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ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:

TEXAS UTILITIES GENERATING COMPANY

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

REPLACEMENT
COTTON CONTENT

Location: Bethesda, Maryland

Pages: 14,015-14,180

Date: Monday, August 27, 1984

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1 ORIGINAL
2 UNITED STATES OF AMERICA
3 NUCLEAR REGULATORY COMMISSION

4 BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

5 -----X
6 In the matter of: :
7 TEXAS UTILITIES GENERATING : Docket Nos.
8 COMPANY :
9 (Comanche Peak Steam Electric :
10 Station, Units 1 and 2) :
-----X

11 3rd Floor
12 4350 East West Highway
13 Bethesda, Maryland

14 Monday, August 27, 1984

15 Hearing in the above-entitled matter convened at
16 2:30 p.m.

17 BEFORE:

18 JUDGE PETER BLOCH, ESQ.
19 Chairman, Atomic Safety and Licensing Board
20 U.S. Nuclear Regulatory Commission
Washington, D.C.

21 JUDGE ELLEN C. GINSBERG
22 Member, Atomic Safety and Licensing Board
23 U.S. Nuclear Regulatory Commission
Washington, D.C.

24 JUDGE HERBERT GROSSMAN
25 Member, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C.

1 APPEARANCES:

2 On behalf of the Applicants:

3 WILLIAM A. HORIN, ESQUIRE
4 McNEIL WALKINS II, ESQUIRE
5 BRUCE DOWNEY, ESQUIRE

6 On behalf of the NRC Regulatory Staff:

7 STUART TREBY, ESQUIRE

8 On behalf of CASE:

9 BILLE GARDE, ESQUIRE
10 ANTHONY ROISMAN, ESQUIRE
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1 to do presented in abstract form very quickly?

2 MR. TREBY: Yes. The staff made this motion
3 because we do not believe that the Intervenors have
4 met the test which they had indicated they were going
5 to meet to show some sort of connection between the
6 staff's action or inactions and the issue in this
7 proceeding which is whether or not the applicants have
8 in some way committed intimidation or harassment of
9 their workers so as not to comply with the, their QA/QC
10 Program.

11 We have, since we filed our motion, received
12 a copy of the applicant's response, dated August 27,
13 1984. In their response the applicants indicate that
14 they would support a motion that there be summary
15 disposition on the question of whether or not the
16 staff actions or inactions are relevant to this matter
17 and they would clearly indicate that they don't believe
18 it is relevant based on their analysis contained in
19 their motion which indicates that the Intervenors
20 had indicated that they were going to make available
21 a number of witnesses, I believe the applicants indicate
22 14, that of those witnesses, the only ones who were
23 made available were Mr. Colton and the Board has
24 already ruled on that matter. And the only other
25 witness would be Mr. Henry Steiner, and the applicants

1 indicate that with regard to Mr. Steiner they don't
2 think that his testimony supports any connection with
3 regard to staff actions or inactions.

4 We agree with those, that portion of the
5 applicants' motion. The applicant goes further and
6 indicates that they do not believe it would be
7 appropriate to strike the testimony of Doyle, Hunnicutt
8 and James E. Cummins because they believe that it
9 serves a purpose to put some sort of contextual frame-
10 work into what we have referred to in this proceeding
11 as the tee-shirt incident.

12 Upon reviewing the staff's pleading in those
13 depositions, we concur that it does have some value
14 in providing some sort of contextual framework. In
15 view of this discussion that I've just gone through,
16 I guess I would agree with the applicant's filing in
17 that we believe that the Board should grant summary
18 disposition on the question of whether the staff's
19 action or inaction in any way affected the applicant's
20 QA/QC Program or contributed to what has been referred
21 to as some sort of an atmosphere of intimidation at
22 the site, but we would not object to the staff's
23 testimony being in there for contextual purposes.

24 JUDGE BLOCH: So, I'm to interpret the
25 motion as a motion to limit the use of the testimony?

1 Is that basically it? I mean really isn't a summary
2 disposition motion in a traditional sense?

3 MR. TREBY: That's true. It's, it's, the
4 testimony relates to providing a fuller record for the
5 Board with regard to the tee-shirt incident but the
6 staff still is firmly of the view that what actions
7 or inactions the staff may have played is not an issue
8 before this Board and that there has been no showing
9 on the parts of the Intervenors that there is any
10 relevance of the staff's action or inaction based on
11 the record which has already been developed in the
12 depositions.

13 JUDGE BLOCH: My sense is that the best
14 party to go next if it can limit itself to only new
15 matters is the applicants. The staff seems to have
16 summarized their written argument quite well. Is there
17 anything additional that the applicants wish to add?

18 MR. DOWNEY: Yes, Your Honor. Actually, I
19 thought of us as being the sidelines in this one, but
20 I'll be happy to address the motion.

21 JUDGE BLOCH: Well, if you'd prefer to be
22 on the sidelines, that can be arranged.

23 MR. DOWNEY: All right. I will, I'm afraid
24 I always have, can't resist the temptation to make my
25 point.

1 As I understand the way this issue arose,
2 Your Honor, the issue of staff misconduct that was
3 at the June 15th and June 27th hearings before the Board
4 during which the Intervenor indicated that they were
5 establishing nexus between staff conduct and applicant
6 conduct at the site and that they would establish
7 that the staff action or inaction contributed to what
8 they have described at various times as the atmosphere
9 of intimidation at Comanche Peak.

10 Both the staff and the applicants objected
11 strongly to the inclusion of this issue in this
12 proceeding. I think both the staff and the applicant
13 articulated at the time we thought it was a Red Herring,
14 there was no evidence to support this issue and that
15 it better be alone so that we could focus on the true
16 issues in this case.

17 Since that time, we've had our deposition
18 round and (inaudible) where literally dozens of
19 witnesses testify. And of those witnesses, only two
20 of the promised 14 address this issue.

21 The first, as Mr. Treby indicated, is Mr.
22 Colton, whose testimony has been struck. The second
23 is Henry Steiner, and a summary of his testimony appears
24 in our pleading.

25 I don't think it's fair to say we've moved for

1 summary disposition. Rather, it's fair to say that we
2 ask the Board now to rule on the motion that was
3 originally made in June, June 15th, renewed on
4 June 27th and which I, which the Board referred only
5 on pending a review of the evidence.

6 In our judgment, that motion is now right
7 for consideration. Intervenors had their chance. They
8 failed to prove their case and can strike this issue
9 now would simply save the parties the trouble of
10 including this in the findings of fact and winding
11 it into the briefs and arguments on the other issues.
12 I think it's clear now this is not an issue and it's
13 time to close the record on the matter, strike it from
14 the case and move on to the issues that are in
15 contention.

16 JUDGE BLOCH: Again, I take it you're arguing
17 in support of what Mr. Treby suggested, that it be
18 in the case for context but not with respect to the
19 NRC's pattern?

20 MR. DOWNEY: Context is not the word that
21 we would use, Your Honor. It's clear from the transcript
22 of Mr. Cummins' deposition and from the pre-trial
23 testimony of Mr. Hunnicutt that they have knowledge
24 about the events themselves. And it's that knowledge
25 that we find relevant to this proceeding, not necessarily

1 that their testimony somehow places something in
2 context because they were participants. They were
3 there. They were observers. And for that purpose,
4 we think it's relevant. I don't feel that it's useful
5 to go through line by line and try to cross
6 out those parts that aren't relevant but simply a more
7 reconomical approach for the parties and the Court
8 is simply just to, to say NRC conduct is no longer an
9 issue. If it has anything to do with applicant conduct,
10 the parties agree.

11 JUDGE BLOCH: Mr. Roisman?

12 MR. ROISMAN: I'm a little puzzled by what
13 I'm hearing. The staff is unclear what its position
14 is. It seems to have shifted in, even in the course
15 of the discussions today. They've come up with a
16 summary disposition motion which the party who they
17 claim made it has now disclaimed that he's made it.

18 The party who was said to have made that,
19 namely the applicant, is now saying, well, I don't
20 agree with the staff, that we want it in for contectual
21 reasons but we want it in for other reasons.

22 Part of the problem I have is that the
23 parties are moving without papers with regard to an
24 issue of not inconsiderable importance. We are
25 prepared to respond as best we can under these

1 circumstances, but I will tell you that we have written
2 proposed findings on the issue of the staff conduct
3 or we think that the proposed findings support our
4 proposition which is that the staff's attitude and
5 conduct at the site and off the site through Region IV
6 was such that it put the whistle blower in the position
7 of feeling alone.

8 And the Hunnicutt testimony and the
9 Cummins testimony on their face demonstrate that that's
10 exactly what happened. Mr. Hunnicutt testified that
11 not once but at least three times the NRC was contacted
12 during the very course of the tee-shirt incident. And
13 on each occasion without any independent investigation
14 on its own, took upon itself to accept the word of
15 the Vice-President, Mr. Clements, who told them that
16 the situation involved certain internal personnel
17 matters.

18 Mr. Clements on this record has testified
19 that he was misinformed by Mr. Tolson about the nature
20 of the events that were actually transpiring and
21 that if he had been aware that the tee-shirts had been
22 worn on previous occasions during the week in which
23 this, the real event that we've been focusing on
24 occurred, that he would have acted differently than
25 he did.

1 What it demonstrates is and we think
2 demonstrates rather clearly is that both the resident
3 inspector and the Region IV people who looked at that
4 question take the applicant's word at face value and
5 take the word of the people who are on the site who
6 are merely employees of the applicant at substantially
7 less than face value. That is the essence of what
8 we are arguing.

9 Now, there's testimony from Mr. Taylor that
10 confirms that he recognizes that there were people
11 on the site who said that they were afraid to come
12 to his office because it was so visible at the plant
13 site and so forth, that he had not set up any
14 particular mechanism for them to reach him in a way
15 that would not disclose that. And all of that we
16 think indicates what it was that the employees
17 perceive.

18 JUDGE BLOCH: And, Mr. Roisman, if I
19 understand your argument, really what the NRC intended
20 or whether they did their job in good faith really
21 is irrelevant to your argument. It's the perceptions
22 of the employees at the plant.

23 MR. ROISMAN: Well, that's right. I'm not
24 trying to delve into or suggesting that Mr. Hunnicutt
25 was somehow or another evil or venal or any such thing

1 nor do I think our case depends on making such proof.

2 What we are trying to establish is from the
3 perception of the work force, what was there? Much
4 as you are going to look at the question, was the
5 management reaction to various things that workers
6 said reasonable and appropriate in the context, we
7 think also it's appropriate to look at the staff in
8 terms of evaluating what was going on down at
9 Comanche Peak during the time that this plant was
10 under construction? And that is essentially what
11 our issue is.

12 I do not have here with me only because of
13 just the, the logistics of it, our proposed findings
14 on this issue, and then I would be able to quote you
15 transcript references and the like. I'll be more
16 than happy to provide those tomorrow or Miss Garde
17 will. I'll be happy to provide those tomorrow over
18 the phone just so you can go look at those pieces, but
19 I think the better thing to do is, in my judgment, is
20 either the parties should make a real motion that
21 we're clear who's moving what and what their basis
22 is, and we will make a real response.

23 Secondly, the applicant...

24 JUDGE BLOCH: I understand the motion to be
25 one to strike for relevance, at least for the limited

1 purpose of demonstrating a problem.

2 MR. ROISMAN: But I don't understand what it
3 is they're striking. Both of them say Hunnicutt and
4 Cummins should remain in.

5 JUDGE BLOCH: What they're striking is the
6 use for the purpose of showing a pattern of conduct
7 by the NRC. Now, you, I take it, are disagreeing with
8 that, but I think what their purpose is is understandable
9 even if the words have been changed a little bit.

10 MR. ROISMAN: Well, if that is the purpose,
11 we would certainly like to have an opportunity to,
12 to at least give you the benefit of those transcript
13 references so you can look. Nobody else seems to have
14 done that, at testimony that we think shows that the
15 issue was logged.

16 Now, don't misunderstand me. I'm not
17 saying this is the single most powerful issue in the
18 case, but I think it's real. I don't think it belongs
19 in the strike and discarded category.

20 Miss Garde is pointing out to me that the
21 Atcheson findings are, similarly reflect this concern
22 we think. And, also, we want to make clear that the,
23 the applicant in its motion raises a point that we
24 would like an opportunity to respond to by affidavit,
25 and that is they say we can draw an evidentiary

1 implication from the failure of you to bring to the
2 hearing certain witnesses who you said you were going
3 to bring. We would like to submit affidavits from
4 either appropriate counsel or from the...

5 JUDGE BLOCH: Well, we can't do that. Your
6 decision whether or not to bring people doesn't give
7 rise to inferences in this proceeding.

8 MR. ROISMAN: Well, I think it's important
9 for the Board to know why your witnesses didn't come,
10 and I'd like to have them have that information.

11 JUDGE BLOCH: Then you're going to have to
12 submit some kind of evidence.

13 MR. ROISMAN: That's right. I'm going to
14 submit an affidavit.

15 JUDGE BLOCH: Well, I'm not sure if that's
16 appropriate under the proceeding we established.

17 MR. ROISMAN: Well, the applicant raises
18 the issue, Mr. Chairman. I don't see how we can just
19 ignore it. I mean they have, they have...

20 JUDGE BLOCH: I'm going to ignore it. I, I
21 don't see any credibility to your not producing a
22 witness. I mean if we had to explain why people are
23 not produced in this proceeding, we certainly would
24 never end.

25 MR. ROISMAN: Well, if the Board is going to

1 disregard it, that's fine, but I'm, I'm concerned that
2 the applicant puts a coloration on it that implies
3 something that is, in fact, demonstrably false.

4 JUDGE GROSSMAN: Mr. Treby, it seems to me
5 as though you are really asking for a partial summary
6 disposition on this issue, something that I think we
7 would have to allow the parties to brief and if that's
8 the case, do you think we'd be saving time by going
9 that route rather than just allowing the parties to
10 submit proposed findings and responses to it as they
11 normally would?

12 MR. TREBY: Well, I guess the staff is
13 somewhat in a dilemma in that the dates for filing is
14 rapidly approaching. We're talking about four days,
15 and I'm not sure that under the press of work people
16 would be able to file responses to other motions.

17 I think there is a saving if this matter is
18 eliminated because then it is one less matter that
19 needs to be put in the proposed findings. On the
20 other hand, I would agree with what Mr. Roisman has
21 said. I don't think it's the major part of the
22 findings by any...

23 JUDGE GROSSMAN: And also one more item to
24 be appealed, also, if we go your route without allowing
25 the parties to have their say on the matter.

1 MR. TREBY: Well, I believe the parties have
2 had their chance to have to stay. Mr. Roisman
3 represented during the various pre-hearing conferences
4 we had before we went down for the evidentiary
5 depositions, that he would be able to show some sort
6 of a nexus between the staff actions or inactions and
7 what was being perceived by the workers at the plant.

8 In our pleading, we have pointed to the two
9 tee-shirt witnesses, and we find nothing in their
10 depositions that did that. The applicants in their
11 pleading have looked at the testimony of the, on the
12 other witness who came who had anything to say about
13 the staff, Henry Steiner, and have addressed whether
14 or not he made any showing.

15 The only other witness was Mr. Colton, and
16 the Board has stricken his testimony. I'm really at
17 a loss to know what testimony Mr. Roisman has made
18 references to that support some sort of a perception
19 on the part of workers with regard to the NRC.

20 (PAUSE).

21 JUDGE BLOCH: We understand this to be in the
22 nature of a motion to strike based on lack of
23 relevance. We think there's sufficient relevance, that
24 it should remain in the record, and you'll have an
25 opportunity to see the findings.

1 The next matter on the agenda is Intervenors
2 Motion to Strike portions of the testimony of Gordon
3 Purdy, Thomas Brandt and Tony Vega.

4 Mr. Roisman, it's your motion.

5 MR. ROISMAN: Mr. Chairman, I'm willing to
6 also include, if the parties are, the motion to strike
7 testimony of applicant that you've just gotten a copy
8 of and the parties got this morning.

9 JUDGE BLOCH: Is there any objection to the
10 remaining motion being argued at the same time?

11 MR. DOWNEY: No, Your Honor, not from the
12 applicants.

13 MR. TREBY: The staff has no objection.

14 JUDGE BLOCH: Please proceed.

15 MR. ROISMAN: Our position is stated in our
16 papers.

17 JUDGE BLOCH: Mr. Downey for the applicants?

18 MR. DOWNEY: Yes, Your Honor. My response
19 can't be quite as brief since I haven't filed a paper.
20 But our position, Your Honor, really, Your Honor, really
21 comes from the June 27, 1984 filing made by the
22 Intervenor.

23 And as you will recall, that filing is in
24 response to our request repeated several times formally
25 and in pleadings filed with the (inaudible) to have

1 the Intervenor identify those issues about which they
2 are going to cross examine our witnesses so that we
3 could properly interview them, prepare them, select
4 the appropriate materials for their review in
5 anticipation of the deposition.

6 To start now with Mr. Roisman's basic point
7 is that we had our crack. He cross examined these
8 witnesses and then we were obligated to re, on redirect
9 examination to ask them questions about the subject
10 matter.

11 I find interesting the use of the term
12 redirect since there was no direct examination to
13 begin with. But putting that aside, starting with the
14 Brandt motion...

15 JUDGE BLOCH: Our reporters have the same
16 problem with our transcripts. They can't figure out
17 what it is either.

18 MR. DOWNEY: Starting with the portions of
19 the Brandt transcript in the first motion, the first
20 item is the QA (inaudible). Wasn't listed as a subject
21 matter for Mr. Brandt's testimony in the June 27th
22 case.

23 The second matter, testimony about an incident
24 involving Mike Foot, not listed in the June 27th
25 pleading. Mr. Purdy, a matter concerning Linda Barnes.

1 The statement about Miss Barnes in Mr. Purdy's
2 description was limited to interference with Miss
3 Barnes' attempts to use proper documents in her
4 review. Now, look at...

5 JUDGE BLOCH: Without going through every
6 section, is it your, your contention that each of
7 these matters was a question of an incomplete under-
8 standing of the allegation at the time that you were
9 conducting your cross examination of your company's
10 witnesses?

11 MR. DOWNEY: Well, (inaudible) it would be
12 what Mr. Roisman calls redirect examination, but
13 not in every single instance, Your Honor, but in
14 virtually all.

15 JUDGE BLOCH: Would you argue that the others
16 were excused by the rush of the proceeding and the
17 need to prepare rapidly?

18 MR. DOWNEY: Well, that in part, Your Honor.
19 And second, there's a separate level before we even
20 get to that. Level one is we had no notice that was
21 the subject matter. And it's not in the June 27th
22 pleading.

23 Point two is they didn't ask about it in
24 their cross examination. So, we came back and put in
25 some items. For example, Mr. Vega was not, was not

1 examined on the tee-shirt incident during his deposition.
2 We came back and asked him some questions about this,
3 om the subject of the motion to strike.

4 JUDGE BLOCH: Okay. Now, that also is in
5 the nature of what we have understood as a direct case.
6 We had always talked about applicants putting on a
7 direct case.

8 MR. DOWNEY: That's correct.

9 JUDGE BLOCH: This is your direct case?

10 MR. DOWNEY: Well, now, with...well, it's
11 part of our direct case with Mr. Vega's testimony on
12 the tee-shirt incident. It's principally, Your Honor,
13 I guess four levels of argument.

14 One, it wasn't listed, and I could go through
15 point by point and identifies those points that were
16 not listed in their June 27th pleading.

17 Second, if it was listed, they didn't ask
18 about it. So, we didn't following the cross examina-
19 tion.

20 Third, to the extent they ask about it, it
21 was geared to finding out particular details of the
22 event that occurred, which is most cases (inaudible)
23 testimony as to which we objected.

24 In our part of the case, our affirmative part
25 as you correctly point out, we focused on did this

1 allegation come to these managers' attention and, if
2 so, what did they do about it, irrespective of whether
3 the allegation is true or not.

4 A good example of that is the allegation of
5 Linda Barnes. We don't think any of that is intimidat-
6 tion. Indeed, with respect to Linda Barnes, it is
7 my understanding they don't contend now that she was
8 intimidated, although the pleadings suggest that they
9 were going to do that.

10 But in any event, our focus was, what did
11 Miss Barnes say and what did Mr. Purdy do in response
12 to that? We still don't think she was intimidated,
13 but we think that Mr. Purdy took what really was a
14 frivolous complaint and dealt with it in a very serious
15 way. And I think that is relevant to, to this case.
16 So, that's our third level of argument, management
17 reaction to the allegations that were raised.

18 And the fourth and I'm sure and I can give
19 you an example of this, in the rush of things, we did
20 not cover every single point that perhaps we could
21 have. And a good example of that is with Mr. Purdy's
22 testimony, matters concerning Bob Bronson. I think
23 actually in the first motion that's the only such
24 item. Possibly some part of Mr. Vega concerning the
25 1979 survey (inaudible), but of the many items listed,

1 you only get to that level with two or three items in
2 the entire paper.

3 Now, as to, I'd like to address also
4 Mr. Purdy's part of the second motion that was filed
5 this morning. Mr. Horin will address the issues
6 raised concerning Mr. (inaudible), Mr. Telepat (ph) and
7 Mr. Johnson.

8 In this morning's paper the Intervenor sought
9 to strike certain parts of Mr. Purdy's testimony
10 concerning Linda Barnes, certain parts of his testimony
11 concerning Sue Ann Neumeyer and certain parts of his
12 testimony concerning the tee-shirt incident.

13 As to the tee-shirt, that's not a listed
14 item for Mr. Purdy. He was not examined on it, and it
15 simply now came our time to put on his part of the
16 story on that issue and we did it.

17 As to Miss Barnes and Miss Neumeyer, there
18 are, it's principally a management reaction to their
19 complaints, and I think in doing this, it's important
20 to note that both of these witnesses testified. And
21 insofar as I know, neither of them testified that
22 they were harassed or intimidated in any way. Rather,
23 they will corroborate certain things or prove that
24 other people were intimidated, although that wasn't
25 the original purpose for which they called them.

1 Because there were allegations at one time
2 raised by these two ladies, I think it's important to
3 show what Mr. Purdy did in response to those allegations
4 and we've undertaken to do that in his, his direct
5 examination.

6 Mr. Horin will now address the issues
7 concerning the panel of Mr. Liffert (ph), Telephat and
8 Johnson.

9 MR. HORIN: Mr. Chairman, as part of the
10 second motion which CASE filed this morning, they
11 moved to strike as impermissible redirect examination,
12 a portion of the testimony of Messrs. Calicut, Liffert
13 and Johnson presented as a panel.

14 Mr. Downey has accurately stated the
15 substance of the, of our response to this portion of
16 Intervenors motion also, specifically, the first level
17 of argument which Mr. Downey summarized is our basis
18 for opposing this motion. And that is specifically
19 that Intervenors had not identified the specific
20 allegations or the specific areas of examination in
21 which they intended to, to go into with respect to
22 Mr. Calicut, Liffert and Johnson in sufficient detail
23 that applicants were on notice as to what they should
24 prepare these witnesses for.

25 I think, also, Mr. Downey's third level of

1 argument is applicable here as well, and that is that
2 this deposition of these three gentlemen was presented
3 for the sole purpose of addressing applicant's direct
4 case, if you will.

5 JUDGE BLOCH: Mr. Horin, my problem here
6 is that as I read this motion and I got it just about
7 the same time you did probably, only Transcript 25,
8 Line 5, and Transcript 37, Line 12 are being challenged
9 for impermissible redirect. The rest is being
10 challenged for impermissible leading questions.

11 MR. HORIN: Yeah, and I'm getting right now
12 to the portion on impermissible redirect and that the
13 particular section to which they cite in that portion
14 of their motion concerns the testimony of Mr. Liffert
15 regarding a particular incident of harassment or
16 intimidation in his explanation of the specific
17 response which management took with respect to that
18 incident.

19 And the purpose of the testimony here is
20 to demonstrate what management's policy was, the
21 craft management policy was with respect to harassment
22 and intimidation and to demonstrate by illustration
23 through Mr. Liffert how that policy was implemented. And
24 that is, this testimony is presented for that purpose,
25 and it is not part of any particular allegation. It is

1 only coincidentally related to other allegations, but
2 it is presented for a specific purpose which applicants
3 believe is permissible and which is relevant to the
4 issues in the proceeding.

5 With respect to their motion with respect
6 to leading questions, applicants recognize that many
7 of these questions could, in the strict sense of the
8 term, be considered leading questions; however, we
9 believe that this is simply a consequence of the
10 manner in which this proceeding in these evidentiary
11 depositions have been taken in that applicants were
12 presented, in effect, with only on the last minute
13 with respect, presented with information regarding
14 particular allegations and in responding to those
15 allegations, to have, upon having adequate time to
16 prepare that, we gave CASE the opportunity to also
17 sit through these depositions and they declined to do
18 so.

19 I think that to whatever extent CASE may
20 believe that these leading questions may have
21 prejudiced them in some way, that is easily cured by
22 their opportunity to conduct cross examination of
23 these witnesses at the upcoming hearings.

24 JUDGE GROSSMAN: Mr. Roisman, excuse me, one
25 question. Were these leading questions objected to at

1 the time they were posed or were you not present at
2 these...

3 MR. ROISMAN: We were not present. This was
4 the pre-file direct that the applicant put in, and
5 it was taken when we were not there.

6 JUDGE BLOCH: The (inaudible) of the Board
7 and I hope I'm not slighting you, Mr. Treby. I want
8 to go back to Mr. Roisman. The (inaudible) of the
9 Board is that we do want to have an adequate record.
10 That's one thing. I also have some concern that, as
11 I understand it, there really was no direct case
12 presented by the applicants until these filed motions.
13 I may be wrong about that. You may want to correct
14 my point of view on that, but if we are concerned
15 about our adequate record and we are concerned about
16 an opportunity to present a direct case, shouldn't we
17 leave the information in the record that you're
18 moving to strike.

19 MR. ROISMAN: Okay. Well, let me, let me
20 deal with because I do want to deal with the generics.
21 I really think that the record speaks for itself, and
22 it's not a question of whether this question or that
23 question, I'm not going to argue that with you. I
24 hope that if the Board agrees with the principles that
25 I enunciate, it can then look at the details of whether

1 a particular question was or was not impermissible and
2 I don't see any use in us arguing about that.

3 First of all, let me, let me deal with the,
4 with the concern of the Board. The generic proposition
5 that you've expressed is one in which I could not
6 quarrel. It's one which has been presented by every
7 single Intervenor that has stood in front of every
8 single licensing board, in front of every hearing that
9 has ever been held in this agency and it has always
10 answered with the same answer: You had your bite at
11 the apple. Go home. It's time for a decision.

12 JUDGE BLOCH: It hasn't been answered in
13 this proceeding in that way.

14 MR. ROISMAN: Well, I'm delighted and I'm
15 delighted to have it done on behalf of a beleaguered
16 applicant as long as it's a principle that applies
17 to beleaguered Intervenor.

18 I don't think that the principle is a bad
19 one, that you're surprised a little bit. You weren't
20 quite prepared. Things are moving faster than you
21 could, but legitimately to do that, one has to look
22 at not only what happened but what the resources were
23 of the parties.

24 Now, the applicant here had enormous
25 resources potentially available to it. Whether it chose

1 to use them or not, I can't say, but I mean the
2 applicant went to go to the rate proceedings and find
3 out the kind of budget that the applicant asked for
4 this licensing proceeding and given the billions they
5 have invested, that's not surprising.

6 Nonetheless, with all of that, they come
7 here and they supplicate to the Board. They say, it
8 was too much for us. And we, in one place Mr. Downey
9 in a show of great candor, indicates, well, maybe we
10 made a mistake. You know, maybe we should have done
11 something we didn't do.

12 JUDGE BLOCH: That's the next motion.

13 MR. ROISMAN: That's right, but I...

14 JUDGE BLOCH: That's not Mr. Downey.

15 MR. ROISMAN: But the point is that, that
16 those arguments are made and you've heard them and
17 they're in the records of licensing hearings. They're
18 made by Intervenors and I can assure you with much
19 better basis than this applicant makes them.

20 If the Board's position is that the, getting
21 a complete record is really the most important
22 consideration, then you have my endorsement for that,
23 and I cannot quarrel with that.

24 I would say that based on that because I
25 consider that to be a new standard, not the standard

1 under which I practiced before this agency and not the
2 one with which the people who I have consulted have
3 had. And I'm not saying new to this hearing, Mr.
4 Chairman, but new to this agency. We, too, have some,
5 some things that slip through the cracks. We want
6 to have Mr. C. C. Randall brought to the hearing, and
7 we want to examine him on the issues. He has turned
8 out to be a very pivotal person. But we didn't call
9 for him before and, so, having not done so, I felt
10 like we were foreclosed.

11 If this is open, then we will ask for that
12 in the formal and appropriate way. Mr. Bennetzen
13 is being brought to the hearing to testify in a
14 limited questions dealing with what Miss Gregory
15 testified about. I would like Mr. Benetzen to tell
16 us about the events that led up to Mark Welch,
17 replacing him as the head of the Safeguards Building
18 Task Force on electrical investigations. I think
19 that is a very vital part of what we have (inaudible)
20 called the tee-shirt incident. We did not realize
21 where Mr. Bennetzen fit into this whole puzzle. He
22 is going to come to the hearing.

23 If the standard is in the rush of things you
24 should have a chance, we would like to have that
25 chance.

1 JUDGE BLOCH: Providing the parties have
2 acted in good faith and have attempted to present what
3 they could when they could, yes, I would far prefer to
4 error on that side to allow you some leeway and to
5 argue before the Board that you need the leeway than
6 to strike testimony that the applicants have
7 introduced because it was late. In fact, that is the
8 principle that we used on our earlier findings in this
9 case, where CASE didn't even file findings and the
10 Board, nevertheless, thought it was necessary for the
11 adequacy of the record.

12 MR. ROISMAN: Well, I'm, I'm delighted to
13 have that confirmed in this portion of the hearing and
14 although I don't think that responds to all of the
15 motion that we have, I agree that it responds to some
16 portions of it.

17 JUDGE BLOCH: I'd prefer on the motions to
18 strike for hearsay to wait until the time of the
19 findings to do that.

20 MR. ROISMAN: All right. I, I was torn,
21 actually, between that, and if I had not been going
22 through the, the pre-file...for instance, we had not
23 made any motions on the hearsay with regard to other
24 portions of, testimony of other witnesses. And one
25 reason for that is because of the almost endless number

1 of exceptions to the hearsay rule, someone may come up
2 with an explanation. I think Mr. Downey today came
3 up with an explanation for some of the testimony, why
4 I'm using it for this and not for that. And, frankly,
5 I put in the hearsay because I saw it. It sort of
6 jumped out at me, and I'm sitting there writing my
7 notes and I figured, well, if I know it, why shouldn't
8 you know it; right?

9 But let's talk about, let's, let's, let's
10 talk about this in a different context. I don't think
11 that the, that the applicant's position which is sort
12 of varied on the surprise position is a legitimate
13 one across the board.

14 Witnesses came and testified and seemed to
15 be quite knowledgeable about the subjects that they
16 were being asked about. Applicant is not made as I
17 think this board expected it to, a showing of surprise.
18 The mere fact even if, even if the witness...

19 JUDGE BLOCH: Okay. What about the direct
20 case problem? When were the applicants to present
21 their direct case?

22 MR. ROISMAN: I, I was going to get to that.

23 JUDGE BLOCH: Okay.

24 MR. ROISMAN: All right. I mean I'm giving
25 you my weakest argument first. I'm going to end up with

1 a real zinger here.

2 All right. So, I think, I think they should
3 have had to make a much better showing. We have
4 identified things that to us appear to be a replicate
5 of testimony that had already been introduced where
6 it looked to me like the witness is going back and
7 saying, well, on second thought, I've got an even
8 better answer to Mr. Roisman's cross than I gave the
9 first time. And I understood that that wasn't, I
10 mean that does seem to me to exceed even what I'd like
11 to see the impecunious Intervenor get as a right.

12 JUDGE BLOCH: Can't, isn't that...that sounds
13 to me like that's an invitation to destructive cross
14 examination. If they were really testifying on almost
15 exactly the same subject, then they went to talk to
16 their counsel and they have a slightly different nuance,
17 it sounds to me like you're up to showing that and
18 that that wouldn't be a bad thing for the record from
19 your standpoint either.

20 MR. ROISMAN: Yes and no. I mean with all
21 candor, I think that you're right. It makes for good
22 (inaudible). I don't think it necessarily makes for
23 good truths. We'll never get at the answer to the
24 question, what did your counsel really tell you you
25 should have said in answer to that question?

1 JUDGE BLOCH: No, because we will see, we
2 will see that the story was told once. It was told
3 again. We're obviously going to trust the first story
4 a little bit more than the second story. That's
5 logical.

6 MR. ROISMAN: All right. Okay. Well, let
7 me, let me move on, if you will, my better argument.
8 And since you're anxious, I'm anxious, too, to talk
9 about the direct testimony.

10 My understanding was direct testimony was
11 to be completed at the end of the second week of the
12 four week hearings. Now, Mr. Downey and I had a
13 private agreement and it applies to Mr. Vega, Purdy
14 and who's your third big guy?

15 UNIDENTIFIED SPEAKER: Brandt.

16 MR. ROISMAN: Brandt, excuse me. Mr. Vega,
17 Purdy and Brandt. And I told him during the course
18 of the second week of the hearings that since those
19 three people were going to be talking about an omnibus
20 group of things, some of which would be rebuttal
21 and some of which would be direct, that to the extent
22 that he was presenting direct testimony as to those
23 three people, I have no objection if they were to
24 postpone.

25 We all anticipate it in the fourth week, and

1 I'm not complaining that if they've got direct now,
2 they had to have presented it before the end of those
3 four weeks, but that, of course, does not apply to
4 Mr. Calicut, Liffert and Johnson, etc.

5 So, I believe that to the extent that we've
6 had an explanation here from Mr. Horin, that portions
7 of the Calicut, Liffert and Johnson testimony are
8 direct testimony, it is beyond the time period by
9 some substantial period with no agreement between the
10 parties to the contrary.

11 And I would request that the Board hold the
12 applicant to that, to that criteria.

13 Finally, about the leading question. I'm
14 not sure I understood what the applicant's excuse is,
15 but let me say this. Number one,...

16 JUDGE BLOCH: Basically, that you weren't
17 there to instruct them. That was the problem.

18 MR. ROISMAN: I had, the record will reflect
19 if you will look at the depositions that I did do
20 with Mr. Davidson, that not once but on numerous
21 occasions, I have explained to Mr. Davidson that he
22 has an almost uncontrollable urge to repeat what he
23 wishes the witness had said and then have the witness
24 say, yes.

25 I don't think that this testimony that we've

1 identified even remotely fails in the category of
2 useful information. It is Mr. Davidson saying something
3 and then saying to the witness, do you agree? And
4 the witness says, yes.

5 That is so leading that if it were used by
6 the applicant, if they attempted to rely upon it as
7 evidence in the proceeding, I think the Board would
8 have to say, no way. This does not represent the words
9 of the witness. This represents the words of a lawyer
10 as to what he wishes the witness would say.

11 So, I don't think it falls into the generic
12 category that you identified. We want to have a full,
13 complete record. We don't want a full, complete
14 record of Mr. Davidson's version of the facts. And, so,
15 I stick by my opposition and request that the identified
16 portions of the Calicutt, Liffert and Johnson testimony
17 that is really Davidson's testimony, be stricken.

18 And, so, that there's no question about it,
19 no parties doing any proposed findings on it and it's
20 out of the hearing period.

21 JUDGE GROSSMAN: By the way, could you just
22 explain one thing to me, any counsel, why these were
23 taken ex parte rather than with Mr. Roisman or some
24 other representative present?

25 MR. DOWNEY: Yes, Your Honor, I can explain

1 that. As you recall, we phoned the Board a week before
2 these depositions were taken and asked for precisely
3 that order, that is that we because of the constraints
4 of time, all lawyers that the Intervenor were able to
5 muster (inaudible) were occupied at all times up
6 until the end. We couldn't have put on any more
7 witnesses.

8 As it was, we worked until midnight into
9 1:00 a.m. some mornings taking depositions. I reported
10 to the Board then that we were unable to complete our
11 case and asked for three more days of three sessions
12 each in Glen Rose where we could all be present to
13 put on this testimony and obviate the need for cross
14 examination (inaudible) hearing.

15 Mr. Roisman opposed that and in response to
16 his opposition, the Board ordered us to present his
17 pre-file. Because of the constraints of time and
18 the very large number of witnesses remaining to be
19 put on, we chose simply to put on a direct examination
20 of (inaudible) Court Reporter, as the method for
21 doing that, filed those transcripts (inaudible).

22 JUDGE BLOCH: Mr. Horin, I suspect from the
23 way you presented this and the way Mr. Roisman has
24 addressed it that, in fact, we have a problem with
25 leading questions.

1 Could you describe to us the importance of
2 this testimony to the applicant's case, what it stands
3 for? I'm afraid we're not well enough versed in it
4 to know the substance of what we're talking about.

5 MR. HORIN: As Mr. Downey explained, a
6 portion of applicant's direct case, if you will, is the
7 demonstration of the policy which was in place with
8 respect to the treatment by management of allegations
9 of harassment or intimidation.

10 And applicants have presented through Messrs.
11 Calicutt, Liffert and Johnson evidence regarding the
12 policy that was in place in that regard and also, in
13 addition, to what...

14 JUDGE BLOCH: Well, to what extent does that
15 depend on say written documents that were circulated
16 throughout the plant? Is that the large, the largest
17 part of it (inaudible)?

18 MR. HORIN: In many instances, it is an
19 oral network. In other instances, there are written
20 documents, but it is extremely important with respect
21 to those areas in which written documents would not
22 even be expected to be used, communications from
23 foreman or from general foreman down to their foreman
24 and from foreman down to their individual workers as
25 to how this policy was actually implemented at the

1 site. And Messrs. Calicutt, Liffert and Johnson have
2 direct knowldge of the implementation of that policy
3 and the particular portion to which Mr. Roisman Objects
4 with respect to impermissible redirect is an example
5 by Mr. Liffert of how that policy is implemented,
6 taking one allegation and showing step by step how
7 it was dealt with by the various levels of management
8 and managing people.

9 JUDGE BLOCH: Off the record for a second.

10 (OFF THE RECORD).

11 JUDGE BLOCH: Mr. Horin, you didn't mention
12 who the gentlemen are, Calicutt, Liffert and Johnson.

13 MR. HORIN: Mr. Calicutt, just to refresh my
14 recollection, Mr. Calicutt is a general superintendent
15 of (inaudible) at Comanche Peak and one of the craft
16 disciplines.

17 Mr. Liffert is the assistant general super-
18 intendent. And Mr. Johnson is below Mr. Liffert. He
19 is a foreman, I believe. So, what we have are three
20 different levels of management at Comanche Peak who
21 are able to trace through each level, the implementation
22 of the policy of that management with respect to
23 harassment and intimidation.

24 MR. DOWNEY: Your Honor, if I could clarify
25 that. The purpose of offering this testimony was to

1 show how the policy against harassment and intimidation
2 of QC inspectors is implemented on the craft side
3 of the construction site.

4 We have lots of testimony elicited from
5 Mr. Roisman on cross examination of the witnesses about
6 how that works on the QC side.

7 JUDGE BLOCH: It's a policy of intimidation
8 of QC, I assume.

9 MR. DOWNEY: Yes. They say that the, how
10 they respond on the craft side of this policy, what...
11 if a craftsman has a dispute with the inspector, how
12 does that get resolved? What happens? If it gets
13 out of hand, what happens to the craftsman?

14 And that's the purpose of this testimony, to
15 show how the craft side of the house which, as you
16 know, the manner of construction is different, how
17 the craft side of the house implements the site wide
18 policy against intimidating QC inspectors.

19 MR. ROISMAN: Mr. Chairman, if I may, I just
20 want to add one, one thing and then I'm going to be
21 quiet on this because I think we've, we've really
22 talked about it enough.

23 I would urge the Board to read the transcript
24 references. This is, this is, it's not a question of
25 whether, although I think that's pertinent also, this

1 is direct testimony that came too late. These witnesses
2 were not within what I talked to Mr. Downey about.
3 And they were, by the way, at least two of them I think
4 were actually called as witnesses by us at an earlier
5 time. If they had something to say on this, the
6 applicant could have put it in then, but putting that
7 one aside, it is the portions we want to strike
8 because it is leading are not probative of anything.

9 Let me, let me just quote you one example to
10 give you an idea, give you a flavor of this, on Page,
11 I think it's 58. Yeah, 58. My copy has the page
12 numbers cut off. At Line 12. Mr. Davidson, so, in
13 other words, these two individuals with whom you had
14 had the discussion the prior evening and prepared a
15 letter or memorandum to Mr. Randall in which they
16 accused you of having said some unkind things about
17 Mr. Randall and also engaging in some kind of conduct
18 that they thought was improper. That's right. Is
19 that correct? That's correct.

20 Now, he's just taken this opportunity to,
21 to write his proposed finding on this.

22 JUDGE BLOCH: It sounds like there may be
23 a transcriptial error there.

24 MR. ROISMAN: Well, all I can do is read it
25 as it, as it appears, obviously, but my...

1 JUDGE BLOCH: Let me just...answer one thing.
2 Is that possibly a summary of something that already
3 was said because sometimes Mr. Davidson appears to
4 do that?

5 MR. ROISMAN: Yes, but then he asks the
6 witness to confirm it.

7 JUDGE BLOCH: Well, you know, what's the
8 harm? I mean we know that.

9 MR. ROISMAN: The harm is that he didn't
10 like the way the answer came out the first time and he
11 puts in his own nuances to it. And I do not want
12 Mr. Davidson, I want Mr. Davidson's testimony only if
13 he's going on the witness stand and I have my chance
14 to cross examine on it.

15 Otherwise, I want Mr. Calicutt, Johnson and
16 Liffert. Then I think that...

17 JUDGE BLOCH: How would you feel if we
18 allowed the testimony in but urge sequestration of
19 these witnesses at the hearing so you can cross examine
20 them independently?

21 MR. ROISMAN: I would be more comfortable with
22 you telling, with you striking all of this and giving
23 them the chance to come on the witness stand at the
24 hearing and be asked the questions properly and give
25 their answers.

1 I'm not sure that everything they said there
2 is something that I want to cross examine but I also
3 don't want to have it used as applicant testimony
4 when it's Davidson testimony.

5 I wouldn't object if they were brought back
6 to the witness stand and were asked the proper question
7 and then gave their answer in their own words.

8 JUDGE BLOCH: Would you mind if they did
9 that before the hearing without you and I being present?

10 MR. ROISMAN: No, but if Mr. Davidson does
11 it, this, this is of grave risk that it will happen
12 again.

13 MR. DOWNEY: Your Honor, may I address a
14 point or two? First, I would say that this is pre-
15 file testimony which we could have written and have
16 the witness swear to as is often the case of pre-file
17 testimony which we didn't do. We put on live
18 witnesses.

19 Second, I think that if the objection to
20 leading questions, and I think Mr. Roisman unfairly
21 has singled out this, Mr. Davidson's transcript for
22 that, we could go through the volumes of transcript
23 that his witnesses put on and bring out precisely the
24 same kind of examination.

25 Indeed, Mr. Goldstein's written testimony is

1 replete with such examination. Now, I don't really
2 care. If we want to put on these witnesses at the
3 hearing, we'll ask them the questions and they can
4 testify about them. If they want to let the evidence
5 in, in, let Mr. Roisman cross examine them, that's fine.

6 All I ask if you're going to (inaudible)
7 questions, leading questions, we're going to get through
8 this transcript with a magnifying glass and pull them
9 all out, and I'm going to start with Mr. Goldstein's
10 testimony.

11 JUDGE BLOCH: Well, let's deal with Mr.
12 Goldstein's testimony separately. That really isn't
13 relevant now. Mr. Treby, Judge Treby, would you
14 please rule on this for us.

15 MR. TREBY: My ruling, I guess, would be
16 that as has been pointed out, this is pre-file testimony,
17 and pre-file testimony, the very same information
18 could very well have been written and just to sworn
19 to by the witness.

20 I guess I believe that the, some of the
21 questioning does appear to be leading, and to that
22 extent, the applicants are I guess being put on notice
23 here that it appears to be not the testimony of the
24 witness other than the fact that he confirms it but
25 the testimony of the people who are questioning him.

1 And the Board will give it whatever weight
2 they think is appropriate and taking that into
3 consideration, but I, I really believe that to have
4 the applicants refile this testimony, putting it in
5 proper form is really just putting formal (inaudible)
6 because it will be, I expect, much the same testimony.

7 And with regard to the Board's suggestion
8 about sequestration, I guess I would oppose that. I
9 believe that that would be unduly burdensome, would
10 just take three times the time to get through this
11 panel than normally. And we have relatively a busy
12 week.

13 (PAUSE)

14 JUDGE BLOCH: We decided to allow the testimony
15 but the applicant should be aware that where the
16 testimony is elicited from leading questions, we may
17 give it very little weight.

18 And the witnesses must be made available
19 at the hearing for cross. In addition, because the
20 witnesses appear to have been led and we will read the
21 testimony to decide whether we think that the
22 representations of counsel are correct, but for the
23 time being I'm accepting your representation that the
24 witness was led. We'll try to get to that in the next
25 day or two, but assuming we do not change our mind on

1 that and notify the parties, we would like counsel
2 for applicants who have already briefed and led the
3 witnesses not to have further contacts with these
4 witnesses before the hearing.

5 MR. DOWNEY: Your Honor, would that, would
6 that apply also to the leading questions that were,
7 that we can identify for the witnesses for Intervenor
8 who we plan to call?

9 JUDGE BLOCH: You haven't demonstrated that
10 to us yet, and we will talk about it. As our next
11 subject...

12 JUDGE GROSSMAN: Wait, before...were there
13 any ex parte depositions submitted by the Intervenor
14 in this case?

15 MR. ROISMAN: No, just...one piece of, there
16 were two pieces of pre-file testimony, one of which
17 is a, is a witness who is, who is our witness, Dr.
18 Goldstein. Other than that, there was none.

19 JUDGE BLOCH: Why don't we go to Dr. Goldstein
20 next.

21 MR. ROISMAN: Mr. Chairman, I'd like to
22 request...

23 JUDGE BLOCH: Yes.

24 MR. ROISMAN: ...reconsideration of my
25 acquiescence in the schedule because Miss Garde advises

1 me that she, in order to catch a flight, must leave
2 here at 4:10 and the items on Mr. Downey's list is
3 6 and 7, are items that either she needs to be here to
4 hear or for me to talk to her about it.

5 JUDGE BLOCH: Okay. Let's go to the next.
6 Okay. What are the concern on the former findings?

7 MR. DOWNEY: Your Honor, that's an item
8 that I added to the list. It has to do with the
9 question about evidentiary...two points, really.

10 First, how do we note, if at all, matters
11 as to which there have been objections to the evidence.
12 I have received...I believe you spoke with Mr. Walter,
13 perhaps Mr. Roisman about this point. It's my
14 understanding that the Board's request is that we
15 note there's been an objection to the evidence that
16 we're relying upon.

17 JUDGE BLOCH: And also state your position
18 on it. That also would apply since we've asked that
19 the findings cover the principle points by the
20 opponents. Unless you're sure that the thing is going
21 to be excluded, you could address their principle
22 points and mention that they're also, that they're
23 relying on an objective piece of testimony.

24 MR. DOWNEY: If I may, Your Honor, I've got,
25 I'm having some difficulty with this concept. First,

1 in the last point you made, I really don't know what
2 the major points of the intervenors are. That may
3 sound as if I'm (inaudible) but I candidly don't.
4 They've shifted positions, as I see it, on various
5 issues, and I simply don't know.

6 My colleagues and I spend a great deal of
7 time trying to figure out their position on issues so
8 we can try and respond to your findings.

9 JUDGE BLOCH: Okay. You see, our, our
10 problem is that to help us at the final decision stage,
11 we're going to address all the principle arguments.
12 If you can't help us, you can't help us.

13 MR. DOWNEY: I can't, I can't, I can't help
14 you until I know what they are.

15 JUDGE BLOCH: Okay. Obviously, you cannot
16 write about what you don't know.

17 MR. ROISMAN: Mr. Chairman, I might add, we
18 have the same problem with, with Mr. Downey.

19 JUDGE BLOCH: I think there may be a
20 communication problem.

21 MR. ROISMAN: Which has not risen to the
22 level of harassment and intimidation. I think the
23 difficulty that he states and I would join him in
24 this concern is that, number one, out of this whole
25 volume of testimony that was elicited in the course of

1 the four weeks in Glen Rose and now the new volume
2 that was done during, during the applicant. there's
3 some of it which nobody will rely upon. I mean it
4 came out, you looked at it, you decided I don't care
5 for it very much.

6 If we were now to go through all the testimony
7 and earmark everything that if it were being "offered
8 in evidence", we would object to, then I think that
9 we would have a task that would exceed our capabilities
10 not only between now and the end of the week but between
11 now and the end of the year.

12 And I had always contemplated and I suspect
13 Mr. Downey and Mr. Treby did the same thing, that we
14 would take this transcript and we would not treat
15 everything as though it became your evidentiary record.
16 We would by identifying a proposed finding and telling
17 you transcript page so and so, basically say, I'm
18 offering that. I'm offering what I have relied upon
19 as the evidence for you to rely on.

20 Now, if you want to go and read something
21 else and say I want, I, the Board, want to rely on
22 this, then the parties would get some opportunity,
23 presumably, or since they made their objections, you
24 would see that they objected, that what you wanted to
25 rely on is hearsay or it was incompetent opinion or

1 whatever it might be.

2 When the parties submit their proposed
3 findings to each other which is all being done simul-
4 taneously on Friday, we would then at the conclusion
5 of the evidentiary hearing, we would then go back and
6 I would see that Mr. Downey relied on pages such and
7 such and such and such and either I did object or I
8 reserved objections as we did as to all of these. And
9 I'm going to now say he can't rely on that. That's not
10 competent testimony.

11 JUDGE BLOCH: Okay. If everyone wants to
12 proceed that way, the Board's not going to force it
13 the other way.

14 MR. ROISMAN: I just, I just think it's
15 the only plausible way. I understand why he doesn't
16 know exactly what I'm going to rely upon in there. I
17 don't know exactly what he's going to rely upon in
18 there.

19 JUDGE BLOCH: Well, I know...

20 MR. ROISMAN: You have to decide. We will
21 have told you what we don't like about his and I know
22 he'll tell you what he doesn't like about ours, and
23 I'm sure Mr. Treby will do the same for both of us.

24 JUDGE BLOCH: Well, I mean I know they're
25 going to argue that they took a variety of steps in order

1 to improve communications at the plant and they were
2 serious about that. I assume that somehow you're
3 going to address whether that was adequate, and you're
4 going to argue that the tee-shirt inspectors were
5 intimidated.

6 MR. ROISMAN: Yes, right.

7 JUDGE BLOCH: And you know the principle
8 reasons that they're going to argue that that happened
9 and that's the kind of thing I'm talking about where
10 you can address a principle argument of the other side.

11 MR. DOWNEY: Your Honor, I think for once
12 Mr. Roisman and I are in agreement.

13 MR. ROISMAN: He's said that about three
14 times in the course of the hearing.

15 MR. DOWNEY: It's been going on now for
16 twelve weeks. So, it doesn't happen often. I think
17 we were operating on the assumption that we would each
18 file findings and then challenge findings where we,
19 where I thought his evidence...

20 JUDGE BLOCH: Well, let's do it that way.
21 Let's do it that way, say everyone agrees. Is that
22 right, Mr. Treby? You don't care about that. You don't
23 have any findings?

24 MR. TREBY: Well, that...I think I may have
25 had a discussion with the Board Chairman, that I thought

1 that the whole record was not, the whole evidentiary
2 depositions were not the record and that we were going
3 to suggest those portions we thought should be the
4 record. And you disabused me of that.

5 JUDGE BLOCH: Well, I thought we could limit
6 the motion as to strike just to what people were
7 relying on. What I was suggesting, by the end of the
8 case, we're going to have to have people's comments on
9 the principle arguments made by the other parties.

10 MR. TREBY: I guess the only clarification I
11 want is just what portions of the depositions are the
12 record or are not the record. If I understood what
13 Mr. roisman and Mr. Downey just agreed with each other
14 about, we're going to have to look through their
15 findings wherever they cite a page and some lines, that
16 will be what they believe is the record. And we can
17 go through that and we may find that that's a relatively
18 small amount out of the 10,000 pages.

19 JUDGE BLOCH: That's correct.

20 MR. TREBY: I guess I had at one time invisioned
21 that people were going to go through the various
22 transcripts and say with regard to Witness A, I offer
23 transcript pages 1 through 6, 15 through 18, whatever
24 pages they offered and whichever ones they weren't going
25 to offer, they weren't going to offer them and there

1 wouldn't be an explanation.

2 JUDGE BLOCH: I think I'd prefer the concept
3 which is basically a concept of mandatory findings in
4 finding that the only thing that's going to be relevant
5 is the decision and therefore part of the record that
6 the Board will rely on is what people cite as findings.
7 And that's, I take it, what the applicants and CASE
8 have just agreed to.

9 Is that a problem, Mr. Treby?

10 MR. TREBY: No.

11 JUDGE BLOCH: Now, I take it that the staff
12 relies on a portion of the record. We will also include
13 that as record, of course, subject to our rulings on
14 objections.

15 MR. ROISMAN: As I understand the practical
16 steps that would be taken is that when we file, on
17 Friday we file the findings, the Board will then have
18 in front of it in advance of the hearing essentially
19 what the parties think proves their case, absent
20 whatever is going to develop in the hearing.

21 If the Board thinks there's something else
22 that we ought to be addressing that's out of, that none
23 of us pointed to, you will, as you've already done
24 on some occasions, say, hey, guys, why didn't anybody
25 talk about Jones over here and what he had to say?

1 And that at the end of the hearing when each
2 party files their final proposed findings as opposed
3 to their preliminary proposed findings, at that time
4 the parties would be expected to fully integrate in
5 whatever it was that the other party had said that they
6 thought was objectionable and why they thought it was
7 objectionable. You can't rely on this. That part of
8 the transcript doesn't prove it. The evidence you
9 rely upon was not proper to be received, etc.

10 And then when we do our replies after the
11 final findings are filed at the end, that will be just
12 to deal with what we've just learned about. We don't
13 wait on all of our objections to what we've learned on
14 the 31st until we do our post-hearing replies. We
15 do it in our initial presentation of our proposed
16 findings after the hearing.

17 JUDGE BLOCH: That makes sense, that the
18 objection should be made at those first set of findings.
19 And, of course, the...and we would have ruled out the
20 hearing on any objections in the course of the hearing.
21 So, that will wrap up the objections.

22 MR. DOWNEY: If I understand Mr. Roisman, he's,
23 we are in agreement, but let me...

24 JUDGE BLOCH: It's really simple. In your
25 proposed findings, you will file objections you have to

1 the reliance on portions of the record the parties
2 have said they're relying on.

3 MR. DOWNEY: In the post-hearing finding?

4 JUDGE BLOCH: In the post-hearing finding,
5 that's correct. They will only be allowed to rely on
6 findings that they have filed or on stuff at the hearing
7 itself, but it will be an obligation to state your
8 objections to portions of the record at the time of
9 your first post-hearing filing.

10 Mr. Treby, do you have a problem with that?

11 MR. TREBY: Well, I guess I had understood
12 Mr. Roisman to be saying that he intends to include in
13 his filing on Friday objections to the record.

14 MR. ROISMAN: No. No, I'm sorry, that's...
15 no. What I was saying was...

16 JUDGE GROSSMAN: His first post-hearing
17 filing.

18 MR. ROISMAN: My first post-hearing filing,
19 I will file whatever objections I have to whatever you
20 and the staff and the applicant identify on your
21 Friday filings as things that you rely upon that I
22 think were improper for you to rely upon, as well as
23 any other thing that I want to say to try to rebut that
24 based upon the hearing.

25 In other words, we don't do the post-hearing

1 findings as though there were no pre-hearing findings.
2 We do it with the knowledge that there were pre-hearing
3 findings and that that first post-hearing filing should
4 incorporate what we have to say about that, which would
5 make our reply findings much smaller and which is
6 senseable if you look at the times that we've set for
7 each other to do reply filings.

8 MR. TREBY: I anticipate that the staff is
9 going to be making some objections to portions of the
10 record in this pre-hearing findings. I guess what
11 I'm hearing...

12 JUDGE BLOCH: There's no bar to that. You've
13 got to do it by the first post-hearing finding if you
14 want to make it...

15 MR. TREBY: But you can do it both times
16 except that when we're doing the post-hearing ones,
17 we will then be on notice as to what it is that the
18 other parties have relied on.

19 JUDGE BLOCH: Yeah. The biggest problem
20 for the Board is that objections filed pre-hearing
21 may be to things that were not relied on by the other
22 parties, and we don't want to bother ruling on those.

23 Mr. Treby, on Item 7, could you first tell
24 us as well as you can the scope of what's going to be
25 done, hopefully, by the end of September by the staff

1 on this intimidation issue to set the stage for the
2 discussion of Item 7?

3 MR. TREBY: At the present time, the staff
4 has what is called a technical review team, consisting
5 of anywhere from 50 to more people on-site looking
6 into a very large number of allegations which they have,
7 number one, gleamed through looking at the record and
8 perhaps previously issued Office of Investigation
9 reports, the transcript and other sources.

10 In addition, they apparently have had some
11 contact with workers at the plant, I guess, and others
12 who are making allegations with regard to the
13 construction and the design process. And they are
14 looking into all of these allegations, and they have
15 compiled a very long list of them. And they have
16 divided them, as I understand it, into different areas
17 of expertise. For instance, electrical, piping,
18 structural, whatever the different categories may be.

19 It is my understanding that the schedule
20 called for them to be working on this matter the
21 months of July and August and compiling a report in
22 September. And they were hoping to issue a report by
23 mid to late September. And that is still the only
24 knowledge I have except that I understand from talking
25 with Mr. Baledo (ph), who is the, the leader of this

1 activity with regard to Comanche Peak, that he is
2 receiving new information from sources which he does
3 not identify to me and that he is looking into those
4 matters as well.

5 Now, what impact that has on his schedule,
6 he hasn't disclosed to me either, but I do know that
7 he's getting more information.

8 JUDGE BLOCH: Does the staff have a view
9 on whether we can or should close the record based on
10 the hearing we're about to hold?

11 MR. TREBY: The...I have some difficulty
12 answering that question because I understand, number
13 one, that the Office of Investigation has a number of
14 ongoing matters relating to the subject of intimidation.
15 And certainly the board order...

16 JUDGE BLOCH: Is that in addition to the
17 technical review team?

18 MR. TREBY: That's my understanding, although
19 they may be talking to each other.

20 JUDGE BLOCH: I understand that sometimes
21 happens in (inaudible).

22 MR. TREBY: Sometimes. Not necessarily with
23 staff counsel. So, there's a question of the OI
24 investigations and, and to what role they should play.
25 I have raised that question with the Office of

1 Investigation and also with the Director of Licensing.
2 And it's my understanding that there will be, if there
3 has not already been, a board notification giving the
4 Board some indication of what activities the Office of
5 Investigation is, is engaging in.

6 JUDGE BLOCH: Nothing recent.

7 MR. TREBY: Well, all right. Well, then,
8 hopefully it will be coming out in the near future.

9 JUDGE BLOCH: I guess the only way we...

10 MR. TREBY: I do know that the, Mr. Ipilioto(ph)
11 has engaged a number of different consultants. He's
12 engaged consultants relating to the technical review
13 that he's doing down there. For instance, he's going
14 to be incorporating into his report, as I understand
15 it, some of the work that the Brookhaven National
16 Laboratory is doing in the codings area. I understand
17 that he has gathered other consultants in a number of
18 other areas.

19 One group of consultants that I understand
20 that he has engaged were people with regard to this
21 question of intimidation in the sense that he did
22 request certain impartial consultants from the Idaho
23 National Laboratory, I guess. I'm not sure if I
24 understand the name of the organization. It's Idaho,
25 AG&E is the, what I'm always, the way it's always

1 referred to, to me, to look into this matter of
2 intimidation. And, and I understand that they have
3 engaged certain subcontractors who are knowledgeable in
4 construction practices and also a, a fellow by the
5 name of Newton Margolies (ph) who I believe is the dean
6 of some university out in California dealing with
7 management.

8 These people, after having signed protective
9 or non-disclosure statements, have been shown the
10 various transcripts of the evidentiary depositions, and
11 they are providing a report to Mr. Ipilioto.

12 JUDGE BLOCH: Well, to the extent that it's
13 based on the transcript, it can just help the staff
14 write it's findings.

15 MR. TREBY: That's true.

16 JUDGE BLOCH: That doesn't...but to the
17 extent that it's independent of expertise, it may be
18 useful to the Board, to the extent that it's
19 information that's beyond the scope of our record.

20 We either have to consider it, don't we, or
21 we have to be assured in an evidentiary quorum that
22 it's not relevant to the decision in the case?

23 MR. TREBY: That is correct.

24 JUDGE GROSSMAN: Well, you're not suggesting
25 that we could close a record without having some sort of

1 wrap-up on this, on these investigations, are you? In
2 other words, we do have to wait before we close the
3 record or at least not to close it categorically until
4 we do have something from these investigations, don't
5 we?

6 MR. TREBY: Well, it seems to me the Board
7 has two choices. It can, number one, close the record
8 with the provision that the record can always be
9 reopened if some, if this information comes out and is
10 shown to be significant and the appropriate motion is
11 made by a party, including the staff, that the record
12 should be reopened. And that this...

13 JUDGE BLOCH: Because I think, I think
14 as a prerequisite to that, we need some kind of
15 assurance as to what it was that was pending.

16 MR. TREBY: Right, that is possible.

17 JUDGE BLOCH: (Inaudible) investigations
18 pending into three things that really matter while the
19 rest of the stuff doesn't matter. I mean we would
20 be foolish to close the record, wouldn't we, in that
21 case?

22 MR. TREBY: In my view, you would be, but I

23 ...

24 JUDGE BLOCH: I think we have a picture of

25 ...

1 MR. TREBY: On the other hand, I guess the
2 Board can continue to pursue the hearings, the various
3 findings, that the Board has in the past reached
4 certain conclusions on matters even though the record
5 has not yet been closed, and I guess to the extent that
6 it was assured that whatever the staff was doing wasn't
7 going to affect that, it could continue along that
8 road, although not formally closing the record.

9 JUDGE GROSSMAN: See, I wasn't suggesting
10 that we would stay the proceeding now, Mr. Treby. So,
11 don't worry about that.

12 MR. TREBY: And I do want to alert the
13 Board, as I have I guess in various pre-hearing
14 conferences, there is a very large effort going on by
15 the staff. I think I've also previously indicated that
16 at this point the staff, the technical staff, staff
17 counsel's client has advised staff counsel they don't
18 have a position on the question of intimidation which
19 has been a problem that we have had in this proceeding
20 in the sense that we have not offered direct testimony.

21 And my understanding is we will not have a
22 position until the technical review teams effort is
23 completed.

24 JUDGE BLOCH: Now, while we are on the
25 record in this case, Mr. Treby, on the pre-critical

1 testing motion, what we anticipate is that if the
2 applicants file, that we will get a staff comment on
3 the merits of whatever they file. That's (inaudible).

4 MR. TREBY: That's right. Now, I guess
5 one of my questions is I don't know the staff...well,
6 I don't know whether the applicant has filed. Are
7 you talking about...

8 JUDGE BLOCH: No, in response to the order
9 we issued last Thursday or Friday.

10 MR. TREBY: Right.

11 JUDGE BLOCH: We've asked for some substantive
12 filings on pre-critical testing. If it goes that
13 way and they actually file, we would hope that the
14 staff could expedite a comment on the merits of what
15 they file so that we...

16 MR. TREBY: I have indicated that to Mr.
17 Ippolito. He indicated that I guess some of the matters
18 that you had enumerated might be necessary from that
19 order are things that they're looking at, and I can't
20 give you any assurance that those would be done any
21 sooner than the technical task force whole review.

22 JUDGE BLOCH: Okay. Mr. Downey?

23 MR. DOWNEY: Your Honor, I, I would object
24 to holding the record open for the completion of
25 these various and many investigations. We've just

1 completed a massive effort to take evidence on this
2 issue.

3 All the parties had a full opportunity to
4 call witnesses, present whatever testimony they wanted.
5 We have a second hearing coming live in September.
6 It is simply a complete record. We are making a
7 complete record. I don't think we need Mr. Ippolito's
8 report or the report of the OI on some particular
9 allegation to address the issue that the Board
10 (inaudible) and the parties have tried.

11 Now, as to this one report, 84-132, that's
12 here. It's timely. I suggest we could deal with that,
13 that report, but to hold up the proceeding after this
14 huge effort to develop a complete record, seems to me
15 not productive.

16 The parties here have very clear objectives.
17 I think it's fair to state that the Intervenors wanted
18 to prove up harassment and intimidation at the site.
19 And they went at it tooth and nail, and they called
20 their witnesses. And they cross examined our witnesses.
21 We produced every witness they asked for.

22 We wanted to prove that we had a good
23 personnel practice on the site and the harassment and
24 intimidation was not a problem. We think we've done
25 that. We think the record is rounding out and will

1 be rounded at the conclusion of the hearing. To wait
2 for some report coming on some unknown subject at
3 some unknown time after this effort just doesn't seem
4 prudent.

5 JUDGE BLOCH: Why is it different from a
6 technical issue like the staff report on the quality
7 of the seismic ability of a crane to withstand seismic
8 forces? I mean the Board would never go ahead on a
9 technical issue without waiting for the staff's advice.
10 Why would we go ahead in this case without waiting for
11 the staff's advice?

12 MR. DOWNEY: Your Honor, I'm not schooled
13 in technical issues, but I think I can...

14 JUDGE BLOCH: Maybe Mr. Horin would like to
15 comment on this.

16 MR. DOWNEY: Well, I think I can see a
17 practical distinction in one case, at least in this
18 proceeding, CASE, the Intervenor, is proceeding with
19 some limited resources on the technical issues. And
20 that the staff is being called upon to provide
21 independent judgment by the Board on the issue.

22 In this case, in this hearing, on this
23 docket, CASE is ably represented by what the gentleman
24 had referred to as the dean of the anti-nuclear
25 (inaudible). I don't know if he would take issue with

1 that reference, but I think it's a fair one.

2 JUDGE BLOCH: Are you (inaudible)?

3 MR. DOWNEY: No. There are plenty of
4 resources to litigate the issue; lawyers in Glen Rose,
5 pages and pages of transcript. So, I think there's a
6 very practical difference in the way the records have
7 been developed.

8 Here, in this docket, ample opportunity for
9 CASE to prove its point, ample opportunity for us to
10 respond to it.

11 JUDGE BLOCH: But, you know, that's true
12 on technical issues, too. You've got an Intervenor
13 with certain resources. Sometimes they're pretty good.
14 They have engineers that worked at the plant. The
15 applicants have proof on the other side.

16 For strictly an adversary proceeding, you'd
17 never wait for the staff. Why do we ever wait for
18 the staff?

19 MR. DOWNEY: My point is here, Your Honor,
20 I don't know the relative strengths and the relative
21 balance of the, the resources on these other issues.
22 My supposition, my suspicion is that uniformly across
23 the board on the technical side, the Intervenor has
24 fewer resources to bear than they do in this proceeding
25 where they had, what seems to me, a fair and full

1 opportunity to present their case. And while this
2 may not technically be an adversary proceeding, I
3 think it's pretty clear from the outset that the
4 Intervenor set out to prove that there was harassment,
5 intimidation at the site and they did it hard nosed
6 and went at it as tough as they could, and the record
7 will speak for itself.

8 JUDGE BLOCH: Mr. Horin, could you supplement
9 that?

10 MR. HORIN: I'd just like to add that with
11 respect to the Board's analogy to technical issues, I
12 think that the Board's analogy may be correct with
13 respect to those items that are dealt with in an SER
14 routinely by the staff in that the boards are, in their
15 normal practice, will await the staff's completion of
16 an SER on a particular item, a technical issue, in many
17 instances before reaching a decision on those technical
18 areas.

19 But here we're dealing with allegations that
20 have sprung up, that the staff just happens to be
21 conducting their own investigation into. It's not
22 within the normal course of the activities the staff
23 conducts for technical reviews.

24 The staff is here going off and pursuing
25 independently allegations that have risen in the

1 proceeding. The Board has an independent obligation
2 on its own to pursue those allegations.

3 As Mr. Downey has pointed out, the parties
4 have fully, I can't emphasize more, fully investigated
5 the same allegations the staff is doing, and I
6 don't think that there is really an analogy between
7 this situation and the type of normal review the staff
8 does as part of its technical review in the SER area.

9 JUDGE BLOCH: What if we were to require from
10 the staff based on the knowledge of the ongoing
11 investigations that they present some testimony about
12 the extent to which they know that our record is or
13 is not complete? Would that be a helpful middle
14 ground so that we would know whether there are things
15 communicated in confidence to the staff or known to
16 the staff through its investigations which bear directly
17 on the subject under investigation?

18 MR. HORIN: It may be helpful to the Board,
19 but it would be our position that it's not necessary.
20 I think that we have, as Mr. Downey pointed out,
21 fully litigated all these areas. And that if the
22 staff has some manner that they are pursuing that may
23 touch on the same areas, the Board may go into those
24 areas quite ably by closing the record at the conclusion
25 of these hearings and moving, in case the staff comes

1 up with something that is relevant to what is being
2 dealt with, moving to reopen at that point.

3 UNIDENTIFIED SPEAKER: Assuming it's...

4 MR. HORIN: Assuming (inaudible) to reopen.

5 JUDGE BLOCH: Stands for reopening. Mr.
6 Roisman?

7 MR. ROISMAN: Mr. Chairman, Miss Garde and I
8 will both, both respond to this.

9 JUDGE BLOCH: One moment. We'll go off the
10 record.

11 (OFF THE RECORD).

12 (END OF TAPE 1).

1 MR. ROISMAN: I think it is appropriate that
2 we are in the appeal board hearing to address this
3 question. Because, I think the appeal board put this
4 issue to rest, and Byron, the board does not have the
5 option of closing this record when it knows, it
6 certainly knows now from what Mr. Treby has told it
7 that there is relevant information coming. In that
8 case, the ongoing investigation was an applicant
9 investigation. This case is a staff investigation, but
10 I don't see that, again, if what you said earlier
11 applies, it is the same principle again. The record
12 needs to be complete.

13 Now, that doesn't mean that everybody can
14 come up and say, well, I can imagine that there might
15 be a new study started, or that a study may get
16 started. We have a relevant study that has been going
17 on in various phases and is documented in, as you know,
18 a general outline in the June 11 letter to you signed
19 by Mr. Ippolito. We have the July 13 preliminary look
20 that formed, I guess, part of the base for deciding to
21 go on. I think that Byron is really controlling on the
22 question.

23 Number two, the very issue of harrassment and
24 intimidation, that is, whether there was any that
25 occurred appears to now being investigated by the

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1 regulatory staff through experts. I would submit that
2 while admittedly we are playing Hamlet with Hamlet being
3 the applicant, we appear to be playing Hamlet without
4 Hamlet's ghost. Neither, it is an appropriate way to do
5 the play. We need to hear from the regulatory staff on
6 that, because this is more than a mere adversarial
7 proceeding. The staff is invested with an independent
8 responsibility, which it appears through Mr. Ippolito
9 to be taken seriously to investigate and record on. Mr.
10 Horin has found the distinction in mainly, that it is
11 the safety evaluation report items that have more often
12 than not had this. But, I submit it is not a
13 difference. That the reasoning behind it is the same.

14 Third, I don't believe that the technical
15 issues that Mr. Ippolito is looking into are irrelevant
16 either, based upon the way in which the staff and the
17 applicant have chosen to, if you will, defend the case.
18 If I understand the applicants' position, it runs
19 something like this.

20 One, there was no harrassment at plant site.
21 Two, anybody who got harrassed and intimidated deserved
22 it, in the sense that they were wrong. So, when we
23 fired Mr. X, who fired X, because he was an
24 incompetent, has demonstrated by the fact that the
25 issue that he raised, or which he got harrassed or

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1 intimidated about, he was wrong on and our people were
2 right on, the technical issue.

3 Third, the applicant says even if it was
4 harrassment and intimidation, even if he didn't deserve
5 it, we took care of the problem. The underlined
6 technical issue has been taken care of, so you don't
7 have anything to look at.

8 So, I'll say in candor, we didn't drag the
9 technical issues into this proceeding. It was drug in
10 from the applicants and staff description of what they
11 thought the issues were. Having made that point, and if
12 you look at the depositions, you will see that a great
13 part of the deposition involves examining the
14 correctness, if you will. The underlying technical
15 problem that was the source of the irritant, if you
16 will, that produced the incident about which all the
17 testimony is occurring.

18 Now, we have Mr. Ippolito going out there,
19 and admittedly looking at some issues that have nothing
20 to do with technical questions by people who alleged
21 they were harassed and intimidated, but others that are
22 right on the mark, straight on to the issue.

23 I think that, at least as to that portion of
24 the technical investigation, there is no choice but to
25 leave the record open and to get that completed.

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1 Now, I think the board invited the staff to
2 try to parse that a little bit and say, well, which
3 part of what Mr. Ippolito is doing is currently
4 relevant to the technical questions raised here, as
5 well as the harrassment and which is not. Maybe that
6 leads to, hopefully, a staff decision that will push
7 ahead with the ones that the hearing is waiting on, and
8 resolve the others a little bit further down the line.

9 I think that conceptually would be okay. But,
10 then you get into the pre-critical testing question.

11 In my judgement, the board is not in a
12 position to authorize this utility to move ahead with
13 anything, absent the resolution of matters of the
14 magnitude of what Mr. Ippolito has suggested here, so
15 that in terms of what the applicant really wants. This
16 isn't a secret, they want a decision one way or another
17 that will allow them to either move ahead or junk the
18 project. In terms of that, they are not helped by
19 splitting the Ippolito task force reported to parts or
20 pieces, because they want the sub-critical testing to
21 be done. They want, they have got a lot of filings
22 which the board is aware of, that has been filed in the
23 other part of the case, in which they and the staff
24 together are basically saying let's postpone this issue
25 until the hearing is over. We will have that issue

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1 resolved later, a post-licensing addition of issues.

2 That, I'm sorry, I don't have those here in
3 front of me. They come in the office because I am on
4 the generic issue...

5 JUDGE BLOCH: I don't know of any that do
6 post-licensing on the other side yet.

7 MR. ROISMAN: Oh yes. There absolutely is and
8 I...there's a youngblood letter that is out. It went to
9 you as well. It went to all of us...Oh. I know which
10 one it was. It dealt with the question of the problems
11 inside the reactor control room, investigation done by
12 the staff, and whether or not the reactor control
13 operators were properly qualified to do there work and
14 when you would have to address that question and it was
15 supposed to be done as a post licensing matter by the
16 staff and the applicant.

17 JUDGE BLOCH: Okay, but I thought you meant
18 within the technical issues that have already been
19 raised.

20 MR. ROISMAN: No. I'm sorry. I was using it to
21 illustrate that the basic point, that the approach
22 here. I mean, we know the Chairman of the NRC has
23 issued a memorandum on this. It is public knowledge.
24 This is a "fast track" case, and there is no reason for
25 us to be putting on Mr. Ippolito some difficult task of

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1 dividing up his pie into different pieces. If it is a
2 practical matter, he is going to have pieces in the pie
3 that are going to have to hold up the ultimate
4 determination on this plant one way or another. Let's
5 let him finish his whole report. So, I wouldn't urge
6 that you impose upon Mr. Treby to impose on Mr.
7 Ippolito to divide the whole thing up.

8 What I would say is I think his technical
9 investigation, he went to many of our witnesses, and
10 many of the whistle blowers to ask them about their
11 technical concerns, the same ones that were the subject
12 of the depositions, and others that were not the
13 subject.

14 Looking at the harrassment and intimidation
15 matter and apparently consulting with experts on
16 that...

17 JUDGE BLOCH: Now the present scheme on the
18 technical matters that are related to intimidation,
19 they are generally speaking, part of the other, the
20 companion case?

21 MR. ROISMAN: No. Some of the technical issues
22 are related to this case, for instance as you know the
23 coatings issue that is being raised here.

24 JUDGE BLOCH: But it was also was raised in
25 the other part of the case.

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1 MR. ROISMAN: It happens to be in both sides
2 of the case, but it is apart of looking at the quesiton
3 of those coding inspectors.

4 JUDGE BLOCH: I understand. It has to be
5 looked at. What I am going to tell you is the way that
6 the board anticipates going forward on that is to try
7 any other case, and the findings in this portion of the
8 case as well. The difference is the board before the
9 case is heard.

10 MR. ROISMAN: I understand that. All I am
11 talking about is when you consider the record "closed"?

12 JUDGE BLOCH: The applicants didn't get a
13 chance to address technical issues that might have to
14 be resolved. We have to go back to them on that.

15 MR. ROISMAN: No. But I would like to have Ms.
16 Guarde, who has some information. I think it is
17 pertinent to also let us address this briefly if she
18 may.

19 MS. GARDE: On the scheduling aspects that
20 were raised by Mr. Treby. I think it is extremely
21 important that the board not be under any dilusion
22 about the potential completion date for this particular
23 exercise. Because I have arranged interviews for Mr.
24 Ippolito and in working with him on the allegations
25 that are under investigation for witnesses in this

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1 proceeding and other witnesses. I feel confident that I
2 can tell you that in my latest conversation with Mr.
3 Ippolito, which Mr. Treby, may be beyond the time that
4 you talk to him is not still late September, in terms
5 of the issue in completing of the report.

6 Frankly, they lost about 3 weeks in July,
7 which they are now having to remake because of some
8 personnel problems. They haven't even started talking
9 to entire class of whistle blowers that is almost as
10 large as the groups they haven't talked to yet.

11 I think to discuss the scheduling thing on
12 the idea that they are going to actually complete this
13 thing in the next week or two and go home and spend the
14 next month writing the report is just in error. They
15 haven't even begun the inner views on harrassment and
16 intimidation with the whistle blowers that are alleging
17 harrassment and intimidation. Those experts were just
18 retained and, although they have been reviewing
19 transcripts, they haven't started their interview plan
20 yet.

21 I mean, I know that personally, because I
22 have to arrange these interviewes, and I have talked to
23 Mr Ippolito. I would agree with what...

24 JUDGE BLOCH: Before we continue, Mr. Treby,
25 do you know anything inconsistent with that, or is

1 this, possible just better information?

2 MR. TREBY: I don't know anything inconsistent
3 with that, and it may well be better information. Mr.
4 Ippolito has been very careful about confidentiality
5 and, as a result, he probably has had many discussions
6 to Ms. Garde that he is not relating to me. So, it may
7 very well be better information.

8 JUDGE BLOCH: Have you further put in
9 information for us, Ms. Garde?

10 MS. GARDE: I think if the board notification
11 does not bring you up to date on at least, the number
12 of OI investigations that you need to be brought to
13 date on that. I will let Mr. Hayes tell you that in
14 his board notification.

15 But, there is also on-going OIA
16 investigations. All of those things...

17 JUDGE BLOCH: You used the word let, do you
18 mean ask? I assume you are not in a command or control
19 position with Mr. Hayes at this point?

20 MS. GARDE: I won't touch that with a ten foot
21 pole.

22 MR. DOWNEY: I will be happy to address that.

23 MS. GARDE: I just, the only thing I am doing
24 is offering information which I think may be more up to
25 date than Mr. Treby's. Mr. Roisman stated as...

1 JUDGE BLOCH: I am concerned both that we not
2 close this record when there is information that is not
3 available to us. Because, I don't consider that an
4 adequate record. This is not a combat. It is a decision
5 about the adequacy of the plant.

6 But, I am also concerned that the applicants'
7 right to operate a plant not be interfered without any
8 opportunity to contest it. I guess the problem is that
9 the staff schedule looks like it could cause that to
10 happen at this point.

11 I would be willing to sit down at
12 conversations between the parties to discuss that
13 scheduling problem, that it does look like, in effect,
14 on applicants schedule without any finding of fault. I
15 don't think that is consistent with due process either.

16 MR. DOWNEY: Your honor, may I address a
17 point?

18 JUDGE BLOCH: Yes. Mr. Downey.

19 MR. DOWNEY: I don't feel qualified to address
20 this issue on behalf of the applicant, because I don't
21 know how things are done in the other side of the
22 house on the technical issues. But, I am deeply
23 concerned by some of the things I have heard from the
24 intervenor's table. The apparently think they have
25 witnesses they didn't call. They had the subpoena power

1 aboard, available to them to bring them forward. They
2 knew their names, they are working now with these other
3 groups in asking you to delay to have the stories that
4 they had a full opportunity to present in Glen Rose. I
5 am very troubled by that. It seems to me that if we
6 delay this proceeding, or delay closing the record to
7 get this in, they have accomplished the very purpose
8 that they have set out to do which is delay. Not to
9 have judgment on the merits.

10 MR. ROISMAN: I object to that. The record
11 will reflect that we did not delay. You are the one
12 that asked to postpone the findings, you're the one
13 that asked...

14 JUDGE BLOCH: Okay, I think that is an
15 irrelevant discussion. The charge was irrelevant, the
16 countercharge becomes irrelevant. I don't think that's,
17 the board has the question of whether we need to leave
18 the record open, and not the motivations of anyone
19 involved in this case. I think we are going to need a
20 representation from staff about the importance of
21 what's pending.

22 If I understand what is going on,
23 investigation is a very important one. But, it could
24 be that as things progress, the staff will learn that
25 it doesn't have the same opinion of its own work. I

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think we need the staff's representation on the importance to our record and whether or not we shall leave this open so that you may make an informed decision as to whether we will have an adequate record at the end of this.

If it is necessary, to put the rest of it in form decision about whether to close the record, I think we should have some staff testimony that would help us to know whether it is a complete record when we finish.

Do you have any brief comment on the need to leave the record of the interface issue which the board raised with all the parties that need to leave the record open for the resolution of some technical issues related to intimidation, such as the quality of coatings.

MR. DOWNEY: Your honor, I see no need to do that. As Mr. Roisman said in his remarks on June 15, June 28, he was going to prove that if there were defective hardware in the plant, it was accused by harassment and intimidation. He hasn't done that.

You have an opportunity to do it, and hasn't. To supply an instance because some inspections, some problems, somewhere in the plant. You hook that up with some harassment and intimidation seems to be a leak

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1 that is not justified by anything in this record.

2 There is not a single witness your honor, not
3 a single witness who said I didn't do my job. None.

4 On the basis of that record, to say that
5 there is some problem with hardware caused by some
6 atmospheric.

7 JUDGE BLOCH: I know you have witnesses that
8 you have said that the procedures for paint instruction
9 were inadequate. You have to say, well, we are forced
10 to change to innadequate procedures, and then we have
11 the lupinsky report, the comments on the quality of
12 paint. Then, we have a National Laboratory report
13 stating certain things. Then, the applicants come in
14 and they ask for a waiver of the safety requirements
15 for their paint. I mean, there is a technical issue
16 that is related to the allegations about paint here. I
17 would...

18 MR. DOWNEY: The technical allegations about
19 paint can be sure. But they are related to the
20 intimidation here. The workers who will claim they were
21 itimidated, claim that they were intimidated by being
22 forced to apply procedures which did away with the
23 quality of the paint.

24 There is not a word of testimony to support
25 that testimony. I hope we don't have to get in it to

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paint this to you.

JUDGE BLOCH: I think that's not correct, even to your own witnesses with respect for Mr. Dunham that they testified to Mr. Dunham's station about how he shrugged his shoulders, threw his hands up in the air, and I think it was quite obvious that he was concerned about the change in the procedures that he was being told. I would be surprised if his direct testimony doesn't say that, but I'm not certain of that.

MR. DOWNEY: Okay, your honor I have read it and it does not. I pried that case, and I know that record. If it goes in my statement

JUDGE BLOCH: Okay, let's go on to item No. 3.

MR. TREBY: Okay, well, before we go to No. 7, I had, I guess, begun all of this by giving you some sort of a background.

JUDGE BLOCH: You have a position to take, oh please.

MR. TREBY: Okay, I also, well, as far as the position, I think that is has become quite evident that the staff, this is one instance where the hearing appears to be ahead of the staff, that the staff's review is still going on. The staff does not have a position on the matter.

The best representation that I can give you

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with regard to the staff is that they have an approved plan, which indicates that they are supposed to have a report out by the end of September. We have heard from Ms. Garde that she has some information that it may slip.

I have not been told that, but it certainly is not beyond the realm of possibility. I guess I have also indicated to you that I know OI has some ongoing investigations, and in fact, my understanding is that OI has released certain reports to Mr. Dirks on some matters which are relevant to the subjects of the evidentiary deposition. I requested that those things be provided to the board in parties. There is the question of sanitizing them, and of course, they contained information from people who have been afforded confidentiality.

I then requested that the board at least be made aware that these things exist. I was told that you were going to be getting a board notification, and I expect that you hopefully, we will get one shortly. I have no control over board notification.

JUDGE BLOCH: Okay. I would urge, incidentally that anytime we protect the identify of a witness in this hearing that we need use only a letter designation and never use the name even in camera transcript. I

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1 think that we actually tricked ourselves, to some
2 extent, in releasing some information, and also that
3 everything be publicly marked on the cover of the
4 envelope and on the document so that we make sure that
5 we do maintain confidentiality. Have you finished your
6 presentation, Mr. Treby?

7 MR. TREBY: No. I was going to now address
8 what I understood to be question 7, which is, there was
9 certain information noted on pages 61-63.

10 JUDGE BLOCH: I passed that, because my
11 understanding was, in fact, that was an interim report
12 as part of the final work.

13 MR. TREBY: That's right, and it will allow
14 those same matters will be covered in this technical
15 review teams report to come out. However, with regard
16 to what the underlying information with regard to the
17 information that it sets forth on pages 61-63. Some of
18 that is attached to the report in the statements that
19 people, A-1, through A-7. In fact, there were a total
20 of 33 interviews conducted by one of the review team
21 members. He recorded his note of those interviews.
22 Those notes were provided to both the applicants and
23 the ntervenors before the evidentiary depositions took
24 place down in Glen Rose.

25 As I have indicated A1 through A7, I guess

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1 are attached here. The renaming, I don't know, 27 or so
2 documents consist of one page phrases, I guess,
3 indicating what occurred during the interview.

4 The staff has no problems providing them with
5 the board in Camera-X parties, but we don't know what
6 the other parties views are on that matter.

7 JUDGE BLOCH: For the total data? or that
8 those conclusions were from the interviews?

9 MR. TREBY: That's correct.

10 MR. DOWNEY: Your honor, if I may. With
11 respect to this particular interim report, I appreciate
12 the board's concer to hear from the staff. Here it is
13 spoken. To solve this particular view with aspect of
14 the problem, we would have no, we would observe any
15 objections of hearsay, and committ those pages of the
16 report to comment, proven the . tter is stated.

17 The entire section. I think that it actually
18 expands to 3-1/2 or 4 pages. To make that complete for
19 the record considered evidence.

20 JUDGE BLOCH: The same for the attachments?

21 MR. DOWNEY: I don't think we could do that.

22 JUDGE BLOCH: Mr. Treby was offering, I think
23 that there might be ways to get the whole set of
24 attachments.

25 MR. DOWNEY: I would not want to. Here we are

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1 doing with two different things. I can see this report
2 and I can say put it in. I would waive cross
3 examination and let it go. I can't predict that the
4 in-camera ex party, I have to at least be able to see
5 it to make a judgement about it.

6 JUDGE BLOCH: I could have predicted what you
7 would say about the report. I can't predict what you
8 say about the documents we haven't seen yet.

9 MR. DOWNEY: I can say, I won't say anything
10 about the documents I haven't seen.

11 MR. TREBY: Well, I have those documents. If
12 you think it is a position value, I can provide copies
13 to the applicnats tgether, and the intervenor, they can
14 look at them.

15 JUDGE BLOCH: If I understand also, that the
16 purpose of some of the ongoing activity is to take the
17 specific things recorded by these witnesses and follow
18 up on them, is that right?

19 MR. TREBY: That is correct. My understanding
20 of the purpose of the central report as sent forth in
21 the cover letter of the report, etc., were to give the,
22 Mr. Ippolito, the task force leader sort of an overview
23 that has been happening at Comanche Peak since he has
24 just been assigned this task to give him some sort of
25 basis on which to come up with his schedule, and to

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look into certain matters which had been brought to his intention. Early on to his taking over the position.

My understanding from confrontations with him is that he has received some confidential information. The T-shirt incident had occurred, and so Wally was down there with a review team which were made up of people mainly from a different region than from there. He decided to look into, and have them ask the question as to whether they were aware, whether the plant personnel had any plan safety or quality concerns. He was trying to determine, because there was also a 2026 motion before the commission that construction should be shut down.

JUDGE BLOCH: You mean whether or not?

MR. TREBY: Whether or not. So, in order to gather this information they interviewed a number of people. Since they have done it, for some reason he decided he needed to set forth some information here on this report.

JUDGE BLOCH: Okay. We do hope we will get that representation from the staff. I think you are either, as a written document from the staff or as testimony as to the adequacy of our record without the finished staff work. Unless there is a stipulation of one of the parties by that time.

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1 The purpose of that is very important. It is
2 to let us know whether we have got an adequate record
3 on the one hand, and to afford procedural due process
4 to applicants on the others, so there is some thought
5 given as to whether we need to keep this record open. W
6 try to decide that in an informed letter.

7 MR. TREBY: I'm not sure whether, I will ask
8 Mr. Ippolito about it. My concern is that I am not sure
9 whether on September 10, 1984 he will be able to tell
10 me the answer to that question.

11 I don't know how much longer, if at all, the
12 reviewer for this is on-going. I guess the other
13 concern is that from what I hear and what I personally
14 understand. He has been talking to a number of the same
15 people that came forward in the evidentiary depositions
16 that we took.

17 To that extent, it is possible, but a lot of
18 his information will be cumulative, or duplicative of
19 that evidentiary deposition...

20 JUDGE BLOCH: We don't want to keep it open
21 just for that...

22 MR. TREBY: That's right.

23 JUDGE BLOCH: But the other stuff that we are
24 worried about, and concerned about it, because we are
25 trying the plant, not a joust. But, we don't want to

1 decide that in any more ignorance that is absolutely
2 necessary.

3 Let's continue with the, no it is not that.
4 Lets go to the Lipinsky matter information that the
5 board was interested in.

6 I think Mr. Roisman, when he spoke to me
7 Saturday morning indicated that his plan had been
8 introduced. A deposition that was taken of Mr.
9 Lipinsky? Is that correct?

10 MR. ROISMAN: No. A transcript of the meeting
11 that was prepared.

12 JUDGE BLOCH: Excuse me, it is a written
13 transcript of the meeting.

14 MR. ROISMAN: It was a written transcript of
15 the meeting by several representatives of the
16 applicant. Mr. Lipinsky and several other
17 representatives of OB. Cannon. Some people who are
18 identified as to being with EBASCO. But, I think it is
19 EBASCO as contractor to the applicant. We will
20 introduce it as part of our with it proposed findings
21 in the exhibit to speak for itself.

22 This was the transcript taken in the ordinary
23 course of the applicants' business, and apparently it
24 was, in fact, at some point in the transcript itself
25 referenceing May to reviwing the transcript before it

1 is being made "a final document" by one of the O. B.
2 Cannon representatives to one of the applicant
3 represented the meeting.

4 JUDGE BLOCH: Mr. Downey, I saw some
5 dissatisfaction come across your face.

6 MR. DOWNEY: Joe Lipinsky was on their witness
7 list. If Joe Lipinsky had something to say he should
8 have come to the hearing and testified.

9 MR. ROISMAN: Yeah. We should have had the
10 transcript. We asked for all the relevant materials
11 related to this backing in May, and we got it three
12 days ago.

13 MR. DOWNEY: And I will stand here for a year
14 and argue that document is not in any way responsive to
15 an data request we received from the intervenor. We
16 have produced paper after paper not responsive
17 informally at their request. This is just an example.
18 No evidence that Joe Lipinsky has anything to do with
19 this proceeding.

20 JUDGE BLOCH: I guess the problem is that the
21 board saw its report, and CASE's comments on it a long
22 time ago. What the report looks like, that a
23 consultant was hired that he said you have bad news.

24 All of a sudden the consultant works and I
25 want some kind of an explanation in the record on how

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1 that happened.

2 MR. WALKINS: Mr. Chairman, if I could. Mr.
3 Lipinsky will be at the hearing in the other side of
4 the proceedings shortly, either by affidavit or by
5 testimony to address all of the technical issues raised
6 in his report. You see, we will be hearing from them.

7 If the intervenors want to call him as a
8 witness in this proceeding or in the other proceeding,
9 that is of course their prerogative if they believe that
10 the testimony is incomplete in itself.

11 JUDGE BLOCH: Let me just be clear. The thing
12 about the Lipinsky meeting which is of most interest to
13 me. I have not read the whole meeting transcript. I
14 have one of my law clerks doing that. It is what Mr.
15 Tolson has to say, not what Mr. Lipinsky has to say.

16 It is relevant to Mr. Tolson's attitudes
17 regarding a whole variety of very relevant subjects.
18 Obviously, until we had seen the transcript, we had no
19 idea that Mr. Tolson would go on in such great length
20 about his attitudes about QC auditors

21 MR. WALKINS: Can you tell me whether the
22 transcript addresses the concern I just raised?

23 MR. TREBY: You mean, no. I would have to talk
24 with the law student that I have working on that, did
25 not come into the office this morning. He was working

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1 on it over the weekend. I was hoping to have the
2 answer to that. I wanted to know what transpired
3 between when Lipinsky erased the memorandum that is,
4 the so-called Lipinsky memorandum. When the staff took
5 Mr. Lipinsky's deposition when he essentially, recandied
6 what he had said in the memorandum.

7 This meeting transpired in between the two, I
8 can't, I can't tell you because I have not read the
9 entire transcript of that meeting, whether that sheds a
10 great deal of life, a little bit of light or no light
11 at all.

12 JUDGE BLOCH: Do you have an expert in that
13 meeting who could tell me?

14 MR. WALKINS: Yes, Mr. Chairman. Mr. Lipinsky
15 came to the site and spent two days there. On the basis
16 of applying visit to a number of questions about the
17 quality of the paint program at the site. The utility
18 heard about it sometime later, and they heard about it
19 because the intervenors produced a copy of the trip
20 report in this proceeding. They were deeply concerned
21 that he had made those conclusions and drawn the
22 conclusions and made some of the judgements that he did
23 in an effort to satisfy Mr. Lipinsky and themselves
24 that these projects have no merit, they invited Mr.
25 Lipinsky and others.

1 Other representatives of CANON to the site
2 and spent a great deal of time explaining the technical
3 background on the basis for each of the categories of
4 items that he addressed in his other trip report.

5 You will find that the transcript reflects
6 that technical briefing in some detail.

7 JUDGE BLOCH: Did Cannon then issue a
8 formal/fina report?>

9 MR. WALKINS: They did not. They were not
10 asked to. Incidentally, this trip report was an
11 internal memo that Mr. Lipinsky rewrote for his own use,
12 and for the issue of O.B. Cannon. He never intended it.
13 In order at OBE cannon to become a public document. It
14 certainly was not intended to reflect the views of O.
15 B. Cannon.

16 JUDGE BLOCH: Does the transcript reflect the
17 process by which O. B. Cannon's work was terminated?

18 MR. WALKINS: O.B. Cannon's work has not
19 terminated. They are still under contract to the
20 utility.

21 JUDGE BLOCH: Does it reflect the nature of
22 the visit to the site and whether it was part of
23 continuing work, or this just a one-shot visit?

24 MR. WALKINS: Which visit?

25 JUDGE BLOCH: The Lipinsky visit.

1 MR. WALKINS: The original visit?

2 JUDGE BLOCH: My impression from the materials
3 filed, that it may be just a misimpression, that it was
4 part of the ongoing study of the quality of paint, and
5 there was just cut off all of a sudden.

6 MR. WALKINS: No. That is incorrect, Mr.
7 Chairman. O. B. Cannon was called down along with
8 several other corrosion engineers, coating experts
9 during that summer, during the summer of '83. In an
10 attempt to evaluate the program on an overall basis, the
11 specific work item that O. B. Cannon was asked to do was
12 to rewrite a procedure for repairs. That, when they
13 came down and lookind it over, there were big meetings.
14 There were several big meetings. They parceled out
15 assignments, and rewriting that procedure was the one
16 assignemnt that was given to O. B. Cannon.

17 MR. TREBY: The staff was also concerned about
18 Mr. Lipinsky because, among other things, one of the
19 staff's inspectors, a Mr. Hawkins who is really an
20 inspector from Region 3, who have been to have been
21 loaned to region 4 to look into the coating matter was
22 requested to be at these evidentiary depositions. We
23 thought that his testimony would be of no value if
24 there was nothing there for Mr. Lipinsky. The problem
25 was that Mr. Hawkins had taken a statement from Mr.

1 Lipinsky, which again, is something that we provided to
2 both parties and are prepared to supply to the board. I
3 have copies with me today, in which, as Mr. Roisman has
4 characterized, and I would agree with his calculations.
5 Mr. Lipinsky seemed to recap totally whatever has been
6 contained in his original memorandum.

7 JUDGE BLOCH: Including the statement you made
8 for the NRC employee? Did he also recap the statement
9 that was taken by Mr. Hawkins?

10 MR. TREBY: No. In this statement to Mr.
11 Hawkings, he seems to be recapping what he said in this
12 memo which had been previously filed with the board. At
13 that point, we weren't quite sure what role Mr.
14 Lipinsky was playing. We expected that he would be in
15 the other portion of the case.

16 JUDGE BLOCH: Alright. The best way to proceed
17 is that you are going to file the transcript. You
18 probably are going to challenge the relevancy of it. We
19 are going to read it, to find out whether we need more
20 on the matter.

21 MR. WALKINS: Mr. Chairman, if I could, I
22 believe Mr. Roisman has stated that he does seek to
23 introduce the transcript to show anything regarding Mr.
24 Lipinsky with more from Mr. Tolson's.

25 MR. ROISMAN: I said from what I know that is

1 correct. But, that is why I have somebody reviewing the
2 whole transcript. I looked at that because, I at least
3 thumbed through it, the sort of long syllables by Mr.
4 Tolson stood out. I read several of those and noted
5 them, so I know that is in there. It is that I don't
6 know the question to your question, Mr. Chairman, which
7 really is what is the substance of what is said in the
8 whole transcript?

9 JUDGE BLOCH: I want to understand if this
10 thing was recanted why it was recanted and what went on
11 there.

12 MR. WALKINS: Mr. Chairman. I am not at all
13 comfortable with Mr. Treby's use of the word recanted.

14 JUDGE BLOCH: Modified James. The testimony
15 became different from what it seemed to be in the
16 draft.

17 MR. WALKINS: It was not testimony.

18 JUDGE BLOCH: It was a draft. A non-released
19 draft.

20 MR. WALKINS: It was an amendment to the files
21 that Mr. Lipinsky wrote. Now, his conclusions to the
22 extent that they could even be called conclusions in
23 that trip report, proved to be erroneous in his view.
24 He as so testified under oath.

25 MR. TREBY: I want the record of this

1 pre-hearing conference to be clear. There are two
2 different transcripts we are talking about. I'm talking
3 about a transcript involving a interview, if you
4 will...

5 JUDGE BLOCH: Let's not talk about them. We
6 want to see both of those transcripts, so however...

7 MR. TREBY: Fine. I just wanted to clarify
8 that there were two sections.

9 JUDGE GROSSMAN: Well, there must be one that
10 has Mr. Tolson involved in it, and another one in which
11 it is just an affidavit by, or a statement by Miss
12 Lipinsky, is that correct, there are two different
13 ones?

14 MR. TREBY: You are correct with regard that
15 there appears to be some statement with Mr. Tolson. I
16 haven't looked at that, so I can't speak to that. The
17 one I am talking about was a statement taken of Mr.
18 Lipinsky by Mr. Hawkings by a court stenographer. Mr.
19 Lipinsky was placed under oath. He had counsel present,
20 and he was interviewed by Mr. Hawkins, and a transcript
21 was made of that interview.

22 MR. DOWNEY: Judge Grossman, if I could, a
23 series of events, sequentially wise, is a two day trip
24 sometime in July or August. That memorandum which was
25 an internal will be counted in random surfaces and is

1 becoming known to the applicant. The applicant then
2 invites O. B. Cannon down to discuss Mr. Lipinsky's
3 concern, was during this period of time, I don't know,
4 October.

5 MR. DOWNEY: October or November there was
6 some extensive set of meetings with O. B. Cannon
7 people, including Mr. Lipinsky at the site. During that
8 set of meetings, the transcript of one meeting compared
9 to the transcript that Mr. Roisman referred, was during
10 this set of meetings that Mr. Lipinsky's concerns were
11 addressed. The situation was explained to him. The
12 various technical answers were provided. Sometime in
13 January that the interview of Mr. Hawkins took place,
14 and it reflects Mr. Lipinsky's view at the time after
15 having become informed.

16 JUDGE BLOCH: I would invite the applicants if
17 they have them to also file with us a purchase order or
18 contractual understanding that outlines the scope of
19 the work that was being done by O. B. Cannon. That
20 would help us to understnad what was happening.

21 MR. TREBY: I will undertake to provide the
22 board at the close of this pre-hearing conference the
23 Hawkins interview. I would just like to note for the
24 record it says confidential on it. I understand that
25 Mr. Hawkins has, not Mr. Hawkings but Mr. Lipinsky, who

1 susequently contacted both by O. I. and by I & E, and
2 has indicated that he doesn't require confidentiality
3 any more.

4 JUDGE BLOCH: Maybe you can mark that off. It
5 would be particularly confusing, because it is a
6 security classification.

7 MR. WALKINS: Do you have a statement from Mr.
8 Lipinsky to that effect with regard to that
9 transcript?

10 MR. TREBY: I have a, I don't have a statement
11 with regard to that transcript with me. I do have the
12 stateent, not of Mr. Lipinsky but of the office of
13 investigation indicating that they have contacted Mr.
14 Lipinsky.

15 MR. WALKINS: Is this Mr. Ippolito's group
16 down site?

17 MR. TREBY: No. No. The office of
18 investigation, Mr. Hayes's group.

19 JUDGE BLOCH: Do you know, Mr. Watkins whether
20 he may. I mean at one point your form was represented.

21 MR. WALKINS: I don't know if he is waived on
22 confidentiality.

23 JUDGE BLOCH: Maybe you could check with Mr.
24 Reynolds who is representing him, and if there is a
25 problem, let Mr. Treby know promptly so that we won't

1 accidentally reach that premise.

2 MR. TREBY: Does the applicant have any
3 problems with me giving a copy to the board?

4 MR. WALKINS: No. We've already gotten from
5 the staff under the understanding that it was not, and
6 we have not held it as though it were confidentially.
7 We haev not published it either, but it is not kept in
8 a separate place, and we have not restricted to look at
9 it. It is not kept in a separate place, and we have not
10 restricted to look at it.

11 JUDGE BLOCH: We could remedy that if the
12 applicants and foremost promptly that that was the
13 wrong treatment.

14 MR. WALKINS: We shall.

15 JUDGE BLOCH: Item No. 3. We would like to
16 state that the context in which you want to consider
17 item 3 is in the contest of article 7 of the Federal
18 Rules of Evidence on expert testimony. A little 701 and
19 following, direct contact?

20 MR. DOWNEY: Yes, your honor.

21 JUDGE BLOCH: Your motion.

22 MR. DOWNEY: Your honor, I think our motion
23 lays out our arguments in favor of support of strike
24 Mr. Goldstein's testimony. On its face, this testimony
25 doesn't distinguish among the various things that we

1 like for him in forming instructions.

2 It is clear from the representations of
3 counsel that were made both to me and to the board in
4 the conference call. A substantial part of the picture
5 that he used were advocates of documents to proposed
6 findings of fact prepared by counsel. The cases we have
7 cited to the board indicate that such advocacy
8 documents are an impermissible bases for expert
9 opinion. Mr. Goldstein's testimony on its face, in the
10 case that 1983 survey is not the kind of material from
11 which he normally relies in forming judgements in his
12 profession. It is coming clear from the face of this
13 testimony, and so far, unto us through any information
14 provided by the intervenors.

15 What it was with respect to the 1979 survey
16 that Mr., Dr. Goldstein reviewed. It could have been
17 summaries. It could be the interview sheets. It could
18 have been proposed findings of fact. It could have been
19 all three. The point is that there is no affirmative
20 showing that that is the kind of material he or any
21 industrial psychologist would rely on in forming an
22 opinion. So, there is nothing but which you relied
23 about would permit him to offer the opinions and
24 continue to use his pre-filed testimony. I would add
25 two points. One, reviewing Dr. Goldstein's testimony

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1 that every opinion offers is like the testimony, or
2 some of the examples of testimony that Mr. Cal
3 Canuthers cited by Mr. Roisman, and affirmable negative
4 reponse to a long meeting question. A remarkable
5 example which appears on page 8 was a 26 line question,
6 7 subparts, and a single answer yes.

7 JUDGE BLOCH: If I recall correctly, wasn't,
8 weren' all the subparts materials who is supposed to
9 have reviewed?

10 MR. DOWNEY: No. That is not correct. The
11 question is are these examples of the kinds of things
12 that tend to inhibit people from reporting, and he
13 lists a whole bunch of things. There are not supposed
14 to be things he viewed. That's not the only example
15 your honor. It is other opinions that, really, the only
16 other part of his testimony that might matter at all.
17 The opinion testimony about what is happening at the
18 site, all in respect to the questions. The most
19 remarkable at all is this bottom line which appears on
20 page 14, where not one double negative in the question
21 with a negative in response. Based on all this stuff.
22 All the stuff being permissible material that we
23 described to you in our motion. Did you say that there
24 was not a problem, if QC personnel, if only they were
25 not able to carry out the work. The answer is well, it

1 is not possible to say that. That seems to be Dr.
2 Goldstein's bottom line. Given how he gets to the
3 bottom line and what he used to get there, all of
4 which we think is impermissible; impermissible
5 materials from which you could revise.

6 When it gets to that point, that's when it
7 should be struck. It is quite simple. Not an adequate
8 foundation.

9 JUDGE BLOCH: Mr. Roisman.

10 (End of tape.)
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1 MR. ROISMAN: ... may testify in terms of opinions
2 or inference and give his reasons therefor without prior
3 disclosure of the underlying facts or data unless the
4 Court requires otherwise. The expert may in any event
5 be required to disclose the underlying facts or data on
6 cross-examination. So as to the simple first question
7 which is raised in the Motion, did Mr. Goldstein, Doctor
8 Goldstein's have to include specifically the reference to
9 all the underlying data, the answer is no, and that is
10 clear from Rule 705. The second question is whether or
11 not to the extent that he has disclosed and that I in
12 conversations with the Board and with Mr. Downey disclosed
13 that he relied upon certain other information such as
14 number one, the proposed findings of the Intervenor, which
15 is one group; and secondly, so-called hearsay information,
16 whether that is precluded, and I think the answer to that
17 lies on Page 48 of Mocre's treatise on the subject, and
18 in particular, and I will quote: "As Kale", they've just
19 cited a case here, "As Kale noted, the expert need not be
20 given all the facts in the case or even the contrary view ...

21 JUDGE BLOCH: Could you cite the case please for the
22 record and give the spelling of the name?

23 MR. ROISMAN: It's Kale, K-A-L-E. I'm sorry, it's on
24 the preceding page of this and I was relying more on Moore
25 than on the case.

1 JUDGE BLOCH: What page of Moore are we talking
2 about?

3 MR. ROISMAN: Page 48 of Volume Eleven of Moore and
4 this is the 1982, is shown on the front of the volume, the
5 inside cover, and the case of Kale is cited at 274 Fed.2d
6 476 is the case. It says "The expert need not be given
7 all the facts in the case nor even the contrary views of
8 the parties as to disputed facts. Once the expert is
9 given facts sufficient to form a reasonable foundation for
10 his opinion, it can be left to cross-examination to test
11 the witness' hypothesis and with it his credibility against
12 the other party's view of the relevant facts. This approach
13 leaves to the trier of fact the determination of an expert's
14 credibility and thus the weight to be given his opinion."
15 And then they conclude with this, which I think does not
16 fit our case, "On occasion, however, courts will sustain
17 an objection to a hypothetical question which excludes so
18 many of the relevant or qualifying facts that it will lead
19 to an answer based on inadequate premises." And I don't
20 think there'll be any question about that and we have
21 offered, as you know, to provide the Applicant with an
22 opportunity to look at the documents which Mr. Goldstein
23 looked at. So, on the second question as to whether or
24 not because the witness was looking at the information which
25 was in the possession of the Intervenor and represented

1 their view of the evidence, I see no problem with that
2 either and in fact would note that in Rule 70 ... I'm
3 sorry, in Moore's, again on Volume Eleven, page 47, they
4 make note of the fact that, and again I'm quoting, and
5 I apologize for quoting - there's simply not time to do
6 a prepared writing for the Board on this, "A second method
7 of informing an expert of the facts on which he is to
8 base his opinion is to acquaint him with the facts at the
9 trial. The technique may be either to present the pertinent
10 facts in the form of a hypothetical question which solicits
11 the expert witness' opinion on the basis of the facts set
12 forth in the question or to have the expert attend the
13 trial, hear the evidence, and then offer an opinion based
14 on the evidence. When the latter method is used, and
15 where the evidence is in conflict, Rule 705 can be used to
16 determine upon which facts the expert based his opinion."
17 That's, of course, precisely what is the process that is
18 going on here. Now for its part, well, let me just summarize
19 by saying I think the thrust of what Moore's is saying there
20 and the thrust of those cases is that when you have a situ-
21 ation which a witness is relying on, on facts which are
22 disputed facts or in which you think that they are an
23 incomplete statement of all the facts, that the remedy is
24 not to keep the expert's opinion out, but rather the remedy
25 is to go instead to cross-examination if you can show that

1 there's a fact which if you're right will ultimately be
2 established to be correct, and that the witness would say
3 well gee if that's true then my opinion would be different,
4 then you'll prevail, and our approach was a very simple
5 one. The record is full of conflicting perceptions. We
6 don't win in this case if we're not able to establish the
7 essence of the facts upon which we rely, so it made to me
8 perfectly logical sense to in effect put to the witness'
9 series of hypothetical questions. If these facts which
10 we believe we will show in the record are correct and
11 for instance he was given the Atchison DOL decision by the
12 Secretary of Labor to look out, and he was given this
13 Board's decisions on Mr. Hamilton to look at, if those are
14 the facts, what do you say about it? If those are the
15 facts. And that seems to be perfectly permissible.

16 Now the Applicant for its part, somewhat curiously
17 I must say, cites the Court decision in Zenith Radio noting
18 that on appeal, which the appeal by the way is sub nom
19 In Re Japanese Electronics Products which appears at 723
20 Fed.2d 238, the Third Circuit Opinion in 1983, they note on
21 appeal reversed on other grounds. In fact, it would appear
22 that it was reversed on these grounds, and I would like to
23 quote from Page 278 of that Opinion in which the Court at
24 the end of an extended discussion on the generic subject, on
25 the striking of an expert witness' testimony on the ground

1 that he was relying upon inadequate data to form an
2 opinion. Essentially the identical argument which the
3 Applicant presents here in which they quote a piece of
4 the lower court's reasoning on that whole issue. The
5 appellate court says "We hold, therefore, that on this
6 record the trial court erred in excluding expert opinion
7 evidence on the ground that it was based on materials
8 not reasonably relied upon." Now there were several
9 different theories presented on which the lower court
10 struck the evidence. One was that it was based upon cer-
11 tain incompetent opinion, excuse me, incompetent facts
12 that the court had excluded and held were inadmissible.
13 Another was as the Section quoted by the Applicant on
14 Page 3 of its Motion was that they had relied upon what
15 were essentially the Plaintiff's Answers to Interrogatories
16 which represented one parties view. The appellate court
17 never addressed that part of the basis for the rejection
18 of the expert opinion. It focused instead on this other
19 piece, but the Court reversed as to all of it, so that
20 while not giving us its full reasoning, the Court did make
21 clear that it did not believe the expert's opinion should
22 be rejected even though it was in fact in part based upon
23 using facts that were contained in the Plaintiff's Answers
24 to Interrogatories and thus clearly one party's, one party's
25 view of it.

1 It's a very long opinion I might add, both in
2 the District Court and the Court of Appeals, and I will
3 not represent to you that I have read the whole opinion,
4 but I believe that from what I read that a fair reading
5 of what the Court was saying on this particular issue
6 is exactly what Moore's was saying, which is that maybe
7 this will go to the weight of that expert's opinion if
8 you can show that the expert relied upon some stuff that
9 is so improbable that you can't find that the reliable
10 facts in the proceeding then the expert is essentially
11 giving you an irrelevant opinion about a set of facts
12 that have no bearing on the case, but that the place to
13 deal with that is in the hearing, not by taking the
14 expert out of the hearing.

15 In particular, I think Footnote 46 in the Court's
16 Opinion, and when I say the Court I'm talking about the
17 Third Circuit in the Japanese Electronics Products case,
18 is illustrative of that view. It's very critical of what
19 it considers to be a narrow view by the District Court
20 of Rule 703, and in fact suggests that it thinks the
21 District Court may have adopted the minority view. 703
22 was a hotly contested rule.

23 So the third point that I would like to make is
24 that I think that the, even the opinion that principally
25 is relied upon by the Applicant does not give support to

1 their proposition, that their proper remedy is to proceed
2 through the route of discovery.

3 Now that brings us to, and I beg the indulgence
4 of the Board to go outside Part 7 and to go to the Federal
5 Rules of Civil Procedure, and in particular Rule 26(b)(4),
6 which deals with discovery as it relates to experts. What
7 that Rule indicates is that in the first case, the Appli-
8 cant limited by the Federal Rules in this case, would be
9 limited to asking through an interrogatory for the witness
10 who's an expert to merely summarize what it is that were
11 the basis for the opinions that the witness is giving.

12 The disclosure of the additional information in
13 the form in which we have offered to do is actual, another
14 step available only to them upon application to the Board
15 and a ruling by the Board to that effect, and that the
16 normal rule is that that information is available at the
17 hearing, at the time when they want to do their cross-
18 examination.

19 I point that out not to indicate that I want to go
20 back on what I said, but to indicate that I think that we
21 went substantially further than was necessary in order
22 to respond to the concern that the Applicant has and to
23 provide them in advance of the hearing with the informa-
24 tion that they want.

25 Now they requested the opportunity to take the

1 expert's deposition and my only concern with that, and
2 I've not objected to them taking the deposition, is what
3 is the proper scope of that deposition. It is different
4 for an expert than it is for a witness. It is a limited
5 kind of deposition and I believe that the proper procedure
6 is for the Applicant to make quite clear what it is, is
7 the scope that they want to proceed into. For instance,
8 I have no problem with the expert being asked did you
9 look at this, did you look at that, and the, the Applicant
10 getting answers to that. I think doing what we've seen
11 in the context of the discovery deposition of non-expert
12 witnesses, which is essentially to do the cross-examination
13 in advance of doing the cross-examination again later,
14 should not be allowed and would be impermissible and not
15 appropriate.

16 I also want to make clear that it is our intent to
17 request the witness fees as provided with respect to that
18 deposition under Rule 26(b)(4)(c), B4C, and that to the
19 extent that the inquiry that the Applicant is going into
20 is beyond the normal and just mere interrogatories, that
21 the Applicant also be required to pay a reasonable part
22 of the costs of providing that witness, and as I under-
23 stand the Rule that means of the attorneys fees related
24 to the lawyers that have to be there to defend the witness.
25 I want to make those clear ...

1 JUDGE BLOCH: You think, you think they not only
2 have to pay the consultant fee for the witness but also
3 the lawyers fees?

4 MR. ROISMAN: Yes, that is exactly my understanding
5 of what the, the Rule says, Your Honor. And finally I
6 want to say with regard to the question of the witness'
7 reliance upon hearsay, which, as I understand Mr. Downey's
8 argument, is the reliance of the witness' on the 1979 and
9 1983 surveys as I think the witness' testimony makes very
10 clear the surveys themselves are not particularly good
11 surveys. Nonetheless, there are specific answers to
12 specific questions in there which provide the witness
13 with the very kind of information which experts of this
14 type do get. They do in fact conduct surveys. They just
15 do better ones. They do more professionally developed
16 ones and I think his testimony makes clear in at least a
17 general way what a more professionally developed investi-
18 gation would be, but that investigation does include
19 receiving what is in effect hearsay, and in fact the
20 studies are often one group of people gathered the data
21 and another person interprets it, so it's inherently
22 hearsay in that sense.

23 I don't think the fact that any of that data is
24 hearsay is objectionable or represents any kind of a
25 problem here, and some on the issue of the questions of

1 the reliance of the witness on hypo ... if you will
2 hypothetical facts which we believe the record will
3 demonstrate are not hypothetical but that the Board will
4 find that we are correct and they are the true facts,
5 that that is a quite standard and acceptable practice
6 not only recognized but specifically endorsed in both
7 Rule 703 and 705, that with regard to the reliance on
8 what might be inadmissible evidence, and by the way, I
9 don't agree that the surveys are inadmissible. We are
10 offering them in evidence and that will be disputed, but
11 I believe that they are admissible. They're admissions
12 against interest; they are prepared in the normal course
13 of the company's business and they were therefore business
14 records exceptions, and we could go down all that, but
15 I simply want to indicate I'm not conceding that they're
16 hearsay. But even if they were, what the expert has done
17 is he is, he has relied upon statements that were made in
18 the course of an investigation the Applicant took and
19 that that is a permissible thing for him to do.

20 Finally, on the question of leading. I do not
21 believe that the situation presented in Mr. Goldstein's
22 testimony is at all similar to the situation that was
23 presented in the testimony with regard to Misterns Callicutt,
24 Liford and Johnson, and I think the important difference
25 is, number one, the questions which the witness is asked

1 are asked in the form they are so that we can find out
2 what he thinks about a particular thing. It's not to
3 ask him to confirm that a particular thing exists, it's
4 to ask him the long question Mr. Downey gets such glee
5 out of citing is to say what are these things, and whether
6 we had handed him these things in a written piece of paper
7 and say here's exhibit one, here are all these things,
8 what do you think about these, or whether we did the more
9 efficient from our perspective way of doing it doesn't
10 seem to matter. I've asked him to give me my, his opinion
11 about that. That's different than asking him to ... I'm
12 now going to tell you a whole bunch of events that happened
13 and you tell me did they happen. I think that's a
14 dramatically different thing.

15 And with regard to the last group of questions
16 which are where we go through the Atchison facts, the
17 Amalton facts and so forth, here again the witness had
18 been given this, these various pieces of information for
19 him to look at and it was to get his answer to some very
20 specific questions, not to put words into his mouth, but
21 to get his opinion about some very specific things that
22 are pertinent in this case.

23 I don't think it meets at all the criteria, it
24 doesn't represent my effort to summarize well then Mr.
25 Witness what you're really saying here is and I give a

1 little paragraph and then he says ah yes, that's what
2 I'm really saying. So I think that is, it's in a dramati-
3 cally different posture as is evident just by looking at
4 Mr. Goldstein's testimony on the one hand and Mr. David-
5 son's testimony on the other.

6 JUDGE BLOCH: Mr. Treby.

7 MR. TREBY: The Staff does not support the Applicant's
8 Motion. We believe that Rule 703, which says basis of
9 opinion, testimony by experts, and that states the facts
10 or data in the particular case upon which an expert bases
11 an opinion or inference may be those perceived by or made
12 known to him at or before the hearing. If a type reason-
13 ably relied upon by, if of a type reasonably relied upon
14 by experts in the particular field in forming opinions or
15 inferences upon the subject, the facts or data need not
16 be admissible in evidence.

17 The testimony of Mr. Goldstein seems in the main
18 to be based upon the surveys that were taken in '79 and
19 ;83, and it seems to me that those are the types of
20 information reasonably relied upon by experts in those
21 fields.

22 Now in indicating that we don't believe the testi-
23 mony should be struck. It does not mean that we think
24 the testimony in its present form should be given very
25 much weight. We were very distressed in reading Pages

1 8 through 12 particularly, which is just a series of
2 statements made to this expert to which he merely says
3 yes, provides no basis or any other information support-
4 ing such a, a statement as yes, and so we would think
5 that it's worthy of very little weight, but if put to
6 the question as to whether or not we think it's admissible,
7 we would have to say that we believe the testimony is
8 admissible.

9 MR. DOWNEY: Uh, Your Honor ...

10 JUDGE BLOCH: Could Mr. Downey clarify the matter
11 with respect to fees?

12 MR. DOWNEY: Your Honor, I didn't ... our Motion ...
13 we don't ... on the basis of this Motion we don't think
14 there'll be a deposition of Mr. Goldstein, so we weren't
15 prepared to argue that question. I don't have my Rules
16 with me. I'll be happy to brief the Court if it becomes
17 necessary, but I do think it's important to point out to
18 Mr. Roisman we found five arguments we didn't make.

19 We didn't say he had to disclose this. We didn't
20 say that any of the, we didn't say anything in response
21 to the arguments he made. We say the testimony of
22 Goldstein, as it stands, shows it's not the kind of
23 material that experts reasonably rely upon. At least
24 Mr. Treby had the right argument. It came out wrong
25 on, in the news, the argument we're making, and we rely

1 upon his testimony.

2 First he says the '83 surveys are no good so I
3 can't rely on them. He said it himself, we didn't say it.
4 He, Mr. Roisman said he relied upon findings of fact that
5 we prepared, the cases we've cited to you, and most par-
6 ticularly the Fifth Circuit case that we cite, says that's
7 not right stuff, that's advocacy paper, it's not what
8 experts rely upon. We know now as we sit in this hearing
9 room that's what he relied upon and that tells us it's
10 wrong.

11 JUDGE BLOCH: You're repeating the Fifth Circuit
12 case? Would you like to comment on Mr. Roisman's state-
13 ment that that case was overruled and that that ...

14 MR. DOWNEY: Yes, I would. No, that's a different
15 case, Your Honor, and we note that it's overruled. It's
16 my recollection and Mr. Roisman correctly points out both
17 of these opinions are quite long. The basis for excluding
18 the testimony ...

19 JUDGE BLOCH: It's the Zenith which is not old that
20 he said was overruled.

21 MR. DOWNEY: That's right, Zenith not (inaudible).

22 JUDGE BLOCH: That would be actually under the
23 Federal Rules so it might be relevant.

24 MR. DOWNEY: Both of them are.

25 JUDGE BLOCH: But under the current version.

1 MR. DOWNEY: Both of them are, Your Honor.
2 JUDGE BLOCH: Okay. Sodin (ph) is the other one?
3 MR. DOWNEY: Yes. It's a 1983 Fifth Circuit case.
4 And I think Judge Weinstein in his treatise, which is
5 also quite recent, sets out the proper standard. In jargon,
6 these are advocacy documents. That's what the proposed
7 findings of fact from a particular advocate are, and
8 that's what Doctor Goldstein relied upon. That's improper
9 and that's the basis of our challenge. It's not that he
10 didn't tell us what he relied upon. Mr. Goldstein, or
11 Mr. Roisman's quite right, that's not the subject of dis-
12 covery, but we know, we know that it was improper.
13 The other point I would make - Mr. Roisman said
14 there are two ways to pose hypothetical questions or
15 questions offered in direct examination of experts. One
16 is the hypothetical question and the other is to have
17 the expert sit through trial. These aren't hypothetical
18 questions. Hypothetical questions, properly formed, state
19 the facts, the assumptions. These questions don't state
20 the facts being assumed when the witness is asked to
21 give testimony on it.
22 JUDGE BLOCH: But the Rule 705 makes it clear that
23 you don't have to state the facts. What you're contesting
24 is not what you state in the question, but what you testify
25 about. Why isn't the document shown, the findings that case

1 is going to file in essence a hypothetical question?
2 So assume that our findings are correct, and you're going
3 to be able to see what all those findings are, now how
4 do, how do you interpret those?

5 MR. DOWNEY: Because this paper doesn't give facts
6 upon which ...

7 JUDGE BLOCH: 705 expressly says you don't have to.
8 The expert may testify in terms of opinion or inference
9 without prior disclosure of the underlying facts or data.

10 MR. DOWNEY: You're asking him to render an opinion
11 with assuming certain facts.

12 JUDGE BLOCH: Yeah, but they don't have to disclose
13 what the facts are. That's what 705 says. That's the
14 rule you didn't mention in your brief.

15 MR. DOWNEY: That's a different point I think, Your
16 Honor. You're asking there what ... you ask Doctor Gold-
17 stein what's your opinion of the cooling down or something
18 and he could give it, tell you that. That's not what
19 they're asking. They say Mr. Goldstein assume one, two
20 and three. He's not relying on facts, he's relying on
21 assumptions, and those aren't statements of fact.

22 The additional point, Your Honor, is that ... if
23 you have a question go ahead.

24 MR. GROSSMAN: No, no, no. Continue please.

25 MR. DOWNEY: It's a different point entirely. We

1 know what he relied upon and for that reason we know
2 his testimony should be struck. We know it's not what
3 experts rely upon, the Sodin case tells us that.

4 JUDGE BLOCH: We're going to take a brief decisional
5 recess.

6 (RECESS)

7 JUDGE BLOCH: The Motion to Strike is denied pur-
8 suant to Rule 705. The proper way to bring out the weight
9 of this testimony is to ask further questions. In its
10 present form, the testimony is not overly valuable to
11 the Board, but if the witness is not called by the parties
12 I would expect to want to speak to the witness anyway.
13 We see no basis in the Rules for reimbursement of attorneys
14 fees. Reasonable costs and expenses are what's called
15 for. I hope there won't be any disagreement that we'll
16 have to break on that score. We do hope that the cross-
17 examination will not be overbearing and will be a reason-
18 able attempt to bring out the background of the expert,
19 to bring out relevant information on his credibility as an
20 expert, as well as the facts on which he testified. Is
21 that really what you're concerned about Mr. Roisman, is
22 that cross-examination and deposition might attempt to
23 bring out embarrassing facts of the witness' background?

24 MR. ROISMAN: No, that it would go on forever. I've
25 already had the Applicant tell me on the telephone that it

1 was going to go on forever and frankly, I don't take well
2 to that kind of threat and I don't take well to it and
3 I want them to file the proposed deposition outline which
4 I believe is required under Rule 26(b)(4). They need
5 your special permission to conduct the deposition. I
6 want the opportunity to see what they propose to delve
7 into at the deposition and to give you my arguments as
8 to why I think it should only be done at trial. The expert
9 is not just another witness. The expert is a special
10 witness with special rights and I intend to see that those
11 rights are fully enforced with respect to this witness.

12 I have no idea in any real sense, except Mr.
13 Downey's occasional snide comments to me, as to what it
14 is he intends to do with the witness. I want to know that.
15 I want to know it in advance and if I think it's objection-
16 able, I want an opportunity to come to you and say he's
17 going too far afield, I don't think that's permissible.
18 If he's going to try that he's got to wait until he's at
19 trial.

20 So that's my position, and in all ...

21 JUDGE BLOCH: Is there a deadlock here Mr. Downey
22 or do you agree with what the witness ought to be told in
23 advance? Is there a need for a deposition plan? What
24 do you plan to do to make this a fair deposition?

25 MR. DOWNEY: We plan to explore... we don't plan to

1 explore Doctor Goldstein's qualifications, but we do plan
2 to explore the basis for his opinions, what he was and
3 was not shown, what it is that might change his opinions,
4 exactly what his opinions are because they're not clear
5 to me through reading this unsworn direct testimony.

6 JUDGE BLOCH: That's the usual form in these pro-
7 ceedings. I take it he's going to be called and asked to
8 swear to it.

9 MR. DOWNEY: I confess, Your Honor, my experience
10 is not in ... is in courtroom, not administrative proce-
11 dures, and unsworn papers I guess I'm not quite sure of
12 their status I'm telling you. I was told by the way that
13 I went to extraordinary effort to get all these witnesses
14 to sign these recent depositions. I didn't need to and
15 I should have done like this. I did it bodily.

16 I don't think there's going to be a problem. I
17 would not intend nor would I countenance any infringement
18 on Doctor Goldstein's rights.

19 JUDGE BLOCH: Can you do it in what time is avail-
20 able for this witness?

21 MR. DOWNEY: Unfortunately, that's not very ...

22 MR. ROISMAN: The witness is available on the 30th
23 if we're talking about pre-filing of findings. The witness
24 is available on the 30th from approximately 9:30 until
25 approximately 5:30.

1 JUDGE BLOCH: Is that enough time?

2 MR. DOWNEY: Well, it's not enough time, and there's
3 a separate problem. We don't have the paper which he
4 was provided. We can't commence this deposition or feel
5 it would be productive to commence the deposition until
6 we know what materials Doctor Goldstein was given.

7 MR. ROISMAN: Let me say on that score that there's
8 hardly a witness that we talked to of the Applicants where
9 we did not get major pieces of information during or
10 immediately before the deposition. I did not feel that
11 there's any justification for that. I have all, I have,
12 I'm very confident that the information which the Applicant
13 will get from us that the witness relied upon, the biggest
14 piece of it by the way is the '79 surveys and the summary
15 thereof that was prepared by the Applicant, and, which
16 I've already told them. The '83 surveys and the summaries
17 which consist of simply recording answers to certain groups
18 of questions on a little summary sheet, that was also pro-
19 vided to us by the Applicant. In terms of just the sheer
20 bulk of material, that's this much or so, and the Atchison
21 DOL findings which, of course, the Applicant knows about,
22 and this Board's findings on Mr. Amalton, which the Board
23 knows about. And the only things that are, really that
24 are beyond that that the witness saw were these proposed
25 findings of fact that we had and I am unwilling to disclose

1 those to the Applicant at least until the eve of the
2 deposition because I do not wish to show them my work
3 product, and I'll be very candid with you, I've done an
4 analysis. I've had ... my staff has done an analysis
5 of the '79 survey and we've identified which particular
6 survey answers we think are pertinent to this point and
7 why and it'll all be presented in our proposed findings
8 of fact. It's not my intent to give the Applicant the
9 opportunity to see that one day before they're entitled
10 to see it, but even then I'm willing to do that. I'm
11 willing to give it to them on the 30th when they do the
12 deposition. But I ... I don't feel that I have to give
13 them my attorney work product in order to allow them to
14 do what they want to do.

15 MR. DOWNEY: There's a simple solution, Your Honor.
16 We'll take the deposition Tuesday, Tuesday following
17 Labor Day.

18 JUDGE BLOCH: Tuesday following what?

19 MR. DOWNEY: Labor Day.

20 JUDGE BLOCH: Is that a simple solution?

21 MR. ROISMAN: I don't know. I would have to talk
22 to Doctor Goldstein. I was thinking that the Applicant
23 wanted him before the proposed findings. I haven't tried
24 to get a date that was acceptable to him and then get an
25 attorney to cover that deposition since I would not be here

1 for it. I would have to go back and it happens I will
2 also not be here the Tuesday following Labor Day. I have
3 a court appearance in Boston that afternoon, but I would
4 have to check on the availability of the attorney to
5 cover it and Doctor Goldstein.

6 MR. GROSSMAN: Doctor Goldstein is going to be at
7 the hearing I assume?

8 MR. ROISMAN: Yes, we intend to bring him out on
9 the Wednesday of the hearing, the 12th.

10 JUDGE BLOCH: If you go on the 30th, I just urge
11 that you give the lawyers a couple of hours at the beginning
12 where they've got a chance to look at the basis for the
13 testimony help them formulate questions. If you just gave
14 it to them at 7:30 when you're going to start at 9:30 ...

15 MR. ROISMAN: Alright, let me ask you a question
16 on that. There may be at least one way to deal with that.
17 I don't know what role Mr. Downey is personally playing
18 in either the deposition of Mr. Goldstein on the one hand
19 or the development of those findings on the other. Maybe
20 I could ask him. May I ask him a question?

21 JUDGE BLOCH: You want to accept a Chinese wall kind
22 of arrangement?

23 MR. ROISMAN: No, I want to know ... Mr. Downey,
24 are you going to do Mr. Goldstein's, Doctor Goldstein's
25 deposition?

1 MR. DOWNEY: If I don't do it I will inform you
2 of the plan of examination.

3 MR. ROISMAN: You know, I don't have any problem
4 with them having the information tomorrow if the party
5 who's going to have the information is not going to be
6 working on any findings related to it. In other words,
7 I don't want them to take my proposed findings and use
8 those, use that work product to meet their deadline.
9 We worked until midnight many nights in order to get this
10 thing pulled together and I don't intend to let anyone
11 else have the benefit of it, but I'm willing to accomodate
12 him in any way he wants. The material is ...is, you know,
13 I think could be pulled together in another day or so and
14 I'd let them have it, but I just need that protection.

15 MR. GROSSMAN: Well now Mr. Downey, why do you
16 think it's necessary to have this in advance? The
17 purpose of the deposition I assume is what's contemplated
18 under the Federal Rules of Evidence which is to find out
19 the substance of his testimony and what he bases his
20 testimony on. It's not to cross-exam him and shake his
21 story at the time of discovery, and so I would assume that
22 if you had the information at the same, on the same date
23 as your taking the deposition, that your purpose would be
24 accomplished.

25 MR. DOWNEY: Your Honor, in most cases I would

1 suggest that's true, but the character of this material,
2 that is proposed findings based on a very very large
3 record which presumably would contain citations back to
4 the record which we want to check in preparation for
5 his deposition. It's a different kind of animal that
6 we're dealing with. It's not ... form the entire basis
7 for our Motion to Strike. It would require a great deal
8 of digging on our part to take those proposed findings
9 and go back to record and see exactly what it is that
10 he was being asked to assume, because I take it, the
11 way they were characterized, these were hypothetical
12 questions, although it's very difficult for me to under-
13 stand that connection with this examination.

14 MR. ROISMAN: Judge Grossman, if I understand what
15 you just said, which of course was my understanding as
16 well, it is that this is not the time at which the expert
17 is subjected to the question well doctor what if in fact
18 this was, as it's stated here on transcript page so-and-so
19 and so-and-so and not as it's characterized there, then
20 does that change your opinion? That's cross-examination.
21 The purpose here is to discover did you look at this, yes,
22 and perhaps to ask what was it about it that made you form
23 this particular opinion? But not to then challenge the
24 witness and say well wait a second I want to show you the
25 transcript page that's cited there ...

1 MR. GROSSMAN: My understanding ...

2 MR. ROISMAN: Is this ... let's go and look at
3 that transcript today.

4 MR. GROSSMAN: My understanding of the Rule that
5 was adopted in 1975 was that basically discover of experts
6 is done through interrogatories, but in certain cases,
7 if that's not adequate, the same type of information that
8 is generally ascertained through interrogatories can be
9 taken through discovery, and that type of information
10 is basically the subject matter on which the expert is
11 expected to testify, and I don't see that you need that
12 much advance knowledge of the subject matter of the testi-
13 mony in order to explore that area on deposition, but
14 now that's a personal observation and perhaps you have
15 another feeling about the Rule.

16 (Long Pause)

17 JUDGE BLOCH: The question is the scope of the
18 appropriate cross under the Federal Rules. A particular
19 Rule has been cited. Would you like to comment on what
20 you believe the scope should be Mr. Downey?

21 MR. DOWNEY: Your Honor, I don't have that Rule
22 with me. I think it's principally as Doctor Grossman
23 has indicated, that the need to have these findings in
24 advance is consistent with that Rule. It may be that
25 when we go to the transcript we think the finding on its

1 face is not supported by the evidence cited in the finding,
2 in which case we would choose to treat that differently
3 in our examination of Doctor Goldstein, and if we think
4 it is supported by the weight of the evidence.

5 JUDGE BLOCH: I guess the reason that Judge Grossman's
6 comment is important is what you're going to be limited to
7 is discovering the basis for the opinion. It's not going
8 to take that long and you're not going to do a lot in terms
9 of for example, probing about alternative facts and how
10 he decided those. You're just going to find out what he
11 relied on which may be almost entirely just a turning over
12 of the documents plus perhaps questions about expert
13 treatise's that he may have relied on in forming that
14 opinion.

15 MR. DOWNEY: I think it's broader than that, Your
16 Honor.

17 JUDGE BLOCH: Okay, now why is that and how is
18 that?

19 MR. DOWNEY: For example ...

20 JUDGE BLOCH: Would you like to borrow our Rules?

21 MR. GROSSMAN: And the pertinent Rule is 26(b)(4)(a)
22 (1) small i which is one, and that's where the principal
23 reliance is on interrogatories and you're now asking for
24 a deposition in place of interrogatories and it's a limited
25 purpose as I read it.

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JUDGE BLOCH: As Judge Grossman read it to me.

(Long Pause)

MR. GROSSMAN: NRC Rule that supercedes the Federal Rules of Evidence here, please enlighten me about that. Is there?

MR. TREBY: I'll have to check the regulations, but my understanding is that our Rules generally follow the Federal Rules of Evidence.

MR. GROSSMAN: In this particular, or that's something you're not aware of?

MR. TREBY: I'm not aware of it, but I will check.

MR. DOWNEY: Your Honor, may I make a suggestion?

JUDGE BLOCH: Mr. Downey, sure.

MR. DOWNEY: We would be happy to file what we believe the proper scope of discovery is so that we don't ... I mean I have no intention to try and go beyond that. I confess to you I don't know precisely what it is. I know that I have lots of questions I'd like to ask Doctor Goldstein. Maybe even Mr. Roisman is right and we have to hold some of those to trial.

JUDGE BLOCH: Okay, we also know that Notice from Code of Federal Regulations, the procedural rules of this Agency, that there is no explicit adoption of the Federal Rules for use in our proceedings, so the question of what standard applies may itself be quite complex, but we should

1 resolve it before the deposition.

2 MR. DOWNEY: I think that all counsels, Your Honor,
3 are in favor of holding it the Tuesday or Wednesday
4 following Labor Day.

5 JUDGE BLOCH: I would urge that when the parties
6 discuss the timing of the deposition and what's going to
7 be in it, that they take consideration both of the rights
8 of parties under the Federal Rules and of the need for
9 expedition at the hearing itself so that if an agreement
10 could be reached on limited additional matters that might
11 go beyond the Federal Rules, but that would promise to
12 add something to expedition at the hearing, we'd at least
13 like the parties to consider that and we hope that agree-
14 ment can be reached without a further ruling by the Board.

15 MR. ROISMAN: Mr. Chairman, let me just say that
16 when I leave here I leave until the day after the day after
17 Labor Day and I am nowhere. Now I have people in my
18 office, but I don't have a lawyer at this point, and if
19 we're talking about filing legal papers, there's no lawyer
20 to file a legal response.

21 JUDGE BLOCH: Well, I think the only thing we can
22 do under the circumstances is to attempt to protect your
23 client's rights as the Board and hope that Mr. Treby will
24 assist in that effort. I don't know what else we can do.
25 I do think that it's certainly, what Judge Grossman has

1 said is consistent with what I've understood the proper
2 Rule to be. Whether the NRC has regularly used it or
3 not I don't know. I've been basically away from it for
4 five years so I don't know what the Board rulings are.
5 I'm not aware of any ruling that I knew of starting from
6 '79 back to the early part of the '70's one way or the
7 other on that question, that is, to what extent could you
8 probe an expert witness prior to a hearing beyond the
9 scope that Judge Grossman has mentioned. Does that mean
10 that there's no way the Applicants can reach you to discuss
11 the issue?

12 MR. ROISMAN: Yes, if they could reach me then my
13 purpose for going away would have been destroyed.

14 JUDGE BLOCH: That sounds ominous. Is it a record
15 matter?

16 MR. ROISMAN: Yes, absolutely. I'm going away to
17 get away from this for five days so that I will be in a
18 mental condition to go to that hearing. I mean I'm taking
19 the only vacation that I have had this summer is what it
20 is, and I need ... I'm going to a place that I have no
21 telephone.

22 JUDGE BLOCH: Is there a necessary problem presented
23 by this or can we just pass onto another matter?

24 MR. DOWNEY: I suggest we pass on. We would be
25 happy to work with whomever Mr. Roisman designates ...

1 JUDGE BLOCH: Are you going to be able to designate
2 someone?

3 MR. ROISMAN: Yeah.

4 JUDGE BLOCH: Okay.

5 MR. DOWNEY: I can give the Board my assurance that
6 we'll research carefully the question of proper scope.
7 We'll come prepared to the deposition. We'll inform the
8 Board in advance what we think it is, and that's all I can
9 say.

10 MR. ROISMAN: I would think if ... I don't want to
11 presume on the Board, but I would take it that there's at
12 least one member of the Board who believes that if the
13 Federal Rules apply, then the scope is as I believe it is.
14 I think that if the ...

15 JUDGE BLOCH: It seems to be that way.

16 MR. ROISMAN: ... Applicants believe the scope is
17 broader than that, that they should have to, at a minimum,
18 at least get the Board's okay and not leave the burden on
19 us to start calling the Board and asking for it, and of
20 course to notify us. Ms. Gard will be the one who will
21 receive any pieces of paper that come to the office or
22 participate in any conference calls.

23 JUDGE BLOCH: Except that we did urge that in the
24 interest of expediting the hearing there may be some
25 matters that really are no problem for him to go into at

1 the deposition and I think consideration should be given
2 to that. I can imagine some limited probing as to
3 Applicants version of the facts and his opinion on that
4 or possibly some outstanding authority that they think
5 divurges from it if they don't spring it on him and he
6 knows in advance that they're going to ask him about it.

7 MR. ROISMAN: Well, he is prepared to deal with
8 this. I told him he should anticipate at some time that
9 the Applicant'll say but if the facts were this, this and
10 this, would that still be your opinion, and he's perfectly
11 willing to tell that. It's the sort of argumentative
12 cross-examination type of thing in which the expert is
13 challenged with some portion of the transcript that the
14 Applicant believes establishes the facts as he thinks they
15 are and asks the expert to read that transcript ...

16 JUDGE BLOCH: And that doesn't seem appro ...

17 MR. ROISMAN: ...saying in light of that does that
18 change your opinion.

19 JUDGE BLOCH: Well, they should ask their own
20 questions based on their version of the transcript. I
21 don't think challenging the witness is necessary at this
22 stage. I think I agree with that. Alright, let's proceed
23 onto the last subject. Excuse me, there's two more sub-
24 jects.

25 MR. WALKINS: Second to last, Mr. Chairman. If I

1 could address the Motion regarding Mr. Amalton's termina-
2 tion.

3 JUDGE BLOCH: I want to make a brief statement in
4 hope of expediting this one.

5 MR. WALKINS: Real brief, just to ...

6 JUDGE BLOCH: No, I want to.

7 MR. WALKINS: Oh, sure. Still real brief.

8 JUDGE BLOCH: We've read what Applicants have filed
9 on Robert Amalton and we're surprised to see there was
10 so much more for them to say than they said at the time
11 that they filed the Motion for Reconsideration. At the
12 time of the Motion for Reconsideration on Amalton the
13 description of what the Applicants might show was far more
14 scanty than was made available here. I am pleased under
15 the circumstances the Applicants lawyers have stated that
16 possibly they should have said more earlier. I'm convinced,
17 at least subject to argument here, that an adequate record
18 would require a re-opening of the Amalton matter because
19 of the large amount of relevant evidence. I'm hoping, Mr.
20 Walkins, we may be able to pass to the other parties after
21 that statement.

22 MR. WALKINS: I believe we may.

23 JUDGE BLOCH: Mr. Roisman, have you any reaction to
24 that? I understand ...

25 MR. ROISMAN: Yes, I do. You ruled that we would

1 not have to respond until you had ruled that we had to
2 respond. I did not prepare to come and even discuss
3 the Hamilton matter because you were very clear on that
4 ruling and I'm not prepared to discuss it ...

5 JUDGE BLOCH: I agree with that.

6 MR. ROISMAN: ... and will not be until I return
7 from vacation.

8 JUDGE BLOCH: Okay. We can pass that. I guess ...
9 when will we be able to hear your arguments on that ...

10 MR. ROISMAN: I took every piece of the Hamilton
11 testimony and the undesignated portions of Brandt and Purdy.
12 I'd like the Applicant to tell us what transcript pages
13 they claim are the Hamilton and what they think is some-
14 thing else which they've not done in their Motion. I
15 simply put it into a file. I didn't look at it. I didn't
16 do any proposed findings on it. I didn't prepare any
17 cross-examination for it.

18 JUDGE BLOCH: That was completely appropriate.

19 MR. ROISMAN: Okay, and it will not be part of our
20 cross-examination plan that is filed on Friday.

21 JUDGE BLOCH: You mean your proposed findings.

22 MR. ROISMAN: No, we were to do a cross-examination
23 plan on Friday as well. The filing that was due on the
24 20th, which was postponed to the 31st, was to do a pro-
25 posed finding and a cross-examination plan. We're ...

1 JUDGE BLOCH: Is that the Applicants understanding?

2 MR. DOWNEY: Our understanding was we would identify
3 those witnesses who we wish to cross-examine if that's
4 what you mean.

5 MR. ROISMAN: No, my clear understanding what the
6 Board had ruled on the 14th was that we would identify the
7 witness and indicate what it was we wanted to cross-examine
8 the witness about, and there was even a discussion and I
9 believe that the Applicant was asked and everybody agreed
10 that they were willing to do that without doing the normal
11 plan which is you see the plan and the opposing party
12 doesn't and we discuss ... don't want any witness to be
13 surprised, make sure they come to the hearing and they're
14 prepared and that, that the witness is not ... I mean
15 the Applicant isn't disadvantaged by this exception of
16 our one witness which is Doctor Goldstein ...

17 JUDGE BLOCH: Could we have direct testimony pre-
18 filed, right? You want a cross-examination plan also?
19 I didn't think I called for it.

20 MR. ROISMAN: No, I believe that you did in the
21 transcript of the 14th, Mr. Chairman.

22 MR. TREBY: My recollection was the 14th of June ...

23 JUDGE BLOCH: My recollection is you asked for
24 that and I said instead of that we'd have the proposed
25 findings.

1 MR. ROISMAN: My recollection, and I do not have
2 the transcripts here, is that, is that both would happen.

3 JUDGE BLOCH: Mr. Treby.

4 MR. TREBY: My recollection was that we did discuss
5 both and that it was determined that since we were going
6 to be filing these proposed findings that that would
7 serve in lieu of a cross-examination plan because that
8 would indicate what the parties intended to prove.

9 JUDGE BLOCH: And did the proposed findings cover
10 things because they won't necessarily cover what you hope
11 to show at trial? I guess the problem is you have done
12 that extra step. It won't hurt your preparation. I don't
13 think you have to file it though.

14 MR. ROISMAN: Well, to be very candid with you,
15 I'm sort of of two minds about the question of filing it,
16 I mean first of all there are a whole bunch of witnesses
17 and portions of witness' testimony which we do not intend
18 to pull. For instance, just to give you an example, Mr.
19 London. We ...

20 (End Of Tape)
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1 JUDGE BLOCH: Well, it's good to give advance notice
2 if you're not going to report our cross examination of a per-
3 son because then the person is treated kindly and doesn't
4 have to be there, but, aside from that, it seems to me that
5 unless someone shows me a portion of the record that required
6 cross examination plan, I don't believe th' we require it.

7 MR. ROISMAN: Well, if anyone has the 14th trans-
8 cript here --

9 JUDGE BLOCH: Not in this room. I have it down-
10 stairs.

11 MR. ROISMAN: Well, I guess -- everybody seems to
12 remember it differently than I and I'll decide whether it's
13 to our advantage to disclose it or not.

14 JUDGE BLOCH: When are you going to -- have you al-
15 ready prefiled the Hamilton testimony or are you going to?

16 MR. DOWNEY: Yes, it was filed.

17 JUDGE BLOCH: It was filed?

18 MR. DOWNEY: Yes, your Honor.

19 JUDGE BLOCH: So, what we have left, Mr. Roisman,
20 is that you will have the opportunity sometime prior to the
21 hearing charges to the Board that we've just made in error.

22 MR. ROISMAN: Would you just enlighten me? I mean
23 I looked over briefly just to see the generic nature of it.
24 It appeared to me that it all related to whether the rail was
25 slippery or variations on that theme. I had understood in

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the conference call that you indicated that that was not what you were expecting to see as being persuasive since they had had their bite at that apple before.

JUDGE BLOCH: Well, my impression was that they did have a lot on rail and whether it was slippery, but they had other things as well. I will do it from memory because I don't have it in front of me. But there was stuff about Mr. Hamilton having previously gone to the same area.

MR. WALKINS: Mr. Chairman, there was additional material regarding the two dangling ends involving other QC inspectors who either were or were not asked to perform the task and were or not terminated as a result. There is an explanation of Mr. Hamilton's having been assigned a new supervisor shortly before the events of this day.

JUDGE BLOCH: That was important to us in the reconsideration decision where we provided, in part, on the fact of the supervisor being assigned.

MR. WALKINS: And then there is testimony from the disputed supervisors who were most directly involved who, in fact, made the decision to recommend termination and the individual who accepted the recommendation regarding the extent to which anything that Mr. Hamilton had ever said or done on the job had anything to do with the reason for which he was terminated. And the answer to that is no.

JUDGE BLOCH: There also was suggested, finally, that

1 a couple of the people who refused to go with Mr. Hamilton
2 had previously gone and done inspections.

3 MR. WALKINS: There is not only testimony to that
4 effect, but inspection documents signed by those two inspec-
5 tors.

6 MR. ROISMAN: Mr. Chairman, do you want - I just
7 want to be sure what it is you want me to address. I assume
8 you do not want me to address whether that testimony is
9 creible or not credible, but whether or not you should have
10 allowed the applicant having once given them a chance to re-
11 open the record to now, being denied, to now get another
12 chance to re-open the record.

13 JUDGE BLOCH: That's right. My feeling is that, giv-
14 en the nature of the offer, that the record just would not
15 be adequate for us to rest on what seems to have been a very
16 fragmentary record. Now I'm annoyed and disturbed because
17 we actually have a similar thing happen, we thought, on the
18 technical issues, on design, but I'm more concerned about
19 an adequate record that we decide the actual facts in the
20 case than I am about the advocacy problems that either of
21 the parties have.

22 MR. WALKINS: Mr. Chairman, in case Mr. Roisman, it
23 isn't clear to him, any and all of these witnesses are sub-
24 ject to cross examination by the Board and by intervenors.

25 JUDGE BLOCH: That's right, but the first step is

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1 that he have an opportunity to show why we should change
2 what we've just ruled.

3 MR. ROISMAN: As I understood it, again, your prior
4 ruling was you would rule nothing. You would indicate to
5 the parties --

6 JUDGE BLOCH: Whether you should answer,

7 MR. ROISMAN: Whether it should be answered and
8 based on that, you would decide whether to rule. I'm not
9 trying to tell you to take out of your mind what's in your
10 mind. I just want to make sure that the record is clear
11 there is no ruling at this point.

12 JUDGE BLOCH: We can easily abide by what we said
13 previously.

14 MR. ROISMAN: I don't have that transcript with me
15 either, but that is my understanding of exactly what you rul-
16 ed.

17 JUDGE BLOCH: I'm sure you will take our previous two
18 rulings, which are inconsistent with what we've just said,
19 and you will inform us as to which time we were right.
20 And then we will rule. We haven't ruled yet. You're correct.
21 We have not ruled yet. We can all choose.

22 MR. DOWNEY: Mr. Treby, would you comment on this
23 matter?

24 MR. TREBY: Yeah, we thought - the staff reviewed
25 the applicant's pleading and we thought that the applicant

1 had made a sufficient showing to re-open the record under
2 any test under either the Wolf -- test as to whether or not
3 the record --

4 JUDGE BLOCH: Oh come on, that can't be true because
5 they had the opportunity to gather these facts before. They
6 are not new facts.

7 MR. TREBY: Well, that is true. There may not be new
8 facts, but we think that they are important facts and that
9 certainly are important for a full record.

10 JUDGE BLOCH: Of course, it's not a matter of -- I
11 guess it is. Well, it may or not be a matter of re-opening
12 the record once we rule the first time. Mr. Roisman will
13 inform us of that.

14 MR. ROISMAN: Yes, Mr. Chairman, I'm going to try to
15 do this as quickly as I can. I think - let me just say that
16 I think the underlying issue here is one that I will also
17 ask for in the locutory appeal on. I think if this rule is
18 adopted, when the sauce is in the other boat so to speak,
19 the utility industry is going to go crazy because what this
20 utility has done here is done in every hearing by every in-
21 tervenor. They always have new stuff that comes up after
22 the hearing closes on an issue. They always do. That's
23 always good stuff which they didn't find out earlier because
24 they just didn't have the resources to find it or the witness
25 didn't come forward or nobody understood it before that. It

1 happens in every single hearing and I don't think that this
2 Board should make that rule without, at least, the Appeal
3 Board saying that they are now ready to change what is,
4 essentially, a 25 year rule in this Agency about closing
5 records.

6 JUDGE BLOCH: Ok, you think the proper standard is
7 the standard for re-opening the record and you will --

8 MR. ROISMAN: I don't think there is any question
9 that that's the proper standard that the Agency has followed.
10 I have argued vehemently against it on numerous occasions.

11 MR. WALKINS: I am not sure the record has ever been
12 closed. The Board's holding was that this issue hadn't been
13 decided. I believe the case is --

14 JUDGE BLOCH: Well, Mr. Roisman is saying that that's
15 the same thing as closing the record on that.

16 MR. ROISMAN: It is and it's done all the time.
17 That's exactly what the Boards do in these rolling hearings.
18 They close the record on issues and that's the end of the
19 record.

20 JUDGE BLOCH: Ok, you're going to argue that to us.
21 Now, we have one more issue for this and that is the motion
22 to take discovery concerning witness F. Clearly, it's a

23 MR. DOWNEY: Yes, your Honor. Clearly, it's a
24 motion which there would be no need to file, but for the pro-
25 tective order.

1 JUDGE BLOCH: Mr. Downey, let me start by asking a
2 question. My understanding of the witness F testimony is
3 that the gentleman had technical concerns about the plant.
4 Half of his case is that he raised them, he raised them re-
5 peatedly and the applicants resolved them adequately, as I
6 understand the applicant's case. And that, in addition, he
7 is somewhat of a difficult person to get along with. So
8 you've got court martial testimony that you want to put in
9 the record.

10 MR. DOWNEY: That's right.

11 JUDGE BLOCH: Why do you need more about his back-
12 ground if that's the nature of the case? Is there really
13 anything more that you need to demonstrate your case other
14 than the fact that you dealt with the technical concerns
15 adequately ?

16 MR. DOWNEY: If I could be assured that that was
17 sufficient in the Board's mind.

18 JUDGE BLOCH: But if you didn't deal with the techni-
19 cal concerns adequately, does it matter if he is a really
20 evil person?

21 MR. DOWNEY: Let me start, your Honor, with how this
22 came about. Witness F comes forward under the cloak of se-
23 crecy to tell his story. He forces us to prove to counsel
24 through a legal order that won't even let us investigate his
25 claims. We give him the name of the supervisors and the

1 people with whom with worked, can't talk to them. As you
2 recall, we had that long telephone conference -- little
3 pieces of information. We went to them --

4 JUDGE BLOCH: Yeah, I understood the background and
5 the investment of a motion. I want to know what the rele-
6 vance of this more background information is to the case you
7 are making.

8 MR. DOWNEY: Your point, your Honor, our point, your
9 Honor, is this witness F has -- raised these complaints.
10 They were addressed. He's the man who wouldn't take yes for
11 an answer. He was disagreeable. He was argumentative. He
12 had problems working with every single person with whom he
13 dealt. As the Board narrowed his credibilities, the major
14 question to be resolved here, in the course of doing his
15 work, we discovered by accident, he was an EI when he left
16 the Navy, which -- would then be left in -- for his term of
17 enlistment. And we find out that he's had this court mar-
18 tial for having assaulted a commanding officer and tearing
19 up his personnel file and other things, evidence that we
20 think substantiates the recurrence of the kind of difficulty
21 that he experienced at Commanche Peak. It is also observed
22 he has 4 employers in a very short time.

23 JUDGE BLOCH: Yeah, but suppose he was the devil and
24 he came to you with information about the plant? If you
25 treat it adequately, you haven't intimidated him. And if

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1 And if you treat it inadequately, you have intimidated him,
2 haven't you?

3 MR. DOWNEY: No, I think that this man's difficulty
4 in dealing with people, as evidenced by his court martial,
5 is appropriate evidence on how he dealt with the people at
6 Commanche Peak. We don't think he's intimidated at all.
7 He's the one who is saying he was and his perception is what
8 he's contending in this case. We would hope to prove, through
9 this discovery, and it may be that there is no one there that
10 even remembers the man.

11 JUDGE BLOCH: Your proof attempts to show that all
12 his technical concerns were listened to and responded to,
13 doesn't it?

14 MR. DOWNEY: We feel it does show that. We have, if
15 I could be confident that - I've got to go after this - his
16 story, like any other story, in this case and --

17 JUDGE BLOCH: Well, I hope you don't go after every
18 other story the way you went after this story, Mr. Downey.
19 We've read a good part of those depositions, most of which
20 I don't think were anyway connected to the case. They were
21 just, I'd say about 90% of the depositions were just con-
22 flicts between the attorneys there. I'm surprised Mr. David-
23 son isn't here, himself, to discuss that - those depositions.

24 MR. DOWNEY: He'll be happy to do that, your Honor,
25 He's actually at Commanche Peak doing other things today.

1 You know, I must say something, your Honor. I think that Mr.
2 Davidson has been unfairly attacked in these proceedings by
3 counsel for the intervenor. There are always two lawyers
4 in those rooms and there are always two lawyers -- in impos-
5 ing objections and I don't think Mr. Davidson - his demeanor
6 I thought was exemplary in many cases considering the re-
7 sponse that was given to him in some of these depositions.
8 And I think that was a discovery deposition. We pursued it
9 properly. Mr. - witness F's counsel didn't object to the
10 way these things were going on. We actually had agreement
11 reached with Mr. F's counsel that were rescinded by counsel
12 for the intervenor.

13 MR. ROISMAN: That is a false statement.

14 MR. DOWNEY: I would be glad to point out to you, to
15 the Board, the transcript pages in which that occurred. I
16 don't have them with me. The point is that we think witness
17 F, by his personality, and we do have a defense for the wit-
18 ness F allegations. Defense one is he was obnoxious. He
19 was disagreeable. He couldn't get along with anyone and
20 that caused him trouble at the job site. There was no one
21 intimidating him.

22 The second part is, he raised concerns - whether his
23 concerns were correct or incorrect - and we dealt with them.

24 JUDGE BLOCH: Did you just over-characterize the --
25 I mean, I know you've got testimony that he never took no

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1 for an answer, but obnoxious and disagreeable, is that in
2 the --

3 MR. DOWNEY: One of the few incidents of - he played
4 us by overstepping bounds with the QC inspector and --
5 witness F do it and that's -- and I think that's a good ex-
6 ample. Our point is we haven't had an opportunity to ade-
7 quately explore all of witness F. Court martial records and
8 being convicted of felonies were relevant to the issue of
9 credibility and that's what this issue turns on. Is his
10 testimony that I was harrassed credible?

11 JUDGE BLOCH: Mr. Roisman?

12 MR. ROISMAN: What the witness has done is he has
13 described two events and then the applicant's witness de-
14 scribed a third event in which things were said to the wit-
15 ness which the witness treated as harrassing and intimidat-
16 ing. Stripped of all the other verbage, those three events
17 with one minor exception, are conceded by the applicant's
18 witnesses. Number one, the witness was told, "You're skat-
19 ing on thin ice." The witness was told by his employer,
20 "Either should I have Mr. Merritt come down and pull - jerk
21 your chain or come down and pull in your reins?" - a differ-
22 ence which is slight in any event. The record is there to
23 look at for whatever one wants to put on it and, third, that
24 one of the witnesses, after confrontation with this person
25 said, "You'll never accuse me of either violating the safety

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1 rule or committing a crime" - something like that again. And
2 the witness, in testimony, not now witness F, the witness
3 who said it indicated his own perception of what he intend-
4 ed to convey by that statement. There isn't a credibility
5 question in the issue. I don't think there is any question.
6 We are trying to make out the proposition that witness F was
7 an angel. He was, obviously, a difficult person. We could
8 even stipulate to that fact that he's a difficult person and
9 he got under people's skin. There is no question about that.
10 What in the world, whether he did or did not have more that
11 they wish to probe in his military record, more which they
12 want to probe in his record at other employment, that has
13 to do with anything in the case, I don't know. You're,
14 basically, asked to look at and answer this question, was
15 it warranted for the applicant to say to him the things
16 that were said to him, even if he was the most obnoxious
17 guy in the world?

18 JUDGE BLOCH: Based on what he did at the plant?

19 MR. ROISMAN: Yeah. That's right and there is this
20 separate question which sort of gets into the Ippoleto re-
21 port, was he right or was he wrong? Everybody agrees he was
22 right on the Farrell resident transformers and I submit that
23 is on the merits of the issuance of the 50-55 D and I sub-
24 mit and we have proposed findings to the effect that Westing-
25 house and General Electric clearly, indeniably, violated

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1 part 21 and that the company, by not reporting it, in effect,
 2 violated part 21 themselves. But that's for the Board to
 3 decide and it's got nothing to do - I mean, we're not offer-
 4 ing witness F as to whether part 21 was violated. We're
 5 offering the regulation itself, which indicates what the
 6 standard is and why, given the conduct that was testified
 7 to, not by witness F but by Mr. Vogelsang as to what it was
 8 when, essentially, what did they know and when did they know
 9 it is what the part 21 question is about. I don't see how
 10 this gets into this and what they are asking for, as you
 11 will see in the filing we got this morning, is they're ask-
 12 ing to go to the Navy, to every former employer to take all
 13 this information and then, of course, to use all of that in
 14 another one of these marathon depositions which just seems
 15 to me to be irrelevant material. There has got to be an
 16 end to it. Again, and I don't want to keep harping on this,
 17 but maybe it's just because of my experience in the Agency,
 18 were an intervenor to try an identical tactic with regard to
 19 - just pick a witness, pick any witness that an applicant
 20 puts up and says, I want to go back to grade school. I want
 21 to find out whether he fought in the school yard and I want
 22 to work my way through to show that this is the kind of per-
 23 sor that had a record of lying. That he had a record of
 24 this or that and everybody would say, come on. He's talking
 25 about some technical issues. He's talking about some

1 particular event. We can evaluate that. You put an end to
2 it. I think witness F is time to put an end to.

3 JUDGE BLOCH: Then the standard we should apply is
4 what?

5 MR. ROISMAN: A reasonable standard.

6 JUDGE BLOCH: For what, is it something in the
7 Farrell rules or in the regulations of discovery or what?

8 MR. ROISMAN: No, if I remember, it's 2. - it's
9 been so long.

10 MR. DOWNEY: 2.720.

11 MR. ROISMAN: No, that relates to a different matter.
12 It's the relevance of evidence. The evidence has to be
13 relevant material and probative and this information isn't
14 going to lead to anything that's relevant material or proba-
15 tive.

16 JUDGE BLOCH: 720 is subpoena, so that's not it.

17 MR. DOWNEY: Your Honor, if you're asking about
18 the federal rules for procedure in the scope of discovery,
19 it's rule 26C, which is anything is discoverable that can be
20 reasonably calculated to lead to admissible evidence.

21 JUDGE BLOCH: I think it is reasonableness standard,
22 based on relevance to the subject matter of the proceeding.

23 MR. ROISMAN: Let me just add that we have offered
24 to stipulate in the military court martial records. We've
25 given the applicant's counsel a copy of those records and

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1 said, "Here." It says in it these things. This is what he
2 was charged with. This is what the result was of that
3 charge. If the purpose is to show that he has a tainted
4 character, which I think is, again, of dubious evidentiary
5 value, you know, how much do they need? What do they want?

6 JUDGE BLOCH: In the record so far, in the eviden-
7 tiary record, to what extent is there a direct conflict
8 which involves the credibility of witness F, where he has
9 said something happened and other people said something else
10 happened, so you're trying to use his background to show
11 that he doesn't tell the truth.

12 MR. DOWNEY: Your Honor, the fact that they utter
13 the same words doesn't mean there is not a credibility re-
14 solution that's required. Here is witness F saying they're
15 saying these things in a threatening way and, in fact, our witness was
16 saying, that's not the way in which it happened at all.
17 It's his taint that he puts on these --

18 JUDGE BLOCH: So he says it was done in a threaten-
19 ing way and your witness says he didn't do it in a threaten-
20 ing way?

21 MR. DOWNEY: Right, and I think that it's important
22 to point out additional factors on it. But for this pro-
23 tective order, this issue wouldn't be here. We would
24 simply call Mr. F's former employer and say, "Mr. Jones, I'm
25 Mr. Downey. I represent so and so. Did you have an employee

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1 working there named X? He'd say yes. I'd say what happen-
2 ed? Was he a good employee? I'd try to get to the bottom.
3 That's probably what's going to happen. Maybe there is no
4 one who knows. But it's the protective order that forces
5 us to come to these lengths to get some basic background
6 information. I might add, you know, but for some observa-
7 tions in his file we wouldn't have found out that he punched
8 out his Navy Commander, which I think is relevant in what
9 kind of employee he is and what kind of attitude and what
10 kind of temperament and disposition the man has. And that's
11 at issue in this case.

12 JUDGE BLOCH: Mr. Treby?

13 MR. TREBY: The staff supports the applicant's mo-
14 tion. We think that it is necessary for them to develop
15 information, not so much because of credibility, although
16 we would grant that credibility is a factor that they're
17 entitled to look into, but more it goes to the merits of
18 a person's personality. Was he the type of person who could
19 be intimidated? Was he - and, in fact, was he intimidated
20 by these statements? How did he take statements that people
21 made to him? This is the kind of information that I under-
22 stand the applicants seek to be getting from former employers
23 and his past employment history. And the question here is
24 not a question of was there a difference of opinion as to
25 some technical matter, but it appears to be a question of

1 how did he perceive the information that was being given to
2 him or the instructions or the response he was getting from
3 his management when he brought things to them. That is the
4 issue here and I guess in order to get to that point one does
5 need to go back a little bit, since there appears to be some
6 question. I agree that without the protective order, it is
7 possible that all that might have been involved here is a
8 telephone call and it may be a lot of smoke, but the - as
9 the applicant has pointed out, he doesn't have that option.
10 He needs to come here and get the Board's permission.

11 The last thing I would add is that the staff, while
12 it firmly believes that the applicant is entitled to develop
13 this, is supporting it with some reluctance because the
14 staff does not like to go into these kinds of matters. We
15 generally don't think that it is relevant to the kinds of
16 issues we have in the case, prior personnel history, etc.

17 MR. ROISMAN: Mr. Chairman, just one thing I'm very
18 unclear about and I received these papers this morning, so
19 I've not had a chance to look into it at all. I'm very un-
20 clear about what is the status of military government docu-
21 ments and their availability, given the Privacy Act limita-
22 tions at all. So I would think that if the Board were going
23 to do anything that the Board would need to be very careful
24 that it didn't issue a subpoena against a federal authority
25 which, in some way or another, encroached upon that. There

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1 is nothing in the document that answers that question and I
2 don't know the answer to that question.

3 JUDGE BLOCH: Mr. Roisman, with respect to this wit-
4 ness, are you maintaining that this witness personally was
5 intimidated or that the actions of the applicants, with re-
6 spect to this witness, were of the nature that showed they
7 were engaging in a pattern of intimidation of employees?

8 MR. ROISMAN: Both.

9 JUDGE BLOCH: Both.

10 MR. ROISMAN: Both.

11 JUDGE BLOCH: That he actually was intimidated and
12 stopped reporting things?

13 MR. ROISMAN: No, that. No, no, he left the site
14 and his testimony as I remember it was that he felt near the
15 end of his work, that it was very difficult, but that's a
16 problem which I think you, yourself, recognize. Most of
17 these people who come forward themselves are saying, "I
18 can't do my job. It got harder and harder. I finally got
19 really tired of it. I left or I resigned or, you know, or
20 something like that.

21 JUDGE BLOCH: He felt forced out?

22 MR. ROISMAN: In effect. I mean, he didn't go till
23 he had a job, but yes he has testimony to that effect.

24 JUDGE BLOCH: Well, the motion for further discovery
25 on witness F is denied. We feel that there is enough

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1 information in the record already on his demeanor and his
2 background and that that other stuff would be, at best,
3 cumulative or redundant and we want to leave the record as
4 it on that issue. Yes, Mr. Treby?

5 MR. TREBY: May I ask a question about witness F?
6 To avoid any problems, can I suggest that any proposed find-
7 ings with regard to witness F be filed separately from the
8 other findings and be treated as if they were like safe-
9 guard findings, that is, just filed in camera so that they
10 --

11 JUDGE BLOCH: Yeah, but they should be clearly mark-
12 ed, "Not for Public Use" in large letters.

13 MR. TREBY: Alright.

14 MR. ROISMAN: Mr. Chairman, let me just in response
15 to what Mr. Treby raised. There is a couple of places in
16 our findings where we had occasion to cross reference. My
17 concern, as you know, had been with regard to - we refer to
18 the witness as witness F throughout the finding but it's
19 because the witnesses that were called by the applicant were
20 to not know that the witness who was witness F was, in fact,
21 the person whose name they had that, even though you refer
22 to it as witness F, when you say witness F's testimony you
23 disclose that information. In a few places where we cross
24 referenced we refer - we cross referenced the finding and we
25 refer there to testimony regarding an STE engineer or an STE

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1 as a way of deleting the witness F reference and we would
2 not propose to put those in camera. I don't think that
3 those would cause anything more than what is already known
4 among the people to whom disclosure has been made and that
5 is, that somebody did make testimony about the STE person
6 and that that testimony did certain things. I just want to
7 make sure now that that's not a problem and that we don't
8 have to put that sub-piece of other findings into in camera
9 protection.

10 JUDGE BLOCH: There is a letter from Michael Spec-
11 ter to Mark Davidson marked August 15 and it says, cc, All
12 persons on service list. And that particular letter has a
13 list of things from which I think it's possible to deduce
14 who witness F is if you know his background.

15 MR. ROISMAN: Yes, I know. YOU indicated that to
16 me and I got a call from Mr. Clements at the --

17 JUDGE BLOCH: Oh, so you did catch it and it's mark-
18 ed up there?

19 MR. ROISMAN: It is my understanding that it was
20 caught.

21 JUDGE BLOCH: So that letter of August 15 should be
22 treated as not for public use by the parties as well. Is
23 that a problem for the applicant? Have they already dis-
24 seminated that one, which wasn't marked?

25 MR. DOWNEY: We just put it in the correspondence

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file.

MR. ROISMAN: If it's like our correspondence file--
(CHATTER.)

MR. DOWNEY: You'd be hard pressed to find it. You would have to be looking for it.

MR. TREBY: Mr. Chairman, I understand that we were going to be filing separately. It seems to me we can't talk about witness F and all these other people who testified.

JUDGE BLOCH: Yes. File them separately and separately marked also means in a separate envelope completely that says, "Not for Public Use" because you don't want it to be opened and they not noticing that there are two documents instead of one.

MR. ROISMAN: Mr. Chairman, I have one other question on F which I would like to raise, just very briefly. The applicant's attorney has requested that we, instead of producing witness F for further deposition, produce him instead for cross examination to the Board and, obviously, one of the problems caused by that is that his testimony is taken in camera. The Board is holding a "Public Proceeding", etc. I would like to offer a compromise for dealing with that and that is the following: that on the Saturday preceding the hearing, here in Washington, witness F appear before the Board for his cross examination in an in camera proceeding and that that could become part of the hearing

1 record. We'll be happy to provide the witness and the
2 attorney at that time since down in Fort Worth it wouldn't
3 be a public hearing in any event.

4 JUDGE BLOCH: I have a full day of personal commit-
5 ments that Saturday. You don't want to do it Saturday eve-
6 ning, do you?

7 MR. ROISMAN: I think that's possible. I think that
8 could be done. I would have to talk to Mr. Specter for sure,
9 but I don't see what that shouldn't be possible.

10 MR. DOWNEY: I have a slightly different problem,
11 which is, I have a professional commitment to be in Glenn
12 Rose with --

13 MR. ROISMAN: But it is Mr. - or am I mistaken, it's
14 Mr. Davidson who will be --

15 MR. DOWNEY: Both of us will be there.

16 JUDGE BLOCH: How about doing it on our return to
17 Washington immediately after the hearing is over?

18 MR. ROISMAN: Do you mean on the following Saturday?

19 JUDGE BLOCH: Not necessarily the Saturday, but it
20 may be the middle of the week.

21 MR. GROSSMAN: He's only available on week-ends.

22 MR. ROISMAN: He now has employment and that causes
23 a problem. So the week-ends are better for him.

24 JUDGE BLOCH: Ok, how about either the Saturday of
25 the hearing week, if we end early enough to do that?

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1 MR. ROISMAN: My prognosis is on the assumption that
2 the bulk of cross examination will be carried out by us and
3 with the reservation that I haven't even looked at the
4 Hamilton stuff and if you rule it in that's others. I don't
5 see the hearing running to the 6th day.

6 JUDGE BLOCH: We'll take that under advisement. Any
7 other matters we must deal with?

8 MR. TREBY: Yes, I have two others I would like to
9 raise real quickly. Number one, with regard to the proposed
10 findings that we're filing on the 31st, I wonder if we
11 could make filing on the Board here on the 31st and provide
12 Dr. Jordan's mailing it the 31st, so that he got it over-
13 night the next day?

14 JUDGE BLOCH: What's the problem?

15 MR. ROISMAN: It's due to be filed at 5 p.m. on
16 Friday, the question is, can we make the service to the one
17 person who must have it by Friday at 5 p.m. who is out of
18 town by putting it in express or overnight mail to him?

19 JUDGE BLOCH: No problem.

20 MR. TREBY: Your Honor, and then I have a second
21 matter.

22 JUDGE BLOCH: The same thing is alright for the
23 applicants as well and court case.

24 MR. TREBY: The second matter also deals with the
25 proposed findings and that is --

1 JUDGE BLOCH; But that was not an exception though
2 for the in-town counsel notifying each other, right?

3 MR. TREBY; Right, no we will provide all in-town
4 counsel, it was just that Dr. Jordan - in order for him to
5 get it it would have to be mailed the day before. Mailed
6 by 2 o'clock and I can't guarantee that we're ready at 2
7 o'clock on the 30th.

8 JUDGE BLOCH: Ok, next matter.

9 MR. TREBY; I notice that the State of Texas is not
10 here. I don't know whether they're participating --

11 JUDGE BLOCH; They were invited.

12 MR. TREBY; Alright, I guess my only point is that
13 I assume that they were also aware of the schedule for fil-
14 ing for post findings and if they do not file for post find-
15 ings, then it is assumed that they are in default. There
16 is a specific rule that says that in order to be found in
17 default, you have to be directed to file proposed findings
18 and I don't want to suddenly find that at some later point
19 the State of Texas says they were not directed to file pro-
20 posed findings.

21 JUDGE BLOCH; It was not my understanding that a
22 governmental entity could be in default if they didn't have
23 obligations. That they had rights to participate with other
24 parties, but that they didn't default from the proceedings
25 by not filing findings. Am I wrong about that?

1 MR. TREBY: Well, default in the sense that they --

2 MR. ROISMAN: According to 2715, you are correct.

3 JUDGE BLOCH: That's what they're under, is --

4 MR. ROISMAN: Well, sometimes the states come in
5 under 2.714 and I was not here when they joined the proceed-
6 ings so I don't that.

7 JUDGE BLOCH: Well, they are a participating govern-
8 mental entity it is my understanding, so I don't know what
9 default would mean. They either file timely with other
10 people or they're not part of it.

11 MR. TREBY: That's my only point.

12 JUDGE BLOCH: Mr. Horn, am I right about that?

13 MR. HORN: That was before I was part of the proceed-
14 ing also.

15 MR. ROISMAN: It was also before I was part of the
16 proceeding. Am I clear, I just want to be clear about this
17 that even though it's your understanding and I will have
18 someone check the transcript to what the parties -- I think
19 that's different. That there is no cross examination plan
20 required. The parties are required to identify which of the
21 pre-filed testimony they intend to conduct cross examination
22 on.

23 JUDGE BLOCH: Which witnesses?

24 MR. ROISMAN: Yes, that's right which witnesses.

25 And that applies to staff as well as ourselves and to the

1 applicant.

2 MR. TREBY: I think that's only polite, yes.

3 JUDGE BLOCH: Any other matters?

4 MR. TREBY: Those were the two that I was to raise.

5 MR. ROISMAN: May I just check for a second?

6 MR. TREBY: Oh, I guess there is one other, I'm
7 sorry. Mr. Roisman filed as part of his direct testimony
8 some excerpts from Mr. Tolson. I guess I'm not sure what
9 witness is sponsoring that excerpt. So I wouldn't know
10 who to indicate I wanted to cross examine.

11 MR. ROISMAN: Well, the document was prepared by
12 OI and if a party objects to its introduction into evidence
13 then we would need Mr. Driscoll to come to verify that,
14 that it was prepared by him and how they prepared it.

15 JUDGE BLOCH: Is there a problem on the authenticity
16 - is it authenticity we're worried about?

17 MR. DOWNEY: It's completeness, your Honor.

18 MR. GROSSMAN: The tape shows many inaudible por-
19 tions. The transcript shows a great deal of conversation
20 and colloquy at this meeting was inaudible. Like any in-
21 complete document, it ought to be struck.

22 MR. : Are these statements made by Mr.
23 Tolson that we're talking about now?

24 MR. GROSSMAN: Some of them were made by Mr. Tolson
25 and some by other people in a tape recorded meeting that Mr.

1 Tolson was in attendance at.

2 JUDGE BLOCH: Do you think the inaudibleness in the
3 remarks is sufficiently extensive to invalidate the useful-
4 ness of the document?

5 MR. DOWNEY: Correct.

6 JUDGE BLOCH: I can't tell that until I see the
7 document.

8 MR. DOWNEY: Ok, well it's attached to our pre-file
9 testimony. It's the second part of the pre-file testimony.

10 JUDGE BLOCH: But this could affect our desire to
11 call Mr. Lipinsky as a witness also.

12 MR. ROISMAN: Yeah, but this is not --

13 JUDGE BLOCH: With respect to Mr. Tolson.

14 MR. ROISMAN: That's right. This is an entirely
15 different meeting and not in - it's related only in the
16 sense that it appears to be paint coatings as opposed to
17 something else. I had, I just wanted to put on the record,
18 Mr. Chairman, the following things. We have not received
19 the Neumeyer travellers. We are told we will either tonight
20 or tomorrow. That's not the first time we've been told
21 that it's either tonight or tomorrow.

22 I'd like to formally ask the applicant to provide
23 me with readable copies of the Purdy exhibits that relates
24 to the tallies of the ROF of individuals that cannot read the
25 copies that I have. I think it's exhibit 10 and I'd like to

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1 ask the applicant to provide me with Brandt pages 45311
2 through 24, which are missing from my copy of the deposition
3 of Mr. Brandt. That is his pre-file testimony in the form
4 of a deposition.

5 JUDGE BLOCH: Did the applicants get those page
6 numbers?

7 MR. DOWNEY: What pages?

8 MR. ROISMAN: 45311 through 24.

9 MR. DOWNEY: They were in my copy, be glad to copy it.

10 JUDGE BLOCH: Anything else? We stand adjourned.
11 (Whereupon, the proceeding adjourned at 6:30 PM)

CERTIFICATE OF PROCEEDINGS

This is to certify that the attached proceedings before
the NRC.

In the matter of: COMANCHE PEAK STEAM ELECTRIC STATION
UNITS 1&2

Date of Proceeding: AUGUST 27, 1984

Place of Proceeding: BETHESDA, MD.

were held as herein appears, and that this is the original
transcript for the file of the Commission.

GEORGIA PINKARD

Official Reporter - Typed

Georgia Pinkard/PPB

Official Reporter - Signature

David L. Becker

PREPARER

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