also a remedy for you to ask the
7 question? Don't you have the authority to ask them
8 the question? You do, I mean, you have the authority
9 to ask them to bring people in to answer questions.

10 ADMINISTRATIVE JUDGE FARRAR: Well, we
11 have, it is in 2.1233, it says we may, on our
12 initiative, submit written questions to the parties.

13 MR. SUGARMAN: Right. And then it says,
14 also --

15 ADMINISTRATIVE JUDGE FARRAR: Sometimes
16 that is done. Right now when we say we have a real
17 question here, in this area of concern, please make
18 sure your testimony addresses this.

19 Or that could be done afterwards, and also
20 what could be done afterwards is we, if we find the
21 issue isn't resolvable on the written presentations we
22 can, after we get those written presentations, ask of
23 the --

24 MR. SUGARMAN: Can I read your paraphrase
25 of it, footnote 33.

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1 ADMINISTRATIVE JUDGE FARRAR: No, 2.1235,
2 we can insist, as I said earlier, on oral
3 presentations by anybody. And that, to me, is when --
4 we are not in position now to ask a whole lot of
5 questions, because we are, because your contentions
6 were relatively sparse, and we said they are germane,
7 but they were -- and that is all they had to be at
8 that stage.

9 But they don't give us enough fodder to
10 say here are the questions we want to ask about this,
11 until we see what your case really is.

12 MR. SUGARMAN: Well, we are here today to
13 narrow and specify the issues, and I have given you a
14 narrow specific issue, question. I guess I would be
15 requesting that you consider, under regulation 1235,
16 1209H, and 1233 second sentence, and 1235A, that the
17 company provide written information as to whether
18 they've made heat calculations based on the full array
19 of maximum array of sources.

20 ADMINISTRATIVE JUDGE FARRAR: Here is what
21 we will do. If what you present, in your written
22 presentation triggers a need for us to do that, we
23 will do that under 2.1235. But we don't know enough
24 about where this issue is going, now, to raise that
25 question.

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1 What was that first one, 1209 what?

2 MR. SUGARMAN: I'm reading from your
3 footnote, footnote 33 in your decision of October
4 29th, and it refers to 1233, second sentence, 1209H,
5 and 1235A.

6 ADMINISTRATIVE JUDGE FARRAR: Right. We
7 are not going to do that now. We may do it at some
8 future time, but we are not going to do it now.

9 MR. SUGARMAN: Did you want to say more
10 about the consequences of electricity loss, Dr.
11 Resnikoff?

12 ADMINISTRATIVE JUDGE FARRAR: I think I
13 cut him off on that first issue, and he was going to
14 get to a second one.

15 DR. RESNIKOFF: I never thought you would
16 ask. The second issue involves the product, and
17 whether the product will be dispersed in the pool, and
18 whether that is a safety concern, or just a matter of
19 losing product.

20 We have some concerns about what would
21 happen in that eventuality, and how the pool will
22 eventually be cleaned up. It is not a simple task to
23 just simply clean up the water. The material may also
24 stick on the liner.

25 And it is not an easy matter to simply

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1 empty the pool, since the sources are sitting there at
2 the bottom. So we have some concerns about cleanup of
3 the pool, and cleanup of the product. And that
4 involves also plugging of filters.

5 MR. SUGARMAN: Yes. I just want to make
6 it clear, we are still talking about loss of
7 electricity. And I'm speaking in very elementary
8 terms. The loss of electricity triggers a loss of the
9 pumps?

10 DR. RESNIKOFF: Yes.

11 MR. SUGARMAN: And the loss of the pumps
12 triggers a loss of bell pressure.

13 ADMINISTRATIVE JUDGE FARRAR: So if you
14 lost the air pressure that keeps the water out of the
15 bell, the product could then become waterlogged with
16 whatever consequences that leads to, depending on the
17 product. And you are concerned that that would
18 interfere with the safe operation?

19 DR. RESNIKOFF: That is right. I mean, I
20 could go further. The company -- all right.

21 ADMINISTRATIVE JUDGE FARRAR: No, I mean,
22 we want you to go further, but we understand now what
23 your, more specifically than we did before, what the
24 concern is.

25 Then we had air line damage. You talked

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1 about -- see, this is kind of a variation of the same
2 thing you --

3 MR. SUGARMAN: That is what he was just
4 telling me.

5 ADMINISTRATIVE JUDGE FARRAR: -- just
6 talked about?

7 DR. RESNIKOFF: That is exactly right.

8 ADMINISTRATIVE JUDGE FARRAR: Then why
9 don't we combine what is listed as 1.5 and 1.6, and do
10 those together.

11 We put 1.8 and number 6 together, the
12 untested design, or untested installation and
13 assembly. This goes to the part of the matters we
14 were discussing today.

15 Would it be appropriate to put this off
16 until we make a ruling on the, particularly the
17 discovery request?

18 MR. SUGARMAN: I mean, I don't know what
19 the ruling --

20 ADMINISTRATIVE JUDGE FARRAR: There is no
21 sense you trying to make a case on this and have a
22 footnote at the end that says, and by the way we still
23 don't have those documents, and we weren't able to
24 make a case.

25 MR. SUGARMAN: I'm sorry, I misunderstood

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1 you.

2 ADMINISTRATIVE JUDGE FARRAR: Why don't
3 we, with those two, whatever schedule we set for these
4 other issues will not be the schedule for this one,
5 because this one has to abide our ruling on the
6 pending discovery. Is that right, Mr. Thompson?

7 MR. THOMPSON: I wouldn't think you would
8 brief these things in seriatim, or something. I
9 mean, I think we ought to just brief them all at once,
10 so just wait until you rule and then have them file
11 theirs sometime after that. Because that may
12 determine what happens.

13 ADMINISTRATIVE JUDGE FARRAR: I was hoping
14 we could go ahead. Now we will have four batches of
15 issues, or four sets of issues, one of which is the
16 batch we've just been talking about, another of which
17 is this untested design which depends on discovery,
18 the third one is security planning, which the Staff is
19 involved in, and the fourth one is decommissioning
20 plan.

21 So I was hoping we would get the batch of
22 what I call the miscellaneous, the ones that we've
23 been talking about, those would all go forward now.

24 MR. SUGARMAN: Are you suggesting that we
25 would have a different schedule for the disposition of

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1 these separate issues?

2 ADMINISTRATIVE JUDGE FARRAR: Yes.

3 MR. SUGARMAN: I would not like to see
4 that, because the cumulative effect of all these
5 issues has a bearing on the outcome of this
6 proceeding. And if we, if I'm envisioning correctly,
7 maybe I'm misunderstanding what your thinking is, but
8 I think to salami them into separate ones detracts
9 from the significant of the cumulative effect of all
10 of them.

11 So if I'm understanding you correctly,
12 maybe I'm misunderstanding you. But if I'm
13 understanding you correctly I would think that would
14 be, that would tend to underestimate the extent of the
15 problem here.

16 ADMINISTRATIVE JUDGE FARRAR: Well, we --

17 MR. SUGARMAN: Bifurcated cases, excuse
18 me, are not a good thing in general to a plaintiff.

19 ADMINISTRATIVE JUDGE FARRAR: Well the
20 bond issue conceivably could go off on a legal ruling.

21 MR. SUGARMAN: Oh, yes.

22 ADMINISTRATIVE JUDGE FARRAR: The security
23 planning is going to take some sort of closed, or some
24 sort of documents that won't be available to the
25 public to see, because we can't discuss that kind of

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1 information in documents that are available to the
2 public.

3 This one that we just talked about has to
4 abide our rulings on these other matters, which are
5 not imminent, because we have to wait for the Staff
6 briefs and your responses.

7 So what I thought I was offering is the
8 chance to come forward on five or six issues, get
9 those rolling, get the company's response in. Now, if
10 you don't -- I assumed you wanted to move forward as
11 quickly as possible because at this point the
12 irradiator is operating commercially.

13 If you don't want to then that is your
14 choice. On the other hand, if we were to grant the
15 Stay Motion Mr. Thompson would be in here saying let's
16 get these issues briefed as quickly as possible.

17 MR. SUGARMAN: Well, I don't know, I can't
18 speak for Mr. Thompson. We've got a Stay Motion that
19 stands on its own two feet, whatever happens with
20 respect to that, we don't want to compromise our
21 opportunity to present our case fully to you on the
22 whole merits.

23 And I would not want to see it broken into
24 pieces because of, as I said, the pieces all relate to
25 each other. The discovery relates to potentially

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1 everything.

2 ADMINISTRATIVE JUDGE FARRAR: All right.
3 Then I was operating, then, under a false assumption.
4 Mr. Thompson, do you have any objection to waiting to
5 brief, or to do the written presentations until we are
6 ready to move forward on all of them? Although
7 security is going to be separate and the bond may go
8 off on our legal ruling.

9 MR. THOMPSON: Well, I don't have a
10 problem, now that I understand what you are saying,
11 going forward on the other issues, because they are
12 going to file, and then we will file.

13 So I don't have a problem with that, they
14 are each going to be distinct issues.

15 ADMINISTRATIVE JUDGE FARRAR: You don't
16 have a problem with us not setting a schedule for
17 written presentations until we are ready to move
18 forward on all of them?

19 MR. THOMPSON: I don't necessarily have a
20 problem either way, to be honest with you.

21 ADMINISTRATIVE JUDGE FARRAR: Okay, fine.
22 Mr. Sugarman, do you want to wait and do it all at
23 once? We will do that.

24 MR. SUGARMAN: I do.

25 ADMINISTRATIVE JUDGE FARRAR: Okay.

1 Although --

2 MR. THOMPSON: But totality and
3 cumulative, I understand what Mr. Sugarman is
4 discussing. They are going to have to address, with
5 specificity, the issues that we talked about.

6 MR. SUGARMAN: Yes.

7 ADMINISTRATIVE JUDGE FARRAR: Now, I will
8 warn you that if we wait too long on this you will be,
9 you will get not only a new settlement judge, but you
10 will get a new judge because at some point the Salt
11 Lake aircraft crash consequences in the spent fuel
12 cask case will emerge, and once that re-emerges, that
13 is all I will be doing.

14 MR. THOMPSON: Well, if that is the case
15 then I would prefer that we move forward more
16 expeditiously, because I don't think that we want to
17 go through trying to re-educate a judge as to all of
18 the stuff that has gone on here.

19 It was bad enough that people retired in
20 the HIR case -- I take back what I said.

21 MR. SUGARMAN: I reiterate what I said.
22 I would rather have somebody who is looking at the
23 whole case. And I think that looking at bits and
24 pieces of it, that makes it even worse.

25 ADMINISTRATIVE JUDGE FARRAR: Let me do

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1 this. I had a phone message that the company in the
2 Salt Lake case is about to file its answers, and the
3 case has been in abeyance while we are waiting for
4 them to file answers to Staff questions.

5 We should know, by early next week, what
6 the schedule of that case will be. Once I know that
7 I will tell you, and we will get on a conference call
8 and decide how best to do this.

9 MR. SUGARMAN: Okay.

10 MR. THOMPSON: Fine, fair.

11 ADMINISTRATIVE JUDGE FARRAR: I will
12 retire as the merit judge and become the settlement
13 judge.

14 (Laughter.)

15 ADMINISTRATIVE JUDGE FARRAR: Who knows.
16 All right, security planning we are going to skip for
17 another day when we get Staff on the phone.

18 We had number 4, was the neighbors water.

19 MR. SUGARMAN: Well, the neighbors water
20 relates to the integrity of the pool, and the
21 integrity of the sources.

22 ADMINISTRATIVE JUDGE FARRAR: So we can
23 put that one back up with pool -- well, I think --

24 MR. SUGARMAN: Let me ask Dr. Resnikoff if
25 there is anything I'm missing on that. I take it you

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1 want something on the consequences also?

2 ADMINISTRATIVE JUDGE FARRAR: Well, there
3 was a concern you had that at some other facilities
4 workers had improperly flushed stuff down the toilet,
5 or it got into the septic system, or something, and
6 contaminated groundwater.

7 But I thought the main thrust here was the
8 pool cracking?

9 MR. SUGARMAN: Right. I don't think there
10 is anything more to say on it at this point, we will
11 address it.

12 ADMINISTRATIVE JUDGE FARRAR: Then why
13 don't we do that one, number 4, with the first one the
14 pool cracking issue.

15 The only one remaining, other than
16 security, is the transportation accidents, where the
17 company had objected as this being -- it was too
18 generalized, and this ties in, again, with loading and
19 unloading.

20 Do we want to put that together with the
21 rod mishandling issue?

22 MR. SUGARMAN: Well, it is overlapping,
23 but it is not coextensive, because we are talking
24 about transportation as opposed to in-plant
25 activities. I wouldn't be exactly sure where

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1 transportation stops and loading starts.

2 It may be in the parking lot, or it may be
3 in the building. But if you want to lump them in
4 order to make a more coherent presentation, to the
5 extent they are overlapping, I don't have any
6 objection to that.

7 ADMINISTRATIVE JUDGE FARRAR: Right. To
8 the extent they are overlapping put them together. If
9 you want to have a part B and C where they are not
10 overlapping, you can do that.

11 MR. SUGARMAN: Okay.

12 ADMINISTRATIVE JUDGE FARRAR: All right.
13 Then I think we've accomplished what we can accomplish
14 today. Are there any loose ends that appeared over
15 the last several months, that we haven't dealt with?

16 MR. THOMPSON: I just want to make sure
17 that I understand, these are the issues, this is it?

18 ADMINISTRATIVE JUDGE FARRAR: That is what
19 I understand. And we will do nothing on them now.
20 I will inform you about the schedule in the private
21 fuel storage case, and at some time I will -- we will
22 come up with a schedule.

23 MR. SUGARMAN: Could I have just a moment?

24 (Pause.)

25 MR. SUGARMAN: Dr. Resnikoff wants to make

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1 sure that I didn't misstate myself. Transportation
2 will be a separate, to the extent that it is separate,
3 I mean, it is not being subsumed in the mishandling or
4 on-site.

5 Transportation outside the plant, on a
6 public right of way, highway, railroad, or whatever,
7 is a concern, it is part of this proceeding. We
8 didn't just take it out?

9 ADMINISTRATIVE JUDGE FARRAR: Right. I
10 guess I'd ask the question, and I don't know the
11 answer to it, do we have jurisdiction to consider
12 transportation by people who are not the company?

13 MR. SUGARMAN: Well, I mean, if you are
14 asking me my contention would be absolutely under the
15 National Environmental Policy Act, have the
16 responsibility to consider that, to litigate it many
17 times.

18 MR. PUGSLEY: Which part of NEPA are you
19 referring to?

20 MR. SUGARMAN: To disclose all the
21 potential environmental effects of an action.

22 MR. PUGSLEY: But isn't that for a major
23 federal action?

24 ADMINISTRATIVE JUDGE FARRAR: Well, let's
25 do this. We will take -- everybody think about this

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1 and in our next pre-hearing conference we will take up
2 how, and to what extent, this is or is not an issue,
3 the off-site part of the transportation.

4 You may be right that it is something that
5 we consider under NEPA. I just don't want to, at this
6 hour, get into that discussion with nobody prepared to
7 do it.

8 ADMINISTRATIVE JUDGE KELBER: In
9 discussing transportation accidents, however it is
10 done, would be useful to us if you would separate out
11 those precedents, or accidents with type B casks,
12 because there is a whole range of casks, a whole range
13 of shipments out there, and there isn't enough time
14 between now and the start of the Yucca Mountain
15 proceeding to settle it.

16 MR. THOMPSON: Well, and not all of them
17 are relevant.

18 ADMINISTRATIVE JUDGE FARRAR: We will
19 think about that in our next pre-hearing conference.
20 Now, in terms, generally, of schedule suppose we say
21 we are starting tomorrow, how much time would you
22 need, are we talking two weeks, two months, two years,
23 to file your written presentations?

24 MR. SUGARMAN: Well, from the time that we
25 start --

1 ADMINISTRATIVE JUDGE FARRAR: Right,
2 whenever we say go. And I'm not trying to pin you
3 down but I just want, for my own scheduling purposes.

4 MR. SUGARMAN: Well, it may depend, a
5 little bit, on when it happens. My trial schedule is
6 fairly clear for the next couple of months. I don't
7 know about Dr. Resnikoff's.

8 ADMINISTRATIVE JUDGE FARRAR: Well, let's
9 assume for now you were clear and we say, we are going
10 to start Monday, how much time do you need? And I'm
11 not pinning you down, I just want to get an idea of
12 what our ballpark is.

13 MR. SUGARMAN: It is hard for me to say.
14 Once we get the information we need I would say a
15 month. But I would have to say that we are working on
16 15 different cases at the same time.

17 ADMINISTRATIVE JUDGE FARRAR: So we could
18 be talking six weeks for you, and six weeks for you?
19 Or is it your experience that you can do it in less?

20 MR. THOMPSON: It depends on what date you
21 come up with.

22 ADMINISTRATIVE JUDGE FARRAR: So we are
23 talking a three month, possible, briefing schedule?

24 MR. THOMPSON: Forty-five days each.

25 ADMINISTRATIVE JUDGE FARRAR: Okay, thank

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1 you all. We end here with a whimper, not a bang. But
2 I appreciate the audience, your interest in the case,
3 and your attention. So we are adjourned.

4 (Whereupon, at 4:32 p.m., the above-
5 entitled matter was adjourned.)

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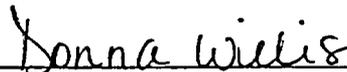
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Name of Proceeding: CFC Logistics-Prehearing
Conference

Docket Number: 30-36239-ML

Location: Quakertown, PA

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