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Title: Sequoyah Fuels Corporation and
General Atomics
Oral Argument

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Docket Number: 40-8027-EA; SML No. Sub-1010
ASLBP No. 94-684-01-EA

Location: Rockville, Maryland

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

+ + + + +

ORAL ARGUMENT

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In the matter of: : Docket No. 40-8027-EA
SEQUOYAH FUELS CORPORATION and : Source Material License
GENERAL ATOMICS : No. Sub-1010
Gore Oklahoma Site : ASLBP No. 94-684-01-EA
Decontamination and :
Decommissioning Funding :

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Friday, January 27, 1995
Hearing Room 3B45
11545 Rockville Pike
Rockville, Maryland

The above-entitled matter came on for hearing,
pursuant to notice, at 9:30 a.m.

BEFORE:

JAMES P. GLEASON Chairman
G. PAUL BOLLWERK Administrative Judge
JERRY R. KLINE Administrative Judge
THOMAS D. MURPHY Administrative Judge

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20 ALSO PRESENT:

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

(9:30 a.m.)

1
2
3 CHAIRMAN GLEASON: Good morning again. This
4 proceeding involves an enforcement order by the Nuclear
5 Regulatory Commission involving the Sequoyah Fuels
6 Corporation and the General Atomics. I am Judge James P.
7 Gleason, and with me is -- other members of the Board are
8 Judge Paul Bollwerk on my left, and Judge Jerry Kline on
9 my right, and an alternate member of the Board, Judge Tom
10 Murphy on my extreme right.

11 I think it would be helpful at this time if
12 the parties would introduce themselves for the reporter.
13 We could start with the left and just go around.

14 MS. UTTAL: Susan Uttal representing the
15 staff. With me to my right is Catherine Marco, and to the
16 far right is Steven Hum, all of the general counsels for
17 this.

18 MR. AXELRAD: Maurice Axelrad and John
19 Matthews of Morgan, Lewis, & Bockius representing Sequoyah
20 Fuels Corporation.

21 MR. DUNCAN: I'm Steve Duncan of Mays &
22 Valentine, and I represent General Atomics.

23 MS. CURRAN: Good morning, I'm Diane Curran.
24 I represent Native Americans for a Clean Environment, and
25 I'm also here today representing the Cherokee Nation.

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1 CHAIRMAN GLEASON: Thank you. This hearing
2 today concerns a motion by Sequoyah Fuels Corporation for
3 a protective order to govern the disclosure and use of
4 information obtained in discovery -- information of a
5 commercial, financial business nature which is considered
6 confidential and/or proprietary.

7 As we know, discovery of any relevant matter
8 is not privileged and is authorized under NRC's
9 regulations and rules and practice. And the parties are
10 in agreement on the terms of the proposed protective order
11 except for one provision, the infamous provision,
12 paragraph seven or the provision known as paragraph seven.

13 Wherein Sequoyah Fuels Corporation and General
14 Atomics propose that the protected material only be made
15 available to persons involved in the conduct of this
16 litigation unless the party producing material or the
17 Board approves a wider dissemination of it.

18 The Staff, supported by the Intervenors,
19 Native Americans for a Clean Environment and Cherokee
20 Nation, propose that it be authorized to distribute this
21 privileged information or protected information to the
22 Nuclear Regulatory Commission's EDO, the executive officer
23 of the agency -- the executive director of the agency or
24 the directors of the Offices of Inspection and the Office
25 of Inspector General.

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1 I will place in the record at this point the
2 complete motion filed by Sequoyah Fuels Corporation and
3 the proposed protective order. The purpose of our
4 proceeding or meeting today and the hearing is to provide
5 an additional opportunity for the parties to argue the
6 issue, and also for the Board to solicit additional
7 information.

8 We will have some further questions as we
9 proceed. The parties have also been forwarded some cases
10 that we have uncovered in our research that are in the
11 general area of the instant case so that they're not
12 identical in the factual sense to it, but they do present
13 similar type of factual settings as the issue before us.

14 Rather than having me summarize the position
15 of the parties, it seems to me probably the best method
16 for us to proceed is if each party in turn would take that
17 responsibility. And then we will provide at a subsequent
18 time an opportunity for the representative of the
19 Intervenor organizations to make any comments that they
20 want to.

21 Unless somebody has a different method of
22 proceeding, we'll go in that fashion. So I would start
23 with the mover of the motion, if we will, and --

24 MR. AXELRAD: Thank you, Judge Gleason.

25 CHAIRMAN GLEASON: Yes, I might say that there

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1 is a podium there if you care to use it that is properly
2 organized with speaking facilities to it, or you can stay
3 in your places as you may choose.

4 MR. AXELRAD: Thank you, Judge Gleason. As
5 you have pointed out, the parties have submitted through
6 the -- a protective order that has been agreed to on all
7 the parties except for one term. The agreed to provisions
8 of the order would among other things provide our
9 protected material should be designated, segregated and
10 marked who can have access to the protected information,
11 how the protective status would be affected by parties
12 dissemination of its own information.

13 How a party would take steps to prevent
14 disclosure, and how protected information is to be kept
15 separate in testimonial pleadings, and how any disputes
16 are resolved by the licensing Board. This protective
17 order will enable a party to respond to discovery requests
18 involving materials that contain protected information
19 promptly, without going through unnecessary formal
20 processes while still having the assurance that the
21 information will be properly protected.

22 In the unlikely event that disputes as to
23 protect the status of the information later arise that
24 cannot be resolved, the discovery disputes will be brought
25 to this Board and resolved by this Board. As Judge

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1 Gleason has pointed out, there is a narrow dispute between
2 the parties relating to proposed paragraph seven that
3 discusses restrictions on the NRC Staff dissemination of
4 protected materials to Staff members not involved in this
5 proceeding.

6 I will address that narrow dispute first, and
7 then the Board's question as to whether the protective
8 order should apply to the NRC Staff if they were to -- if
9 they were to favor the Staff position. In essence, the
10 version of paragraph seven provides that the NRC can
11 provide access to protected information to NRC Staff
12 members and consultants for assisting the NRC Staff in
13 this proceeding.

14 This provides access to anyone in the NRC who
15 is involved or becomes involved in this proceeding.
16 Anyone who is not involved will have access only if the
17 producing party consents or the Board approves. On the
18 other hands, Staff's version -- allow access to other
19 Staff officials and members without regard to whether they
20 are involved in the proceeding.

21 As General Atomics has pointed out in its
22 brief, on the Rule 26 of the Federal Rules of Civil
23 Procedures, courts have routinely restricted the
24 disclosure of protected materials to persons directly
25 involved in a proceeding, and have limited the use of

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1 protected materials for purposes directly related to the
2 proceeding.

3 The NRC Staff does not dispute the judicial
4 interpretations of the Federal Rules of Civil Procedure
5 that serve as guidance to NRC proceedings, nor do they
6 dispute that Sequoyah and General Atomics are entitled to
7 protection of confidential information produced in
8 discovery. However, they maintain that they should be
9 able to disseminate this information within the NRC at
10 their own discretion.

11 Specifically, they argue that our version of
12 Section 7 will interfere with their legitimate exercise of
13 their duties that exceed the Board's jurisdiction. We
14 believe these arguments fail for several reasons. First,
15 our provision would not affect the flow of information --
16 protective directive operations. Since, as the Staff
17 points out, he plays an important role in formulating NRC
18 Staff positions, that it's clear that he is involved in
19 this proceeding -- he can have access to protected
20 information even under our version of Section 7.

21 CHAIRMAN GLEASON: Could I ask for -- just to
22 clarify that a bit, Mr. Axelrad? You're still talking
23 about the EDO's activities in connection with this
24 particular litigation, are you not? You're not talking
25 about the EDO in connection with any activity outside of

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1 this litigation, or are you?

2 MR. AXELRAD: Well --

3 CHAIRMAN GLEASON: That point has just not
4 been made clear, and I wanted to clarify it.

5 MR. AXELRAD: Well, he would get access to the
6 extent that he is involved in the formulation of the
7 Staff's position. Once he has access to the information,
8 obviously he cannot segment his own mind as to what the
9 information means to him. If however he wanted to give
10 access to that information to anyone who is not involved
11 in the proceeding, then he would have to get the Board's
12 permission.

13 But to the extent that he himself decides to
14 do anything or needs to do anything on the base of the
15 information, he is -- he obtains the access to the extent
16 that he is involved in this proceeding.

17 ADMINISTRATIVE JUDGE BOLLWERK: So he can't
18 simply hand it to the head of all our -- the IG and say
19 here it is without coming back to the Board?

20 MR. AXELRAD: Exactly.

21 CHAIRMAN GLEASON: That's the part I wanted to
22 -- thank you.

23 MR. AXELRAD: Now in that connection, our
24 provision would not improperly affect the theoretical flow
25 of information either to the Office of Investigation or to

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1 the Office of Inspector General. We have not sought in
2 our order -- our protective order, to prohibit such
3 dissemination of information. The information is not
4 being disseminated for the purposes for which it was
5 obtained.

6 That is, for the comment of this proceeding,
7 the additional dissemination would require either the
8 consent of the party or the approval of the Board. In our
9 view, this is a reasonable restriction reflecting the
10 Board's responsibility and authority that control
11 discovery in this proceeding and the use of discovery
12 materials by the parties.

13 No single party, not even the NRC Staff, claim
14 to have the unilateral ability to use protected discovery
15 information beyond the scope of this proceeding.
16 Moreover, the impact on the Staff's theoretical discharge
17 of its responsibilities outside this proceeding are
18 minimal. They can ask the Board for expedited action if
19 necessary.

20 But it's scarcely conceivable that in a
21 situation involving a facility of this type that's no
22 longer in operation, that any health or safety
23 consideration would be affected by the minor delay
24 involved in requesting the Board's permission to
25 disseminate the information. The Staff's argument that

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1 the Board cannot direct or supervise the Staff's discharge
2 of its independent responsibility is without merit.

3 This is not a situation where the Board will
4 be directing the Staff on how or when to perform its
5 licensing or enforcement function. We are dealing solely
6 with the exercise of the Board's authority under Section
7 2.740(c) over the parties entitlement to discovering a
8 proceeding and over restriction properly imposed under
9 discovery rights in a proceeding.

10 The Staff's proposed paragraph seven would
11 oscillate the Board's authority and abrogate such
12 authority to the Staff. Under our version of paragraph
13 seven, if the Staff were ever to believe that the
14 authority had -- that the Board had improperly refused to
15 allow use of specific protected materials in a way that
16 adversely affects their ability to discharge other
17 responsibilities, the Staff can appeal to the Commission.

18 The answer is not that the Staff should be
19 able to decide unilaterally that it can use protected
20 information outside this proceeding. In the order that we
21 received a couple of days ago, the Board has asked us to
22 address the applicability, if any, of eight authorities
23 cited in its memorandum of January 25.

24 ADMINISTRATIVE JUDGE BOLLWERK: Before you
25 start with that, can I just ask you a couple of questions?

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1 First of all, I take it one of the reasons that you want
2 this provision is because in many instances if you were
3 concerned about the use of enforcement -- or information
4 for enforcement, you'd be asserting some kind of a self-
5 incrimination privilege.

6 But I take it since these are corporate
7 documents, there's no such privilege that can be asserted.
8 So you're concerned what will be done with the documents
9 that you can't object to on that basis?

10 MR. AXELRAD: Our concern really starts before
11 that. Our concern starts with just minimizing the number
12 of people that have access to the confidential information
13 in the first place. We are concerned about inadvertent
14 release of information as one of the reasons why we have
15 in the proposed protective order conditions dealing with
16 people maintaining logs and finding people -- their
17 responsibility and things of that kind.

18 ADMINISTRATIVE JUDGE BOLLWERK: Well, but it
19 strikes me that the offices we're talking about
20 disseminating it to, you're talking about the IG and the
21 Office of Investigations, are people who by their very
22 nature are used to dealing with confidential information.
23 Is that really a concern if they're going to disclose this
24 information outside the agency or to the public somehow?

25 I mean, isn't it really going to be kept close

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1 at hand? That's what these organizations do.

2 MR. AXELRAD: Our view -- certainly that is
3 true that they have their own processes for maintaining
4 information confidential that have been leaked in the past
5 I'm certain. But in any event, our view is basically that
6 there should not be any dissemination of the information
7 outside the scope of this proceeding that could
8 potentially compromise it at some point without that being
9 done on a case by case basis, either our consent or the
10 Board's approval.

11 And it would be under specific -- by basis. I
12 would suspect that in most instances it probably would not
13 be difficult if the Staff wanted to do that to even obtain
14 our approval for that to be done. We just did not want to
15 let it be done broadly without even our knowledge.
16 That's something we would reasonably be entitled to.

17 ADMINISTRATIVE JUDGE BOLLWERK: What is the
18 standard that you see this Board applying in terms of
19 withholding this information from the Staff? When the
20 Staff comes in to us and says we'd like -- if we were to
21 drop your reading of the order, the Staff comes in to the
22 Board and says we have this information, we want to turn
23 it over to the Office of Investigations, what's the
24 standard that we apply to determine whether it does or
25 doesn't go over to OI?

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1 MR. AXELRAD: That would depend upon -- the
2 Staff in the first place would have to provide some
3 justification to the Board for doing that. And I -- the
4 standard would be the reasonableness of the Staff's
5 justification.

6 I think that -- theoretically, at least, there
7 might be some -- has expressed at some of these other
8 cases that you cited us to as to whether discovery process
9 has been -- for other purposes, I think that's very
10 unlikely to happen in this situation. I think the
11 standard would be one of reasonableness.

12 ADMINISTRATIVE JUDGE BOLLWERK: Well, I guess
13 one of the things that's concerning me is given the
14 Staff's broad authority in enforcement matters, what is
15 there for us to judge here? I mean, any instance that we
16 would withhold the information would probably be
17 information that's so far off the track that I can't
18 believe the Staff would try to -- would be interested in
19 turning over to OI anyway.

20 MR. AXELRAD: Judge Bollwerk, that's the point
21 I'm trying to make. If there is a reasonable basis for
22 turning the information over to another portion of the
23 agency, I don't think that the step of having to do that
24 and going to the Board to do that is an unreasonable
25 restriction. It would only be in those situations where

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1 the Staff is acting unreasonably which may or may not take
2 place, that we would want the Board's protection.

3 ADMINISTRATIVE JUDGE BOLLWERK: I guess one
4 other concern I have -- obviously if the Staff has to come
5 to us and ask us for our approval, in theory, you've been
6 alerted there is a problem with some information that you
7 may not have known before. And that obviously in their
8 opinion would compromise their potential investigation.
9 How do we handle that problem?

10 MR. AXELRAD: As I mentioned -- as we
11 mentioned in the footnote of one of our reply briefs,
12 under appropriate circumstances if the Staff decided that
13 that was necessary to proceed -- have to proceed ex parte
14 before the Board, and it would be up to the Board to
15 decide whether it's appropriate for them to see it ex
16 parte or whatever to have to be notified.

17 ADMINISTRATIVE JUDGE BOLLWERK: So we could
18 proceed totally ex parte, you would never know about the
19 matter if we made that determination?

20 MR. AXELRAD: We believe that we are entitled
21 to at least the Board's protection, and we believe that
22 the Board would -- yes, that protection would be adequate.
23 Speaking for Sequoyah.

24 ADMINISTRATIVE JUDGE BOLLWERK: So then part
25 of the determination we could make is to whether the

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1 information would ever be made available. You wouldn't
2 even be -- know that the Staff came to us and asked us for
3 the -- asked that the information be passed along?

4 MR. AXELRAD: That is correct, Judge Bollwerk.

5 ADMINISTRATIVE JUDGE BOLLWERK: So you're not
6 asking for some kind of an open notice provision then --

7 MR. AXELRAD: No.

8 ADMINISTRATIVE JUDGE BOLLWERK: -- as some of
9 these cases have talked about?

10 MR. AXELRAD: Exactly, I think it would be
11 more reasonableness on those cases which required ten days
12 advance notice to the party who supplied the information
13 before the information could be provided.

14 ADMINISTRATIVE JUDGE BOLLWERK: All right, I'm
15 -- go ahead. I'm sorry, I just wanted to -- a couple of
16 questions I had that I wanted to get -- you were going to
17 talk about the cases. I don't know if you've got
18 something to say.

19 MR. AXELRAD: Of the cases that the Board has
20 asked us to review, the one that seemed to us to be the
21 most relevant and analogous to our proceeding is Harris v.
22 Amoco, which also involved a protective order in an
23 adjudicative proceeding. In that case, the EEOC had
24 intervened in a lawsuit brought by some employees claiming
25 that Amoco had discriminate against them.

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1 During discovery, the EEOC had obtained access
2 to the company's confidential data involving age and sex
3 of employees under a protective order which restricted the
4 agency's use of the data for the present litigation unless
5 it obtained the court's consent. Upon appeal, the EEOC
6 sought to have these restrictions removed, but the 5th
7 Circuit held that the District Court Judge had not abused
8 his discretion.

9 EEOC argued that the restriction would impede
10 the agency's ability to discharge its statutory
11 responsibility to ferret out, prevent, and remedy
12 discrimination. But the court held that the commission
13 was free to investigate discrimination under its statutory
14 powers rather than through the back door of discovery.

15 Moreover, the court pointed out that the
16 District Court expressly reserved the power to rescind the
17 order upon a party's application. Thus, if faced with a
18 properly substantiated EEOC request, the court might
19 release the material to the agency to be used consistent
20 with the agency's statutory functions.

21 We have the same circumstances here. The NRC
22 Staff should not be able unilaterally to use the back door
23 of discovery for other purposes. If for a particular
24 circumstance, they can justify the use of protected
25 information, this Board will be available just like the

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1 District Court in Harris.

2 ADMINISTRATIVE JUDGE BOLLWERK: Not to
3 denigrate the EEOC's responsibilities and authority, but
4 isn't what the NRC is about slightly different at least in
5 terms of health and safety responsibilities?

6 MR. AXELRAD: I understand, Judge Bollwerk,
7 but that would be the factor that the Board would take
8 into consideration. And as I've indicated before, the
9 minimum delay involved in having the Staff come to the
10 Board we don't think has any health and safety
11 consequences in our situation.

12 ADMINISTRATIVE JUDGE BOLLWERK: Do you see any
13 difference between -- in terms of for instance, the
14 Dresser Case that talks about the authority of the SEC
15 versus what's talked about in terms of the EEOC in the
16 Harris case? I mean, the Dresser case talks in the
17 context of a subpoena, but it talks about the authority of
18 the SEC to move forward and the need to disclose
19 information to the Department of Justice which, although
20 it's one step removed, is arguably something that's going
21 on here.

22 If it's turned over to OI, then it may need to
23 go to the Justice Department. And there was no provision
24 that was -- the court wouldn't accept a provision there
25 that blocked the SEC from essentially passing along the

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1 information.

2 MR. AXELRAD: If I recall correctly, the
3 Dresser case was also a case involving investigative
4 powers as opposed to a case involving adjudication. I
5 don't recall the Dresser case specifically, Judge
6 Bollwerk, but a number of these cases involve situations
7 of investigatory information being used for a variety of
8 purposes by agencies.

9 They are not cases, as I recall, that involve
10 the use of discovery material in a proceeding. We believe
11 those are different principles. The only reason that the
12 Staff is getting this particular information is because
13 it's involved as a party in a proceeding. It's not
14 because the Staff is carrying out some other function. To
15 that extent, the use of discovery material is a proper
16 matter to be decided upon at the discretion of the
17 presiding Board.

18 And what we are arguing for is for the
19 protection of the presiding Board in a situation where the
20 Staff seeks to use material outside the scope of a
21 proceeding.

22 CHAIRMAN GLEASON: Mr. Axelrad, do you have a
23 feeling as to -- an opinion that assuming the validity of
24 the Staff's position, the question we raise as to what are
25 they doing here at all? I mean, if they have this right,

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1 they have this right regardless of what the Board says.
2 Can one draw that conclusion?

3 MR. AXELRAD: Well, I think the --

4 CHAIRMAN GLEASON: In other words, they're
5 propounding the proposition that they have an over riding
6 duty that if information comes into their possession that
7 requires it involves issues of safety, that they have a
8 responsibility to forward that information to the three
9 offices that they indicate.

10 Now if that is their position -- if that is a
11 valid position, then really there's nothing for them to
12 even argue about, is there? There's nothing that the
13 Board can do about that one way or the other.

14 MR. AXELRAD: I assume that the Staff's
15 concern is that since they've -- they're agreeing to a
16 protective order and the protective order is issued, that
17 if the protective order restricts what they consider to be
18 the exercise of their duty, that it raises a question as
19 to whether they have somehow compromised their ability to
20 exercise their duty.

21 I mean, the Staff can speak for themselves,
22 but I assume that's why they're --

23 CHAIRMAN GLEASON: I intend to have them speak
24 on that issue, but I wanted to get your comment as well.
25 All right, thank you. Had you finished with your Harris--

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1 MR. AXELRAD: I finished with the Harris. I
2 was going on to -- of the other cases, FTC v. Anderson and
3 FTC v. Atlantic Richfield, we believe are also
4 instructive. Anderson is interesting to us not for its
5 holding, but because of what was undisputed in that case.
6 The FTC had obtained information from Anderson in an
7 adjudicative proceeding under an administrative subpoena.

8 A protective order had been issued. Anderson
9 appealed because the District Court had refused to
10 prohibit use of non-confidential information in other
11 proceedings. The Court of Appeals ruled that this was not
12 an abuse of discretion. For our purposes, that ruling is
13 irrelevant since no one is disputing the use of any non-
14 confidential information obtained in discovery.

15 What is interesting in the Anderson case,
16 however, is that the protective order did require FTC if
17 it wanted to disclose confidential information outside of
18 the proceeding, to provide the supplying party ten days
19 notice so that it could seek relief. This provision was
20 not in dispute, and is clearly analogous to the type of
21 protection that Sequoyah is seeking under paragraph seven.

22 In Atlantic Richfield, the FTC sought to make
23 available information obtained in an investigative
24 proceeding involving Atlantic Richfield to FTC's counsel
25 in a separate adjudicative proceeding involving Atlantic.

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1 Atlantic appealed an unfavorable District Court decision.
2 The Court of Appeals remanded to the District Court the
3 instructions to remand in turn to the FTC so that the
4 commission itself could provide an interpretation of its
5 procedural rule.

6 In the interim, the court ordered FTC
7 attorneys to return the protected materials to the
8 investigative staff. Although this case is dissimilar to
9 our proceeding, the basic principles announced by the
10 Court of Appeals are quite apt. The court stated that
11 regulatory agencies have an obligation to keep
12 investigative and adjudicative roles separate in order to
13 ensure the judicial fairness of adjudicative proceedings.

14 It added that the confidence of the public and
15 the courts and the integrity of the FTC and other
16 agencies' adjudicative processes rested in great part on
17 their effort and success in keeping separate these two
18 diverse functions. The court pointed out that unfettered
19 flow would tend to undercut the role of the administrative
20 law judge in any adjudicative proceeding.

21 It would also encourage surreptitious
22 interchange of documents, would encourage future
23 investigative actions without bona fides, and would
24 separate completely the essential separation of the two
25 functions of the FTC and of other regulatory agencies.

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1 In the remaining decisions cited to us by the
2 Board, there are two District Court decisions which
3 involved the Resolution Trust Corporation and which appear
4 to us to be the least relevant to our current situation.
5 They involved the RTC's ability to interchange information
6 among three or four investigations being conducted by the
7 RTC.

8 Those cases did not involve the authority or
9 responsibility of a court or tribunal over the conduct of
10 discovery in an adjudicative proceeding. Thus, in our
11 view, they are not instructive in our current situation.
12 Although those decisions refer to the Court of Appeals
13 determinations in Atlantic Richfield as dicta, in our view
14 the principles espoused by the Court of Appeals in
15 Atlantic Richfield are good law and good policy whether
16 those decisions were holdings or dicta.

17 ADMINISTRATIVE JUDGE BOLLWERK: I understand
18 the point about discovery and the way the information
19 comes into the hands of the Staff is through the discovery
20 process. But all those other cases dealt with subpoenas.
21 And the way the information came into the hands of the
22 Staff was through lawful subpoenas. So essentially,
23 you've got the information coming into the hands of the
24 Staff through appropriate method, whether it's a subpoena
25 or discovery -- the question is, where does the

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1 information go after that?

2 And it strikes me -- for instance, in the
3 District Court cases, they said it can go within the Staff
4 to other investigations. I mean, what's the distinction
5 that you're drawing that makes important such -- discovery
6 such an important factor here?

7 MR. AXELRAD: What makes it such an important
8 factor is that in an investigation, the agency is
9 performing a statutory function -- statutory duties, that
10 gets information that -- whether it can disseminate
11 properly or not is dependant upon what his particular
12 statute and rules and practices are with respect to
13 investigations and how investigations are conducted, and
14 what they do with investigative information.

15 Here we're dealing with an adjudicative
16 proceeding before a tribunal. And the question is, how do
17 you deal with discovery material that is produced in the
18 course of a proceeding. And that the Staff obtains only
19 because it's a party to a proceeding. If the party wish -
20 - if the Staff wishes to go out and conduct an
21 investigation of Sequoyah and GA and issue subpoenas --
22 get more information, what they can do with that
23 information will be determined by the NRC's rules and
24 statutes and procedure with respect to investigations.

25 ADMINISTRATIVE JUDGE BOLLWERK: All right,

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1 you've raised two interesting points. Let me deal with
2 one. You talked about policies and procedures which is
3 one of the things several of these cases refer to. I'm
4 not aware of any specific policy or procedure the agency
5 has on this matter. Two questions -- is this something we
6 should simply certify to the commission and ask them
7 what's the agency's policy?

8 MR. AXELRAD: I really don't believe that's
9 necessary. It seems to me that we have presented a very
10 reasonable basis for the provisions that we seek. The
11 Staff has presented its basis. I think the Board is fully
12 capable of reaching a decision on that point. If the
13 Board's decision is unsatisfactory to either of the -- any
14 of the parties involved, they can seek to appeal.

15 The commission, of course, keeps a close eye
16 on Board functions and has reached down before if it
17 thought that it was a matter of significant policy. I
18 myself do not believe that what is happening in this
19 particular protective order and this particular provision
20 is so earth shaking. We are not seeking to prohibit the
21 Staff from using the material for other purposes.

22 We are not seeking to have the Staff inform us
23 if they want to use that information for any other purpose
24 under all circumstances. All we're saying is that this is
25 a proceeding before a licensing Board. The licensing

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1 Board controls discovery material, and if the Staff wants
2 to use it outside the proceeding, they just have to come
3 to the Board and get its approval.

4 ADMINISTRATIVE JUDGE BOLLWERK: Well, I guess
5 one of the problems is that my understanding and
6 fundamentally this -- I think the commission is always
7 concerned about any instance where licensing boards are
8 dealing with Staff functions, and especially an
9 enforcement function.

10 I mean that -- I think they're going to be
11 clearly interested in that. Let me ask a separate
12 question.

13 CHAIRMAN GLEASON: Could I --

14 ADMINISTRATIVE JUDGE BOLLWERK: Sure.

15 CHAIRMAN GLEASON: Could I add on to that
16 question?

17 ADMINISTRATIVE JUDGE BOLLWERK: Sure, go
18 ahead.

19 CHAIRMAN GLEASON: If the Staff's position has
20 some merit, is this a matter that should be written out in
21 the regulations?

22 MR. AXELRAD: It was certainly -- we obviously
23 could have avoided this whole situation if there was a
24 regulation dealing with this specific kind of
25 circumstance.

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1 ADMINISTRATIVE JUDGE BOLLWERK: Let me put a
2 question on to that one then. Can the commission issue a
3 policy or regulation that says that this Board has nothing
4 to do with discovery information that comes in? That the
5 Staff can do whatever it wants with it? Can they do that
6 as a matter of law?

7 MR. AXELRAD: I would be reluctant to believe
8 that the commission would write that kind of a regulation,
9 but obviously the functions of this licensing Board as
10 spelled out in the regulations. Section 2.749(c) as
11 presently drafted clearly gives the Board the authority
12 and the responsibility to control discovery and to provide
13 such protection as appropriate if a party seeks it.

14 If the commission wanted to limit the type of
15 protection that the Board could provide a party, I'm sure
16 it could write some reasonable restriction into the
17 regulation granting that authority to the Board. I gather
18 from some of these other decisions that you've cited, that
19 some of these other agencies do have policies or
20 procedures with respect to sharing information among Staff
21 members with respect to investigations and things of that
22 kind.

23 Maybe they have a better defined investigative
24 role in the statutes and things of that kind than this
25 particular agency has. I haven't had the chance to look

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1 at all these other practices, procedures of other
2 agencies. I don't think that the problem is so huge that
3 having to draft a specific regulation at this time is
4 necessarily called for. I think it could be handled
5 reasonably.

6 ADMINISTRATIVE JUDGE BOLLWERK: One of the
7 things that bothers me here -- I mean, admitted we are
8 here to interpret the agency's regulations if they exist.
9 Arguably though, we're not here to make policy about
10 matters that aren't written out or we can't tie to a
11 regulation somewhere, and that's one of things that
12 concerns me.

13 And I think one of the things I'm hearing is
14 we may be in a policy area, and if there's a policy here,
15 isn't that something the commission should decide?

16 MR. AXELRAD: Well perhaps, Judge Bollwerk,
17 but it does seem to me that there is a --

18 ADMINISTRATIVE JUDGE BOLLWERK: That's why I
19 asked you if as matter of law the commission cannot say to
20 the Staff you can disseminate this information, then
21 there's something we should be saying. Because we do make
22 rulings on legal matters. But if it's solely a matter of
23 policy, isn't it something the commission should speak to?

24 MR. AXELRAD: Well, often policy mixed
25 together and what we have here is a situation involving a

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1 discovery question. There are Federal Rules of Civil
2 Procedure which have been interpreted by courts in many
3 circumstances. I think analogies can readily be drawn. I
4 don't think it's that difficult to reach a reasonable
5 decision on this particular narrow point.

6 ADMINISTRATIVE JUDGE BOLLWERK: I'm not
7 saying, sir, a difficulty in reaching a decision. It's a
8 question of who should be making the decision. I guess
9 that's the question I'm raising.

10 MR. AXELRAD: Judge Bollwerk, I believe that
11 this Board has been delegated the authority by the
12 commission to reach decisions on matters of exactly this
13 type. And if the commission is not satisfied, the
14 commission knows what to do.

15 ADMINISTRATIVE JUDGE BOLLWERK: You're
16 certainly right about that.

17 CHAIRMAN GLEASON: Go ahead, Mr. Axelrad.

18 MR. AXELRAD: I was just going to make one
19 last point with respect to those eight decisions. One
20 common teaching I believe from all these authorities is
21 that an administrative tribunal and a District Court
22 undoubtedly has the discretion to impose restrictions on a
23 federal agency's use of discovery on investigative
24 material.

25 In none of those cases do I recall seeing

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1 anything that indicated that there was a lack of authority
2 on the part of the tribunal to take such action. It was
3 just a matter of how should the tribunal properly exercise
4 its discretion. And we believe that taken as a whole,
5 those decisions reflect that this Board should utilize its
6 discretion under 2.740(c) to impose the very sensible
7 restrictions that we have proposed.

8 Now regardless of which version of Section 7
9 the Board adopts, we believe that the Board -- strongly
10 believe the protective order should be made applicable to
11 the NRC Staff. The Board has questioned whether if it
12 accepts the Staff's position on proposed paragraph seven,
13 the statutory and regulatory constraints in 18 USC 1905
14 and 10 CFR Sections 2.790, 9.17 and 9.25 make it
15 unnecessary that the Staff be the subject of any
16 protective order.

17 In our view, that need still exists because
18 complying with those provisions to designate protected
19 information would be unduly burdensome and delaying
20 because the absence of a protective order would improperly
21 shift the decision making function regarding discovery
22 disputes from the Board to the NRC Staff, and because
23 those provisions do not cover a number of important
24 aspects of the protection information as to which all the
25 parties have reached agreement.

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1 As both the Staff and we have pointed out,
2 requiring that all information to be protected be
3 processed under 2.790 would require the private party to
4 prepare formal affidavits under that section. The Staff
5 would then have to review all such information against the
6 requirement of 2.790 and make a formal determination.

7 Not only would this process delay discovery,
8 but none of this costly and resource consuming effort
9 should be necessary unless one of the parties disputes a
10 claim to protected information and seeks to make the
11 information public. Since it is unlikely that this would
12 occur frequently, the use of a protective order rather
13 than relying on a 2.790 process would obviate all of this
14 unnecessary effort and delay.

15 ADMINISTRATIVE JUDGE BOLLWERK: Could I ask
16 you a question with respect to that? One of the things
17 that bothers me about the argument I hear here is that in
18 discovery and then in a hearing, this information that's
19 marked as protected information is supposed to be withheld
20 from the public. Now, in the discovery context, that may
21 be a slightly different situation. In some of the cases
22 that have been cited here, there seems to be a different
23 public right to information and discovery context.

24 But in terms of the hearing, without there
25 ever having been a termination by the agency in context of

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1 2.790 which requires that you all submit affidavits that
2 there be a determination, we're talking about withholding
3 information here potentially. Is that proper? Shouldn't
4 this order be amended somehow to require that you make
5 those kinds of showings to us or somebody else before the
6 information is withheld from the public in any hearing?

7 MR. AXELRAD: Well, Judge Bollwerk, we don't
8 think that that question has to be reached at this point.
9 The basic problem so far as practical aspects are
10 concerned is that -- what would happen if this protective
11 order were not issued is, the Staff asks us for
12 information, and we -- and they want it to be produced for
13 their inspection.

14 We have a large stack of information, we can
15 mark it protected, they can come in and look at it, they
16 will ask for some of it to be copied, okay? They won't
17 ask for all of it. So some of it will be copied, and they
18 will take that with them. Unless there's any kind of a
19 dispute between us as to whether that information needs to
20 be protected, there will never be any need to go through
21 any of the formal processes.

22 And if so, we'll go through the formal process
23 only for the small bit of information as to which they're
24 claiming or somebody is disputing the claim to protect the
25 information.

1 ADMINISTRATIVE JUDGE BOLLWERK: Correct. And
2 that's with respect to discovery. My concern --

3 MR. AXELRAD: I understand. I was going to
4 that, Judge Bollwerk.

5 ADMINISTRATIVE JUDGE BOLLWERK: All right, all
6 right.

7 MR. AXELRAD: Now, with respect to all that
8 information, it's unlikely that any information which the
9 Staff didn't take back with them, that that would ever
10 become part of the process -- that probably would not be
11 introduced in the first place. And even with respect to a
12 lot of the information that they do take back and do look
13 at and they do deem to be relevant, again, only a small
14 portion of that would need to be submitted to the Board as
15 part of the hearing.

16 Now at that point, if somebody really wants to
17 make use of that information for purposes of the hearing,
18 obviously everybody will scrutinize that a lot more
19 carefully. And it may be that some understanding will be
20 able to be reached as to -- a portion of that can be
21 excised so that the information can be produced without
22 protection. It may be that something else can be worked
23 out.

24 If the question arises by the time of the
25 hearing, that there's certain information that some party

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1 wants to use and it hasn't gotten to any kind of a formal
2 review, I think that would be the appropriate time to
3 decide whether or not any more formal steps need to be
4 taken.

5 The answer is not to impose upon the parties
6 having to put everything -- the big pile of stuff through
7 2.790, I know right from the beginning.

8 ADMINISTRATIVE JUDGE BOLLWERK: Right. All
9 right, I'm not disputing. My problem is that this order
10 is written and it does not distinguish between discovery
11 and the hearing. In fact, it basically says once the
12 stuff is protected information, it's protected for all
13 purposes. And I'm wondering if the order even needs to be
14 narrowed to only cover discovery or needs to be broadened
15 with an additional paragraph to deal with the problem of
16 the hearing?

17 MR. AXELRAD: Okay. My recollection of prior
18 hearings that I've been involved in where parties seek to
19 produce protected information, is that they have to file
20 that information with the Board with an appropriate motion
21 to have that particular information protected, and the
22 Board looks at the justification at that time. The Board
23 does not rely on a Staff's -- upon an individual or
24 party's prior determination as being a determination for
25 purposes of the proceeding. The way this --

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1 ADMINISTRATIVE JUDGE BOLLWERK: Well, am I
2 misreading the order then? It doesn't cover the hearing
3 situation? Again, my problem is that the order seems to
4 be so broad that it seems to cover all instances. If we
5 can -- you know, this is something we can take up later if
6 you want to, but it --

7 MR. AXELRAD: Yeah, paragraph 11 deals with
8 that subject. It was our intention when we drafted that,
9 that that would cover the similar information initially to
10 the Board. We did not think through fully whether or not
11 that meant that that information would be forever kept
12 confidential or whether additional steps would be taken
13 before the Board to justify the Board's continuing to
14 treat it in that protected manner.

15 All we wanted to do is to avoid the
16 possibility that somehow somebody could take one of those
17 pieces of paper, file a motion with the Board on some
18 other matter and somehow attach that as an unprotected
19 material. We wanted to be sure that any material
20 submitted to the Board maintained this protected status.

21 ADMINISTRATIVE JUDGE BOLLWERK: Do you think
22 here at a minimum we need an additional sentence that says
23 the Board can establish additional procedures for holding
24 the material in camera during a hearing?

25 MR. AXELRAD: Certainly.

1 ADMINISTRATIVE JUDGE BOLLWERK: Is that -- any
2 of the parties have a problem with that?

3 MS. UTTAL: Staff doesn't have a problem.

4 ADMINISTRATIVE JUDGE BOLLWERK: All right, all
5 right. Maybe that's what we'll need to do then. I
6 appreciate you addressing that problem, because it's
7 something that's been a concern to me.

8 MR. AXELRAD: That has been our intention,
9 Judge Bollwerk.

10 CHAIRMAN GLEASON: Mr. Axelrad, are you
11 familiar with any other -- after all, a journeyman
12 attorney that's had long experience with NRC cases -- have
13 you any experience or know of any other case where the
14 Staff has attempted to carve out an area, if you will -- a
15 protective order like they're doing here?

16 MR. AXELRAD: You mean where a similar
17 protective order has been --

18 CHAIRMAN GLEASON: Right. Where the Staff
19 wants to have a right to turn over protected material to
20 other investigative personnel in the agency?

21 MR. AXELRAD: We're back to discussing
22 paragraph seven?

23 CHAIRMAN GLEASON: Yes.

24 MR. AXELRAD: No, I am not. On the other
25 hand, I must admit there have not been that many

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1 protective orders in my years of dealing with the Staff
2 that turned out to be necessary. We did cite the one in
3 Diablo Canyon where there was a -- where the Staff agreed
4 to a protective order that didn't include any such
5 provision. I am not aware of any.

6 CHAIRMAN GLEASON: All right, all right, go
7 ahead.

8 ADMINISTRATIVE JUDGE BOLLWERK: Can I ask one
9 other general question with respect to the terms of the
10 orders, and this is addressed to both parties. There's no
11 provision in here for the Freedom of Information Act. Is
12 that something that needs to be included in this order if
13 someone comes in and makes an FOI request? I mean, the
14 information is in the hands of the Staff. It's an agency
15 record, it has to be dealt with somehow.

16 MR. AXELRAD: Our view is that that question
17 would be dealt with under the FOIA if that question ever
18 came up that we could not in this particular order try to
19 deal with that. One of the cases, and I can't recall
20 which one it is that you cited, did have a discussion
21 which indicated that it wasn't that clear whether
22 information obtained in discovery in fact constituted an
23 agency record.

24 It said that was a matter to be decided some
25 other time. And I'm not sure how that matter was resolved

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1 in that particular case. I suspect it's unlikely that
2 there will be too many FOIA requests. The chief writer of
3 FOIA requests involving Sequoyah proceeding is sitting at
4 one of these tables, so I suspect she will not have to use
5 that particular mechanism.

6 ADMINISTRATIVE JUDGE BOLLWERK: Right. Well,
7 I just don't know how much press interest there is in
8 this, how much other -- there may be other groups that are
9 not part of the Intervenor -- the two Intervenors here
10 that are interested, I don't know. Does that have any
11 concern for the Staff in terms of how it would be handled?

12 MS. UTTAL: Not at this point. We think it
13 could be handled as it comes up at a later date.

14 ADMINISTRATIVE JUDGE BOLLWERK: All right, if
15 the parties -- I mean, this is your chance to put this in
16 the order, so if you're satisfied to let it sit -- I mean,
17 that leaves the possibility that the Staff will get the
18 FOIA request and then maybe need -- say they need to turn
19 it over the Office of Administration or somebody and other
20 people are getting involved in dissemination.

21 We can to some degree control this now in the
22 order if you want to do it. But if that -- if you want to
23 leave it hang, it's up to you.

24 MS. CURRAN: I would just like to make it
25 clear that I did not interpret this protective order as

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1 preventing an Intervenor from seeking disclosure under the
2 Freedom of Information Act of records that became agency
3 records as a result of this process. And if that needs to
4 be clarified, then perhaps there should be a paragraph in
5 the order.

6 CHAIRMAN GLEASON: Well, we're not sure that
7 it needs to be clarified, so you know, you're -- all Judge
8 Bollwerk is doing is pointing out the possibility to you.
9 It's up to you to decide what to do.

10 ADMINISTRATIVE JUDGE BOLLWERK: This was
11 submitted to us jointly. If you all agree that nothing
12 needs to be done, maybe we'll just need to leave it go.
13 If there's something -- but since I've raised it, if you
14 think about it, if there's something you want to do, let's
15 do it now and within a reasonable time. You know, the
16 next several weeks or something. Yes?

17 MR. DUNCAN: Judge Bollwerk, could I address
18 just that issue? I'm not certain, but I'd like to take a
19 little bit of time to reflect on that issue, because there
20 is a case law. And one of the cases you've cited that
21 said once an agency obtains documents, it can be used for
22 any purpose.

23 And I would hate to think that some
24 proprietary information from my client, General Atomics,
25 came into the hands perfectly under the terms of the

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1 protective order and was being used for the purposes of
2 this proceeding in a perfectly proper way only to later be
3 the subject of an FOIA request by somebody unrelated to
4 the proceeding and have a devastating competitive impact
5 on my client because we overlooked it.

6 So I'd like to give some thought to that. It
7 would be a very reasonable part that we would suggest.

8 CHAIRMAN GLEASON: I'm not so certain -- I'm
9 not certain either way, but my general impression is that
10 there's an exception that that material is not subject to
11 FOIA requests. But you can research it and --

12 ADMINISTRATIVE JUDGE BOLLWERK: Well, it's a
13 question of subject versus -- here is an agency record and
14 not subject to disclosure, which means you have to tell
15 you've got them, but you will not turn it over. I mean,
16 that's the question.

17 One of the reasons -- Judge Gleason brought up
18 the fact there's not much authority in this area of
19 protective orders. And I suspect if we issue something in
20 writing on this -- attach an order to it, that people are
21 going to begin looking at it in the future, and that's one
22 of the reasons I'm -- I mean, this may be an issue that's
23 going to come up again and maybe it's something we need to
24 talk about now.

25 CHAIRMAN GLEASON: Go ahead, Mr. Axelrad.

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1 ADMINISTRATIVE JUDGE BOLLWERK: Go ahead.

2 MR. AXELRAD: I've discussed extensively now
3 the burden that would be imposed if the NRC Staff was not
4 subject to the protective order. In addition, if the
5 Board does not issue a protective order applicable to the
6 Staff, and Sequoyah must accordingly submit discovery
7 responses pursuant to 2.790, the decision making function
8 in the event of a dispute relating to a claim for
9 protection would appear to shift from the Board to the NRC
10 Staff.

11 We think that it is unconscionable to subject
12 one party to unilateral decisions by another party with
13 respect to a discovery dispute. Under Section 2.740(c), a
14 party is entitled to the Board's protection against
15 inappropriate release of confidential information, and the
16 Board should not abdicate such function to the Staff.

17 Finally, as I've noted earlier, the protective
18 order covers many important aspects of the protection of
19 information which is simply not provided in the stark
20 terms of Section 2.790, 9.17, and 9.25. In view of the
21 confidentiality of the information sought by the Staff, it
22 is vital that the possibility of inadvertent disclosure be
23 minimized.

24 Therefore, the protective order contains very
25 important features. For example, the Staff will remind

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1 personnel and consultants who don't have to sign non-
2 disclosure affidavits of their responsibilities under the
3 protective order and the regulations. The Staff, like
4 other parties, will minimize the number of copies made,
5 segregate the materials, maintain a log of each copy made,
6 and will return copies after the proceeding.

7 Sequoyah should not be deprived of this
8 protection which has been agreed upon by all parties.
9 This question must be considered in overall context. The
10 information that we are discussing is not information to
11 be submitted to the NRC by Sequoyah in support of a
12 license application or in response to an NRC action. It
13 is information that is being provided to the Staff only
14 because it is a party to a hearing, and is exercising its
15 discovery rights as a party to the hearing.

16 Sequoyah is cooperating fully in the discovery
17 process, but as a party, it is entitled to the full range
18 of protection for confidential information that the Board
19 is authorized to grant. It should not be relegated to the
20 more limited protection granted information submitted in
21 the licensing process just because Section 2.790 happens
22 to exist in the regulation.

23 The parties have agreed to an efficient and
24 work man like process, and we respectfully suggest that
25 the Board not disrupt our process by relying upon

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1 regulatory provisions that at most deal with only one
2 aspect of the required protection. I'd be glad to answer
3 any additional questions.

4 CHAIRMAN GLEASON: All right, any questions,
5 Jerry?

6 ADMINISTRATIVE JUDGE KLINE: No.

7 CHAIRMAN GLEASON: Mr. Duncan -- do you have
8 any further questions?

9 ADMINISTRATIVE JUDGE BOLLWERK: No, no.

10 CHAIRMAN GLEASON: Mr. Duncan, we have no
11 further questions at this time, Mr. Duncan. Do you have
12 any additional statements you want to make?

13 CHAIRMAN GLEASON: Judge Gleason, I would
14 appreciate an opportunity to make a few brief comments.
15 First of all, let me just say that I join in the argument
16 that Mr. Axelrad has presented. But let me be specific on
17 a couple of points that may be useful to the Board.

18 First of all, as the Board knows, General
19 Atomics is a private company. I mean, the reason we're
20 here from my standpoint, is because this is a private
21 company. It's intentionally so. It's involved in a wide
22 range of competitive businesses, many of which are in the
23 nature of what could be fairly called start up businesses
24 in areas in which the competition is quite keen.

25 We are talking about -- from our standpoint --

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1 proprietary information, financial information,
2 information that would be useful to market competitors,
3 and perhaps devastating to a relatively small company like
4 General Atomics. The concerns that I have about the
5 standard approach to protecting information and the rules
6 is that yes, there may be statutes that prohibit
7 government officials from disclosing information. I
8 understand that, I used to be a government lawyer myself
9 many years ago.

10 But General Atomics is sufficiently small that
11 if, inadvertently, information of a competitive nature
12 were disclosed in some way -- inadvertently,
13 unintentionally -- if it got out in any way, I can't
14 predict whether it would still -- the company would still
15 be around by the time it finally tried to obtain some kind
16 of a remedy for that.

17 This is a reasonable way to protect that.
18 We've tried to be reasonable. The Staff's been very
19 reasonable in discussing it with us. We just have one
20 disagreement over the one paragraph. My reading of the
21 Staff's position tends to be -- and I used to assert the
22 same kind of positions when I was a government lawyer -- a
23 concern about the institutional implications. What does
24 this mean? Does this mean that they're giving up some of
25 the authority that perhaps they believe they have?

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1 And all I can say is, from my standpoint, if
2 that's a concern, I would be certainly willing to include
3 in the proposed order some kind of a stipulation among all
4 of the parties which the Board could issue that --
5 essentially to the effect that the protections that are
6 carved out are based on the unique circumstances of this
7 particular case, and don't have any precedential value for
8 any future proceedings, for other parties in other
9 proceedings, and so forth.

10 We're simply trying to protect very sensitive
11 information for our respective clients for the purposes of
12 this particular proceeding. One last comment, and I state
13 the obvious when I say this. This is the kind of issue
14 that I think could be worked out with the Staff. Because
15 we're not dealing with a reactor situation here. We're
16 not dealing with a plant that's operating.

17 We have time to address these issues and work
18 them out. We've had pretty good success working together
19 so far. I think maybe we're making too much of this whole
20 issue, because I suspect that we're going to be able to
21 work out almost all of our discovery disputes. And if we
22 can't in those very few limited circumstances, all we're
23 asking is that someone stand and -- between the Board's --
24 I mean, between the Staff's free, total, unfettered
25 discretion to use sensitive information.

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1 Someone, namely the Board, second guess that
2 and say this is reasonably related to the purposes of this
3 hearing -- reasonably related to this proceeding. And if
4 that's the case, then that's a reasonable standard that
5 doesn't exist now and we would be happy with it. So with
6 that, Judge Gleason, I have no further comments.

7 CHAIRMAN GLEASON: Thank you.

8 ADMINISTRATIVE JUDGE BOLLWERK: Can I ask Mr.
9 Duncan one question? Is your status in this case any
10 different given the fact that SFC is the licensee and
11 you're still disputing jurisdiction?

12 MR. DUNCAN: Well it could be, I've thought
13 about that.

14 ADMINISTRATIVE JUDGE BOLLWERK: I mean
15 obviously, the commission has its fingers "into SFC as the
16 licensee." There is a question about -- that hasn't been
17 decided, at least by this Board yet, about the
18 jurisdiction of the commission over --

19 MR. DUNCAN: And as --

20 ADMINISTRATIVE JUDGE BOLLWERK: -- General
21 Atomics.

22 MR. DUNCAN: And as you know, Judge, we're
23 contesting that jurisdictional issue here and elsewhere.
24 I've thought about that. We've been successful in working
25 with the Staff, and if I could work out some kind of a

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1 reasonable protection and preserve my right to challenge
2 the jurisdiction over my client totally, I would be happy
3 with that.

4 But that's -- I don't want to get hung up on
5 the fact that we're contesting jurisdiction in every form
6 that we can. I'm willing to go along with the protective
7 order so long as it gives us the kind of protection even
8 while we contest it, understanding that I'm not waiving
9 any right to contest the Board's jurisdiction.

10 CHAIRMAN GLEASON: All right. Thank you, Mr.
11 Duncan. Ms. Uttal?

12 MS. UTTAL: Thank you. As to paragraph seven,
13 it's the Staff's position that whether or not to refer a
14 matter to OI or OIG is an independent responsibility of
15 the Staff over which, with all due respect, the Board has
16 no jurisdiction and no authority to control. We realize
17 or we acknowledge that there's a tension between the
18 discovery rules and the Board's responsibilities to
19 control discovery and the use of discovery materials, and
20 other policies governing the Staff.

21 The Staff has a specific responsibility as
22 laid out in the management directives to report certain
23 matters to OIG and OI. The Staff has very little
24 discretion in whether to report such matters. The only
25 discretion in whether to report something to OI is whether

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1 there's a reasonable belief that some wrongdoing has
2 occurred. And even if the Staff decides not to report a
3 matter to OI, they still have to meet -- I understand they
4 still have to meet with OI regarding the matter.

5 So there's no discretion about whether to
6 refer something to OI. Therefore, the Staff should not --
7 excuse me, the Board should not put itself between the
8 Staff and OI regarding this reporting.

9 CHAIRMAN GLEASON: I might say that your
10 characterization -- putting itself before them -- your
11 position essentially then is what I tried to extract from
12 Mr. Axelrad, is that despite what this Board will do with
13 respect to this order, you have the clear, untrammelled
14 responsibility to turn over information to those offices?

15 MS. UTTAL: We have the responsibility which
16 is why we are contesting this paragraph in the order. We
17 do not want to become a party to a document that could
18 somehow be considered a waiver of that responsibility
19 which we can't -- I don't believe we can really waive. Or
20 a conditioning of that responsibility. And that is why
21 we're here today.

22 CHAIRMAN GLEASON: Well, but I'm getting down
23 to the end of the road here perhaps. But even assuming
24 the Board does not support your version of paragraph
25 seven, you still have this -- in your view -- this

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1 responsibility of reporting that information to those
2 offices?

3 MS. UTTAL: Well, I don't want to say that we
4 want to step over the Board's -- step on the Board's head
5 as it were, but we would have to probably take it further
6 if the Board disagreed with us on this matter.

7 CHAIRMAN GLEASON: In terms of appealing to
8 the commission on an emergency basis or something?

9 MS. UTTAL: Probably something like that.

10 CHAIRMAN GLEASON: All right. Go ahead,
11 proceed.

12 MS. UTTAL: The Staff has the specific
13 responsibility to report this wrongdoing where there is a
14 basis for belief that wrongdoing has occurred. And these
15 are in the management directives that I cited. And these
16 management directives were approved by the commission.

17 ADMINISTRATIVE JUDGE BOLLWERK: Is there
18 anything in the management directives, agency policy,
19 agency regulations, anywhere that addresses this
20 particular problem?

21 MS. UTTAL: About?

22 ADMINISTRATIVE JUDGE BOLLWERK: About
23 discovery materials coming into the hands of the Staff and
24 then disseminating them throughout the agency?

25 CHAIRMAN GLEASON: Protected discovery

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1 material.

2 ADMINISTRATIVE JUDGE BOLLWERK: Protected
3 discovery materials.

4 MS. UTTAL: Not that I'm aware of, no. But it
5 does say that if information of wrong -- regarding
6 wrongdoing comes into the hands of the Staff, there's a
7 responsibility and the duty to report it -- or to refer it
8 with any documents that support the finding of wrongdoing.

9 ADMINISTRATIVE JUDGE BOLLWERK: What about Mr.
10 Axelrad's point that this information is available to the
11 agency through all kinds of different mechanisms --
12 demands for information, subpoenas, however else it needs
13 to get it? Why does it have to come in this way?

14 MS. UTTAL: Well, if OI's -- OI has to be made
15 aware that there is a problem -- a wrongdoing problem.
16 And the directive says that when you make a referral, you
17 attach any documents relating to the referral to that
18 referral. This would seem to require the Staff to tell OI
19 what's going on and to give them the proof or the
20 information supporting the allegation of wrongdoing.

21 ADMINISTRATIVE JUDGE BOLLWERK: When OI issues
22 a demand for information, or the Staff issues a demand for
23 information, is that something that goes to the commission
24 for their review before it's sent out?

25 MS. UTTAL: Not necessarily.

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1 ADMINISTRATIVE JUDGE BOLLWERK: So it may go
2 out directly from the region or headquarters without any -
3 - the commission having a chance to say yes it should
4 issue, no it shouldn't issue?

5 MS. UTTAL: I can't answer that definitively.
6 It goes to the EDO, I believe. I don't know what -- I
7 don't know the exact mechanism for how it happens. I'd
8 have to find out. The tension between the Staff's
9 responsibilities to report this matter -- these matters,
10 and the Board's responsibilities to oversee discovery has
11 to be resolved in favor of the Staff's responsibilities,
12 because those are specific.

13 When you specifically learn of wrongdoing, you
14 must report it. And I think that that overrides the
15 delegation to the Board of responsibility to oversee
16 discovery.

17 ADMINISTRATIVE JUDGE BOLLWERK: Although,
18 we're not talking about overriding, aren't we talking
19 about a procedural mechanism here as a protection? I
20 mean, nobody is saying this information is never going to
21 get to the proper place, it's just saying what procedural
22 way is it going to go.

23 MS. UTTAL: Yes, but for what purpose would it
24 come before the Board? The Staff really has no discretion
25 whether to report something. And if the Staff was

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1 required to come before the Board and say we want to refer
2 this to OI, I don't think that the Board would have the
3 authority to say you can't, we don't think it's sufficient
4 to report. The Staff doesn't have any discretion. I
5 don't think the Board can interpose its own discretion.

6 ADMINISTRATIVE JUDGE BOLLWERK: Well, the same
7 discretion -- there's a judgement that's involved. The
8 Staff has to decide it's related and it's reasonable and
9 all those sorts of things. Why can't the Board make that
10 -- admittedly we'd be second guessing the adjudicatory
11 Staff's determination if that regard, but there's a
12 question of reasonableness and should it go forward.

13 That's something you have to decide as well.
14 I mean, you don't simply -- I don't think -- take all the
15 discovery material you get and sort of ship it over to OI.

16 MS. UTTAL: No, but the decision to be made is
17 delegated to the Staff to make.

18 ADMINISTRATIVE JUDGE BOLLWERK: But there's a
19 decision here that's delegated to this Board which is
20 discovery material subject to a protective order has to be
21 treated in a certain way. And we have responsibilities to
22 make sure that material is not mistreated by someone. And
23 one way it could be mistreated is for material that's come
24 in under discovery, and that's how the Staff gets it, to
25 be used for an improper manner.

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1 To harass someone or to -- as they say,
2 information that has no reasonable relationship to an
3 investigation.

4 MS. UTTAL: You can't assume that the Staff is
5 going to act improperly. You have to assume that the
6 Staff will act properly within its regulatory
7 requirements. And there's no requirement in these
8 management directives that anything interposed between the
9 Staff and OI.

10 CHAIRMAN GLEASON: Well, --

11 ADMINISTRATIVE JUDGE BOLLWERK: That also goes
12 back I guess to my question for a demand for information.
13 My understanding is sometimes the -- often the commission
14 looks at these before they go out. The commission is then
15 interposing itself. Aren't we acting as a delegee for the
16 commission in this instance?

17 MS. UTTAL: But you have to --

18 ADMINISTRATIVE JUDGE BOLLWERK: I see Mr.
19 Chandler back there shaking his head. If he knows the
20 answer to this question, I'd appreciate it. But I don't
21 want to bring him in if he doesn't want to -- do you have
22 a problem with that? I'd just like to --

23 CHAIRMAN GLEASON: Who is Mr. Chandler?

24 ADMINISTRATIVE JUDGE BOLLWERK: Mr. Chandler
25 is one of the --

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1 CHAIRMAN GLEASON: One of the who?

2 ADMINISTRATIVE JUDGE BOLLWERK: He's with the
3 Staff, NRC Staff.

4 CHAIRMAN GLEASON: Well, if --

5 ADMINISTRATIVE JUDGE BOLLWERK: He's an
6 attorney.

7 CHAIRMAN GLEASON: If the --

8 ADMINISTRATIVE JUDGE BOLLWERK: Ms. Uttal's
9 supervisor.

10 CHAIRMAN GLEASON: If Ms. Uttal has no
11 objection.

12 MS. UTTAL: I can't object, Your Honor.

13 (laughter)

14 CHAIRMAN GLEASON: All right, Mr. Chandler?

15 MR. CHANDLER: For the record, Mr. Chairman,
16 my name is Lawrence Chandler. I'm the Assistant General
17 Counsel for hearings of enforcement. Mr. Bollwerk, in
18 response to your question, the commission infrequently is
19 involved in reviewing demands for information. But it
20 would be dependent in large part on whom the demand is
21 being issued.

22 The Staff routinely will issue demands for
23 information, especially to corporate licensees.

24 ADMINISTRATIVE JUDGE BOLLWERK: Without the
25 commission review or any kind of --

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1 MR. CHANDLER: That's correct.

2 ADMINISTRATIVE JUDGE BOLLWERK: All right.

3 Thank you, I appreciate that.

4 MR. CHANDLER: Sure.

5 CHAIRMAN GLEASON: Ms. Uttal?

6 MS. UTTAL: Yes. The only other thing I would
7 like to emphasize about these management directives is
8 that they are -- they cover -- seem to cover all
9 activities of the agency. There's no limitation as to
10 whether they apply to materials obtained during an
11 adjudication or materials obtained from other sources.
12 And as I said before, they were approved by the
13 commission.

14 CHAIRMAN GLEASON: One of the things that
15 strikes me about this case is that first of all, we're in
16 a gray area that really nobody has really chartered any
17 kind of a clear course. And here we sit as a Board that
18 is assigned a responsibility to preside over a litigation
19 that covers our jurisdiction -- a litigation.

20 And in order to proceed with that litigation,
21 we have to oversee the discovery process, and that
22 discovery process does provide in fact for protected
23 information. And you are saying well, yes, but we have
24 another duty down the road which places the chain towards
25 the investigative arm of the agency.

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1 And if this kind of information should be sent
2 to that agency, we have an overriding duty to do it. It
3 does strike me that this is a matter that -- if your
4 position is valid -- that should have been spelled out
5 someplace in the rules, or should have been spelled out at
6 least in terms of precedence somewhere.

7 And I think Mr. Axelrad is right that the
8 general tenor of the cases that get into this area -- and
9 certainly the cases that we've come up with generally talk
10 about separating functions of an agency so we don't have a
11 merger of them. And one can very easily see how the
12 adjudicative function of an agency can be used as an
13 investigative tool.

14 And that kind of makes a mockery out of this
15 whole -- or could make a mockery out of this whole
16 protective order procedure.

17 MS. UTTAL: Well, I think that what a lot of
18 the cases were talking about was the fundamental fairness
19 of the adjudicatory proceeding. They're worried about
20 information coming in through a back door and somehow
21 tainting the adjudicatory proceeding. We're not talking
22 about that in this case. We're not talking about
23 interfering with the fundamental fairness of this
24 proceeding.

25 We're talking about something comes up in

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1 discovery that the Staff determines needs more -- needs
2 investigation, an allegation of wrongdoing. And referring
3 that to the appropriate body, either OI or the Inspector
4 General, depending on what the wrongdoing is. And
5 advising them of that and giving them the proof of that,
6 and then they take it from there. But it has -- it would
7 not be affecting the fundamental fairness of this
8 proceeding because it would not be back dooring of
9 material that wasn't obtained through discovery.

10 CHAIRMAN GLEASON: Well, the thing that spells
11 out, at least in my review of this, is this has never been
12 brought up before apparently. Was the Staff incorrect
13 what it did in the Diablo Canyon case in your view?

14 MS. UTTAL: Well the Diablo Canyon case, as we
15 discussed in the brief, really just involved one report.

16 CHAIRMAN GLEASON: Well, it still was
17 information, you know.

18 MS. UTTAL: But as indicated in our brief, the
19 Staff was aware of what the information was, I believe,
20 and knew that this was a non-issue basically -- whether
21 they would have to refer it to anybody.

22 CHAIRMAN GLEASON: Why wouldn't we attempt,
23 since this is a kind of a "no man's area," -- why wouldn't
24 we attempt to work out some kind of an accommodation with
25 respect to this case which would go along the procedure

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1 suggested by Mr. Axelrad, and with respect to coming
2 before the Board.

3 Or if one was concerned about -- on the part
4 of the Staff, that that information might give way to a
5 knowledge of a potential investigation which is not the
6 most desired thing from an investigative point of view,
7 one could ask for an ex parte session with the Board on
8 the part of the Staff.

9 MS. UTTAL: I don't believe that that is --
10 that was the intention of these management directives, and
11 the intention of the commission in --

12 CHAIRMAN GLEASON: But the management
13 directive just doesn't even talk about protective orders.
14 I mean, it doesn't -- you know, there are lots of
15 management directives that don't consider and haven't
16 considered everything else that happens in an agency. And
17 if it hasn't discussed it, that doesn't mean that it
18 doesn't get involved. It's certainly involved here.

19 MS. UTTAL: But I don't think it would serve a
20 purpose for the Board to interpose itself. If they don't
21 think there's a --

22 CHAIRMAN GLEASON: Well, the Board is not
23 interposing -- there is nothing that is inhibiting, as far
24 as we can determine, the Office of Investigations and the
25 Office of Inspector General from doing any kind of

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1 investigating they want with respect to either of these --
2 or either the licensee or General Atomics. I mean,
3 nobody's preventing them from doing anything.

4 MS. UTTAL: But Your Honor, if the
5 adjudicatory Staff or the Staff that's involved in this
6 case becomes aware of some problem that should be
7 referred, and OI and IG are not aware of it, then they
8 have no reason to investigate and to be made aware of it.

9 ADMINISTRATIVE JUDGE BOLLWERK: Then they will
10 be --

11 CHAIRMAN GLEASON: Yeah, why wouldn't you come
12 before the Board and make that case? Isn't that a
13 solution to it? A practical solution, if you will.

14 MS. UTTAL: I think that it's outside the
15 Board's jurisdiction.

16 CHAIRMAN GLEASON: So then I get back to my
17 other comment that -- with respect to what the Board does
18 in this particular issue, you're going to claim a
19 jurisdiction to do whatever you want to in connection with
20 this material?

21 MS. UTTAL: I don't think I could say -- I
22 don't know what -- can you give me a minute to think about
23 it?

24 CHAIRMAN GLEASON: Sure.

25 (Whereupon, the proceedings went off the

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1 record from 10:44 a.m. until 10:45 a.m.)

2 CHAIRMAN GLEASON: Yes, Ms. Uttal?

3 MS. UTTAL: Your Honor, we would have to
4 follow the policy of the agency to the best that we can.
5 I believe that if the Board disagreed with our
6 interpretation of what we say the policy is, then we would
7 have to go up to the commission about it.

8 CHAIRMAN GLEASON: I see, all right. All
9 right, are you finished?

10 ADMINISTRATIVE JUDGE BOLLWERK: One of the
11 things I find interesting -- I was looking at this. This
12 is the Manual For Administrative Law Judges. It's the
13 Third Edition, 1993. It has three form protective orders
14 in it, none of which say -- well, all of which -- the
15 terms of them would seem to allow the dissemination of
16 information only within the litigation.

17 It does not permit it to the Staff. Now these
18 are not the Bible or anything like that, but you know, I'm
19 wondering where we're going here. And it doesn't seem to
20 be a -- one of them has an FOIA provision in it if anybody
21 wants to look at it, but that's --

22 You know, this doesn't seem -- you would have
23 thought if this were a big problem, this would have come
24 up before. And it seems that the orders in here simply
25 say it stays within the litigation, it doesn't go anywhere

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1 else. Absent an order from the presiding officer, in this
2 case an administrative law judge.

3 MS. UTTAL: I don't know if it's come up here
4 before, but apparently it's come up in other agencies. We
5 have some of these cases.

6 ADMINISTRATIVE JUDGE BOLLWERK: Maybe you'd
7 like to talk about those for a second if that would be --

8 MS. UTTAL: Well, in *FTC v. Atlantic*
9 *Richfield*, the Board after giving its opinion remanded the
10 case back to the FTC for the FTC to interpret its own
11 rules regarding whether the information could be shared
12 between the investigatory and the adjudicatory Staff.

13 We tried to find the history of what happened
14 after that, and there's a footnote I believe in the *RTC*
15 case. *RTC v. Thornton*, where it indicates that the case
16 went back to the FTC, and the FTC decided that the
17 information could be shared, and that was not challenged
18 as of that date. Footnote 5, I believe it is.

19 In the *Richfield* case, the FTC refused to give
20 any notice that they were going to be sharing the
21 information. And apparently the FTC -- the commission
22 decided that that was fine and it could be shared in that
23 manner. I don't find the *Harris v. Amoco* case to be
24 particularly relevant.

25 In that case, the holding was limited to when

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1 the EEOC intervenes in a private age discrimination, or
2 employment discrimination matter.

3 ADMINISTRATIVE JUDGE BOLLWERK: Although it
4 does talk about the broad responsibilities of the EEOC to
5 investigate discrimination. But it says nonetheless, in a
6 discovery context, that's not enough without the court
7 saying okay.

8 MS. UTTAL: And they based it on the EEOC's
9 statute, and I believe rules and -- each agency has a
10 different statute and a different set of rules, and that
11 can be seen from looking at the FTC cases also.

12 ADMINISTRATIVE JUDGE BOLLWERK: What is it
13 then about the NRC statute that makes this a different
14 situation?

15 MS. UTTAL: Well, we have --

16 ADMINISTRATIVE JUDGE BOLLWERK: Or rules or
17 whatever you want to --

18 MS. UTTAL: Well, the regulations that I --
19 and the policies that I've talked about before. The
20 management directives regarding sharing of information
21 with OI.

22 ADMINISTRATIVE JUDGE BOLLWERK: Right.
23 Although there's a general -- isn't there a general
24 government policy that if -- any government employee that
25 sees wrongdoing is supposed to bring that to the attention

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1 of the appropriate authorities. So what I'm asking is
2 what is different about the EEOC and the NRC's organic
3 statutes that distinguishes these two instances?

4 MS. UTTAL: Well, I can't answer as to the
5 EEOC's organic statute. I didn't have the time -- if you
6 want me to delve into what their rules and their
7 regulations and their statutes say, then I would like a
8 chance to look into that.

9 ADMINISTRATIVE JUDGE BOLLWERK: Well I guess
10 all I'm saying is if there's something different about the
11 NRC's health and safety responsibilities versus what the
12 EEOC does, it would make it a different case.

13 MS. UTTAL: Well of course, because we're
14 talking about matters that involve dangerous
15 instrumentalities. And you're talking about our
16 responsibility to protect the health and safety, and our
17 emergency responsibilities and all those other things --

18 ADMINISTRATIVE JUDGE BOLLWERK: All right.

19 MS. UTTAL: -- covered by our statute, which
20 is kind of a looser statute.

21 ADMINISTRATIVE JUDGE BOLLWERK: Well, does
22 that then talk -- lead us to a distinction between an
23 instance where the Staff sees information that causes a
24 health and safety concern such that they must act
25 immediately to shut somebody down or do something

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1 immediate as opposed to simply an enforcement case where
2 maybe somebody has misrepresented something to the agency,
3 or there's a civil penalty involved, or you know,
4 something that does need immediate action.

5 Is there a distinction to be drawn between
6 what should be brought to the Board and what should be
7 brought to the -- what shouldn't be in terms of those
8 sorts of cases?

9 MS. UTTAL: I don't believe so, but I'd like
10 to have a while to think about that. There shouldn't be
11 any reason, because the management directives and the
12 policies are the same no matter what. They don't specify
13 what kind of wrongdoing has to be brought to the fore.

14 In terms of some of the other cases, the cases
15 involving the other agencies, the court spends a lot of
16 time talking about the -- again, the rules and regulations
17 of these various agencies and the constraints they're on.

18 And we've already discussed what I -- the
19 Staff's position on the policies are. And I think that
20 because these cases appear to be very fact specific, that
21 what happens in another agency is not necessarily
22 instructive for what the NRC can do. In terms of our
23 responsibilities and the agencies policies regarding the
24 information and what to do with it.

25 Some of these cases do not involve agencies at

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1 all. And I don't find them to be particularly relevant.
2 Anderson v. Cryovac, I don't think is relevant to this
3 matter.

4 ADMINISTRATIVE JUDGE BOLLWERK: Would it be
5 your position in the context of the adjudicatory
6 proceeding that information gained in discovery that was
7 supposed to be protected, but nonetheless there was a
8 question about it in terms of the Staff and wrongdoing,
9 that the commission could delegate the authority to the
10 Staff or tell the Staff you can simply take that and do
11 what you want with it, and in an adjudicatory context,
12 you don't have to show it to us, you don't have to show it
13 to the Board, you don't have to show it to anybody.

14 Just proceed with it. Even though it's
15 discovery material, it was gotten for the purpose of
16 discovery in this proceeding. You don't need to come to
17 us, don't come to the Board, just go with it where OI or
18 OIG as you see fit. You think the Staff -- the commission
19 can do that? There's no problem with that?

20 MS. UTTAL: I believe that the commission can
21 and has said that you have to refer materials to OI and
22 the IG.

23 ADMINISTRATIVE JUDGE BOLLWERK: And the fact
24 there's an adjudication going on is not relevant to who
25 has to look at it, either the commission, the Board, or

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1 anybody?

2 MS. UTTAL: Yes.

3 ADMINISTRATIVE JUDGE BOLLWERK: Okay.

4 CHAIRMAN GLEASON: Do you not think that, as a
5 matter of fairness, if your position is valid, that that's
6 a matter that should be sketched out in the rules and
7 regulations?

8 MS. UTTAL: I don't think it's required to be
9 sketched out in the rules and regulations. I think that
10 the commission policy is enough, and that the Board can
11 recognize the commission policy regarding the sharing of
12 information with OI.

13 ADMINISTRATIVE JUDGE BOLLWERK: Well, although
14 several of these cases seem to be very concerned about --
15 for instance, a couple of the District Court cases --
16 about whether the policy was stated or not. They seem to
17 say once the policy is stated, at least with respect to a
18 subpoena, then the agency can go off and do what it wants.
19 But until there's a statement of the policy in terms of
20 how it will be handled, there's a question about what's
21 the appropriate mechanism.

22 MS. UTTAL: Well, in that case --

23 ADMINISTRATIVE JUDGE BOLLWERK: And in that
24 case, since there's policy, then we've been given the
25 authority to deal with this adjudication and we're subject

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1 -- you know, we're responsible for protective orders.

2 MS. UTTAL: It's our position that the policy
3 is there -- what to do with the information whether or not
4 there's an adjudication going on.

5 ADMINISTRATIVE JUDGE BOLLWERK: I think that
6 the Staff's position as I understand it is the policy --
7 the only policy that deals with this is the policy
8 requiring the Staff to turn over information dealing with
9 wrongdoing to OI or the IG, whoever.

10 CHAIRMAN GLEASON: Which is in the management
11 directives.

12 ADMINISTRATIVE JUDGE BOLLWERK: Right.

13 MS. UTTAL: Management directives and --

14 CHAIRMAN GLEASON: Which management directive
15 are you citing?

16 MS. UTTAL: I cited them in my brief. I think
17 it's 8.8.

18 CHAIRMAN GLEASON: 8.8?

19 MS. UTTAL: Let me look.

20 ADMINISTRATIVE JUDGE BOLLWERK: If I misstated
21 your position, please correct me. But I think as I
22 understand it --

23 MS. UTTAL: Well, there's also the case law
24 that says that the Board cannot direct --

25 CHAIRMAN GLEASON: Direct.

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1 MS. UTTAL: -- the Staff in the independent
2 regulatory duties. It's also been cited. Management
3 directive 8.8, management of allegations and the appendix
4 to that.

5 ADMINISTRATIVE JUDGE BOLLWERK: I have to say
6 the only other case that I found that seemed to have
7 anything to do with this in terms of the commission is an
8 appeal board decision 555 -- ALAB 555, 10 NRC 23, where
9 the appeal board raised other problems with the protective
10 order, but they approved an order and the last sentence
11 states "No disclosure of the assertively proprietary
12 information described above shall be made outside the
13 United States Nuclear Regulatory Commission or to anyone
14 within the commission who is not taking an active part in
15 the review of such information."

16 Now, there may be some ambiguity there, but
17 that does seem to limit the disclosure of the information
18 to those that are basically involved with the adjudication
19 in some way or another. That's at page 29 of 10 NRC.

20 MS. UTTAL: I don't know. I'm not familiar
21 with that case. I would have to review it, see when it
22 was decided, these would be the management directive and -
23 -

24 ADMINISTRATIVE JUDGE BOLLWERK: The case is a
25 1979 case. It deals with the North Anna Plant in Virginia

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1 Electric and Power Company.

2 MS. UTTAL: Well, I'd like to be given the
3 opportunity to review it -- look into its history.

4 CHAIRMAN GLEASON: I was going to suggest we
5 take a break at this time if it's all right with you
6 people. Let's take 15 minutes, please.

7 (Whereupon, the proceedings went off the
8 record from 10:58 a.m. until 11:12 a.m.)

9 ADMINISTRATIVE JUDGE BOLLWERK: Let me start
10 off by just maybe trying to summarize at least where I'm
11 at in this, and maybe you can help me then one way or the
12 other. Let me start off by saying that I'm acutely
13 sensitive to the Staff's enforcement responsibility and
14 the protection of that authority and the broadness of it,
15 so this is something that concerns me a great deal about
16 what this particular provision involves.

17 But having said that, I think in the context
18 of an adjudication, again you have to look at what's
19 happened with Sequoyah Fuels and General Atomic. The only
20 way that they can protest this order and get review before
21 the agency and before the court of appeals is to come
22 before the agency, request a hearing, submit themselves to
23 the agency processes, one of which is discovery.

24 And then in the discovery context, they have
25 to turn over certain materials to the agency. They're

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1 willing to do that, they're trying to play by the rules,
2 but their concern is that what they then turn over the
3 agency for one purpose is going to be used for another
4 purpose.

5 And all they seem to be asking for is some
6 kind of minimal protection. Somebody who's not part of
7 that arguably enforcement process or not in that mode
8 that's going to look at the information, make a
9 determination is it reasonable to turn it over, and I have
10 to say for myself given the status of the enforcement
11 authority, I don't know what you could bring before us
12 that we couldn't say yes, you probably need to turn this
13 over.

14 Because you wouldn't bring it before us if it
15 were that far out of bounds. But having said that,
16 nonetheless they have the -- because they have come in and
17 put themselves in front of the agency's adjudicatory
18 process, they want that assurance that somebody who's not
19 part of that process will look at it.

20 It can be done ex parte. In fact, this is
21 better to them -- better for you all than a demand for
22 information from OI because in theory, that has to go out
23 to them and they have to respond to it. They may not even
24 ever know that this information is being turned over, at
25 least under they way they've indicated they can accept a

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1 protective order.

2 So, I guess we're talking about a minimal
3 procedural step that protects their interest as an
4 adjudicatory party -- as part of the commission's
5 adjudicatory process. And I guess -- can you explain to
6 me why that's a problem? Have I overstated the case?

7 CHAIRMAN GLEASON: I think you've done it
8 perfectly.

9 MS. UTTAL: Well first of all, it's my
10 understanding that what they're afraid of is outside
11 disclosure of proprietary information that could interfere
12 with their ability to do business and could remove their
13 competitive edge. Now, OI of course would be subject to
14 whatever protective order assigned here, because they are
15 part of the Staff.

16 ADMINISTRATIVE JUDGE BOLLWERK: Right. I
17 don't consider that a particularly -- I mean, I think the
18 -- I'm not going to assume that the agency is going to
19 disclose the information outside their own with the
20 protective order. So the real question is, what they're
21 concerned about is that there be some minimal
22 determination that what the Staff wants to do with this is
23 reasonable.

24 MS. UTTAL: Okay. But I don't think that
25 under the management directives, the policy of the agency,

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1 that the Board can second guess the Staff's determination
2 that something has to be referred. So it's basically --
3 the matter should not go to the Board. It should go
4 directly to OI, because if the Staff determines that
5 something should be referred, then it's going to have to
6 be referred.

7 ADMINISTRATIVE JUDGE BOLLWERK: And I would
8 also say I take it if we disagree -- and again my -- with
9 my statement that I can't conceive of what you would give
10 us that we wouldn't say yes, but if we disagree, then in
11 theory you'd go to the commission. And gee whiz, it
12 wouldn't surprise me if you got review. So again, I don't
13 know what the problem is here. I mean, there's a process
14 here. All they're asking for is a minimal procedural
15 protection in the context of this adjudication.

16 MS. UTTAL: It would be -- I think it would be
17 an empty -- well, I can't say that, I take that back. One
18 of the concerns that some of these cases are talking about
19 is the time delay -- that investigations have to proceed
20 sometimes very quickly. And they --

21 ADMINISTRATIVE JUDGE BOLLWERK: It strikes me
22 this could all be done in 24 hours or less in some cases.

23 MS. UTTAL: That's one of the considerations.
24 The other consideration is that because the Staff has to
25 do what the commission directs us to do which is to refer

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1 things to OI with very little discretion, then the Board
2 cannot second guess the Staff's determination, and there's
3 no reason to present it to the Board. And the Board
4 should not interpose itself --

5 ADMINISTRATIVE JUDGE BOLLWERK: Although if we
6 second guess that -- as you say, second guess it -- the
7 commission, who has the authority over both us and over
8 you, is the one that's eventually going to see it. I
9 mean, the second guessing here I guess I don't see it --
10 our authority is coming from the same source.

11 MS. UTTAL: Well, but it's our position that
12 the Board doesn't have the authority to do this, so the
13 Board should not do this.

14 ADMINISTRATIVE JUDGE BOLLWERK: All right, I
15 guess it's clear you just don't think we have anything to
16 say about this, and that -- that's not, you know -- I
17 can't -- you made it clear.

18 CHAIRMAN GLEASON: Do you have anything else
19 to say about our not having anything to say?

20 MS. UTTAL: I haven't had the opportunity to
21 read the North Anna case, but I do have it before me. I
22 don't think it changes our position. It's my
23 understanding that it predates the establishment of OI.
24 It predates the management directive, which I believe was
25 -- and I'm not sure about this, but there's a date on it

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1 of 1987. This is a 1979 case.

2 And it predates the establishment of the NRC
3 IG. So I don't -- it has no effect on what we're saying
4 here today.

5 ADMINISTRATIVE JUDGE BOLLWERK: Well, does the
6 creation of the IG put any kind of different spin on this?
7 Is this a different situation because of the IG's
8 authority in any way that you can point us to?

9 MS. UTTAL: Well, there's also the management
10 directive that requires us to cooperate with the IG in
11 referral matters of NRC of wrongdoing to the IG without
12 any discretion there either. I'm just mentioning that. I
13 can't speak for the IG. We have a responsibility though,
14 a duty. The same manner as we do with the OI.

15 Other than summing up our position and
16 emphasizing the fact that we believe that any decision or
17 any -- regarding whether or not it should be referred,
18 should be -- and is within the Staff's responsibilities
19 and should not be controlled by the Board. One of the
20 things that we spoke about before and I do want to
21 emphasize, is some of these cases talk about the problem
22 of separating the investigative and the adjudicative
23 functions of the commission.

24 Basically in general, investigations are
25 broader than adjudications. So the underlying problem or

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1 the underlying worry is that the investigation would
2 affect the fundamental fairness of the adjudication by
3 bringing things into the adjudication that could not
4 normally come in. We don't have that problem here. The
5 worry about the fundamental fairness basically flows in
6 one direction when investigative material comes into the
7 adjudication outside this discovery process.

8 In this case, we're talking about advising and
9 referring matters to an investigative body, not bringing
10 things into the adjudication.

11 ADMINISTRATIVE JUDGE BOLLWERK: I take it one
12 thing that's going to flow from this case one way or the
13 other is that in the future, parties are going to be on
14 notice that if they give the Staff something -- if your
15 provision prevails -- then it can go anywhere within the
16 agency's enforcement mechanism, and they're subject to
17 that.

18 So I guess they need to be aware. Not that
19 that will -- in theory, they still have to respond to the
20 discovery request, but --

21 MS. UTTAL: They do still have to respond to
22 the discovery requests, and one cannot say that the Staff
23 is going to willy-nilly send things all over the agency.
24 It's for specific purposes having to do with the
25 regulatory requirements and our responsibilities.

1 CHAIRMAN GLEASON: Does that conclude your
2 presentation?

3 MS. UTTAL: Yes, Your Honor.

4 ADMINISTRATIVE JUDGE KLINE: At the moment, as
5 the record stands before us though, the question of
6 wrongdoing is not even hinted at in our record at present,
7 is it?

8 MS. UTTAL: No.

9 ADMINISTRATIVE JUDGE KLINE: And in fact, the
10 order that the Staff issued to the General Atomics was not
11 premised on any allegation of wrongdoing, isn't that
12 correct?

13 MS. UTTAL: That's correct.

14 ADMINISTRATIVE JUDGE KLINE: Yeah, okay.

15 CHAIRMAN GLEASON: Ms. Curran?

16 MS. CURRAN: I have a few comments. The
17 Cherokee Nation come to this from the perspective of
18 having an interest in seeing that the NRC is able to
19 fulfill its responsibility to ensure the safety of the
20 public in the best way that it can.

21 It seems to us that the fundamental purpose of
22 this protective order is to protect the trade secrets of
23 General Atomics and Sequoyah Fuels. And there's no issue
24 here as to whether trade secrets will be divulged as a
25 result of what the Staff wants to do. The question is

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1 whether they're -- whether the Staff should be able to use
2 the information against -- in other ways.

3 We go back to the basic statutory requirement
4 that in obtaining a license, an entity agrees to disclose
5 information to the NRC as the NRC desires. And I think
6 there's a fundamental premise here that in exchange for
7 the right to operate a dangerous nuclear facility, that
8 the licensee agrees to reveal information as required by
9 the NRC.

10 And it's perfectly in keeping with that
11 statutory requirement that the Staff would -- if it saw
12 information indicating wrongdoing by the licensee or its
13 owner, would take the appropriate action to address that.
14 We're not talking about harassment, we're talking about
15 the exercise of the agency's responsibility.

16 I don't believe that the licensee has the
17 right to notice as to whether the agency is using
18 information to investigate wrongdoing by it. In addition,
19 we're concerned somewhat that the licensing board may not
20 have the authority to pass judgement on the relevance of
21 discovery information obtained in this proceeding to other
22 potential proceedings.

23 It seems to me that the scope of the Board's
24 authority is pretty narrowly defined to the issues within
25 the case. And whether the Board should be passing on the

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1 relevance or weight of material or the appropriateness of
2 referring it to OI or the Inspector General, I'm not sure
3 that's within the authority of the Board as it's set out
4 in this proceeding.

5 ADMINISTRATIVE JUDGE BOLLWERK: Let me ask you
6 a question, Ms. Curran. You're going to be turning over
7 discovery material as well. And I don't know if any of it
8 is going to be protected necessarily, but let's say that
9 something you turned over the Staff rang a bell with them
10 in terms of one of your clients. Now doesn't that cause
11 you some concern in terms of what they're going to do with
12 it?

13 I take it you're saying you're subject to the
14 proceeding, therefore they can do whatever with the
15 information you give them as well without coming to
16 anyone?

17 MS. CURRAN: I can't envision what --

18 ADMINISTRATIVE JUDGE BOLLWERK: I mean, what's
19 sauce for the goose is -- you know. I can't either, but
20 they're going to take this information and they're going
21 to make a decision, and it's going off to OI or OIG if
22 they find it necessary. And nobody is going to say --
23 that's not part of that enforcement process is going to
24 say anything about it.

25 ADMINISTRATIVE JUDGE KLINE: Ms. Curran,

1 you're having trouble answering because the matters as
2 posed to you is kind of -- as you say, speculative. But
3 that's the problem for the Board, isn't it? I mean, this
4 whole think on wrongdoing is all speculative.

5 We don't have anything concrete to deal with
6 among any of this -- you know, in any of these protected
7 papers. And so, your dilemma is our dilemma in this case.

8 MS. CURRAN: Well, I'm not a nuclear licensee
9 either.

10 ADMINISTRATIVE JUDGE KLINE: Well, let me
11 address that for a moment, because it's something that has
12 been bothering me. The ultimate issue in this case
13 revolves around the question of whether the Staff exceeded
14 its authority in issuing an order to General Atomics. And
15 they're resisting on the grounds that they're not a
16 licensee.

17 And you know, that the Staff went too far in
18 exercising its authority. Does it compromise in your mind
19 the fairness that the Board must exercise to, in a sense,
20 decide a question that relates to jurisdiction of the
21 Staff prematurely? I mean, in discovery as opposed to you
22 know, the ultimate decision that the Board has to make.

23 So the issue for us in a way is protecting the
24 fairness of our procedure. And we take, you know, very
25 seriously the health and safety functions that the Staff

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1 must protect, and the health and safety functions that the
2 OI must protect, but we have duties of our own to protect
3 the fairness and integrity of this proceeding.

4 And I must confess that I'm a little uneasy
5 about getting close to the questions of jurisdiction
6 prematurely when that's the issue in the case. That's the
7 issue that's going to be the bottom line decided later
8 somewhere else. And I'd like your comment on that. Or
9 anyone else's, for that matter.

10 MS. CURRAN: Well, we believe that the NRC has
11 the right to ask -- to obtain information from General
12 Atomics as the owner of Sequoyah Fuels. And that based on
13 that, that because General Atomics is involved in a safety
14 related operation regulated by the NRC, that the NRC Staff
15 should be able to pursue its safety related obligations in
16 that --

17 ADMINISTRATIVE JUDGE KLINE: Well, you're
18 asserting things that General Atomics is disputing. And I
19 don't want to decide it now is the problem. And how can
20 we resolve this without really, in a way, infringing on
21 the decision that's properly to be made later?

22 CHAIRMAN GLEASON: Do you have any comment on
23 Judge Kline's dilemma, so to speak?

24 MS. UTTAL: I don't think that you have to
25 make a decision whether there's NRC jurisdiction, which of

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1 course is --

2 CHAIRMAN GLEASON: But in a sense, he's saying
3 you are doing that if you're allowing material to be
4 turned over.

5 ADMINISTRATIVE JUDGE KLINE: Let me refer Ms.
6 Uttal there -- the commission Staff's response to Sequoyah
7 Fuels' motion for protective order. And on page four, it
8 says -- it outlines the authority of OI. And it says the
9 OI -- the commission has vested OI with the authority to
10 conduct investigation of licensees, applicants,
11 contractors, vendors, and so forth -- other allegations of
12 wrongdoing.

13 And much of what's contained in that sentence
14 is what's being disputed as the ultimate issue in this
15 case. So you're calling on us to decide that one of the
16 parties is in fact an applicant, a licensee, a vendor or
17 contractor or something like that.

18 MS. UTTAL: I'm going to have to think about
19 this for a few minutes.

20 MS. CURRAN: Well, it seems to me that whether
21 information is referred to OI or IG for investigatory
22 purposes is distinct from the question of whether the NRC
23 uses that to bring legal action against General Atomics
24 which might not be legal.

25 And that -- I guess we're going on the road

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1 onto speculation as to whether something would ever evolve
2 into an unfair legal action against General Atomics as a
3 result of information obtained in this case. And it seems
4 to me that General Atomics would have recourse in that
5 case.

6 ADMINISTRATIVE JUDGE KLINE: Well, that's my
7 fundamental concern is maintaining the integrity of our
8 process which really means maintaining impartiality at
9 this early stage. Some day we're going to decide it, but
10 not today -- on you know, the ultimate issue. And I don't
11 think that we should be called on to decide some aspect of
12 the reach of NRC's authority prematurely before we've
13 heard the case.

14 MR. DUNCAN: Could I address the issue?

15 ADMINISTRATIVE JUDGE KLINE: Yes, I'd like to
16 hear from you.

17 MR. DUNCAN: Taking to its logical conclusion,
18 the position -- the extreme position, and I think it's an
19 extreme position that the Staff has taken out -- puts a
20 company like General Atomics, which in the context of this
21 proceeding, has not been even hinted at of having engaged
22 in any wrongdoing, is not a licensee of the commission for
23 the purposes of the October 15, 1993 order.

24 If this Board does not have the authority to
25 grant the minimum -- I mean, by any standard -- minimum

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1 protection which we're seeking while we're contesting the
2 jurisdiction, what do companies like -- what recourse do
3 companies like that have but to simply go to federal court
4 in every single instance that comes before an adjudicatory
5 panel of the commission?

6 They would have no alternative but to seek
7 federal judicial relief or relief in some form. And all
8 we're seeking here is the relief of a licensing Board to
9 give us some reasonable protection even while we debate
10 and challenge the broader jurisdictional issues.

11 ADMINISTRATIVE JUDGE BOLLWERK: Does that mean
12 if we grant the order that you're asking for that you're
13 going to withdraw your case in federal case?

14 (laughter)

15 MR. DUNCAN: No, sir, no sir. It does not
16 indeed, but thank you for trying.

17 MS. UTTAL: Judge, I'd like to make two points
18 on that issue.

19 CHAIRMAN GLEASON: Go ahead.

20 MS. UTTAL: First of all, the Atomic --

21 CHAIRMAN GLEASON: Were you finished, Mr.
22 Duncan?

23 MR. DUNCAN: Yes, sir.

24 MS. UTTAL: Sorry. The Atomic Energy Act as
25 quoted in the first part of that paragraph on page four

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1 authorizes the commission to conduct investigations as the
2 commission may deem necessary or proper to assist it in
3 exercising any authority provided in this act, or in the
4 administration or enforcement of this act. So that's
5 broader than the 10 CFR 1.36(a).

6 In addition, OI is also authorized to
7 investigate unlicensed persons. We're going to assume --
8 and it's the Staff's position that of course GA is a
9 defacto licensee, but without making that decision, if
10 they have the authority to investigate unlicensed persons,
11 then Staff's position -- they have the authority to
12 investigate unlicensed entities also depending on the
13 circumstances.

14 ADMINISTRATIVE JUDGE KLINE: But in this case,
15 that's all subject to dispute, right? I mean, the element
16 of wrongdoing comes into the issue of investigating non-
17 licensees, doesn't it?

18 MS. UTTAL: Yes. But the --

19 ADMINISTRATIVE JUDGE KLINE: And none of that
20 is alleged here, right?

21 MS. UTTAL: Well, we're here because the Staff
22 doesn't want to be precluded should evidence of wrongdoing
23 come --

24 ADMINISTRATIVE JUDGE KLINE: We understand
25 that.

1 MS. UTTAL: Okay.

2 ADMINISTRATIVE JUDGE KLINE: So address the
3 question of harm in the alternative proposal, because as
4 it appears now, you could get an overnight decision ex
5 parte if need be. And having exhausted that remedy in
6 case we make the wrong decision, then you'd be free to go
7 to the commission. Is there really an urgent matter of
8 health and safety at stake here?

9 MS. UTTAL: Again, I don't --

10 ADMINISTRATIVE JUDGE KLINE: Even if one turns
11 up. I mean, you could get prompt address to it, couldn't
12 you?

13 MS. UTTAL: I don't believe that it's the
14 commission's intention or the commission's policy that we
15 should have to go to the Board on these kinds of matters.

16 ADMINISTRATIVE JUDGE KLINE: Yeah, I
17 understand you believe you have an ironclad obligation to
18 go. But in case we disagree with you, I wanted you to
19 address the question of harm. Is there harm to the health
20 and safety function if in fact we decide we have to go the
21 other route?

22 MS. UTTAL: Well, I would think that some of
23 that would depend on what kind of allegation --

24 ADMINISTRATIVE JUDGE KLINE: Yeah, I know. I
25 mean, we're all speculating here. But even in the worst

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1 case of revelation of some urgent health and safety matter
2 -- radiological health and safety matter -- we have
3 virtually assured you that you can get a prompt decision
4 on it. I mean, it won't hang out there for months. You
5 can get one -- you can even get it ex parte according to
6 the --

7 So is there a genuine harm assuming that you
8 don't prevail on it?

9 MS. UTTAL: This is getting -- you're asking
10 me to speculate on what kind of harm, and --

11 ADMINISTRATIVE JUDGE KLINE: Well, what's been
12 built into the protective order is a contingency that says
13 hey, just in the -- you know, in the speculative
14 possibility that some sort of wrongdoing pops up, of which
15 there's no hint now, which makes it speculative at the
16 outset. But nevertheless, in case that little hole
17 appears, we've found a way to plug it. And the question
18 is, is that harmful to the interest of NRC Staff?

19 MS. UTTAL: If the NRC Staff is made party to
20 an order that limits its ability to comply with the
21 commission policy -- it has to comply with commission
22 policy, then there's a harm to the Staff.

23 ADMINISTRATIVE JUDGE KLINE: We understand
24 your view that there's an ironclad obligation to do this.
25 And we do have to review that. But I mean, you know,

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1 there are other points of view here that equal -- you
2 know, require equal scrutiny that says look, you get what
3 you want but by a different route. And why that is you
4 know -- why that's offensive to you isn't really clear.

5 MS. UTTAL: Well, I think I've stated our
6 position.

7 ADMINISTRATIVE JUDGE KLINE: Yeah, I
8 understand.

9 MS. UTTAL: I have no further comments.

10 ADMINISTRATIVE JUDGE BOLLWERK: Ms. Curran I
11 think is has --

12 CHAIRMAN GLEASON: Yes, Ms. Curran?

13 MS. CURRAN: I have some concerns. One would
14 be that supposing -- and here again, we're speculating
15 completely. But supposing that the Staff came to you with
16 a concern some information showed wrongdoing by General
17 Atomics, and the Staff said to you we want an ex parte
18 order referring this to the Office of Investigation.

19 That creates two concerns for you. The first
20 one is, should it be ex parte? And then you are now --
21 you're now in the position of deciding whether whatever
22 this wrongdoing is rises to that level of seriousness in a
23 matter that's totally unrelated to the issue that's before
24 you -- the decommissioning case.

25 The second is, you have expressed this concern

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1 that -- one of the central issues here is the NRC's
2 jurisdiction over General Atomics. So to what extent
3 would your concern over the NRC's jurisdiction over
4 General Atomics affect your determination as to whether
5 the issue should be referred to the Office of
6 Investigation?

7 And I'm not 100% sure how that should be
8 resolved, but it gives me pause. And I guess I'll just
9 put that on the table.

10 CHAIRMAN GLEASON: One thing, that is not
11 speculation and I suppose should be mentioned again is
12 that, as I recall, it's been some time since I've read the
13 initial order. This case has not been achieving any marks
14 for rapidity. But as I recall, your -- it doesn't make
15 any allegations of misconduct on the part of either
16 General Atomics or Sequoyah Fuels Corporation, does it
17 not, Ms. Uttal?

18 MS. UTTAL: I don't believe there are any
19 allegations.

20 ADMINISTRATIVE JUDGE BOLLWERK: Can I just
21 repeat -- I just wanted to say. Again with Ms. Curran,
22 you understand that what you're arguing here for applies -
23 - could apply to an Intervenor as well who made
24 information available to the NRC? I mean, you're willing
25 to accept that if that's what flows from --

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1 MS. CURRAN: Yes.

2 ADMINISTRATIVE JUDGE BOLLWERK: All right.

3 MS. UTTAL: Judge? I didn't address the issue
4 of whether the Staff should be subject to --

5 ADMINISTRATIVE JUDGE BOLLWERK: Sure, if you
6 want to say something about that, go ahead.

7 MS. UTTAL: I did. Well, I think that I've
8 stated the Staff's position in our pleadings, but I'll
9 just reiterate it. Under normal circumstances or in
10 general, we don't believe the Staff need be subject to a
11 protective order. We think that 2.790 in conjunction with
12 18 USC 1905 are enough of a deterrent for unlawful or
13 unauthorized release of the materials in question here
14 which are basically trade secrets and financial
15 information.

16 Without a finding under 2.790 which we're not
17 requiring in this case, a protective order would be
18 needed, and we've agreed to voluntarily subject ourselves
19 to the protective order rather than require this -- what
20 may be massive amounts of information to go through the
21 2.790 proceeding.

22 CHAIRMAN GLEASON: At a much slower procedure.

23 MS. UTTAL: Yes, yes. And we believe this is
24 a well founded decision on the part of the Staff to become
25 subject to the protective order other than paragraph

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1 seven, because it would come to the same effect as if -- a
2 2.790 proceeding.

3 Under 18 USC 1905, there has to be some
4 proceeding or some rule or regulation in the agency which
5 decides whether a document is confidential -- whether a
6 document is trade secret. And that procedure in this
7 agency is 2.790, which has been accepted to be a validly
8 enacted regulation with the force of law under 18 USC
9 1905.

10 But as I said, if there is no 2.790 finding,
11 then there has to be some other mechanism. The mechanism
12 in this case would be a protective order voluntarily to be
13 subject to. And we believe that that could be a
14 substitute for the 2.790 proceeding.

15 The only question that I bring to the Board's
16 attention is the contractors -- vendor/contractors are
17 probably not subject to 18 USC 1905. They would have to
18 be subject to a protective order under any circumstances.
19 But as to the Staff, under normal circumstances --

20 CHAIRMAN GLEASON: All right. Anything else,
21 Mr. Axelrad?

22 MR. AXELRAD: Just one very brief statement on
23 this overall question the Board has been asking the Staff
24 about. As I see it, the Staff admits that there's a
25 tension between a management directive and these

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1 regulations which are entrusting the licensing Board with
2 the responsibility to provide protection for confidential
3 information otherwise controlled discovery.

4 Management directive may have been approved by
5 the commission, but it's not a regulation. As far as I
6 know, has not gone through any formal procedures that will
7 allow anybody to participate in any fashion whether or not
8 it would hopefully protect other interests of other
9 parties. It certainly doesn't say anything about --
10 specifically about how discovery materials in adjudicatory
11 proceedings are to be handled.

12 But how can the Staff admit this tension -- I
13 mean, management directive and the regulations that
14 authorize what actions the Board could take? It
15 apparently feels that the way to address and accommodate
16 that tension is to ignore the regulation which entrusts
17 responsibility in the Board and give persuasive effect
18 just to the management directive.

19 And as far as we're concerned, that's
20 untenable. Particularly since there is a ready route
21 under which both the management directive and the
22 regulations can be readily accommodated. It's a process
23 which we've suggested and which this Board has discussed.

24 It does not create any undue delay which
25 allows the Staff to discharge whatever responsibilities it

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1 believes it has under the management directive in a way
2 which would make sure that the Board can also achieve its
3 responsibility. That's all I have to say.

4 CHAIRMAN GLEASON: Okay, thank you very much.

5 ADMINISTRATIVE JUDGE BOLLWERK: I have one
6 question, Mr. Axelrad, and I'll make it very brief. One
7 of the things I'm trying to figure out is -- your concern
8 is that information you've given this agency for one
9 purpose not be used for another. Why doesn't that apply
10 to non-confidential information?

11 In theory, the Staff can take anything else
12 that's given to them and refer it to OI and you're never
13 going to know about it. Now, why are we not being asked
14 to enter a broader order here that covers any discovery
15 material? I mean, what makes this protected material
16 different?

17 MR. AXELRAD: Well, what makes it different is
18 its importance and sensitivity to the licensee in the case
19 of Sequoyah and to GA as a non-licensee.

20 ADMINISTRATIVE JUDGE BOLLWERK: But it's
21 importance and sensitivity is its financial information,
22 not in your estimation as having anything to do with
23 enforcement matters. I mean, you don't think there's any
24 enforcement matters here. You're just simply turning this
25 over because it's discovery. But the Staff might think

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1 something different. And that's what you seem to be
2 concerned about. It's a difference in judgement here.

3 MR. AXELRAD: There are really two aspects of
4 this matter. One is -- and an important one from our
5 standpoint -- is to minimize access to confidential
6 information. The fact that even though OI, OIG, anyone
7 else within the NRC has these procedures and processes to
8 protect information, the possibility of inadvertent
9 disclosure gets increased the more people have access to
10 it.

11 ADMINISTRATIVE JUDGE BOLLWERK: All right.

12 MR. AXELRAD: There's a need to know context.
13 So certainly confidential information should get that
14 protection.

15 ADMINISTRATIVE JUDGE BOLLWERK: All right,
16 fair enough.

17 MR. AXELRAD: Now, whether or not there would
18 be a misuse of the adjudicatory process to take care of
19 some other investigatory purpose that the Staff might
20 have, I would hope that that would be very unlikely. I
21 would hope that that would never come into question. If
22 it did, it would come up in the case of any particular
23 instance when the Staff would seek the Board's approval to
24 repeat the information.

25 ADMINISTRATIVE JUDGE BOLLWERK: Yeah, but the

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1 problem is you're not asking us to review whether the
2 Staff's procedures to give it to OI or OIG are going to
3 protect the information from dissemination. You're asking
4 us to look at it in terms of what they're going to use it
5 for.

6 MR. AXELRAD: The reasonableness of their
7 desire to transfer the information to somebody else,
8 that's correct. And what would come into play in
9 determining that reasonableness would be something that
10 would have to be looked at at that point.

11 ADMINISTRATIVE JUDGE BOLLWERK: But that again
12 deals with -- it strikes me both confidential and non-
13 confidential information. But you're not asking -- you
14 don't seem to care about non-confidential information.

15 MR. AXELRAD: I don't think there would have
16 been any chance to get any kind of protection for non-
17 confidential information.

18 ADMINISTRATIVE JUDGE BOLLWERK: So you're sort
19 of boot-strapping the fact that it's proprietary to get a
20 determination about whether it involves an investigation?

21 MR. AXELRAD: Well, I don't consider it to be
22 boot-strapping. I consider it to be the type of
23 information which requires the most protection, and
24 therefore should be entitled to treatment by the Staff in
25 a manner that is only consistent with the purposes of this

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1 proceeding unless they get the Board's approval.

2 ADMINISTRATIVE JUDGE BOLLWERK: All right.

3 CHAIRMAN GLEASON: All right, thank you.

4 We're going to -- the Board needs to take about five
5 minutes. Did you have anything else?

6 MR. DUNCAN: I had one question, Judge
7 Gleason. The issue of the FOIA request -- I would propose
8 that we be given a short period of time, one week or
9 something like this, to see if we can reach some kind of
10 an agreement or a paragraph to address that issue. That
11 is to say, whether materials that were part of the
12 discovery process would then -- how would they be treated
13 with a separate FOIA request by some third party.

14 CHAIRMAN GLEASON: Well, you may find that you
15 don't even need to reach any agreement, but we'll be glad
16 to give you time to research it. The Board needs to take
17 about five minutes here by itself to see what we want to
18 do next. Don't go too far away, we'll be back with you.

19 (Whereupon, the proceedings went off the
20 record from 11:49 a.m. until 11:52 a.m.)

21 CHAIRMAN GLEASON: We have convened and
22 discussed this, and we will not be issuing any bench
23 ruling. We would like you to take a week -- not more than
24 a week's time to come up with any other information you
25 want to provide to the Board dealing with this subject.

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1 And also anything with respect to the FOIA statute.

2 ADMINISTRATIVE JUDGE BOLLWERK: Judge Gleason
3 raised a valid point back when we were talking. He said
4 there's a question about whether discovery material is an
5 agency record since it comes into the hands of the Staff.
6 This order that I found in here was a FERC order -- had a
7 provision dealing with FOIA.

8 But that doesn't necessarily mean that that's
9 the last word on it. So you may -- that's something you
10 need to -- if you think it's important. If you don't
11 think it's important, then we'll deal with it when we need
12 to if that comes up.

13 CHAIRMAN GLEASON: Anyhow, we'd like to get
14 whatever else you're going to produce by the end of close
15 of business next Friday. And then hopefully, surely
16 thereafter we'll issue our decision on the motion. All
17 right, thank you all for your attendance and
18 participation.

19 (Whereupon, the proceedings were adjourned at
20 11:53 a.m.)

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C E R T I F I C A T E

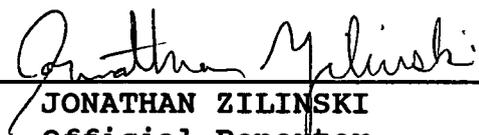
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: SEQUOYAH FUELS CORP. AND GENERAL ATOMICS, ORAL ARGUMENT

**Docket Number: 40-8027-EA; SML NO. SUB-1010
ASLBP NO. 94-684-01-EA**

Place of Proceeding: ROCKVILLE, MARYLAND

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



JONATHAN ZILINSKI
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