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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of:

TEXAS UTILITIES GENERATING COMPANY

(Comanche Peak Steam Electric Station, Units 1 & 2)

Location: Bethesda, Maryland Pages: 13,868-14,050

Date: Thursday, June 14, 1984

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

TEXAS UTILITIES GENERATING COMPANY

(Comanche Peak Steam Electric Station, Units 1 and 2)

Nuclear Regulatory Commission
Conference Room 415
4350 East West Highway
East West Towers
Bethesda, Maryland

Thursday, June 14, 1984

Hearing in the above-entitled matter reconvened at 9:30 a.m., pursuant to adjournment.

BEFORE:

JUDGE PETER BLOCH, ESQ.
Chairman, Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

JUDGE HERBERT GROSSMAN, ESQ.
Member, Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

ELLEN GINSBERG, ESQ.
Member, Atomic Safety & Licensing Board
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C.R.
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Tape 1

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PROCEEDINGS

JUDGE BLOCH: Good morning. I'm Peter Bloch, Chairman of the Licensing Board for the Comanche Peak operating license proceeding.

Today we are sitting on the Board for the OL-2 case dealing with intimidation allegations. With me this morning, Mr. Herbert Grossman, also a Judge on the Atomic Safety & Licensing Board.

The parties are familiar with each other, and the Reporter is familiar with their identity. So, we won't -- we will dispense with formal identification for the record.

We have just concluded an informal negotiating session concerning problems relating to the confidentiality of witnesses and some other related discovery matters. A limited agreement was reached during that period. That agreement relates to the efforts that will be made both by CASE and by Applicants. These parties have agreed to speak to each of the witnesses whom they know of who, apparently, have requested that their names be held confidential during. During these conversations, they will attempt to pursuade these individuals to give up their request for confidentiality. If they succeed, the name of the individual -- and I take it the practice

from the discovery requests between the parties is that description of the incidents to which that person will testify will be disposed to the other party. If the person refuses to give up the confidentiality, the first consequence is that the party will not be able to use that witness at the hearing. The second is that the party will disclose the reason that confidentiality is still requested and the substance of the testimony which is being withheld. The purpose of that disclosure is to allow the Board to reach a subsequent determination as to whether it's necessary to the hearing record that some or all of those individuals disclose their identity.

It's understood that those are the ground rules and that neither of the parties will be subpoenaed for the names of those witnesses other than through a Board decision about the necessity of the testimony.

Is there any other necessary part of that agreement that the Board -- that the parties would wish to state for the record at this time?

MR. ROISMAN: Mr. Chairman, we have indicated that we will go to our gap and get them to give us the information which we do not have. Well, we assume that the Applicant will also go beyond its

current immediate knowledge to reach for what knowledge there is, so that there are not witnesses who will later show up in somebody's testimony saying, well, I talked to a person who asked not to be identified, and they said such and such, that what -- that what we're attempting to do is to prevent that from occurring without everybody knowing it in advance and giving you a chance to deal with it.

JUDGE BLOCH: You want a full statement of relevant information possessed by the -- by the witnesses who are requesting that their identities be withheld; is that right?

MR. ROISMAN: Yes, and the reaching out, I mean like we go to GAP, and it isn't -- GAP, the name of that person, Ernie Hadley, is already known, but that people that he knows who might form the basis for some of the opinion or statement that he would make in a hearing, that we're going to go to those people and talk to them. So, that we're --

JUDGE BLOCH: Where does that stop? I'm not sure what the --

MR. ROISMAN: Well, in the Applicant -- the Applicant has got contractors and subcontractors. Maybe some of them have also performed investigations under the same rubric of confidentiality to determine

whether or not there was a harassment or intimidation or look at the various charges, and I would assume that even if they're not currently known to the Applicant's attorneys, that they will make sure that if those exist, that they try to break through those confidentiality.

JUDGE BLOCH: So, you want the scope of this obligation to extend to any investigations done either for GAP or for CASE, presumably, if there were such?

MR. ROISMAN: Yes.

JUDGE BLOCH: Or for the Applicants or their major contractors?

MR. ROISMAN: Yes.

JUDGE BLOCH: Okay. Is that acceptable?

MR. BELTER: Yes.

JUDGE BLOCH: Yes. Now, I heard one other suggestion there and that is that the follow-up should be not only to the individuals named in those reports but one further level which is the individuals, individuals whom those people have stated are a basis for a portion of their testimony. Is that the other suggestion?

MR. ROISMAN: Yes. To try to get at everything that one might reasonably say, if you heard

a witness get up on the witness stand, --

JUDGE BLOCH: Okay, but only as to those witnesses. It's not infinitely recursive?

MR. ROISMAN: No, no. It's only infinitely to the point that it is relevant.

JUDGE BLOCH: Relevant to the testimony of that one person. Is that understood or is that so vague as to be --

MR. BELTER: I, I think so, Your Honor. I don't think there is any of that with respect to the investigations that we've got, but I will check it.

MR. ROISMAN: I think -- I think the litmus test will occur during the course of some hearing when someone gets up on the stand and during the answer to a question says, well, I talked to someone, I can't tell you who it was, and they said, and everybody says --

JUDGE BLOCH: Okay. Well, we're going to rule --

MR. ROISMAN: -- and we never heard about that before.

JUDGE BLOCH: We're going to discuss whether or not to admit hearsay. I will tell you that we have ruled on the record in the welding matter on credibility, that we were not going to receive

hearsay on credibility issues. So, if we were to change our view, that would be as a result of a discussion this morning.

Okay. Is there a necessity to state any of the matters for which we were unable to reach agreement? There is to be a discussion this evening or at some early time -- there's a couple of other things to state -- discussion early this evening or some earlier time to try to resolve the deadlock of discovery between CASE and the staff. Both parties enter into that with some trepidation but with good faith.

MR. REYNOLDS: Mr. Chairman, I would just like to state for the record that we are very concerned that if the Board does not take the initiative and firmly control the remaining schedule for this case, it's going to drag on for quite awhile and unfairly or unduly prejudice Applicants in that their fuel load date will be compromised.

The Board is well aware of our concern in this regard. I wanted to state for the record -- we talked about it on the -- in the off the record discussion -- and we would urge the Board to be forceful not only in setting deadlines but in enforcing those deadlines.

JUDGE BLOCH: Okay. Now, the agreed deadline on the matter that we just discussed was that the report on anonymous witnesses will be made by June 25th. In addition, a status report with all information collected by June 20th.

And I -- obviously, there's some lag there. You're going to start writing the report based on what you've got at the time you start writing the report. You're going to have to cut -- have some cut-off point.

But the object there is to provide the parties with the information as soon as possible so they can begin following up on it.

MS. GARDE: Can you wait just one minute?

JUDGE BLOCH: Yes.

MS. GARDE: Okay.

JUDGE BLOCH: The next matter logically ought to be the definition of intimidation since it has an impact on other matters that we also will be taking up today.

Mr. Belter suggested to me yesterday a half hour time per party. I'm not sure it takes that much. I would suggest 15 minutes per party maximum. Is that acceptable to the parties?

MR. REYNOLDS: Yes, Your Honor.

JUDGE BLOCH: There being no objection, I guess the ordinary order seems to me to be appropriate here which would be CASE and then the Applicants and then the staff.

Mr. Roisman.

MR. ROISMAN: Well, I think we've said it pretty much all in our pleading. We feel that the issue is grounded in the question of implementation of 10CFR, Appendix B, and that the question before the Bcard is a two part question. Did the Applicant prove it even if we said nothing? And, secondly, on top of that, we have a lot of things to say that would indicate that the question of implementation of Appendix B is resolved against the Applicant. The essence of what we're saying is that we have information which we will present and a lot of which is already in the record, to the effect that there was an active program in the Applicant of discouraging the compliance with 10CFR requirements and with reporting non-conforming conditions.

We do not believe that that is inerently linked to hardware, although as you already know from things that have been put in the record, that linkages exist in this case, but that as we explain in our discussion of the underlying decisions of either

the Commission or the Appeal Board, we think that it is now clear that Appendix B stands apart from hardware, that you can flunk the licensing test, if you will, by not having implemented Appendix B even without a single piece of hardware being shown to have been defective. By stating that is not to say that we aren't going to introduce evidence about defective, but it's really more intended to make clear that it's not a solution to the problem for the Applicant to take every one of our hardware pieces and say, I fixed that one. Now, aren't you satisfied? That at some point, and that is a definition which we are not nearly so pressured as to attempt to give . At some point, you get beyond isolated incident and into pervasive. And I think we all agree that those are the words. And I didn't see anybody write anything that would tell us how you drew that line. And I guess in the end we'll give it all to you, and you'll decide.

Beyond that, I think the only thing that I would say at this opening point is that our position is that there is no additional hurdle that CASE must go over to produce the evidence which we have outlined to some extent in our filing on this issue with respect to the harassment intimidation

issue.

JUDGE BLOCH: You know, you have -- you're over -- you are somewhat oversimplified. Aren't you really saying that once you've put into evidence the matters that are now in the record in deposition form, that you will pass that burden?

MR. ROISMAN: Well, I guess I don't want to debate it too much because -- well, some of it is in the record. The Atchison testimony is there. The Steiner testimony, to some extent, is there.

JUDGE BLOCH: And Hamilton testimony.

MR. ROISMAN: Huh?

JUDGE BLOCH: Hamilton?

MR. ROISMAN: Yes. And I don't want to try to -- I don't want to argue a angels on the head of the pinpoint, but I think that once the contention is in, these series of almost like 110 yard hurdles that the Applicant would have us leap, you've got to meet this one before you can produce that evidence. You've got to do that one before you can produce that next, are inappropriate. And we detailed them and why we think those hurdles are inappropriate. I think anything which is relevant to the issue of harassment/intimidation, as we've just defined it, is appropriate for us to introduce into this record without

some pre-existing condition other than the normal test for what is appropriate evidence. It's got to be reliable, probative and, you know, the usual standards.

JUDGE BLOCH: How do you feel in this context about hearsay?

MR. ROISMAN: Well, I think the question is as it always is in th· hearsay context two-fold, one, the unique status of the Administrative Board without a jury, where the weight issue has always been a much more predominant consideration. And the tendency is let it in, and we'll decide whether it's irrelevant. And then the more narrow thing that arises even in the Court context which is why are you introducing it? If I put on the witness stand someone from GAP to get down to the nuts and bolts of it and the someone from GAP says, I spoke to 47 people , and everyone of them gave me the following stories, essentially. And he is reporting on what he heard. That is obviously not hearsay.

If he's trying to tell you that --

JUDGE BLOCH: Wait, what?

MR. ROISMAN: It is not hearsay for him to report on what he has heard. It's not the truth of what he heard, it's that he heard it.

JUDGE BLOCH: Except that it's entirely insignificant that he spoke to 47 people.

MR. ROISMAN: No, no.

JUDGE BLOCH: It's what they said that matters.

MR. ROISMAN: And that he, he --

JUDGE BLOCH: That's hearsay.

MR. ROISMAN: No, that's not hearsay. What's hearsay is the truth of what they said. If they express to him a genuine statement and said, I felt --

JUDGE BLOCH: But if what they said was false, we wouldn't care, would we? It's got to be the truth of what they said that matters.

MR. ROISMAN: No, not at all. It's the truth of what they believe, what they say. The issue -- what if -- what if the witness comes into this hearing, gets up on the witness stand and says to you, I felt intimidated from the moment I walked on the plant site and everyday that I did my job, I deeped six, at least three NCRs that I would have reported. There are so many of them, I couldn't possibly tell you which ones they are, but I did that.

Applicant produces a witness that proves

that this person's basis or feeling intimidated was as absolutely baseless as it could possibly be.

JUDGE BLOCH: Okay. First of all, if he testifies about his own feeling of intimidation, that's not hearsay.

MR. ROISMAN: No, but if, if we have a witness who testifies someone told them that they felt that way, they're reporting on what they heard, and that is relevant.

JUDGE BLOCH: Yes, but whether or not it was true, is really what's relevant.

MR. ROISMAN: You mean whether it's true that they said it?

JUDGE BLOCH: No. Whether or not they really felt intimidated.

MR. ROISMAN: Or whether they, they assembled.

JUDGE BLOCH: It could have been a joke. It could have been a joke.

MR. ROISMAN: I see what you're saying. All right.

JUDGE BLOCH: It could have been something he said once, but he said fifteen other times something else. And he's not here to ask him about that.

MR. ROISMAN: The only time when that issue

can come up in this proceeding, takes us back to the issue that we discussed off the record this morning. We're not going to not put on the witness who the person talked to. We're going to put on that witness. The only time we're going to run into a problem --

JUDGE BLOCH: Okay. So, you're not going -- you don't intend to rely on hearsay?

MR. ROISON: I don't intend to rely on hearsay, but I do intend to put the GAP witness on in order to give an overall view, and then I intend to support what the GAP witness said by the individuals, but I want somebody who is experienced, as the GAP people are, with dealing with whistle blowers, to give you a sense of the depth, breath, duration of this kind of problem at this plant site. And I will then support each of those by the individual.

And the only place where we run into a problem and we postponed the question, what will we do if the GAP guy says I spoke to X, Y and Z.

JUDGE BLOCH: Well, actually, what does the GAP guys summary of what he learned about the plant add to the summary you could write from the evidence in the record? Isn't it just his conversation with people who are not available for cross examination?

MR. ROISMAN: It's also his expertise as someone dealing with the issue of whistle blowers, which I do not have. In other words, this, this -- the knack -- one of the things we're going to have is we may have witnesses who told different people different things.

JUDGE BLOCH: So, you think you've got an expert in the labor relations contacts to whistle blowers?

MR. ROISON: Yes, I think that's a way of putting it, yes, someone who has developed skills --

JUDGE BLOCH: His testimony will help us to understand the record because he has greater expertise than we as lawyers have on that subject?

MR. ROISMAN: Yes.

JUDGE BLOCH: Okay. Do you have anything else to say on the scope? I interrupted you.

MR. ROISMAN: Not at this point. I mean I think, as I said, we had really, essentially, the last filing here, and I don't -- I didn't want to just go over it again.

JUDGE BLOCH: You -- you have a whole paragraph on the bottom of Page 9 and the top of Page 10 about the absence of the NRC check and balance system.

MR. ROISON: Uh-huh.

JUDGE BLOCH: Do you think that those matters are relevant to whether or not intimidation occurred at the plant, regardless of whether you can demonstrate a conspiracy between the NRC and the Applicants?

MR. ROISON: Oh, absolutely. That didn't have anything to do with the conspiracy, could just be total incompetence. We don't want to get into -- anymore than we want to get into, into the Applicants' motives. We don't want to get into the staff's motives, either.

JUDGE BLOCH: Let's assume that they might as well have been in Alaska. What would that do to us in terms of inferring that the Applicants have intimidated people?

MR. ROISON: What it would do is indicate what the impact, give you a better sense of what the impact of individual acts of intimidation. What our witnesses will testify to, at least some of them, is that they felt isolated at the plant site. They had no place to turn, that one of the reasons why the firing of Chuck Atchinson impacted as it did on so many people at the plant is that they didn't feel like there was any place to go. When the report

came out, as Chuck walked out the door, the plant's resident inspector said, there goes your 1980 alleger.

That was -- that is a significant part of why an incident of intimidation, even one, may have had more impact at the Comanche Peak plant than it would have in a situation which although there were attempts to intimidate, people always knew they could go to the staff. They always got vindication at the staff, and that word was known among the work force.

JUDGE BLOCH: I guess I see that as an -- as an anticipatory defense, which they try to prove that there was no intimidation because the staff was doing a terrific job in holding it down. Clearly, you could introduce evidence that the staff wasn't holding it down.

MR. ROISMAN: Well, but it's not only that. There's a -- it seems to me that there's somewhat of a balance. When we're dealing with this question of pervasiveness, one of my problems in writing about the standard was that it is inherently amorphous, but it did seem to me that it was on a sliding scale.

In a plant which in which the staff was doing a really bang-up job and everybody knew it and

anytime you felt pressured, you could go to the staff. The staff investigated it. You were kept out of it. And pretty soon some real changes began to take place, even though there might have been hundreds , thousands of those incidents occurring, one might argue that each one was encapsulated and kept from effecting or infecting the work force and that the whistle blower who went to the staff, got his vindication so fast that you can't say that the reasonable assurance requirement is gone.

Conversely, with a relatively few people coming forward and saying, I actually got harassed. I was fired or I was put into a bad job or cat calls were made at me or they pointed fingers at me or locked me up in a room and went through my files.

A relatively few of those where it's known in the work force that if you get yourself in that position, you're hanging alone because there's no staff to go to, would make that an arguably pervasive intimidation situation because the staff's absence -- when, in fact, if they were in Alaska, the situation would have been better than it was here. The work force would have been better off, not, again, because of any question of collusion but because the staff was, was blowing back to the Applicant the information

that was being given to them by the witnesses. If they hadn't been there, the witnesses -- the people in the work force would have been less frightened. They felt like --

JUDGE BLOCH: Because that was part of a pattern that made it look like the Government and the company both were trying to intimidate which is even worse than just feeling your company is trying to intimidate you.

MR. ROISON: Yes, correct.

JUDGE BLOCH: And you think you can -- you can demonstrate that?

MR. ROISON: Well, yes. I mean I think, yes. I, I think we can whether we get -- you asked the question on collusion. That's a term which we wouldn't use.

JUDGE BLOCH: Okay. I had understood that you thought you could show that the NRC was part of the pattern of intimidation. That, obviously, would be highly relevant.

MR. ROISON: Right.

JUDGE BLOCH: I'm not sure that at the top of 9, the end of the first sentence of the paragraph there. What kind of experts are you thinking of there? Are those -- are those your --

MR. ROISON: Okay. Just a second. Let me --

JUDGE BLOCH: Investigatory experts?

MR. ROISON: Oh, I'm sorry, the first --

JUDGE BLOCH: The end of the first paragraph there.

MR. ROISON: Okay. No. What we would propose to do is to bring in experts or expert on the question of implementation of Appendix B to indicate how -- what, what is the real nature of the kind of atmosphere that one must create on the plant site in order to effectively produce the things that Appendix B intends. I meanI would see bringing in someone with some experience in, in that area. And we have a number of problems. One of them, and why it's difficult to identify experts is, some of the best experts may not be willing to come and testify against a fellow applicant in a licensing procedure. And there are some plants that have done a lot better job than Comanche Peak in this regard.

But our intent is to try to show the linkages between this atmosphere at the plant site, the contentious between craft and inspectors and the impact on Appendix B, what Appendix B is really intended to create, kind of a partnership relationship

that's intended there. That's the nature of the experts.

JUDGE BLOCH: Okay.

MR. ROISON: Yes, I'm sorry. And Billie reminds me also someone in the industrial psychological area to talk about what would you expect the impact to be on a work force of seeing these things, are somewhat tongue in cheek example of the hanging QC inspector. When do you reach the point that a single or a couple of events are so -- have such an impact in the work force, in this work force?

JUDGE BLOCH: On Page 15, I take it you're really advocating demonstration that there was not sufficient organizational independence from costs and schedules. You're not going to try to argue anything about what the costs are; right? You're not going directly to costs?

MR. ROISON: No, no. We're going to -- no, but our, -- but our -- but our motive point is to show through both the financial information and, as I understand it, we will talk about that at some point on the CASE's letter -- for this hearing only limitation on the data that's coming out in the -- in the rate proceeding.

We want to establish the existence of the

financial pressure to help establish the existence of a motive for these things to happen. We see this very much. We're not going to get, I don't think, the Applicant witness, sort of Perry Mason style, to break down on the witness stand and say, I confess, I did it.

You're going to have to infer the result from what we show. So, we would --

JUDGE BLOCH: Do you need anymore than official notice that a slow down in the schedule of the plant cost money? I mean we know it costs money.

MR. ROISON: It's -- I think some extent that it's how extreme it is. How much -- for instance, if public service company of New Hampshire, did the -- did the pressure go up dramatically when a couple of days ago the Supreme Court of New Hampshire held that on uncompleted plants, public service company of New Hampshire cannot recover money from the rate payors.

I would say that's a quantum leap in terms of pressure on the company and that one can argue -- if you're arguing motive and opportunity, which is what we will argue here, that's showing the depth of the motive is important, I do not want to argue or --

and don't see any reason why we need to get into the interstices of the precise financial status of the Applicant, but I do want to show their motive. I want to show they were under and are under a tremendous financial pressure.

JUDGE BLOCH: Sounds like a few weeks of hearing right there.

MR. ROISON: Well, I don't know. One of the -- one of the questions will be how much we will be allowed access to the information that's in the ongoing rate proceeding and how much we can -- how much of what comes out of that we can use here.

Currently, we're, we're cut off from that information, the information is coming out in discovery.

JUDGE BLOCH: Well, let's ask if -- let's ask if it is relevant. I overheard Mr. Reynolds say it sounds irrelevant. It sounds that way to me, also.

If you prove that there is intimidation, that is, that -- well, however we're going to -- however we wind up defining it -- why is motive at all relevant? This isn't like trying to infer whether the guy actually was where he said he was by his motive.

MR. ROISON: Because the premise that you make is the premise that motive relates to. If we -- I agree, if we prove intimidation, that's the end of it, but we have to present every case.

What, what if we present to you enough that you say, well, --

JUDGE BLOCH: Border line.

MR. ROISON: I'm, I'm inclined that way. And then we show that the company had a motive for wanting to intimidate. You've got to make some inferences here on this issue. This isn't like sending in the inspector and looking at the pipe and finding out whether it was properly weld or not. This is --

JUDGE BLOCH: Well, that sounds like some extraordinary motive like they're on the brink of bankruptcy, something like that. They are in dire --

MR. ROISON: Well, --

JUDGE BLOCH: -- financial straits.

MR. ROISON: We haven't seen the data. So, I don't -- I mean I can't tell you what it is.

JUDGE BLOCH: But I would say within the ordinary range of public utility companies and costs, it seems to me that it would add very little to the

record for the time that it would take to, to go into it, but we are aware that there are costs to delay period and they exceed $1 million a day just in -- probably just in interest costs.

MR. ROISON: Well, it may be that on, on some of those factors, that we can stipulate. I think one of the concerns here is is this Applicant is significantly worse off than others. In other words, everybodys got some of --

JUDGE BLOCH: Well, I don't see where that would matter at all.

MR. ROISON: Because if they are significantly worse off than others, then -- I mean this whole Appendix B section that we cited, including sufficient independence from costs and schedule when opposed to safety considerations, presupposes that there's a tension between those.

By definition, if the pull on one side of this tension is greater in one case than it is in the other, the measures needed to counteract it on the other side must be greater. For the Applicant to carry its affirmative burden -- if it was a -- if it was in a tougher financial position than its colleagues, then they would have had to do to do their right, have had a significantly better Appendix B

implementation to deal with just that very consideration, so that they counteract the tough.

JUDGE BLOCH: I guess I'm saying I could imagine an extraordinary situation where you would have information on financial condition that we could rule was material, but I don't think within the range of normal variation and the fact that it's worse than some other utilities could pursuade us much.

MR. ROISON: Well, at this point, all we're doing is seeking the discovery of the material. We thought that --

JUDGE BLOCH: I'm not going to block --

MR. ROISON: Yes, all right.

JUDGE BLOCH: -- discovery because it could wind up to be relevant, the motive, as I'm not planning to. We'll see what scope winds up being after the argument.

Applicant should have a -- have you concluded your argument?

MR. ROISON: Let me ask Miss Garde if I have.

(PAUSE).

MR. ROISON: I think the point she made we'll make in rebuttal to what we anticipate the Applicant will say on this issue of the relevance of

costs and scheduling in terms of evaluating harassment/ intimidation.

JUDGE BLOCH: I'm going to give the Applicants the same amount of time but with the understanding that since there are two parties -- take an opposing view, that if they feel it necessary I would understand the possibility for more time.

MR. BELTER: I think it might depend on the nature of the questions, Judge Block. But let me -- let me respond, briefly, to the last point while it's fresh in my mind.

If what Applicant suggested is true, I would suggest evidence that the Applicant is in better financial condition than other nuclear utilities, would also be relevant to a question of intimidation.

Our position, basically, is it's entirely irrelevant, but if you're going to get into that, I can assure you that you could easily spend several weeks discussing measures of, of how you, you rate one utility versus another. And you'll never come to an answer on that question.

I think the bottom line from our standpoint is that as we get into that, we'll show that we are better off financially than most other nuclear

utilities. And the point they're trying to make would help us.

JUDGE BLOCH: Well, let's leave it as the Board's feeling is it's likely to be a material unless an extraordinary case of financial circumstance could be made.

MR. BELTER: I, I think that would satisfy us for present purposes. Let me turn for just a moment to scope, Judge Bloch.

Reading the two pleadings here, it's obvious to me that our ships passed in the night. We thought we were being asked to deal with an issue that had been set aside, to be tried in front of a separate Board. A separate Board was authorized here to here, an issue described as harassment and intimidation.

CASE has described that issue to us. We, we understand what they are alleging. And it starts at the bottom of Page 4 of their responsive pleading, and they, they state -- they contend there was a pattern and practice of harassing and intimidation which included threats, coercion, annoyances, physical abuse, termination, job transfers, decrease in compensation and other examples.

That's what our proposed standard was

directed to, and that's what we believe is, is the issue before this Board with the dash two docket on it.

We've never -- we've never contended that evidence of, of what we all understand to be strictly intimidation is the only way that a QAQC program could be undermined. What we understood was that was the issue that we're being asked to propose a standard on and that would be heard before this Board. It was the people issue, the non-technical issue.

JUDGE BLOCH: Okay. I think that's the way the Board understands, as a people issue, but I'm not sure we understand it quite as narrowly as you argue it to be.

Let's just suppose, hypothetically, that there are, I don't know, from four to 35 incidents that are proved and that the Board believes exist. What is the Board to do to decide whether they are isolated incidents or part of a pattern? Isn't it -- turn to the Applicants and say, now, how did you respond to what you knew about these things?

First of all, what did you know? What kind of investigation did you conduct? Did you take reasonable steps to correct what you found was wrong

or to find out that it wasn't true? Was the action of the Applicants reasonable in such a way that we're confident that, that these were isolated and shut off by the Applicants?

MR. BELTER: I would agree with everything you said, Judge Bloch. The question is not one of, of is there an objective standard, pick a number, of how many incidents would create a pattern. I think we're all clear that there has to be more than isolated incidents. There has to be a pattern.

There's a good case that, that I think would give you some guidance on, on the numbers and the type of incidents which actually have been established, but yet a pattern was not shown. And that's the South Texas project case. It was the Phase 1 initial decision, March 14, 1984.

I believe in that case there were -- there were actually eight out of ten allegations of intimidation substantiated. And, yet, the Board did not go and make the finding, could not make the finding that the reasonable assurance that the plant would operate safely could not be made. They, they indicated they would continue to review the situation.

JUDGE BLOCH: That was in the context of, of a -- that took such severe action that they kicked

out the major contractor and made sure that the program would be completely redesigned.

MR. BELTER: And if eight or ten of those type allegations were substantiated here, we might be in the same situation. You have to weigh -- you have to weigh the type of incidents that are actually established, and there's nothing really established yet here until we hear CASE's evidence, we hear the staff's evidence, and we hear our own evidence.

JUDGE BLOCH: Well, let me ask, what would you expect to be a reasonable standard if there were one incident of intimidation, as to what the Applicant's standard of conduct under Appendix B would be in that situation?

MR. BELTER: The, the first thing -- the first thing that you would want to know on this incident of intimidation would be the reaction of the person allegedly intimidated. Did he do his job? Did he continue to report non-conforming conditions or does he testify that as a result of whatever the object of circumstances were, he continued to do his job? He did not react. That's the first thing.

JUDGE BLOCH: That's your reaction? My reaction is that the first thing I'd want to know is who did the alleged intimidation or how did the feeling

of intimidation arise.

MR. BELTER: Oh, I'm assuming that that --

JUDGE BOCH: -- and quarantined it.

MR. BELTER: I'm assuming that you would already have testimony about that. And that I assumed in your question it had been established that coercive acts took place, that they were intended to intimidate, that the person felt intimidated. But, then, you would want to see what was the result of that? Exactly as you say, was it -- off? What was the impact of this on others?

I would not -- I would not contend that those are, are irrelevant questions.

JUDGE BOCH: Okay. Let's, let's assume there was no incident. There was a rumor, and your management learned about it. The rumor swept through the plant. False. But all of a sudden all of your inspectors believed that they better not report QC deficiency.

MR. BELTER: It would depend on the nature of the evidence that establishes the rumor. For example, two or three persons report to management that they have heard -- that someone has told them something. I'm having a hard time grasping this rumor concept. Management would have to probably respond,

put out a document, reassuring persons that you are obligated to report non-conforming conditions. You do --

JUDGE BLOCH: -- learn what's going on in there?

MR. BELTER: You do -- you do have an obligation to come to us or to come to the NRC and report your concerns.

JUDGE BLOCH: So, really, the important thing for the QC Program isn't whether the beliefs of the people are justified but whether there is a belief that you should conscientiously report non-conforming conditions?

MR. BELTER: And whether or not non-conforming conditions are being reported or whether some of them are not being reported.

JUDGE BOCH: That's r ght.

MR. BELTER: Judge Boch, I have -- I would like to address -- I think it would help, help you and your questions may make me run over but the specific objections that CASE raises one at a time.

I would like to emphasize before I get into that, though, that without discussing them in great detail, the relevant precedence we think would be helpful to you here, are the Perry case, which we

had cited for the proposition that perfection, basically, is not required. There are decisions, other decisions that support that, particularly PG&E and the Diablo Canyon case.

We're not arguing that Midland and Simmer are not applicable here. We will certainly contend that our situation is nothing like what, what exist in those cases.

JUDGE BLOCH: When you cite Perry, I see it as much like any other deficiency in a plant. If Management has a good program for identifying deficiencies and resolving them, they don't bother me. But if intimidation occurs and Management doesn't have that program, then we're in trouble.

MR. BELTER: I don't disagree with that, Judge Bloch. Starting with staff's objections, staff had, had, what I would characterize as one specific objection, although it related to the second and third elements. They, they indicate that they don't feel the standards should have a requirement that the person actually fear or that there be harmful effects. They suggest the situation where QC inspector might be pursuaded not to do his job out of team spirit or out of promise of some favor.

Fair enough, my response is fair enough,

but that's not what we thought was the issue here. Nobody has told us, to be blunt about it, that there's evidence of bribery of QC inspectors. If there is, let's put us on notice here this morning that you've got that type of evidence and let's deal with it. But we, we understood that the issue was exactly as CASE contended, that they will prove physical abuse, coercion, annoyances and other examples of harassment and intimidation.

I'm, I'm not aware of anyone suggesting anything along the lines, for example, of forgery that, Judge Bloch, you suggested earlier. That's not what I understood and what we understood as intimidation. If there is, it's another -- it's something else, but it's not what we were trying to deal with here. And I don't think -- I don't think we have a problem because I don't think there is anybody contending that they have evidence of it. If there is, I want to hear it this morning.

With respect to CASE's specific objections, and I'd like to just briefly go through them one at a time. The first objection -- and it might be helpful if you had their pleading there, where they're numbered, starting at Page 10 -- they suggest that an accurate statement doesn't have to occur.

JUDGE BLOCH: Please continue.

MR. BELTER: It's our position that it's difficult to understand what they have in mind here, but some act or some statement has to occur. It doesn't necessarily have to be immediately contemperaneous with the feeling of the actual results, with the feeling of intimidation, but you can't have a credible witness simply come in and say, as Mr. Roisman suggested earlier, from the moment I walked in here, I felt intimidated without giving a reason why that person felt intimidated.

This relates to our, our suggestion that there has to be a reasonable person standard here. Unless the Board is willing to assume, for example, that the entire population at Comanche Peak, in particular the population of QC inspectors, is saturated with unreasonable people or people who have abnormal fears, you can't establish or conclude or infer that there's a pattern of intimidation from acts or statements which the Board realizes and we realize would not intimidate a reasonable person.

You can't accept testimony as credible where someone comes in and says to you, I'm the egg shell type person. I have this un -- abnormal, unreasonable --

JUDGE BLOCH: You want them to at least show how this feeling arose?

MR. BELTER: Absolutely.

JUDGE BLOCH: Okay. Now, of course, you agreed that in an extreme case, if they really showed that there was a --

MR. BELTER: If they --

JUDGE BLOCH: -- evasive feeling in the whole plant that you don't report to Management, that could be another way of showing it.

MR. BELTER: I would -- I would concede that if we took a QC inspector out and hung him in front of everyone else, that the effects of that could last longer than the day that it happened. So, that a person could come in and say, I feel intimidated. Why did you feel intimidated? Because I saw this hanging or because someone told me of this hanging. And I am testifying as to my own personal belief, and that belief is reasonable. This Board could conclude that it would be reasonable for a person to feel intimidated, but if a person comes in and just tells you, I feel intimidated, why? I don't know why. I just feel intimidated. I can't give you a rational reason, one which would influence a reasonable person to be intimidated. And that testimony is of no

probative value here, unless --

JUDGE BLOCH: I guess all the guys I know at the plant tell me I'd better not be a nit-picker.

MR. BELTER: You have to evaluate that.

JUDGE BLOCH: -- nothing from the supervisor telling me that, just that's, that's what they all tell me. So, that's the way I live here.

MR. BELTER: Well, we'd ask who told them. We'd get specific. When was it told to you? What was your reaction?

MR. BLOCH: Better find out as much as possible about it, and it would depend on how many such people there were. If there are just a couple of them, you know, you're going to get a wide variation of attitudes, I suppose, in any plant, at any work place.

If there were a very large number, we'd have a different situation. I think we're trying to anticipate the detail that we may be --

MR. BELTER: We, we may do, but, but I think the bottom line here is that we feel that there has to be some basis for finding intimidation other than testimony of a sincere person who may be abnormally fearful.

The second objection that CASE has is, is

the question of whether or not it has to involve supervisory personnel. Several points here. We, we understood from the Board's memorandum -- I have a copy of it here -- of March 15th, that you indicated that except for the testimony of the Steiners, the issue with respect to craft was not currently open.

JUDGE BLOCH: That issue that I was talking about, where there's a discussion about whether it's deferred or not open, was a harassment of the craft, not craft harassment of QC inspectors.

MR. BELTER: We had not -- I don't -- I don't think -- we've contended that every act of intimidation has to relate or has to be performed or directed to QC inspectors. I think I would have a difficult time responding in more detail here until I see exactly what it is, the specific incidents that they, they contend they're going to prove.

JUDGE BLOCH: We had a couple of isolated incidents in the Hamilton context where we have findings that there was a --

MR. BELTER: I think you -- Judge Bloch, we made clear in our pleading and we put it in a footnote, that, that there could be -- it's Footnote 5 on Page 5 -- other types of intimidation other than the job action type intimidation that we're contending

had to be made by supervisory personnel.

The point we're making there on supervisory personnel was simply that, that the acts or statements, again, to be reasonably interpreted as intimidating, had to be made by someone with the ability to carry them out. And we're talking about job actions, typically, craft would not be in a position to cause a job action to be taken against the supervisory personnel.

Craft might be in a position to make physical -- to threaten physical abuse.

JUDGE BLOCH: Yes or make it inconvenient or annoying or whatever.

MR. BELTER: We, again, until we see what it is they contend they will prove -- and at the time we wrote this, I had no indication that there would ever be any evidence of physical abuse. That's why we wrote that out.

JUDGE BLOCH: We have two findings in the Hamilton context after reconsideration that were something of that nature. There was some pranks. So, there's very limited findings already about some harassment by craft of QC.

MR. BELTER: And, and aside from those incidents, well what I meant, that we understood, at

least until today, until I saw this pleading, that there were no allegations of threats of physical abuse. And when we see further discovery, we may have it, but I can't respond in greater detail at this point in time.

MR. GROSSMAN: Well, you know, I have a, a problem overall with trying to define all of this in advance. What you're really saying is that you can postulate examples of things that aren't really material, that may be presented but that we ought to rule out in advance as not really being material to harassment and intimidation.

And the thing is you can postulate an intimate number of, of things and you can't really tell whether it's material until you have it presented. The same way you can't tell now until you finally discover everything, we can't tell until we hear the evidence that's proferred at the hearing.

And, so, you know, it seems as though trying to tie everything down and limit everything in advance is counterproductive, and that we ought to just indicate that we're not going to be that liberal and let everything come in, but we're going to test everything that comes in as to how material it is to harassment and intimidation. And I don't see how, how

far we can go in advance of the hearing in order to set these limits.

MR. BELTER: Now, this does address the question, Judge Grossman, of what the purpose of trying to establish a standard in advance of the hearing is intended to accomplish. I, I would give you one -- I don't disagree with, with the problem you're having, that it's difficult in advance of hearing all the testimony to establish firm ground rules, but some of them can be helpful. And let me give you an example.

We have one of CASE's objections being to the question of whether Management intent should be considered relevant here. I don't know what their position on it is. I hear them argue vigorously at one point in time that they intend to establish Management's motive, that Management had, in Mr. Roisman's word, an active plan to discourage people from reporting non-conforming conditions.

On the other hand, I see in the pleading an argument that intent is not relevant, that they don't have to establish intent. If the issue is intimidation, I think intent has got to be shown. If it's some mistaken impression of Management actions or miscommunications, it's a different -- it's a

different issue. It may be, as you suggested, that, that if there was a pervasive miscommunication, Management intended one thing in the directives it put out, in the statements it made, but they were interpreted as something else, we've got a different issue, but I did not understand from what we knew about it that there's any evidence along these lines of mistaken communications or miscommunications.

So, intent is a necessary element behind the Management actions that are -- that are going to be the subject matter of this harassment and intimidation hearing.

JUDGE BLOCH: You're saying --

MR. BELTER: That Management intended to intimidate.

JUDGE BLOCH: I understand.

MR. BELTER: That Management intended to prevent people from reporting conditions.

JUDGE BLOCH: But you really are saying that if you do certain things and you don't intend the effect, the effect is nevertheless to discourage people from reporting?

MR. BELTER: Not at all. What, what I'm trying to -- and it really comes down to a notice problem, Judge Bloch. We're on notice that there's an

intimidation issue here. I'm not on notice that there's an issue that people have been misinterpreting Management directives. Management intended one thing and someone says I intended something else. We've got a different issue here.

JUDGE BLOCH: That's -- I guess I agree with you on the burden of proof argument. I haven't stated that, although I don't think it gets you too far, and that is I think there is a burden of going forward on CASE to establish that there is some intimidation.

The problem is that my, my understanding of the record is that they have enough either in the record or about to be in the record that I can easily anticipate the burden shifting. And then you pass to the question of what Management has done to respond and what they know about it.

MR. BELTER: I would -- I would disagree with your characterization of the record, Your Honor, but I, I don't think we've gained anything here this morning by arguing over specific evidence.

Our, our obvious intent would be to go forward after we hear what their evidence is. We did have an affirmative case presented two years ago on a QAQC program. There are -- there are areas where

we feel we could supplement that and probably should supplement --

JUDGE BLOCH: __ QAQC for operations?

MR. BELTER: No, it really didn't relate to intimidation, but it did establish the, the QAQC Program.

The evidence -- again, without getting into it in great detail, a lot of the limited appearance statements that were made I understand are not evidence yet. I would disagree. I have digested those statements. I would disagree that as far as intimidation is concerned that, that 90% of them relate to matters other than intimidation. They may relate to technical concerns, but not intimidation.

I, I would anticipate that regardless of how you establish the burden of proof, we're going to go forward and present an affirmative case in any event.

JUDGE GROSSMAN: Okay. My problem is procedural. You have mentioned an example -- let's say someone comes forward with what you think is an unreasonable fear, let's say a phobia of some sort. You would like us, now, to define all the elements that are necessary in order to find that this is an actual case of intimidation or harassment.

Well, if someone comes forward and there are some elements that are missing that would indicate that this is a reasoned fear, well, that's something that you can determine on cross examination and some argument that you would make to the Board at that point, taking the whole thing together doesn't constitute harassment and intimidation. But, now, you're asking us to think these things out in advance, to postulate all kinds of examples that occur in which only a partial case is made or there's an incomplete case made and set these limits in advance. And I don't see how we can do that. I mean it, it really boils down to a question of materiality when the evidence is put on to begin with and then a question of completeness when there's cross examination and rebuttal, and it's all something that is done after hearing or after the hearing on brief and not something that you can -- that we can arbitrarily sit down and define right now, that is set limits rather than define. I think that's basically what your position is, that we ought to have all these limitations that we can conceive of in which testimony is incomplete or perhaps misleading.

And I think that, really, that's a province of the trial judge or the Board at the time the

evidence is presented as to whether it is material and then, secondly, what the implications of the evidence are.

MR. BELTER: I don't disagree, Judge Grossman, but let me suggest one way in which the -- what we're -- what we're doing here might be helpful. We're doing it at the Board's suggestion.

You've got the results of this discussion, the position of the parties on what a standard ought to be, whether you actually come out with an order adopting one, it is another question. I don't think we're actually requesting that.

We, we responded to your request for a proposal, but if, if, for example, we finish the deposition process and we find that one witness' testimony, through deposition, consists basically of -- it can be summarized in a certain fashion. I won't try to get into it.

JUDGE BLOCH: But basically you're --

MR. BELTER: We're looking for something -- we're looking for something to say, this witness' testimony is of no probative value here.

JUDGE BLOCH: You think it's --

MR. BELTER: It adds nothing. We can make a motion for summary judgment on the basis of what

we've got. And it's at that point in time that there may be a vehicle from both sides, to limit the scope of the hearing or even at the close of the hearing, define some basis for saying this witness' testimony adds nothing.

And what I'm -- what I'm particularly talking about here is, is trying to get some focus on what constitutes intimidation.

JUDGE BOCH: (INAUDIBLE).

MR. BELTER: Get us beyond -- get us beyond something of what I understand CASE's position to be, that, as they describe it, intimidation is a state of being. There's got to be something more. There has to be a casual effect for this state of being.

You just can't accept the testimony of somebody coming in and saying, I just feel intimidated, with no reason for it. If that's all there is, that is -- that is not probative and can't be probative in this issue.

JUDGE BLOCH: Not highly credible, is it?

MR. BELTER: It's not credible.

JUDGE GROSSMAN: Okay. I take it you're just telling us the parties -- let us know where you're coming from, now, as far as how broad you think

the hearing ought to be and you've made your points not in the form of a trial brief but, basically, as an overview, but what I'm saying is, you can't expect us to, to define everything, to dot all the i's and cross all the t's in advance when it comes to determinations of what are -- what is material, that there are a number of things that we have to take into account, and we can only take those into account after we hear the testimony or what's being proferred as testimony and some -- until we hear the cross examination.

Okay. I don't think we have any disagreement now, but I'm saying that I don't think we're going to come out with as tight a standard as, as you suggest we might come out with here, if any standard at all.

MR. BELTER: I think it's difficult to discuss -- I think I recognize that. And I think it is difficult to discuss it in a vacuum without specific examples and testimony in front of you.

I'm, I'm suggesting that if you were able to come up with a specific standard, it might help limit the scope here. It might help for summary judgment motions for the key things --

JUDGE BOCH: Okay. Why don't you move --

(END OF TAPE).

MR. BELTER: Mr. Reynolds suggests certain specific items that might be helpful to be established early on. The scope of the intimidation issue here as we understand it is intimidation of QC inspectors. The allegations, if there are any, of the intimidation of craft personnel, if there are any - I'm not aware there are - intimidation of craft personnel is not relevant here and it would be helpful to establish that.

Now craft intimidation of QC inspectors would be relevant. We're talking about QA/QC program which involves the inspections themselves. QC inspectors could be, conceiveably, intimidated by management or by craft, but intimidation of craft personnel themselves is not what we're dealing with here. If the QA/QC program works, any results of intimidation of the craft program personnel would be taken care of.

JUDGE BLOCH: I think CASE agrees that at this stage, at least, that's correct. Is that right?

MR. ROISMAN: I agreem but I have difficulty with it where I've got somebody who is - what am I going to do with a witness who says, I'm aware of specific events that took place and it's part of what harrassed and intimidated me and the events that took place involved craft people, not QC people.

JUDGE BLOCH: It's relevant to QC. It's got to be

tied in as relevant to QC intimidation.

MR. ROISMAN: Sure, I mean if the same guy goes up and beats up two craft people and then beats up someone from QC, that's -- I suppose and --

No, beats up two craft people and then threatens to beat up a QC person. But what I want to be clear about is, it is not our position that you can end your inquiry on the issue of the harrassment and intimidation issue with the conclusion of the QC inspector intimidation. In trying to find pervasiveness and trying to see if the applicant carries its burden, then you must also see the craft intimidation - it's part of the whole question of pervasiveness. I understand you want to for just scheduling.

JUDGE BLOCH: It depends. If the QC intimidation issue clears up and isn't demonstrated I really dor't think it would be fruitful to go forward on the other issue of intimidation of craft because I would expect a good working QC program not distorted by intimidation to be able to pick up problems that might arise from tough working conditions for craft. If there were serious problems in the QC program, I can imagine a borderline situation where you'd have to go into craft intimidation, but there could also be one where it's so bad in QC that you wouldn't bother with craft. That's why, I think, facing it makes so much more sense.

MR. BELTER: Judge Bloch, one other objection that

CASE, that we feel we should respond to and that is the question about applicants right or duty, if you will, to discipline QC inspectors. It's our position that applicant not only has a right, but a duty to discipline an inspector who is not following established procedures and criteria. We'd be derelict in our duty if we allowed inspectors to apply their own criteria. Now I don't want to be cute about it, but it is clear to us that an inspector who decides that home plate should be 24 inches on his own when the rule is it's got to be 18 inches, we have a right and a duty to discipline that inspector. And that's not intimidation. That doesn't establish a pattern or add anything of probative value to a claim that we are deliberately attempting to undermine the QC program.

That type of action would be in furtherance of a QC program, QA/QC program.

JUDGE BLOCH: That would depend on how it relates to other evidence I think, but what you said is obviously true, that an instance of enforcing a QC regulation against a QC inspector without more, obviously is not intimidation.

The New York City Police Department has a rule book so complicated that you can always catch your cops doing something wrong. If it were that kind of a pattern, we'd have the other conclusion, wouldn't we?

MR. BELTER: I think so, your Honor. I don't feel a

necessity to respond in detail to many of the other items that CASE has alleged because I think we basically have an agreement on recognizing that there will be honest disagreements between craft and QC, that the program doesn't have to be error-free . I won't discuss the twelfth objection which relates to what the state of the evidence shows right now. We can disagree on that.

Let me just turn for a moment, unless you have other questions on it, to the subject of hearsay. Bascially what we're trying to accomplish here, and it's a bit of a reaction to what we've heard so far in preliminary discovery, is to not put us through having to hear Congressmen, newspaper reporters and other testify about what they have heard about conditions at Commanche Peak where they were in no position to personally observe it. I think, to that extent, you could give us an indication early on that that type of testimony is not acceptable. Secondly, --

JUDGE BLOCH: I guess my problem is I'm more willing to indicate early on that hearsay won't be accepted. It sounds to me like the general rule of the parties - unless there is a specific reason for an exception in a case, I can imagine a specific argument, but I don't know what these Congressmen might know directly. I'm not going to rule that a Congressman doesn't have direct knowledge of the plant. You've got to have direct knowledge of an issue that's

related to intimidation.

MR. BELTER: Well, I suppose we could all imagine a situation when a Congressman might, but --

JUDGE BLOCH: I don't know, Billy Garde -- one day. For all I know --

MR. BELTER: -- take a deposition. And I think, your Honor, I would agree with basically the conversation you had with Mr. Roisman earlier on on what does constitute hearsay. My only point would be, where you have an incident - and all of these incidents are going to be ambiguous - to some extent there will be credability quest'ons as to objectively what happened, what was said. That, for example, where there is two witnesses to an incident, the fact that one side of the presentation on this incident may be able to present 3 or 4 other witnesses who report second and third hand on what they've heard, adds nothing probaitve to the testimony of the two witnesses who were directly there, who can testify with direct knowledge. And, clearly, that's hearsay and despite the liberality of rules relating to administrative proceedings, we think it should be kept out here.

JUDGE BLOCH: I'd like to say with respect to something in Mr. Roisman's brief on page 7, he argues that applicant's response both here and in the -- deny rather than to correct. I hope we don't come out of the hearings with that impression because that would be the most serious

situation I could --

MR. BELTER: That certainly is not our position - we have denied where we felt it was appropriate to deny and numerous actions have been taken, responsive actions, to problems that have been foreseen and we will present that.

JUDGE BLOCH: Yes.

MR. TREBY: The staff understood the purpose of these various pleadings on the standard of litigation to focus, the scope of the sub-issues of intimidation and I use the word sub-issue intentionally because we really have only one -- in this proceeding which is contention 5. And we believe that the harrassment and intimidation issue is relevant to this proceeding only as it relates to whether the applicant's Quality Assurance program complies with Appendix B and enabling the Board to make the required finding that the construction has resulted in a safe plant in accordance with that matter in controversy that's been raised here in contention 5.

We think that it's really a matter of evidence to this contention, this sub-issue of intimidation, and that is whether the applicant has an adequate QA program. We've heard earlier and - that the applicant did put some evidence into the record at an earlier stage in this proceeding - I guess last September of 1980 or something to that effect, as to what their QA program was -- We would agree to this

extent with what Mr. Roisman has said, which is that the applicant has a burden of showing us that it has an adequate QA program. To the extent that there have been issues raised with regard to intimidation, that goes to, has the applicant's QA program been adequate? And, in looking at that, and in giving some focus to that question we think it's necessary to look at Appendix B and the key provisions of Appendix B and some of those key provisions are that you have to have a - you have to have your Quality Assurance program in writing. There has to be certain procedures, policies in written form that are to be followed by your QC inspectors. And another key provision of that is that the QA organization has to have the freedom to carry out this program. We would think that what is necessary to be showing intimidation is some sort of act or statement on the part of the applicant that caused its Quality Assurance people not to follow these written procedures, to follow the written program that they should be following in order to - as required by Appendix B.

JUDGE BLOCH: Well, suppose that the act or statement was made by the craft personnel, just as a hypothetical and the management never made an act or statement? Would that be exculpatory?

MR. TREBY: Oh, I think we go back to freedom and the freedom is somehow -- upon by the craft people that I

think that would be something that we'd want to know about too and the effect a determination on that. We would also assume though that if that kind of stuff was occurring that the QC inspectors would bring that to the attention of their management and that their management ought to take some sort of action so that we wouldn't assume there just would be a - some incident, you know, in a vacuum where all of a sudden all of the QC inspectors were feeling intimidated by the craft people and that somehow or other the applicant's management didn't know about that.

JUDGE BLOCH: If it's one incident we're probably not going to worry that much anyway.

MR. TREBY: That's right. We, as we have noted in our finding, we also agree that are not going to get perfection in these kinds of programs as was pointed out by the Perry decision and the Calloway decision.

JUDGE BLOCH: Do you ever get into the question of job incentive when you - as part of this issue?

MR. TREBY: We - job incentives in the sense that you would not find problems?

JUDGE BLOCH: What the incentives are for the QC inspectors. Do they make it clear to QC inspectors who are conscientious and do a good job that that's what they want?

MR. TREBY: Yes, I would assume that that would be part of the applicant's permanent proof that they have a good

QA program, that they have trained these people, that they have instilled in their QC - QA/QC work force a feeling that they are to adequately inspect or inspect against procedures to make sure --

JUDGE BLOCH: It's tough to get at, you know, the staff has tried to look at that. To look at the question of what the job incentives are for QC inspectors.

MR. TREBY: I'm not sure they can look at job incentives. They can look at other - it's hard to look at abstract things. You can look at concrete things, such as does the applicant have that training program so that you can determine what kinds of instructions they have.

JUDGE BLOCH: See what people tend to get promoted, you can look at what people get good evaluations.

MR. TREBY: Well, that's possible, but that's, again, an extremely massive task to go through a personnel folder of a work force --

JUDGE BLOCH: A small sample - 30 people, 20 people.

MR. TREBY: Well, I don't know. As I said, it seems to me that it might be very burdensome. One could argue that if you take a sample of only 30 or 40 that that's not an adequate sample and then you get into how large a sample you'd have to take and then I think also you're getting into areas of management prerogative too, which is something that it's hard for the staff to really assess.

There may be other bases upon which people are being promoted to supervisors other than the number of NCR's they write or don't write. And that's really --

JUDGE BLOCH: Tough issue because there are a lot of factors involved.

MR. TREBY: That's correct. I'd like to address one thing that applican'ts counsel made, when we indicated we had some objection to their elements 2 and 3 it was because we thought those things were too narrow. It's not that we are asserting that we have some information on people who are being rewarded not to find things or that we're implying that people were bribed. We did not think that setting out as an element of what kind of information could be brought before the Board should be limited to just this matter of, you know, chilling the bruises, that you have to come in and -- black and blue marks and see it on the QC inspector in order to show that there was intimidation.

We think that, as we also point out in our pleading, this term intimidation and harrassment is sort of a shorthand, that it's blown up in this proceeding the things that we have variously described as discouragement and other words. I don't think that you can just go to a dictionary and look up the word intidimation and harrassment. It doesn't necessarily connote a sense of fear in order to have intimidation. The reason the staff believes that it's important to

emphasize Appendix B and the requirements of written procedures and compliance with those written procedures is because, again, that is a concrete matter. That is something that we can look to to find some sort of evidence on it. We can bring in evidence as to whether or not there has been compliance with the written procedures or whether there has been any evidence of an indication that people are being discouraged or told not to comply with written procedures.

It's something concrete and something that we can handle. The concept of a general state of being or a pervasive feeling around the plant that one shouldn't do one's job is a much more difficult concept to grasp and we think that it would be a far more productive proceeding if we knew - concentrate on elements such as compliance with the written program and conformance to Appendix B.

JUDGE BLOCH: So it focuses on whether the applicants have created beliefs in the inspectors that they should do their job as it's written or whether they have tolerated a situation where they know that they're not supposed to do it as it's written?

MR. TREBY: That's correct. I think though we need to also have some bounds on this matter of intimidation. As I started to say, it's really related to this question of contention 5, to start getting into matters of financial qualifications of the utility it seems to me that

we are going far afield from contention 5 in that that is why I think that the whole purpose of this was to focus this and to bring some sort of a sense as to the limits of intimidation.

It is not a matter unto itself. It is all, as I said, earlier, related to the evidentiary question as to whether or not the applicant has an adequate QA/QC program and has constructed this plant so that the Board and the staff can make the necessary findings in 5057A.

Let me, unless you have some questions on that part, turn to the hearsay question. The staff has some concerns about the question about hearsay. I guess in part because of course the only evidence the staff can put forward is what its investigators have gleaned from talking to various people and that is, of course, hearsay. It may be an exception to the hearsay rule in the sense that is determined in the official course of business -- but it is not firsthand information. Our OI investigator who went out and interviewed, for instance, in one of his reports 76 people obviously is just reporting what he heard from those 76 people. And he is not telling you his firsthand information as an employee at the plant. We would not want to preclude our OI investigator's testimony.

JUDGE BLOCH: Proving him negative is extremely cumbersome if you have to have direct testimony because then

you've got to have a large sample of people saying nothing happened.

MR. TREBY: That's correct. -- As we said in our pleading here, we believe that --

JUDGE BLOCH: -- Mr. Roisman, how do you feel about that type of - that kind of thing where they talk to a large number of people all of whom said nothing has happened? Should we exclude that?

MR. ROISMAN: It's the goose and the gander, isn't it? I think the difficulty with this sort of blanket ruling on the question of hearsay is that there are going to be instances in which no one is going to dispute the fact that that, at least, ought to be in the record whether you decide to give it a lot of weight or not. That's the way courts act when --

JUDGE BLOCH: Nobody reports their -- in that category, is that what you're saying?

MR. ROISMAN: Yes, and I'm going to argue that GAP reports may also, but we'll argue about that. I haven't even seen and there is no report, if there were, I'd give it to --

JUDGE BLOCH: Do you think OI reports fall into that category?

MR. REYNOLDS: Yes, we do.

MR. GROSSMAN: We do.

JUDGE BLOCH: There can be no dispute about that. Go on.

MR. REYNOLDS: We're now saying that everybody agrees investigatory reports ought to go into the record?

(CHATTER.)

MR. : -- federal employees, federal investigators.

MR. REYNOLDS: It's a difference, but it's not a distinction.

JUDGE BLOCH: Well, it's something we can argue about later, but --

MR. GROSSMAN: Ok, but you're agreeing that the OI reports can go in or the OI testimony - I assume you're going to put on a live --

MR. TREBY: We're going to put on a live witness, yes.

MR. GROSSMAN: How do you feel about that, Mr. Roisman? Would you like to see the report before you --

MR. REYNOLDS: If they choose.

MR. ROISMAN: Well, the difficulty with it and it's unique to OI maybe more than anybody else is going to be, when we get the report with the conclusions and we don't get the underlying data upon which it was based, it's worse than hearsay. It's a summary of hearsay. And that would be very troublesome to us. I want to see - if I've got an OI man

-- I can't tell you who they were and this is the essence of what they told me and I have a transcript of each one of them or their affidavits or I have a tape recording or whatever it is, which I'm not going to allow you to see, but trust me, those 27 people said that this is one of the nicest places they ever worked. I'm going to object to that going in unless I have the access to the other. Now that may just get us back to the issue we talked about this morning, which is, does it go in if you can't get at the underlying thing. But I'm not saying that the report with the underlying data available and our chance to probe it is not appropriate to put into evidence.

JUDGE BLOCH: Ok, but we have a channel where we're going to try to narrow that - unnecessary witnesses, that kind of thing. I assume that that's actually one of the things we'll consider, whether they are necessary to be able to use in OI reports, for example.

MR. TREBY And I would like to also point out that to-date the only OI report that has any substantial redaction in it had attached to it all of the statements that had been taken and which formed the basis for the report and while it is true that those statements also contained redactions, the statements themselves are attached to the report. I'm not aware that that report, at least, certainly was not based on any depositions or any other hidden

information.

JUDGE BLOCH: Are you aware of any motion in OIA to -- extricate the report that they gave to us?

MR. TREBY: The only thing I am aware of is a memorandum that was written by the Executive Legal Director to the Acting Director of that office requesting that they do something to correctly review that document. My understanding was that that was various scheduling of Commission meetings -- I have nothing further that I can report to you.

JUDGE BLOCH: That was the document that deleted transcripts.

MR. ROISMAN: The transcript of this case?

JUDGE BLOCH: As a matter of fact it deleted mention by Marshall Miller of Dr. Mc Cullum's name.

MR. TREBY: Let me also mention that we've talked about OI reports. It is possible as we see what the incidents are that CASE raises that some of those things may have been looked at by inspectors from Region IV or IE as opposed to an OI investigator. We would also intend to put on those inspectors and offer as evidence their reports as relevant.

I don't want to just limit the agreements that we just previously reached that staff can only put on OI investigators. We may well also have other employees of the --

JUDGE BLOCH: Will we know which reports you

intend to try to put into evidence so that we will be able to make judgments as to the necessity of particular witnesses -- for review?

MR. TREBY: Yes, we will try to alert you to that. I guess that's part of the discovery process. I guess I would agree and I just have one last comment that I may need to make or the staff needs to make and that is, as we've stated, we think that the applicant bears the ultimate burden of proof that it has an adequate QA program. But we also believe that before - that if there are various offers by CASE of intimidation, or allegations which are accusing or raising into questions the adequacy of that document that CASE has a burden to come forward and tell us what those allegations are so that they can be responded to.

JUDGE BLOCH: I take it you've filed discovery requests? Is that right?

MR. TREBY: To-date we have processed what the applicant -- and they were very broad discovery questions. We may file other ones. We intend to participate in depositions which, I guess, is going to be a subject to be taken up later today, but we had anticipated that the written part of discovery was going to consist mainly of the list of names of potential witnesses and, perhaps, what their allegations were. And that most of the remainder of discovery was going to be some depositions at which time we

would participate and get that information.

JUDGE BLOCH: Let me ask you about Judge Grossman's concern. One view is that whatever purpose is going to be served by this conference has already been served by getting things out in the open and discussing them. Another view is that we ought to issue some kind of a ruling. Would you like to give us a suggestion as to what you'd do?

MR. TREBY: I guess I would suggest that there ought to be some sort of a ruling focusing in some way on the intimidation issue. I think it would be helpful to, at least, indicate whether or not the Board agrees that it is limited to or should be in some way connected with Appendix B and the adequacy of Appendix B as opposed to some broader view of what intimidation and harrassment means. I think we need a definition of our terms of intimidation and harrassment.

JUDGE BLOCH: Would you give us some advice on your view as to how much guidance we should ;ive the parties?

MR. ROISMAN: Well, most of what you said I agree with. I'm reluctant to let you write it in and do it wrong. I mean, I think what you were saying today is consistent with what we're saying. There are a few points that I would make in rebuttal of what the applicant said, but I didn't hear from you affirmation that you agreed with them on such

issues as whether we have to prove intent, whether or not we have to show that hardware has been affected as a prerequisite, nor do we see any necessity at this point, if I understood what Mr. Grossman said, that's something for the applicant to argue after the evidence is in. They say, oop, you didn't prove intent. You lose. You didn't prove hardware damage. You lose. Or, you know, or we rebutted all those things and so what you're left with you'd lose, but that doesn't affect, at this point, the scope of discovery which is the number one item and, number two, that if applicant believes that after discovery he can make those points, it will do so in the traditional summary judgment mode. We will do so in the traditional response and that will be how it will be dealt with.

The other items that are here that we talked about, the use of hearsay, on which we had some limited agreement I guess with respect to that. The -- duty on the applicant which I take it they conceded that they have and, if I understand Mr. Belter has indicated that they will probably introduce some additional affirmative evidence on that question. I think from their standpoint if you want to make that clear so that they know it, Mr. Treby's point about saying that it's related to Appendix B, you know, the Appendice B, like Appendix A is written in such a way that only the non-nimble lawyer is unable to relate something to

it. I mean we could have made all the arguments under Appendix A. Who knows, maybe even under the old Appendix C. I think if you wanted to go beyond that you'd have to get into to more of the details than I think we've adequately discussed this morning. So, the short answer is, I don't have any objection if you want to memorialize it, but you have been careful on the record at each point you've said, now is this what everybody agrees to and then nobody complained and you said no one objected and that seems to be fairly adequate.

JUDGE BLOCH: Do you think there is a need for additional oral clarification?

MR. BELTER: The transcript will be helpful, I think sufficiently helpful, your Honor. The only additional point I would ask you to perhaps consider either in another order or just orally here would be the point about phasing this issue and not considering relevant, at this point, any allegations of intimidation of craft.

JUDGE BLOCH: My impression is that that was pretty clearly stated. I would want to clarify one thing that I said earlier. I'm concerned that some OI matters which are not themselves intimidation matters would have evidentiary weight in deciding whether or not Appendix B is being properly implemented at the plant. I wouldn't want to close the record with such important matters pending before OI and,

therefore, form an opinion based on less than the complete record. So I think to say that OI can rest assured when it's finished all the intimidation matters isn't adequate if some of the other matters in any reasonable interpretation would affect one's conclusion as to whether Appendix B is being properly applied at the plant. Let's take a one hour break for lunch. Off the record.

(LUNCH RECESS.)

JUDGE BLOCH: The Board concludes that for the most part the record this morning will help to straighten out some of the issues concerning the scope of intimidation. We could add a general standard which we'll do now. I don't think it's going to be all that helpful to the parties, but it's an effort.

The burden for going forward rests on CASE. It must show that management was aware of incidents or actions that might have been interpreted by workers as a discouragement to the proper reporting of deficiencies in the QC program. At that point the burden shifts and applicant must show that it has responded reasonably to the information available to it in light of the requirements of Appendix B.

I think that's a general guideline. I can imagine specific evidence coming up in the course of a hearing that would lead us into different avenues of evidentiary analysis. Are there any problems the parties would like to raise with

that very vague and general statement?

MS. GARDE: Could you repeat the one for applicants going forward very quickly?

JUDGE BLOCH: Off the record.

(BRIEF RECESS.)

JUDGE BLOCH: Ok, this afternoon the first matter we will take up is the use of evidentiary depositions. Let's have 5 minutes from each of the parties on that subject.

MR. ROISMAN: The filing that we made on the issue was not intended to be taken piece by piece. It only works, in our judgment, if it's part of the whole package. The package is this. Number one, that the parties complete their discovery. Number two, that then, as we indicated, the depositions be taken - applicants, staff and house.

Number three, that the parties then do the post-deposition process with the restrictions that we suggested with respect to the use of new information in the hearing that is truly new, you go ahead and do it. If you really could have done it in the deposition, you can't hold back and then bring the person up in front of the Hearing Board just for the heck of it. And obviously credability you wouldn't want to show, to bring the person to the Hearing Board new information, you learned it in the course of the deposition and you really couldn't reasonably be expected to have had it before.

JUDGE BLOCH: What about Mr. Reynolds position this morning that something might surprise you, so you try to pursue it then, but you want to continue --

MR. ROISMAN: No, no, I think that's fine. I mean, I think it's - I don't think that it's legitimate for the parties to be surprised by information which was in their possession all along and say, gee, it never occurred to me that someone might take that thing and use it this way in cross examining one of my people and, you know - I mean, I think you can't lay down a hard and fast rule, but if you say --

JUDGE BLOCH: Reasonableness test.

MR. ROISMAN: That's right. If you say we're not going to countenance repetitiveness and we're not going to allow counsel to use the hearing to make up for their mistakes on an extensive basis, then I think that that would be appropriate. But those pre-hearing filings to us are extremely important because it forces the parties, before the evidentiary hearing actually begins, to let you know and let each other know what they think they know. Why they think they're going to prevail. And I think that's an important part to make the whole package work.

JUDGE BLOCH: Maybe we should discuss the package together in that case, but could you add for our assistance what the actual time deadlines you think might work out?

So we can set them as targets.

MR. ROISMAN: Yes. The problem with giving you actuals is this - and then I'll do the best I can with it. Number one, we have discovery requests out to the applicant that have been out for some time. We're still in - I think Mr. Beyer said that by Wednesday of next week we'd either have it or we will know that we can go down there to get it. But we still don't know what to do with the data in the rate case which our client has in her possession, but we can't look at because we're not part of the rate case and it has got a restriction on it that she's concerned about.

JUDGE BLOCH: Will that be resolved soon, Mr. Reynolds?

MR. REYNOLDS: We intend to respond to Mrs. Ellis soon. Whether that will constitute a resolution of the question remains to be seen.

MR. ROISMAN: But if that route is not available then the discovery request made there will be made here. That seems a little foolish to me, but I don't see much other way to go about doing that.

JUDGE BLOCH: If you discover the answers you've already received?

MR. ROISMAN: Exactly, but which I can't see because of --

JUDGE BLOCH: I understand. I wasn't being

facetious.

MR. ROISMAN: Right. Secondly, we have indicated in what we'll call question 3 of the interrogatory request and have tried to further explicate it both in meetings with the applicant and otherwise that we want all the memoranda and the written documents in the possession of the applicant that relate to these matters of harrassment and intimidation. Ms. Garde gave them some examples of places where we would expect they might find it, like in their ombudsman file, in their line file, but we're interested - we want to know, has the harrassment-intimidation issue or anything that's relevant to it been discussed to the Board of Directors? Has it been discussed in the President's office? Has it been discussed in memoranda to the Vice-President for Construction Control? We want to see those memoranda. So far the level of information that we've gotten is so far removed from that that I am not particularly confident that what we'll see next Wednesday is going to get us there.

Now, if the applicant states in writing that there is nothing else, that that is the applicant's - in effect, what they will be telling us is, we have no other response to the charges of harrassment and intimidation and no other affirmative evidence in our possession that we have a good QA/QC program to respond to harrassment and intimidation than what you've got, ok, that's fine. That locks that off.

That tells us the limit of what they're going to make as an affirmative proof.

JUDGE BLOCH: I have a feeling you're using a good -- device which Mr. Reynolds uses often, but that you're not really just arguing about what the time schedule should be.

MR. ROISMAN: Well, it is part of the time schedule because if we're fighting over this issue --

JUDGE BLOCH: I know, but you could have just said you had important discovery requests outstanding and you don't know the impact on the hearing.

MR. ROISMAN: Then I wouldn't have been -- We need the personnel files of the people who we are dealing with here, both the ones who will be their witnesses and the ones who will be ours. We don't have their list yet. They don't have all of ours yet. We understand the problem in getting those at this point. So that's number one.

Number two, there is a preliminary matter that relates to the taking of depositions that has got to be resolved before, at least, any of the depositions of our witnesses are taken. We were advised by another attorney working with GAP that at the deposition of the DOL hearing one of the people who was to be our witness - that, in effect, she was threatened with character assassination by the applicant's attorneys, the same law firm, different lawyers, in the form of threatening to open up some nasty matters. And in the

course of that discussion her attorneys were advised that it would not be in her best interest for them to continue and a settlement was offered in which she, effectively, was told drop your charges.

JUDGE BLOCH: On the record or off the record?

MR. ROISMAN: It was off the record, but not private. And, in addition, the attorney was told that if the client dropped it, sanctions being sought against the attorney would also be dropped. I think both of those things constitute violation of the canons of ethics. More importantly even than that is that they constitute harrassment and intimidation of potential witnesses. If that is going to be the approach that's taken in the depositions with respect to the same woman, as well as others - by the way, her name is Billie Orr, it's not a secret witness - our approach to how to do the depositions is going to be dramatically different.

JUDGE BLOCH: I don't know why. I mean, if that happens in the depositions in alleging a case on intimidation --

MR. ROISMAN: Well, but it makes it necessary for us to do a much more thorough preparation of the witness before they are subjected to that and we would ask for some pre-rulings on such questions as whether or not allegations regarding the person's use of controlled substances has

anything to do with the CASE hearing which is one of the issues which was threatened be raised with respect to this person. Secondly, the person's personal living habits, who they live with and what their relationship was with that person. I don't want to have to go down to Fort Worth to have those questions asked and for me to tell my witness you can't answer them and us to have to come back. So I'm very concerned that a very nasty turn has been taken with respect to this issue and I agree with you, I think it is a form of harrassment-intimidation. Some of the evidence which we will put on --

JUDGE BLOCH: It may or may not be. I guess the question is whether it is admissable questionning.

MR. ROISMAN: That's correct.

MR. REYNOLDS: And the question also, Mr. Chairman, would be whether it was a discussion between counsel in the context of settlement negotiations or whether it was some other type of discussion. I'm not familiar with it, so I can't respond, but I don't think it's even appropriate to discuss it further here.

MR. ROISMAN: We were advised explicitly --

JUDGE BLOCH: Are you actually seeking a ruling on something of this sort now?

MR. ROISMAN: Well, I will present to you - and that's what I'm trying to explain, your Honor, I will

present to you a request for a protective order, in effect, to exclude certain lines of questionning which were intended to be pursued in that proceeding. And I am concerned that what happened in that proceeding is now intimidating a witness who we want to use in our proceeding. Because of threats that were made there with respect to her testimony - the context of the DOL claim --

JUDGE BLOCH: Ok, why don't we file that separately. I think the subject matter we're addressing is hard to remember at this point. -- what we're supposed to be talking about.

MR. REYNOLDS: Alright, the question - the deadline - you can't know where it ends unless we know where it begins and these things have got to be cleared up before it can begin.

JUDGE BLOCH: There are a lot of uncertainties, let's go on from there.

MR. ROISMAN: Our total number of witnesses which we would expect to put on or to present at least for purposes of depositions, that is likely witnesses for the hearing, is between 60 and 80. Our efforts to take the direct statements from them, which is the form we would propose to use in the deposition, we expect will take on the average of about 2 hours per person. That is we will ask a person to simply tell your story for the record and with a minimal amount of

interference from us, not worrying about the usual, what you do in front of a jury, let them tell their story.

I cannot predict how long the applicant will spend in cross examination. Dobie Hathaway is now going into her second day of deposition with respect to the DOL claim that she had pending, so I can't add that into it. But our people will take about 2 hours per each of the 60 to 80.

Secondly, we would anticipate with some obvious overlap, that as to each of them there would be at least one applicant witness that we would want to depose for each of those 60 or 80. That would be at least the one person who our person claims was the source of the harrassment or the intimidation.

JUDGE BLOCH: But that's duplicative, so it doesn't add up to 60 to 80.

MR. ROISMAN: It may be. You mean it may be the same person who harrassed 4 people?

JUDGE BLOCH: Yes, likely.

MR. ROISMAN: Yes, that is possible. But some of it is beyond that that makes it probably still come out close to 60 to 80 as we then go up the chain to, depending upon the documents and what they show us, to the last person up the chain who is implicated in the conduct which produced the harrassment - intimidation and our estimate is that that may be 20 more or so based upon what we now know.

So, at the conservative end, I'd say 120 depositions. At the broader end, maybe 160 based upon present knowledge. For the applicant we would expect that - to get from them, assuming reasonable cooperation and that we have in our possession the relevant documents before we go into deposition, about on the average 4 hours. Now that's allowing for the fact that someone like Tolson, for instance, would be substantially more than 4 hours and other people we would expect to be less. But, on the average, say 4 hours of our - call it cross examination - if you will of those people. And that's pure questionning and answering. That doesn't account for any counsel on the record wants to make clear, that sort of statements.

And we would expect 10 people from the staff at this point whose depositions we would want to take and those would be about 4 hours. Now, that's not to say that we have every single name. We names and based upon the names we have we have some sense of what we think the total number would be.

JUDGE BLOCH: Ok, now let's translate the dates.

MR. ROISMAN: Well, we're proposing - with some exceptions - that we basically work 4 day weeks as soon as we start this, but we don't see any way that we're going to start it when we had hoped that we would start it. Now one reason is since the time that we filed that schedule, I have

been advised by the Second Circuit that on Wednesday, the 27th, I will be in New York City arguing a case and so that has messed that up. To the best of my knowledge it's the only oral argument that I have scheduled, but I did not anticipate it coming now since we filed the final brief in the case only on the 11th of June. The Second Circuit is on its own calendar and they set it very fast - oral arguments on the case.

We're prepared - with the other exceptions that I mentioned - to go one after the other to get through that. I did not try to calculate --

JUDGE BLOCH: I'm not asking for - oh, I see, you haven't done a calculation?

MR. ROISMAN: No, I'm sorry. I didn't calculate out where that comes to. I mean, I guess we could fairly quickly here, if you want.

JUDGE BLOCH: I want.

MR. ROISMAN: Do you want to take a short recess?

JUDGE BLOCH: 5 minute recess.

(BRIEF RECESS.)

MR. ROISMAN: At the low end, 50 days - 8 hour days. That's 8 hours of depositions. At the high end, 65 deposition days. That's without regard to how long the applicant spends either putting on the direct of their persons, how long the staff spends putting on the direct or cross of their

people, how long the applicant staff spend doing the cross of our people.

JUDGE BLOCH: -- on your schedule would it work out to 12 to 16 weeks?

MR. ROISMAN: Yeah, if we did 4 day weeks.

JUDGE GROSSMAN: 15 to 20 I have. You say two depositions a day and 120 depositions, is that right?

MR. ROISMAN: Well, I did it differently. I just took the number of hours. I took 60 people for 2 hours each for us --

JUDGE GROSSMAN: Oh, 60 people. I thought you were talking 120.

MR. ROISMAN: No, I did a low end of 60 of ours, 60 of theirs and 10 of the staff. The high end, 80 of ours, 80 of the applicant's and 10 of the staff.

JUDGE BLOCH: 12 to 16 weeks, starting when?

MR. ROISMAN: 12 to 16 weeks starting as soon as we have got in hand the documents that we need to do it and that you've ruled on the protective order that we want with regard to our witnesses. But, if that were all done, we would start the week after the 4th of July.

JUDGE BLOCH: -- July 4th start --

MR. ROISMAN: No, July 5th -- I'm sorry -- no the 4th is a Wednesday.

JUDGE BLOCH: July 9th, start depositions.

Approximately October 15th end depositions. What's the next target on your schedule?

MR. ROISMAN: After that, two weeks later - a total of 5 weeks to when you're ready to go to hearing.

JUDGE BLOCH: Ok, October 31 - oh, 5 weeks to hearing.

MR. ROISMAN: At which time you have in hand the proposed findings of fact of all the parties with the gaps that they intend to fill at the hearing, cross examination plans, motions for summary judgment submitted and either decided or not depending on your schedule.

JUDGE BLOCH: November 20, 1984? About November 20 roughly. So we get to celebrate Thanksgiving.

MR. ROISMAN: In Fort Worth.

JUDGE BLOCH: Ok, then the hearing starts after Thanksgiving and the hearing terminates, maybe, in December.

MR. ROISMAN: If it's done right, we would not anticipate a very long hearing.

JUDGE BLOCH: Ok. Any more to say about the proposed schedule?

MR. ROISMAN: No, I think that does it.

JUDGE BLOCH: Mr. Belter?

MR. BELTER: I'll take first shot at it, your Honor. I don't think I can keep Mr. Reynolds in his seat here. After 5 years of working at this and intervenors being in here

with Mr. Roisman, I don't know, a month and a half or two months, there is no way we could conceiveably do that kind of schedule. I will say this, you have 60 to 80 witnesses that you know of. I expect their names tomorrow and we can go through them. Mr. Downy and I are willing to work 6 days a week. We're willing to split it into two sessions so we can take double sessions of depositions and cut it in half.

MR. ROISMAN: As soon as you give me a grand for the second lawyer in my office.

MR. REYNOLDS: Mr. Chairman, that is not applicants problem and the case law is clear on that. We're facing a million dollars a day here in September if we don't have a license. YOu have our pleadings on that. For Mr. Roisman to sit there and tell us we're going to wait until November to start trial because CASE now has procured him and he only has one attorney to work on this case is just riduculous.

MR. ROISMAN: Unlike the situation when you had CASE and you had no attorneys to work on it.

MR. REYNOLDS: That was CASE's problem, Mr. Roisman, not ours.

MR. ROISMAN: No, it's a question of due process.

MR. REYNOLDS: No, it isn't. No, sir.

JUDGE BLOCH: I think there are two views. I hear two views. Let's continue, Mr. Belter.

MR. BELTER: Your Honor, as far as the order of depositions is concerned, I think we've responded in our pleadings. Until we know, and I hope I'll know tomorrow, --

JUDGE BLOCH: Let me interrupt for a second. Mr. Roisman, I'd like your help thinking about this stuff. Parties are allowed to go into hearings without attorneys at the NRC and the issue has been around a long time. Is it your view that we should not consider at all the time that was spent before you agreed to join CASE?

MR. ROISMAN: No, not at all. You can start counting the time from the moment that we get the applicant's response to the outstanding discovery requests that have been sitting for a minimum of two months on their desks. I don't care if you start counting then, that still pre-dates my arrival on the CASE by at least a month.

MR. BELTER: You can look at the discovery again and it's not going to delay matters at all. I think, Mr. Roisman --

MR. ROISMAN: It has already delayed matters.

MR. BELTER: To pursue the question that Judge Bloch raised, you have indicated to us in response to a question from me in our informal meeting that I could consider Ms. Garde to be virtually an attorney in this case. I see no reason why you two can't split up and Bruce Downy and I can split up and do depositions simultaneously. We would

give her all the privileges of an attorney as far as speaking and objecting is concerned. We could split it up.

JUDGE BLOCH: Aren't there at least some of the witnesses that are sufficiently routine so that that's a feasible suggestion?

MR. ROISMAN: It depends. If we're going to have the applicants exploring their drug use habits, if any, their marital or non-marital living habits, if any. If the nature of examinations that take place with them are going to be similar to what's already happened to some extent on the witness stand in this hearing --

MR. REYNOLDS: I can assure you that if the basis for termination was drug use, then questions will be asked about drug use in the deposition. I can guarantee you that.

JUDGE BLOCH: Let me just suggest tnat what you're suggesting is a possible inefficiency, but it's easily handled. You just give Ms. Garde guidelines as to when certain threatening matters come up she comes and gets you out of the other session.

MR. ROISMAN: I don't know the answer to that question yet as to whether that is acceptable or not. I will tell you that I think the willingness of some of these witnesses to become public is somewhat dependent upon their fear that they will be subjected to this sort of thing and they need to be represented by counsel at the time of the

deposition being taken. I will not rule out, out of hand, the possibility of doing some doubling up and maybe there are some that clearly fit the "routine" category and it doesn't matter. Certainly the 60 or 80 of the applicants that we wish to cross examine I feel I will do myself.

MR. BELTER: Well, let's see that would still permit some doubling up if the other witnesses were being done at the same time. You don't want to do that. Your proposal is to finish with the applicant's people first, before your people go.

MR. ROISMAN: That's correct.

MR. BELTER: The problem with that, your Honor, is we don't know who our witnesses are. You've indicated to me already that --

JUDGE BLOCH: Now wait, my problem with that is I don't understand why it's relevant.

MR. BELTER: He's going to call people --

MR. BELTER: Well, I understood - let me put it in perspective then. Mr. Roisman, you indicated that the time for surprise was over. You've got a secret witness and this witness knows of an applicant witness who supposedly knows something about this incident, you want us to put on a witness who knows absolutely nothing about why he's being called. He's in there to sit down. He knows nothing about what he's being called for. We can't coach him. We can't prepare him,

as you want to prepare your witnesses and you just want to start asking questions blind, is that the way you want to proceed?

JUDGE BLOCH: I think you ought to address your remarks to the Chair. It would be a much better --

MR. BELTER: I'm sorry about that, your Honor, but I can't understand what we're having difficulty here with. Why it is that they're being insistant as far as the scheduling of depositions go, applicant's witnesses have to be deposed first.

JUDGE BLOCH: Well, let me ask you --

MR. BELTER: We've got 36 witnesses.

JUDGE BLOCH:Isn't it the case that their witnesses for the most part are already on record, even though we don't have it, they've spoken to OI or they've spoken to - no, you don't think that's the case?

MR. BELTER: I don't think --

JUDGE BLOCH: Well, it is in the sense that they already have committed themselves as to what their story is.

MR. BELTER: If you want me to characterize what I know of it from my brief review of looking at the statements of the 36 names we've gotten there were approximately a third of them that I didn't know anything about. The other third can be divided into, perhaps, two categories. Ones which we have thoroughly investigated and, perhaps, we might not even

take their depositions and another third of whom we may have a limited appearances statement and we would have to take a deposition to find out whether or not this person's testimony is even relevant here. I raise that particularly in regard to, for example, craft people who through limited appearance statements indicated that they feel they've been intimidated. An item which is subject to phase two in this proceeding as I understand the ruling this morning.

That, in itself, may considerably cut this down. My greatest concern is that I've now been told for the first time there are 60 to 80 witnesses. Initially we were told June 4th there may be 40 to 50. Now it's 60 to 80. I'm told that we're going to get names in dribs and drabs. I want to know who the 60 to 80 are.

MR. ROISMAN: You have 48 already. We gave you 48 on the 4th of June. I don't understand this. You're sitting there as though you've got two and now we're telling you there might be 80. I'll tell you, every time I poke my finger into this case I find 10 more witnesses.

JUDGE BLOCH: I'm sorry to interrupt -- Let's wait for rebuttal -- Mr. Belter?

MR. BELTER: 36 names is all the names I've been given. I don't know who you're going to call on the T-shirt incident. Tell me who your witnesses are. Put their names down and I will consider them as additions to the 36 that I

have.

JUDGE BLOCH: What about Mr. Roisman's argument that the best way to do this would be for everyone to be sequestered and not know what the others --

MR. BELTER: A rule on this is not inappropriate if -- but I understood him to say that there is no grounds here for surprise. If you want to proceed by putting a witness on who knows - and taking his deposition, who knows nothing about what questions you're going to ask him and you ask him to test his memory about an incident that happened 2 or 3 years ago, I'm going to want to have from you in advance what is it you expect him to remember? What is it that he's supposed to be testifying about? I don't want -- sit there and have him up there totally surprised by your questions.

JUDGE BLOCH: Are you going to ask about specific incidents?

MR. ROISMAN: For particular individuals, sure. -- supervisory personnel -- harrassed whose names were given, what's their side of the story? What do you say? What happened? Did you tell him he'd lose his QC badge if he didn't do the right things?

JUDGE BLOCH: Well, wait, before this happens though you are providing a summary of the testimony to the witnesses so you will know, you should know and you have a

ground for objection if you don't -- incidents that are going to be referred to.

MR. BELTER: I expect to have that tomorrow, but my question initially is, if CASE has the burden of going forward to the extent you described it this morning, why shouldn't we, in a most orderly fashion, take their depositions, find out what the incidents are and then respond? Give us our response. You suggest that you're afraid that our witnesses would -- testimony in response to what your witnesses -- I think either side could have that fear, if you will.

I could just as easily say the same thing to you.

JUDGE GROSSMAN: You already have a leg up -- you already are going to have a summary of what Mr. Roisman's witnesses are going to be presenting, so you already have, you know, a start on it. He doesn't have anything with regard to the people he wants to depose that are the company employees.

MR. BELTER: Well, if I had that,I might be able to evaluate this position, but I don't have it yet. I don't know who the 60 to 80 witnesses are. I don't know the detail to which they're going to give a description of the times and incidents and what is involved. I don't think, in fairness to either side, when you're talking about discovery and your positions there ought to be a rule that the

one side has to go before the other. Any rule that establishes, per se, --

JUDGE BLOCH: You want to mix it up?

MR. BELTER: As we can schedule it, especially if we're breaking into - in order to accomodate this massive number of witnesses, we've got to break it into two pieces and have double depositions going on. It doesn't make sense to suggest that all of our witnesses have to be taken first because there is going to be the potential for more witnesses later. Any argument you could make that our witnesses ought to be first, an argument could be made the other way. When you're in discovery there is no reason to prefer one side over the other. We've got 36 names. A third of them I don't know anything about.

(End of tape)

P R O C E E D I N G S

MR. ROISMAN: Our people have nothing to gain here. Nobody's trying to save their job. Our people are people for the most part that don't have jobs. It is the concern that there is pattern of practice within the applicant to do the very thing that we're trying to protect from, to make sure that it doesn't happen.

JUDGE BLOCH: Am I correct in perceiving that the most important interest that you have in terms of speaking for their people first is not with respect to specific incidence where there may be flashes of memory. Really, it is with respect to applicants overall response to this issue.

JUDGE BLOCH: We really would would be satisfying your needs if the applicants came first only with respect with that one issue, the reasonableness of management's overall response to life's intimidation.

MR. ROISMAN: But, but part of that is, of course is how they respond to individual incidents. I have no problem in leading Mr. Elterson's turn. I would expect to be able to let him know in advance, in general, what it is that I want said. But, I don't want to use an example that has already come to the floor. It was a surreptitious tape recording made by Mr. Donam at a meeting. Mr. Donam had before Mr. Tolson, had said that anything

BH
NRC
T-4
1

about this had indicated he had the tape recordings, Tolson might have known -- well better come completely clean because we've got the tape recording. If you get Mr. Tolson to say it never happened--I never said anything like that, then later you have the tape recording. It helps establish the point that we are attempting to make. So not knowing Mr. Donam had the tape recording would be an important piece of information. That would not mean that you wouldn't, of course, tell Towson that one of the things that I'm going to talk to you about is this meeting that you had (identify the meeting), with these employees. That's one of the questions. I would expect to have to do that, and would want to do that. It wouldn't do me any good to have the witness say, gee I'm going to do a subpeona ducasteecum (phonetic) with these people. If they have got any documents in their possession that we don't already have to bring them along with them. Of course I'm going to tell them what I want to talk to them about. I don't want them to hear my man's story as to how he supports what he has to say.

JUDGE BLOCH: Now you are talking about surprise, when initially you said you didn't care about surprise.

MR. ROISMAN: No, I'm not talking about surprise I'm talking about the fabrication of testimonies is what I'm talking about.

BH
NRC
T-4
2

JUDGE GROSSMAN: Let me ask you, Mr. Roisman, have all your people had their perspective testimony recorded in some way, such as reports to interviews by OI and other people at NRC.

MS. GARDE: I think the greatest bulk of these people you're already familiar with or have testified in, for instance the Department of Labor proceeding, or have either talked to the NRC, either OI or IE. Or, their testimony is discussed in the concept of an OI or IE report. They, themselves may not have given the deposition, but their substance is included in an OI report. Or, a small category of people that we have that we have not identified yet by name. The people from the GAP investigation who have given a statement to a GAP investigator. If they are to be a witness in the case, I would imagine it would be given to them. So, they will have something in hand. They will not have any idea of what these people are going to be talking about. There is going to be something in writing.

MR. ROISMAN: Those are the people that the next ten day period applies to.

JUDGE GROSSMAN: It's obvious where we're going. It seems to me that there is very little opportunity for their witnesses to fabricate their testimony at this stage. Whereas, the applicant's witnesses are the ones

BH
NRC
T-4
3

who haven't yet been recorded, and would have the opportunity to change their testimony, whether foreshedded (phonetic sp.) or some other way. I think that's what we're really interested in precluding now.

MR. REYNOLDS: You've reached that conclusion, Judge Grossman, on the basis of what we just told to you? How do we know, will we see these sworn statements by these witnesses so that we may see them.

MR. TREBY: I think I have a concern also, which is.. that what we've heard is that you've learned about these things through the Department of Labor proceeding. The applicant's witnesses have testified in the Department of Labor proceedings also.

JUDGE GROSSMAN: The same 60 to 80 people who have testified here.

MR. TREBY: Well, I don't know.

MR. BELTER: That's the problem, Judge Grossman, it just doesn't add up to 60 or 80.

MR. REYNOLDS: The point is that the record in the Department of Labor case contains the testimony of their witnesses and our witnesses.

MR. BELTER: To the extent that there's a concern here about witnesses credibility, I think that we have established in the Department of Labor proceedings that several of these witnesses have in effect made false

statements. We've established that. We have grounds for being suspicious of the credibility of your witnesses. This thing cuts both ways. I just don't see any reason why there should be a ruling that as far as discovering of depositions that there has to be a certain order.

JUDGE GROSSMAN: Well, to me the order is only important if there is a possibility that the witness might change his testimony in view of what he has discovered from other people's testimony. It would seem to me that if the case were that one side witnesses have already been pinned down on what they are going to say, and the other side hasn't that we would go ahead and have the other side's testimony depositions taken first.

If that's not the case, then I'd like to hear differently. It seems to me as though that's a logical way of doing things.

MR. REYNOLDS: To our knowledge, that isn't the case. No, we're talking about the people who are testifying in the DOL case that's the case. But, we've done our testimony there too. The records are closed on the DOL cases. We're talking about the balance of the witnesses, 40 or 50 people. I know of no sworn statement by those people that preserves for later reference to their story.

MR. TREBY: I guess I would agree with that. We have no statement from all these people. If we take,

BH
NRC
T-4
5

for example, Betty Brink. The only thing I remember Betty Brink ever raising was some questions with regard to concrete.

JUDGE BLOCH: Yes, but in fact, you don't know that Betty Brink has given a statement.

JUDGE GROSSMAN: Right. Let's distinguish between what you know, and what's already been recorded that you can receive at a later time. Whichever it is, it is still immunable. It is still there, and what do you know about it. I don't want to get into decarte now, but.

MR. TREBY: I think that it is possible there may be a small number of statements taken by OI. I'm not aware of that fact, but I assume that they may have taken some depositions. I do know for a fact that this Bezinsky had a deposition taken. But, aside from those small number, I'm not aware of it being recorded anywhere what exactly the allegations are of these various people. We might have had some filings, but we've also had some of these people testify at different times in hearings and they said different things at different times. It might sound contradictory, but supplementary.

JUDGE BLOCH: Followed by the conclusion of Mr. Belter's statement.

JUDGE GROSSMAN: The witnesses whom we are talking about, and the statements that we're referring to was not

BH
NRC
T-4
6

intended to be limited to the DOL. The process, the procedure used by GAP in talking to these people has been to take an affidavits which are completed now. And most, but not all are have been sent to OI. The ones that are still to be completed will be sent to OI. Any concern about whether our witnesses -- quote -- tell the same story or not -- unquote -- is etched. And, any witness that we use has got to be one whose affidavit we are going to be putting forward. Otherwise, we've already discussed that problem. Those statements will be there. One of the things that we are trying to do in this ten day period is to go to those 60 or so people who have statements, and find out from them whether we can release those statements and release their names so that everybody will have them. But those will be pinned down in that regard.

JUDGE BLOCH: Mr. Belter, have you any precedence for us on the way this is generally done in either the courts or the NRC.

MR. BELTER: I'm afraid I don't know anything about the NRC, Judge Bloch. My general impression is that courts allowed the schedule to be discovered without order. It's usually left up to the parties. There's no practice of taking one side's discovery before the other side in a case. I might conclude, with respect to the schedule the proposed findings of facts in advance of the hearing,

BH
NRC
T-4
7

you're only going to have post findings of fact after the hearing. That's duplicative. You're just going to wind up doing it twice. That adds another two weeks to the schedule. I would like to propose that we get as many as these 60 to 80 names as possible tomorrow. We will volunteer to Mr. Roisman, the names of management witnesses we contemplate putting on as an affirmative case, that no particular order of witnesses be scheduled, and that all parties be allowed to notice depositions of each other's witnesses as soon as possible. We should split it into two sessions so that we can accommodate the large number of witnesses that we are told that we are going to have some indication of tomorrow. Start taking depositions the week of the 25th, as Mr. Roisman already suggested. We're willing to go six days a week.

JUDGE BLOCH: The reason for going beyond the 25th is your court date.

MR. ROISMAN: On the 27th.

JUDGE GROSSMAN: In this case let me say at the outset, I don't think that it's possible with the time constraints that we have that the board not work out the schedules. If you go out and just issue 50 notices of depositions, and Mr. Roisman goes out and notices 50 notices of deposition, the same time period, there is going to be a heck of a traffic jam on the thing. So, we have

BH
NRC
T-4
8

to decide on what order they go in, just because of the posture of the case, regardless of what's usually done under the Federal rules.

MR. BELTER: As a matter of orderly procedure, then, Judge Grossman, we have 36 names now. I expect that we will get others tomorrow.

JUDGE BLOCK: Then, there's a 10-day schedule.

MR. BELTER: There's a 10-day schedule. I would expect that when we get a look at the 36 names, or at the additional names we're going to get tomorrow, and we get statements as to what they're going to say, I anticipate that there are going to be some in there who belong in phase 2. Perhaps we can defer them. Maybe a substantial number of those, where the only allegation, the only testimony is to be an allegation of intimidation of craft. Why not go ahead and take the depositions of those persons who have been named so we get some kind of feel for what the evidence is that the intervener claims is undermining our QAC program. That's the orderly way to proceed here. Then as we go along, if a case witness is oppossed, and they mention a management person who was at this particular incident, obviously you can ask us whether or not we intend to offer that person as a witness. Certainly, you can take a deposition. You can tell us who you think our obvious witnesses are now, of the incidents that you already

know about. The ones that are already testifying in the DOL cases, you could schedule them for two weeks after we start your witnesses. Assuming optimistically, we get through your first 36 in two weeks. We can go back and forth that way.

JUDGE BLOCH: Stuart, thank you very much.

MR. TREBY: I agree that this period of time seems excessive, and I think that some sort of procedure needs to be set up to do it in a more efficient way. I think that the more efficient way is to set up two parallel sets of depositions being taken at the same time. My staff would support that. We would support this compromise position of five days per week of taking those depositions.

JUDGE BLOCH: You're 4, you're 6.

MR. TREBY: As to who goes first, I think I would tend to agree. I don't think there's any precedence here in NRC practice or corp (phonetic sp.) in who goes first. The discovery is usually, whoever got into the courthouse first, and whoever sends out their interrogatories or files their notes into depositions. So I'm not sure that there's an established order as to what should be done. However, I would like to point out that I'm not sure that having a generalized statement from any one of these thirty-five people, plus however many fall into

category number 36 here, is sufficiently putting the other parties on notice as to what these persons are claiming. I suspect that what we would get are those with broad statements, and then to have a deposition to last the period of time we're talking about. In four hours or so, I would expect that we're going to be getting into a lot of detail; far beyond the broad generalizations that might be set out.

JUDGE BLOCH: Lets clarify that a little bit. I take it that these statements should include specific dates on which incidents are alleged to occur, the names of the people.

MR. ROISMAN: Yes.

JUDGE BLOCH: The names of the people involved?

MR. ROISMAN: Yes.

JUDGE BLOCH: How else can we specify the level of details, so that someone's not going to be surprised by having one level of detail by one party, and another level by another party.

MR. ROISMAN: Well, at this point no one is requiring the applicants to specify any detail. I am extremely upset at the suggestion that our people would divulge themselves in every way possible, and many of the at great risk to their careers to do so, are now being told by the applicant and the staff that they should do it yet

BH
NRC
T-4
11

again, before an applicant witness opens his mouth, much less puts in a statement here. I think that it is grossly unfair. Our witnesses may not have given everything they know to the applicant at this point. But, there witnesses have given zero, and we have come forward with a great deal of evidence. We've been told the fact that Mr. Reynolds almost screeching it to you, reminded you that this issue has been before the board for a year and a half. How did it get here. Not by the applicant raising it. Not by the staff raising it. Not by there witnesses saying anything. Not by the staff's people saying anything, but rather Juanita Ellis, drug that issue into this hearing, kicking and screaming all the way and using statements from the people whose names we are now telling everybody as though they didn't know who they were in the first place.

Chuck Atchison lost his job over this issue. Doby Hatley lost her job over this issue.

MR. REYNOLDS: Objection. I just can't hear this any longer. This is going on a public record and its flat wrong! Now if this is argument of counsel

MR. ROISMAN: I have got a DOL hearing that supports me on the Atchison thing.

MR. REYNOLDS: You also have a statement from the secretary of labor that Atchison was a liar that he

would not believe. That's the problem with your witnesses Mr. Roisman. We don't believe them. That's the problem.

MR. ROISMAN: I know you don't belive them, Mr. Reynolds. The issue here is will the applicant carry some of this responsibility by saying its share first. We believe that they should, that we've done all that we should have to do. I will not be ready to start depositions on my side until I have been able to sit down and talk to them.

MR. REYNOLDS: Rebuttal. This rebuttal on top of rebuttal. It's Mr. Treby's turn to talk. I don't know how we got over to here.

MR. ROISMAN: I'm sorry. I thought you had asked me.

JUDGE BLOCH: I did. I think I asked a limited question, but I don't remember that this is still responsive to the question. Mr. Treby.

MR. TREBY: That is my problem. As to going forth with all of the applicant's witnesses before the cases witnesses, or even some of the defense witness. It seems to me that they should be interspersed. I don't see why all of one party seems to go first, before the other party. But, I do point out that it is hard to respond if what the applicant's witnesses are supposed to be doing, putting on the rebuttal to allegations of intimidation and

harrassment. That is suppossed to be contained in the depositions that are being taken. It seems to me that, that might be difficult without having all of the details being put.

JUDGE GROSSMAN: It seems to me that we're talking about two sets of applicant's witnesses. The one set Mr. Roisman wants oppose, and the one's that applicant wants to use for its affirmative case. I think that when we're talking about case witnesses, we're talking about one category of witnesses that case wants to use as its affirmative .. in its affirmative case. I hate to keep using case in two senses here but,.. of course the board will have to discuss it, but, it seems to me that we can have one set of applicants witnesses first. Then, cases witnesses, and then the other set of applicant's witnesses. The rebuttal class last. Now, that's something we ought to discuss. What does Mr. Treby think about that?

JUDGE BLOCH: A substantial joint membership in those two classes? Is that right?

MR. BELTER: There may be.

MR. REYNOLDS: Until we know what the allegations are, we really don't know what our affirmative case is. That's what we're trying to tell you.

JUDGE BLOCH: The way that the board phrased the applicant's affirmative burden, it seems to me, is that

BH
NRC
T-4
14

they should have reasonably responded to the information that was available to them. It would be understandable that there would be some incidents that management wouldn't know abcut. But, to the extent that the burden is to reasonably handle information available. You don't even have to know what the interviewer's story is before you tell your story.

MR. REYNOLDS: Well. The problem will be, I'm sure, that when you have people like Mr. Tolson, for example, who managed hundreds and hundreds of people over seven or eight years, I don't know how long. Thousands of personnel decisions, and management decisions. Then, if you get the man in a room and say, .. tell me what happened on October 15, 1980, its going to be a wast of time. Because, unless he's had an opportunity to refresh his recollection as to what we're talking about, it's not going to be useful, nor is it fair.

It isn't trial by surprise. Mr. Roisman, himself has said that the time of surprise is over.

JUDGE BLOCH: It's clear, that you get to call the man back. Obviously, Mr. Tolson would have a lct of difficulty remembering specific dates. Informed of a specific factual situation, he might recall more about it. So, you have a record of which Tolson was deposed. He said, I don't know anything about May 15, 1980. I just

BH
NRC
T-4
15

don't recall it. And then, there would be specific testimony. You don't have a misleading testimony in that case.

MR. REYNOLDS: It's inefficient.

MR. BELTER: It's very inefficient. It makes more sense to go ahead with the names we know of now. I do think that there is a distinction here, that Judge Grossman brought up about the potential for some management witnesses who are not witnesses to specific incidence. They may be affirmative witnesses. Where this problem of being surprised by questions about what happened on October 15, 1980, may not really be part of their relevant testimony.

JUDGE BLOCH: Could you suggest how we could define that class.

MR. BELTER: Why don't we suggest this. If we start, for example, with a two week period for us to take depositions of the names that we know of, and reserve a period in which the management's, so called affirmative witnesses could be heard from. These would not be witnesses who, necessarily would have knowledge of specific incidence. But, the type of affirmative witnesses would be putting in to present essentially to update the testimony we had two years ago on the QAC program. That would get the ball rolling. We could go back and forth with

BH
NRC
T-4
16

periods of noticing each other.

JUDGE BLOCH: If we did that, got the ball rolling, and then we did alternate calls by the parties, that would satisfy you?

MR. BELTER: I think we've got to start with the names of the parties we know of now. And then, tell them in response with those witnesses, obviously once we use the witnesses we have you can set this period to take in.

JUDGE BLOCH: You just suggested identifying affirmative witnesses. If those, you can identify those, they would be deposed first. Let's say starting at July 9th. I guess in terms of the court date, its hard to go too much earlier than that. The so called affirmative witnesses, and then we did a rotation of who called the witness. Would that satisfy you?

MR. BELTER: I don't know that that's going to satisfy the total scheduling problem. Because, at this point I don't think the so-called affirmative witnesses. This is very tentative, and we're not committed to anything like this. With a number of 60 to 80 witnesses. It might be a few.

JUDGE BLOCH: It might be 4. It might be 5.

MR. BELTER: I guess my problem with that is sure, I'm willing to have them taken early on in the process, perhaps, not necessarily at the end of our deposing

BH
NRC
T-4
17

the witnesses, the case intends to present. Why not start with the 36 names I've got right now. And, why not start with one session on the 25th. Ms. Garde doesn't have to be involved in the court case in New York.

JUDGE GROSSMAN: I don't believe they have finished what I was about to say.

MR. MIZUNO: It appears to me that the problem that we are having here as far as to who is going to at the poles first is really unique to this case, because of the particular way that these allegations have come to the floor in this particular proceeding. I would just point out in a normal practice, in the Federal Court, you are suppossed to follow a complaint, which basically, is a concise summary of the actions and events which form your cause of action, or various causes of action. At that point, everybody generally knows the nexus of facts which are to be the point of contention. In this case that is not true, in many instances here. I think that is the problem that we have. I think that the staff has a problem in that some of these people I have not seen before, and of course some of these people we have seen before. But, we don't know exactly what the testimony will be. Some of them have been only mentioned in the other people's testimony. To the extent that case contends that the staff is aware of these people because

there witnesses that they have listed here have given statements to OI, I would contend. The staff would contend that, while that is commendable from the standpoint of case's witnesses going for staff counsel is not aware of this. Because, as we all know, OI is not giving us staff counsel. They're not giving the staff these statements. And, so, therefore we are seriously not aware of these statements. We are in a blind position. Therefore, I believe the best course of order, is in fact, to take a stronger position in the applicants, to have cases witnesses go first, and to have the staff and the applicants depose these witnesses and ask their questions to find out the real fact surrounding their claim. Only then can the staff go back and say, ok, now that we know these facts, can we do a reasonable cross-examination of whatever witnesses the applicants put forth, as well as going back to our own staff and asking them which people of you were involved. Then make these people available for deposition.

JUDGE GROSSMAN: Now, do you think that the staff's right hand doesn't know what the left hand is doing, that Mr. Roisman's witnesses have to come forward again and tell the left hand exactly what the right hand knows?

MR. MIZUNO: It's unfortunate. Yes, I would

BH
NRC
T-4
19

have to agree that this is part of the problem. But, there is also a problem here, of labor proceedings here. I don't want to just say that it's just OI, but again the Department of Labor proceedings have been preceded. The staff has been aware of some of these proceedings, we have some contact. But, we certainly do not have all the transcripts of all the various discovery depositions that were taken in, whatever Department of Labor cases are there.

JUDGE GROSSMAN: Even if you don't have what OI has available to it now, don't you expect that you will have those statements after the reports are issued by OI.

MR. MIZUNO: Yes. Once the reports are issued it has been the practic of the people to append the statements. But, that doesn't help us with the purpose of conducting our own depositions.

JUDGE GROSSMAN: No, but that does address a point of whether those statements have been memorialized.

MR. MIZUNO: Yes.

MR. TREBY: One last thing that the staff needs to say before we give up our right to be talking at this point, and that is, with regard to any staff witnesses that are called. We certainly will cooperate. We will not waive our rights under 2.720A to rely because, certainly we would make, to the extent we can, OI

BH
NRC
T-4
20

investigators available, and inspectors who are going to be receiving subpeonas for Mr. Durks, or Mr. Denton, who is the director of NRR, or Mr. Collins who is the head of the region 4. We have to give serious consideration as to whether that is something that the staff voluntarily will be agreeing to. We do not know.

JUDGE BLOCH: We're in recess for decisional purposes.

(off the record discussion.)

JUDGE BLOCH: Mr. Roissman may rebut on the one subject of the 4 days, 5 days, 6 days.

MR. ROISMAN: When we operate on double schedule you take all of our resources and put them into the proceeding. I don't have a law clerk to back it up, if this is my law clerk. I don't have a paralegal to back it up if this is my para-legal. When you also put this on anything other than a four-day week, what you're really doing is denying us due process. I don't care whether the comission gets intervener funding or not, but the realities are the realities. We cannot be everywhere at once. We cannot work as we have offered to do in our thing with our witnesses in the evening to get them prepared so that they can have their depositions taken. We cannot prepare for the cross-examination of the applicants witnesses, and work 5 or 6 day weeks and double up, and do all the other

things. It puts at a premium, the party that has the resourses wins the case, by having that advantage. That is unfair to us. We are going beyond normal procedures. Most courst don't require 6 days of depositions, or even 5. Four-day weeks are quite normal. And, on top of that they don't require people to double up and to put... Billie Garde is very bright, but she's just finishing her first year of law school. They don't require people to put that kind of an experienced person in for doing cross-examination of protection witnesses. So, we're already being asked to go well beyond the normal, which I think is wrong.

I don't think we should have to do any of that and we certainly shouldn't be, also required to go into a 5 to 6 day week on top of that. This is the end of my rebuttal.

MR. REYNOLDS: My reaction is that we address this argument in a pleading we filed over a month ago, regarding to scheduling, where we asked the board to reconsider its schedule. The case load before this agency is clear that resource constraints are to be taken into consideration, but they are not dispositive of issues such as this, particularly, where through one reason or another we are faced with a deadline of late September, 1984 when this plant will be finished. The amount of money will be

by the rate payers of the state of Texas, is already a matter of record of this case, if the plant isn't licensed at this time.

JUDGE BLOCH: We sympathize with Mr. Roisman's plight, however, Mr. Roisman and Ms. Garde are not the only attornies available on this case. Case has had two other attornies that I can recall, off hand, participate in this case already. There is no reason, at all that Case can't get additional lawyers to handle depositions on these matters. So, its not as though these two individuals here are all or nothing in terms of who can help case on this issue. I suggest to the board that the equities far outweigh, the equities on the side of preceeding with a 5 or 6 day schedule, far outweigh the problems that Mr. Roisman just provided to the board.

(Off the record discussion.)

JUDGE BLOCH: First, we decided the nature of the deposition process that we're about to undertake should be evidentury in nature. By that, we mean only that the depositions will be able to be admitted into evidence without objection to the witness is also available. It also means that objections based on redundancy will be possible, but it's understood that questions may be asked at hearing which go to the credibility of witnesses for the purpose of bringing out live testimony,

BH
NRC
T-4
23

something that the party wishes to do. They also may be asked, with respect to information subsequently inquired, that is subsequent to deposition, or ask information that might have been asked by a referral lawyer, but just was missed at the time, because there was a developing situation where new information was acquired. The question of order of witnesses is a difficult one.

The board has no special distrust of any of the witnesses in this case. That's not the basis for our decision. On the other hand CASE's witnesses have for the most part and have recorded themselves in statements, either in affidavits to GAP personnel that will be made available, in statements in courts, or before the office of investigation or other NRC investigators. In that way depositions are already recorded and fixed. Further, it is our understanding that the nature of the allegations that these witnesses are making will be made known in response to applicants discovery request, prior to the taking of depositions. So, there should be no surprises as to the nature of the incidents as to which witnesses will be asked to testify.

Although, applicants are on the record to a certain extent, particularly in the Department of Labor hearings, there on the record in a rather narrow way in response to employment discrimination charges, and not wit-

BH
NRC
T-4
24

respect to the applicant's QAQC response to the allegations that are being raised. We therefore, set as the order for deposition, first CASE's deposition of applicant's witnesses, second, applicant's deposition of CASE's witnesses, third, applicant's deposition of additional witnesses that it wishes to call, and fourth, staff witnesses. The hearing schedule will commence on July 9, and should end by September 9, by having double sessions, 4-- per week. Four days per week. We realize that this will to some extent tax CASE's resources, and to some extent it will inconvenience and perhaps have substantial monetary implications for applicants. In reviewing the burden, we have to balance the extraordinary costs to applicants with the possible delay of the opening of the plant against fairness considerations for the interveners. In doing that, we are aware that these issues have been pending for a while in this case.

We don't think that either of the parties are particularly responsible for them having lagged to this point. We do note that a portion of the hearing burden still remaining, is a result of applicants having failed to carry the burden of proof with respect to the quality assurance issues addressed in our December memorandum in order that a portion for the posture of this case is therefore due to that failure too. We are interested in

BH
NRC
T-4
25

having a discussion about the proposal that CASE may, what's to happen five weeks prior to hearing. It would be helpful to us for Mr. Roisman to address each of the elements there. Lets see if we can appoint it. Hopefully it will only take five minues of party with no interruptions.

MR. REYNOLDS: Before we get to that Mr. Chairman, a couple of points of clarification on your ruling, please. You stated that the affidavit already in GAP's possession will be made available to applicants. I would like to know how and when.

JUDGE BLOCH: My understanding was that CASE made that undertaking, and it would be prior to the beginning of the deposition. Is that correct?

MR. REYNOLDS: That's prior to the beginning of any depositions.

MR. ROISMAN: In ten days we will know whether we've got the confidentiality problem. If we know that we don't the statement will be made available.

MR. REYNOLDS: Your ruling will be that there will be double sessions four days per week starting July 9? and running through September 9?

JUDGE BLOCH: That's correct.

MR. REYNOLDS: I would question the board and ask for reconsideration on why the board is in effect,

BH
NRC
T-4
26

condoning the waste of three weeks between now and July 9th, to commence discovery. I would further..

JUDGE BLOCH: It's not to commence discovery, there is discovery going on.

MR. REYNOLDS: We can start tomorrow. We can take a deposition tomorrow if the board says you're free to do so. We don't understand at all, why you're waiting three weeks, so that CASE can depose our people, when we can be deposing their people between now and July 9th. We could be perhaps, finished between now and July 9th. We're wasting three weeks. I just don't understand that. I don't think that serves the public interest at all.

JUDGE GROSSMAN: Of course, the scheduling that you're talking about now has nothing to do with the order, because whenever you started the order that we've set is basically the order that it is going to go in.

MR. REYNOLDS: I don't understand that.

JUDGE GROSSMAN: In other words, Mr. Roisman and Ms. Garde are going to have to be available to whichever depositions go first, so the time in which we start has nothing to do in which the order that the depositions are going to be taken. Whether we started tomorrow or July 9th, the order that we set really has no relevance to that beginning date.

JUDGE BLOCH: Is that correct, Mr. Roisman,

I would think that would be part of your constraint that you wouldn't be prepared to go on applicants witnesses until July 9th.

MR. ROISMAN: We're still waiting for, from the applicant for instance, files, information that we have asked for. I understand, Mr. Belter said, I will just have to assume what was asked for is going to be available when we appear down in Fort Worth.

JUDGE BLOCH: I take it we do have ten days of exchange of information on.

MR. REYNOLDS: Let me reiterate my point. I'm not making myself clear. We have twenty-one days between now and July 9, roughly. They are being wasted, because we could be deposing CASE witnesses starting next week. and perhaps be finished by July 9th, but the board is establishing some artificial rule that says because Mr. Roisman can't be available we can't take our deposition. Twenty-one days, twenty-one million dollars to the people of Texas. That is not serving the public interest, to my opinion. I think that's wrong.

JUDGE BLOCH: Mr. Roisman.

MR. ROISMAN: The premise of the 21 million of course is, of course, if we started 21 days earlier, the applicant would really be ready to use "Quote A" licensing decision within the time frame that the twenty one

BH
NRC
T-4
28

days would be detected. Now, we're not debating here, that question, but all we have is the unchallenged affidavit of the applicant. We have the reality that we've got a lot of outstanding issues in the case, and I don't understand that on this record that anybody can believe that even if the plant is completed and they are ready to start, that the process, which must be completed before the can start could possibly be completed even if there were no harassment intimidation proceeding. So, I think that it's somewhat bogus to look at that as though somehow or another we are interfering with it.

JUDGE BLOCH: Can you tell me in a little bit more detail why we have to wait until July 9, rather than doing something earlier than that.

MR. ROISMAN: Well, if you start with the premise that this is the order in which you are going to do it, until the applicant provides us with the documentation and discovery that we've asked for regarding the matters that we want to talk to their witnesses about, we can't very well be prepared to do it.

MR. REYNOLDS: We have had a request pending for two months also, that is not fully responsive. We're prepared to go forward.

MR. ROISMAN: That's understandable, since we've already put a lot of people in the record.

BH
NRC
T-4
29

JUDGE BLOCH: I don't understand, if both sides are two months late how can one side be dragging its feet but not the other.

MR. REYNOLDS: We're prepared to go. All we ask of you is that you let us take our discovery now. Now what's wrong with that?

JUDGE BLOCH: I understand, but the reason he's not prepared to go is partly that you didn't come up with the discovery.

MR. REYNOLDS: That has noting to do with us deposing his witnesses. That has nothing at all to do with us deposing his witnesses.

MR. ROISMAN: Part of what we've asked for was the personnel files on the people whom they want to depose.

MR. BELTER: You've already got all of them. Every one of them.

MR. ROISMAN: We have the personnel files?

MR. BELTER: You have the materials, and the personnel files that are responsive to your data requests I looked through them myself, and I gave them to you.

MR. ROISMAN: Do we have anything that you intend to use during deposition, to question the person's competence in their personnel.

MR. BELTER: Nothing in the personnel file.

Everything that would be used in deposition of the personnel file, you have.

MR. ROISMAN: So, in the personnel file you're not going to deal with any "allegations of drug usage" that we don't have.

MR. BELTER: That you don't have. There's only one person that I knew of that that came up with, and that's the person you're talking about, apparently, who was being deposed yesterday.

MS. GARDE: My understanding of the way that you construed our discovery request is very narrow. Your not representing that you don't intend to.

MR. BELTER: No, I haven't looked through any 10,000 personnel files.

MS. GARDE: And, for the list of the people that you named in your letter to Juanita, you went through their personnel files to pull out what you thought was relevant to our request.

MR. BELTER: Yes, that's right. I pulled out everything that had anything to do with harrassment and intimidation complaints.

MS. GARDE: And, that was a list of people that you identified as our responsive to the list that we had identified as a preliminary list.

MR. BELTER: That's right. You gave me that list when?

MS. GARDE: On June 1st.

MR. BELTER: There were about five more names that will go through that you will have by Wednesday that were not on the list that I gave you.

MS. GARDE: Am I understanding you to say that you're not going to, for example, pull out the job applications of someone and use it to cross-examine someone in the course of the deposition as you have been doing with Miss Alley.

MR. BELTER: I don't know, until I find out that the person lied on their job application. If we find that out, we will use it.

MR. TREBY: If I may interrupt, I don't see what the relevancy of that is as to deposing the applicant's witness. We're not talking about deposing the CASE's witnesses.

MR. REYNOLDS: No, we're talking about reconsideration of the Board's ruling on its order of ruling simply because of its order of presentation, simply because its not in the public interest to wait three weeks.

MR. TREBY: Just to clarify what my statement is, my understanding of the question that was being addressed, which the board chairman asked was why is it

that you're not ready to go until July 9th. And, the answer was, because we need more information from the applicant. My question is, from what I've heard so far I don't see what the information from the applicant has anything to do with taking the applicant's depositions. I guess my question, and I thought was the court's question, is why can't you take applicant's depositions earlier than July 9th.

JUDGE BLOCH: Yes. I'm not sure I understand that yet.

MR. ROISMAN: Let me try to explain it again. We have asked the applicant to tell us what procedures they have implemented with regard to the memorandum that are in their possession. Tolson wrote to Vega after such and such an event. We have not received that yet. We don't have a full answer to that discovery request. I don't want to take Tolson or Vega or somebody else who I may not know yet, but will as soon as I talk to talk to Tolson or Vega, without having the documents in front of me. Particularly, if I'm going to use that as evidentary. On top of that, an additional matter, in terms of my personal situation, on Monday and Tuesday I'll be in San Francisco. On Wednesday, I'll be in transit. On Thursday, Friday, Saturday, and Sunday, I'll be in Seattle. On the following Wednesday, I'll be in New

York City. Those are fixed, in so far as I am concerned, that involve committments that pre-existed anything that we've filed in this except for the court order, which I've told you about today, which I have learned about.

JUDGE BLOCH: Mr. Reynolds. Was the applicant's response to the CASE discovery tardy?

MR. REYNOLDS: No. I think what happened was that applicants.

MR. BELTER: I think I can address that question a little better, your honor. Getting into the case I wanted to be certain that we covered all potential files that might have responsive documents, and it's very difficult. The reason, all I've been doing the last week or two is just checking. There are not a great deal more documents that are going to come out. We basically have 90% of it. I'm just making certain that anybody that we've covered., that we've covered all the files that might have responsive documents. It's difficult, because the obvious files, were searched, and were given the first time. But then you find that there may be somebody else that kept a certain document in his file. And what we're finding now is that we're just finding the same documents we've already given them, but I can't assert that we have conducted a satisfactory document search until we make these extra efforts. Not everybody is available to us,

BH
NRC
T-4
34

tracking down people to make sure that they go through their files.

JUDGE BLOCH: Did I hear you say you started a week or two ago?

MR. BELTER: I started the second search a week or two ago. We came up with the first search that we responded to, I don't recall. We gave the initial response back in early May.

JUDGE BLOCH: Why was the initial response not a full response?

MR. BELTER: We received clarification from CASE with respect to. We never agreed with the initial CASE interrogatory that we would do what they asked for.

JUDGE BLOCH: Is this the T-shirt incident we talked about.

MR. BELTER: No. This is a broad general discovery request. The major problem with it was a problem that the staff was having. It would have taken us six months to a year to literally search all files. We offered a compromise, which involved searching certain files. When Mr. Roisman and Ms. Garde got in here they detailed a list of other files. We had to search them. In searching those files, I will admit that, obviously there may have been other persons whose files should be searched to be certain we've gotten any potentially re-

sponsive documents. It was a kind of an interative process. What we did was we volunteered to respond in a certain fashion, which we did. Then we were asked to conduct a search in a different way. We have not yet completed the second way of doing it. I will say that I think that we're 99% complete. I'm just trying to be certain that we've covered all of those bases. I'll admit to you right now, that when I do respond I don't think that there is any way that we could tell you with 100% certainty that there isn't another copy of same thing that somebody hasn't squirreled away in his attic somewhere.

MS. GARDE: May I respond briefly? I think its important to point out that a comment that Mrs. Ellis wanted me to make today, and I think that it's appropriate to make it at this point, is that in her review of the information, which she is not currently aloud to disclose to us. She has found at least four documents which are responsive to our request in this matter, which we haven't seen at all.

MR. BELTER: Are they in the files that you have told me to search.

MS. GARD: My clarification of that does not relieve you of the burden of responding to question 3. That was a clarification of places that you should look

I never said that it was a substitution for question 3.

MR. BELTER: Let me be clear. We never volunteered to respond to question 3 as you phrased with it. We have not yet volunteered to respond to question 3 and we cannot and will not respond to question 3 the way you phrased it initially.

MR. ROISMAN: Let the record show that I'm giving the board a copy of a document of CASE's motion to compel dated 4-16-84, and contained in it is a quotation that is the question that we are talking about. I don't want to argue about it, I just want the board to see. This is the question to the answer of which we are now arguing.

JUDGE BLOCH: What I'm trying to ascertain is whether there was any footdragging in answering this question 3.

MR. ROISMAN: What's missing from what you had in front of you are letters that I wrote back to Mrs. Ellis, shortly after we received the first one. I don't have them with me, in which we offered to compromise solution. A way of getting at the type of information that she was seeking in a more efficient fashion. It was in effect, we told her we would refuse to answer interrogatory 3 as it was phrased, and we did refuse. It would have required us to spend half a year at least

searching through thousands and thousands of personnel files for a potential needle in a haystack. The compromise we offered to her was somewhat detailed, but in summary it was that we would look through the files of people we know of and if they would give us more names, we would look through those files.

We invited them to suggest to us the specific persons files that we would look through and we would do that.

JUDGE BLOCH: I take it that--

MR. BELTER: --to give us those names.

JUDGE BLOCH: I take it that you've asked your managers to whether they knew of these documents .

MR. BELTER: We have, The problem I have, Your Honor, with "managers" is a question of how many people we have to ask, "do you have anything in your file that may be responsive," and after fifteen or twenty files are searched it gets to be a question of how many more files we can search to find another copy of the same document you ve already given out in the potential hope that you might find another one responsive.

MR. ROISMAN: I think a whole clase of documents that Mr. Belter has not free to disclose or discuss is the management memoranda that deal with the company's resporse.

MR. BELTER: I've got most of those on my desk now and--

MR. ROISMAN: See I don't understand why we had to clarify what we wanted was that information. I think question three on its face, and that's always how the process goes, you ask your question, the other side says

39

it's not clear enough and they wait and wait to give you the information. If the Board of Directors has ever discussed harrassment and intimidation issues encompassed in the question, when we should have had the minutes. It shouldn't have been that Mr. Belter had to wait for Billie to tell him to look at the ombudsmen file to see if there were any harrassment and intimidation matters.

We feel that what she's laid out in the letter there is rather self evident. If the question is foot-dragging, I think it's occurred and still occurring. We don't know until we see what happens next Wednesday, what we've done.

MR. REYNOLDS: Mr. Roisman is flatly wrong. There has been no foot-dragging at all. This is a process that was proceeded in good faith and in accordance with the Board's instructions. There has been communication back and forth between Ms. Garde and Mr. Belter. There's been no foot dragging here. And, I would add further, that this discovery issue is--the issue is why don't we get on with discovery by allowing us to take depositions starting next week. We're wasting three weeks if we don't do that, and that is just improper balancing of the equities in this case, if the Board permits that to occur.

JUDGE BLOCK: Mr. Roisman, what is your schedule?

Is it next week that you're out of pocket?

MR. ROISMAN: Next week I'm out of pocket. The following week I have the oral argument and that is the schedule.

MR. REYNOLDS: I suggest that perhaps CASE can get the other attorneys, Mr. Bob Hagar, or Mr. Ortese to assist them in the deposition process or Mr. Sinka.

MR. ROISMAN: Chair, with all due respect, I don't think it's either the Applicant's or the Board's prerogative to tell CASE that they can retain or whether those people are available. It's all like us, been on a volunteer basis. We're the first ones who have been able to volunteer and say we'll finish out the issues. I don't think it's too realistic to expect to go searching every free public interest lawyer in the Country in the hopes they'll find one that's available next Monday.

MR. REYNOLDS: Well it certainly is the Board's prerogative to order that efficient discovery commence and one other thing I would add is that Mr. Roisman neglected to mention that with regard to the fuel load date, the caseload forecast panel itself, the staff itself has concluded that that is a workable schedule so it isn't solely the Applicant's affidavit in this record that supports that date. And I don't think it's up to

this Board to second guess what the staff has concluded what the applicants has presented to the Board and has updated bi-weekly. I really urge you that you are misapplying the equities here if you conclude that we should sit and wait three weeks before discovery commences. That's a terrible cost that's being incurred, if we wait.

JUDGE BLOCH: What does staff advise?

MR. TREBY: The staff recognizes the Board has a very difficult problem.

JUDGE BLOCH: I appreciate that.

MR. TREBY: We -- I guess what we would propose is that based on what we heard that it may not be possible to start tomorrow, but I guess we don't see why we can't start having these depositions eleven days from now. The next ten days as I understand are going to be involved in tracking down all of these different witnesses to see whether they are going to be free or give up confidentiality.

Mr. Roisman has told us about his commitments and so I can understand that for ten days they may be out of pocket. I don't see why the depositions couldn't begin on the eleventh day.

JUDGE BLOCK: The eleventh day is on--

JUDGE GROSSMAN: The eleventh day is on a Friday I would guess the 25th. We're on the 14th now and no one's

going to start then. We're talking about --

JUDGE BLOCH: Can you--

MR. ROISMAN: I cannot. I have an oral argument on the 27th. We also have the underlying issue of whether or not you start with--the Board has issued a ruling here, a de facto motion to reconsider has been granted. Nothing has been said to undercut the Board's conclusion that the order of the depositons should be the order starting with the Applicants.

MR. REYNOLDS: That's not correct.

MR. ROISMAN: We have not--I'm having a lot of trouble keeping on one track.

JUDGE GROSSMAN: Okay, let's first of all, find out why we can't ruin everyone's July 4th for them and start let's say July 2nd, what would be your objection to that?

MR. ROISMAN: I can give you no objection to that provided the Applicant has met his responsibility, and divulge the information that we ask him.

MR. BELTER: May I ask a question, when you rule that the Applicant's witnesses have to go first I don't know who those witnesses are.

JUDGE BLOCH: They're not applicant's witnesses. They're CASE's

MR. BELTER: CASE is going to tell us--

JUDGE BLOCH: You want a deadline on when that will be/

MR. BELTER: Reasonable notice.

JUDGE BLOCH: You'll get a chance to call your witnesses afterwards as well, if there are additional people.

JUDGE GROSSMAN: We're not talking about a big difference here. I think staff is correct that couldn't really mechanically start tomorrow, and it would take something like eleven days which really brings you up to the week of the 25th. Mr. Roisman is willing to start on July 2nd, so we're really talking about a difference of one week.

JUDGE BLOCH: Granted to the extent that we'll change it to July 2nd with a September 2nd target for ending depositions. Now let's talk very briefly about the five weeks that are proposed for between the end of depositions and hearing.

MR. ROISMAN: Should I start:

JUDGE BLOCH: Please. I would like this to be uninterrupted if possible, even by the Board.

MR. ROISMAN: On page eight of our filing entitled CASE's Proposed Scheduling Procedures for Resolutions dated June 1, is where I'll start. Two weeks after the completion of the deposition process, each party

will file simultaneously the following four categories.

One, proposed findings. What I envision is, that having had the depositions, having had all in effect the all the discovery completed, and each party having thoroughly disclosed to the other who they intend to call as a witness and what they intend to rely upon, it should be possible to actually write proposed findings of fact and conclusions of law. I've taken my best shot, I've got everything I can possibly have, and what I don't have, I know what I don't have. I've got three more questions, or I've got one more witness or whatever it is and I would identify where in my pattern of porposed findings my gap existed and what I was proposing to fill the gap with for purposes--it would be in the nature of a cross examination plan, if I had someone to cross, could be in the nature of proposed direct testimony if I had a new witness to put in, could be in the nature of an exhibit, if I had piece of evidence to introduce into evidence, what have you.

Second, Motions For Summary Judgement: Parties now have the information in front of them that they think show what the issue is, they should at that point say, and I want Summary Judgement on this when it's all over.

JUDGE BLOCH: Is ther any difference in your

mind between Summary Judgement and Request for Stipulation?

MR. ROISMAN: Do you mean by that admission? Request for Admission? I'm not familiar with the procedure that Request for Stipulation?

JUDGE BLOCH: You have a Request for Admission. The idea is that you think there may be some thing that are just not controverted. You really don't want the Board to issue an opinion on whether or not Summary Disposition should be granted on those things. Probably given the complexity of the record would exceed the time before hearing.

MR. ROISMAN: No, I would include then and see no problem that at the same time, if you've got discrete items that you believe the other parties really don't have any defense to.

JUDGE BLOCH: Is this a request for admission.

MR. ROISMAN: For instance, Mr. Reynolds can have his fact that Chuck Atchison put a false statement down when he originally applied for a job at the Comanche Peak Plant. We'll say yes, that'll be that. And, we'll put down that the DOL ruled that Atchison was fired because he reported safety violations, and we'll agree to that. That's yes, I would hope we could do those things.

JUDGE BLOCH: The first step is proposed findings,

46

the second step is stipulations?

MR. ROISMAN: Yes, but all done--I just had to give it to you in order. But all done at the end of two weeks after the last deposition, so two weeks after September 2nd on your schedule.

JUDGE BLOCH: Okay.

MR. ROISMAN: The third thing would be that all the exhibits which the parties intend to introduce, documentary and so forth, would be identified and that would include, of course, whatever portions or whatever depositions are proposing to put in.

Fourth, the pre-filed testimony for any relevant matters which develop subsequent to deposition or otherwise meet whatever the standard is that you earlier articulated with regard to the filing of additional matters for actual oral hearings.

We do not list, well I'm sorry, there's a five on this, on the next page, I already mentioned which is cross examination plan.

We do not specifically list, but we would hope specutory language only, that the Board if they thought there were matters that it wanted to explore would identify those to the parties on or about that time so that we would also know, plan to have this person at the hearing even though none of us decided that we

wanted to bring him.

JUDGE BLOCH: In that case I guess we will be getting depositions as completed then.

MR. ROISMAN: I would hope so. One week after that list is submitted, so now we're three weeks out from the close of the depositions. The parties have filed a cross examination plan that were identified to them the previous week for the first time.

JUDGE BLOCK: No, those would be Notice to both parties. Suppose it was a matter, you know, you thought someone were lieing and you figured out how to show that, your plan doesn't go into so much detail that you can show the nature of how you were going to do that would it?

MR. ROISMAN: No, I don't think so, but we sort of both agree that we were not-that we would disclose openly and not behind closed doors. I think you'll judge whether or not you think somebody sandbagged, you know, say, I'm going to talk to this witness life in general and then you end up, you know, in something entirely different, I think the Board will know what to do with that.

At least I'm not worried that you won't know how to deal with that.

JUDGE BLOCH: The purpose is primarily time

management by the Board or some other purpose?

MR. ROISMAN: The purpose of the cross examination plan?

JUDGE BLOCH: Yes.

MR. ROISMAN: To make sure that the witness comes to the hearing equipt to answer the question and has no excuse that, "gee, I have to go back to my office, or I've got to go look at the file or--

JUDGE BLOCH:: List the exhibits that he must be prepared to testify about without extended delays that kind of thing?

MR. ROISMAN: Exactly, precisely. I'm going to use these five documents and I want him to have read them and want him to be familiar with so I don't have to hand it to the witness and say would you please read this over, and I want to ask you some questions about it?

JUDGE BLOCH: Yes, that kind of thing.

MR. ROISMAN: And similarly if any party objected to a proposed use of a witness the other party is going to put in. You show up with someone who you should have revealed a long time ago and now you're for the first time saying I'm going to put him in.

He never got deposed, or a deposed person who you think has been thoroughly investigated and they show no reason to be able to talk to him on a witness stand.

49

Whatever those are--do those objections. One week after that was done, the Board would rule in prefatory language obviously, would rule on the witnesses, scope of the testimony, summary judgement motions, whatever.

In otherwords, four weeks out, you would have ruled on all of our fights. And finally, with one final week for preparation, we would begin, the fifth week out with the actual hearing.

JUDGE BLOCH: Now your request for admissions I take it, are based, you don't have any provisions for response to that, do you?

MR. ROISMAN: I would assume that that would occur in the one week after the submittal of the above listed items. Anybody objected to anything that got filed at the end of those two weeks would file whatever they wanted to say in opposition.

JUDGE BLOCH: And, then we have one week to rule.

JUDGE BLOCH: And you have one week to rule on it.

JUDGE BLOCH: Do you have any more?

MR. ROISMAN: No.

JUDGE BLOCH: Mr. Belter?

MR. REYNOLDS: Let me just say as a preliminary matter before Mr. Belter addresses the details of that,

50

that what we have here appears, is, the Board acquiesing in the scope of discovery that CASE has proposed, to the detriment of the Applicant and the rate payers of the State of Texas. There is ample precedent before this Agency, for a Licensing Board to say, CASE you've got thirty days in which to take your discovery. Get it all done in those thirty days and then we're going to trial.

But you haven't done that here. What you have said, is Mr. Roisman, How long. Oh, we have eighty witnesses, so it's going to take 50 to 65 --

JUDGE BLOCH: Is this a second Motion for Reconsideration?

MR. REYNOLDS: Yes it is.

JUDGE BLOCH: We only allow one.

MR. REYNOLDS: When you're talking about the equities and the money involved here--

JUDGE GROSSMAN: We did give you the double sessions here and we did cut back one of the three weeks, so you know, it wouldn't reflect what actually happened, you know, if you say we gave them, what they wanted.

MR. REYNOLDS: Well, we are going to lose fuel in September and you've said you're not even going to start hearing until--we're not even going to finish

51 discovery until September. Let me make one more point and then I'll pass it to the specific comments. You say now that the period for discovery will be July 2 through September 2. I submit that you shouldn't block out that much time.

You should say the depositions should proceed with the double sessions four days a week until completion.

JUDGE BLOCH: That's understood.

MR. REYNOLDS: No foot dragging.

JUDGE BLOCH: Absolutely. If it goes beyond September 3, you've got to show Show Cause for not completing, that's all.

MR. REYNOLDS: Yes, but it's four days a week, continuously, from July 2nd until it's finished.

JUDGE BLOCH: That's correct. We did allow--we did not rule on this, but we did allow the possibility that there were special circumstances where Mr. Roisman has to help out Miss Garde because of a special problem that would protect the witness. That would be--

MR. ROISMAN: There's one week in there when I've already indicated, my job that's Executive Director of my organization requires me to be at the ATLA convention for one week, which I previously identified. Miss Garde will be available that week, but she cannot do

52

double sessions.

JUDGE BLOCH: Which week is that?

MR. ROISMAN: Starts actually on a Saturday on the 21st and runs until the end of the week, and following Friday the 27th , I'll be in Seattle, until July. But that doesn't mean, my understanding of the Board's ruling is that we will have sessions that week and Miss Garde will be available then.

JUDGE GROSSMAN: One thing that I think Judge Bloch may not have said, maybe he did, was that we would expect that you would put on your entire case on deposition and so if that element was neglected, the Board's ruling, we still expect that.

JUDGE BLOCH: We expect you to attempt to do that.

MR. REYNOLDS: That's a real problem if we're going to put our witnesses on first. How are we supposed to put on direct testimony?

JUDGE GROSSMAN: You're not putting your witnesses on first. Mr. Roisman is putting on your employees, the Applicant's employees, who he is intending to use. You're putting your witnesses on last actually, so you ought to have everything rapped up at that point.

MR. ROISMAN: Staff goes after.

JUDGE GROSSMAN: I'm sorry, staff goes after that.

MR. REYNOLDS: In other words, if we have a panel, Mr. Vega is the QC supervisor, is going to make a statement about his commitment to quality assurance. We have to take his deposition in order to do that?

JUDGE GROSSMAN: Yes, and I think that it'll be a lot more expeditious than the hearings that I've participated in. I think we can do it a lot better. I won't take all the fault of that, but I think you clean it up on deposition. Of course you're only going to be offerring the material that ought to go into the record.

JUDGE BLOCH: We have met most of the people-- your poeple, and frankly I have difficulty in looking at someone's face and knowing whether they're lieing.

MR. REYNOLDS: There is one important thing though and that is if credibility is an issue with CASE's witnesses we have to have an opportunity to call them live so that the Board can witness the demeanor of the witness.

JUDGE BLOCH: We clarified that. We also stated that for that purpose, if there's a direct conflict and you want to dramatize that, you can call your witnesses on that narrow credibility question.

MR. REYNOLDS: It is clear then that the discovery accept for the week that Mr. Roisman is unavailable, will proceed two sessions continuously and during that week, Miss Garde would fly solo.

MR. TREBY: I guess I have--on behalf of the staff, two clarifying questions. The first is, I'm still not clear as to what statements we are getting and when we are getting those statements from CASE as to what their witnesses have stated. The reason I'm unclear is because I thought I heard about two different statements. One was a statement that we are getting in response to discovery and we will get the name and statement of their allegations.

The other statement that I have heard during the course of these proceedings was the statement which has been given to I guess really GAPs people who are are assisting CASE.

JUDGE BLOCH: My understanding is that as soon as they know that the person is going to testify they will make that affidavit available .

MR. TREBY: Within ten days we're going to get the statements and then , when are we going to get the affidavits?

JUDGE BLOCH: As soon as they know that the person is going to testify. In other words--

MR. TREBY: What we'll find out in the ten days is if the person had any problems, and if they don't give the affidavit. So I would hope that within the period of ten days we will know all the people

55

who are willing to testify under the no holds barred criteria and will produce the affidavits. Option two is that some will say, "I'm willing to let you use my affidavit, but it's got to be in camera, we will submit, Propose to the Board those names and as soon as the Board rules and the protective order are to be signed and the parties sign them, and get the affidavits.

Three, the worst case, somebody who's got something that we think is relevant, given to OI but they are not willing to have their name used or involved in any way even in the protective order and then we have to deal with that issue. That's all.

(end of tape)

MR. TREBY: Then, within the 10 days, we will either be getting two of these statements, one is a statement that is being provided along with the names, together with the statement that was provided to the, together with the statement that is provided the GAP investigator, or we may just be getting a name and the statement that has been provided to the GAP investigator.

JUDGE GROSSMAN: I really need to clarify whether or not we're getting two statements or one statement.

MR. TREBY: You might ask Miss Garde, but I believe you're only getting one statement, if they say that they're willing to have their names and the content of what they said published, so that you would only be getting that one statement, is that correct?

MISS GARDE: Let me repeat it back to see if I understand it correctly.

JUDGE BLOCH: Wait a minute, let me state it, I think I understand it. There are two cases, right. One is where the person's going to testify, right?

MR. TREBY: No, no, we're talking about separate things. I think, no, I understand that there are different statements, there are different cases, whether one is going to testify voluntarily and one when he is testifying only on camera, or doesn't want to testify at all or whatever those various circumstances are.

What I'm concerned about is that we've heard of two different ways of getting statements of what the cases' witnesses are going to say. One message that we get, what it is that they're going to say, is to get their names and the statement of what their allegation of in the 10 day period.

A second way of determining what the case witness is going to be saying and which the Board, I think, relied upon as a basis upon which the fact upon, relied upon, was the proposition that they were then on record as to just what their statement was and it wouldn't be changed, was the statement they'd given to a GAP investigator.

Now, what I'm trying to determine, is when are we getting each and both of those statements.

MR. ROISMAN: Within the 10 days. We're doing actually, only to furthe confuse it since it's getting late in the day and it's always fun to get complicated around 3:30 or 4:00, we are going to provide, as we've already partially provided, we'll provide by the end of the day tomorrow, the documents in our possession, information in our possession that relates to any of these harrassment intimidation issues and the names of the remaining people that we now know, that exclude a whole bunch of people that the GAP people have talked to that we don't know yet. We will start, maybe tomorrow, no later than Monday, the process of

calling all of those people, by going to the GAP person, seeing whether or not they are gonna make themselves public.

As we learn, five days out from now, we will provide those names and any additional statement that's available. It may be a statement that they made to GAP, maybe an affidavit that they gave to OI or both, we'll give those to you. And then, 10 days out, we will have completed that process as to those people and the only thing left will be if there's somebody who said you can't say about me, but that we think we want to have the Board know about, and then we'll face the question how to deal with it.

That's what we'll do. So we've got another stack, about like this, Mr. Belter, which I will review and you will get tomorrow, of some more of researches through the Juanita Ellis files.

MR. BELTER: And I also understand that with respect to the 36 names we've gotten so far, that you'll give us names, dates, incidences.

MR. ROISMAN: As many additional as we've got, that is correct.

MR. BELTER: May I address just briefly the second half of this proposed schedule by Mr. Roisman, that is the post-deposition phase?

MR. TREBY: We've been waiting for that.

MR. ROISMAN: That's all right, we're still clarifying Based upon Mr. Reynold's second shot at reconsideration. So you've not yet gotten to your time to talk about the schedule.

MR. TREBY: We were going to do this without interruption but the Board violated the rule first, so we figured that we could come in at this point.

JUDGE BLOCH: The Board apologizes.

MR. TREBY: The second thing I think I need clarified, is when are we going to get the names of those applicants, witnesses, which the case intends to call for deposition purposes. And, of course, the staff intends to be participants in those depositions and we need to know who they are so that we can prepare.

MR. ROISMAN: Shall I start reading now?

JUDGE BLOCH: Do you know them already?

MR. ROISMAN: I know some.

MR. REYNOLDS: Sure, read them.

MR. ROISMAN: Grant, Tolson, Vaga, Clements, Cromeans, Hicks, Purdy, S. Spencer, D. Chapman, R. Yoki, H. Hutchison, F. Strand, M. Spence, P. Brittan, R. Ice, J. Callicut, C. Flowes, L. Carnes, G. Tanley.

JUDGE BLOCH: And when would the rest of the witnesses names be available?

MR. ROISMAN: Of the people from the applicants?

JUDGE BLOCH: Yes.

MR. ROISMAN: Probably by Tuesday morning, we would hope. All right, we're gonna try to simultaneously meet both goals. We have enough there I think to get started on the second, and we will try, it's juggling, and you tell me, but my inclinations are to think you've got that five and 10 day thing, I want to give you something of value on the fifth day, and there will be just alot of sitting on the telephone and calling those people. But we'll try to do it.

MR. TREBY: It was my further recollection that we were told that we were going to be receiving these witnesses would be receiving something equivalent to a subpoena duces tecum, which would indicate they should bring certain documents. These are the various incidents that we want to talk to you about. Will we be receiving those kinds of pieces of data and, if so, when? Again, so we can prepare.

MR. BELTER: So we don't have witnesses sitting there, wasting time, being asked of events two years, three years ago. So they have some idea.

MR. ROISMAN: I'm sorry, I didn't hear the beginning.

JUDGE BLOCH: They want to know the documentation, when are they gonna get the subpoenas and notice of the events that they're going to have to testify about?

JUDGE GROSSMAN: Do you need subpoenas here, are we just noticing them? They're all applicant's witnesses. Do you require subpoenas?

MR. REYNOLDS: No, but we'll be moving to quash a few of them. Certainly we don't need Harry Brittan, Chairman of the Board, to be deposed in these matters. So, if you need subpoenas to initiate that process, you better get them for written. But, as far as I'm concerned, I can move to quash or seek protection from a notice of the deposition so I don't think you need subpoenas.

MR. ROISMAN: Well, the more paperwork we have to do, the longer it takes.

MR. REYNOLDS: Don't threaten me with dilatory tactics, Mr. Roisman.

MR. ROISMAN: I'm not threatening you with anything, I'm telling you a fact.

MR. REYNOLDS: I'm going to protect my rights.

JUDGE BLOCH: He's suggesting you may do it by notice and he will will move to oppose if he opposes.

MR. REYNOLDS: Yes, does that cut both ways? Do we need subpoenas for case's witnesses?

MR. ROISMAN: You're gonna have to dot every I you want me to dot, Mr. Reynolds, every single one of them.

JUDGE BLOCH: No, wait, he said that you could, give him a notice, not a subpoena.

MR. ROISMAN: And I said I want a notice from him.

JUDGE BLOCH: For your witnesses.

MR. ROISMAN: Well, I want to know the same scope, I want to know what he wants to

JUDGE BLOCH: You don't have the same control over your witnesses as he has over his. You sure that's enough?

MR. ROISMAN: If I have a problem, I'll indicate it in opposition to the notice.

MR. REYNOLDS: But that takes time. I'll be to you seeking subpoenas.

JUDGE BLOCH: I think that would be more efficient for us to just sign subpoenas.

MR. REYNOLDS: I think so too.

MR. TREBY: Does the staff need to file notices?

JUDGE BLOCH: Of its own witnesses?

MR. TREBY: Not of its own witnesses, but as I indicated earlier, we intend to participate in the depositions, so does that mean that we need to duplicate each of the notices?

JUDGE BLOCH: Any witness who shows up, you may

MR. REYNOLDS: You're welcome to participate in any deposition we notice.

JUDGE GROSSMAN: You may participate, you're a party, you have to, a deposition isn't a deposition unless all the parties are entitled to examine. So you don't have to

worry about

JUDGE BLOCH: Whether or not that's true, you may.

MR. TREBY: I was gonna say

JUDGE BLOCH: We do have the power to issue procedural orders. Okay. Now, are you going to notice any witnesses of your own, in addition to the ones that the other parties are noticing?

MR. MIZUNO: We may very well be. I have to go through all these witnesses, I mean the people that were listed in that other, and try to get back to the staff people and see what they have on any of these people. I've already transmitted the letter to them, but I have yet to talk to them about

JUDGE BLOCH: When you say on, you mean about?

MR. MIZUNO: About.

JUDGE BLOCH: Okay, Mr. Belter.

MR. BELTER: As I was about to say, Judge Bloch, the five week post-deposition process, in our judgment, is duplicative. You're gonna have a hearing and you're going to have post-hearing briefing, why not start the hearing one week after the last deposition, with the only filing being allowed summary judgment motions.

With summary judgment motions being, or request for admissions, being allowed at any time. If we finish one week's worth of depositions and we've got a free day in

there and we feel that the testimony of the entire, deposition testimony of a witness is totally irrelevant, we file a motion with respect to that point. Or we can request admissions as we go along.

We don't need five weeks at the end of the deposition process to get ready for a hearing that's gonna be held anyway. Findings of fact, for post-findings of fact in advance of the hearing process itself, are going to require just as much effort as they would at the end of the hearing process. Why not put them over until the hearing is over.

It's going to take you two weeks to draft proposed findings of fact, let's do it after the hearing. Why do it two times?

JUDGE GROSSMAN: Well, you know, I'm surprised that the role seems to be reversed here. It's usually the applicant's attorney that wants proposed findings in advance and the intervenor's attorney that doesn't. Usually proposed findings before hand are a way of focusing the hearing and cutting down the length of time it takes to hear the issues.

And it's usually opposed by the ones that don't have the resources to prepare it, even though everyone understands that it's the expeditious way of trying the case.

MR. REYNOLDS: But we will have already focused the hearing through this deposition process.

MR. BELTER: We're gonna have every witnesses' deposition taken. If we're getting statements in advance, all we're doing to the proposed findings of fact is really getting a jump on the proposed findings of fact you have to make at a given point in time in any event.

It's quite conceivable that the proposed findings of fact would change as a result of the hearing process. So you're just doing it twice. And, I would suggest again, hearing one week after the close of the depositions.

JUDGE GROSSMAN: Do you find that the proposed findings in advance are critical to the way this case is going to be heard?

MR. ROISMAN: My experience with proposed findings is that they are an important guidepost to where the question marks are, where the doubts are. When you see, when you the Board see, when the parties themselves see where each other is going with the respect to the depositions, and with respect to the total evidence of the case, it then becomes clear what the hearing's about.

If you don't force the parties to articulate in substantial detail, whatever you want to call it, prior to the commencement of the hearing, exactly what the evidence is, and what they rely upon and where they're headed, then

it's harder to control the limits of that hearing. I think you add time to the hearing, substantial time, and you do it more in the dark.

This way, and I don't see, what I see happening after the hearing is over, which I believe should be a relatively short hearing, is some minor amendments, I assume all have word processors, I heard even the staff does now, you go into your word processor, you make the changes in your original proposed findings to accommodate the new evidence that you picked up in the course of the hearing, and you submit the revised one to the Board, you know, I would say a week after the hearing's over. Less even, if the Board wants, because I think we should be in a very tight little hearing. And you know the questions you want to ask. My experience in looking at licensing board decision, is that the Licensing Board is sitting there writing a decision and saying I wish I had thought to ask that now.

We're constantly looking at the reopening questio This is a way of avoiding it. We're gonna plead our case before you hear us and then you're gonna make sure that we have exhausted what we have to say. No second motion for reconsideration.

JUDGE BLOCH: It certainly is useful to the Board to know whether questions that the Board has really are

relevant to the outcome of the case. In terms of cutting down on our questioning, I think would be helpful.

JUDGE GROSSMAN: Mr. Treby, what's your position?

MR. TREBY: I guess my position was that we were going to indicate that we didn't think proposed findings were going to be all that helpful. That we thought that the purpose that proposed findings would serve would also be served by these cross-examination claims which would help to focus where, at least, the parties thought the issues were and what the concerns are.

I also have some difficulty preparing proposed findings simultaneously with requesting admissions, because it seems to me I need to know what the admissions are before I can prepare my proposed findings.

So I guess I was going to suggest that, with regard to what we believe the appropriate post-hearing, post-deposition, pre-hearing activities would be, would be to do items two through five, that Mr. Roisman proposes, which would give us both the request for admissions and the cross-examination plan. One week later, for anybody to oppose the request for admissions, and go to hearing at that point, three weeks after the depositions.

MR. BELTER: May I hear that again? You're suggesting items

MR. TREBY: Two through five.

MR. BELTER: Summary judgment, exhibits, prefiled testimony.

MR. TREBY: Well, I guess I would, I guess I would also exclude most of the summary judgment. As I understand it, motions for summary judgment are where everybody agrees on the fact, there is no conflict and it seems to me you're gonna get those, agreements when you agree to admissions and that there is really little purpose to be served in filing motions for summary dispositions.

MR. BELTER: Or if there are such, they can be filed at any time.

MR. TREBY: Right, right.

MR. BELTER: You don't need a time, we don't need to put that in the schedule.

MR. TREBY: That's correct.

JUDGE BLOCH: I think it's unlikely that three weeks before a hearing, you're going to get action on summary disposition.

MR. REYNOLDS: It could be in July.

JUDGE BLOCH: Oh, yeah.

MR. REYNOLDS: Any time during the process.

JUDGE BLOCH: You could, although the answer to summary disposition can be we have other related testimony still to introduce.

MR. BELTER: Well, for example, if we find out that

all of the testimony on a particular incident is covered by two or three depositions, it may be that some motion is appropriate.

MR. TREBY: Sure.

MR. BELTER: I would just again ask the Board to consider whether the time involved in drafting proposed findings of fact, which appears to me to be at least two weeks out of this whole schedule, is it really gonna save two weeks of hearings on it?

JUDGE BLOCH: And you don't think that, well, of course, Mr. Roisman is also suggesting, only one week to the final findings are filed. In exchange for having filed the proposed findings, he wants only one week after hearing to file his findings.

MR. BELTER: I'm sorry, I didn't see that in here.

JUDGE BLOCH: He just said it.

MR. BELTER: He said, that was an additional, so we'll have, in effect, final briefs one week after the close of this hearing?

JUDGE BLOCH: That's what he's proposing, simultaneous for everyone?

MR. ROISMAN: I would hope so.

MR. TREBY: Staff needs about four more days.

MR. REYNOLDS: Well, we may have an opportunity to reply also, it's contemplated in the rules and we'd be

able, burden of proof, opportunity for applicant's to reply because of the burden of proof.

JUDGE GROSSMAN: Well, if it's simultaneous then both parties, then all the parties have a chance to reply.

MR. REYNOLDS: That's what I would hope.

JUDGE GROSSMAN: I mean, if

MR. TREBY: We'll advocate it, Judge Grossman.

JUDGE GROSSMAN: Pardon me?

MR. TREBY: Nothing.

JUDGE GROSSMAN: I've never heard of simultaneous briefs in which only one side has an opportunity to reply, have you, Mr. Reynolds?

MR. REYNOLDS: I can't say that I have. I can't say that I've

JUDGE GROSSMAN: If it's seriatim, someone goes first.

MR. REYNOLDS: Let me suggest this.

JUDGE GROSSMAN: The other party goes second and every party has a chance to reply.

MR. REYNOLDS: I would suggest that process would condense time limits.

JUDGE BLOCH: What about seven days for applicant, additional five days for interviews?

MR. ROISMAN: I'd rather do simultaneously and reply. I'm nervous that he seems to want to reply and not give me,

I'd like to reply, I'd like to do it simultaneous and pre-file

JUDGE BLOCH: Under the rules, he gets the right to reply.

MR. ROISMAN: Yeah, I understand, but I'm proposing what Judge Grossman has suggested, we do it simultaneously.

JUDGE GROSSMAN: Wait, I haven't suggested simultaneous briefs. All I've said is when it's simultaneous, both parties have a chance, all the parties have the chance to reply.

MR. ROISMAN: Delay has been the main.

JUDGE GROSSMAN: I haven't suggested that that's how we do it.

MR. ROISMAN: Delay have been made the major consideration, simultaneous filing over five weeks can't delay anybody.

MR. REYNOLDS: We feel that we would be unduly prejudiced if we didn't have the opportunity to file a reply. We think the Board should adopt the order of presentation in the rules, but condense the time limits.

JUDGE BLOCH: Okay, what time limits do you suggest?

MR. REYNOLDS: Seven, 12 and 15.

JUDGE BLOCH: I know it's acceptable for, well, you don't like the idea that you've got, that he's got the only reply. YOu will have the right to object to the reply,

if it goes beyond being a reply.

MR. ROISMAN: I understand. I know

JUDGE BLOCH: That means it's a reply to new matters that were raised that he couldn't have anticipated.

MR. ROISMAN: Just for the record, I understand that this is $8 million process we're using here. My process would have ended in seven days, his is gonna take 15. Just want to see what the value is of the reply if it's $8 million worth of

MR. REYNOLDS: We've already spent $60 million on your discovery, Mr. Roisman. It better be worth it.

MR. TREBY: Well, if we're doing that, we have no problem with their just being three days after we hear from them, but I guess we'd like it to be three business days. I don't want to find that we're getting these things served to us on Friday, and we have to file our thing on a Monday.

JUDGE BLOCH: We need four numbers, you gave me three, right? Seven, 12, 15. 15 also, simultaneously with the staff? Or do you want to wait until after the staff? 18?

MR. TREBY: If we can have a moment.

(Brief Recess.)

MR. BELTER: After applicant, but at the same time as intervenors.

MR. TREBY: No, because there's no way we could then respond to the

JUDGE BLOCH: You know, I wonder if you're really overplaying the need for this much process, given the fact that you will have had the proposed findings of fact based on all the evidentiary depositions before you ever went to the hearing.

MR. TREBY: I hadn't heard that we had

MR. REYNOLDS: No, I hadn't either, that's okay. My schedule is too long.

JUDGE BLOCH: That's the basis for shortening up the period after hearing. That's what we're talking about. Mr. Roisman has said, if we prefile findings of fact, two weeks then we can cut, he suggested, simultaneous briefs, one week after the hearing.

MR. BELTER: I hadn't understood that was the entire basis for it. I thought we were ready to go ahead and do that in any event.

JUDGE BLOCH: No, that was the basis for it. Because you've already spent the time, so carefully preparing for hearing, and setting up the basis for focused hearing, that you're not gonna have to have much difficult, much time to amend what you've done after the hearing's over.

MR. REYNOLDS: Well, if that's the case, you're not indicating the Board has ruled that that's the way it will

be, or are you?

JUDGE BLOCH: No, but that's the suggestion and I think we lean towards it. Because of the possibility of saving hearing time and post-hearing time.

MR. REYNOLDS: If that's the case, then I didn't understand that. I would suggest that perhaps the time should be five days, seven days, 10 days and 12 days. Five, seven, 10 and 12.

JUDGE BLOCH: Do the other parties accept that?

MR. ROISMAN: If the two were Saturday and Sunday, no.

MR. REYNOLDS: No, next business day.

JUDGE BLOCH: No, no,he means he wants two working days.

MR. REYNOLDS: Yeah, I agree with that.

MR. ROISMAN: The staff we're talking, working days.

MR. REYNOLDS: No, the staff has to work on weekends, Mr. Roisman.

MR. TREBY: Of all working days, now, you're talking about five, seven, 10 and 12.

JUDGE BLOCH: YOu want five calendar days, would you then have

MR. REYNOLDS: Five calendar days unless they fall on weekends, in which case you go to the next business day.

JUDGE GROSSMAN: Okay, you want five business days.

JUDGE BLOCH: That's the filing day, but he wants two business days, whether it ends on a weeknight or not.

MR. REYNOLDS: All business days.

JUDGE BLOCH: All right. That's five business days, two business days, three business days, and two business days.

MR. REYNOLDS: Right.

JUDGE BLOCH: Based on Federal service, counselor.

MR. ROISMAN: I assume we're talking in hand.

JUDGE BLOCH: Yes, they should be in hand on the end of the day on which they're due.

MR. ROISMAN: Not overnight, in hand on that day.

-- In hand on that night.

JUDGE BLOCH: Now, I guess, there still are some decisions to be made about the five week proposal, because I guess staff was objecting that even if we adopt the proposed findings, I guess, you didn't think the examination plan was also necessary, or what?

MR. TREMBY: No, what we had said that we didn't that, our inclination was that the cross-examination plan gave you the focus that the proposed findings were and we would have suggested that you not

JUDGE BLOCH: Go the other way.

MR. TREMBY: But if you're gonna do the proposed

findings, then I'm not sure you do need a cross-examination plan and I also have some question whether or not you need to have this time in their promotions for summary dispositions.

JUDGE BLOCH: There's no extra time for that. That's simultaneous, right? The summary disposition with admissions is simultaneous. If you want to file it, you can, if you don't want to, you don't have to.

MR. ROISMAN: Five items that occur two weeks out, of which you had suggested using only four, but not the proposed findings.

MR. TREBY: The staff had proposed using four and then wished it would modify that to say using only three. Or gotten rid of some of the disposition also. I guess, to cut through all this, the staff doesn't see why we need to go five weeks out. They don't see why we can't go into hearings three weeks out. And what I understood was gonna be happening on the fourth week, was the Board's ruling on the motions for summary disposition and since we don't think that there's much chance that a motion for summary disposition filed three weeks or four weeks for a hearing, is going to be ruled upon favorably by the Board. That we don't see why you con't go to hearing three weeks after.

JUDGE GROSSMAN: Okay, and again, I think Judge Bloch

has stated that the reason that we're going this route is that we think it's gonna save time in the long run, both post-trial briefing, but primarily I think hearing time. That if we have all these things submitted in that five week period, we'll have everything focused much better and you'll cut probably weeks off the hearing

MR. BELTER: So we would go three weeks, hearing three weeks after depositions.

MR. ROISMAN: I'd like to have some clarification on what it is that this staff is proposing. I'm not clear that I understand. To file something two weeks after the depositions, does anybody have a chance to reply, whatever that thing is that we file, before the hearing starts, just filing papers without regard to reply.

JUDGE BLOCH: Well, the only things that needed a reply, as I understand, was the request for admissions, right?

MR. TREBY: Right.

JUDGE BLOCH: And if that was struck, then there's no need to reply.

MR. ROISMAN: No, there's the summary judgment motion, and the proposed witnesses for hearing. If the depositions have been evidentiary, then the parties, if you want to object, if you want to say this person shouldn't have to go back, that everything that they should have said

they could have said. I'm trying to figure out if we're gonna use the element, the five or four or three elements. Some of them, some party

JUDGE BLOCH: Of course, you could always object to the proposed witnesses at trial, too.

MR. BELTER: I would suggest that we have three weeks between depositions and the trial. For one week after the depsoitions are concluded, these five items will be filed.

MR. ROISMAN: It's not realistic.

MR. BELTER: Summary disposition motions and proposed findings of fact can be worked on as you go along.

MR. TREBY: They can be, with more staff.

JUDGE BLOCH: I don't think taking an extra week after the proposed findings, when you're gonna save time post-trial.

MR. BELTER: Well, have we concluded now that we are gonna have proposed findings in advance?

JUDGE BLOCH: I think if we get this five, seven, 10, 12 day schedule at the end, that's quite a savings.

MR. BELTER: Well, I don't think we need five weeks between close of discovery and commencement of hearings.

JUDGE BLOCH: I think we may be able to narrow that, but I think we do need a two weeks, for proposed findings. It seems to me to do that in less than two weeks

would be to cut down on the quality of it and take away alot of the possible advantage of it.

Identify exhibits and testimony, right? In addition, prefiled testimony, I'm not sure that you need under those circumstances any type of response. If the witnesses are improperly noticed because they don't meet the criteria we've set up, just object at trial.

So that we could have two weeks for proposed findings and go to trial. Either one week or 10 days later

MR. TREMBY: One week or ten days later would be

MR. ROISMAN: What do you want to do with summary judgement responses? File them at the time trial starts?

JUDGE BLOCH: Say that if you're really gonna have a crack at summary disposition, you better try to file that at about the time that the testimony stops, rather than at that two week period. You can file them anytime, or you can file them at the end of the, you know, just a couple days after the depositions stop.

I guess what, you'll be especially for Case, which has control of calling the staff witnesses, the applicant's witnesses first. I don't think it should be a major trouble. I think allowing extra tim for summary dispositions is an unnecessary element.

MR. BELTER: If we follow the normal rules, I understand, it Judge Bloch. Summary disposition motions having

to be filed 15 days in advance of hearing, how about establishing a 10 day response time to any summary disposition motions and expect rulings early on in the hearing. If there are any.

MR. ROISMAN: It's very difficult to predict now, if the hearing is, the process is embraced by the parties then the size of the hearing is small, the amount of papers that one can prepare and file before the hearing, oppositions to motions, what have you, relatively easy. If the process is not embraced, and the hearing is a four week hearing, trying to respond to a substantial flood of summary judgment motions make it impossible for Case to do a competent job, either responding or preparing for the hearing.

MR. BELTER: You misunderstood. I suggested that the summary disposition motions, summary judgment motions, have to be filed 15 days in advance of the hearing. And you'd have to respond if 10 days were also asked, five days in advance of the hearing, so that there wouldn't be any of this busines going on during the hearing.

MR. ROISMAN: I'm not talking about the hearing, I'm talking about a little bit of preparation for the hearing, I don't mean problem preparing in short order for one week hearing. It's alot different than preparing for a five week hearing. I can't say now what that is and I

don't want to be put in the position of a summary judgment motion going by the wayside because I can only devote three hours to it, because I've also got to be getting ready for the hearing on a very broad range of issues. And it's difficult to know that right now.

MR. BELTER: Why don't we just leave summary judgment out of it. We have a severe problem in accordance with the rules.

JUDGE BLOCH: That's what I was gonna suggest. Incidentally, I'm not certain whether I would construe the hearing as starting, when you started taking these depositions as opposed to when you go into public sessions, since we're treating them as evidentiary and it's a mixed question to me.

I would hope there would certainly be no attempt to burden anybody with numerous summary dispositions.

JUDGE GROSSMAN: Yes, see, now that's a thought that occcurred to me. We're having those double sessions here, I say we, I mean the parties and then you file, any party files a motion for summary disposition, I don't see how you can expect the opposing party to respond to that.

I mean, I don't

MR. BELTER: Judge Grossman, I think I have one really specific incident in mind. I don't know what else would come up, but on the basis of some of the limited

appearance statements that are in here, I can anticipate the possibility that we may take several depositions of some of these potential case witnesses and find that their only allogations, the only things they're talking about are attempts to intimidate craft, which we have a rule they're not

JUDGE BLOCH: I'll bet you can reach a stipulation on that.

MR. BELTER: I think we can take those out. I don't know whether we can or not.

JUDGE BLOCH: I bet you can take them out of stipulation.

MR. BELTER: Well, I would hope we could. I'm really, looking for a vehicle to take care of that and I don't know what else might come up, but there ought to be some vehicle for

MR. MIZUNO: The problem, I guess, the staff has on very good intentions by applicants, it's just that for whatever reason, very good reasons, we ended up with alot of summary dispositions motions in the QA area and it frankly has overloaded staff, now. Although, for whatever reason, this instance, it might end up with applicants wanting to file summary dispositions on many of these matters at the end and

JUDGE BLOCH: I think that's what we all imagined.

Now that Mr. Belter has spoken, I don't think that's what he anticipated.

MR. MIZUNO: I hope not.

MR. BELTER: I think, try, that's the only thing I have in mind. I understand, I've seen others working on it.

MR. REYNOLDS: May I make a suggestion? Looking at the calendar, we start discovery on July 2nd, which conveniently is a Monday, but we close on September 2nd, which is a Sunday. I would suggest August 31st, the last Friday, would be appropriate.

And then the hearings would be scheduled to commence on the 24th of September, which is a three week interval between close of discovery and commencement of hearings.

JUDGE BLOCH: That's the schedule that the Board adopts.

MR. REYNOLDS: I would state that that's with the opinion that it ought to be possible to do the entire hearing in no more than two or three weeks. If the Board should be far off in that judgment, we hope we can be told becaues we would consider allowing further prepration. We would hope that you could complete a hearing in a week to 10 days.

JUDGE BLOCH: Well, that would be even better.

MR. REYNOLDS: And those dates that I suggested and you adopted, would move back in time, day for day, with an expedition of completion of discovery. Discovery is completed on August 21st, and we pick up 10 days in the whole process.

JUDGE BLOCH: That's correct.

MR. ROISMAN: May I just ask in the spirit of the day, for motion for reconsideration? On the five, seven, 10, 12 business days, since our whole affirmative filing will be coming at the seven day, and only a reply at 10 day, I'd like to propose that the seven be made an eight, so that we are three days after receiving applicants to do our whole affirmative filing which includes of course both the reply and

JUDGE BLOCH: YOu want five, eight, 11, 13?

MR. ROISMAN: No, no, five, eight, 10 and 12.

JUDGE BLOCH: Well, that's up to the staff as to whether they can turn it around.

MR. ROISMAN: We'd like three days

JUDGE BLOCH: Five, eight, 11 and 13.

MR. ROISMAN: The staff attend, are they the ones who attend there?

JUDGE BLOCH: Yes. Five, eight, 11 and 13 business days. Okay, we have a matter of an arbitrary cut off date for discrimination incidents that the Board is familiar

with the filings on that, does not think that oral argument would be particularly productive. We establish today as the artificial, arbitrary cut off date, subject to extension for good cause.

That means that items that might occur after today should be other than merely repetitious, they should be something special or suggestive about them.

MR. ROISMAN: You're talking, by items, you mean events?

JUDGE BLOCH: Events, well, yes, events.

MR. ROISMAN: Somebody who we learn of for the first time tomorrow who says of something that happened last week, that's not covered, it's something we learn next week that says on Saturday something happened.

JUDGE BLOCH: Events occurring after today, which require some showing of good cause.

MR. ROISMAN: May I ask a question on that? I had some problem with sort of just understanding the concept of the cut off in the context of the March 15 ruling. Are you saying that there will be a unique burden on the party who comes forward with some harrassment incident that they wish to have put in, different than would have happened if the harrassment incident had occurred yesterday?

JUDGE BLOCH: That's the object. The object is to somehow try to accommodate the need to be able to get a full record of harrassment, with the possibility that other

events that occur after this may be merely cumulative, but because of their late occurrence, trial of them might delay the plan. If you have something that's really special in that it really adds significantly to the record, that's the kind of good cause showing that I'm talking about.

If it's one other individual who's allegations are almost the same as 20 others you're already going to introduce, it won't add much.

MR. ROISMAN: Just to clarify, can you tell me, I understand if I come in with someone who says that event that X talked about, I saw it too. That's cumulative. What if we have somebody that's

JUDGE BLOCH: That's a previous event. That's no problem.

MR. ROISMAN: All right. But if it's a new event, what, I don't understand, what is cumulative of in the context of proving pervasiveness? You mean it's the same man as now, has done the same thing to QC inspector number 33.

JUDGE BLOCH: That would certainly be cumulative. I can imagine some intermediate cases, depending on how blatant the situation is but, suppose someone comes in, he says, you know, those guys were always pushing me hard on the job and they really didn't want me to report things.

And you've already got 12 witnesses who say that.

MR. ROISMAN: Would it be fair to assume that it would be a remarkable event should the Board conclude as to one of those proffered and rejected that as to the very thing the proffered and rejected was related to the weight of evidence was not enough to carry the point. That would not occur that the Board would rule that one of these cumulative ones was out and then on the very issue that the cumulative one wanted to come in on, that there wasn't enough evidence in the record to carry the point.

I can understand the Board saying the point, no matter how many people said it, doesn't rise to enough for us to be concerned with, but I would think it would be somewhat unfair.

JUDGE BLOCH: It's a good argument to make when you file your good cause.

MR. ROISMAN: All right, okay.

JUDGE BLOCH: Mr. Mizuno?

MR. MIZUNO: Did we get put on a schedule with actual conduct at the hearing, such as five days, six days, a week before the hearing?

JUDGE BLOCH: I see, since we anticipate no more than than a three week hearing, I think we should, I think we should plan five day weeks. Okay?

MR. REYNOLDS: We agree.

JUDGE BLOCH: Why don't we, when we get closer, and can estimate the number of days, if we're gonna have eight days, it seems kind of silly to go, well, let's see how it's gonna go.

JUDGE GROSSMAN: Well, let's put it this way, I prefer three four week, three four day weeks, than three five day weeks, but that's as far as I'll go.

MR. REYNOLDS: Well, I think we all agree with that. But we don't prefer four four day weeks.

JUDGE GROSSMAN: Yeah, I understand.

MR. ROISMAN: I would also submit, just for the record, that if it came to it, under those circumstances, I'd rather have one six day week than a five day week and a one day week.

MR. REYNOLDS: We can finally agree on something.

MR. ROISMAN: When all you've got's the hearing, you do the hearing.

MR. REYNOLDS: Sure, I agree with that.

JUDGE BLOCH: The pre-hearing conference is adjourned. Thank you very much.

CERTIFICATE OF PROCEEDINGS

This is to certify that the attached proceedings before the NRC COMMISSION

In the matter of:

Comanche Peak Steam Electric Station, Units 1 & 2

Date of Proceeding: June 14, 1984

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original transcript for the file of the Commission.

Barbara J. Becker
Official Reporter - Typed

Barbara J. Becker
Official Reporter - Signature