



TERA

**UNITED STATES  
NUCLEAR REGULATORY COMMISSION**

**In the matter of:**

METROPOLITAN EDISON COMPANY

Docket No. 50-289 (Restart)

THREE MILE ISLAND, UNIT 1

SPECIAL PREHEARING CONFERENCE

**Place:** Bethesda, Maryland

**Date:** February 21, 1980

**Pages:** 1-35

INTERNATIONAL VERBATIM REPORTERS, INC.  
499 SOUTH CAPITOL STREET, S. W. SUITE 107  
WASHINGTON, D. C. 20002  
202 484-3550

8002290

091

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

-----X  
:  
In the Matter of:                   :  
:  
METROPOLITAN EDISON COMPANY       :  
:  
(THREE MILE ISLAND, UNIT 1)       :  
:  
-----X  
Docket No. 50-289 (Restart)

Conference Room, 5th Floor  
East West Towers  
4350 East West Highway  
Bethesda, Maryland

Thursday, February 21, 1980

This Special Prehearing Conference was held, pursuant to notice, for presentation of the above-entitled matter, at 9:00 a.m., Chairman Smith, presiding.

On behalf of UCS:

ELLYN R. WEISS, ESQ.

On behalf of NRC Staff:

DANIEL T. SWANSON  
JAMES R. TOURTELLOTTE, ESQ.

On behalf of Metropolitan Edison:

ROBERT E. ZAHLER

P R O C E E D I N G S

1  
2 CHAIRMAN SMITH: Are you ready to proceed, ladies  
3 and gentlemen?

4 MR. TOURTELLOTTE: Yes.

5 MS. WEISS: Yes, sir.

6 MR. ZAHLER: Yes.

7 CHAIRMAN SMITH: In our Prehearing Conference session  
8 held in Harrisburg last week, we agreed to adjourn to this place  
9 today for the limited purpose of hearing arguments on Union  
10 of Concerned Scientists' motion to compel discovery of the Staff.  
11 This arrangement was possible because all of the parties agreed  
12 that the only business that would be discussed would be the  
13 UCS motion.

14 Thursday evening, the Board received a call -- Thursday  
15 afternoon, the Board received a call from Robert Q. Pollard of  
16 the Chesapeake Energy Alliance, requested by telephone that he  
17 be permitted to appear at this session of the Prehearing Con-  
18 ference and to argue other matters which I understood to be,  
19 during that telephone conversation, general due process matters.  
20 I told him that, of course, he is welcome to appear; this is  
21 an open Prehearing Conference, but we would not permit him to  
22 argue matters of general interest to the other intervenors.

23 He indicated that it was a matter of great importance  
24 to him and it was important that he be given the opportunity  
25 to appear hear and argue and asked if the Board would recon-

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

sider if he received the consent of all of the parties to appear here. I told him that -- and that he would file a motion reflecting the consent of all the parties. I told him that he is certainly free to file whatever motion he wishes, but that I would recommend to him that he not waste his time because in the first instance, it is unlikely that he could, in the time involved, obtain the consent of all of the parties; and secondly, even if he were able to communicate with all of the parties, the nature of the communication and his explanation of the subject matter would give rise to serious possibilities of misunderstanding.

Nevertheless, CEA did file a motion to permit oral argument. The only reason we are bringing it up now is that it is consistent with our commitment to the parties, last week, that we will not depart from business relating particularly to the UCS motion. And, the motion reflects the fact that he had some communication with some of the parties in which he described and discussed his purpose of requesting oral arguments and he requested he be permitted to appear here.

The problem with his motion is that the original concern that I had still exists and that is the motion does not indicate to the Board that the parties were fully informed as to what he wanted to discuss and now, it is apparent that he wished to discuss his, the CEA Omnibus motion to the Board, dated February 13, 1980; that was the motion presented, hand-

1 delivered to the Board and to some of the parties on February 13.  
2 That motion is, the Omnibus motion to the Board is quite clearly  
3 a motion which involves areas of quite strong and general  
4 interest of all the parties in this case. So, despite the fact  
5 that some of the intervenors agreed, including UCS, agreed to  
6 allow Mr. Pollard to argue these matters, the Board believes that  
7 it would be inconsistent with its commitment to some of the  
8 parties, to all of the parties that we would not depart from  
9 the narrow business at hand here. And, indeed, the intervenor  
10 who is most directly involved or is equally involved as CEA, that  
11 is People Against Nuclear Energy, PANE, did indicate that they  
12 were not pleased with the idea that intervenor funding, for  
13 example, would under CEA's motion be discussed today and that  
14 they could, under some hardship, appear and represent their  
15 position, but they were advised that CEA's motion to present  
16 oral arguments today would be denied.

17 So, yesterday, Robert Q. Pollard was advised by  
18 telephone that his motion to appear here today and present  
19 oral arguments was denied. And, of course, that being the case,  
20 there is no need for any party opposing that motion to file  
21 responses to it; it is quite late to file responses to it any-  
22 way; and I note the Mr. Pollard is not here today, Robert Q.  
23 Pollard is not here today, Mr. Robert Q. Pollard, in case I  
24 haven't mentioned it, is the representative of Chesapeake Energy  
25 Alliance.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Now, moving on to the business scheduled for today, the Board has reviewed UCS's motion to compel the NRC Staff to respond to interrogatories. It is our view that the Prehearing Conference session in Harrisburg on February 13, has resolved many of the issues, but there are some, as we recognized then, that remain for discussion.

The first that we have identified is the request by UCS, referred to on Page 10 of the UCS motion; which, as UCS states it, UCS has asked the Staff to identify all sections and page numbers of the SER, Safety Evaluation Report, or FSAR which contain subject matter pertaining to each UCS contention. The Staff refused to answer this question according to UCS with respect to every UCS contention on the basis that it is not necessary to a proper decision in the proceeding and because it is unduly burdensome. Well, the defense of, quote, not necessary to the proper decision in the proceeding, end of quote, was discussed and disposed of last week; unduly burdensome was not. If the Board were ruling today, we would deny the motion to require the Staff to identify all subject matter pertaining to each UCS contention in the SER and/or the FSAR because, in our view, these documents are not particularly large. We see no reason why UCS cannot do it as well, or in fact, better than the Staff and we do not believe that is particularly burdensome for UCS to do it for itself. But, even if it were, perhaps, significantly more convenient for the

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Staff to do this task than for UCS to do it, our ruling would still be that UCS should do it itself, because you are asking the Staff to exercise judgment on your behalf as to what is relevant and what isn't relevant, which again, is sometimes necessary when you are dealing with a large pool of data. But, when you are dealing with a relatively small pool of data, that is very undesirable because it gives, raises the possibility of misunderstanding as to the judgment of relevance. So, we would normally be disinclined to shift the burden from the discovering party to the party against whom discovery is sought to identify what the discovering party seeks as relevant.

Before we call upon the parties to address this issue, I overlooked the fact that we have new counsel present today that has not been identified, Mr. Tourtellotte, is that the case? Who is with you at the counsel table?

MR. TOURTELLOTTE: To my right is Lucy Swartz and Dan Swanson. And, Dan Swanson will be representing the Staff today regarding the objections.

CHAIRMAN SMITH: Mr. Zahler is present and you, sir -- oh, you are representing the Staff.

MR. TOURTELLOTTE: Harley Silver is also here; he is the project manager for the NRC Staff.

CHAIRMAN SMITH: Okay.

As to the remaining specific interrogatories beginning on Page 12, if the Board were ruling today, without benefit of

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

further argument, we would find in each instance UCS is entitled to at least a portion of the relief it seeks. So, with that before you, we will ask Ms. Weiss, representing UCS, to begin addressing the Staff's response to UCS's motion to compel.

MS. WEISS: The Staff didn't respond on the merits of any of the specific objections, and I am thinking primarily of the relevance objections which I gather is what the Board would like to hear about now?

CHAIRMAN SMITH: Why don't we take it up on the context, do you have any quarrel with the Board's reasoning on the portion of your motion on Page 10 in which --

MS. WEISS: No, I don't have any further argument on that.

CHAIRMAN SMITH: So, you will accept the Board's ruling without any further discussion.

MS. WEISS: Yes.

CHAIRMAN SMITH: Well, then that will be the ruling of the Board.

Then, let us move to -- I will allow you to move to wherever you want to move, but to me, the next item for consideration is your motion, the portion of your motion on Page 13, you are discussing Interrogatories 88 and 89. But, suit yourself, Ms. Weiss; it's your opportunity to convince us, or further convince us that you have some merit along these lines.

MS. WEISS: Well, let me just say at the outset that,



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

as I say, the Staff didn't respond to the merits of any of these objections -- the merits of our motion to compel, I should say, or any of the specific interrogatories beginning on Page 13 and going to the end of the motion.

I really have nothing to add beyond what is there in writing. If the Board is familiar with it, maybe we can save some time, I don't need to make any oral argument. If you would like to hear me summarize what is in the written motion, I would be happy to do that.

CHAIRMAN SMITH: So, you don't believe that the Staff has said anything in its response that --

MS. WEISS: No, I don't think there is anything at all that is directed to the relevance objections which were the remaining objections; there is nothing in the Staff's response to our motion to compel that goes to that.

CHAIRMAN SMITH: Do you think that the Staff is in default of response to your motion to compel?

MS. WEISS: Well, technically, I suppose they are in default. I imagine -- I assume that they are standing on whatever they said in their original objections. And, of course, we responded directly to those in the motion to compel; nothing else was raised in the response to the motion to compel.

In that -- given that that's the case, you may want to hear from the Staff first and I could reserve, essentially, rebuttal until after we hear what the Staff's arguments are.

1 But, as I say, I really have nothing additional to say at this  
2 point other than what is in writing. If you would like me to  
3 summerize it, I would be happy to do that.

4 CHAIRMAN SMITH: I see no need to.

5 MS. WEISS: Okay, fine.

6 CHAIRMAN SMITH: I call upon the Staff.

7 MR. SWANSON: Again, I'm Daniel Swanson, counsel for  
8 the Staff.

9 As Ms. Weiss correctly noted, the Staff did not respond  
10 to the specific interrogatories in the response to the motion  
11 to compel. The Staff, instead, noted its general objection to  
12 that motion to compel that it was without basis in the regula-  
13 tions. If we are now proceeding under a request under the  
14 regulations for the Board to make a determination as to whether  
15 the Staff should be instructed to answer certain interrogatories,  
16 we are, of course, prepared to get into the merits.

17 As we noted in our response to the specific interrog-  
18 atories, we had objections to, and I will take the first two,  
19 the first four interrogatories together, because I think they  
20 seem to relate to, at least the Staff has the same general  
21 objection to them.

22 The Staff objected to Interrogatory numbers 88 and 89,  
23 as well as 122 and 123 for the same basic reasons; in each of  
24 the two groups of interrogatories, the first interrogatory re-  
25 quested a date as to when the Staff made a formal decision against

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

backfitting of a Reg guide; the second question asked for a contemporaneous documentation supporting the Staff decision not to back that. The Staff's position is that these general requests for background information and documentation regarding a general backfitting of a Reg guide is not related to this proceeding. The relationship between the Reg guides and TMI-1, which is clearly relevant, is asked for in separate interrogatories; for example, the first Reg guide addressed in Interrogatories 88 and 89 is asked for in relationship to TMI-1 in Interrogatory numbers 90 and 91.

The second set of interrogatories, 122 and 123, which address Reg guide 189 is asked for in relationship to TMI-1 in Interrogatory numbers 124 and 125. The Staff readily concedes the relevancy of this Reg guide as it relates to to TMI-1 and we will answer those questions. However, the Staff has not seen any basis or showing by UCS for maintaining that the general decision to backfit or not to backfit a Reg guide completely apart from its relationship to TMI-1 has any relevance to this proceeding.

The Staff would also note that if UCS, in fact, is asking for documents pursuant to Section 2.744 of the regulations which, incidentally, is not so indicated in the interrogatories that UCS has a burden to meet under the regulation to satisfy the relevance of the information they are asking for; they must convince the Board not only of the relevance, but they must set

1           forth with reasonable specificity the category of the information  
2           obtained for the items themselves.

3                   The Staff would, however, rest its objection primarily  
4           on the stated response in its response to interrogatories that  
5           the general subject matter addressed since they seem to be  
6           excluding TMI from these two sets of interrogatories, it is  
7           just not relevant to this proceeding.

8                   CHAIRMAN SMITH: What was your last statement?

9                   MR. SWANSON: Okay, I should clarify that.

10                   The Staff is interpreting the fact that they have  
11           asked follow-up questions, specifically related to TMI as  
12           casting, perhaps, a different interpretation on the first two  
13           sets of interrogatories and would otherwise be normally read.  
14           For example, if the first two sets of interrogatories were  
15           asked without any follow-up questions, the Staff would treat  
16           them as being, perhaps, a general question as well as a specific  
17           one. The Staff would be, obviously, willing to address the  
18           specific relationship of the Reg guides and TMI-1. However,  
19           UCS has already gone ahead and asked those specific questions  
20           in follow-up interrogatories; so, the Staff reads the interro-  
21           gatories as readily being capable of differentiating between the  
22           specific relationship between TMI-1 and the Reg guides, and  
23           the more general subject matter of the decision of whether or  
24           not to backfit the Reg guides to other plants.

25                   DR. JORDAN: May I just ask a clarifying question?

1                   Would it be your opinion in regard, perhaps, to then  
2 Interrogatory 88 that if they had said, when did the Staff  
3 make the formal decision against backfitting of Reg guide 1.47  
4 to TMI-1; would you then have said that is relevant? And,  
5 you would have answered --

6                   MR. SWANSON: Yes, I think that would be relevant.  
7 As a matter of fact, that may well be an inherent aspect of  
8 the subject matter of 90 or even 91, the relationship between  
9 that Reg guide and TMI-1.

10                   CHAIRMAN SMITH: Mr. Zahler, how do you want to par-  
11 ticipate in this discussion?

12                   MR. ZAHLER: In a very limited manner. The licensee  
13 doesn't have a position in general with respect to UCS's motion  
14 to compel against the Staff. As it affects the general relevance  
15 question in the scope of this proceeding, that does impact on  
16 licensee and we do have a view. If you are interested, I  
17 would give you a very brief comment as to what licensee's  
18 view of the relevance question is in general.

19                   I guess the one thing we point out is that this  
20 proceeding, unlike some other past investigations relating to  
21 the accident, is not concerned with a backward look as to Staff  
22 practice to determine whether it was good, bad, or indifferent.  
23 The question before the Board is whether what the Staff is  
24 proposing for the restart of Unit 1 is necessary and sufficient  
25 to assure the public health and safety. That necessarily focuses

1 the inquiry into what the Staff is requiring of us at this time,  
2 not what the Staff required of us in the past or should have  
3 required of us in the past. The general question as to back-  
4 fitting seems, to licensee, to go to this retrospective inquiry:  
5 was it appropriate, was it not appropriate to have exempted  
6 certain plants from backfitting of particular Reg guides that  
7 came out subsequent to the licensing of those plants.

8 As to whether or not this plant should now be required  
9 to meet a Reg guide, that may be a legitimate subject for this  
10 proceeding within the scope. Inquiring into that does not, it  
11 seems to me, really require that there be a general inquiry  
12 as to the background to Regulatory guides and why they were or  
13 were not applied to other plants in the past. That is somewhat  
14 extraneous; I think it tends to loose the focus of this proceed-  
15 ing and distract the parties from what is at issue, which is  
16 whether what the Staff is now requiring of licensee is necessary  
17 and sufficient.

18 CHAIRMAN SMITH: Ms. Weiss?

19 MS. WEISS: Well, Mr. Chairman, I want to begin by  
20 seeking to clarify something that Mr. Swanson said at the  
21 beginning when he mentioned a burden that UCS has to meet; and  
22 he never specified what burden. I understand that he wasn't  
23 here at the --

24 CHAIRMAN SMITH: Excuse me, Ms. Weiss, I would take  
25 their position that they have abandoned that; isn't that correct?

1 MR. SWANSON: Well, the burden I think that she is  
2 referring to is just as to if the UCS is, indeed, making a  
3 document request under 2.744, which is not specified in the  
4 interrogatories, but if they are, there is just a general showing  
5 required of the documents, as with any document request that you  
6 would, with reasonable specificity, identify the category or item  
7 requested and a general statement as to its relevancy.

8 CHAIRMAN SMITH: I was not aware until this moment  
9 that there was a surviving issue, a burden upon the Staff and  
10 it would be my view that you have probably won on that score  
11 and if you argue further, you know the risks inherent in that.

12 Are you now arguing against discovery on these Inter-  
13 rogatories 88 and 89, and 122 and 123 on the basis of burden?

14 MR. SWANSON: The only objection we cited in our re-  
15 sponse was one of relevance. I'm just making the point that it's  
16 perhaps the relevancy question wouldn't even have risen if  
17 there were sufficient basis shown in the original interrogatories  
18 as to why the information requested is related to this proceeding,  
19 but absent that, the Staff maintains its original position that  
20 the general subject matter inquired into is just outside the  
21 scope of this proceeding.

22 CHAIRMAN SMITH: Perhaps, I shouldn't have interrupted  
23 you, Ms. Weiss.

24 MS. WEISS: No, I think that was useful, and I take  
25 Mr. Swanson to be saying that they are standing on a general  
relevance objection; that's what I have responded to.

1 First of all, just a word about the standards of  
2 of relevance; admissibility, potential admissibility  
3 of the evidence which may be discovered is not an issue, as the  
4 Board is aware, and that goes primarily to Mr. Zahler's comment.  
5 The standard is whether it is relevant to the general subject  
6 matter or might lead to discoverable evidence.

7 I think we have demonstrated clearly exactly how we  
8 intend to use the answers to these interrogatories. UCS has  
9 had a contention admitted which essentially asks for application  
10 of Regulatory guide 1.47 to TMI.

11 Now, we understand the Staff's position to be that for  
12 whatever reason, it believes that it is not necessary to apply  
13 the requirements of Reg guide 1.47 to TMI. We have asked two  
14 questions: when did the Staff make the formal decision against  
15 backfitting of Reg guide 1.47, and for them to provide the con-  
16 temporaneous documentation supporting that generic decision.  
17 Because it is our understanding that when the Reg guide was  
18 formalized, a decision to backfit it or a decision not to back-  
19 fit it was made in a generic way; whether or not there is any  
20 documentation that supports that, we don't know. But, it is  
21 our understanding that there was never an effort to go on a  
22 plant-by-plant basis and make the backfitting decision.

23 But, the only decision that we would find contempor-  
24 a. ous with the implementation of the Reg guide would be a  
25 generic decision. What we intend to use that for is primarily



1 in cross-examination of the Staff and applicant witnesses who  
2 would be arguing that it is not necessary to implement Reg guide  
3 1.47; we intend to compare the reasons that they give now for  
4 the decision not to backfit or not to apply Reg guide 1.47 with  
5 the reasons that they gave at the time that the Reg guide was  
6 implemented to see if those are consistent, to see if there  
7 really is anything different in the situation now than there was  
8 then, which would argue for implementation of the requirements  
9 in the Reg guide. And, also, in order to prepare our direct  
10 testimony; we intend to have to meet arguments with regard to  
11 the lack of necessity to implement the Regulatory guide and  
12 we want to know, I think we are entitled to know, what those  
13 reasons have been from the very beginning and what they are  
14 today.

15 So, I think not only is it clearly relevant to the  
16 subject matter, but it is going to lead to admissible evidence  
17 and we cited cases which say that we are entitled to discovery  
18 which is used for cross-examination purposes and we think that  
19 this is certainly going to be used for that purpose; the answer  
20 is the information gained would be used for that purpose. I  
21 really don't think there is any question that it is relevant  
22 to the subject matter.

23 CHAIRMAN SMITH: Your arguments apply equally to the --

24 MS. WEISS: Yes.

25 CHAIRMAN SMITH: -- to the environmentally qualified --

1 MS. WEISS: Yes.

2 CHAIRMAN SMITH: Okay, is there anything further on  
3 these two, or these four interrogatories?

4 We move on to the -- excuse me -- Ms. Weiss, shall  
5 we follow the pattern that you have suggested with respect to  
6 earlier and ask the Staff to defend its position?

7 MS. WEISS: I would suggest that.

8 CHAIRMAN SMITH: Okay, Mr. Swanson? We are on 140  
9 and 142 on Page 17.

10 MR. SWANSON: Okay. The Staff has the same basic ob-  
11 jection to these interrogatories. They are seeking information  
12 to a generic proceeding and they are not asking for specific  
13 information related to the TMI-1 proceeding.

14 The Staff has additional specific objections to these  
15 interrogatories, but before I get into them, I might note the  
16 same basic construction of the interrogatory sequence here as  
17 we had in the first two categories: we have three interrogatories  
18 here addressing a generic proceeding; we have follow-up interro-  
19 gatories which address the specific proceeding at hand. Again,  
20 the Staff readily concedes that the remaining interrogatories  
21 on design basis accidents related to this proceeding are not  
22 objectionable if they ask for information that is clearly re-  
23 lated to this proceeding and is likely to lead to discoverable  
24 information.

25 The Staff did not object to Interrogatories 143 and 144

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

which we believe are related to this proceeding. In addition to the general objection of relevancy, the Staff has specific concerns with regard to these interrogatories. Question number 140 merely asked for members of the Staff who have been assigned or will be assigned on our proposed rulemaking proceeding. Perhaps I have missed something, but in looking through the motion to compel, I don't see that the UCS has even addressed the specific interrogatory; I simply fail to understand how the names of individuals who are working on a generic proceeding, not this proceeding but a generic proceeding, have any relevance to this proceeding.

Similarly, Interrogatory 141 asked for a draft to file analyses related to the general subject of probability and consequences of accidents design beyond the current design basis. Based on my reading of the motion on Page 18, they again are clearly referring to the generic proceeding. However, this interrogatory as constructed beyond the concern we have over relevance, is seemingly without bound. There is no reasonable particularity as to the type of documents that are requested; basically, they are asking for all draft and final analyses, memoranda, reports, recommendations, and other documents relied upon or consulted by the Staff related to this general subject matter.

Granted, the general discovery rules do allow for discovery of information which may lead to information which is

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

relevant. However, this is not a license to seek information without bound. As the Board pointed out in the Barnwell decision, parties should not be permitted to roam in the shadow zones of relevancy and to explore matters which do not presently appear germane on the theory that it might conceivably become so; that is a quote in a Barnwell decision under 5 NRC-H 492. That Staff concedes or perceives this interrogatory to be nothing more than a fishing expedition by UCS to find general information on general subject matter without any indication that it is related to this TMI proceeding.

On Interrogatory 142, UCS is asking the Staff to predict what position it is going to take in a proposed rulemaking and the Staff has the further objection here that being asked to speculate -- not only that, but to explain our speculation fully. The Staff finds these three interrogatories to be clearly objectionable.

CHAIRMAN SMITH: In addition to your original response, was one of relevance, but now, as I understand it, you are expanding your response to the motion to compel on it is unbounded and because it is requiring a position to be formulated which may or may not be in existence now; is that --

MR. SWANSON: That's correct. But, again, we perceive the primary objection to be one of relevance.

CHAIRMAN SMITH: Up until now, as I understand it, UCS has not really had an opportunity to address your other ob-

1 jections, your other responses.

2 MR. SWANSON: That's true, I think.

3 CHAIRMAN SMITH: Mr. Zahler, do you want to --

4 MR. ZAHLER: Licensee has no comment with respect to  
5 these.

6 CHAIRMAN SMITH: Ms. Weiss?

7 MS. WEISS: Mr. Chairman, I object strongly to the  
8 Staff coming here today and stating new grounds for opposing  
9 the motion to compel and I'm not going to respond to them  
10 because I don't want to waive my right to that objection. I  
11 think if they want to raise new grounds for objection, they  
12 have got to file a paper and request permission to late-file  
13 it; this should have been done a long time ago and I'm not  
14 even going to respond to it today.

15 I want to respond only to the objection which is,  
16 proposed rulemaking of generic subjects is unrelated to this  
17 proceeding: that's the totality of the Staff's objection.

18 CHAIRMAN SMITH: As you noted, Ms. Weiss, we also  
19 observe that new grounds were being raised and we should in-  
20 dicate some sensitivity to your position. But, as a practical  
21 matter, considering your problem of resources and everyone's  
22 problem with time, I would suspect that you might be fully  
23 capable of responding today anyway. But, I think you are correct;  
24 it is somewhat of an imposition for you to be faced, for the  
25 first time, with new grounds against your motion. It may very

1 well be that you could, without further ado, you could prevail  
2 on all basises without -- I don't want to force you into it.  
3 You are taking a steady, cautious approach, which is a prudent  
4 thing for counsel to do. I suggest that you gamble a little bit;  
5 see what happens and if you are not -- if you don't think the  
6 due process has been afforded, well then we will consider your  
7 point.

8 MS. WEISS: Well, I will accept that --

9 CHAIRMAN SMITH: You don't have to it, Ms. Weiss.

10 MS. WEISS: I accept that suggestion in the spirit in  
11 which it was offered.

12 I guess I display a little peak, I think it is just-  
13 ifiable. As the Board is aware, we spend a long time writing  
14 interrogatories; we spent a long time doing the motion to compel.  
15 I really very much resent being faced with new arguments today  
16 when we preceived the objections to be without foundation and  
17 unsupported and essentially, just tossed off. Be that as it may.

18 I'm going to respond, at least, first to the relevance  
19 objection. I truly can't believe the Staff is actually taking  
20 the position that no discovery can be permitted about generic  
21 subjects. The subject matter is directly related to the UCS  
22 Contention 13; I didn't think that that can be disputed. I think  
23 we are entitled to know if there is any difference between the  
24 Staff's position in a generic proceeding on precisely the same  
25 issues, and the Staff's position here on the question of Class 9

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

accidents.

It's clearly relevant information and I think we are entitled to it. Interrogatory 140 asks for the names of individuals; that's for the purpose of determining whether and who we might want to depose of subpoena or ask the Board to subpoena from the Staff. I think that what -- well, we heard a new objection with regard to Interrogatory 141 that it was without bounds; I think it's clearly without bounds, the subject matter that we are asking for is clearly defined. And, I might point out that sometimes I think we are just playing games here because I could probably get everything I've asked for if I did a Freedom Information Act request unrelated to this case; be that as it may, we are involved in this case now.

We intend to use the answers, both for cross-examination to pursue any technical or policy inconsistencies in the Staff's position and to form a foundation for our direct testimony on the subject.

As you know, the UCS contention has been admitted for discovery purposes only, at least at this point; and I think we are entitled to an unusually broad standard of relevance, given that we are going to have to specify that bounds of this contention after we are through with the discovery process. And, if the Staff is going to frustrate that by not giving us anything during discovery, we will be exactly where we were at the beginning some months hence.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CHAIRMAN SMITH: Ms. Weiss, given relevance, if the Board should order the Staff -- compel the Staff to respond to Interrogatories 140 and 141, particularly, and if they should elect to take the dump truck approach, wouldn't you be in somewhat the same position that you were with respect to asking for some identification on what is relevant? You could be overwhelmed with documents here and then you would have to wade through them and determine for yourself what is relevant and you might very well turn around and say, okay, now tell us in those documents you have provided where the body is buried or --

MS. WEISS: Well, I don't think that is going to happen because our suspicion is that there aren't all that many documents lying around from the Staff on the probability and consequences of Class 9 accidents. I would be willing to take the risk if there are a lot to wade through and decide what's relevant. But, I don't suspect that there is a whole box car load of documents on those issues hanging around in the NRC Staff.

CHAIRMAN SMITH: Where we were leading was, certainly assuming relevance which the Board is veiwing it as an assumption worth consideration, there must be a better way as a practical matter for responsible counsel to solve, you know, to work it out.

This is what somewhat concerns the Board that the Staff seems to have taken a -- maybe we have misperceived it --



1 the Staff seems to have taken a flat position; it is not relevant;  
2 no further discussion. We want to urge the parties not to be  
3 quite so arbitrary and save everybody difficulty and be a little  
4 bit more sympathetic to the discoverers request and see if these  
5 problems can't be solved in a practical way.

6 MR. TOURTELLOTTE: Mr. Chairman, could I address that?

7 CHAIRMAN SMITH: Yes, please, Mr. Tourtellotte.

8 MR. TOURTELLOTTE: Because we got into that a little  
9 bit at the other Prehearing Conference.

10 It is certainly not our intention to be reluctant  
11 to discuss or work these things out. What I think happened in  
12 this instance is kind of an unfortunate circumstance, but back  
13 when we were discussing, that is Ms. Weiss and I were discussing  
14 the possibility of her filing a motion to compel, what we sort  
15 of got into was a situation where she felt like she needed some  
16 information and she needed it now. The responses that we gave  
17 were not sufficient, particularly regarding those responses that  
18 said, we don't have the information now; we will have to give it  
19 to you later.

20 Because of that circumstance, as much as anything I  
21 think, Ms. Weiss felt that she had to file a motion to compel.  
22 We were willing at that time to try and work things out, but  
23 then, on the other hand, we understood her position quite well  
24 and her feeling that there was a necessity of filing the motion  
25 to compel.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

We are still ready and willing to try and work as many of these things out as we can. Nevertheless, when faced with a motion to compel, we had to answer in a way that we felt was a reasonable response and in a way that would protect our position.

CHAIRMAN SMITH: I think we can see the under-current of the problem here.

Does the Staff persist upon its objections to 141 on the basis of burden or do you think there is a good possibility that the UCS and the Staff could work out 141, given relevance, in a reasonable way? In view of changing circumstances, I mean.

I want you to bear in mind that not once has this Board ignored the Staff's concerns about resources, and the Board is sensitive to that problem and is going to be very sympathetic. But, we want to address the issues in the proper frame in which they are presented. If you objected to that based upon the limited amount of resources at one time, re-appraise it and see if that's still your position.

MS. WEISS: Mr. Chairman, do you think we might give them a couple of minutes?

MR. TOURTELLOTTE: Well, was the question only directed toward 141?

CHAIRMAN SMITH: That's the one I see to be -- you can sense that the Board is inclined to believe that the general subject matter is relevant. But, now as Ms. Weiss pointed out

1 and we pointed out for the first time, we are faced with the  
2 suggestion -- not the suggestion, but the objection that it is  
3 also burdensome and 141, I can see, possibly could be burdensome.  
4 But, now we are saying, can't you work it out?

5 MR. SWANSON: Excuse me, Mr. Chairman, we would like  
6 a couple of minutes to talk about it, I just want to clear  
7 something up. We did not raise, today, the objection of burdensome  
8 of this objection. I think the only thing that was new that was  
9 raised was the comment that 142 asked for the Staff to speculate.

10 CHAIRMAN SMITH: Okay.

11 MR. SWANSON: The general, I think everything else  
12 I argued today was just expanding upon the general objection of  
13 relevancy. We are not claiming -- we did not mean to claim today  
14 nor did we state in our response that the objection was one of  
15 burdensome, but if we could have a just a couple moments to talk  
16 this one over.

17 CHAIRMAN SMITH: I just misunderstood.

18 MS. WEISS: Well, I had that same misunderstanding.

19 CHAIRMAN SMITH: Let's take a few minutes recess.

20 (Whereupon, the hearing was recessed at 9:55 and re-  
21 convened at 10:30.)

22 CHAIRMAN SMITH: Is there anything to report to the  
23 Board on the negotiations?

24 MS. WEISS: Yes. Do you want to go first?

25 MR. SWANSON: Yes, I think we have an agreement now

1 on the remaining interrogatories which were the subject of the  
2 motion to compel.

3 On 140, the Staff will list the members of the Staff  
4 working on Task Forces which are going to be identified in the  
5 March 7th submittal to the Board on Class 9 accidents.

6 Let me skip down to 142; similiarly, the Staff will  
7 submit a position, if it has one as of that date, as part of  
8 that submittal. We understand that this will be a continuing  
9 obligation if the position is not set forth at that time.

10 On 141, we have agreed to inform UCS by next Wednesday,  
11 that will be the 27th, the extent of the request. We had some  
12 discussions as to just what exactly was meant by this request  
13 and we will get back to UCS informally next Wednesday to discuss  
14 this and hopefully, reach an agreement at that time as to the  
15 scope of the interrogatory and the Staff's ability to respond to  
16 it.

17 MS. WEISS: That's fine.

18 MR. SWANSON: Okay. On 145, the Staff can simply  
19 state that the generic position in the treatment of Class 9  
20 accidents is the same as it was prior to the Off-shore Power  
21 Systems case. There really isn't much else we can say on that  
22 matter; it's my understanding that that response satisfies the  
23 question, anyway, of UCS, although they might not be totally  
24 satisfied with the content of the answer. It's at least respon-  
25 sive to the question.

1 MS. WEISS: And you all have agreed to provide that  
2 answer in writing; is that correct?

3 MR. SWANSON: We can do that. As a matter of fact, we  
4 can provide the answer in writing to, I think, all of the re-  
5 maining interrogatories that were the subject of the motion to  
6 compel.

7 Again, I think that leaves one point; there was a  
8 request for all drafts. The response would be subject to the  
9 qualification of not providing non-privileged -- excuse me, of  
10 providing privileged information. And, I think on that basis,  
11 we have reached an agreement as to the balance of the interroga-  
12 tories that are subject to the motion to compel.

13 CHAIRMAN SMITH: I missed something. I didn't get  
14 from 145 through 147.

15 MR. SWANSON: Okay. I had started to talk about them,  
16 if we want to reduce it in writing, we will provide written  
17 answers then to 145, 146, 147, 148, and 149.

18 CHAIRMAN SMITH: Well, I just wonder if these answers  
19 may not just bring us right back to the motion to compel. If  
20 there is going to be better communication --

21 MS. WEISS: I don't foresee another motion to compel.  
22 What I foresee is possible follow-up, but I don't foresee as a  
23 result of our discussions that it would be necessary to renew  
24 a motion to compel.

25 CHAIRMAN SMITH: Well, there is no use for the Board

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

researching for trouble if the parties -- now, what issues remain for the Board to rule on in your motion to compel?

MS. WEISS: I think just the interrogatories that we previously argued, 88 and 89, 122 and 123.

CHAIRMAN SMITH: We have prepared to rule on those, and we will order the Staff to respond to Interrogatories 88, 89, 122, and 123.

MS. WEISS: I'm not sure they heard that.

CHAIRMAN SMITH: The Board is ruling that the Staff must respond to Interrogatories 88, 89, 122, and 123.

MR. SWANSON: I think there might remain one matter that we haven't discussed, and that is the general Question C, or has that been the subject of a ruling that escaped me?

In other words, when the Board opened up this morning, it went directly to Interrogatory number 5 and it passed over the general Question C, which is to be answered as to each interrogatory.

CHAIRMAN SMITH: Would you direct me to the page in UCS's motion?

MR. SWANSON: Okay, it's on the very first page of the interrogatories and on the motion --

CHAIRMAN SMITH: I don't have the interrogatories.

MR. SWANSON: I think it is Pages 5 and 6.

CHAIRMAN SMITH: This is still open. Can the area of dispute be narrowed any better for the Board?

1 MS. WEISS: Well, I may be able to help.

2 What we have asked for is documents that were examined  
3 by the Staff, but not relied upon. In other words, we are not  
4 asking for any independent search. So, I don't think that there  
5 could be any question of it being unduly burdensome. I don't  
6 know whether the Staff had understood it in that way, but  
7 that's what we are asking for; we are not asking to make an  
8 independent search for all relevant documents, we are just asking  
9 you to identify the ones that you have examined, but which you  
10 aren't relying on.

11 CHAIRMAN SMITH: I, myself, was troubled by the word  
12 examined, hoping that a narrower term, yet useful to UCS, could  
13 be agreed upon.

14 I understand the basic idea and I have no trouble with  
15 it; but you need something more than that which was relied  
16 upon. But, to go from that point, to examined is , to me  
17 seems to be a great distance.

18 MS. WEISS: I'm open to suggestions if anybody has  
19 any thoughts.

20 MR. SWANSON: That's basically the Staff's concern, too.  
21 Obviously, there are documents that may not support a Staff  
22 position that were examined and maybe even relied upon, but not --  
23 those documents, perhaps, didn't constitute part of the Staff's  
24 basis for a position. Those documents, obviously, would be  
25 discoverable and would be provided.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

But, the way the interrogatory is written, it would seem to include something as extreme as a newspaper article that happens to be -- that happened to pertain to the subject matter questioned. Obviously, some sort of bounds needs to be put on the interrogatory as framed.

CHAIRMAN SMITH: I have seen this language in interrogatories before, Ms. Weiss. And, I know that you are not the first one to be this broad.

But, nevertheless, it does seem to be, just within the context of this case, it does seem to be very, very broad.

MS. WEISS: Well, what we are really asking for is when the Staff sits down to answer the interrogatory, it makes use of some series of documents; some of which it relies on, some of which it doesn't because it contradicts their position or whatever. I don't see that that's really all that broad, given that we not asking to make any independent search, but just to tell us when you formulated your answer, what sources did you go to and consider.

Now, maybe considered would be a better word.

CHAIRMAN SMITH: All right. I think you are getting closer to it. All of it is a judgment -- it is highly judgmental in response, but certainly considered is approaching reasonability.

MS. WEISS: It certainly depends on their good faith, yes.

MR. SWANSON: I think we have specified the specific



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

concern the Staff has and as the Board pointed out, the real problem is that no matter what specific word we agree on, there is going to be a judgmental aspect of it. And, perhaps, using the word concerned would satisfy that problem of the Staff's -- or considered, I guess was the word suggested by Ms. Weiss.

The Staff just points out that it will, obviously, set forth documents that it has seriously considered, whether or not it supports the Staff position or whether or not it actually was relied on for the ultimate Staff conclusion.

This doesn't preclude the possibility in the future that there might be some argument as to whether or not judgment was properly exercised, but given the understanding that we would use the word considered, the Staff doesn't have an objection.

CHAIRMAN SMITH: There is no way we can avoid the potential problem which you referred to, but good faith is all that Ms. Weiss is asking for, as I understand it. I think, then, you have worked that problem out. We will substitute the word examined -- I mean considered for examined.

Is that agreeable Ms. Weiss?

MS. WEISS: That's fine, Mr. Chairman.

CHAIRMAN SMITH: Mr. Swanson?

MR. SWANSON: No objection; that's fine.

CHAIRMAN SMITH: Now, how can -- I think that as far as time is concerned, the parties has all the rulings from the

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Board on the motion which is needed to proceed.

Can a simplified order disposing of the motion be agreed upon by the parties? This is a matter of burden to the Board. Rather than go through every point that has been discussed and debated and analyze it as we are usually required to and make a ruling, haven't we arrived at the point where the Board's -- or, first that Staff has, on its own, agreed to the general aspects as to the nature of the response, the timing of the response, and the degree of the response. They have agreed to that, I think, to Ms. Weiss' satisfaction and to the Board's satisfaction in our Prehearing Conference on Wednesday.

Today, we have agreed to virtually everything that was remaining pending, except 88, 89, 122, and 123; we ruled upon it.

Can you envision a simplified ruling by the Board which would solve your problem? I'm trying to avoid work. I just don't want to have to have a big analysis of the motion to compel and our rulings on it if really, it seems to me that as we approached every item, the issue just sort of fell away.

MS. WEISS: Well, on the matters that we have discussed today, I think the Board could just issue an order which would accept the stipulation on the pages of the transcript as it was read in.

CHAIRMAN SMITH: Well, Ms. Weiss, would it burdensome -- you are, I see, the party who has largely prevailed in this pro-

1 ceeding. Then, could I ask you to present an order to the Board  
2 with Staff's approval?

3 MS. WEISS: Yes, Mr. Chairman. Let me just --

4 CHAIRMAN SMITH: A proposed order for the Board to sign.

5 MS. WEISS: I'm under a couple of very severe deadlines.  
6 One for this case next Monday, and I also have a very quick  
7 deadline on Indian Point before the Commission and I have to get  
8 a major piece of work in for that --

9 CHAIRMAN SMITH: Ms. Weiss, since it was your motion,  
10 you are the one who really needs any formal order of the Board.  
11 If you don't feel you need it timely, let's just do it whenever --  
12 all I want to do is clean the slate of the pending motion to  
13 compel and you can do it better than we can; you can do it  
14 simply.

15 MS. WEISS: I'd be happy to do it on the issues that  
16 we discuss today. I just wonder if -- I would just kind of  
17 suggest a date for it and maybe if it's acceptable to the parties  
18 I would propose an order by next Thursday on the agreement that  
19 we will all move ahead on the basis of the agreements that  
20 we have reached on the rulings we have had today.

21 CHAIRMAN SMITH: Well, the Board will order the parties  
22 to proceed on the oral rulings of the Prehearing Conference;  
23 that's not a problem. So, remaining only is you, I would think,  
24 would require a written order from the Board and you can present  
25 it whenever, as far as I'm concerned and if there is no objection

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

by the parties, whenever you have time.

MS. WEISS: Does the Board want me to propose an order also on the matters which we discussed in Harrisburg?

CHAIRMAN SMITH: The matters we discussed in Harrisburg I think have general relevance to all of the parties and when we issue the Prehearing Conference Order, I think, it would probably be appropriate if we made the observations on the rulings as required.

The only thing that I would expect from you, then, would be a proposed order approved by the licensee and the Staff relating to -- and you know, as far as I'm concerned, you don't have to have the licensee on it. Is there any problem there, do you think, Mr. Zahler?

MR. ZAHLER: I guess we are not interested and I don't think it is necessary for us to sign a stipulation on anything like that.

I would just as a matter of courtesy that if Ms. Weiss sends it to the Staff, that she send us a copy. We may have some useful comments that would just make it clear or something; I don't know.

CHAIRMAN SMITH: Okay. A formal order which you think satisfies your requirements and adequately and accurately reflecting the Board's rulings, approved by the Staff, whenever you are able to do it.

I think there should be some theoretical deadline on

1 it; let's say April 1st.

2 MS. WEISS: Thank you, Mr. Chairman.

3 CHAIRMAN SMITH: You're the one who needs so you  
4 decide when you want it filed on the record. I really don't  
5 think you need it, but it should be cleaned up.

6 Okay. I think that we have concluded. Is there any  
7 other business related to this particular consideration?

8 Okay. I think that the parties should be and the  
9 Board does commend them for their responsible approach that  
10 has been taken toward these discovery problems. You have been  
11 quite responsible and we appreciate it.

12 The conference is adjourned.

13 (Whereupon, the conference was adjourned at 10:55.)  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25