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NUCLEAR REGULATORY COMMISSION

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In the Matter of:

PREHEARING THREE MILE ISLAND

DOCKET NUMBER
PROD. & UTIL. FAC.

50-289-5P

Return Original to DSB

TR01

Location: Bethesda, Maryland Pages: 27,319-27,466

Date: Monday, September 17, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
PREHEARING THREE MILE ISLAND

Nuclear Regulatory Commission
4350 East West Highway
Fifth Floor
Bethesda, Maryland
September 17, 1984

Hearing in the above entitled matter
reconvened at 1:05 p.m. pursuant to adjournment.

BEFORE:

Judge Smith
Judge Wolfe

APPEARANCES:

Mr. Goldberg
Mr. Blake
Mr. Trowbridge
Mr. Voigt
Ms. Bernabei
Ms. Doroshov
Mr. Jordan

PROCEEDINGS

1
2 JUDGE SMITH: Good afternoon, ladies and gentlemen.
3 I believe we have some new appearances. Mr. Goldberg,
4 do we have appearances for the staff?

5 MR. GOLDBERG: Not at this prehearing conference.
6 We've recently filed a Notice of Appearance as well as
7 Finkelstein.

8 With me today are Mary Wagner, previously filed in
9 Notice of Appearance, and to my right is Jay Goteris
10 (phonetic), Region I regional counsel.

11 JUDGE SMITH: I see Mr. Lewis is with you. Mr.
12 Lewis.

13 MR. VOIGT: May it please the court, my name is
14 Harry H. Voigt, I am a partner in the firm of Bucklan,
15 Lifing, and McRay, here in Washington.

16 Mr. McBride and I previously appeared on behalf of
17 Mr. Pole and Mr. Boyd during the cheating phase of the
18 restart proceedings.

19 Our firm is here today to protect the interest of
20 certain of our individual clients who have been the
21 recipients of deposition notices issued by TMI alert.

22 And I have with me today Mr. James W. Muller, an
23 associate of our firm.

24 JUDGE SMITH: I take it you will participate at the
25 appropriate time. You have no request to make at this

1 time? We know everyone else?

2 We will first begin with the outstanding discovery
3 problems, then move to the significance of the recent
4 Commission rulings.

5 Beginning with the Decamp mailgram issue, we
6 have...first let me announce that conferences such as
7 this to rule on discovery disputes and other prehearing
8 matters will be held rather regularly.

9 We probably will be having them often enough so
10 that when a motion is filed for discovery relief, the
11 answer may very well be heard orally in a conference
12 such as this.

13 Maybe this will save the parties and the board a
14 lot of time and effort if we could move along in this
15 fashion.

16 Therefore, the first item that we wish to address
17 is the licensee's motion to modify TMI subpoenas along
18 the line of our earlier rulings on the scope of
19 discovery on that issue.

20 Are you prepared to address that? Do you have any
21 objection to the motion?

22 MS. BERNABEI: Yes, I do. For the record, my name
23 is Lynn Bernabei, representing TMIA. We had no
24 objection to the second proposed modification, that is,
25 that the individuals not be required to produce any

1 documents already produced by GPU.

2 In fact, that was the presumption of the subpoena.
3 We have no problem with that. Again, as to the first
4 portion, we would object to limitation in the manner
5 proposed by the protective order.

6 Without wanting to burden you with the same
7 arguments that were proposed before, what I would note
8 is that there have been certain information uncovered
9 during discovery that I think points out the importance
10 of a broader scope of discovery, that is, on conditions
11 other than simply the pressures by the question of
12 hydrogen and/or core damage.

13 And I'd like to point out one example and sort of
14 point out to the board how I think there was a
15 limitation that was previously imposed, in that the
16 licensee has requested in this instance is really based
17 on a faulty technical judgment by the board.
18 Recently...

19 JUDGE SMITH: This will be your second request for
20 consideration on this issue.

21 MS. BERNABEI: Well, it's in the context of our
22 response to the request to modify the subpoenas to the
23 individuals.

24 JUDGE SMITH: However, as far as the principles
25 upon which you are applying, you are asking for the

1 second time now to reconsider it.

2 MS. BERNABEI: Well, it's slightly a different
3 argument.

4 JUDGE SMITH: All right.

5 MS. BERNABEI: And I'd like to make it. Since
6 again, we did not have time to file a formal written
7 response, in the course of answering questionnaires,
8 certain GPU employees stated that they had documents
9 that were relevant to the pressure spike issues and to
10 the questions asked them on the questionnaire.

11 Essentially what GPU did, and Mr. Blake can correct
12 me if I'm wrong, is that they sent out questionnaires
13 to their employees which was premised on the fact that
14 only those questions that the board allowed should be
15 answered.

16 Those employees were asked in the last question
17 whether they had any documents relevant to the
18 questions that they had been asked on the
19 questionnaire, and many of the employees said, "Yes, we
20 do have documents."

21 Subsequently, some of those documents were
22 produced, some of them were not. In the course of
23 producing documents that either the employees had
24 brought to them or in their own document production,
25 GPU produced a memorandum to Mr. Arnold with several

1 attachments.

2 One of the attachments was a set of notes that were
3 taken in Parsippany on the day of the accident,
4 apparently in Parsippany in corporate headquarters.

5 That indicated information transmitted to corporate
6 headquarters from the site. In those notes, it was
7 indicated that information that there were in-core
8 thermal couple readings of 2500 degrees Fahrenheit, was
9 reported to Parsippany on the first day of the accident.

10 The NRC has stated in its investigation, that is
11 NUREG 0760, on reporting and information, that if they
12 had information that this information was known on the
13 first day of the accident, that they would conclude
14 from that if there were other confirming conditions
15 also known, that people knew that there had been a
16 generation of hydrogen and serious core damage.

17 I can refer you specifically to the portion in
18 0760. And for the record, what will be page 18, and
19 I'd like to read whether it's Mr. Mosley or Mr. Stello,
20 it states that "in retrospect, if all the readings had
21 been available (and they're talking now about the in-
22 core thermal couple superheat temperatures) and had
23 been examined, in light of other confirming temperature
24 indications, it might have been recognized that the
25 greater than 2000 degrees Fahrenheit temperatures

1 indicated the core was within the range in which an
2 autocatalytic exothermic steam reaction could occur."

3 In fact, that's what these notes represent, that
4 not only did people on-site know the in-core thermal
5 couple readings, but the people off-site, supposedly
6 the people who were talking to Mr. Arnold on the first
7 day of the accident had information which the NRC
8 concluded in its report would be critical to an
9 awareness of hydrogen generation and apparently an
10 indication that there had been serious core damage on
11 the first day of the accident.

12 Therefore, I think that for this board to say that
13 information on conditions other than the pressure
14 spike, other than the generation of hydrogen and
15 combustion of hydrogen, other than core damage, is
16 really making a technical decision that the NRC, and I
17 don't think anybody in this room, including the
18 licensee, would be willing to make.

19 In other words, the indication of thermal coupled
20 temperatures in-core of greater than 2500 degrees
21 Fahrenheit is in itself the same as saying there was a
22 generation of hydrogen, there was serious core damage.

23 And we have...and so what I would argue, in the
24 context of this motion, but more largely in the context
25 of discovery of this case, that for this board to make

1 the technical decision at this point is totally
2 unsupported by the record. It goes against
3 congressional reports of this, it goes against the
4 NRC's own conclusion in its report.

5 And I doubt if there could be a technical person
6 the licensee could produce that would say that those
7 temperatures are not relevant to determining whether
8 there was the production of hydrogen and serious core
9 damage.

10 JUDGE SMITH: Mr. Blake?

11 MR. TROWBRIDGE: Mr. Chairman, Mr. Blake will speak
12 on most of the matters today. I will speak on this
13 one.

14 JUDGE SMITH: Yes, I'm sorry. I noticed that you
15 were signalling.

16 MR. TROWBRIDGE: Mr. Chairman, I don't want to
17 repeat the argument that we already had and the board
18 has ruled on.

19 I would simply remind the board again and Ms.
20 Bernabei again, that the issue in this case is what Mr.
21 Decamp said, which is interpretation of the pressure
22 spike and the initiation of containment strike in terms
23 of core damage at the time the pressure strike
24 occurred.

25 And that is the central question, is what did

1 Decamp say and what did he rely on. The board was
2 correct on ruling on other events which may or may not
3 have been interpreted in terms of core damage.

4 JUDGE SMITH: Mr. Trowbridge...

5 MR. TROWBRIDGE: I would like to say at this point
6 that I do not know and none of us know the document
7 that Ms. Bernabei is referring to.

8 MS. BERNABEI: I can produce the document, and it
9 was produced to us pursuant to GPU's discovery.

10 MR. TROWBRIDGE: I don't doubt it.

11 MS. BERNABEI: And in fact, it was a document that
12 was on distribution to Mr. Blake in September of 1980,
13 so the notes to which I refer were notes provided to
14 Mr. Arnold, pursuant to his request in September of
15 1980, presumably in preparation for response or
16 interviews for NUREG 07060 investigation.

17 Mr. Blake was specifically one of the recipients of
18 both the memorandum to Mr. Arnold and to Mr. Blake. We
19 do have extra copies which we can provide.

20 I think this is a very serious matter and although
21 it isn't relevant to the request to modify, I think
22 there is a substantial question whether Mr. Blake and
23 Mr. Arnold should have disclosed that information to
24 the NRC at the time they realized it.

25 It is the first information that anyone had, as far

1 as I know, that there was knowledge outside the site of
2 2500 degree temperatures of the in-core thermal couple
3 readings that indicated to anyone.

4 Mr. Stello said that, Mr. Manson said that, Mr.
5 Mosley said it in his report.

6 JUDGE SMITH: Well, let's assume that that's the
7 case. You are remand to go into that type of
8 information?

9 As I see it, it is the Decamp mailgram, and only
10 the Decamp mailgram and the particular paragraph cited
11 there.

12 MS. BERNABEI: I ...

13 JUDGE SMITH: And I don't understand your argument.
14 I thought you were telling us that the 2500 ... did you
15 say 2500 degrees?

16 MS. BERNABEI: Yes, I did, sir.

17 (Laughter.)

18 JUDGE SMITH: Thermal coupled information was an
19 indication of core damage.

20 MS. BERNABEI: That's correct.

21 JUDGE SMITH: If that is the case, then, did they
22 not correctly turn the information over to you?

23 MS. BERNABEI: No, that's not my point. Let me...

24 JUDGE SMITH: Okay, then what is your point?

25 MS. BERNABEI: Let me state the point, because it

1 is not attempting to get into the other condition,
2 other than these particular temperatures.

3 What I am stating to you, and I think we can
4 certainly provide an expert. I think any expert that
5 could give testimony in this would agree.

6 The readings of 2500 degree Fahrenheit in the core
7 on the first day of the accident indicated the
8 generation of hydrogen, that is, the reaction of the
9 cladding, on the oxidizing of the cladding, so as to
10 produce hydrogen, and it indicated serious core damage.

11 There is no other way to read those temperatures if
12 believed. The NRC has said it, GPU has said it, Mr.
13 Miller said that, "Yeah, I knew about them." And
14 there's some question whether he believed it.

15 But those temperatures can mean nothing else.
16 There is no other technical explanation. If you get
17 those temperatures, you automatically would get the
18 reaction of the cladding to produce hydrogen and
19 serious core damage.

20 What we now know is that Mr. Arnold had access
21 to that information on the first day of the accident.
22 We have discovery responses from GPU, information that
23 Mr. Arnold talked to Mr. Decamp some time when he was
24 making decisions about a repressurization strategy on
25 the first day of the accident.

1 Therefore, Mr. Decamp, in this way, could very well
2 have learned of the generation of hydrogen during
3 generation of hydrogen and apparently the serious core
4 damage the reactor had suffered on the first day.

5 And what I'm pointing out to you, sir, is not ...
6 what I'm pointing out to you is that this is
7 information that is critical to understanding what Mr.
8 Decamp knew.

9 Mr. Decamp was located in Parsippany or New Jersey
10 for a portion of March 28 and a portion of March 29,
11 and by restricting discovery to the narrow words of the
12 protective order ...

13 *Smith* MS. BERNABEI: Ms. Bernabei, we did not restrict
14 discovery to the narrow words. We have a footnote in
15 our order which made it clear that we counted on the
16 licensee not to do exactly what you're saying.

17 Just exactly what order would you have us issue
18 now?

19 MS. BERNABEI: What I'm asking you for, and again,
20 it's in the context of the licensee's request to ...

21 JUDGE SMITH: Yeah.

22 MS. BERNABEI: ... to modify, that we be allowed to
23 inquire, and I'm talking now about depositions as well
24 as discovery, into other conditions of the reactor.

25 And I'm using the 2500 degree Fahrenheit as a

1 rather graphic example, which even the NRC had admitted
2 would be relevant to hydrogen generation.

3 JUDGE SMITH: You're taking the core temperature,
4 thermal couple readings, as an example of why we were
5 wrong.

6 MS. BERNABEI: That's correct.

7 JUDGE SMITH: And I'm saying to you that I
8 don't...that does not demonstrate that we were wrong,
9 because you did get that information.

10 MS. BERNABEI: But let me say this. It was not
11 produced. I mean, I don't know why or how, or the
12 method by which GPU decided to produce that.

13 What I'm saying is information of that type, of
14 that genre, that includes conditions other than the
15 pressure spike or hydrogen combustion are relevant, I'm
16 using that as an example.

17 How we got this particular document, I don't know.
18 But what I'm saying is that your order would not
19 necessarily permit us to get discovery information of
20 that sort.

21 Because we happened to get this one document, we
22 certainly were pleased we got this document. What I'm
23 telling you is that this is relevant information that
24 GPU should be obliged to produce.

25 And this has always been our argument, but I'm

1 trying to give you a graphic example of why, and I'm
2 trying to do it in the context that we really can't
3 argue about.

4 Mr. Trowbridge really didn't address my central
5 argument, that the NRC in NUREG 0760, that Mr. Stello
6 and Mr. Manson and other statements have said, 2500
7 degrees Fahrenheit in-core thermal couple readings
8 coupled with other confirming conditions would indicate
9 that generation of hydrogen would indicate serious
10 core damage.

11 Those are their statements, and so I'm trying to do
12 it in the context in which people are going to argue.

13 JUDGE SMITH: So you're arguing, really, in an
14 anticipatory breach of our order. You're saying that
15 unless we can do something more, they will not comply
16 with our order, which is to produce information with
17 respect to the generation and combustion of hydrogen
18 and indication of core damage.

19 MS. BERNABEI: No, sir, I'm not doing that. Let me
20 say first ...

21 JUDGE SMITH: Assuming you're correct about
22 indications, and I assume you're reading from 0760.

23 MS. BERNABEI: That's correct.

24 JUDGE SMITH: Assuming you're correct and you're
25 saying that if we don't do something they're not going

1 to comply because they would not give us that
2 information.

3 MS. BERNABEI: What I am saying is that the
4 licensee, as well as the other parties to the
5 proceeding, in dealing in some depth with the issue,
6 understand that conditions other than believing the
7 pressure spike, stating, "I believe in the generation
8 of hydrogen," or seeing the core damage would indicate
9 knowledge of the generation of hydrogen and serious
10 core damage.

11 That's what I'm telling you, and I'm saying your
12 order, although you did obviously put a caveat in it,
13 to say we should proceed in good faith, really does not
14 address that problem.

15 The problem is there are other conditions which
16 indicated to the operators apparently on-site which
17 indicated perhaps to Parsippany, there had been a
18 generation of hydrogen, whether or not it was
19 combustion, and serious core damage on the first day of
20 the accident.

21 And those conditions we are now foreclosed from
22 inquiring into, the fact that we have this one memo that
23 wasn't produced, I assume it wasn't produced because it
24 had this 2500 degree Fahrenheit temperature. It was
25 produced for other reasons.

1 What I'm saying is that your order forecloses us
2 from getting information which we believe is critical
3 to the issue, and I'm providing a graphic example
4 because the NRC itself has admitted both in NUREG 0760
5 and in congressional hearings that that is so.

6 So what I'm arguing for is not just the thermal
7 couple range. I'm arguing for the other conditions, in
8 addition, which GPU now wants to foreclose on...

9 JUDGE SMITH: All right.

10 MS. BERNABEI: ...an investigation into. And one
11 of the reasons I'm making the point now is that I
12 assume during the deposition that as appropriate, they
13 will make the objection that we cannot inquire into
14 conditions other than the very narrow conditions of
15 hydrogen generation, the words hydrogen generation, and
16 serious core damage. And I think that limits us.

17 JUDGE SMITH: You're beating that. If that is the
18 case, then they will not be in compliance with what we
19 understood to be their commitment and what the board
20 understood to be the nature of the inquiry.

21 I think we should go in, as you're just coming out
22 from another argument that you should have made, that
23 you already had two chances to make.

24 The example that you give, I don't want to make a
25 technical judgment. Mr. Vendenburger (phonetic) isn't

Vendenburger

1 here. The example that you give with the support that
2 you gave from 0760, it would seem to me as information
3 that should be produced.

4 MR. TROWBRIDGE: Mr. Chairman?

5 JUDGE SMITH: Specifically.

6 MR. TROWBRIDGE: I think we are going to have the
7 problem Ms. Bernabei is talking about. As I recall,
8 our conference, as we read the board's order, we were
9 not going to give an over-narrow definition to hydrogen
10 generation or...we'll leave it at hydrogen generation
11 and combustion for the moment.

12 For example, we said that we would have no trouble
13 answering questions about thugs, even though the word
14 thug wasn't used.

15 We would have no difficulty answering
16 interrogatories, and we did answer interrogatories
17 about were there instructions not to operate electrical
18 equipment because of the possibility of a spark,
19 ignition.

20 These kinds of questions. But as to did somebody
21 know that the PRV was open for how many hours and when?
22 And the number of other questions about reactor core
23 conditions, we objected to them, we have not answered
24 them, we have not supplied information in respect to
25 those matters except possibly incidental to supply

1 something that was directly relevant to the pressure
2 spike.

3 JUDGE SMITH: Would you agree with me, Mr.
4 Trowbridge, that the information just described of 2500
5 degree temperatures is information that arguably could
6 or should be presented in response to the board's
7 order?

8 Is that a broad interpretation of what you mean by
9 the breach of it?

10 MR. TROWBRIDGE: I haven't considered it, but no, I
11 would not.

12 JUDGE SMITH: Then we do have a problem.

13 MR. TROWBRIDGE: Well, Mr. Chairman, I believe, if
14 I'm not mistaken, that the original interrogatory which
15 we objected, remember the list of conditions...

16 JUDGE SMITH: Yes, a lengthy list.

17 MR. TROWBRIDGE: Of conditions. I believe they
18 included thermal couple readings.

19 JUDGE SMITH: I beg your pardon?

20 MR. TROWBRIDGE: I believe the list included
21 thermal couple readings.

22 JUDGE SMITH: That's right. The last one before
23 hydrogen, the last ... I don't have the interrogatory
24 here before me, but the last one before they got
25 actually down to the hydrogen, thermal couple readings.

1 And at least two of the board members, and maybe
2 all three of us, considered the possibility of reaching
3 back up and putting those in there.

4 Of course, we didn't have in mind a particular
5 language, as she's reporting, from 0760, but we
6 decided, no, we don't want to be going through plant
7 conditions and having the board decide which one is an
8 indication of hydrogen generation and combustion and
9 which ones were not. That is not our business.

10 And so we pointed out that we considered the fact
11 that Ms. Bernabei, by shotgunning, created a problem of
12 her own making.

13 You know, you put in everything that you can think
14 of that you didn't get, so we didn't feel like we
15 should sit down and design the interrogatories for you.

16 You could have very well come back in the argument
17 to say, "Well, all right, I can see that the opening is
18 not sufficiently relevant," or the argument can be made
19 it is not.

20 But core exit thermal couple of such elevated
21 temperatures are close enough, but you didn't do that,
22 and we did not want to make the technical determination
23 in each instance.

24 I can see, Mr. Trowbridge, because we did not
25 include that last one, that you might think of that as

1 an affirmative decision that we made. That was not our
2 case.

3 We were trying to imply general...it's exactly
4 correct that we did grant the protective order, but we
5 granted the protective order with respect to
6 those...excuse me. I just have to get the
7 interrogatory.

8 What was the date that was the ...

9 MS. BERNABEI: August 31st, excuse me, July 31st.

10 JUDGE SMITH: July 21st?

11 MS. BERNABEI: It's dated the 31st, I believe. I
12 have another copy if you need it.

13 JUDGE WOLFE: Which interrogatory was that again?

14 MS. BERNABEI: The first set, the first set.

15 JUDGE SMITH: Well, for example, let's take
16 interrogatory 16. That's not a good example because
17 that's limited to Mr. Decamp.

18 MR. TROWBRIDGE: If you try document request five,
19 Mr. Chairman, I think ...

20 JUDGE SMITH: All right, document request...

21 MR. BERNABEI: The condition.

22 JUDGE SMITH: Number two. All right, this one
23 differs from others because G is out of place. It
24 isn't G; it's J. I can't get exactly to it.

25 MS. BERNABEI: Well, there's also interrogatory

1 number four. But again, the in-core thermal couple
2 temperature readings are not ... are several above the
3 hydrogen...

4 JUDGE SMITH: You don't mean number four.

5 MS. BERNABEI: The interrogatory number four?

6 JUDGE SMITH: Number four is method of
7 communication.

8 MS. BERNABEI: You're right.

9 JUDGE SMITH: All right. Forty. All right. Forty
10 is a good example because the interrogatory 40-E
11 requests any information that has to do with an excess
12 of 2000 degrees Fahrenheit had been measured on the in-
13 core thermal couple.

14 We granted the protective order, but we did not,
15 and it wasn't requested with respect to an
16 interrogatory 40-I, which is a pressure pulse.

17 Well, that is correct that Judge Lindburger
18 (phonetic) and I, and I'm not sure that Judge Wolfe was
19 present... yes, I'm sure he was present during one of
20 those discussions, did actually focus on the
21 temperatures in excess of 2000 degrees and considered
22 that that might be so closely associated with the
23 possibility of core damage and the consequent
24 possibility of hydrogen, that perhaps it should be
25 included.

1 But we made a general motion that we were not going
2 to go through particular plant conditions and make a
3 determination as to nexus or connection, and that it
4 would be up to you, because you did shot gun it, it
5 would be up to you to make sure that you got answers
6 like that.

7 I think maybe you're doing the correct thing now
8 but in the wrong context, and that is bringing to our
9 attention where our conditions have sufficient
10 relevance to the possibility of hydrogen combustion and
11 should be cleared by discovery.

12 But the protective order, I suppose, could very
13 well be read that you don't have to ask anything about
14 temperatures.

15 MS. BERNABEI: Well, Judge Smith, may I just
16 respond to something you said? I could perhaps explain
17 how we did make up the conditions because it wasn't a
18 random sampling of conditions in the reactor.

19 These have been basic conditions that during the
20 day should have indicated to the operators that there
21 was serious core damage somewhere along the line.

22 JUDGE SMITH: Well, we disagreed with you.

23 MR. BERNABEI: No, I understand. I understand.
24 But I'm trying to explain to you that many of these
25

1 are factors that were discussed either in NUREG 0760 or
2 were discussed in the congressional report, the so-
3 called Udall Report on the subject.

4 And all I'm saying is they weren't a random
5 selection and I think there was a technical decision
6 that was made that perhaps in some respects could not
7 be justified.

8 What I would perhaps recommend in this particular
9 situation is that those conditions which the board
10 feels are so closely related in their technical
11 judgment that they could be inquired into that perhaps
12 we list, because I think of both the NRC report, that
13 is, NUREG 0760, and in the congressional report, agree
14 that they're relevant conditions, specifically the two
15 that I would point out is, one, the thermal couple
16 temperatures, as you pointed to, and secondly the hot
17 leg temperatures.

18 Those two are acknowledged by both the staff and in
19 the Udall Report to be conditioned so as to indicate
20 the generation of hydrogen and severe core damage.

21 And again, I would refer you to the portion of the
22 NUREG that talks about in-core temperatures greater
23 than 2000 degrees Fahrenheit plus confirming
24 temperatures.

25 And I think in this case the confirming

1 temperatures would be the hot leg temperatures in
2 excess of 700 degrees Fahrenheit.

3 And I think that, and ...

4 JUDGE SMITH: Which two?

5 MS. BERNABEI: That would be number C and number E.

6 JUDGE SMITH: C and E?

7 MS. BERNABEI: C and E. And I would also suggest
8 in addition H, which has to do with the radioactivity
9 measurements, because ... or perhaps a better way of
10 doing it would be radioactive measurements per se.

11 There is some testimony that radiation checks were
12 made.

13 JUDGE SMITH: We haven't looked at that one. The
14 only one that we really thought about was the 2000
15 degree.

16 I don't recall discussing at all C, the 700 degrees
17 in the hot leg.

18 MS. BERNABEI: Well...

19 JUDGE SMITH: Activity about it. I didn't see
20 that. What's the connection?

21 MS. BERNABEI: I can tell you Mr. Craig was there,
22 and Mr. Goldberg was there also. I did speak to, at
23 your suggestion, we did speak about the discovery
24 request we had made of the staff.

25 And in that discussion, Mr. Craig and Mr.

1 Harvester, who were two of the three primary officers
2 of the NUREG, perhaps two of the four, stated that with
3 regard to ... if there had been a concern about
4 hydrogen, what would the kind of checks would have been
5 made of the reactor.

6 And both...I believe it's either Mr. Craig or Mr.
7 Harvester said, "Well, the only check we can think of
8 other than to see if the containment has burst apart,
9 would be to determine the radiation level and to take
10 some radiation readings."

11 Therefore, I think that any indication that the
12 radiation levels had been taken or checked around the
13 time of the pressure spike would be relevant
14 information, as to whether or not the pressure spike
15 was believed.

16 Of course, we have one shift supervisor, Mr. Schwab
17 (phonetic), says those checks were made.

18 But I think that's relevant information.

19 MR. TROWBRIDGE: Mr. Chairman, before I react, I
20 would like a clarification. Is Ms. Bernabei suggesting
21 that we now reopen the question of what was done about
22 the interrogatories and depositions?

23 Do we go back to the 400 people and ask them
24 additional questions? Because we asked the questions
25 that we understood we were supposed to ask.

1 Or is she talking about only the further
2 depositions? I'm not sure of my response, so I would
3 like to know if she's talking about the deposition
4 to take place hereafter, from here on out, or whether
5 she's talking about going back and redoing discovery.

6 MS. BERNABEI: I think at a minimum, we should be
7 talking about the document request and the scope of the
8 deposition.

9 JUDGE SMITH: The document request?

10 MS. BERNABEI: The document request, of course...

11 JUDGE SMITH: Your question was interrogatories or
12 both, document request and interrogatories?

13 MR. TROWBRIDGE: I was separating between the
14 protective order related to document request and
15 interrogatories.

16 What is immediately before the board now is the
17 question of deposition. We have rulings on the
18 documents, and as far as I'm concerned, the rulings and
19 the documents should be the same for documents produced
20 by subpoena as well as documents produced by request
21 for documents.

22 I would remind the board of its own instructions to
23 Ms. Bernabei that if she had some factual basis on
24 which she wished to express consideration, that she
25 should do so.

1 There was no effort to relate thermal couple
2 readings to hydrogen burn. You've got none of that. I
3 think it's too late to go back and reopen the scope
4 that's already been decided.

5 JUDGE SMITH: Well, that may be. I think a
6 distinction can be made. One thing we haven't talked
7 about today, and that is whatever our ruling is, all of
8 this information, to the extent that it came into the
9 possession of Mr. Decamp, is available to you.

10 I don't ...

11 MR. TROWBRIDGE: We had supplemented with respect
12 to Mr. Decamp.

13 JUDGE SMITH: Yes, I know. So you know, you're not
14 entirely without access to this information.

15 MS. BERNABEI: Let me ...

16 JUDGE SMITH: If we had not done correctly and with
17 respect to future discovery we can correct it, I think
18 we ought to look at it somewhat differently rather than
19 make them go back and do the discovery because I put
20 the responsibility directly on you.

21 If you have this information and you believe that
22 the in-core thermal couples were so directly related to
23 hydrogen, and you had two opportunities to make that
24 argument, point out the basis of it, and seek to get
25 the board's ruling corrected, but you didn't.

1 However, you are raising it, and it may be timely
2 now with respect to the new discovery.

3 What's the difference between your document request
4 and your subpoenas for your documents? What's the
5 difference in your discovery approach?

6 MS. BERNABEI: I assume that some of the operators
7 may have taken documents home with them.

8 JUDGE SMITH: Oh, I see.

9 MS. BERNABEI: And I would assume that they are not
10 therefore subject to possession of control of GPU.

11 JUDGE SMITH: Well, what should we do? Should we
12 go back...should the board go back and look at the...

13 MR. TROWBRIDGE: Mr. Chairman, let me remind the
14 board that the original set of interrogatories and
15 document requests didn't just ask for GPU as a
16 corporate body possession.

17 As for what was in the possession of a number of
18 individuals, and we went to the individuals. We said,
19 "Do you have any documents?" And relevant to the
20 pressure spike or generation of hydrogen. "If so, let
21 me know."

22 We got 40 responses, "Yes, we have
23 documents." We get on the phone with these people.
24 Well, some of them turn out that maybe it was the
25 Kemeny Commission Report they had, or other major

1 pieces that were already in the discovery room.

2 But where it wasn't that obvious kind of a
3 document, we asked them to let us have copies. And the
4 copies were reviewed and if they were documents not of
5 the character of Kemeny Commission or a major
6 investigative report, we put them in the public
7 discovery room.

8 Now I'm speaking, Mr. Chairman, secondhand. I did
9 not do any of this, but I got on the phone before it
10 came out with an individual who did run this part of
11 the discovery process, several of the documents, and
12 put them in the discovery package to go into the room.

13 But I believe the account I am giving you is
14 correct. In other words, this is a repetitive request,
15 one we've already responded to.

16 JUDGE SMITH: That aspect of it we haven't reached
17 yet, we didn't reach that yet in our discussion.

18 I was hoping that we could resolve the reach of the
19 request.

20 MS. BERNABEI: I have no problem, as I stated at
21 first, I have no problem with those operators who are
22 being deposed not producing any documents that GPU has
23 already produced.

24 I have reviewed all the documents produced
25 pursuant...on the pressure spike, and what I found in

1 my review is that there were several people that
2 indicated on their questionnaires that they had
3 documents not of a character of public information,
4 that is, Kemeny Commission Report, or things of that
5 sort, but information such as logs.

6 GPU...I asked specifically what these individuals
7 were talking about on their questionnaire, and I got a
8 short list from the paralegal who was working in the
9 room.

10 GPU has decided to produce some of those documents.
11 GPU has decided not to produce other of those documents
12 as not relevant.

13 As an example, one of the things that I thought was
14 quite relevant that they have not produced, and I
15 specifically wrote Mr. Blake a letter about this this
16 morning, were logs that were in the observation center
17 on the first day of the accident.

18 We think that is relevant information, especially
19 considering the fact that at least one individual on
20 his or her questionnaire stated that the way he knew
21 about the hydrogen ... he said he knew about the
22 hydrogen explosion on the first day of the accident and
23 he learned of it through the observation, something of
24 that sort.

25 I think that's relevant information. I guess I'm

1 pointing out to you that I think GPU has made a
2 determination that some of these documents aren't
3 relevant, whereas the operators themselves have not
4 made that determination.

5 JUDGE SMITH: Can't we keep the two issues
6 separate and just work on one now? Now we're talking
7 about the second one.

8 With respect to their second request, then, you
9 don't object to it?

10 MS. BERNABEI: That's correct. That is that they
11 not produce any documents that have previously been
12 produced.

13 JUDGE SMITH: So that's resolved. And now with
14 respect to the first one, that is that the discovery be
15 limited in the same manner that your interrogatories
16 and document requests were limited, I thought we were
17 almost approaching the solution before we got off on
18 that.

19 It seems to me that we should not require a new
20 discovery, a new search effort, by utility, but that
21 unless Mr. Trowbridge agrees, the board is going to
22 have to sit down and determine whether, based upon
23 information you gave us from 0760, that the 2500 degree
24 thermal couple information is so closely related to
25 hydrogen explosion and that should be produced.

1 If we make that determination, Mr. Trowbridge,
2 we're going to rule that that would be consistent with
3 our discovery order and that we do not intend...we
4 refuse to grant the protective order with respect to
5 other plant conditions, we do not intend to forever and
6 ever in the case preclude discovery, because we did not
7 intend to make a judgment, a technical judgment, as to
8 relevancy.

9 It's just that that information standing alone
10 without some nexus to hydrogen will have to be
11 produced.

12 MR. VOIGT: I'd like to be heard on that.

13 JUDGE SMITH: Okay. Why?

14 MR. VOIGT: Judge Smith, when I originally saw
15 these discovery requests...

16 JUDGE SMITH: Before you get into any arguments of
17 substance, would you tell me what standing you have to
18 get into this discussion?

19 MR. VOIGT: I was attempting to address that
20 question, your honor.

21 JUDGE SMITH: Thank you.

22 MR. VOIGT: When I first saw these discovery
23 requests, I was very alarmed in the sense that they
24 strongly suggested that these people wanted to
25 relitigate the whole first day of the accident and

1 perhaps the second and third days as well.

2 Now, I represent approximately 45 individuals who
3 have testified over and over and over again before the
4 NRC in response to their own company, in the Senate, in
5 the House, the Kemeny Commission, the Regolden Special
6 Inquiry Group.

7 These men are worn out. They're sick and tired.
8 They feel as if they're being persecuted five years
9 later, they're still being reexamined and subject to
10 inquisition about how they conducted themselves during
11 these very emotionally-charged and confusing moments of
12 the accident.

13 And I can assure you that many of these individuals
14 would have taken individual steps to protest this kind
15 of discovery.

16 But we saw that the company was making a reasonable
17 request to limit the scope, to confine it to a specific
18 question that the appeal board put on remand, Mr.
19 Decamp's knowledge of specific conditions, not
20 everything that happened that morning.

21 And we said fine. We don't have to come forward.
22 We don't have to file on behalf of individual clients.
23 And I saw the board's...or heard of the board's order,
24 and I said that's terrific, I don't have the get
25 involved, because the board, at the insistence of the

1 companies, has confined the discovery, my clients will
2 not be subject to this kind of repeated inquisition.

3 Now I hear that the board is retracting...

4 JUDGE SMITH: You don't hear anything, Mr. Voigt.

5 MR. VOIGT: Then I'd like to be heard on ...

6 JUDGE SMITH: I'm going to tell you. We'll hear
7 from you later because I do want to have later on a
8 better understanding or a better effort to place some
9 perspective the scope of this issue.

10 Right now I'm trying to very narrowly address a
11 very simple technical issue. And that is one thing and
12 that is all, at this point, and that is, is the
13 elevated temperatures so closely related to hydrogen
14 burn that our previous order should have included it.

15 And I think really...I'm not going to permit you to
16 argue your point at this time. I may or may not give
17 you an opportunity later, I don't know.

18 Can you give us any information today about the
19 elevated thermal couple readings?

20 MR. VOIGT: Your honor, that's what I asked to be
21 heard on and you interrupted me and said ...

22 JUDGE SMITH: Then get to the point quickly.

23 MR. VOIGT: Sir, I've attempted to answer your
24 question about standing. Now may I address the merits?

25 JUDGE SMITH: Well, I'll say that on that basis of

1 standing, I don't believe you should.

2 MR. VOIGT: Well, then I may have to file my own
3 motions, Judge.

4 JUDGE SMITH: Well, then you file whatever you want
5 to, Mr. Voigt.

6 MR. VOIGT: I'm trying to keep it simple, Judge.

7 JUDGE SMITH: Well, you're not; you're complicating
8 it. We have a simple issue here, and before we go away
9 from it, I want that issue resolved, and that is, is
10 the document that she found and documents of that
11 nature which allude to 2500 degrees Fahrenheit, thermal
12 couple readings on the day of the accident so closely
13 connected to the hydrogen burn and combustion that that
14 should be produced?

15 Now it's difficult enough for the lawyers on this
16 board to wrestle with these problems, without having
17 you introduce things which are only marginally
18 relevant, if at all.

19 As you know, throughout this hearing, we have been
20 somewhat sensitive to the problems of the plight of the
21 workers out there.

22 And I hope you don't think we're being insensitive
23 now, because we have priorities and we have the
24 organization and we're going to follow it.

25 MR. VOIGT: Judge, I don't disagree with any of

1 that. I wanted to give you my views on the 2500 degree
2 temperature reading.

3 JUDGE SMITH: You're tying that in to the standing
4 of your people to be harassed, and this hearing is such
5 a remote connection, I don't believe we should hear
6 from you.

7 MR. VOIGT: You're not interested in the
8 significance of the 2500 degree pressure strike, to the
9 pressure stike?

10 JUDGE SMITH: I am interesting in keeping some kind
11 of organization in this hearing, and that is people
12 don't come in walking off the street and begin give us
13 advice as to the technical issues.

14 And you're doing it under the aura of representing
15 the interests of some 40 employees who are tired of
16 going through depositions.

17 That is not closely enough related to this
18 particular factual issue to hear you with respect to
19 that.

20 If you have information which you believe is so
21 important to the public, health, and safety that we
22 have to hear from you on this, then you make that
23 representation, then we'll hear from you. We can't
24 walk away from it.

25 * But you don't have standing to argue the technical

1 issues in this case.

2 MR. VOIGT: Well, reserving the right to disagree
3 with that, Judge, I've been living with this for four
4 years and I think I know something about the record,
5 and I was going to say about one minute's worth on the
6 merits on the 2500 degree reading.

7 Now you told me you don't want that, fine.

8 JUDGE SMITH: I said only if you have information
9 which would otherwise have an important effect on the
10 public health and safety.

11 And unless you have that, you do not have standing
12 to argue the technical issues. And I'm certain that
13 you would not tolerate any of the hearings that you're
14 responsible on in having non-parties come in and argue
15 the technical issues on the showing that you've made.

16 Now, Mr. Trowbridge.

17 MR. TROWBRIDGE: Mr. Chairman, let me try and
18 answer the question I believe you were putting to me.
19 Let me say first that the licensee would oppose the
20 court order as it understands it as going back and
21 redoing or repeating the discovery that's taken place
22 today.

23 JUDGE SMITH: Yes, I think you've made a good
24 argument out of that.

25 MR. TROWBRIDGE: With respect to the present crop

1 of depositions, I'll have something unrelated to say
2 about them later, but in terms of scope, as to the
3 present crop of depositions and subpoenas for the round
4 coming up, we would not object to including the thermal
5 couple temperatures in the question or document
6 request, providing they haven't already been provided.

7 But we understand also that what we're talking
8 about will be the knowledge of people on these subjects
9 on the thermal couple or for that matter, pressure
10 spike as well, on March 28, the date of the accident.

11 JUDGE SMITH: Trowbridge, will you repeat your last
12 statement?

13 MR. TROWBRIDGE: That to the extent we're talking
14 about obtaining information about what people knew or
15 what documents existed relating to the events, we're
16 talking about the events on March 28 and what people
17 knew on March 28th.

18 JUDGE SMITH: Yes. Thank you.

19 MS. BERNABEI: Judge...

20 JUDGE SMITH: I think...

21 MS. BERNABEI: May I just be heard on that last
22 point?

23 JUDGE SMITH: Yes.

24 MS. BERNABEI: The last point, I do have a problem
25 with the licensee's production of documents, or rather

1 the questionnaires because they did limit it to what
2 each of the individual, the question, that would have
3 information knew on March 28th.

4 I have a problem with that, in that I think it is
5 relevant as to later dates. So we're now talking about
6 what Mr. Decamp knew up through May 8th or 9th when he
7 sent the mailgram.

8 I think we're talking about what the operators or
9 other people who knew what was going on at TMI knew in
10 the period surrounding the pressure spike, okay, and
11 that occurred, as you know, at 2 p.m. on March 28th.

12 I think it is relevant to a period around that
13 date, whether it be March 29th or early March 30th,
14 what people knew and how they knew it.

15 So I don't think limiting it to that one particular
16 date is relevant. Now, GPU has always stated that
17 nobody knew anything until late night of March 29th and
18 early morning of March 30th.

19 I think at a minimum, we should be allowed to
20 inquire into March 28th and March 29th, since that is
21 close enough in terms of what people knew from the
22 pressure spike, knew from the pressure spike and
23 perhaps from ~~in-core~~ thermal couple readings.

24 That's what we're really talking about. I would
25 object, and I haven't filed objections to what's been

1 produced...

2 JUDGE SMITH: We're getting now into the essential
3 issue, which is not yet been perceived, I'm afraid, by
4 anybody in this proceeding, as to how we view it, and
5 where it all came from.

6 Since the last time this came up, the board members
7 have spent some time going back over the genesis of
8 this issue.

9 And perhaps it would be a good time to review it
10 and see if we can't put it into perspective and get
11 some forwarning of how the board is going to review it,
12 how we're going to control the presentation of the
13 balance of discovery.

14 If you remember, there is nobody here from TMI-A
15 that was present at that time. I don't believe you
16 were, Ms. Dorozhow, but Mr. Mosley came and was the
17 sponsoring witness for that document.

18 And one of the parts in there was a statement by
19 the authors of that document that because of the
20 statements of the two control room operators, Mr.
21 Chescuik (phonetic) and Mr. Mayer, I&E made an inquiry
22 as to whether Mr. Decamp had made a false material
23 statement in his mailgram to Mr. Udall.

24 And I&E concluded that as much as it was not a
25 statement that was required under the Atomic Energy

1 Act, it was not a false material statement, and that
2 set out, was sharply outlined, in my view, as he made
3 his appearance.

4 In fact, at this point, I will ask to be bound into
5 the transcript the testimony of February 18, 1981, from
6 pages 13,060 through 13,066.

7 [Note: The testimony of February 18, 1981, pages 13,060
8 through 13,066, as requested by Judge Smith, should be
9 inserted at this point.]

10 In any event, we noticed that the reason that
11 obviously that document had found there was no false
12 material statement was that it was not a statement
13 which was part of the log being made.

14 And it was that reason, and that is the only
15 reason that exists in my memory to this moment, that I
16 and no one else in that room pointed out to Mr. Mosley
17 that for his purposes, that may be a satisfactory
18 disposition.

19 But for our purposes, we do not believe that a
20 false statement, if it was false, could be overlooked
21 because it was not one required to be made under law,
22 if you're interested in management integrity.

23 We received Mr. Mosley's assurance that he believed
24 in his conducted investigation and his contact with Mr.
25 Decamp that the statement was believed to be true.

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13,060

1 they were not required to report accurately?

2 A That is a much more -- that is much more
3 difficult to address. I think if you say that if they fail
4 -- they were not forthcoming, fully forthcoming in these
5 concerns with the state that may have misled people.

6 Q No. I mean -- all right. That is right. I
7 thought that the second question would be easier than the
8 first, but you have identified that it is better.

9 I mean, I compared intentionally withheld with
10 intentionally misled.

11 A In that case, there was no -- I did not conclude
12 that that was motivation.

13 *Judge Smith*
Q All right. Then the letter from Mr. Dieckamp to
14 Congressman Udall or the Mailgram has received a lot of
15 attention in both the Udall Committee reports and your
16 report.

17 The I&E people really leave it dangling, and I am
18 not criticizing that at all. Your job is to see to what
19 extent your regulations are complied with, but as far as the
20 Board is concerned, and as far as I would imagine, the
21 intervening parties and the public, it seems to me that
22 there should be a further inquiry or further explanation.

23 As I understand, your committee's report on Mr.
24 Dieckamp's letter on page 45, that -- well, let me read your
25 conclusion. "The investigators concluded that for a

1 statement to be considered a false statement under Section
2 186 of the Atomic Energy Act of 1954, as amended, the
3 statement must be made in a licensed application or it must
4 be a statement of fact required under Section 182 of the Act.

5 The Dieckamp Mailgram was neither of the above.
6 Therefore, it does not constitute a potential material false
7 statement under the Act."

8 Specifically -- generally I asked you about Met
9 Ed officials. Let me ask you specifically about the
10 Dieckamp Mailgram. Under any normally accepted standard,
11 was it a false material statement?

12 *Mr. Moseley:*
 A Let me develop it just a little bit, if I may.
13 If we look at that particular statement -- and I will quote
14 it. Quote, "There is no evidence anyone interpreted the
15 pressure spike and the spray initiation in terms of reactor
16 core damage at the time of the spike, nor that anyone
17 withheld any information."

18 If we dissect this statement a little bit, on the
19 core damage -- that is, the conclusion, interpretation of
20 the spike -- in terms of core damage, our conclusion in the
21 investigation was that on March 28, no one related the spike
22 and the spray initiation to hydrogen and the Zirc-water
23 reaction and its relationship to core damage.

24 So we have concluded similarly that on March 28,
25 they did not reach such a conclusion.

1 Concerning withholding, that portion of the
2 statement, again our conclusion was Met Ed was not fully
3 forthcoming in that certain things were not passed on to the
4 Commonwealth of Pennsylvania, yet we concluded that
5 information was not intentionally withheld from either the
6 NRC or the State of Pennsylvania.

7 So from the standpoint of what I believe to be
8 the intent of Mr. Dieckamp's statement, I think that - I do
9 not believe that it is false, but if we go to a literal
10 reading and we take it to say there is no evidence that
11 anyone withheld any information, then that becomes a very
12 hard-to-handle statement.

13 It is so broad and so inclusive that it is almost
14 impossible to say about anything. So if we wanted to go
15 down that road and look at it from the very literal meaning,
16 I think it is open to so many different interpretations that
17 perhaps you may want to pursue with Mr. Dieckamp this.

18 I personally do not believe it is worth any
19 additional investigative efforts.

20

21

22

23

24

25

1 Q This is what I mean. You people have interviewed
2 Mr. Dieckamp and everyone is involved, and I am interested
3 in your opinions rather than the details of it. If Mr.
4 Dieckamp had said -- concluded his statement nor that anyone
5 intentionally withheld any information you would have had no
6 quarrel at all with his mailgram, is that correct?

7 A That is correct. The other part is the no
8 evidence statement at the beginning -- no evidence that
9 anyone made this inference. There was some testimony that
10 was collected during the numerous investigations that infers
11 that maybe somebody did make this connection. Our
12 conclusion is, however, that they did not, and therefore, I
13 do not quarrel with the validity of that part of the
14 statement, in terms of what I think he meant to say rather
15 than what the words actually say.

16 Q And, of course, our particular interest is not
17 necessarily whether there was evidence that anyone
18 interpreted the pressure spike and the spray initiation in
19 terms of reactor core damage, but whether Mr. Dieckamp
20 believed the statement when it was sent to Mr. Udall. That
21 is our principal concern because we are interested in the
22 reliability of an important management officer in the
23 corporation. That is the view we want. Based upon your
24 investigation, your knowledge, your interview with Mr.
25 Dieckamp, do you believe that as far as his state of mind

1 was concerned, that he was making a truthful statement?

2 A Yes, I believe so. I think he had an unfortunate
3 choice of words, but I believe the basic message he was
4 trying to convey he believed, and I believe it was true.

5 MS. BRADFORD: Mr. Smith, is it possible for
6 someone to be here who was responsible perhaps for the Udall
7 since we are getting a very one-sided interpretation here.

8 CHAIRMAN SMITH: I do not think so. I do not know
9 if you can -- you can recommend ways, but in the first place
10 it would have to be virtually a voluntary appearance, I
11 believe; and secondly, we would not do it unless a very
12 specific benefit could be pointed out. But the Board has
13 not itself conferred on this, so that is just my impression,
14 and we have not evaluated these reports. As we've stated,
15 we are just trying to get a briefing, trying to get some
16 idea, an overview of it and what it means to us in our
17 responsibilities to look at management and emergency
18 planning.

19 MS. BRADFORD: The reason I say this is that it
20 seems to me that the difference in conclusions obviously is
21 one of interpretation.

22 CHAIRMAN SMITH: It would be very nice to have the
23 principal author of the Udall report come and explain to us
24 why he believed, as may be the case, that information was
25 intentionally withheld. But what we have established I

1 believe is that he had the same information base to draw
2 conclusions from that Mr. Moseley did, and his investigators
3 did and that this Board does. So I do not know if he has
4 additional information that leads him to that conclusion.
5 Well, maybe we should find out. But you look through these
6 reports and if you see a basis for us to conclude that
7 somebody has come up with a different conclusion based upon
8 differing information or an interpretation of information
9 which may be not be obvious that we have overlooked, you
10 bring it to our attention, then we will worry about it
11 then. But if it is simply that different people arrived at
12 different conclusions from the same information, well, I
13 don't need -- we don't need the view of an anonymous staff
14 writer for Congressman Udall, if that is what it is.
15 However, if he does have better information and it is of a
16 material nature related to our case, well, you point that
17 out to us and we will take it under consideration.

18 I think I have stated it correctly.

19 BY CHAIRMAN SMITH

20 Q You are not aware of any body of information that
21 they used which differs from the body of information that
22 you had?

23 A You stated it exactly right, yes, sir.

24 CHAIRMAN SMITH: But you have your chance to come
25 back to us and point out that that is not the case.

1 MS. BRADFORD: Fine, thank you.

2 CHAIRMAN SMITH: You have any other questions?

3 MS. BRADFORD: No, I do not.

4 CHAIRMAN SMITH: Mr. Adler?

5 MR. ADLER: As I understood, Mr. Moseley was here
6 for information on LER's, too, is that correct?

7 CHAIRMAN SMITH: Yes, but I would like to wind up
8 this part of it.

9 MR. ADLER: I just have one more comment, in that
10 case. I would remind the Board that the admissibility of
11 ANGRY contention 7 relating to the adequacy of NRC emergency
12 response capabilities is still pending before the Board.
13 And I would also note that this report deals in a number of
14 aspects with that very subject, with the adequacies of NRC
15 communications and reporting and their response
16 capabilities, and the Board may want to take that into
17 account in their decision.

18 CHAIRMAN SMITH: And we also want to observe from
19 this direction to your direction that we will depend very
20 heavily upon the Commonwealth to tell us what we should be
21 looking at. As we stated before, we have a mass of
22 information and events. We are staying even with them but
23 we do not have the ability to go through this with the
24 thoroughness -- I do not know if you have it either, but we
25 need help. We need help particularly from the Commonwealth

1 And here's where we get a little bit off the track.
2 So we made a finding attempting to capture that
3 exchange.

4 And on page 14 NRC 556, the board pointed out we
5 could not accept a simple test for false material
6 statement because we were interested in a prior inquiry
7 in integrity.

8 We went on to say, "Although the statement
9 [referring to the mailgram statement] was literally
10 false, because in fact there was evidence of the
11 pressure spike, I&E concluded that Mr. Decamp believed
12 the statement to be true when made.

13 Now if I were writing that today, or even writing
14 it with a little bit more opportunity for looking at
15 the issue at more leisure, it would not have been
16 written that way.

17 We should not have made it a finding that the
18 statement was literally false. There is no evidence
19 that that statement made by Mr. Decamp was literally
20 false.

21 And I&E concluded that it was, but the board didn't
22 make such a conclusion. It sure seemed like we made
23 that finding.

24 Somehow, from that point, it has become an unstated
25

1 assumption, I mean, unexplained assumption that Mr.
2 Decamp made an incorrect false statement.

3 And the issue has come down to whether he knew it
4 was false. As much as I've been involved in this case,
5 I don't know yet what the false statement is said to
6 be.

7 And I don't know yet what are the grounds, what is
8 the exact accusation against Mr. Decamp against which
9 he must defend himself. I don't know.

10 We better find out pretty soon. Of course, it's
11 our responsibility as much as yours, because the appeal
12 board made it clear that it was our failure, and not the
13 parties, that we did not clear it up.

14 And this is one reason why we are allowing a rather
15 discovery on it, because I believe that it is time to
16 clear it up once and for all.

17 But as we sit here today, as one of the original
18 finders of fact in this case, I don't know any reason
19 to this day why Mr. Decamp has to defend himself.

20 I do not know what it is, and I don't know how it
21 built up. The only thing that we were thinking about
22 is, that since the allegation has been made, we should
23 have perhaps brought him in to deny it, rather than
24 leave it dangling, as we said.

25 Now, before we go into a very, very large discovery

1 effort, any bigger than it is, I want a better idea
2 from the people who are claiming that he lied, why they
3 think he lied.

4 I want to know what it is you have that makes you
5 think that he lied, because I don't know. I don't have
6 any reason to believe that he lied.

7 MS. BERNABEI: Okay. Can I address that, Judge
8 Smith?

9 JUDGE SMITH: Well, I would hope that sometime,
10 maybe you'd want to do it in a more considered way.
11 Maybe you might want to make a written finding on it.

12 MS. BERNABEI: What we could do is present you with
13 the evidence that we've uncovered so far, if that would
14 be sufficient.

15 JUDGE SMITH: I would be also interested in what
16 evidence we had even before you started this most
17 recent discovery thing.

18 But you have to bear in mind that that is part of
19 our consideration when we're not allowing you to go
20 galloping through that plant and having a relitigation
21 of the accident.

22 And there's another aspect, too, which has to be
23 looked at in focus. The words of the mailgram are
24 somewhat ambiguous, that is, there's no evidence that
25 anyone interpreted the pressure spike and the spray

1 initiation in terms of reactor core damage at the time
2 of the spike, nor did anyone withhold any information.

3 Now, that statement, that clause standing alone
4 would seem to broaden the area which a false material
5 statement perhaps could have been made, that "nor did
6 anyone withhold any information."

7 But I noticed that the appeal board interpreted
8 that information exactly the way I did, if you get
9 information that he's referring to is information with
10 respect to pressure spikes, spray initiation in terms
11 of core damage, and not information in general about
12 the terms of the accident.

13 I think you'll agree that that's a reasonable
14 interpretation of it.

15 MS. BERNABEI: Yes, we have no problems with that.

16 JUDGE SMITH: And that's what the appeal
17 board...they used the word withheld "such" information.
18 Now with that, I think maybe you can understand better
19 why we believe that if you have a full range of
20 information at the Decamp capture point, and you have
21 more specific information available of the other plant
22 operators, you have all that you need.

23 And we might not even have gone so far, but the
24 appeal did make it clear that this inquiry should
25 concentrate on anyone in the control room interpreted

1 the pressure spike as such.

2 Now that brings us to the next stage. I see you
3 noticed Mr. Lankford (phonetic) deposition and that you
4 have inquired extensively of Mr. Blake and Mr.
5 Trowbridge into what the people over at Udall Committee
6 had to do with this.

7 I hope to head off what I perceive as an effort to
8 use this issue and this hearing for purposes that
9 it's not intended for, and we won't allow it to go into
10 it.

11 You're not ever going to turn any hearing which I
12 participate in to a carnival, I can tell you that.
13 This is going to be a careful, well-structured, well-
14 defined factual inquiry, and it's going to be nothing
15 else but.

16 And we can all relax and accept that and we'll go a
17 lot more smoothly, but it's not going to be anything
18 else but that.

19 So if we're doing talking about...and I believe we
20 are, I think your point about turning on the
21 depositions and subpoenas of the 29th, I don't
22 understand that point.

23 I don't believe we should allow that. It is
24 specifically the 28th that he was alluding to on that
25 day, and I've read part of his responses to

1 interrogatories. I just simply don't understand your
2 point.

3 MS. BERNABEI: What I think we're talking about
4 now is the scope of the depositions, and what I'm
5 saying is that whatever the questions in the
6 interrogatories, I think we should be allowed to
7 inquire as to knowledge on the 28th and 29th, at least
8 up to the period which GPU acknowledges it knew there
9 was a hydrogen explosion.

10 Let me just...

11 JUDGE SMITH: I just don't understand why. You
12 know, I just ...

13 MS. BERNABEI: Let me explain. From the response
14 to our discovery thus far, we have basically from
15 DeCamp, who again is the critical individual in this
16 whole issue, conflicting information about what
17 communications he had, what he knew about TMI-2 in the
18 afternoon of March 28th.

19 In the first response, we learned that Mr. DeCamp,
20 apparently after he returned to his home in New Jersey
21 from Harrisburg, talked to Mr. Arnold prior to Mr.
22 Arnold's determining a new strategy, sometime in the
23 late afternoon of March 28th.

24 The second response we got, the so-called
25 supplemental response, the response of Mr. DeCamp

1 changed.

2 Now Mr. DeCamp says he talked to Mr. Arnold after
3 the stragegy had been implemented and it was in the
4 evening, and it was somewhat of a different
5 conversation.

6 I think this raises some credibility problems of
7 Mr. DeCamp, since these two answers, at least the way I
8 read them, are somewhat different.

9 I think it's relevant that we know what Mr. DeCamp
10 knew, not only on the evening, but what he knew on the
11 morning of March 29th regarding the pressure spike and
12 potentially serious core damage.

13 And I would include in that in-core couple reading.

14 JUDGE SMITH: Another problem that the board has
15 with this issue, is that we do not have a full
16 appreciation and never had a full appreciation of why
17 he was even sending the mailgram.

18 We don't know what the purpose of it was or much
19 about it at all. I still don't understand your point.

20 MS. BERNABEI: May I go back just a second to
21 address the larger issue which you presented? Because
22 I think it is an important one.

23 JUDGE SMITH: You mean, why is he defending
24 himself?

25 MS. BERNABEI: Right.

1 JUDGE SMITH: Well, do you really want to do it
2 now? You're welcome to, but ...

3 MS. BERNABEI: I think it's important in the
4 context since the board obviously isn't familiar with
5 the document produced or the answers, understandably,
6 and I think it's important for us to put it into
7 perspective why we think that this is an important
8 issue and why we're asking the question perhaps as
9 broadly as we are.

10 JUDGE SMITH: Would you use your microphone,
11 please?

12 MS. BERNABEI: Certainly. I think there was
13 evidence at the time the appeal board made its decision
14 to reopen on this issue, in terms of ... there was some
15 evidence that people in the control room knew that a
16 hydrogen explosion had occurred.

17 And I'm referring now specifically to Mr. Mayler
18 and Mr. Schwab's testimony.

19 JUDGE SMITH: We alluded to that in our initial
20 decision.

21 MS. BERNABEI: I understand. I think that there is
22 a fair interpretation that the testimony is that they
23 knew that there had been a hydrogen explosion.

24 At least one of them in one of the testimonies
25 given used the word "hydrogen."

1 I also say that there is testimony about
2 instructions that Mr. Mayler said Mr. Miller gave him,
3 which would indicate knowledge of Mr. Miller about a
4 hydrogen explosion.

5 I think there is information...what I'm saying is
6 that in the record prior to the start of discovery that
7 created a lot of controversy as to whether there was
8 some evidence that people in the control room knew that
9 a hydrogen explosion occurred at 1:50 p.m. on March
10 28th.

11 What we have discovered in discovery, and I think
12 this would help the board understand again why Mr.
13 DeCamp is defending himself, what we have uncovered
14 thus far in discovery is first of all, 18 or 19 people,
15 I believe it is, who have answered questionnaires,
16 saying that on March 28th they knew that there had been
17 a hydrogen explosion.

18 Now, we were rather startled by this information,
19 that 19 GPU employees in the vicinity of the TMI-2, and
20 we don't know their exact locations, although Mr. Blake
21 has been cooperative in trying to obtain that
22 information, that these people said they knew on the
23 first day of the accident that there had been a
24 hydrogen explosion.

25 We consider that pretty startling information.

1 If it were common knowledge, at least in the segment of
2 the operating community that a hydrogen explosion had
3 occurred, there is more than some evidence, there is a
4 great deal of evidence that the people in the control
5 room and outside the control room knew about it.

6 JUDGE SMITH: Knew about what?

7 MS. BERNABEI: That there had been a hydrogen
8 explosion.

9 JUDGE SMITH: But isn't the gist of the statement
10 which is under analysis today is what they made with
11 that information, what they did with that information?

12 MS. BERNABEI: That's correct, and that's my
13 second point. My second point is with the document we
14 received, and again, I just reviewed this Saturday at
15 Shaw Pitman and asked them to make a copy, was this
16 document we know that at least the information about
17 the thermal couples was transmitted to Parsippany.

18 Mr. Arnold, who Mr. DeCamp has admitted he
19 conferred with on March 28th, Mr. Arnold was making
20 decisions about repressurizing the reactor on March
21 28th.

22 He presumably had available to him notes that were
23 taken in Parsippany, notes from either control room one
24 or control room two on the day of the accident when he
25 was making those decisions.

1 It seems to me that it is possible that Mr. DeCamp,
2 in his conversations with Mr. Arnold, again, Mr. Arnold
3 making critical decisions about the reactor, that he
4 may have well talked about the possible generation
5 combustion of hydrogen and serious core damage.

6 I think what we've uncovered in discovery indicates
7 that there is more than some evidence, although
8 obviously we need to inquire further.

9 JUDGE SMITH: Okay.

10 MS. BERNABEI: And I would also note one
11 other...perhaps somewhat of a different approach as to
12 why we think the issue is important.

13 You appraised the issue one time as whether Mr.
14 DeCamp lied. I think that's probably not the only
15 issue.

16 I think correctly in the prehearing conference
17 order, you stated that one of the questions should be
18 whether Mr. DeCamp should have known.

19 Mr. DeCamp was in a position where he was
20 representing to the NRC, to the PUC in Harrisburg and
21 presumably at some point to the Commonwealth of
22 Pennsylvania certain information about the condition of
23 the reactor in the early part of the accident.

24 He later became more important in terms of
25 providing information to the NRC, the ACRS, and to

1 Congress.

2 It seems to me that in that position, he should
3 have been very careful at a minimum, to ensure that he
4 was not negligent in providing false information.

5 Therefore, I think it's critical as to whether he
6 should have known that there was evidence that people
7 in the control room and outside the control room knew
8 about the hydrogen explosion.

9 If he didn't take the minimal kind of steps to
10 ensure that he had proper information before wiring
11 Congress, I might note that that mailgram also went to
12 Commissioner Gilinsky, then I think there's a question
13 about his performance.

14 JUDGE SMITH: Well, you know, I think that you will
15 receive very little in the way of argument from the
16 licensee on that point, and I think that you have the
17 board's agreement in at least three places I know of,
18 at the prehearing conference, at the order filed in the
19 prehearing conference, and perhaps again on the
20 limiting scope of your interrogatories. So I think
21 you've prevailed on that.

22 Okay. I don't think there is anything for us to
23 rule on in that particular issue right now, except I
24 understand every word you say and every sentence you
25 say, but I still don't know why you need the 29th.

1 I understand what you said. I just don't put it
2 all together to that conclusion.

3 MR. TROWBRIDGE: You understand, Mr. Chairman,
4 we've answered that, and Mr. DeCamp, for the entire
5 three days of the accident on up until May 30.

6 JUDGE SMITH: Yes, I understand that. Yes.

7 MS. BERNABEI: If I could just...I mean, this again
8 is probably not the proper context...

9 JUDGE SMITH: Just a moment.

10 MS. BERNABEI: Again, the question being why we go
11 out to inquire into Mr...well, people's knowledge on
12 the 29th.

13 JUDGE SMITH: Yes, this assumes that you've
14 established that on the afternoon of the 29th, somebody
15 did indeed interpret it as a core damage, hydrogen,
16 pressure spike core damage.

17 MS. BERNABEI: And on the questionnaires we
18 received, we received 19 questionnaires. There are
19 actually more, but 19 that we considered, at least on
20 the face, credible.

21 Nineteen people said they knew about the hydrogen
22 explosion on March 28th. Some of those people
23 answered, "I came on shift at 11:00 p.m. I was
24 informed by my shift supervisor when I came on about
25 that this had occurred on March 28th."

1 Some people in their questionnaires said, and I'm
2 including these among the 19 because I think they're
3 close enough, some people said, "I didn't go to work on
4 March 28th.

5 I went to work on March 29th. When I came to work
6 early in the morning, I was told about the hydrogen
7 explosion that occurred the prior day."

8 I think that is relevant as to information known on
9 the 28th and generally circulating around the site.

10 JUDGE SMITH: Would you agree with the general
11 reach of discovery as compared to rules of evidence, as
12 I think she made a threat there.

13 I mean, if one shift reports to the oncoming shift
14 that we had a core damage there because we had a
15 hydrogen explosion, I think she has a right to inquire
16 to that.

17 But that wasn't the way you cast it to begin with.

18 MR. TROWBRIDGE: I've lost the thread a little bit,
19 Mr. Chairman. Is this one shift that reported that
20 "yesterday we had a hydrogen explosion" and indicated
21 they knew it at the time?

22 JUDGE SMITH: Well...

23 MR. TROWBRIDGE: That would certainly be relevant.

24 JUDGE SMITH: Relevant?

25 MR. TROWBRIDGE: Yes. That would be within the

1 scope.

2 JUDGE SMITH: That's what I would think, yes.

3 MR. TROWBRIDGE: The hypothetical.

4 JUDGE SMITH: Right.

5 MR. TROWBRIDGE: That somebody came off shift on
6 the 28th and reported to the next shift the early 29th,
7 "Hey, we had a hydrogen explosion," that would relate
8 to the 28th.

9 JUDGE SMITH: Yes.

10 MR. TROWBRIDGE: No question about that.

11 MS. BERNABEI: But my point is that if somebody on
12 the 29th said, "I can't answer a question about what I
13 knew on March 29th. I didn't come to work on March
14 28th." What I'm saying to you is if they came to work
15 for the first time that week or the first time in those
16 two days on the 29th and learned at that time from
17 fellow workers or supervisors that an explosion took
18 place, I think that's relevant.

19 JUDGE SMITH: Apparently. I would think so. We
20 can't lay out all of the rulings that might be made in
21 a deposition.

22 MS. BERNABEI: That's precisely why I'm asking for
23 the two-day period.

24 JUDGE SMITH: The two-day period without some
25 limitation, without some connection to the first day,

1 would be beyond that you could establish a connection,
2 like the example you gave, well, even Mr. Trowbridge
3 admits that that would be appropriate.

4 So I think you have all the guidance. Then I think
5 we sort of worked out the ruling on this now. We will
6 not enforce the GPU back to the earlier discovery but
7 with respect to the depositions coming up, we would
8 expect that the elevated thermal couple readings would
9 recognize having a sufficient nexus to hydrogen
10 explosion to be included.

11 Do the parties intend to dispute GPU's
12 interrogatories with respect to the committee members?
13 And if you do, we want to know why you need that
14 information.

15 We're just trying to head off what could turn out
16 to be a very complicated discovery ruling and try to
17 approach it more in the scope of the hearing rather
18 than discovery matter.

19 And you intend to dispute the notice of deposition
20 of Mr. Blake.

21 MR. TROWBRIDGE: Mr. Chairman, this is one
22 additional, one quick matter first. I don't want to
23 get into an evidentiary discussion at this point.

24 I do not believe that the licensee's silence means
25 an agreement that there were 19 people who recognized a

1 hydrogen burn on the 29th. We were as surprised,
2 probably more so, then MIA to the answer we got to one
3 of the questionnaires, as we've informed them.

4 We have followed up on that and it's perfectly
5 clear that most, not all, of the individuals misread
6 the question.

7 The question wasn't all that well put. We got
8 answers from people who weren't there, who indicated
9 that, "You mean, did I know it on the 28th? No. Did I
10 know what happened on the 28th of the hydrogen
11 explosion some time later? Yes."

12 This will come out in the course of the hearing and
13 can be interpreted.

14 Mr. Chairman, as to the deposition, Mr. Blake
15 particularly, we have a broader point. We intend to
16 ask that MIA follow the regulations of the Commission,
17 that it supplement its deposition request with
18 identification of the matters on which they wish to
19 depose as well as who's going to take the deposition.
20 This is a formal requirement.

21 This becomes of special interest to me when they
22 depose Mr. Blake and don't say why.

23 JUDGE SMITH: And don't say what?

24 MR. TROWBRIDGE: Don't say why or what matters they
25 wish to depose him about.

1 JUDGE SMITH: Yes, since I doubt Mr. Blake was in
2 the control room, I don't see that he's in the scope of
3 it.

4 But while we're on that subject, what in the world
5 does...what's his name, Myers? Henry Myers. Why do
6 you feel it necessary...are you going to depose that
7 interrogatory?

8 Isn't that borrowing trouble if you're going to
9 answer those interrogatories?

10 MS. BERNABEI: I think that most of them are
11 irrelevant. We haven't filed a formal reponse, but
12 we will.

13 JUDGE SMITH: See, I'd like to take care of these
14 type of matters at this session.

15 MS. BERNABEI: I'm actually looking for them right
16 now.

17 JUDGE SMITH: Well, all right. Why do you want to
18 depose Mr. Blake?

19 MS. BERNABEI: You want to address that one first?

20 JUDGE SMITH: Yes, let's do it that way.

21 MS. BERNABEI: There's two reasons. First of all,
22 Mr. DeCamp, and I can find you specific portions of his
23 response that he specifically states that he first knew
24 of certain information, specifically the Mayler and
25 (inaudible) interviews when Mr. Blake and I think Mr.

1 Wilson told him about it.

2 As you probably know, Mr. Blake, or you may not
3 know, Mr. Blake did sit in on some of the 0760
4 interviews.

5 We believe that there was responsibility of Mr.
6 DeCamp when he learned...

7 JUDGE SMITH: Please use the microphone.

8 MS. BERNABEI: I'm sorry. We believe there is
9 responsibility of Mr. ...

10 JUDGE SMITH: I don't even know if it's working.

11 MS. BERNABEI: Should I talk louder? Is this
12 working now?

13 JUDGE SMITH: Yes.

14 MS. BERNABEI: We believe it is the responsibility
15 of Mr. DeCamp to correct what we believe are
16 misstatements, that there was no evidence of the
17 interpretation of the pressure spike in terms of core
18 damage.

19 We believe that as soon as he learned of the
20 interviews of Mayler and Schwab that that duty arose.

21 It is possible, of course, that this could be
22 handled outside the deposition context. I don't know.

23 But I think that is relevant information. DeCamp
24 specifically stated that he relied on Mr. Blake for
25 that information.

1 I would note that in this proceeding, there is
2 precedent for this in that in the OI investigation into
3 the reportability of the RHR invader reports, I
4 understand that the office of investigation did depose
5 Mr. Blake as to what his advice was to the corporation,
6 as to whether the report to be disclosed to the NRC.

7 I think it's a similar situation here where Mr.
8 DeCamp, the primary individual involved, said he relied
9 on the information given him by Mr. Blake.

10 The second point I would make is that the document
11 I spoke about earlier, and that is Mr. Arnold's ... the
12 memorandum to Mr. Arnold to the Parsippany notes
13 attached.

14 We considered that that was an indication to
15 Parsippany from the control room that hydrogen had been
16 generated and there had been serious core damage.

17 At this point, GPU has not complied fully with our
18 discovery request, which included a request to indicate
19 the distribution of all documents produced. It has not
20 complied with that.

21 We don't know to whom that document was distributed
22 in September of 1980 other than Mr. Arnold and Mr.
23 Blake.

24 It seems to me that that document indicated to Mr.
25 Arnold and to Mr. Blake that people in Parsippany,

1 whether Mr. Arnold was in Parsippany at that time, Mr.
2 DeCamp, who spent part of his time talking to Mr.
3 Arnold, on March 28th, I don't know if that information
4 was transmitted to them.

5 We'll have to inquire in the deposition. But in a
6 minimum, September 1980, it should have indicated that
7 somebody in Parsippany had the information to know that
8 there was hydrogen generated and serious core damage.

9 I believe at that point and what we want to ask Mr.
10 Blake, is, didn't this document indicate to you on
11 September 1980 when you received this, that people knew
12 on March 28th of what was going on with the reactor.

13 JUDGE SMITH: What's that other date you'r using
14 other than March 28th?

15 MS. BERNABEI: September 1980. We do have
16 additional copies if the board would like to read the
17 document.

18 It is a little confusing speaking about it. The
19 cover memo is September 17, 1980. This document
20 evidently comes from a subordinate to Mr. Arnold, Mr.
21 Waller, licensing manager.

22 And he basically is attaching for Mr. Arnold's
23 information GPU's knowledge of core damage following
24 the TMI-2 accident.

25 Attached to the memorandum, and explained somewhat

1 in the cover memorandum, are a set of notes that are
2 dated March 28, 1979.

3 You will note that the notes have on the face of
4 them a notation that they were taken at GPU, at
5 supposed'y GPU service company in Parsippany on March
6 28, '79.

7 And then the notation later on about the thermal
8 couple readings greater than 2500 degrees Fahrenheit
9 appeared on page 6 of those notes.

10 Now, it would appear to me that Mr. Arnold received
11 this information in preparation for GPU's response to
12 the NUREG 0760 investigation, the investigation of the
13 possible reporting failures.

14 We know that on September 1980 had the information.
15 Whether he had the information earlier, we don't know.
16 That is, he was in Parsippany and he was making
17 decisions on March 28th, he may well have had access
18 either to these notes or information from these notes
19 on March 28th.

20 And at minimum, we know that Mr. Blake, who is
21 listed on the distribution list to the September 1980
22 material, that he knew at least by September 1980 if
23 not before that there were indications that people in
24 Parsippany knew about in-core thermal couple
25 temperatures and possibly hydrogen generation.

1 It seems to me that at minimum, this raises the
2 question of whether by admission...this raises the
3 question, I think, of preliminarily by omission, that
4 is, by GPU's failure, at least to my knowledge,
5 transmitted, this memorandum or the March 28th notes to
6 the NRC, there was a material false statement made.

7 But I think more importantly it has to do with the
8 fact that Mr. Arnold perhaps as early as these notes
9 were taken the first day of the accident, knew that
10 hydrogen had been generated, and certainly Mr. Blake
11 knew in September of 1980.

12 I think at that point there probably should have
13 been some disclosure made certainly to the NRC and
14 some corrections to the mailgram should have been made.

15 JUDGE SMITH: Mr. Trowbridge?

16 MR. TROWBRIDGE: I think I'd better let Mr.
17 Blake...I've lost the thread. I do not understand what
18 this has to do with the mailgram.

19 JUDGE SMITH: One of the subissues was that if he
20 learned that the mailgram was inaccurate, did he take
21 any prudent steps to correct any inaccuracy.

22 MR. TROWBRIDGE: I don't...

23 JUDGE SMITH: I think that's the thread.

24 MR. TROWBRIDGE: Mr. Blake is being deposed for
25 what purpose?

1 JUDGE SMITH: It was copied on the memorandum.

2 MR. TROWBRIDGE: In September of 1980.

3 MS. BERNABEI: There was also that he did sit in on
4 the interviews, as I understand it, and Mr. DeCamp
5 specifically relied on information given Mr. Blake in
6 one of the interrogatories.

7 MR. BLAKE: Mr. Chairman, let me start with the
8 last part first. Ms. Bernabei makes reference to Mr.
9 DeCamp's relying on information which I provided him.

10 I believe as to pages 48 and 47 in our response to
11 TMI-A's first set of interrogatories, and it's a very
12 specific reference, to quote Mr. DeCamp's answer, "I
13 have a record of having received a copy of Mr. Schwab,
14 May 21, 1979 interview, from John Wilson on January 29,
15 1981, and at about the same time, I received a copy of
16 an April 25, 1979 GPU interview of Mayler from D. Blake
17 of (inaudible) Trowbridge."

18 That's it. And Mr. DeCamp, as he went through his
19 own set of documents, determined that I had apparently
20 sent him a copy of that interview in the January 1981
21 time frame.

22 And so he said not only when he received it, but
23 also how he got ahold of this information. That was
24 the interrogatory and the answer.

25 I am hard put to understand why I am to be deposed

1 on that. I represent to you that that's the facts.

2 JUDGE SMITH: My concern, Mr. Blake, was that not
3 whether what you're telling us this afternoon is
4 correct or not, I don't even think we should consider
5 that.

6 I was more concerned that there seemed to be an
7 excursion outside the scope of the enquiry and perhaps
8 invasion in the lawyer-client relationship.

9 If they're willing to accept your representation on
10 it, which I would recommend to them, I think that puts
11 an end to it.

12 I really wasn't trying to get into the accuracy of
13 the facts, but the relevance of the facts.

14 MR. BLAKE: That is, as I understand it, one of two
15 bases which they cite. The other being the fact that
16 we apparently in the course of discovery production
17 provided a memorandum which they've now handed out
18 which indicates that I was a CC addressee of a November
19 17, 1980 memorandum.

20 JUDGE SMITH: Right.

21 MR. BLAKE: I don't remember the memorandum and I
22 can't speak to that now, but still, I'm not sure why I
23 would need to be deposed or that in fact the deposition
24 would not delve into attorney-client privilege matters.

25 JUDGE SMITH: Well, as to first if you need to be

1 deposed, I don't know if that's appropriately the
2 issue. There is another matter, however.

3 Were you going to speak, Mr. Blake?

4 MR. BLAKE: I would start with the reason that I
5 guess I refer to the need is that while communications
6 between TMI-A and licensee have not been the best in
7 the course of this discovery, I quite frankly would
8 have expected that counsel would have made some
9 additional inquiries of me along these lines.

10 JUDGE SMITH: What ...

11 MR. BLAKE: Or otherwise in some typically
12 courteous fashion indicated that they might have a
13 desire to depose me.

14 No such communication occurred.

15 MS. BERNABEI: If I could speak to that. I
16 certainly agree with Mr. Blake that the relationship
17 perhaps us has not been harmonious, but I would say
18 that the reason I didn't inquire first is because I
19 expected that whatever we asked Mr. Blake would be very
20 narrow.

21 As the board probably realizes, we didn't know of
22 the board deposition until last Friday, and it was
23 after we knew specifically, basically the two we've
24 outlined, that we wanted to ask questions about it.

25 This is not a fishing expedition. I would be the

1 first person, since I've argued this many times myself,
2 that we respect the attorney-client relationship.

3 I think, though, there is, however, a question, and
4 I think when you're in this particular field, that is,
5 of commercial nuclear energy, there is a serious duty
6 to disclose information, even if it is harmful to your
7 client, if ...

8 JUDGE SMITH: Let's not digress.

9 MS. BERNABEI: Okay.

10 JUDGE SMITH: Just approach this proceeding with
11 the understand that we're not going to talk that way
12 with respect to a narrow issue.

13 We're going to talk about Mr. DeCamp and his state
14 of mind.

15 MS. BERNABEI: Okay. And what we had proposed is
16 two issues in which Mr. Blake, one, was informing Mr.
17 DeCamp of information.

18 He was the source for Mr. DeCamp's information, and
19 I would say that whatever privilege there is, I think,
20 has been waived by Mr. DeCamp by stating this is what
21 my lawyer told me.

22 Secondly, the second instance would be when, and
23 again this is all in the context, as far as we can
24 tell, the NUREG 0760 investigation.

25 When Mr. Arnold and Mr. Blake are being provided

1 information not for the general perusal, but for help
2 in determining how the corporation is going to respond
3 to specific questioning by the NRC on what they knew
4 about core damage, that's the cover letter to the
5 memorandum.

6 Now I think that if the corporation...well, we
7 don't know what Mr. Arnold is going to say yet because
8 we haven't deposed him.

9 However, it seems to me that once the corporation
10 knew in September 1980 about what was known on March
11 28th, is relevant as to whether or not Mr. DeCamp
12 should have corrected that mailgram, even if it were as
13 late as September 1980.

14 JUDGE SMITH: I think that the longer the period
15 passes after May 9, 1979, the less is going to be
16 relevant to our idea of the scope, as to whether Mr.
17 DeCamp should have corrected the information by that
18 time.

19 Will you do it today, for example? I mean, there
20 comes a point when it becomes less relevant.

21 As people would more or less act upon that
22 information becomes more or less important to that
23 correction, but that's a tenuous connection.

24 I would not favor deposing Mr. Blake because of the
25 lawyer-client relationship, unless there is a

1 demonstration that the information is really necessary
2 to your discovery efforts.

3 I would much rather you work it out with ...

4 MS. BERNABEI: We're certainly willing to try.

5 JUDGE SMITH: Try that before you undertake the
6 deposing. How about all your questions to the majority
7 committee's report?

8 You're going to object to some of those, I suppose?

9 MS. BERNABEI: Yes, we are. We don't believe
10 they're relevant at this time.

11 JUDGE SMITH: Or that they could lead to evidence?

12 MS. BERNABEI: No. I believe the original set of
13 interrogatories that we did object to was that they may
14 lead to potential witnesses.

15 We can assure the board that if Mr. Myers or
16 someone else is going to testify that sponsors the
17 Udall Committee report, we will inform GPU. I think at
18 that point certain questions may be relevant.

19 However, we do regard this as harassment of the
20 organization and presumably Dr. Myers, but speaking for
21 TMI-A, I think most of these are pretty inappropriate.

22 JUDGE SMITH: You regard this as harassment of the
23 majority staff?

24 MS. BERNABEI: I can't speak for the majority
25 staff.

1 JUDGE SMITH: Who do you believe is being harassed?

2 MS. BERNABEI: TMI-A.

3 JUDGE SMITH: Oh.

4 MS. BERNABEI: And we answered those in response to
5 some of the same questions posed in the first set of
6 interrogatories.

7 We provided the information. We did our control,
8 we tried to fairly apprise GPU of our case. We believe
9 that most of the information is either on the public
10 record or was in their possession and control.

11 But I think the kind of inquiry that's been
12 posed here really indicate a motive other than a
13 legitimate interest in discoverable material.

14 JUDGE SMITH: Judge Wolfe is going to preside over
15 the aspect of the hearing on the motion to compel. I
16 would like to resolve at the beginning that the
17 legitimate right of the adversary in discovery is not
18 to learn information, but to flush out his adversary's
19 case.

20 And why do you want this information from the Udall
21 Committee?

22 MR. BLAKE: Mr. Chairman, it may be that this
23 problem has solved itself. I get the indication today
24 from Ms. Bernabei that there is not, as I understand
25 it, a current intention to use either Dr. Myers nor

1 others.

2 That may well close all the questions, and we tried
3 to indicate because of the sensitivity, the natural
4 sensitivity here, of inquiring into Dr. Myers' or
5 members of the congressional staff, right up front in
6 our interrogatories, what the purpose was.

7 That's why we went and had a paragraph introduction
8 to the interrogatories, for example, in this last, I
9 believe there is an introductory paragraph before
10 interrogatories 1 through 18, where we tried to
11 describe why, and it was just for this purpose.

12 MS. BERNABEI: This somewhat misstates what I
13 said. I did not indicate that I would not depose a
14 TMI-A witness.

15 What I did say is that at this time he is not, and
16 I assume...

17 MR. BLAKE: Well, at this time, we have no
18 indication that they won't provide us any information
19 about who their prospective witnesses are.

20 MS. BERNABEI: Mr. Blake, wait a minute. Our
21 position is that as such time, which I assume would be
22 fairly shortly, we supplemented our response to
23 identify the witnesses, that therefore certain
24 discovery rights would arise.

25 And that's for Dr. Myers or any other witness.

1 MR. BLAKE: Judge Smith, I believe there is
2 specifically TMI-A's answer was that after discovery
3 closed, they would identify their witnesses.

4 MS. BERNABEI: That's not true.

5 MR. BLAKE: Well ...

6 MS. BERNABEI: That's not true.

7 MR. BLAKE: Well, ...

8 JUDGE SMITH: I think there has to be some
9 clarification. Let's let Judge Wolfe work on this.

10 (Laughter.)

11 JUDGE SMITH: With respect to the motion to compel.
12 The September 13, 1984 motion to compel responses to
13 the second set of interrogatories, to find out where we
14 are on this issue.

15 MS. BERNABEI: I am not prepared to address that.
16 I did not receive a copy of that motion on Thursday and
17 was unable to review it until this morning.

18 For some reason, there was a problem in delivery of
19 the motion, and I have been given a copy this weekend
20 of the motion.

21 So I am not at all prepared to address that. I
22 apologize, but I didn't read it until this morning.

23 JUDGE SMITH: We received a copy of it the 13th.

24 MS. BERNABEI: I understand there were a number of
25 documents that I believe were supposed to be delivered

1 to us that we did not receive.

2 MR. BLAKE: Yes, I believe there was apparently a
3 goof in one end to Ms. Bernabei only on the 13th. Ms.
4 Doroshow, I believe, received her copy on the 13th.

5 With respect to Ms. Bernabei, I tracked it and
6 apparently it was an outside messenger service that
7 delivered that one document.

8 It was sent to 1901 Q Street, which was indicated
9 on the stationary that I had from Ms. Bernabei, which I
10 understand now is an old address and therefore was
11 delivered across the street to the Institute for Policy
12 Studies, an affiliate of some sort with the
13 governmental accountability project.

14 Miss Bernabei told me she did not get it on the
15 13th. On the 14th...

16 MS. BERNABEI: I didn't get the motion...what Mr.
17 Blake is correct, up to the point that we did get what
18 I believe were two other documents.

19 Perhaps it was GPU's third set of interrogatories.
20 We did get hand-delivered that copy. We didn't get the
21 motion until this weekend, so I am not prepared to
22 address it.

23 Everything else Mr. Blake said is substantially
24 correct.

25 JUDGE SMITH: How about Miss Doroshow? You were

1 served, were you, on September 13th, Miss Dorowshow?

2 MS. DOROSHOW: Yes, I was served, but I think Miss
3 Bernabei is the counsel representing TMI-A who has
4 been handling all discovery material and requests since
5 the beginning of discovery.

6 It is our position that she should be the one to
7 argue the motion to compel. This basically is asking
8 for a response to a discovery request which she was
9 primarily responsible for appearing.

10 JUDGE SMITH: Before we just leave this subject,
11 there seems to be two points that are of concern, and
12 in preparing your response, just bear in mind what they
13 are and how the board might look at it.

14 That is they infer from at least two of your
15 responses that you choose not to respond at this time,
16 that you choose to defer your response until after
17 discovery and if that's a misinterpretation, clarify
18 it.

19 But that's a reasonable inference. I draw this
20 inference myself. Is that what you had in mind in your
21 interrogatories, I mean, your responses?

22 MS. BERNABEI: No. In the responses specifically
23 to a number of interrogatories is that we did not
24 currently have the information to answer them, in part
25 because our response is certainly our legal position,

1 depending on what was produced by GPU.

2 I might just state it generally in this kind of
3 proceeding I have always been familiar with the fact
4 that the licensee has almost all the information, and
5 that the intervenors have very little other than what
6 previously appeared on a public record.

7 And I can represent that that is the case in this
8 instance. In terms of witnesses, we will, if we do
9 have witnesses, we will inform GPU as soon as possible.

10 I would certainly say that given what we know to be
11 the cutoff date now of September 30, there is some
12 inconvenience caused by the fact that we do not give
13 the licensee witnesses until later date.

14 I have no problem with working out some kind of
15 extension. I understand that is some kind of problem.

16 But the basic problem is that I'm not prepared to
17 answer what our legal position is.

18 JUDGE SMITH: Problem? When you use the word
19 prepare as to factual responses, that's what is causing
20 the confusion, the confusion in Judge Wolfe's mind and
21 my mind.

22 What do you mean prepared? You're not ready?

23 MS. BERNABEI: I'm saying ...

24 JUDGE SMITH: Or you don't have it? You chose not
25 to because it does not fit into your plan of

1 litigation, or you don't have the information.

2 If there is a distinction, then you have to keep
3 the distinction sharp.

4 JUDGE WOLFE: And more specifically, you represent
5 to us at this time that you do not know the identity of
6 any witness that you might call? Is that what you're
7 saying?

8 MS. BERNABEI: That's corr....the...

9 JUDGE WOLFE: Answer my question. Is that what
10 you're saying?

11 MS. BERNABEI: I'm sorry, would you repeat the
12 question?

13 JUDGE WOLFE: Repeat the question, Mr. Reporter.

14 MS. BERNABEI: What I'm saying is that we don't
15 have confirmation of the witnesses that we intend to
16 call.

17 I'm not saying that we don't have any present
18 intention of calling any witnesses. That's not what
19 I'm saying.

20 JUDGE WOLFE: Is that the sort of information that
21 you would like to have at this time, Mr. Blake, so that
22 you can proceed with your depositions?

23 Or is this the sort of thing that can be held back
24 at some later date?

25 MR. BLAKE: No, that's precisely the information

1 that we were seeking, Judge.

2 MS. BERNABEI: We are not prepared to represent
3 that anyone will appear on TMI-A's behalf at this time.

4 JUDGE WOLFE: I think that Mr. Blake would go along
5 with that if at some later time the witnesses said that
6 they wouldn't want to appear or you advised that they
7 say they won't appear, or whatever.

8 MR. BLAKE: I have prepared and have in part formed
9 a notice of deposition for Dr. Myers, for example, but
10 there is no way that I can serve that at this point,
11 reasonably, until I know whether or not they intend to
12 use him as a witness, in the event we get an answer to
13 our interrogatory.

14 If they intended to, then it would be my intention
15 to depose him, but I can't wait until all the discovery
16 is complete and then notice him because it runs
17 contrary to our...

18 JUDGE SMITH: We understand the principle.

19 MS. BERNABEI: We have no intention to do that. I
20 mean, we realize that would prejudice GPU. We do not
21 have the intention to state on the last day of
22 discovery who our witnesses are.

23 We have no intention to do that. We are currently
24 attempting to determine whether or not Dr. Myers will
25 be a witness, and we will inform GPU immediately when

1 we decide that.

2 And we will certainly make any accommodations...

3 JUDGE WOLFE: You are considering that, putting Dr.
4 Myers on the stand, is that correct?

5 MS. BERNABEI: I'm not free to represent that at
6 this point.

7 JUDGE SMITH: You use words that just leave me very
8 uncomfortable. Prepared to, free to. If you want to
9 litigate this case, you tell us right now what you're
10 going to do and what you think you're going to do.

11 MS. BERNABEI: I'm saying I don't know at this
12 point. Okay. I am not free to speak for a
13 congressional staff member.

14 JUDGE SMITH: No, you don't have to. What is your
15 intent? You can't, of course, speak for them. What is
16 your intent?

17 MS. BERNABEI: We're not going to ...

18 JUDGE SMITH: Present intent.

19 MS. BERNABEI: What I am saying is that we would
20 like Dr. Myers to testify if he could be made
21 available. If that cannot be arranged, we are not
22 going to subpoena him to testify at a hearing.

23 JUDGE SMITH: How about other witnesses?

24 MS. BERNABEI: We have no intentions of any other
25 witnesses at this time.

JUDGE SMITH: Okay.

1 MR. BLAKE: Mr. Chairman, I will have to let the
2 Board know that I will be filing a notice of deposition to
3 take Dr. Myers deposition, and regard that as a permanent...

4 MS. BERNABEL: Well, I stated what I stated, you
5 can interpret it as you will.

6 JUDGE SMITH: We talked about the possible appear-
7 ance of Dr. Myers, all I know is Dr. Myers, I assume it is
8 because TMIA on several occasions requested the Board to
9 bring a principal author of the majority Staff report to
10 the hearing. And on several occasions we said that we would
11 number one, we began on the very date of the transcript I'm
12 alluding to today here on 18th, we first pointed out that,
13 my question whether we could even have subpoena powers to
14 bring him in or whether he'd have to come voluntarily.

15 Next was the point that seems to be the case that
16 the only information that appeared in the Udal committee re-
17 port appears to be available to the majority Staff, is infor-
18 mation which is derived from other sources and it would
19 seem to me that TMIA was suggesting that the Board would like
20 to hear from someone at that majority Staff how we shall de-
21 cide this issue. We suggested that they don't know how we
22 could accept testimony of that nature, you know.

23 We can't have a witness sit here and say well, this
24 is how you should be reading these words. So, I don't see
25 that any of it's changed. I want you to know that unless

1 your witness is either an expert on the subject matter of
2 possibly false communications, which I doubt if you're has
3 adequately, or can bring us some competent testimony as is
4 some facts, we may have difficulty bringing that type of a
5 witness.

6 And in that event, I do think it's very sensitive
7 to use our process to interrogate Congressional committee
8 records. I don't like that at all. And I tell you unless
9 there's a clear showing for the need of it, I don't think,
10 I don't know if that's showing's been made in light of the
11 fact we may have all of this deposition and all of the fuss
12 and all of the attendant problems and end up with a situation
13 where the, where Dr. Myers or anybody else would have to
14 make and can give us testimony.

15 What kind of testimony are you thinking about that
16 he might be able to give us? Is he the only one that you're
17 thinking about?

18 MS. BERNABEI: That's correct.

19 JUDGE SMITH: What is it that he can tell us?

20 MS. BERNABEI: There's basically two things and,
21 again, I'm speaking from somewhat from ignorance of the prior
22 rulings made in the case. But I do understand that there
23 was a decision made at a prior stage in this case.

24 JUDGE SMITH: Several times.

25 MS. BERNABEI: That the Udal report would not be

1 admitted or the Board would not take judicial notice, even
2 though it did take judicial notice, well, it admitted NUREG
3 0760, because Mr. Mosely was here to sponsor it. And then
4 it did take judicial notice of several other reports, inclu-
5 ding the Regovern report, the Senate hearings for central
6 court.

7 JUDGE SMITH: We don't know that that's the case.

8 MS. BERNABEI: On reporting of information. That's
9 and again, that may be incorrect, I was not in the proceedings
10 at this time.

11 But one of the purposes would be to have Dr. Myers
12 sponsor the Udal report. And if I could just suggest, the
13 NUREG 0760 which has been admitted into evidence, is a com-
14 pilation of certain information that the NRC received. It
15 is given to you in a certain context with certain conclusions
16 drawn.

17 Dr. Myers' report is, as you said, substantially
18 information from other investigations and information given
19 to the Interior Committee during hearings and during its own
20 investigation into this matter.

21 There are certain interpretations..

22 JUDGE SMITH: Did he ever do any investigating of
23 his own?

24 MS. BERNABEI: Yes.

25 JUDGE SMITH: He did.

1 MS. BERNABEI: There's certain..

2 JUDGE SMITH: And he's willing to testify on some
3 of his own investigations?

4 MS. BERNABEI: Yes.

5 JUDGE SMITH: Okay.

6 MS. BERNABEI: And I would also state that, and
7 this perhaps gets into the technical areas, Dr. Myers is a
8 physicist and Dr. Myers will be able to testify as an expert.

9 JUDGE SMITH: Mr. DeCamp's state of mind?

10 MS. BERNABEI: No, no, as to whether or not any
11 respectable technical person, physicist, engineer or nuclear
12 technician could think that the 2500 degree Fahrenheit temp-
13 erature meant anything other the generation of hydrogen and
14 serious core damage.

15 JUDGE SMITH: Well, I guess then, I think it'd pro-
16 bably make appropriate interrogatories, that's what you have
17 in mind. That's somewhat different than the reason he was
18 offered for before. It was a total failure of appreciation
19 on the part of TMIA during the main hearing that you just
20 don't throw in a document and simply attach, you know, a
21 human body to that document does not make it admissible.

22 And it was clear before that TMIA had no basis to
23 believe toat Dr. Myers had any information, that he generated
24 on his own, or that he had expert testimony. They were try-
25 ing to get in a report which was predicated upon, on the same

1 information that the Staff made its report.

2 But, all right, I think that's been helpful ex-
3 change. I still have doubts about the use of Dr. Myers in
4 the context that you stated. But having represented that he
5 conducted an investigation, that he has facts, that's fine
6 and then that he intends to testify as an expert as to what
7 a person familiar with the nuclear industry should infer from
8 certain facts, that may be arguable. But at this stage of
9 the hearing, I think that you have the basis for proceeding
10 on your discovery.

11 I don't like it, I don't like it at all, I just,
12 it's going to be a, it's probably the first time that it has
13 come up in this Agency, and any Agency that I know of, that
14 our process is being used against Congressional Staff members
15 and it may be the first time we're using Congressional Staff
16 members as fact witnesses in administrative hearings. So,
17 big trade off, we have a good seat to see what's gonna happen.

18 MR. BLAKE: Mr. Smith, I would say two things, in
19 this regard. First, as I indicated before, I'm aware of the
20 sensitivity here and I do not know whether or not objections
21 will be raised to it. But, I don't know how to square the
22 objections of a fairly big picture, from just immunities or
23 other types of objections being raised, with it then being
24 presented as a weakness thereafter.

25 And, finally, our only interest is in, is appearing

1 here, being potentially offered as a witness. I have for
2 sometime as to this issue, the DeCamp mailgram, held with you
3 and I believe in the first meeting with Miss Bernaber expres-
4 sed it, that there is really very little need for a whole
5 ocean of witnesses in order to cope with this subject area in
6 this hearing.

7 There's an awful lot of work which has been done on
8 this, several investigations, a large number of interviews
9 already of these people and certainly closer in time than
10 five years later, which is where we are today.

11 It is my thought that the parties ought easily
12 to be able to stipulate to the admissibility of large pieces
13 of evidence and documentation which previously have addressed
14 this subject and then we can get about briefing it. My last
15 set of interrogatories of TMIA is headed in that direction.

16 In that, we identify investigative reports and
17 in, interviews of people where, in our view, they've adres-
18 sed this subject. Then ask them if there are anymore.

19 If it is licensees intention to try to get the
20 parties to stipulate, I think by and large, this is TMIA and
21 ourselves, but I don't know, we're at opposite ends of the
22 spectrum. I think the other parties are somewhere between us
23 If we could get together, I propose to try to enter into a
24 stipulation with TMIA and the rest of the other parties hope-
25 fully would join, to put into evidence those portions of

1 investigative reports where this subject is addressed.

2 And I don't mean to exclude Dr. Myers' report from
3 that library. I also don't want to have to call George
4 Crampton or Mitch Rodoban in order to get the Rodoban report
5 which also addresses this subject in the evidence, or the
6 authors of NUREG 0600, or all the others. I think to the
7 extent there are those investigations, they say what it is
8 they say.

9 And if we can stipulate them in, and stipulate the
10 underlying interviews and statements by individuals upon which
11 they relied, then we have something to brief. And I'm not
12 gonna object to people's wanting to call certain individuals
13 beyond that to cross examine them on their statements.

14 But I think we can get a long ways down the road if
15 we just, just will agree rather than horsing it out. Now, of
16 course, that would avoid..

17 JUDGE WOLFE: Have you put this to Miss Bernaber
18 before today?

19 MR. BLAKE: No, initially, right on the first day
20 of the meeting, I think the first time we ever got together
21 on discovery, I indicated very generally to Miss Bernaber that
22 I thought we could put a whole bunch of information in and
23 just brief it, without ever having enter a hearing.

24 But, I mean, it's obvious to me as this thing's
25 been played out, that they want to talk with Mr. DeCamp, for

1 example, and we're not going to object to that or oppose
2 it and there are some other principal figures which some
3 party might want to do.

4 But I think alot of this could be avoided substan-
5 tially and certainly hearing time avoided or the need to try
6 to pull in people exclusively for the purpose of sponsoring a
7 document if we could just get together and agree. I just
8 take this occasion to point out, Mr. Smith, to the Board, I
9 think there are ways to go and I hope that we'll get there
10 to avoid some of these problems.

11 MS. BERNABEI: Well, I certainly have no problem
12 with what Mr. Blake has recommended. I have no problem with
13 what Mr. Blake has recommended. I do disagree, I do think
14 an evidentiary hearing is required but I certainly have no
15 problem with stipulating as to portions of interviews or
16 reports that are, you know, that either party wishes admitted

17 JUDGE SMITH: Yes, it would be very helpful to the
18 Board and, as a matter of fact, if a successful effort isn't
19 made along that line voluntarily, we will perhaps direct that
20 you do do that, that you agree upon the portions of those
21 various reports which are german to the hearing and you'll
22 have to do that.

23 There is, however, one other aspect of it and that
24 is that the Appeal Board has indicated that it was this Board
25 that did not discharge its responsibilities with respect to

1 this issue. If you recall, there was no no participation
2 by any party at all although the intervenors were repeatedly
3 assured that we would hear any case on this and related issues
4 and no one did it.

5 However, in this case, this is a case where the
6 notice of hearing required the Board members, either in the
7 presence of a default on an intervenors, to inquire and the
8 Appeal Board has directed us. So, therefore, it will have
9 to be the minimum the presence of Mr. DeCamp before the
10 Board. And in addition to that, I think we're going to need
11 some type of discovery monitor.

12 Let me say that, discovery monitor, let me say that
13 TMIA's discovery efforts, by a comfortable margin, subsumes
14 the Board's discovery interest. But it does, there's nothing
15 no interest we have in developing the pre-hearing information
16 that is not being conducted by TMIA. But the Board was, my
17 full of the fact, you don't want to wait until the day of
18 the hearing to find out that there's information not being
19 presented that we think should be presented on the issue.

20 We think we should do some discovery monitoring
21 which is not being done. In particular, I think that the
22 17, you referred to 19, but I think you said 17..

23 MS. BERNABEI: There were 17 first and then two
24 sometime later in the week. It's the 19 as we have it now.

25 JUDGE SMITH: Yeah. I think that if those

1 questionnaires could be made available to the Court, that
2 would be satisfactory. Or, if you can propose, if further
3 distillation of those, and you might do it too, generally
4 whether the apparent distillation of those interrogatories,
5 any that you agree are, should not be looked at by the Board,
6 both of you agree, okay, throw those out.

7 As a remainder, bring those into, those question-
8 naires to our attention if you can.

9 MR. BLAKE: I will intend to file with the Board,
10 and copies to the parties, copies of the 19 questionnaires
11 which have been discussed, and supplements to those 19
12 which we have received from the individuals, clarifying where
13 clarification is necessary.

14 That is the extent of the information that we have
15 from the people.

16 JUDGE SMITH: Is there anything else on any dis-
17 covery disputes?

18 JUDGE WOLFE: Well, I take it from what has been
19 said today, that you, Miss Bernabei, are not in a position
20 to respond precisely to the licensee's motion of September 13
21 compel responses to the licensee's second set of interroga-
22 tories, is that right?

23 MS. BERNABEI: That's correct.

24 JUDGE WOLFE: Other than whatever we said with
25 respect to whatever was suggested by Mr. Blake with proceeding

1 to take the deposition of Mr. Myer. So I guess we'll just
2 have to leave a ruling on that for some later date.

3 JUDGE SMITH: Well, what I had hoped we would
4 accomplish this afternoon is my discussing the general respon-
5 sibilities of the parties during discovery as we held. And
6 understanding what our attitude will be and what we think the
7 law to be is that your answers to these motions will be sim-
8 plified. Either you agree or don't agree, understand or as
9 a point that wasn't covered.

10 But one of the things that we do want to accomplish
11 by these conferences is to cut down on your burden, too, in
12 filing papers if you can save time that way, I think it
13 would be helpful to you. So, you look at those answers, you
14 don't have to make it a whole case. If you think we already
15 ruled sufficiently, take advantage of that. If it's points
16 that weren't discussed, then limit your answers to those.

17 Oh, there is an outstanding matter. And that is
18 your motion to compel of February 9th, I mean of September
19 7th. TMIA's motion to compel of September 7th, which, without
20 going into the particular details of it, Judge Wolfe and I
21 believe it's been pretty well mooted.

22 MS. BERNABEI: May I address a few points? I think
23 a portion of it has been, but I'd like to address a few
24 points and also remind the Board that there is also a motion
25 for the extension of the discovery period.

1 JUDGE SMITH: We're gonna come to that next.

2 MS. BERNABEI: If I could just make a few points.
3 Obviously at the time we filed that motion, we did not have
4 available to us any of the documents.

5 JUDGE SMITH: Right.

6 MS. BERNABEI: And a substantially, we did not have
7 available to us the response to our interrogatories. Sub-
8 sequent to that time, and I wanted to give the Board the
9 dates because I think it's important also in your considera-
10 tion of the motion for an extension.

11 I did not have a chance, and again, I'm the counsel
12 of this particular issue that has been reviewing the disco-
13 very, a chance to review any of those documents until the
14 11th. Those documents, both the interrogatory response and
15 the document request responses were not completed at that time.

16 There were supplementations made on the 13th and
17 the 14th. Effectively, although we did need to notice of
18 people for depositions, to fit within the Board's, the Board
19 ordered discovery schedule. We had not completed our review
20 of the documents. In fact, this weekend, I spent most of
21 Saturday over at Shaw Pit in reviewing the documents.

22 What has become clear as I finished the review, is
23 that we still don't know from some of those documents, from
24 some of those documents, what the licensee's response is.
25 With regard to many of the interrogatories. We got volumes

1 and I can just give you an example. For one of the interro-
2 gatories, we got seven volumes from the Department of Energy,
3 and which I think was joint with the NRC, about the TMI
4 accident. And that was supposed to include all indications
5 of the pressure spike or the hydrogen combustion.

6 Well, we're not gonna look through eight volumes
7 to try to figure out what their answer to the interrogatory
8 is. There were other similar instances, perhaps not to that
9 extent, but there were other similar incidences of documents
10 produced were very difficult to review and to this, at this
11 time, I don't know what the answer is that we're supposed to
12 have gotten from those documents.

13 The second point that I couldn't make when I filed
14 the motion because we didn't, we hadn't then reviewed any
15 of the documents, is that there appear to be some, I don't
16 know if we should call them gaps, there appear to be portions
17 of the documents that we did not receive. I wrote Mr. Blake
18 a letter, which he should have received this morning, which
19 indicate those portions of the documents that appear to be
20 less than complete.

21 Now, you know, I'm not implying that there's any-
22 thing, you know, underhanded going on. All I'm saying is
23 that on the face of the document, there seems to be problems
24 with some of them. And these include logs that don't start
25 before late night on March 29th, even though it appears there

1 should be logs in existence for March 28th. This includes
2 Mr. DeCamps notes which are very complete for March 30th, but
3 include minimal notes for March 28th and no notes for
4 March 29th. This also includes the fact that UPU, as I
5 stated before, has said that it will now produce certain logs
6 from the observation center.

7 I listed this in a letter to Mr. Blake, which I
8 can, which I intend to serve on the Board, but there are pro-
9 blems in terms of the completeness of the documents we've
10 received, at least from my facial review of them. You know,
11 I don't know if these other logs exist, if the logs are in-
12 complete. The third one that was quite, was somewhat start-
13 ling is a telephone log of certain conditions in the reactor
14 that has on the face of it control room log, something of
15 that sort, and it stops at 1:38p.m. or 1:40p.m., on March
16 28th, precisely 10 minutes before the pressure spike.

17 And we have no indication that anything was removed
18 from this document..

19 JUDGE WOLFE: This isn't the forest right now, is
20 it?

21 MS. BERNABEI: No.

22 JUDGE WOLFE: We're just considering your motion
23 of September 7th and ..

24 MS. BERNABEI: I'm just ..

25 JUDGE WOLFE: Fold on. I hear alot of statements

1 here that has nothing whatsoever to do with our consideration
2 of your motion to compel responses of September 7th, 1984.
3 Now, you may well have good cause to file another motion to
4 compel in light of things that have not been disclosed to
5 you, in light of your initial set of interrogatories, or your
6 initial motion for production.

7 But, my goodness, let's keep on track here. And, as
8 I understand it, getting back to your motion to compel, I
9 understand that you now agree that the, in substance, you're
10 withdrawing the motion to compel insofar as the licensee has
11 now brought documentation to its Washington office and you
12 do not have to go to Harrisburg. That portion of your motion
13 to compel you now withdraw as moot. Isn't that correct, Miss
14 Bernaber? Yes or not?

15 MS. BERNABER: Yes.

16 JUDGE WOLFE: All right. Secondly, it's now mooted
17 that the licensee has supplemented, that's not a timely man-
18 ner as it should, not having moved for an extension of time,
19 but they have supplemented their responses on September 11,
20 September 13 and September 14. So, that portion of your
21 motion to compel is now mooted. Yes or no?

22 MS. BERNABER: I think not, no.

23 JUDGE WOLFE: No, why? And aren't we getting now
24 into possible, another motion to compel in that what you've
25 asked for has not been produced? You've gotten what you

1 moved to compel. Insofar as you know at this time.

2 MS. BERNABEI: Well, let me back up for a moment,
3 okay. And we're trying to answer your question, Judge Wolfe.
4 I assumed that this hearing, that you were interested in re-
5 solving all the discovery disputes.

6 I believe that part of our motion to compel was
7 that licensee was not first making documents available, but
8 also not making, not providing a response in the way provided
9 under the rules. And what I was attempting to describe for
10 you was not to get off into peripheral areas, or another mo-
11 tion to compel, but indicate how that portion of our motion
12 still stands. That is, that we were not being produced docu-
13 ments in a form that was responsive to interrogatories.
14 That's number one.

15 Number two, there are certain documents that do not
16 appear to be complete. I'm just trying to explain.

17 JUDGE WOLFE: Your motion to compel is only ad-
18 dressed to not having been furnished with responses in a
19 timely manner. Namely by September whatever it was, Septem-
20 ber 4. And they weren't served until actually the 11th, the
21 12th, or 11th, 13th and 14. But now that's behind us, that's
22 mooted. You've got your supplemental responses. If you don't
23 like those, something wrong with them, move once again to
24 compel. All right?

25 So that the second point of you motion to compel has

1 now been mooted, right?

2 MS. BERNABEI: Okay.

3 JUDGE WOLFE: You've asked for reasonable costs,
4 that's yet something else again. Turn a reasonable attorney's
5 fees and costs, is that correct?

6 MS. BERNABEI: Correct.

7 JUDGE WOLFE: Well, as the licensee points out,
8 that's not assessment of attorney's fees and costs and pre-
9 paring a motion to compel. It is not provided for in our
10 rule. However, the federal rules of civil procedure, I think
11 it's rule 37 provides for that. But, it's not in our rules
12 so we can't, we're not authorized to make such assessment.

13 But, in any event, since we're denying your
14 motion to compel in major part, as we've already discussed,
15 even if we had the authority, we wouldn't award the costs,
16 because we are denying in substantial fashion and substantial
17 manner, your motion to compel.

18 Fourth point, is that you're seeking three week
19 extension of time and this, I think again, gets back to
20 Judge Smith's handling of the case insofar as giving consi-
21 deration to further time for discovery in this case. So,
22 back to you, Judge.

23 MR. GOLDBERG: Judge Smith, excuse me. Before we
24 leave the subject of discovery dispute, I did want to inform
25 the Board that while there is nothing currently pending before

1 the Board that the Board needs to rule on with respect to
2 discovery against the Staff, we have been preparing our res-
3 ponses to UCS interrogatories and document request on the is-
4 sue of training. And we will be filing that response soon.

5 It, upon filing, will present the Board with another
6 discovery dispute which will require a ruling from the Board.
7 We're prepared to address it today if the Board wishes, or we
8 can file our response as soon as it's ready to be filed and
9 the Board can take it up at a later time, whatever you
10 prefer.

11 JUDGE SMITH: I guess it would depend somewhat upon
12 how complicated the issue is. However, before we leave the
13 TMIA's September 7th motion, Judge Wolfe invited you to file
14 a subsequent motion to compel. But before we go that far,
15 is there any, have you had any communication with Mr. Blake
16 about your concerns about the adequacy of the response?

17 MS. BERNABEL: Yes. During, this is not directly
18 with Mr. Blake, but during the actual production of documents
19 I was..

20 JUDGE SMITH: Can't hear you.

21 MS. BERNABEL: It was during the actual production
22 of documents, I did speak to the paralegal who was producing
23 the documents and asked her what documents were specifically
24 referenced in some of the answers to interrogatories and whe-
25 ther or not they'd be produced.

1 She was very helpful in that respect. Today, since
2 I did not complete my review of the documents til Saturday,
3 this morning I delivered a letter to Mr. Blake about the spe-
4 cific documents I was concerned about, with parts that, you
5 know, that appear to either be missing or that might be
6 there. I assume that he's had a chance to review the letter.

7 One of the reasons for wanting to bring it up is
8 that there were other issues that were brought up by you,
9 Judge Smith, that the parties had not had a chance to ad-
10 dress in written form but that perhaps could be settled.

11 JUDGE SMITH: Yes, we had hoped before any motion
12 to compel is filed of that nature that there be a very
13 strong record on both sides as Mr. Blake has indicated to
14 satisfy your needs.

15 JUDGE WOLFE: I'm surprised at all that there's
16 a necessity for motions to compel to be filed, to be served.
17 In 18 years at the Department of Justice as a trial attorney,
18 I don't recall of a single instance where I filed a motion
19 to compel for the plaintiffs in any individual case, I had
20 occasions to file motions to compel.

21 I don't know what the matter is. Judge Smith and
22 I have been discussing what we see as being in the offing,
23 a blizzard, a paper blizzard. And we've decided that we're
24 just not going to stand for that sort of activity between
25 counsel. And we insist that you do get together, if you

1 can't get together, why obviously a motion to compel. I
2 don't even see the reason why the first motion to compel was
3 ever filed, get together and talk these things through.

4 JUDGE SMITH: We felt that it was premature. Also,
5 that motion of September 9th, if we didn't say before, is
6 denied and you'll have to renew any aspect of it in the man-
7 ner in which you've discussed.

8 Okay, now, let's take a 10 minute break, return
9 then we'll discuss Mr. Goldberg's point if we can. Then
10 take up the Commission's orders and then hear from Mr. Voight

11 I suppose you'll have an interest in the leak rate
12 litigation, too, Mr. Voight?

13 MR. VOIGHT: That's correct.

14 MR. BLAKE: Mr. Smith, before we break and before
15 we go on to motions that haven't yet been filed, licensee
16 did file a motion to compel on Friday against UCS on training
17 We've worked very well with UCS throughout this training
18 period, we think, and we will be discussing that document
19 with them and hope they will not come back and require a
20 Board ruling on that. But we did file the motion on Friday.

21 JUDGE WOLFE: We could ask for nothing less than
22 that, in fact, the only thing we could have asked in lieu of
23 that would have been that you didn't file the motion to com-
24 pel or had discussed it with UCS in th first place.

25 MR. BLAKE: I hear you, Judge.

1 JUDGE WOLFE: All right.

2 (Brief recess.)

3 JUDGE SMITH: That are pending right now.

4 JUDGE WOLFE: I had one thing, Judge Smith. I
5 notice that, back off that, the Board had suggested that
6 counsel get together, try to work out these problems and stop
7 blizzards of paper before the Board.

8 In this respect, I have noticed, I guess it was
9 particularly with respect to TMIA's motion to compel respon-
10 ses, dated September 7th. I noticed a flurry of letters be-
11 tween counsel for the licensee and TMIA. TMIA says well,
12 we were discussing things, this was our position. The
13 licensee comes back and says no, we said such and such during
14 the course of our discussions.

15 Then there is an exchange of papers. Now how in
16 the world do you expect the Board to make any conclusions or
17 make any rulings on the basis that you people simply not
18 getting together.

19 Now, if it comes down to that, the Board's going
20 to make rather abrupt rulings and cut through alot of this
21 chaff it would seem to me. However, if counsel go after
22 this thing reasonably and responsibly, and if there's any
23 problem about what an agreement is at the time of the nego-
24 tiations and at the conclusion of negotiations, enter into
25 stipulations or signed agreements on this. Don't present

1 this sort of nonsense to the Board.

2 We can't draw any conclusion on who said what on
3 what date and who said something else that's 180 degrees
4 opposite to it.

5 JUDGE SMITH: Was my observation correct? I think
6 we've cleaned up all the discovery matters with respect to
7 the DeCamp issue, is amenable to resolution this afternoon.

8 I do have one other observation. Apparently Mr.
9 Goldberg has worked out a good arrangement, or did work out
10 a good arrangement with Miss Bernabei with respect to her
11 discovery disputes. And as I understand that one of the
12 things that you did was that you did assign somebody knowledge-
13 able in the reports to assist them in finding what they were
14 looking for. Or at least that person was to have been
15 available.

16 MR. GOLDBERG: Yes, in fact, we made available two
17 of the authors of 0760 and for five hours answered not only
18 TMIA's interrogatories which they had served against us, to
19 the best that those individuals could do it at the time,
20 based on their present recollection, but also in the follow-
21 up questions that TMIA had which would assist them in identi-
22 fying relevant information that could be useful to them in
23 discovery.

24 Now, I think it worked quite well. We also reached
25 agreement on the TMIA document request and reached what I

1 think is a satisfactory approach for the Staff, to as expeditiously as possible, identify and produce documents that
2 are responsive to TMIA's document request.
3

4 JUDGE SMITH: So if an arrangement like that could
5 be worked out with the licensee, I think it might be a more
6 efficient sparing of everyone's resources in the long run.
7 You're indicating some type of expression of, not approval,
8 but it's not, at least it's not a bad idea.

9 MR. BLAKE: It sure isn't. I sure can't quarrel
10 with your observation about efficiency. You're absolutely
11 right. Had we been able to work it out, anything approaching
12 those lines to date, I think both sides could avoid another
13 deal of time consuming efforts.

14 JUDGE SMITH: It seemed to have worked out so well
15 with the Staff that I think if you just give it a fresh view-
16 point. I don't get the impression that any party here is
17 either abusing, is intentionally abusing discovery or inten-
18 tionally dragging feet on discovery. I think there are dif-
19 ferences of opinion, they are honest ones, but I think that
20 maybe in our viewpoints as to the discovery obligations might
21 be helpful, but I would really appreciate it if you could
22 just start afresh with a different attitude of cooperation
23 and see what can be worked out.

24 All right, now, Mr. Voight, to the extent that you
25 do have pre-existing invitation from this Board to represent

1 the interests of workers, we want you to take advantage of
2 it. If you have anything that has to be said in that line
3 about the issue just discussed, would you please do it now.

4 But please, this is my admonition, that you don't
5 have standing, unless it's really tied in with the workers'
6 rights to discuss the substantive issues that are involved in
7 discovery disputes. We just don't think it's fair to have
8 you enter the proceeding on that basis.

9 I might also point out that I did express a concern
10 to Mr. Blake about the possibility there being orphans, so
11 to speak, in this proceeding, and that Shaw Pitman's responsi-
12 bilities may or may not coincide with the interest of your
13 clients.

14 Do you have anything you'd like to say about this
15 particular? We'll give you another opportunity when we get
16 into the other aspects of the hearing.

17 MR. VOIGHT: Frankly, Judge Smith, I'm a little
18 troubled by what I perceive to be your attitude here. It
19 seems to me clear beyond peradventure that any one of these
20 witnesses has an absolute right on his own behalf to object
21 to discovery, to file a motion to quash, to refuse to appear
22 at a deposition.

23 What I was trying to convey to the Board is that
24 rather than getting involved in the paper blizzard, I have
25 relied upon the company to make objections and to get

1 reasonable limitations upon discovery. And up until I came
2 here today, I was satisfied that that was a correct and well
3 considered course of action.

4 Because the Board quite properly, in my view,
5 granted a protective order and they limited the discovery to
6 the subject matter that the Appeal Board had remanded upon.
7 And I had hoped that it would not be necessary for me to say
8 anything.

9 But then I got here today and I heard the Board
10 begin to expand the subject of discovery to take into the
11 discovery the thermocouples, which you had previously ruled
12 were subject to the protective order. Now that directly
13 affects the personal rights and personal interests of my
14 clients. And that is why I sought to address the Board on
15 that subject.

16 But you told me you didn't care to hear from me. And
17 you have now ruled..

18 JUDGE SMITH: I don't want to hear arguments from
19 you as to why teh thermocouple issue, sub-issue, sub-sub-issue
20 is appropriate to discovery, that's right.

21 MR. VOIGHT: Very well, sir, thank you.

22 JUDGE SMITH: As such, unless you can tie it in to
23 a particular right of a particular client, I don't see that
24 any of your client has, going to be injured by relevant or
25 irrelevant inquiries. I mean, I don't want to foreclose, I

1 don't know what you have in mind. I don't understand your
2 point. I don't want to foreclose, you're making your point
3 about the rights of your clients.

4 I don't want you telling us about the substantive
5 issues in the case. You don't have standing to do that. If
6 there is inseparable bind between a particular issue and the
7 rights of your clients, then explore it. But don't tell us
8 about what is relevant and what is not relevant in the case
9 and make the general argument that your clients should not
10 be subject to irrelevant arguments. Because you don't have
11 standing to discuss relevancy.

12 Now, is that clear?

13 MR. VOIGHT: No, sir.

14 JUDGE SMITH: It's not.

15 MR. VOIGHT: No, sir. Do I have standing to
16 seek a protective order against discovery on the thermocouples
17 on behalf of my individual clients?

18 JUDGE SMITH: I think that you can move to quash
19 subpoenas.

20 MR. VOIGHT: I think that's right, Judge Smith.

21 JUDGE SMITH: Right.

22 MR. VOIGHT: And I'm trying to avoid the necessity
23 of filing a separate motion by presenting my objections in
24 an orderly fashion this afternoon.

25 And you have twice told me that you will not hear

1 me.

2 JUDGE SMITH: I guess we'll have to leave it that
3 I don't understand what you're talking about, you don't under-
4 stand what I'm talking about and you pursue your remedies,
5 sir.

6 MR. VOIGHT: Thank you.

7 JUDGE SMITH: Now, Mr. Goldberg.

8 MR. GOLDBERG: I just wanted to inform the Board
9 that the costs the Board desires to eliminate whenever pos-
10 sible, alot of paper filing back and forth with discovery
11 objections and that followed by Motions to Compel, I wanted
12 to advise the Board that in preparing responses to UCS inter-
13 rogatories on the training issue, that we do have a substan-
14 tial number of objections, that I didn't want the Board to go
15 away from here believing that there weren't gonna be any dis-
16 putes when in a couple of days from now, when we file our
17 response another dispute arises.

18 Therefore, if the Board wishes to take up that
19 matter now, Miss Wagner is prepared to describe the nature
20 of our objections to the scope of UCS discovery on the train-
21 ing issue for the Board's consideration.

22 I have been advised by Mr. Jordan that understand-
23 ably because we haven't filed our objections yet, he doesn't
24 feel he's prepared to address the discovery dispute. He is
25 aware of what the major issue is. I also want to report that

1 we did contact UCS shortly after receiving their interroga-
2 tories and document request in an attempt to reach an agree-
3 ment on what we think is the proper scope according to the
4 Board's delineation of the training issue and the Board's
5 prior rulings on discovery in this proceeding.

6 It was not a successful discussion and so we proceed-
7 ed to prepare our response, which is not yet ready for filing.
8 So I simply inform the Board that there is that, there is
9 that issue which will be before the Board in a couple of days,
10 in case the Board wanted to take some action on it today, to
11 avoid further filing of papers.

12 JUDGE SMITH: I think, Mr. Goldberg, as you've in-
13 dicated, we are going to have conferences, discovery confer-
14 ences frequently and I think it might be more efficient if
15 we wait until Mr. Jordan is ready to address it and perhaps
16 there might be some informal negotiation before you come to
17 us to resolve it.

18 JUDGE WOLFE: Hopefully.

19 MR. GOLDBERG: Well, as I indicated, we tried that
20 already. We tried that in the first instance to see if we
21 could reach agreement on what we think a more reasonable scope
22 is to the training issue. It wasn't successful, that's the
23 only reason we then proceeded to prepare our objections, which
24 we're getting ready to file.

25 JUDGE SMITH: Okay. All right, now, let's turn to

1 the Commission's action of Friday in CLI 1784, CLI 1884. I
2 had a conversation with Mr. Hall of the Commonwealth of
3 Pennsylvania this morning. He indicated that he wasn't able
4 to arrange to come up here this afternoon, that he had no
5 interest in the general discovery problems, but the Common-
6 wealth does have a strong interest in the TMI II and the
7 TMI I leak rate issue, that they intend to take an active
8 part in discovery and that their view is that they can pro-
9 ceed immediately with the litigation of that case.

10 We have, since TMIA's motion, we have UCS' compan-
11 ion motion in support of TMIA's motion, to set down the leak
12 rate issues for litigation and for extension of time.

13 I think what we want to do this afternoon now is
14 to hear responses to those motions. Do you have separate ar-
15 guments to make with respect to those issues, Mr. Voight?

16 MR. VOIGHT: I would only ask that I be heard after
17 the active parties, in case I want to add something.

18 JUDGE SMITH: All right. So, with that, are you pre-
19 pared, whoever, Mr. Blake, to respond to TMIA's motion? Of
20 last week, of September 11th; UCS' was dated September 14th.

21 I guess the general subject matter we'll be address-
22 sing is what do we do with the CLI 17 and CLI 18, 84.

23 MR. BLAKE: Judge Smith, I am prepared to address
24 that.

25 JUDGE SMITH: I suppose we should blend in to that

1 discussion where you believe, with respect to the other two
2 issues, the DeCamp issue and the training issue, whether
3 there has been a demonstrated need for an extension of dis-
4 covery time.

5 MR. BLAKE: Well, let me take care of the last one
6 first. That is, with respect to the DeCamp mailgram and the
7 training issues, whether or not there's been a demonstrated
8 need.

9 In my view, a basis for extension in the discovery
10 period of those issues would lie with either UCS or TMIA
11 if we've disappointed them in the course of discovery and not
12 come through on the scheduled times. And that disappointment
13 or fialure to come through on the times, that they can show
14 has prejudiced them or in some way has hurt their overall
15 preparation and I've not heard from them on that subject.

16 I've rather heard fairly general complaints about
17 the discovery schedule, having been set too short initially
18 by the Licensing Board. And do not recall objections or
19 motions for reconsideration at that time, following the
20 Board's initial rulings.

21 There are a couple of areas here. One of them is
22 our supplementation of responses to TMIA's first round of
23 discovery, where, as Judge Wolfe pointed out with dates, we
24 did supplement on times after the appointed date when res-
25 ponses were due.

1 Those supplements, in my view, are fairly brief
2 in terms of the total amount of discovery, production which
3 we made in a timely way, and I haven't heard the argument
4 that prejudices the overall in their discovery that would tell
5 me that an extension, overall in the schedule necessarily
6 follows.

7 But I would listen to that and be amenable to some
8 fairly minor, in my view, the extension, if any, if they have
9 been so prejudiced and if they make that case.

10 With UCS, it's not dissimilar. Our response to
11 UCS' first set of discovery requests was due last Wednesday.
12 The answer to their interrogatory took the form virtua'ly,
13 totally, of providing documents. That was the method of res-
14 ponding to their interrogatories.

15 There was a mix-up in communications between our
16 office and the company and we did not have, by last Wednesday,
17 and realized it only at the last moment, the documents which
18 would have been responsive and answered UCS' requests.

19 There were, as of Wednesday, a large number of docu
20 ments available for UCS for review, which had actually been
21 provided in response to TMIA's discovery request, but in
22 areas in which they overlapped. I cite as an example that
23 lesson plans.

24 Realizing that error, we alerted UCS and we have
25 undertaken in the meantime to do our best to get the

1 information which should have been provided last Wednesday
2 to our office and made available to UCS as quickly as we
3 can.

4 I am informed today that the bulk of that informa-
5 tion will be available tomorrow and that some of it, which
6 needs to be received from areas like the Oyster Creek plant
7 or other places where apparently microfiche records are
8 kept for the UPU system as a whole, will be provided, con-
9 tinue to be provided to our offices through the week. And
10 that the total package will be available by early next week.

11 There again, I cite that as an example of a way
12 in which UCS's overall schedule may well have been hurt and
13 they may have a legitimate request for some period of dis-
14 covery extension. Again, I've not heard that specific argu-
15 ment made and I don't know what reaction I would have to it.

16 I have heard, again, that the more general, overall,
17 we just plain need more time in discovery.

18 JUDGE WOLFE: Well, Mr. Blake, is it not a fact
19 that the only motion for extension of time presently before
20 the Board is that which has been filed by TMIA. I wasn't
21 aware that UCS had filed a motion or requested any extension
22 of time.

23 MR. BLAKE: In fact, UCS' motion, as I read it of
24 last Friday signed up for TMIA's request for an extension,
25 but said at a minimum there ought to be 35 day extension.

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1 JUDGE WOLFE: Judge Smith advised that we received
2 today, I haven't received my copy as yet. All right.

3 MR. BLAKE: But again, it is a general, and to the
4 extent our failure to have provided documents when we intended
5 to was not met and to the extent overall, taking into account
6 that they had the TMIA related documents, which overlapped
7 their requests available, that a large part of those docu-
8 ments will be available within three or four working days
9 after they were due. And that all of them will be available
10 a little more than a week after they were due.

11 I can understand, they're able, they represent that
12 that prejudices overall their schedule. Then I can under-
13 stand, to some extent, but not a 35 day, and not anything
14 approaching the end of December as TMIA has..

15 Let me go to the effect of the Commission's orders,
16 which is another ground citing for the need for discovery
17 extension here. There is no doubt of what the tact taken
18 by the Commission which ..

19

20

(End of tape)

21

22

23

24

25

1 MR. BLAKE: Provides for comment by the parties
2 but not in the schedule that the UCS has cited, but
3 rather my understanding response to the Commission
4 initially on October 9th and reply responses due on
5 October 29th is a good deal more lax than the schedule
6 is which UCS believes they're operating under.

7 There's no doubt that that will, that commenting
8 to the Commission will burden the parties here and provide
9 a good deal more work while we are trying to get ahead
10 with the remanded proceeding.

11 I wish people had joined me in my stay request
12 but I stood alone in that regard. But as to the amount
13 or whether or not that ought to have an effect on this
14 schedule, I cite the very sentence which UCS has cited
15 in the Commission's order.

16 And, secondly, the reference on the last page
17 of ~~the~~ CLI 8418 to the Board's... It may be 17,
18 not 18, but in any event, it is the citation to the
19 Board's resolution of leak rate testing and determination
20 to take up both Unit 1 and Unit 2 on the same schedule,
21 that to me indicates very clearly that the Commission
22 when it set its schedule on comments understood the
23 schedule that the Board was working on and hence set
24 down.

25 There's a clear reference to, to, to show

1 that, that degree of appreciation, and I don't see how the
2 Board now ought adjust its schedule when the Commission
3 had to have understood the schedule we're operating on
4 when it put on this additional obligation of commenting
5 to it.

6 I obviously am reluctant to endorse any
7 extension on this period. For the moment I have to assume,
8 from my client's standpoint, that resolution of these
9 items before the Board may well control the overall
10 determination.

11 I just have no choice until I've heard from
12 the Commission and they've completed their review but to
13 make that assumption. But I can do some weighing in
14 making that assumption.

15 UNIDENTIFIED SPEAKER: Some what?

16 MR. BLAKE: Some weighing, some prioritizing.
17 It is clear from the Appeal Board's decision, I think it
18 is clear from, from the Commission's decision and dis-
19 cussions as well that training is the one area which
20 they regard as most important and controlling in terms
21 of making an ultimate restart decision.

22 For that reason, and taking into account that
23 with the obligation to come back to the Commission, adds
24 additional weight to all of us, I make the following
25 proposal: That we maintain the existing schedule for

1 decant mailgram and training issues and adhere as closely
2 as we can to the completion of discovery at the end of
3 September, followed by the schedule which the Board
4 addressed in its initial prehearing conference order on
5 July the 9th, that with respect to the two leak rate
6 issues, that in view of the overlap and additional need
7 to do business with the Commission as well as with this
8 Board and in view of the fact that both the Office of
9 Investigations of NRC and licensee currently have investi-
10 gations underway which haven't been completed and which
11 obviously will play a role in this proceeding, as the
12 Appeal Board itself indicated it would, I, I propose
13 that with respect to those two issues we not have any
14 discovery on them until proposed findings have been filed
15 on the decant and training issues.

16 If I look ahead at the schedule, somewhere in
17 the December time frame I would expect proposed findings
18 on the decant and training ought to have been filed. I
19 am told by Mr. Steer that his investigation will not be
20 completed until the end of this year.

21 TMI II leak rate testing, certainly in terms
22 of readiness to go to hearing, will, will control over
23 Unit 1. I think on Unit 1 leak rate testing we could
24 have done about the same schedule and gone ahead.

25 Unit 2 leak rate testing is, is something where

1 we still don't have in front of us a comprehensive
2 publicly available investigation. Mr. Steer has indicated
3 that there may be as many as 80 people which he wants to
4 interview.

5 I don't need to tell this Board my views are
6 a need for us to do that here, but nevertheless, we are
7 looking at it and deciding that TMI II leak rate needs
8 to be gone into now comprehensively.

9 I don't think we're going to get to first base
10 on that issue until, in fact, these reports are available
11 and able to be the subject of discovery. I don't think
12 that's going to be for several months in any event, and
13 those, this combination of factors is why I make the
14 proposal that I do.

15 JUDGE SMITH: Do you wish to be heard on this?

16 MS. BERNABEI: Yes. First out, I'll address
17 the point that Mr. Blake made first, that's there's been
18 no demonstrated need for additional time.

19 I think both the UCS motion and the TMIA
20 motion we did state that we had been prejudiced by the
21 tardy responses of GPU. Specifically, and in terms of
22 our discovery request, GPU obtained a two weeks
23 extension of discovery to respond to the interrogatories
24 and request for production.

25 As I've described to Judge Wolfe, there are

1 still problems which we will attempt to resolve between
2 ourselves. However, the, without asking for an extension
3 of time, those requests were not supplemented until, or
4 they were not produced at all in large part, until
5 September 11th and they were not supplemented until
6 Thursday and Friday of last week.

7 Because we were forced to, we noticed
8 depositions for this week and next week to get them within
9 the discovery period. Obviously, careful review of the
10 documents would require more than one day, which is
11 substantially what we have, that is tomorrow.

12 So I think we have shown prejudice. I would
13 also say with regard to the training documents,
14 Miss Bradford did come to Washington one day to review
15 those.

16 Those were not available until Wednesday or
17 Thursday, again GPU having obtained a two-week extension
18 of time. And I think that our preparation in that regard
19 was prejudiced. I'll let UCS speak for themselves
20 because they are the party that's going to, that has
21 notice and will be taking the deposition.

22 With regard to the other points that Mr. Blake
23 has made, I, I think he's incorrect on several scores.
24 One, there's no indication that the Commission had laid
25 any greater weight to the training issue than to the

1 other issues. I think that it is clear that the two leak
2 rate issues are very important.

3 The Commonwealth of Pennsylvania has shown an
4 especial interest and I think the Commission, by the fact
5 that it removed the stay from the Hartman Allegation
6 Issue, has shown some interest in that.

7 I think the schedule the GPU set out essentially
8 is a relitigating whether those two issues should be
9 stayed, and what Mr. Blake has proposed is effectively
10 a stay on those issues.

11 I think that the discovery should proceed
12 immediately, as the Commission appears to, appears to
13 have ordered, that the discovery begin immediately and
14 that there be a reasonable period.

15 I would just note that in terms of talking
16 about reasonable period for these two issues that they,
17 at least from my reading of the issue, appear to be
18 factually more complex than the two that the Board has
19 before it, in large part because there is no record
20 developed on it.

21 As you well know, the TMI II leak rate issue
22 has been tied up in the criminal proceeding so that there
23 is very little record before this Board or on the public
24 record.

25 Similarly, the TMI I leak rate issue, in terms

1 of the public record now, is substantially the OI
2 investigation and we have a, we have some indication from
3 the Appeal Board that it considers that that investigation
4 doesn't answer all the questions.

5 Therefore, I think that if the Board would
6 proceed according to Commission direction, it would
7 immediately open up discovery and given the complexity
8 of the issue and the importance attributed to them by
9 the Commission as well as by the Commonwealth of
10 Pennsylvania as a party that there should be a substantial
11 amount of time, and what we suggest is 'til the end of
12 December, hearings to start sometime in February.

13 JUDGE SMITH: Well... Are you done?

14 MS. BERNABEI: In terms of litigation of the
15 foreign issues as a whole, we did suggest in our motion
16 that it might behoove all the parties to put off the
17 hearing until there has been adequate discovery on all
18 the issues.

19 As the Board is well aware, the Commission, in
20 deciding to review the two Appeal Board decisions, could
21 well determine that a portion of these hearings was not
22 necessary.

23 Since I think the greatest expenditure of time,
24 certainly for the Board and to a large degree the parties,
25 is preparation for the hearings themselves, it might

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1 behoove the Board to set a schedule whereby the discovery
2 could proceed and then the hearings were set to occur at
3 one time.

4 It may well be that by, if they were set as late
5 as February that the Commission may well have had time to
6 reach a decision as to whether these hearings were
7 necessary, that is all portions of the hearing currently
8 scheduled were necessary.

9 MR. JORDAN: Judge Smith, speaking for UCS,
10 first, with respect to the discovery thus far, our situation
11 is that we were, I was able to go to the document room at
12 Shaw Pittman last Friday, at which time I requested...
13 understanding that what was there was essentially documents
14 that had been provided in response to TMIA because there
15 had been a mix-up that had delayed the documents that
16 would be responsive to UCS interrogatories.

17 As for several documents in... Unless we have
18 a miscommunication, my understanding was that, at least
19 one set that Mr. Blake has mentioned which is lesson
20 plans, were not available on Friday, which would have
21 been... we could have been getting somewhere.

22 As I understand it, there will be approximately
23 75% of the documents that have been requested by UCS
24 available in the document room as of tomorrow, which is
25 five days, six days after the responses were due.

1 And then the full compliance responses would not
2 be until December 25th, according to the letter from
3 Miss Bowsen (ph). So we are necessarily prejudiced. In
4 particular, we have difficulty preparing for the deposi-
5 tions that we have noted for next week.

6 Now, we did what TMI has explained they did.
7 We noticed depositions that we had to take at the latest
8 possible period in the discovery period that you have
9 set.

10 In fact, I think we in this hearing would be
11 far better off to be able to have those depositions
12 sometime after that so that we can take into account the
13 information that we should have by now in preparing for
14 the depositions.

15 I should add that we will have a discovery
16 dispute with the licensee in terms of their responses
17 to our interrogatories. We will try to work that out
18 as we have been working together and so I don't want to
19 get into it in any great detail except that it involves
20 information specific, for example, to the topics to
21 which people would be testifying, to the background and
22 previous proceedings in which witnesses have testified
23 and that sort of thing.

24 We... That information was not provided and
25 we need to know that in order to depose these people.

1 So in terms of prejudice to UCS, strictly on those issues
2 alone we're talking at least a week and probably two weeks
3 before we've resolved those problems.

4 And, of course, the amount of information and
5 documents is, I'm sure, extraordinary, although I haven't
6 been into the room itself. Now, one major piece that we
7 have not yet seen but that we expect to be the major, one
8 of the major fosome (ph) this case is exams themselves.

9 As I understand, by tomorrow a good number of
10 the exams should be available, and Ms. Bowser, if you'd
11 correct me, is how exactly this goes, but as I understood
12 it on Friday, at least when I was there until 5, just
13 after 5:00, the exams themselves were not available and
14 that I spoke with Ms. Bowser shortly after I got back
15 to our office and it seemed that some were available and
16 some were not yet.

17 At any rate, we considered the exams to be
18 essential to our analysis of the training program and
19 to... we expect to use those in order to prepare our
20 expert witnesses to evaluate the program and, of course,
21 they haven't been able to see those yet.

22 Now, mind you, I say our "expert witnesses".
23 We don't have any that I could even identify as
24 Ms. Bernabei did in response to Judge Wolfe's question,
25 but we are seeking them at this point.

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1 Now, with respect to the impact of the
2 Commission's order, it seems to me that the Licensing
3 Board set-up which is what unquestionably a very expedited
4 schedule for this hearing, it did so when the plate was
5 not full, as it is today, and the Commission went and
6 filled it up, three-quarters of the plate, for the next
7 35 days.

8 If licensee is correct in its statement that
9 it's October 9th instead of September 30th or October 1st
10 that we have to file something with the Commission, that
11 makes us happy.

12 But at any rate, the burden of the Commission's
13 order is extraordinary. It involves both this essentially
14 briefing of the Appeal Board decision and the overlay the
15 Commission has put on top of it of essentially presenting
16 our evidentiary case in order to have the Commission
17 decide we should have the hearing.

18 And that is simply going to take a great deal
19 of time. It will be time taken away from this hearing
20 and UCS, if it does not have some relief, will not be
21 able to prepare adequately.

22 JUDGE WOLFE: You would agree, though, that
23 some of these submissions to the Commission will parallel
24 your preparation for this case? You would agree to that,
25 Mr. Jordan?

1 MR. JORDAN: Well, I sus... That is, in large,
2 part, a matter of timing, I guess. I suspect that what
3 it will do is complicate. Yes, indeed, it will involve
4 the same kinds of things, but it's a matter of what you
5 know when.

6 Ideally, we should be able to put things
7 together and then give it to the Commission and give it
8 to you, but we're going to have to prepare one set of
9 information for the Commission in order to meet that
10 deadline, but by the time we're done with that, which,
11 by the way, in our view, involves considerable legal
12 research and argument in addition to the factual matters,
13 then we're trying to present the case here which is not
14 going to be exactly the same.

15 I suppose there is some parallelism, but whether
16 it really makes it easier is certainly up in the air to me.

17 JUDGE SMITH: Mr. Goldberg?

18 MR. GOLDBERG: The Staff believes that it's
19 extremely important to maintain the current schedule
20 that we're on for hearing on the training issue and the
21 decant mailgram issue.

22 The Staff agrees with the licensee that of all
23 the issues which the Commission is considering for
24 possible further hearings that the training issue is the
25 one that is the most significant and the one which is

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1 most likely to provide information to the Commission which
2 they may wish to have before an actual restart decision.

3 In CLI 84-18 on page 4 the Commission gives some
4 indication that they're particularly interested in the
5 training issue. It is in that context that they say that
6 they do not intend their order to affect the ongoing
7 hearings before the Licensing Board.

8 That's in the middle of page 4. So we think that
9 it's extremely important to maintain as much as possible
10 the current schedule for hearing on training and decant
11 mailgram issue.

12 Following the completion of the hearing on
13 training and decant mailgram issue, discovery can be
14 opened on leak rate matters and we can proceed on an
15 expedited basis to consider that issue.

16 As far as the dates for briefing the Commission,
17 there's some confusion apparently as to when those, when
18 those briefs are due and the order of the Commission
19 calling for comments specifies that the parties have 20
20 days from service of the order to file comments, and
21 under our rules that gives the parties an additional five
22 days allowing for the mail of that order, which brings
23 the parties' response date to October 9th.

24 Fifteen days thereafter the parties have to
25 file replies, again allowing the five days for additional

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1 mail brings that date to October 29th. I have confirmed
 2 these dates with the Office of General Counsel, so it
 3 should be clear to all parties that those are indeed the
 4 dates on which the Commission is expecting the parties'
 5 initial brief and reply briefs.

6 I think that the only thing else I have to add
 7 is that there does seem to be a legitimate need for a
 8 relatively minor extension of discovery period on
 9 training and decant mailgram issue.

10 It seems that with the information that's been
 11 provided and with the information that is yet to be
 12 provided and the depositions that are yet to be taken
 13 that it's virtually impossible to complete all of that
 14 by the end of September, and I think it's not unreasonable
 15 for an approximate two-week extension on the discovery
 16 schedule for the training and decant mailgram issues.

17 There's one additional matter that I want to
 18 raise with respect to the schedule in connection with the
 19 training issue, and I'll briefly describe what it is
 20 and if the Board thinks it's not the appropriate time to
 21 take it up, then you can take it up when the Board thinks
 22 it's appropriate.

23 I've talked to the licensee and to TMIA and
 24 UCS about this and I think we're all in agreement.
 25 Because the nature of the training issue, according to

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1 ALAB 772 and the Board's definition of the scope of that
2 issue and consistent with its rulings in discovery on
3 this issue, the training issue in the first instance
4 deals with the OARP Committee's re-evaluation of the
5 licensee's training and testing program, taking into
6 account the cheating incidents and the deficiencies which
7 it revealed in licensee's training and testing program.

8 In the first instance then the parties are being
9 asked to address an issue which can't be addressed by
10 parties other than licensee until they know precisely
11 what it is licensee's position is on that issue, namely
12 what is the OARP Committee's re-evaluation.

13 We have their special report but it's my under-
14 standing that they're doing a considerable amount of
15 additional work and that they don't intend to issue a
16 supplemental report, but rather will state their complete
17 views in their, for the first time in their testimony.

18 For that reason I think it's appropriate for
19 the other parties to this proceeding, the intervenors and
20 the Staff, to not be required to file their testimony
21 on that one issue, training, until after it has received
22 the licensee's testimony on that issue.

23 What I have in mind is a reasonable period of
24 time like 10 days or 2 weeks after the filing of the
25 licensee's testimony on the training issue before the

1 other parties would have to file their prepared direct
2 testimony on that issue.

3 I've discussed this with the parties and I think
4 we're all in agreement that because of the nature of the
5 issue, that whatever schedule we come up with it provide
6 for licensee's filing of testimony prior to the other
7 parties on the training issue.

8 JUDGE SMITH: Mr. Blake?

9 MR. BLAKE: Just a few brief comments. One is
10 that I think it's appropriate for the Board to take
11 into consideration as it reviews requests at this
12 juncture for extensions how meaningfully the parties have
13 taken advantage of, of the discovery schedule allowed to
14 date.

15 The prehearing conference in this proceeding
16 was conducted on June 28th. At that prehearing conference
17 I specifically made the offer to the parties that
18 Transcript 27 295, that if they had requests for quantity
19 of information, quantity of documents, to get in touch
20 with me, realizing that I was wanting the proceeding
21 expedited.

22 I had no, no requests made of me. At the
23 Board's prehearing conference order I believe issued on
24 July 9th and set the schedule for discovery that we're
25 now operating on.

1 The first request for discovery that I received
2 from TMIA, and I believe their first request for, discovery
3 request, what was received on August 2nd. The first one
4 received from UCS was received on August 29th.

5 So in terms of the, of total available areas
6 that have been, has existed in this proceeding or made
7 available by the Board, I think it's proper the Board,
8 for example, in the case of UCS to take into account that
9 although there was a period between June 28th and the
10 end of September available to ask questions, that their
11 first request was not received by licensee until just
12 literally a day short of, of the last 30 days in the
13 month, in the entire period, on August 29th.

14 With regard to Ms. Bernabei's observation that
15 we requested a two-week extension early on in our
16 interrogatories and documents, it's just not, it's just
17 not correct.

18 We did request an extension to answer the
19 interrogatories to coincide with the period allowed under
20 the regulations to provide our document request, and did
21 provide that response on September the 4th.

22 I've already passed up to the supplemental and
23 whatever the prejudice is from relating to those, but I
24 still have not heard how those several pages literally
25 compared to the boxes and boxes of material which were

1 provided in response to their very broad discovery request
2 has somehow overall prejudiced their schedule.

3 There's a lot there for them to look at without
4 those couple of pages of supplemental answers which, in
5 fact, were days after they would have been required. The
6 observation that, that Mr. Jordan made with regard to the
7 lessons plans, he's right, he was at our offices...

8 In fact, I think the total amount of discovery
9 time for UCS to date of our documents is an hour and a
10 half, but that was last Friday and he did ask for a
11 portion of the, of the documents which was that response
12 to TMIA which covered lesson plans and we were not able
13 to provide it to him at that point.

14 The reason was we were doublechecking to
15 determine whether or not we were in conformance with,
16 with the O&W and Y observation, and we were doublechecking
17 to make sure that there were not lesson plans.

18 Mr. Jordan got back to his office, we received
19 a call from Ms. Bowser 15, 20 minutes or a half hour
20 after he made his request saying we have now completed
21 our, our re-review for that reason and they were
22 available for him to come and see.

23 So 15 or 20 minutes or a half hour is not what,
24 does not translate into weeks or months of discovery
25 extension. With regard to the Staff's observations that

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1 there may be some period of -- there may be up to two weeks
2 of discovery extension which would be, which would lie
3 here, to the extent these, these disappointments in our
4 providing discovery responses to date translate into the
5 need for some extension of discovery and to the extent that
6 goes up even as much as two weeks, I would hope that, that
7 that doesn't necessarily translate into a similar exten-
8 sion in the period for filing testimony and for actually
9 starting the hearing.

10 If the Board, as a result of the conference
11 this afternoon, sees some, some minor extension of dis-
12 covery as necessary, I would have it take into account
13 the fact that, as it has seen in most proceedings, it is
14 licensee which, which has the bulk of the testimony.

15 I believe the Staff second and, by and large,
16 at least traditionally and customarily, intervenors third.
17 We are willing to abide by some minor extension of dis-
18 covery and still maintain the, the period for filing
19 of testimony, even though the crunch is by and large on
20 us.

21 I... TMIA has indicated that at most they might
22 have one witness in one area, decant mailgram. UCS has
23 indicated that they are talking with experts but at this
24 point cannot even say as much as TMIA has.

25 I would hope that the Board would take that into

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1 account and not translate necessarily an extension of
2 the discovery schedule into necessarily an extension
3 in filing the testimony and subsequently the...

4 JUDGE SMITH: Excuse me, Mr. Blake. I under-
5 stood, I understood Mr. Goldberg to suggest that you
6 agreed that the nature of the training issue made it
7 desirable that you file your testimony first.

8 MR. BLAKE: Well...

9 JUDGE SMITH: And it makes sense to me.

10 MR. BLAKE: He did and it was sensible. That
11 was the second part of my reason that I hoped that it
12 wouldn't extend naturally. Also, the fact that
13 Mr. Goldberg has raised that with us and we talked about
14 some reasonable length of time after we file our
15 testimony before the other parties would have to.

16 I can't contest; I think it does make sense,
17 but I would hope that that period of time would be as
18 short as possible. There's a lot of information already
19 available on which other parties can, can start, including
20 the existing report by OARP reconstituting... That's
21 the extent of my comment.

22 JUDGE WOLFE: Did you address, and if so, tell
23 me, the reason given for an extension of time in that
24 the Commission has asked for submissions? You covered
25 that, did you, and you're, in a nutshell your response

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1 was what, Mr. Blake?

2 MR. BLAKE: In a nutshell my response was two-
3 fold. There is an additional burden and I propose that
4 by putting off leak rate testing discovery until following
5 proposed findings, that certainly, from my way of thinking,
6 is a good deal less than, for example, UCS's suggestion
7 that (inaudible) not go on for 35 days and will take on
8 all four issues.

9 I, I think mine is, is the preferable approach.
10 The other one was that, I believe that the Commission
11 must have had in mind when it set this schedule the
12 Licensing Board's existing schedule on the remanded
13 issues.

14 JUDGE SMITH: Anything further before we hear
15 from Mr. Voigt?

16 MR. JORDAN: Judge Smith, I'd respond just
17 briefly to some of the points made by Mr. Blake,
18 specifically on the question of when the parties, the
19 intervenors began discovery.

20 We have this in our motion but I would emphasize
21 that indeed at the prehearing conference we discussed the
22 fact that there would be no real opportunity to begin
23 litigating this case until after the comments had been
24 filed with the Commission, and it then, once that had
25 happened, we were ordered then to appear for the oral

1 argument, both of which required reviewing all the documents
2 that had been filed by the other parties.

3 In our view, we did it as quickly as we could
4 and I would add that, in fact, it's not clear to me that
5 it would have made any difference for UCS in particular
6 to have filed any earlier because, as I understand it,
7 the documents were filed in response to TMIA's inter-
8 rogatories were some two weeks late in coming in any event.

9 So we wouldn't have sped things up at all there
10 anyway. Now, with response to the proposition that the
11 Commission has taken into account the Board's schedule,
12 it seems to me that... I just tried to glance through
13 the order.

14 It certainly doesn't say that specifically and
15 it seems to me that the Commission was concerned with
16 directing the Board not to change what is the scope of
17 this, of this proceeding, but that surely it recognized
18 that it is the Board that is competent to, to maintain
19 the schedule and I don't think the Commission, as it
20 rarely does, would reach down and either condone or alter
21 the schedule for a licensing act.

22 I must say that if, in fact, the Board deter-
23 mines that an appropriate extension is not necessary, we
24 have asked that you certify that decision to the
25 Commission so that if, in fact, the Commission has taken

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1 as the reason for not granting an extension, the Commission
2 should be given an opportunity to, to say whether that's
3 what it meant or not.

4 MS. BERNABEI: Judge Smith, additional comments.
5 I won't repeat any of Mr. Jordan's comments. Mr. Blake
6 referred to the fact that the supplemental response did
7 not prejudice TMIA.

8 I would just say that what severely prejudiced
9 TMIA is the fact that the documents were not produced,
10 again, the documents were responsive to both the document
11 requests and the interrogatories, until September 11th
12 in Washington.

13 We had absolutely no opportunity prior to that
14 time to review the responses to the bulk of our discovery
15 requests. Secondly, as Mr. Jordan said, we made our
16 discovery request for the training materials, such as
17 they should have, they were due under the rules in the
18 middle of, I believe it was the middle of August,
19 excuse me, the beginning of September.

20 GPU did request and obtain a two-week extension.
21 Mr. Blake makes much of the fact that discovery requests
22 were not filed for about a month after the prehearing
23 conference or the prehearing order.

24 I would just state that there was substantial
25 effort put in to our discovery request in an attempt to

1 narrow the issues so that we would not be asking why a
2 broad and open-ended question, and that took a considerable
3 amount of time.

4 I think, by the same token, the Board is urging
5 all the parties to expedite the preparation of the case
6 at the prehearing conference indicated to GPU, as well
7 as the parties, that they would have to operate on a
8 tight schedule.

9 I think we had every right, that is the
10 intervenors and the Staff had every right to believe
11 that GPU would produce the responses within the time
12 under the rule, and I find it sort of amazing now that
13 GPU says that where it was granted extensions of time
14 that now those who had to rely on the information
15 provided them are not entitled to similar extensions of
16 time.

17 The last point is that the rest of the hearing
18 schedule despite, even if the discovery schedule is
19 extended, the rest of the schedule should stand, that
20 is for submission of testimony and the hearing.

21 I think Mr. Blake's right when he says that
22 most of the witnesses that appear in these hearings will
23 be licensee hearings. And at least as to TMIA at the
24 present time we propose to have no more than one witness.

25 However, it must be obvious that the majority

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1 of discovery is needed before cross examination of the
2 licensee witnesses and many of the interrogatories of
3 document request are oriented to just that.

4 And we will not have adequate time to prepare
5 for cross examination of their witnesses or examination
6 of their testimony if we're still working on discovery
7 at the time that testimony is filed.

8 JUDGE SMITH: Mr. Voigt?

9 MR. VOIGT: Thank you. Let me say at the outset
10 that I may be speaking at some disadvantage here because
11 I haven't been served the most recent Commission orders,
12 but I think what I have to say doesn't depend on those
13 orders.

14 JUDGE SMITH: Well, in essence, do you know what
15 they're about, Mr. Voigt? In essence, they just simply
16 say that the previous, that their previous decision
17 staying the remand of the TMI II leak rate issue is
18 listed and that they recognize that we're holding up the
19 TMI I leak rate issue and a general fact is that there
20 is no impediment to us hearing those issues.

21 MR. VOIGT: Thank you, Mr. Chairman. We don't
22 come here to take any position on scheduling or when
23 hearings should be held or not held. I do want to make
24 two points, though, as they affect the direct interests
25 of the workers at the plant.

1 First of all, you've heard that the Office of
2 Investigations has now embarked upon a series of inter-
3 views concerning the TMI II leak rates and presumably is
4 going to produce another report on that subject.

5 And you've also heard that the company plans
6 to conduct a further investigation on that subject. We
7 believe that it would be more orderly and probably would
8 save the Board time if those investigations could be
9 completed first before we get into discovery or a
10 hearing on the leak rate allegations.

11 Obviously, there's no guarantee that discovery
12 would be pretermitted as a result of those investigations,
13 but I would certainly think that it might help to narrow
14 and focus any further discovery.

15 And it might also serve to narrow and focus
16 the necessity for hearings, so we would strongly urge
17 that discovery on the leak rate investigation be deferred
18 until OI can complete its report. Perhaps also until
19 (inaudible) report can be made public.

20 The other point that I wanted to make is that
21 we certainly urge that whatever discovery schedule is
22 adopted for the leak rate inquiries that TMI I and TMI II
23 be done at the same time, and I say that because at least
24 10, probably 15, of the workers were involved with
25 both units and it would just kind of be a total waste of

1 everybody's time if we had one relative discovery for
2 leak rates in Unit 1 and then we came back two weeks or
3 two months later and had another round of discovery for
4 leak rates in Unit 2.

5 So I would hope that whatever discovery schedule
6 is adopted for the leak rate area would be clear that
7 1 and 2 at the same time. Thank you.

8 JUDGE SMITH: Mr. Voigt, we monitor not very
9 thoroughly but to some extent the TMI II Hartman
10 allegations, so-called Hartman Allegations Issue, while
11 it was going up before the Commission and before the
12 Grand Jury and followed it to the point where last year
13 the Commission issued subpoenas to many of your clients
14 and there was a motion to quash that and then I think I
15 lost track of it.

16 In any event, the Commission did not give
17 process against your clients. Now, what can we look
18 forward to in this hearing?

19 MR. VOIGT: The litigation concerning the
20 Commission's subpoenas was settled and there's a
21 stipulation on file in the United States District Court
22 in Harrisburg, Pennsylvania.

23 That stipulation provides that the Nuclear
24 Regulatory Commission has the right to start interviewing
25 our clients concerning the leak rate allegations, the

1 Hartman Allegations, at TMI Unit 2 on March 29, 1984.
2 So OI has been free to start those interviews for some
3 six months.

4 JUDGE SMITH: Well, I'm concerned about
5 discovery process in this case. I would anticipate that
6 there will be efforts to depose and to (inaudible) your
7 clients and, by the parties in this case and I want to
8 know what we can look forward to.

9 MR. VOIGT: Well, let me say at the outset that
10 we represent approximately 45 people. We represent each
11 individual as an individual. This is not a labor union
12 or a fraternity or any other kind of association.

13 And before I ever made the commitment for any
14 client I got to talk to that man, so I could not come
15 in and generalize and say 45 people are going to do thus
16 and such.

17 It may well be the case that 40 of them want
18 to do one thing and 5 of them want to do something different.
19 I am bound by their wishes and their instructions in that
20 regard.

21 So if you're asking me right now how 45
22 individuals would respond to let's say discovery sub-
23 poenaes from the intervenors, the answer is I don't know.
24 I can make some observations.

25 The first observation is that in general these

1 are men who are still employed by GPU, whether or not
2 they are in the same positions that they held previously.
3 I have tended to want to cooperate because they feel that
4 it may be in the best interest of their employer to
5 cooperate, and so long as they're not putting themselves
6 in personal jeopardy, we've urged them to exhibit that
7 spirit of cooperation.

8 With respect to people who may have ceased
9 working at TMI four years ago, their motive for cooperation
10 is obviously different, if indeed they have any, and
11 their individual situations vary widely.

12 I would anticipate that most individuals who
13 are still licensed would find it in their best interest
14 to cooperate because of their position as a licensee of
15 the Nuclear Regulatory Commission.

16 JUDGE SMITH: Yes, I was wondering if that
17 certainly had been noted by licensors.

18 MR. VOIGT: I'm sure it has. There are a
19 few individuals...

20 JUDGE SMITH: It's not really a (inaudible).
21 That's rather obvious.

22 MR. VOIGT: There are a few individuals who
23 have long since left the employ of the company who are
24 in positions outside the nuclear industry and who in one
25 or two cases have said quite frankly that enough is

1 enough and I'll never go back to the nuclear industry
2 because I'll never again subject myself to the kind of
3 harrassment I was subjected to.

4 I suspect some of those individuals may not
5 cooperate.

6 JUDGE SMITH: In any event, I, having observed
7 that all 45 of your clients joined in the motion to
8 quash, or at least substantially all of them, I did
9 have reason to ask the question.

10 I see there's no... You hope it takes such
11 an organized effort this time. I think you've answered
12 the question quite well.

13 MR. VOIGT: Well, let me just clarify that.
14 Principal reason for that motion, as I think the papers
15 made clear, was that they were then in criminal jeopardy.
16 That's no longer the situation.

17 JUDGE SMITH: Anything further?

18 MR. BLAKE: Is that anything further in the
19 entire prehearing or...

20 JUDGE SMITH: Yes, on any subject matter.

21 MR. BLAKE: I have a request for an extension
22 of time to respond to UCS's second set of interrogatories
23 and document production request, which was the answer
24 done on September the 4th.

25 That, that... And if it's appropriate, I'd

1 like to make the request now and get a... That request
2 of UCS is, is exclusively concerned with the OARP members'
3 views on a number of items.

4 As the Board, I think, understands, and I know
5 UCS does, those five OARP reconstituted group members
6 are spread around the country from Upstate New York to
7 Missouri and Florida.

8 And in order to get answers to those inter-
9 rogatories, it required a considerable amount of
10 coordination. It is, it is our intention to provide
11 answers to those interrogatories with just a three-day
12 extension from tomorrow when, by our count, they were
13 due to this Friday.

14 If... They were hand-served by UCS on the
15 4th. If, in fact, UCS had just put them in the mail to
16 us that day and we'd gotten fairly good mail service,
17 we might very well have been able to make the due date
18 just by the way the regulations work for timing of
19 responses.

20 I would also take this opportunity to alert
21 you that the third step of UCS interrogatories, which is
22 also OARP related and requires the same kinds of
23 coordination we expect now to be able to answer on time
24 and will not seek a further, will take the opportunity of
25 getting them together to take care of the second step

1 and to also take care of the third step. So the bottom
2 line is we'd like a three-day extension of time to respond
3 to UCS's second set of interrogatories.

4 JUDGE SMITH: Mr. Jordan?

5 MR. JORDAN: The Board can imagine that while
6 we are sympathetic to this sort of problem, we are not
7 particularly supportive in light of the way things stand.
8 Our view is, and you know our view on the overall schedule,
9 our view is that if they want a three-day extension, of
10 course, the, the interrogatories were filed by hand
11 specifically rather than filing them by mail.

12 That's why we did it, because we would get the
13 answers faster. If they want three days, they can have
14 three days if we can have three days on the rest of it.
15 Now, that's only fair.

16 JUDGE SMITH: Okay, we'll grant the extension
17 and will take the extension into account when the Board,
18 all three of us, consult tomorrow as to general request
19 for extension. I forgot to mention that Judge Linberger
20 is ill today.

21 He expected to be here today. He would have
22 participated fully in his position. He's very much up
23 on all these issues and he'll be prepared to discuss it
24 tomorrow, I believe. At least he plans to be in.

25 MR. GOLDBERG: Judge Smith, I have one other...

1 JUDGE SMITH: Who's speaking?

2 MR. GOLDBERG: I am. One other comment before
3 we close, and that is that as is obvious to the Staff
4 and as I'm sure is obvious to the Board, there have been
5 some substantial disagreements among the parties about the
6 scope of the training and decant mailgram issues.

7 And for that reason I think that it's critically
8 important that before discovery is opened on TMI I and
9 TMI II leak rate matters that there's an opportunity for
10 the parties to address what the appropriate scope of those
11 issues ought to be and that there be some very clear
12 guidance from the Board and clear instructions to the
13 parties to adhere to the scope of the issues as defined
14 by the Board.

15 Hopefully, we can then eliminate some of the
16 problems or the kinds of problems that have arisen with
17 respect to the training and decant mailgram issues.

18 JUDGE SMITH: You're suggesting that we have
19 not been sufficiently clear and forceful in the scope of
20 the, these issues this time, and I don't know how we could
21 have been more forceful on the decant mailgram.

22 I just, just advise me... I think we made that
23 as clear as, as we can. On the training issue I think
24 we've addressed it a couple times, three times, three
25 times.

1 MR. GOLDBERG: Judge Smith, I wasn't suggesting
2 that the Board wasn't clear. I was suggesting that the
3 intervenors have far exceeded the clear rulings of the
4 Board in discovery that they've sought after the Board
5 has clearly ruled on what the scope ought to be.

6 JUDGE SMITH: Okay, anything further this
7 evening?

8 MS. BERNABEI: May I make one request? In
9 terms of the decant mailgram issue we currently have
10 depositions scheduled beginning Wednesday morning. I'm
11 not, I haven't talked to Mr. Blake about this, but
12 there... if any extensions are granted, there may be
13 some kind of accomodation of the deposition schedules.

14 I think it's quite heavy at the current time
15 and we would just appreciate information about any, the
16 Board's ruling as early as possible tomorrow.

17 JUDGE SMITH: All right, I, I don't know what
18 we can do about... I would hate to see a discovery or
19 a deposition schedule which has been set out and
20 arranged and the schedules arranged and everything
21 lightly fall apart, you know. I don't know... Can you
22 be more particular?

23 MS. BERNABEI: Well, we do have depositions
24 scheduled for the 19th through the 21st, this week.
25 Mr. Blake has informed us that two individuals will not

1 be available on the 21st and that, I believe... And if
2 there is not a...

3 MR. BLAKE: I don't understand what you're
4 saying. What two people will not be available?

5 MS. BERNABEI: Rigginback and Joyce. I think...

6 MR. BLAKE: What I've informed Ms. Doroshow
7 is that they are ex-employees.

8 MS. BERNABEI: That's right.

9 MR. BLAKE: That's all. I don't know whether
10 they're available or they aren't.

11 MS. BERNABEI: All right, in any case, there
12 may be a way to compact the discovery schedule if we have
13 some information about the Board's ruling.

14 JUDGE SMITH: Until we consult with Judge
15 Linberger and, and try to similate all this information
16 this afternoon, we can assure you of at least a one-week
17 extension in discovery time while... but we don't like
18 to rule on the maximum amount or the other matters until
19 we have a chance to think about it a little more, so
20 you can count on one week. All right, is there anything
21 further this evening? Does that take care of your
22 immediate problem?

23 MS. BERNABEI: Yes, it does. Thank you.

24 JUDGE SMITH: If there's nothing further this
25 evening, let's adjourn and if possible can you perhaps

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1 keep Monday afternoons open for discovery disputes? I
2 don't think we're going to have anymore, but it's so
3 pleasant to get together with everybody. If you could
4 keep it open, it might be helpful.

5 (Whereupon, the conference was adjourned at
6 5:08 p.m.)

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CERTIFICATE OF PROCEEDINGS

This is to certify that the attached proceedings before the
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In the matter of: Prehearing Conference - Three
Mile Island

Date of Proceeding: September 17, 1984

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original
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