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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

METROPOLITAN EDISON COMPANY
(THREE MILE ISLAND NUCLEAR
STATION, UNIT NO. 1)

DOCKET NO.: 50-289-SP
(RESTART REMAND ON MANAGEMENT)

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 METROPOLITAN EDISON COMPANY
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STATION, UNIT NO. 1)

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6
7 NUCLEAR REGULATORY COMMISSION
8 MONDAY, SEPTEMBER 24, 1984

9 5TH FLOOR HEARING ROOM
4350 EAST-WEST HIGHWAY
10 BETHESDA, MD

11 The Panel met, pursuant to Notice at 1:00 PM.

12 NRC STAFF MEMBERS PRESENT:

13 ADMINISTRATIVE JUDGES, ASLB: IVAN W. SMITH, CHAIRMAN
SHELDON J. WOLFE, ALT. CHAIRMAN
14 GUSTAVE A. LINENBERGER, JR.

15 OFFICE OF THE EXECUTIVE LEGAL DIRECTOR: JACK GOLDBERG, ESQ.

16
17 UTILITY REPRESENTATIVES:

18 METROPOLITAN EDISON COMPANY: DEBORAH B. BAUSER, ESQ.

19
20
21
22 OTHER INTERESTED PARTIES:

23 COMMONWEALTH OF PENNSYLVANIA: THOMAS Y. AU, ESQ.

24 UNION OF CONCERNED SCIENTISTS: WILLIAM S. JORDAN, III, ESQ.

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

1
2 JUDGE SMITH: Good afternoon. This pre-
3 hearing conference was called to see if we can't
4 resolve the dispute between UCS and the NRC staff,
5 which has arisen over UCS's Motion to Compel or rather
6 UCS's first set of interrogatories and the staff's
7 motion for a -- and UCS's Countermotion to Compel
8 staff responses which was hand-delivered to us just
9 before noon today.

10 We excused all other parties from attending,
11 and in connection with that we assured them that we
12 would stick to the subject matter of the motion and
13 the first set of interrogatories of the staff. And I
14 think we can do that, although unfortunately the
15 motion itself raises important issues of the scope of
16 the proceeding. Although if we add to the prejudice
17 of any of the parties that did not elect to come, we
18 will do what is necessary to hear their views.

19 Has there been any change in the staff's
20 position as a consequence of the UCS's Motion to
21 Compel? Have they brought to your attention any
22 arguments that you had not considered or any facts
23 that you had not considered?

24 MR. GOLDBERG: No, I don't think it's
25 changed our position, although it has raised an

1 additional matter in that they're now asking for
2 sanctions as a result of their claim that the staff's
3 position has been taken -- to the extent that they
4 have filed such a motion I certainly would like to be
5 heard on that. And if it suits the Board, be
6 permitted to explain further the basis for the
7 position that the staff has taken with respect to
8 UCS's first set of interrogatories.

9 JUDGE SMITH: All right.

10 MR. GOLDBERG: Our position on UCS's first
11 set of interrogatories which deal with the training
12 issue, in the first instance is premised on the
13 Commission's Rules of Practice with respect to
14 discovery against the staff. The rules are written in
15 such a way that discovery against the staff is on a
16 slightly different footing from the parties' discovery
17 against one another on the issues that appear before a
18 Licensing Board.

19 The Commission's Rules of Practice, Section
20 2.720(h)(2)(ii) specifically provides that before a
21 party can compel the staff to answer interrogatories
22 it must obtain from the Board a determination that the
23 answers to those interrogatories are necessary to a
24 proper decision in the proceeding and that the
25 information sought is not reasonably obtainable from

1 any other source.

2 The purpose of such a rule is the
3 Commission's recognition that the staff is engaged in
4 an extremely significant amount of public health and
5 safety work, not only on the one proceeding that is
6 the subject of the interrogatories, but on a number of
7 other reactors as well.

8 Now, the staff, in this proceeding and in
9 general for the most part, does not insist that a
10 party obtain the required ruling from a Licensing
11 Board before it responds to interrogatories. We
12 recognize the importance of expediting proceedings,
13 especially one such as this, and for that reason what
14 we do is we treat interrogatories served on us as a
15 motion to the Licensing Board to have us answer those
16 interrogatories. And we state at that time our
17 objections if we have any, and also voluntarily
18 provide whatever answers we believe in our judgment
19 are necessary to a proper decision in the proceeding
20 and are not reasonably obtainable from any other
21 source. Now, that is a determination which we in good
22 faith make in every instance in which interrogatories
23 are served against the staff.

24 With respect to UCS's first set of
25 interrogatories on the scope of the training issue we

1 started out initially in looking at ALAP 772 once
2 again, and the particular language in that decision by
3 the Appeal Board remanding that issue to the Licensing
4 Board.

5 It's the staff's judgment that when the
6 language used by the Appeal Board to remand the
7 training issue to the Licensing Board for further
8 hearings, and I quote, "We remand to the Licensing
9 Board that part of this proceeding devoted to training
10 for further hearing on the views of licensee's outside
11 consultants, including the OARP Review Committee, in
12 light of both the weaknesses demonstrated in
13 licensee's training and testing program and the
14 subsequent changes therein." That's from ALAP 772 at
15 pages 76 to 77 of the slip opinion.

16 It's the staff's view based on that specific
17 remand language that the scope of the training issue
18 in the first instance is limited to the views of the
19 licensee's consultants, especially the OARP Committee,
20 on their re-evaluation of licensee's training and
21 testing program, in view of the deficiencies which
22 were revealed by the cheating incidents, and perhaps
23 other deficiencies since the close of the original
24 record on this proceeding.

25 As the Board has recognized, when the

1 licensee's consultants give their views on the
2 licensee's training and testing program in view of the
3 cheating incidents and other deficiencies, then and
4 only then in the context of the particular evidentiary
5 presentation can the parties challenge that view based
6 on whatever they believe is appropriate, assuming that
7 it's admissible evidence that they're subject to use
8 to challenge the licensee's consultants.

9 Beyond that language in ALAP 772 we have
10 looked at this Licensing Board's rulings on the scope
11 of the training issue. In the memorandum and order of
12 the Licensing Board dated July 9th, following the
13 initial pre-hearing conference in this remanded
14 proceeding, the Board made it clear at page three that
15 the undisturbed findings of the Licensing Board on the
16 training issue are not included in the remand. And I
17 think read the Appeal Board's remand language the way
18 that the staff presently reads that language, which is
19 as I've described. In the first instance we look at
20 the views of the licensee's consultants and proceed
21 from that point.

22 Subsequently, on August 30th, the Licensing
23 Board issued a memorandum and order on the late
24 intervenors status, and at page two, ruled once again
25 on the scope of the training issue and indicated that

1 the history of GPU's training problems are outside the
2 scope of this proceeding. It is these very subjects
3 that UCS -- well, let me further cite some Board
4 orders with respect to the training issue. With
5 respect to the NRC exam, we discussed this at some
6 length at the pre-hearing conference on June 28th, I
7 believe it was in Harrisburg, and the Board's July 9th
8 order that resulted from that at page six indicates
9 very explicitly that the NRC exam is res judicata.
10 The Board did indicate, however, that to the extent
11 that the OARP Committee or other licensee consultants
12 rely in some manner on the NRC operating -- operator
13 licensing exam and that reliance can be challenged by
14 the parties. But once again that would be made in the
15 context of the particular evidentiary presentation on
16 August 30th in the Licensing Board's order at page
17 three. Once again, ruling on the scope of the
18 training issue indicated that ALAP 772 does not permit
19 the relitigation of the NRC examination.

20 The Board indicated that its July 9th order
21 previously and correctly bounded the scope of the
22 training issue insofar as the NRC exam is concerned.
23 It's these very subjects which UCS continues to
24 attempt to inquire into, notwithstanding the Board's,
25 I believe, clear rulings that such matters as the NRC

1 exam and the history of GPU's training program from
2 the date of the accident until present are res
3 judicata. ThAt what this remanded proceeding is for
4 is for the purpose of obtaining the licensee's
5 consultants re-evaluation of the training program in
6 light of the deficiencies revealed by the cheating
7 incidents.

8 What UCS has exhibited in their
9 interrogatories and in their Motion to Compel and in
10 their Motion for Sanctions Against the Staff is their
11 complete unfamiliarity with the evidentiary record in
12 this very proceeding. They chose not to participate
13 in the original management phase of the proceeding on
14 training. They chose not to participate in the reopen
15 proceeding on cheating. The very things which they
16 are seeking now to a large extent are already in
17 evidence in this very proceeding. When there are
18 matters that arose subsequent to the close of the
19 record and the staff did an evaluation, those
20 evaluations were served on all parties to this
21 proceeding, including UCS.

22 They are, once again, seeking the very same
23 information from the staff that we provided to them.
24 Their interrogatories indicate an unfamiliarity with
25 Supplement 5, NUREG-0680, where the very questions

1 they asked are answered. They want to know to what
2 extent have we evaluated GPU's training program, what
3 have we done to note deficiencies in that program, and
4 we delineate in Supplement 5 the inspections, the
5 SALPV reports, the operational readiness reports that
6 we have done.

7 Supplement No. 4 to 0680 provided to all
8 parties in this proceeding contains the staff's
9 evaluation of the RHK and Beta reports. UCS wants to
10 know whether we interviewed any operators in this
11 proceeding. If they had read the documents that were
12 provided to them in this proceeding, they would know
13 the answer to that question.

14 JUDGE SMITH: Well, let me ask you, you had
15 a similar type of observation to make with respect to
16 some of TMIA's discovery requests, and you worked it
17 out. You said, hey look, you're overlooking this
18 document, that document, and apparently that worked
19 out.

20 Why -- have you made any effort to talk to
21 Mr. Jordan and point out to him that these matters
22 have been covered in published documents?

23 MR. GOLDBERG: Yes, Judge Smith, I talked to
24 Mr. Jordan at some length last Thursday and provided
25 him some more specific information, which indicated to

1 him exactly where a lot of the information that UCS
2 was seeking was to be found. I went through
3 Supplement 5 and indicated the sections and
4 subsections which describe the staff evaluations of
5 GPU training program and identified the inspection
6 reports and SALPV reports and operational readiness
7 reports.

8 I indicated to Mr. Jordan that a large part
9 of the information sought by the interrogatories, for
10 example, on what the NRC does to prepare for written
11 and oral operator examinations, the standards we use,
12 the format we use, the results of those exams, that
13 all that information was already in the record in this
14 proceeding.

15 And also, furthermore, indicated that to the
16 extent that UCS and the staff disagree on the scope of
17 this training issue that even though some of what UCS
18 seeks is, in our belief, beyond the scope of the
19 issue, if UCS can indicate to us how they believe the
20 OARP Committee is relying on such information which we
21 believe is otherwise beyond the scope of the
22 proceeding, that there wouldn't even be a necessity
23 for UCS to go to the Board to get that kind of
24 information from the staff, that I'd be glad to work
25 it out with him informally and provide the information

1 that he sought to the extent that he shows that the
2 OARP Committee is relying on that by their initial
3 report or answers to interrogatories or whatever
4 mechanism UCS has to show us that indeed it's
5 something that the OARP Committee is going to be
6 relying on.

7 And that's why I find it absolutely
8 outrageous that after that conversation they can claim
9 that our position is taken in bad faith, when not only
10 in our objections did we indicate what we were relying
11 on. And I further more specifically indicated to Mr.
12 Jordan the particular portions of ALAP 772 that we
13 were relying on, indicated to him why the information
14 he sought was reasonably obtainable elsewhere, namely,
15 in the very documents we've already given UCS and in
16 the very evidence that we've introduced in this
17 proceeding.

18 And I just think that when there is what I
19 think is a legitimate difference of professional
20 opinion on the scope of an issue and have a
21 conversation where I offer to make information
22 available without the need to go to the Licensing
23 Board and then to get delivered just hours ago a
24 Motion for Sanctions Against the Staff because our
25 position is being taken in bad faith, I just find

1 astounding and outrageous.

2 JUDGE WOLFE: How long have you had the
3 Motion to Compel before you, Mr. Goldberg?

4 MR. GOLDBERG: About two hours and 20
5 minutes as of this time.

6 JUDGE SMITH: This is the first I had
7 focused on that language, and obviously we wouldn't be
8 quite as sensitive to it as you are. I might say, Mr.
9 Jordan, that as this case progresses and you make
10 accusations like that you should do it very, very
11 carefully and only when you have solid grounds for it,
12 that we will not tolerate that tenor in our hearings
13 unless you really are justified in making such an
14 accusation. That is a strong statement that you made,
15 and if you're making it just from the inferences of
16 the request for a Protective Order, I don't think
17 you're justified in doing it.

18 MR. JORDAN: Well, Your Honor, we obviously
19 recognize the seriousness of a charge of that sort,
20 and we will not make such a motion without giving it
21 serious consideration. We made the motion because --

22 JUDGE SMITH: I don't mean the motion, the
23 charges.

24 MR. JORDAN: The charges of -- the Motion
25 for Sanctions based on the view that the actions must

1 have been in bad faith.

2 JUDGE SMITH: Yeah, must have been taken in
3 bad faith for some purpose such as harassment or delay
4 that would hinder UCS's participation in this
5 litigation. That is a charge of some importance,
6 magnitude. It --

7 MR. JORDAN: The second half of that
8 sentence is, of course, because we have no
9 comprehension of the reasonable legal basis for the
10 position. And accordingly, we speculate as to what
11 the --

12 JUDGE SMITH: Well, all right.

13 MR. JORDAN: -- basis for their actions is.

14 JUDGE SMITH: Let's start right now. In the
15 future if you make charges which border on an
16 accusation of professional misconduct with no more
17 basis than that, you may be subject to having your
18 motion dismissed without considering it on the merits
19 or some sanctions on you.

20 MR. JORDAN: Let me be clear.

21 JUDGE SMITH: But we will not tolerate it.
22 Do you understand that?

23 MR. JORDAN: Yes, sir, I do. However, let
24 me be clear on what the ruling is. It continues to be
25 our view, for whatever reason they may be doing this

1 that the action is taken in bad faith.

2 JUDGE SMITH: All right.

3 The point I'm making is you don't have any
4 reason. Now, you may have that view. You may believe
5 it. Don't express it unless you have grounds for it.

6 Now, continue.

7 MR. JORDAN: I believe it was still Mr.
8 Goldberg's ball.

9 JUDGE SMITH: No, I'm allowing you to
10 address the point that I'm making right now. You may
11 be -- all right.

12 Do you understand that now, Mr. Jordan?

13 MR. JORDAN: Yes, sir, I think we had basis
14 for it. I will certainly follow your directive.

15 MR. GOLDBERG: I don't have anything else to
16 add other than that the basis for the staff's position
17 on the objections that we filed are stated in our
18 response to the UCS's first set of interrogatories as
19 further explained this morning. We believe that that
20 is the correct reading of ALAP 772 and this Licensing
21 Board's prior rulings on the scope of the training
22 issue, in particular with respect to the NRC
23 examination process.

24 In addition to believing that the areas
25 inquired into by UCS are beyond the scope of the

1 proceeding, both subject matter wise and timewise in
2 that they attempt to go back to the date of the
3 accident and seek all the information on staff's
4 inspections and evaluations of GPU training programs
5 since the date of the accident.

6 In our belief that is far beyond the scope
7 of this proceeding and that we're dealing with a
8 remanded proceeding which has a main purpose of
9 obtaining the views of the licensee's consultants in
10 view of the cheating incidents which occurred after
11 they previously testified in this proceeding. That
12 beyond the objections of their interrogatories being
13 beyond the scope of the proceeding and in our view not
14 necessary to a proper decision in this proceeding
15 unless the Licensing Board indicates to us that the
16 Licensing Board needs similar information to resolve
17 this remanded training issue.

18 We have a further objection stated
19 throughout our response that the information which UCS
20 seeks is obtainable from other sources, and therefore
21 is not a proper subject of inquiry with the NRC staff
22 since UCS for itself can read these public documents,
23 and should at the very least be held to the
24 obligations of all parties to a proceeding. And that
25 is to know the record of the very proceeding in which

1 they're participating.

2 I think that what clearly is happening here
3 is that the scope of discovery by UCS is substantially
4 broader than it needs be because UCS is simply not
5 familiar with the prior evidentiary record on the
6 training issue. The staff's detailed evidence on NRC
7 exams written and oral in both the original proceeding
8 and more extensively in the reopen proceeding on
9 cheating, where we had a witness for sometime testify
10 precisely how the NRC conducts operator exams, written
11 and oral. UCS asked for the results of the exam, and
12 said that's the only way they're going to be able to
13 challenge the OARP Committee. The results of the
14 November, '81 exam conducted by the NRC after the
15 cheating was discovered on the April, '81 exams are in
16 evidence in this proceeding.

17 JUDGE SMITH: Did you tell Mr. Jordan that?

18 MR. GOLDBERG: I talked --

19 JUDGE SMITH: Let's just take this as an
20 example and follow through and see what kind of
21 exchange that you've had in an effort to settle it.
22 Did he -- he told you that.

23 MR. JORDAN: Yes, sir, in my response
24 generally to all those kinds of answers was, as I
25 recall, that's fine. Tell us where it is. And that's

1 your answer. That's all we're looking for. Now, it
2 does seem to me that there's another aspect to this,
3 to the extent that everything is in previous testimony
4 or public documents or wherever it may be, then that's
5 where it is.

6 The question stands as a legitimate
7 question, however, to be asked of the NRC staff and
8 for the staff to say it is in all these documents or
9 this testimony or whatever that's previous in this
10 proceeding and it's available to you. You can go get
11 it. And there is nothing else. That they've got to
12 answer, too.

13 If there is something else, they have to
14 answer that aspect of it. It is not enough simply to
15 tell us it's in some other document. So it has two
16 prongs, and were seeking simply the -- we have a
17 question here on "X topic". Where is it, and they can
18 tell us where it is. Now, there is a range --

19 JUDGE SMITH: Oh, yeah, but -- exactly, and
20 it seems to me that Mr. Goldberg has indicated that
21 he's tried to do that and he's willing to do that.

22 MR. JORDAN: The problem that we had -- that
23 I had, and I told him that this was my problem with
24 that answer was that he was unwilling to say to me
25 that that was in fact the full answer to the

1 interrogatory. He was -- for example, I believe in
2 his --

3 JUDGE SMITH: That's a concern I share too.
4 I've seen this type of response before, and I do think
5 that they are entitled that if your request for a
6 protective order is based upon the assertion that the
7 information is available, I think they are entitled to
8 have a period put at the end of it. And as a careful
9 lawyer he has a right to have that representation.

10 MR. GOLDBERG: I can attempt to determine
11 whether for any interrogatory that UCS has asked, if
12 we determine first of all what the proper scope of the
13 proceeding is.

14 JUDGE SMITH: Right.

15 MR. GOLDBERG: Whether there is anything
16 else other than what is already introduced in evidence
17 by the staff in this proceeding, what has been
18 provided to the parties by way of supplements to our
19 SER, or inspection reports which routinely are
20 provided to the parties, SALPV reports, and such
21 things, whether there is anything else other than
22 those documents which UCS has been given, and I
23 certainly would have no objection at all in stating
24 either there is nothing else or if -- and to my
25 knowledge we don't have anything else, but if we do

1 then identifying it for UCS.

2 JUDGE SMITH: Right, I think that would be
3 very helpful. I noticed that myself reading -- and I
4 don't think it was intentional. I think it was just
5 that you're looking at this defense and that defense,
6 and then you have to get it, but I did notice myself
7 that a very careful skeptical lawyer might wonder just
8 to what extent you're making that representation. And
9 I don't blame Mr. Jordan for making that inquiry.

10 So let me -- in the future as you respond to
11 discovery bear that concern in mind, and it might
12 simplify it. Now, we were -- the Board was
13 particularly taken with the statement by UCS in their
14 filing of today in which they say the staff has
15 ignored the only existing evidence of the views of the
16 reconstituted OARP Review Committee, which establishes
17 that the Committee continues to rely upon the NRC
18 examinations.

19 Is that -- do you agree with that statement,
20 Mr. Goldberg?

21 MR. GOLDBERG: I don't disagree with the
22 statement that the OARP Committee may very well
23 continue to rely in some fashion on the fact that
24 operators in addition to undergoing the training and
25 the examinations conducted by the licensees also are

1 required to take and pass NRC licensing exams. And I
2 think everyone recognized in the very beginning that
3 if UCS or any other party doesn't believe that the
4 OARP Committee's reliance on that fact is justified,
5 they're entitled to challenge that.

6 But the way in which UCS is pursuing that
7 issue now is asking the staff to address once again
8 everything that we have done with the NRC exam at TMI.
9 On that we've already testified. We've already given
10 the results of that exam.

11 JUDGE SMITH: Wait, I will hear from you on
12 that, of course. But right now I think that the
13 narrower point should be established. And you've
14 observed a subtlety of the issue which I think should
15 be addressed, and that is -- well, going back to the
16 original notice of hearing and the original shutdown
17 order, immediate effectiveness order, the licensee was
18 required to do several things with respect to operator
19 competency.

20 One was they had to be trained, and two,
21 they had to pass a new examination. And the OARP
22 initial testimony was predictive in nature, and the
23 testimony was yes, they've been trained to operate the
24 plant. And yes, they've been trained to pass the NRC
25 examination.

1 Now, at that time the issue was not in such
2 sharp focus as it is today, and they did use language
3 to -- which we inferred to be that passing NRC
4 examination was one of the measures of operator
5 competence. Now, that -- I think that that may be a
6 subtle point, but it's not so -- it's not really very
7 subtle when you stop to think about it.

8 Now, do you -- what is your representation
9 that the OARP Committee is doing today? Are they
10 acknowledging the fact that they're trained to pass
11 the exam or are they using the passing of the exam as
12 one of their criteria for measuring operator
13 competency? The actual language might have been
14 helpful.

15 MR. JORDAN: Well, we have the actual
16 language or the specific language where they referred
17 to the NRC exams and said their conclusion -- in my
18 language, concerning the adequacy of training -- their
19 language, it's further amplified and documented in the
20 presentation of the results of the most recent NRC
21 examinations.

22 It seems to me they are relying on the
23 results of the NRC exams as confirmation not only of
24 the fact that there's applicants who are trained to
25 pass the NRC exam. In fact, I don't think they're

1 relying on it for that purpose particularly. They're
2 really relying on it as support for their conclusion
3 that the entire training program is adequate. That is
4 to say this is in the OARP special report we received
5 earlier this summer.

6 JUDGE SMITH: Which I haven't read, and by
7 design I don't intend to until --

8 MR. JORDAN: Well, I would say, Mr.
9 Chairman, that we're in a sense between a rock and a
10 hard place on this one. Clearly the OARP Committee
11 has in the language that I just read to you relied to
12 some degree on the NRC exams. As I understand it,
13 there is much more to come from these people, and we
14 don't know what they'll say at that time. The problem
15 here is that UCS is entitled to litigate this issue to
16 the extent that there is reliance.

17 If we take the staff's position that we
18 can't even get to the issue until the OARP Committee
19 has made up its mind and decided ultimately that it's
20 relying on NRC exams, by that time discovery is over,
21 the hearing is coming, and our rights have been
22 effectively taken away. What we have today is --

23 JUDGE SMITH: I'm surprised that you state
24 it that way. I'm surprised that you might not state
25 it another way, and say, at that time since your

1 rights are so threatened that the hearing will not be
2 able to progress until you have an opportunity for
3 discovery.

4 MR. JORDAN: Well, we would certainly say it
5 at that point. And I think we would have that right.

6 JUDGE SMITH: Yeah, this is --

7 MR. JORDAN: And it says this --

8 JUDGE SMITH: This is my concern, Mr.
9 Goldberg. You are predicting, it seems to me, that
10 the OARP will come to the hearing and place no
11 reliance upon the NRC examination as a measure of
12 operator competence. And if you're wrong, then what
13 do we do?

14 MR. GOLDBERG: Well, I think there are some
15 issues which arise at this time concerning the OARP
16 Committee's reliance on whether the NRC exam or
17 anything else like memorization, another issue that
18 UCS raised. It presents some difficult issues in that
19 in our view because the OARP Committee in some manner
20 relies on a particular fact to support its conclusions
21 about licensee's training and testing program doesn't
22 necessarily mean that it opens up a relitigation of
23 everything that was done in a prior proceeding on
24 training because now in their re-evaluation they say,
25 we continue to rely on the NRC exam.

1 Does that entitle the parties to relitigate
2 in its entirety the NRC exam or is it more narrow than
3 that, namely, the manner in which and the
4 justification for OARP Committee reliance on the NRC
5 exam.

6 JUDGE SMITH: All right. Let's take that as
7 a standard for argument, the justification for their
8 reliance. You agree -- you would agree that that
9 would be -- were we to know in advance that they were
10 going to have some justification and reliance on the
11 exam and then they'd have to defend -- they'd have to
12 justify it would we not have discovery on that narrow
13 issue.

14 MR. GOLDBERG: If they rely on an aspect on
15 the NRC exam which was not previously litigated,
16 something new or different that the staff is doing
17 since the close of the record, and they're relying on
18 that, then I certainly agree that it's legitimate for
19 UCS to get discovery on that because there by
20 definition was no previous discovery on that.

21 But if they're simply going to rely on the
22 evidence which was previously introduced in this
23 record on the NRC exam, including the cheating
24 proceeding evidence where we addressed in much more
25 detail deficiencies that were evidenced in the

1 training and testing program and in the NRC
2 administration of exams by the cheating incidents that
3 were specifically addressed, then UCS is entitled to
4 point to that and rely on that and use that in any way
5 they choose to challenge the OARP Committee's views.

6 But I don't think it entitles anyone to
7 reconduct discovery essentially on the NRC exam.
8 We've already had discovery on the NRC exam. I don't
9 think they're entitled to reconduct discovery on all
10 aspects of training because they say the OARP
11 Committee may very well rely on all the facets of
12 training that we've previously litigated in this case.
13 So on the one hand UCS says, well, if you accept staff
14 position we're not going to have any discovery. And I
15 say that if you accept UCS position we are going to
16 have a proceeding on training which is going to be
17 broader than the original proceeding in discovery on
18 training which has no limitation whatsoever.

19 MS. BAUSER: Mr. Chairman, perhaps I can at
20 least add some information if not clarify this. The
21 OARP Committee in their special report essentially
22 acknowledged the results of the NRC exam. I don't
23 know precisely what Mr. Jordan has in mind when he
24 uses the word reliance. I don't think it's correct to
25 say that in that special report the Committee relies

1 on the NRC exam as a way for them to gain confidence
2 in licensee's training program.

3 I think they have to acknowledge that the
4 exam was taken, and they have to acknowledge the
5 results, just like the -- if everyone flunked the
6 exam, presumably it would be incorrect for them to
7 ignore that fact. But it is not -- the exam is not
8 the means by which they will evaluate the licensed
9 operator training program.

10 Similarly, I can say that with respect to
11 their forthcoming testimony the Committee is not going
12 to be relying on the NRC exam as their means of
13 establishing their confidence in the licensed operator
14 training program. I don't think that they will be
15 aware of the exam and of the results of the exam, and
16 I think that they would feel unprepared if they didn't
17 look at that.

18 I -- let me also say that licensee filed
19 answers to UCS's third set of interrogatories on
20 Friday, and one -- Mr. Jordan may not have received
21 that yet. I don't know. But one of the questions
22 specifically asks what the Committee meant in page 46
23 of the special report, which is the language cited by
24 Mr. Jordan. And let me read that answer to you.

25 JUDGE SMITH: Well, could you also do me a

1 favor, however, and read the language again.

2 MS. BAUSER: Yes.

3 JUDGE SMITH: The language of the special
4 report and then your answer.

5 MS. BAUSER: I think the question -- let me
6 read the question as stated. I think that will do it
7 for you, Mr. Smith. The Committee states on page 46
8 it's conclusion that TMI-1 can be safely operated "Is
9 further amplified and documented in the presentation
10 of the results of the most recent NRC exam. State in
11 precisely what manner the NRC exam results amplify and
12 document the Committee's conclusion."

13 The Committee's answer is as follows: "The
14 NRC licensed operator exams are required by law before
15 a person can operate a nuclear power plant. The
16 Committee considers passing these exams a necessary
17 but not sufficient requirement for operating the
18 plant. A high pass rate on the NRC exams in an
19 indication that the training program is achieving one
20 of its objectives."

21 JUDGE SMITH: That objective being passing
22 the exam.

23 MS. BAUSER: Correct.

24 JUDGE SMITH: Aren't they making a legal
25 judgment there or is it -- it seems to me it's a

1 rather vague judgment. They're saying since the law
2 requires they pass an exam -- would you read that
3 answer again.

4 MS. BAUSER: Certainly. "The NRC licensed
5 operator exams are required by law before a person can
6 operate a nuclear power plant. The Committee
7 considers passing these exams a necessary but not
8 sufficient requirement for operating the plant."

9 JUDGE SMITH: All right.

10 Now, the relationship between those two
11 statements, were I the author of it and if I had in
12 mind what I thought the OARP was trying to say, I
13 would have used a conjunction. I would have used
14 therefore or something. But the way it stands it's
15 not really clear that they're making an engineering
16 judgment or a training judgment or a legal judgment.
17 Nevertheless, go ahead.

18 MS. BAUSER: Well, I -- do you want me to
19 continue reading or just go ahead with my explanation?

20 JUDGE SMITH: Go with your argument, yes.

21 MS. BAUSER: Okay.

22 I think that it is more in the nature of a
23 legal argument. That is to say they do not feel that
24 it's appropriate for them to ignore this legal
25 requirement. That is not to say that that's the

1 mechanism that they're going to use to evaluate
2 licensee's program.

3 JUDGE SMITH: I wonder if a solution to this
4 problem might not be to accelerate things somewhat and
5 -- are you going to depose those people?

6 MR. JORDAN: Yes, sir, we intend to dispose
7 them. We have -- most recently -- in fact we had
8 scheduled those depositions for those week, but we had
9 put them off to the end of -- essentially to the last
10 week of the discovery period in order to have the rest
11 of our information available so that we're prepared to
12 depose them.

13 JUDGE SMITH: I think it would be very
14 helpful in this dispute and in the remaining days of
15 discovery if we knew exactly what -- how they viewed
16 the NRC licensee examination. If they are borrowing
17 that as a measure of -- for confidence and competency
18 or if they're looking at it as one of the legal
19 requirements, could you cooperate on getting that
20 answer quickly. Because I think that if they are just
21 simply looking at it as one of the requirements
22 imposed by law on the NRC staff and not as a material
23 part of their conclusion of competence, I think that
24 our original ruling takes care of your discovery
25 request; don't you?

1 MR. JORDAN: Yes, I do. I would add that I
2 -- I think I struggled with the latest answer as you
3 do. It doesn't give me the answer.

4 MS. BAUSER: We'd be happy to supplement the
5 answer if we get -- make sure we agree on the
6 question. We will supplement so that the answer's
7 clear. I think the answer is that it's a legal
8 requirement, but I think we'd be better off with an
9 answer from the Committee.

10 JUDGE SMITH: Yes, I -- do you agree with
11 that?

12 MR. JORDAN: Mr. Chairman, I should add or
13 perhaps amplify. The question to us is whether in the
14 view of the OARP Committee the NRC exams really have
15 any substantive significance to determining the
16 adequacy of the training program. In other words --

17 JUDGE SMITH: Now, that's different. That's
18 slightly different. Let's go back to the Notice of
19 Hearing. The Notice of Hearing and the immediately
20 effective order of July, 1979 said that they have to
21 close down until they are retrained and are
22 demonstrated to be competent and until they are given
23 a new NRC license.

24 MR. JORDAN: Uh-huh.

25 JUDGE SMITH: So the training program was

1 designed in part to pass the test as a separate idea,
2 whether they thought the test was a good idea or not.

3 MR. JORDAN: Okay.

4 I don't think that what I said contradicts
5 your point. It's the substantive question of the
6 OARP's opinion of the training program that is
7 significant. And if the OAR -- for example, if the
8 OARP Committee's view is that there is no need for the
9 -- forgetting legal requirements, as a substantive
10 matter they wouldn't see any need for an NRC exam
11 either to test the adequacy of the operators or of the
12 program itself. And they conclude without --
13 regardless of NRC exam results that it's adequate.
14 Then I would say they're not relying on the NRC exam.

15 JUDGE SMITH: All right.

16 MR. GOLDBERG: But by the same token, Judge
17 Smith, because they acknowledge that there is an NRC
18 exam and that there is a requirement that the
19 operators pass it, does not mean that we have to go
20 relitigate the NRC exam.

21 JUDGE SMITH: I think so. I agree. That
22 simple acknowledgement in the context of the different
23 shades of the discussion we've had here we're not
24 doing.

25 MR. GOLDBERG: You know, I think if the OARP

1 Committee said we've looked at the program. We think
2 it's sort of okay, but what really puts it over the
3 passing mark as far as we're concerned is the fact
4 that they also have to take and pass an NRC exam.
5 Clearly then the reliance on the NRC exam is an
6 integral and an inherent part of their testimony on
7 the adequacy of licensee's training and testing
8 program.

9 But if their testimony is that we've looked
10 at the program itself, and we conclude that it does a
11 great job in making -- in training competent
12 operators, and by the way there's also an NRC exam
13 which independently tests, that does not open up the
14 NRC exam to relitigation.

15 MR. JORDAN: Consistent with what I said the
16 question will be exactly they answered the various
17 questions and we see what they say.

18 JUDGE SMITH: So I think that USC does have a
19 point, however. We don't want to arrive at the
20 hearing and then find out what the situation is. If
21 there is going to be substantial reliance or reliance
22 we should know early and then discovery have to be
23 tailored to accommodate that.

24 MR. GOLDBERG: Judge Smith, this very issue
25 is one that confronts the staff too. We also have to

1 testify on this training issue. And when we thought
2 about what kind of case we could present on this issue
3 we recognized that by the nature of the issue we
4 really need to have the OARP committee's views before
5 we can prepare our case.

6 I confirmed that there was not going to be
7 another report issued by the OARF committee prior to
8 the party's deadline for filing testimony. It is that
9 reason why I explored the possibility of having the
10 licensee file their testimony prior to the other
11 parties. We are faced with the same problem that the
12 intervenor is faced with on this particular issue.
13 And to the extent that these things can be resolved
14 now rather than waiting for licensee's testimony it is
15 to everyone's benefit.

16 MR. WOLFE: Excuse me, Mr. Goldberg.

17 MR. GOLDBERG: Yes.

18 MR. WOLFE: You mentioned something about
19 there being another report by the OARP?

20 MR. GOLDBERG: What I referred to was that
21 they issued their special report earlier.

22 MR. WOLFE: That was June 12th of '84?

23 MR. GOLDBERG: Yes.

24 MR. WOLFE: Yes.

25 MR. GOLDBERG: And it was my view that if

1 they were going to be issuing a final report prior to
2 actually submitting written, prepared direct testimony
3 in this proceeding, along with the other parties, that
4 we could then prepare our testimony based on their
5 final report, recognizing, however, that that special
6 report was just a preliminary look at the
7 training/testing program and having confirmed that
8 they are continuing to do a substantial amount of
9 additional work on the licensee training and testing
10 program I was faced with the same problem that UCS and
11 the other intervenors are faced with, namely, how do
12 we address that issue by the definition of the issue
13 without having the final views of the OARP committee?

14 So what I ascertained was that indeed the
15 OARP committee would not be filing an additional
16 report prior to the date on which all parties were to
17 submit written testimony on this issue. Therefore, I
18 have explored the possibility of licensee filing their
19 testimony, which as I understand, will state for the
20 first time the OARP committee's final views on their
21 re-evaluation of licensee's training/testing program.

22 If the licensee could file that prior to the
23 other parties having to file testimony we then would
24 be in a position of being able to legitimately address
25 the training issue that has been remanded to the

1 licensing board.

2 MR. WOLFE: Now Ms. Bauser, Mr. Goldberg's
3 understanding is correct, the licensee will be filing a
4 -- what a final report of OARP?

5 MS. BAUSER: No, sir. The OARP committee is
6 not going to file an additional report. Their
7 testimony which is due now, before the other parties,
8 will constitute their follow-up, in effect, to the
9 report that they quickly issued several months ago.

10 JUDGE SMITH: Did --

11 MR. GOLDBERG: That is what I was attempting
12 to say. Because they will not be filing another report
13 and we will for the first time see their views in
14 their testimony I thought it was wise for all parties
15 to have that testimony before we have to file our
16 testimony.

17 JUDGE SMITH: Yes, and then our last order
18 gave that relief and --

19 MR. GOLDBERG: Yes, that is right.

20 JUDGE SMITH: -- pointed out the problem
21 that -- this is unusual in that your testimony is
22 going to shape the issue, so to speak, really.

23 MR. JORDAN: Your Honor, I wonder if I may
24 speak to that point?

25 JUDGE SMITH: Yes.

1 MR. JORDAN: It seems to me that that is
2 really not accurate. The issues have been shaped by
3 the deficiencies found in the training program. I
4 recognize that the Appeal Board --

5 JUDGE SMITH: I am sorry. I only meant with
6 respect to the NRC licensing --

7 MR. JORDAN: Okay. Yes, sir.

8 JUDGE SMITH: -- process, yes.

9 MR. JORDAN: With respect to -- setting that
10 aside, the NRC examination process, the question is
11 not what the OARP committee will say or what its views
12 are. The issue are those issues discussed
13 particularly by the Appeal Board but also discussed in
14 this board's previous ruling and in the ruling of the
15 Special Master was to lineate a wide range of
16 deficiencies to include, for example the one that
17 comes particularly to mind as it relates to one of
18 these interrogatories, is the question of attitudes of
19 trainees and so on and that is what the parties are
20 litigating.

21 And whether you say that if we get to
22 challenge OARP committee views -- well, let's assume
23 the OARP committee's views are that the deficiencies
24 show nothing and therefore, the program is adequate.
25 Well, we can challenge their views on all of those

1 issues. The question is, what are the issues in this
2 proceeding. We have no need to wait for the OARP
3 committee to see what it thinks and this really gets
4 to what I think is the main point of contention
5 between UCS and the staff which is, what is the scope
6 of the proceeding.

7 The scope of the proceeding is not what the
8 OARP review committee's testimony is or what they
9 decide the deficiencies are or what they decide the
10 deficiencies mean. The question -- it is the issue of
11 the deficiencies and their effect on the adequacy of
12 training. And for that reason UCS is entitled to
13 inquire of the staff on the full range of the effect
14 of those deficiencies, for example.

15 And it is not, by the way -- to respond to a
16 particular point Mr. Goldberg made -- a question of
17 litigating the history of training at GPU. The
18 question is -- we seek the staff evaluations of GPU
19 training and various ways that they have done those
20 evaluations. Those evaluations are certainly
21 relevant, in fact, we believe they are directly
22 relevant to determining the adequacy of training today.
23 If there is a consistent thread in, for example, the
24 NRC staff analyses or evaluations of the GPU training
25 program that still has not been evaluated despite the

1 the fact that many deficiencies were found. That is
2 extremely serious evidence.

3 JUDGE SMITH: Yes. But isn't the gist of
4 Mr. Goldberg's remarks as far as he knows those
5 evaluations had been reported in published documents.

6 MR. JORDAN: And as long as he says they
7 were reported --

8 JUDGE SMITH: He is going to find out.

9 MR. JORDAN: -- in public documents A, B, C,
10 D and we go read them. We probably got them. It is
11 not a matter of us not knowing the record, it is a
12 matter of us being entitled to an answer by the staff
13 that, yes, here is the answer and it is in so and so
14 place.

15 JUDGE SMITH: Well, I think --

16 MR. GOLDBERG: As I indicated in Section
17 7.3.2 of Supplement 5 -- and I gave this information to
18 Mr. Jordan on Thursday -- the staff described for the
19 commission its evaluation of licensee's training and
20 testing program and described each and every
21 inspection, -- report, operation readiness report,
22 that we had done to evaluate training and testing for
23 the commission as one of the open issues that the
24 commission has been struggling with.

25 JUDGE SMITH: Yes.

1 MR. GOLDBERG: And I will confirm, but
2 the best of my knowledge, there is nothing else other
3 than the ones we have identified there. We attempted
4 in one place to explain and delineate the extent of
5 our evaluations and our overall conclusions we draw
6 from them and how we view the current licensee
7 training/testing program since the close of the
8 record.

9 So if we put the record next to what we have
10 done since the close of the record UCS has a complete
11 picture and has copies of all inspection reports that
12 identify any deficiencies we found, corrective action
13 that we have noted and our evaluation of all of these
14 items on the licensee's training/testing program.
15 That goes well beyond the scope of this remanded
16 issue. That wasn't limited to the deficiencies
17 revealed by cheating and what the OARP committee's
18 views of that may be.

19 So I did indicate that. I will confirm that
20 there is nothing else. If there is something else I
21 will be glad to inform Mr. Jordan of whatelse there is
22 that the staff has by way of evaluation of licensee's
23 training and testing program.

24 MR. WOLFE: And what is the date of
25 Supplement 5, please?

1 MR. GOLDBERG: Supplement 5 is July 1984.

2 JUDGE SMITH: All right.

3 I think there is nothing left for us, then.

4 Is there?

5 MR. JORDAN: As long --

6 JUDGE SMITH: I mean everything may go away
7 or it may not, but I mean at least for today.

8 MR. JORDAN: Well, if my understanding is
9 that at least for purposes of discovery the staff has
10 dropped its opposition to UCS position on scope, then
11 there is nothing further.

12 JUDGE SMITH: I think that is too broad.
13 But I think that whether they adopt your opposition,
14 they have agreed to give you information about the
15 staff's evaluation of the training program and we
16 don't have to resolve the dispute on scope.

17 I might say that I think that the staff's
18 view of the evaluation of the training program, is
19 quite relevant and I agree it may be a point as when
20 you cut it off in time but it is quite relevant I
21 think as you have recognized.

22 So with that in mind I think that unless you
23 have to come back to us your concerns are probably
24 going to go away.

25 Is there anything else, any subject matter

1 we didn't take up in your motion?

2 MR. JORDAN: Your Honor, if I may.

3 JUDGE SMITH: Sure.

4 MR. JORDAN: I would like to be sure that we
5 are covering these so that we don't come back if we
6 can avoid it.

7 Interrogatories two and three relate to the
8 NRC examination and we are treating that differently.
9 I take it Mr. Goldberg has, in essence, said that he
10 will now answer interrogatory five or perhaps what had
11 said that what he has told us is the full answer and
12 he will confirm there is nothing else?

13 MR. GOLDBERG: That the information sought
14 by interrogatory five is contained in Section 7.3.2 of
15 NUREG 0680, Supplement 5. I will determine whether
16 there is anything else that forms a part of the
17 staff's evaluation of licensee's training/testing
18 program and will inform you whether there is anything
19 else or not.

20 MR. JORDAN: So that that would be a
21 complete answer to the interrogatory of what my
22 question is.

23 I take it Mr. Goldberg's answer is yes?

24 JUDGE SMITH: Yes. He wants that period but
25 at the end of the sentence.

1 MR. GOLDBERG: Yes. I will determine
2 whether -- you have in Section 7.3.2 what the staff
3 has described it has done. I will determine whether
4 we have done anything else other than what is
5 described here and that will then be a complete answer
6 to your question.

7 MR. JORDAN: Good. Six is again --

8 MR. GOLDBERG: Excuse me. Before we leave
9 five I want to be careful because five goes back to
10 March 28, 1979. And I am not suggesting that
11 Supplement 5 describes everything we have done since
12 March 28, 1979.

13 Because I think as a matter of scoping of
14 this issue time-wise that that is far beyond anything
15 that was envisioned by the remand.

16 JUDGE SMITH: I agree but where should the
17 cut-off be, Mr. Jordan?

18 MR. JORDAN: Well, as a matter of fact, Your
19 Honor, in discussions with Ms. Wagner, co-counsel for
20 the staff, I discussed with her the fact that we had
21 come to a time limitation agreement with the licensee
22 on interrogatories with them and suggested that she
23 come back to me with some kind of similar approach.

24 She didn't come back on that particular
25 point so I haven't come up with an approach.

1 JUDGE SMITH: Can I suggest that perhaps a
2 time limitation, without much thought to it, perhaps
3 one would be the March 1981 events. I think it was
4 March 1981 in which the -- or August -- no, when it
5 was first discovered that there was similarities on
6 the answers in the NRC examination. That is when the
7 whole issue began to arise. That would be August of
8 1981 when it was reported. Now that makes --

9 MR. JORDAN: Your Honor, that -- we're --
10 to something like that. I would say let's get that
11 information and if we have a reason to go earlier than
12 that then we will worry about it at that time.

13 JUDGE SMITH: Is that --

14 MR. GOLDBERG: It was my view that the
15 appropriate time should be since the close of the
16 evidentiary record in this proceeding on the cheating
17 incidents since in that proceeding we addressed -- all
18 parties had the opportunity to address and those that
19 were there did address the effect of cheating on
20 licensee's training and testing program and what we
21 have done since then is to deal with the training and
22 testing issue with respect to issues that have arisen
23 since the close of the record. That is what is
24 addressed in Supplement 5. And which I will confirm
25 is all we done unless there is something else I can

1 tell you about.

2 JUDGE SMITH: Okay.

3 Now that also seems to make sense, let's
4 say, at the close of the discovery on that session in
5 October of 1982.

6 Mr. Jordan, there was agreed to a discovery
7 by very competent people. There was a lot interest by
8 Judge Millholin himself and I just can't imagine that
9 the effort that has to be put in by the staff to go
10 beyond that date would be worthwhile, would produce
11 any results that would be worthwhile or justify the
12 effort.

13 MR. JORDAN: I guess I would say the close
14 of discovery for the proceeding sounds reasonable.

15 JUDGE SMITH: For the proceeding.

16 MR. JORDAN: Yes.

17 JUDGE SMITH: Is that reasonable to you?

18 MR. GOLDBERG: Yes.

19 MR. JORDAN: Then again it is up to us if we
20 have some reason -- we look at that and see there is
21 some reason to go back before it we ask another round
22 and worry about it then.

23 Moving on to interrogatories eight and nine,
24 relate to staff interviews of TMI operators to get
25 their views on the adequacy of the TMI One training.

1 The subject matter is certainly relevant to the
2 adequacy of the training program, the attitudes that
3 are specifically referred to, for example, in the
4 Appeal Board decision, I believe at page 66.

5 This is one we had not addressed in terms of
6 our discussions earlier.

7 JUDGE SMITH: Yes.

8 MR. JORDAN: And we think that needs to be
9 provided.

10 MR. GOLDBERG: I indicated to Mr. Jordan
11 last Thursday that the staff did interview operators
12 and that that was the subject of Supplement No. 4 in
13 NUREGO 680 which was provided to both parties in this
14 case.

15 JUDGE SMITH: Is that the attire?

16 MR. GOLDBERG: And that is something else
17 that I can check on and get back to Mr. Jordan on.

18 It is also that case that when NRC
19 inspectors conduct their inspections they have contact
20 with operators at various times and as I understand it
21 UCS would have us document every instance every
22 instance when a NRC inspector, for example, had any
23 verbal communication with a NRC operator.

24 And what I am saying is I think that is
25 completely unreasonable and deals with matters outside

1 the scope of this issue and that what the staff did do
2 with respect to -- specifically with the regard to
3 training and testing -- it is interview operators in
4 connection with the content of the RHR report for the
5 most part and that we described that in great detail
6 in Supplement 4 to 0680 and that if there is anything
7 else that we have by way of specific interviews of
8 operators in connection with licensee's training and
9 testing program I can attempt to find that out provide
10 the information to Mr. Jordan.

11 JUDGE SMITH: Yes, I think the
12 interrogatories should be limited to the example.

13 MR. JORDAN: As I am reading the
14 interrogatory today I would say it can certainly be
15 limited although the example, it seems to me, is too
16 narrow. No, I am sorry. The example will do.

17 Interrogatories 10 and 11 relate to whether
18 the NRC believes the OARP relied too heavily on
19 memorization and the basis for that answer.

20 And this, for one thing, is a question of
21 the staff's current position. I flag this point to a
22 board. There are a number of questions later on that
23 relate to the staff positions or staff views. Those
24 are questions of the current staff view. They could
25 not have been answered in previous testimony or some

1 previous document. There has to be an answer today.

2 Now it may be that what we said in the
3 previous document is still our view but we have to
4 have that answer.

5 It is beyond me how the issue of
6 memorization is not relevant in light of the Appeal
7 Board's specific indication that it is relevant.

8 MR. GOLDBERG: Well, it certainly was
9 relevant in the prior proceeding. It was addressed to
10 a certain extent by the parties. It was addressed by
11 the licensing board and the Appeal Board. But unless
12 you are inquiring about the OARP committee's current
13 views, current re-evaluation of training and testing
14 program insofar as memorization is concerned then I
15 certainly think it is beyond the scope of this
16 remanded proceeding.

17 JUDGE SMITH: Let's look at the language of
18 the remand cited by Mr. Jordan at the outset on 76 and
19 77 of the supplement opinion.

20 "We therefore remand to the licensing board
21 that part of this proceeding devoted to training for
22 further hearing on the views of licensee's outside
23 consultants including the OARP review committee. In
24 light of both the weaknesses demonstrated in
25 licensee's training and testing program and the

1 subsequent changes therein."

2 They want to know both the present and the
3 past. I don't know how you can cut it off. We are
4 going to ask the OARP -- I mean the staff if they
5 believe the OARP relied too heavily on memorization.
6 The OARP will have to put subsequent changes in
7 context with the weakness that was perceived.

8 I don't understand how you can have that
9 logical barrier, that barrier in logic in connection
10 unless there is something we are missing here. The
11 weaknesses pertain to pre-changed circumstances by
12 the very nature of that remand language.

13 MR. GOLDBERG: Well, then I --

14 JUDGE SMITH: And memorization is one of
15 them.

16 MR. GOLDBERG: -- don't understand the
17 distinction then between this particular item,
18 memorization, and all the other deficiencies in
19 licensee's training and testing program that were
20 identified since the time of the accident or even
21 since the close of the record. There was a prior
22 motion to reopen the record by one of the intervenors
23 on training program deficiencies and that motion was
24 denied.

25 The Appeal Board denied that motion not

1 withstanding their reopening on the limited issue of
2 the licensee's consultants re-evaluation in view of
3 the cheating incident and other deficiencies.

4 So I just find it hard to distinguish
5 between memorization and any other deficiency that UCS
6 might want to identify since the time of the accident.

7 JUDGE SMITH: Well, isn't your question
8 better put to the Appeal Board? I mean the selected
9 the weaknesses. We don't read that to require a
10 inquiry into all conceivable weaknesses. We read that
11 and I think we stated in our first memorandum in order
12 following the pre-hearing conference that those
13 weaknesses identified in the --

14 Is that your memory? I believe we did.

15 MR. JORDAN: I believe so.

16 JUDGE SMITH: Yes. That is the limitation
17 of it. And that other perceived weaknesses not
18 remanded and not addressed by the Appeal Board are res
19 judicata.

20 I would take your time, Mr. Goldberg. I
21 think it is -- I perceive it is -- I sense that it is
22 important to you and take your time and if we are
23 wrong I would really like to know about it.

24 (Pause)

25 MR. GOLDBERG: I don't have anything

1 specific in these few minutes here to cite from --
2 7072 except that as I read it what the Appeal Board
3 did was -- it began with a general discussion of
4 training and the significance of training and
5 indicated a lot of questions, a lot of relevant
6 questions, about the subject of training as a whole.
7 And then went on, however, to specifically remand for
8 a limited purpose.

9 And the licensing board recognized this in
10 its order on the lead intervenor status when it said,
11 we can all agree on the general, the broad, issue
12 however it has to be limited by the sub-issues which we
13 identified.

14 And I don't find that memorization is
15 something that is to be litigated in this remanded
16 proceeding, absent seeing that the OARP committee in
17 some manner identifies and addresses this as a part of
18 their re-evaluation of the licensee's training and
19 testing program. This is a particular thing which in
20 discussing the differences between staff and UCF on
21 the scope of this issue on Thursday I indicated to Mr.
22 Jordan that if he can show me by the special
23 committees -- by the OARP committee's special report
24 or by licensee's answers to interrogatories that there
25 is an nexus between this particular deficiency and the

1 OARP committee's re-evaluation that there wouldn't be
2 any need to get the board involved. I would undertake
3 to get the information from the staff and provide it
4 to him on our current views to the extent that they
5 may differ from our previous statements on this
6 subject.

7 But I, at this point, just don't see how
8 this particular item is any different from other areas
9 where there were noted deficiencies which are not the
10 subject of these proceeding. We are recognize --

11 JUDGE SMITH: Well, I know but the Appeal
12 Board -- they decided that some proceed deficiencies
13 require attention by the OARP and others they didn't
14 mention. And those they didn't mention we ruled would
15 be res judicata.

16 And on page 63 they quite clearly mentioned
17 -- the statement is, for example, does a training
18 actually enhance the operators' knowledge or simply
19 encourage memorization for test taking purposes? And
20 if the OARP does not address that perceived weakness I
21 don't think they will be responsive to the Appeal
22 Board's order.

23 Ms. Bauser, would the OARP address that,
24 would they have?

25 MS. BAUSER: The intention is to address

1 these past deficiencies in the context of whether the
2 current program responds adequately to them, not what
3 the OARP previous -- not to the extent to which
4 memorization undermines their previous views or
5 anything else. They are not going back into that.

6 Consistent with their special report, they
7 are going to talk about -- I can't talk directly about
8 memorization but the intent is to have them talk --
9 make sure that their testimony considers the past
10 deficiencies identified in -- 772 and considers
11 whether the current program is responsive to those
12 deficiencies.

13 JUDGE SMITH: All right.

14 So I think that this one, at least, is going
15 to talk about what the past deficiencies were in the
16 context of the present program. Whether the present
17 program remedies the past deficiencies, there will
18 have to be an understanding of what the past
19 deficiencies were.

20 So I think we will have to have some
21 discovery on that point. As always ask them for it.
22 There are others, I suppose, you could have asked for
23 but that is the only one.

24 Anything further?

25 MR. JORDAN: To continue on the

1 interrogatories, we have just really covered 10
2 through 13. Twelve relates to memorization and other
3 GPU training programs other than the original OARP.

4 Fourteen relates to NRC review and
5 evaluation of simulator training. It is essentially
6 the same as, I guess, five was. I guess my question
7 is is this something that would be answered in the
8 same way by reference to 0680 or is something more
9 required. It is certainly within the scope of the
10 issues.

11 MR. GOLDBERG: Well, I just disagree once
12 again. It is just obvious to me that UCS would review
13 the issue is that we are going to re-litigate the
14 entire training issue.

15 I don't see any basis for inquiring into
16 simulator training at this point except to the extent
17 that if the OARP committee is going to testify that
18 the thing that makes the licensee's training program
19 adequate is simulator training and that is what we are
20 relying on for our view that it is an adequate program
21 then I don't see any basis to testify once again about
22 simulator training.

23 JUDGE SMITH: Well, this may be a program of
24 many pillars, a building of many pillars, and no one
25 of them is the determinor but all of them together

1 will support their decision.

2 I think you are being very narrow on this,
3 Mr. Goldberg.

4 MR. JORDAN: Your Honor, I would -- I want
5 to get back to this proposition that it matters what
6 the OARP testifies about. I don't think it matters
7 what the OARP testifies about.

8 JUDGE SMITH: Let's say that they don't even
9 mention it, simulator training.

10 MR. JORDAN: Absolutely.

11 JUDGE SMITH: And you wish to establish that
12 absent or consideration to simulator training that
13 their conclusions are not to be accepted, assuming
14 they are favorable or weakened. They are weakened.

15 MR. JORDAN: If we can put it that way,
16 certainly. Or you can just say that we have shown
17 that simulator -- regardless of what OARP said
18 simulator training is necessary and must be improved
19 or something of that nature.

20 JUDGE SMITH: I agree.

21 MR. JORDAN: Fifteen relates to oral exams.
22 The issues are the same it seems to me.

23 MR. GOLDBERG: No, I thought the board
24 already ruled today on the NRC examinations.

25 MR. JORDAN: TMI won oral exams, not NRC

1 exams.

2 JUDGE SMITH: All right.

3 That is a clarification.

4 MR. GOLDBERG: Licensee administered oral
5 examines, is that what the question is about?

6 MR. JORDAN: Yes.

7 JUDGE SMITH: It is modified to say that.

8 You see oral exams are designed even more than written
9 exams for the unit involved. And the NRC would have a
10 TMI one oral exam.

11 MR. JORDAN: Certainly. Sorry it was
12 unclear. We intended licensee administered not NRC in
13 this question.

14 JUDGE SMITH: Sixteen, I don't think you
15 have any trouble with that, do you Mr. Goldberg?

16 MR. GOLDBERG: Well, I sure did have a
17 problem with it but --

18 JUDGE SMITH: Well, this was a helpful
19 meeting. I think that there was not a good
20 understanding of what the discovery rights were.

21 It is rather broad to state everything
22 however the subject matter is relevant.

23 Seventeen is clearly within the scope of the
24 remand?

25 Do you believe -- I put that as a question,

1 Mr. Goldberg.

2 MR. GOLDBERG: No, we did not view this as
3 within the scope of the remand. Because as we stated
4 in our objections the scope of the remand insofar as
5 the staff was concerned was the views of the
6 licensee's consultants.

7 JUDGE SMITH: But how are you going to
8 cross-examine these consultants?

9 MR. GOLDBERG: Well, apparently UCS is going
10 to cross-examine them on every facet of the training
11 program since the time of the accident and I am
12 saying that --

13 JUDGE SMITH: No, the question is posed in
14 the present tense.

15 I think some of these go farther. They show
16 a 16 that doesn't even time limitation. Oh, well,
17 I guess it would to the extent that it is -- well, it
18 needs some time limitation but we are not talking
19 about time limitation now we are talking about scope.

20 If 17 is not in the scope of this remand
21 proceeding -- I think we better hear from you again,
22 Mr. Goldberg. Do you have a thread here that I just
23 don't understand?

24 Seventeen being an -- as a format of GPU's
25 exam encouraged cheating. That to me is a very

1 question to the Appeal Board to sent us back to get an
2 answer to.

3 MR. GOLDBERG: The only deficiency which was
4 identified by the Appeal Board as warranting a remand
5 was the fact that licensee's consultants were relied
6 on heavily by the licensing board in reaching
7 favorable findings and conclusions on the overall
8 adequacy of licensee's training and testing program.
9 But those consultants testified prior to the cheating
10 incidents and therefore, the Appeal Board said they
11 thought it was necessary to get the further views of
12 the OARP committee and other of licensee's
13 consultants on their evaluation of the training
14 program in view of the deficiencies revealed by the
15 cheating.

16 Had the OARP committee testified after
17 cheating was discovered it is the staff's firm believe
18 that there would be no remand notwithstanding the
19 fact that sure, this proceeding identified lots of
20 deficiencies in licensee's program, in the staff's
21 practices in administering exams but none of them
22 warranted another hearing except for the fact that
23 there was heavy reliance on the OARP committee's
24 testimony and that testimony was given before the
25 cheating incident.

1 I think that it would be perfectly
2 legitimate for the staff to address this issue by not
3 representing any testimony at all because the only
4 deficiency that needs to be resolved is the OARP
5 committee has to come in and say why or why not they
6 stand by their earlier favorable evaluation of
7 licensee's training and testing program. And they can
8 be subjected to whatever cross-examination is
9 appropriate based on any of the record that we already
10 have on these deficiencies.

11 I don't think the purpose was to establish
12 another evidentiary record on the deficiencies
13 themselves. And that is what UCS is attempting to do.
14 They had the opportunity to seek discovery on cheating
15 and the effects and cheating in the re-open proceeding
16 and they didn't take it. Now they want to conduct
17 that discovery.

18 We, from --

19 JUDGE SMITH: That is a new issue now, that
20 is a new issue.

21 We already ruled over your objections that
22 UCS may be a participate in this phase of the
23 proceeding. In this respect they are not asking for
24 you to point out information that they missed because
25 they were not a participant. They want to know

1 current information. That is relevant.

2 MR. GOLDBERG: Okay.

3 I explained why the staff thinks that these
4 go beyond the scope of the proceeding and the board
5 has ruled. You just asked me for further --

6 JUDGE SMITH: Well, now --

7 MR. GOLDBERG: -- elaboration of why it was
8 that it is our view that this goes beyond the scope of
9 the proceeding and that is what I attempted to do.
10 But now that we are going interrogatory by
11 interrogatory I think it is going to be necessary to
12 go back and look at the specific objections that the
13 staff has in general at the outset on the scope of
14 discovery because UCS seeks information, not just from
15 the staff, but from the commission office of inspector
16 and auditor, office of investigations and we are going
17 to have to take those up to the extent that we are now
18 attempting to provide answers to these
19 interrogatories.

20 JUDGE SMITH: I don't know if that is the
21 case. What if the staff does not have any view?

22 You are not going to be required to conduct
23 an investigation.

24 MR. GOLDBERG: No, but what I am referring
25 to is some earlier -- some of the general objections

1 that we had to their instructions for responding to
2 this. They want us to respond with all information
3 and the possession or control of present of former
4 commissioners.

5 JUDGE SMITH: Well, that is another matter.

6 MR. GOLDBERG: Well, there has been no board
7 ruling yet on that. Every set of discovery we get
8 from every intervenor includes instructions to inquire
9 into the minds of former and present commissioners of
10 commission level offices and I point out that our
11 rules quite explicitly indicate that it is the
12 executive director for operations which a party of
13 this proceeding and that if someone is not under the
14 custody of the control of the executive director of
15 operations the staff just doesn't have any mechanism
16 and authority to compel these other commission level
17 offices and commissioners and commissioner's
18 assistants to give us whatever information they have
19 on these interrogatories.

20 And if we are going to go through one-by-one
21 UCS is --

22 JUDGE SMITH: Well, I still think that the
23 subject matter is severable.

24 We can come back to whether the former
25 commissioners have to be involved. But absent some

1 other arguing you just simply say that staff's
2 evaluation of the training program is not relevant.
3 And if the staff has made an evaluation of the
4 training program I just don't understand your argument
5 that is not relevant.

6 MR. GOLDBERG: Because we have already given
7 in this proceeding our evaluation of the training
8 program.

9 JUDGE SMITH: That is another defense but it
10 not a defense of relevancy. It is defense of
11 timeliness. It is a defense of available from another
12 source or it is a defense we haven't reached yet and
13 that is it is necessary for proper decision but it
14 certainly is not a question of relevancy. The staff's
15 evaluation of the training program within the context
16 of the remand is clearly relevant.

17 If you have an evaluation, if you have a
18 view, if you don't have one --

19 MR. GOLDBERG: We did make the objections
20 that you just indicated not just relevancy, but that
21 the information is available from other sources, that
22 it's beyond -- of the issue. That the what -- we've
23 stated all our objections.

24 JUDGE SMITH: I know.

25 MR. GOLDBERG: We rely on all of them. In

1 other words even if it's relevant even if it's within
2 the scope of the proceeding if the Board agrees that
3 the information from information thats already been
4 provided to UCS or thats available in other public
5 documents than the staff shouldn't be required to --

6 JUDGE SMITH: I understand, but my thought
7 processes just don't work quite as well as your's
8 apparently. I can divide the issues up, separate them
9 and decide one at a time and then add them all up, but
10 we can't decide wholesale instantly whether the
11 privileged, whether the relevant and whether necessary
12 to a decision and whether they're burdensome and
13 whether they're available for other source.

14 I am able, I think, to take each of those
15 considerations and look at them and when we decide
16 each of them we should come out to a conclusion and
17 someone like building a house, you know, one component
18 at a time.

19 I think it's quite clear that the staff's
20 evaluation of the adequacy of GPU's current trading
21 program is relevant. Whether it's available, whether
22 it's a necessary decision, whether it may be enforced
23 against former commissioners, thats another thing, but
24 it is relevant.

25 MR. GOLDBERG: And I understand our

1 agreement on that was that I have now pointed out
2 precisely where it is. We have --

3 JUDGE SMITH: Okay.

4 MR. GOLDBERG: -- stated where we have
5 evaluated and that what I would have to be -- what I
6 would be required to do beyond that is to verify that
7 that's all that we've done or if not, inform Mr. Jordan
8 what else we have done.

9 JUDGE SMITH: Okay.

10 SPEAKER: Now, we will take up where we left
11 to go to O and I whether we have to go to other
12 people. We'll take that up separately if you wish but
13 right now it is relevant. We will let it as relevant
14 and how you respond may be another matter.

15 JUDGE SMITH: Eighteen and I haven't ruled
16 it. Seventeen is relevant. Eighteen, necessarily, is
17 relevant.

18 MR. JORDAN: Nineteen is not at issue.

19 JUDGE SMITH: I don't understand that 20.

20 Do you object to 20, Mr. Goldberg?

21 MR. GOLDBERG: Yes, we did object that it's
22 beyond the scope of the proceedings, not necessary to
23 a proper decision. It's not reasonably calculated.
24 We move to the discovery of admissible evidence. In
25 that, our view -- review and evaluation of the

1 training program and it is beyond the remanded issue
2 of the OARP's committees re-evaluation of the training
3 program in light of cheating.

4 JUDGE SMITH: I had a more fundamental
5 concern about the interrogatory and that is if the
6 premise is not crossing over the facts. The staff in
7 this particular case did review the content of the
8 training program. That was required by the
9 commission's order to do that and they did and they
10 testified about it.

11 MR. GOLDBERG: I -- well, we -- in this
12 particular proceeding we certainly looked at the OARP
13 program, but I think what UCS is referring to here is
14 that our general practice has been in years to
15 evaluate the effectiveness of a utility training
16 testing program by the performance of the operators in
17 NRC examinations.

18 I think that's probably what --

19 JUDGE SMITH: Is that the quest of it, Mr.
20 Jordan?

21 MR. JORDAN: Yes. I may be mistaken on the
22 point. As I understood it, this was true --

23 JUDGE SMITH: I see.

24 MR. JORDAN: -- at least in part of
25 evaluations at TMI. There may have been some in-depth

1 analysis or evaluation, perhaps, and the question is
2 did this practice remain as it remained at TMI.

3 JUDGE SMITH: So you anticipated a situation
4 of the NRC staff panel and you're going to say "How do
5 you know that operators are confident," and they're
6 going to say "because they pass our exam" and that's
7 it. And so you're going to --

8 MR. JORDAN: Something to that effect.

9 JUDGE SMITH: All right. I think that's
10 relevant, at least for discovery.

11 You already answered 21?

12 MR. GOLDBERG: Yes. No, we did not answer
13 21.

14 JUDGE SMITH: I thought I saw an answer. I
15 see there that you don't have one. I thought I saw
16 one.

17 MR. GOLDBERG: We answered seven and --
18 which also dealt with industry norms.

19 (Pause.)

20 JUDGE LINENBERGER: Mr. Jordan, perhaps at
21 this pause, you could indicate what it is that is
22 sought in interrogatory 21 that has not been provided
23 in the staff's answer to interrogatory 7.

24 MR. JORDAN: The difference is the specific
25 question with respect to how the staff uses the

1 information related to the perceived industry norm.
2 Here we specifically -- we have some -- what the norm
3 is and how it can be used in the response to seven.
4 Here the question is "Does the staff still limit its
5 role to comparing the performance levels of candidates
6 on NRC exam with a perceived industry norm and
7 licensee's past record?"

8 And we -- you see the reference there to
9 ALAP's 772 from which the question is taken. So it
10 goes that extra step beyond what seven asks.

11 JUDGE LINENBERGER: Well, I'm still not
12 quite clear. Are you seeking to determine whether the
13 nature of NRC's review practice, as explained in
14 seven, is currently different in anyway? Is that the
15 thrust of your question in 21?

16 MR. JORDAN: I think it's slightly different
17 from that, which is -- the question is does -- we say,
18 "Does the staff still limit its role to comparing
19 performance levels?" I suppose in a sense that's a --
20 it really is a question of what they're currently
21 doing. It does refer to in the ALAP the staff has
22 indicated its intent not to review licensees future
23 plans to qualify candidates, limiting its involvement
24 to comparing the performance level of licensed
25 candidates on NRC examinations with a perceived

1 industry norm and licensees past record.

2 The question is, here's what they did as of
3 the time that the ALAP -- at least the record was
4 greater for the ALAP decision. The question is, is
5 that what they're still doing?

6 MR. GOLDBERG: I just can't see how whatever
7 answer we would provide to this makes any difference
8 at all to the issue that the board has to decide. It
9 seems to me a generic question about whether -- about
10 the staff's practice in using industry norms in
11 general. It's not focused on TMI 1, on the operation
12 of TMI 1.

13 They have already asked what we've done to
14 evaluate the TMI 1 training program. They've asked us
15 to identify the deficiencies we've found in that.

16 JUDGE SMITH: It's related to the earlier
17 question. They anticipate evidence by the NRC staff
18 saying that they depend upon the NRC licensing
19 examination to demonstrate operator competence. I'm
20 going to point out, I think, try to point out, well
21 that reliance inasmuch as it's based upon industry
22 norms, is not adequate. In its arguable point, I
23 think that they should have a right to make it. They
24 can't make it unless they have the information.

25 MR. JORDAN: I would add, Your Honor, to

1 that that it's -- it also would get to the question of
2 how deeply and how thoroughly the staff has reviewed
3 the program at TMI, if they're relying on one
4 particular type of thing.

5 MR. GOLDBERG: Does UCS claim it needs all
6 this information even if the staff presents no
7 evidence on this issue? I mean, if the reason why UCS
8 claims they need all this is the anticipation of the
9 staff's testimony that we rely on the NRC exam and
10 that's why the licensee training testing program is
11 adequate, then maybe I can save the UCS a lot of time
12 and effort in discovery.

13 JUDGE SMITH: It's a possibility, I'd say.
14 That's a possibility.

15 MR. GOLDBERG: Because, as I told Mr.
16 Jordan, what the staff intends to do in this
17 proceeding -- we've answered -- they want to know what
18 we've done to review the OAR precommittee special
19 report. We told them we have done nothing because
20 what we're going to do in this proceeding is wait
21 until the OARP gives us their final evaluation.

22 We will evaluate the OARP committee's
23 evaluation of the training and testing program.

24 JUDGE SMITH: Well --

25 MR. GOLDBERG: Now, I would hate to see a

1 tremendous amount of time and effort spent on all
2 kinds of discovery because Mr. Jordan anticipates that
3 the staff's going to have certain testimony that he
4 wants to challenge.

5 JUDGE SMITH: At this particular point this
6 probably is a good place to depart from the test of
7 relevancy to the test of necessary to a decision. If
8 the nature of the staff's case is such that it doesn't
9 matter, I think that we better find that out and maybe
10 we will enforce discovery on it.

11 MR. JORDAN: We have two problems with that.
12 One, for the most part I don't think that's an issue
13 that matters -- what the staff decides to testify to
14 or not or whether it decides to testify at all. In
15 fact, the bulk of the information that would be
16 derived from the interrogatories that we have
17 discussed up to this point at least would be important
18 to a decision by the board.

19 If, regardless of whether the staff takes
20 positions today, information that the staff provides
21 has a significant bearing on the adequacy of training.
22 That is important to the board's decision whether the
23 staff choses to bring it to the board's attention or
24 not.

25 JUDGE SMITH: We've already decided that the

1 operators -- that the NRC licensee and examination is
2 the basis for the NRC determining the operator
3 competency. We decided that that is res judicata and
4 the appeal board did not reverse that and not remand
5 that.

6 So, that is not an issue. The only
7 relevance on the NRC's staff's reliance upon the NRC
8 licensing and the basis or that reliance, the only
9 relevance of that would be to the staff's testimony in
10 this hearing.

11 MR. JORDAN: Okay. I'm sorry. I was
12 speaking more broadly than this interrogatory.

13 With respect to this particular
14 interrogatory, it's the only one we've touched on that
15 I think really relates to what the staff puts in its
16 testimony.

17 JUDGE SMITH: Yes. So, I think that --

18 MR. JORDAN: So, if the staff does not
19 testify on the adequacy of training at TMI, it doesn't
20 need to answer this question.

21 JUDGE SMITH: Well, I don't agree with you
22 there. I don't think you're casting that correctly.

23 MR. JORDAN: Let me put it -- go at it in a
24 different way. If the staff chooses to testify -- let
25 us say the staff testifies as Mr. Goldberg has

1 suggested -- looks at the OARP committees new position
2 and evaluates it and gives whatever its opinions may
3 be. Then it seems to me this question is relevant
4 because what the NRC staff has done to understand and
5 evaluate training at TMI is relevant to its ability to
6 evaluate what the OARP committee says.

7 In this particular question, do you limit
8 yourselves to doing this thing? Well, if they do,
9 then that is -- gives the board a basis for evaluating
10 how well they can evaluate the OARP committee's
11 statement.

12 Let me add one more point. That is, if we
13 are to wait, we have a situation where, from the
14 staff's point, where nothing is relevant until the
15 OARP committee comes out and then the staff is going
16 to do its evaluation and then apparently our discovery
17 -- the scope of our discovery rights -- depends upon
18 the scope of the staff's evaluation of the -- of the
19 scope of the OARP committee's testimony.

20 This is another situation where, if we don't
21 have discovery now or soon, we never have it or we get
22 to the point where the staff has taken its positions
23 and then we're entitled to discovery.

24 All we're doing is taking discovery now.

25 JUDGE SMITH: Mr. Goldberg, would you repeat

1 again what you believe the staff's position may be in
2 the litigation?

3 MR. GOLDBERG: We're going to look at the
4 OARP committee's testimony and attempt to evaluate the
5 methodology used by the OARP committee to re-evaluate
6 licensees training and testing programs. That will be
7 based primarily on the OARP committee's testimony as
8 to exactly how they have gone about re-evaluating the
9 training testing program in view of the deficiencies
10 that they've been sent back to consider.

11 We will then be in a position to state our
12 position on the adequacy of the OARP committee's re-
13 evaluation of the licensees training and testing
14 program.

15 JUDGE SMITH: And if you come into the
16 hearing and say, "well, we know the OARP evaluation is
17 a valid one because they can pass the NRC licensing
18 exam", then that's where we are. That's where we'll
19 have difficulties. That's when they will open the
20 article of discovery if we support your motion for a
21 protective order.

22 MR. GOLDBERG: Well, I'm --

23 JUDGE SMITH: They're with --

24 MR. GOLDBERG: -- I believe that to the
25 extent that it's necessary, we will be relying on

1 supplement five for our views on the adequacy of the
2 OARP committee's findings and conclusions. You have
3 given UCS discovery on that insofar as they ask about
4 what we have done to evaluate licensee's training and
5 testing programs.

6 So, I don't see any problem there. To the
7 extent that we have to rely on these reviews and
8 evaluations that we have done since the close of the
9 evidence of record, we will do so. UCS now has
10 discovery on this.

11 JUDGE SMITH: Let's leave it this way. The
12 staff's practice of administering NRC exams and how
13 they evaluate the exam as compared to the example
14 there with the perceived national norm, would in
15 itself be beyond the scope of the remand of the
16 proceeding. If it is your intention to offer
17 testimony which ties your evaluation of the OARP
18 training program and testimony and evaluation to NRC
19 operator testing, then you will have to answer the
20 interrogatory --

21 MR. GOLDBERG: Yes, I --

22 JUDGE SMITH: -- in time for them to be
23 prepared.

24 MR. GOLDBERG: What I will do is I will
25 inform the staff of these rulings and make sure that

1 they're aware that if they believe that there's a good
2 possibility they're going to be relying on this type
3 of information that we should answer this
4 interrogatory right now.

5 JUDGE SMITH: All right. Then there's
6 another thing, too, I'd like to say to all of the
7 parties that I hope that the testimony is not -- I
8 know it's going to be a natural thing to do -- but I
9 hope the testimony is not too much shaped by the
10 board's rulings on discovery. The tendency might be
11 to have the staff make sure it's testimony.

12 Don't let discovery rule the merits of the
13 relevant proceeding. I mean that's -- lawyers would
14 have a habit -- a tendency to do that, but I hope that
15 that is not done.

16 MR. JORDAN: Your Honor, I'm troubled by the
17 outcome of this. I read it -- I read the analysis, I
18 think, the opposite way as you do. The question is
19 not so much whether the NRC staff relies upon the
20 results of NRC exams in its evaluation. The question,
21 for example, Mr. Goldberg explains that the staff will
22 look at what the OARP committee does and, in fact,
23 will look at its methodology.

24 I understand that to mean that the staff
25 will not really evaluate the results of the OARP

1 committee's testimony, but the methodology to assure
2 that the work was done correctly. I make a
3 distinction because I think that means that -- from
4 what he has said so far, that means the staff does not
5 take a position on the substantive question of
6 adequacy of the training, but on the adequacy of what
7 the OARP committee did.

8 If I can push that one more step, what it
9 seems to me whether it is that narrow or that it is
10 broader to the point of staff testimony to the
11 adequacy of the training itself, the question of
12 whether the staff limits itself in the way that we ask
13 about in question 21 is relevant to the staff's
14 experience and knowledge and ability to evaluate the
15 training program.

16 If they are so -- if they so limit
17 themselves, that has a bearing on the board's ability
18 to judge what the staff has been doing and what the
19 staff's testimony is on the issues.

20 MR. GOLDBERG: I guess there are two things.

21 JUDGE SMITH: We agree that there is some
22 relevance but it's too remote to enforce on that
23 basis. This is under the special protection the NRC
24 staff has in the discovery.

25 All right.

1 MR. JORDAN: On 22, we --

2 JUDGE SMITH: Has that been satisfied?

3 MR. JORDAN: I'm sorry. On 21?

4 JUDGE SMITH: Twenty-two?

5 MR. JORDAN: Well, we had -- it was
6 partially satisfied and we talked about Mr. Goldberg
7 looking for the information that seemed to be missing.
8 I assume that's happening.

9 MR. GOLDBERG: Yeah, on interrogatory 22, we
10 discussed that on Thursday and it turns out that our
11 position on Dr. Long and Mr. Frederick are discussed
12 in supplement 5 to NUREG-60 -- 0680, but that NUREG-
13 0680 does not address Dr. Coe or Mr. Newton and we'll
14 be supplementing our response to this interrogatory as
15 to whether or not we have any views on Dr. Coe and Mr.
16 Newton.

17 MR. JORDAN: Finally, 23 relates to Mr.
18 Husted's position in the training program. We
19 consider it relevant since one of the major concerns
20 of the Appeal Board was the positions of people
21 previously involved in the incidence in the training
22 program.

23 JUDGE SMITH: What's the staff's position on
24 that one? I can't seem to find it.

25 MR. GOLDBERG: Well, it's stated in our --

1 on page 9 of our response. We have similar objections
2 to a number of interrogatories. Number 23 included as
3 not -- as beyond the scope of the remanded issue.
4 This in particular deals with non-licensed operator
5 training which is by prior board ruling not a subject
6 of the remanded decision.

7 JUDGE SMITH: I had overlooked that. In
8 light of that, you still believe it's relevant?

9 MR. JORDAN: Oh, yes, sir. The question is
10 not so much whether Mr. Husted is in the right
11 position as it is what does the promotion of him to
12 such a significant position in training -- all be it
13 non-licensed -- indicate about the company's attitude
14 toward training and in particular, of course, licensed
15 operator training.

16 JUDGE SMITH: I think there is a logical
17 defect in the question. What the Appeal Board ruled
18 and what we ruled and the special master ruled with
19 respect to Mr. Husted is one thing. You're requiring
20 the staff to accept all those rulings as a logical
21 premise rather than an adjudicated premise and come up
22 with a conclusion based upon an adjudicated premise
23 rather than a logical premise and I don't think we can
24 require them to do that.

25 Do you understand my point? They may or may

1 not agree with the Appeal Board on this or the
2 Licensing Board. How can they be required to
3 formulate an opinion based upon a premise upon which
4 they don't agree?

5 MR. JORDAN: I guess it seems to me they
6 have to agree with what has been adjudicated by the --
7 after all, the point of those adjudications was --

8 JUDGE SMITH: They have to obey. They have
9 to obey.

10 MR. JORDAN: Yes. Well, then the question
11 is should the staff, assuming that the Licensing Board
12 really on any issue makes a factual finding different
13 from the staff's, may the staff nonetheless willy-
14 nilly ignore that for purposes of its evaluation and I
15 think it must be known.

16 JUDGE SMITH: I'm not suggesting they ignore
17 it. You can't -- you cannot force a professional
18 opinion by adjudication.

19 MR. GOLDBERG: Judge Smith, I would also
20 point out on this that the Appeal Board's requirement
21 that Mr. Husted did not have any supervisory
22 responsibility with respect to non-licensed operator
23 training is a particularly sensitive issue which the
24 Commission has asked the parties to address in the
25 briefs that are going to be filed before the

1 Commission soon.

2 I think this is a clear indication where the
3 Commission has recognized that there are differences
4 between the boards as to how Mr. Husted was dealt with
5 in light of the problems that were pointed out in
6 connection with his attitude and his going to take up
7 on his own the question of the propriety of the Appeal
8 Board's action. I think this is something that is
9 perfectly legitimate for the parties to deal within
10 their briefs to the Commission which will be filed
11 shortly.

12 JUDGE SMITH: I don't think that that should
13 be enforced. I don't know how that they can properly
14 accept the premise or there are several premises there
15 which are not all the same.

16 MR. JORDAN: I think we would accept an
17 answer that said we don't agree with the premise
18 because we think he's not what somebody else said he
19 was or didn't do what somebody else said he did.

20 JUDGE SMITH: We don't believe that that is
21 likely to lead to admissible evidence. That's not
22 ruling it out. If it should come up in the hearing,
23 if in another context, well that's one thing. But, as
24 far as discovery is concerned right now, I don't -- I
25 just don't see how it could lead to anything useful in

1 this hearing.

2 Okay, now, do you want to rule through all
3 the interrogatories. We've ruled on with respect to
4 relevance and with respect to two of them, we've made
5 a ruling that looking ahead in the litigations, based
6 upon what we know about the staff's position, that two
7 of them will not be necessary to a decision.

8 Now, that argument is -- you have other
9 objections, Mr. Goldberg, that you want to raise about
10 discovery in general, about the person subject to
11 discovery?

12 MR. GOLDBERG: Yes.

13 JUDGE SMITH: All right.

14 Now, let's take up the person subject to
15 discovery, first.

16 MR. GOLDBERG: Okay.

17 UCS asked that their interrogatories be
18 answered based on information and the possession or
19 under the control of present or former NRC
20 commissioners. The staff, which is a party to NRC
21 adjudicatory proceedings, is the executive director of
22 operations and his staff. This does not include the
23 Office of Investigations, the Office of Inspector and
24 Monitor, the Office of Policy Evaluations, the
25 commissioners present or former or the commissioners

1 personal staffs.

2 In sections 2.720(h)(2)(ii) the commissions
3 regulations say that when the presiding officer
4 directs that the staff respond to interrogatories that
5 the executive director for operations will designate
6 NRC personnel with knowledge of the facts to answer
7 the interrogatories. Once again, all the executive
8 director for operations can do is assure that someone
9 on his staff with knowledge of the facts respond to
10 the interrogatories. This does not reach into
11 commissioner's offices, commissioners or former
12 commissioners, their personal staffs, or any
13 commission level offices.

14 There's simply no authority under our rules
15 for discovery by a party to the proceeding to get this
16 kind of information from commissioners or commission
17 level offices as distinguished from the NRC staff,
18 which is a party to the proceeding.

19 JUDGE SMITH: Mr. Jordan, oh.

20 MR. GOLDBERG: Similarly, USC asked us to
21 provide information under the authority or control of
22 former NRC employees. The staff simply does not have
23 any mechanism to require former employees to provide
24 information that they may have on the interrogatories.
25 All the staff can do is get the present employees with

1 the knowledge and the responsibility in the areas
2 which are the subject of the interrogatories to
3 provide answers to the best of their knowledge and
4 belief.

5 So, to the extent that we have the
6 objections to the instructions A and G-1 which are set
7 forth on pages four and five of our response, the
8 staff asks for a protective order that the discovery
9 of information in the possession of such persons has
10 no basis under NRC rules of practice.

11 JUDGE SMITH: Mr. Jordan.

12 MR. JORDAN: Yes, sir.

13 In our view the NRC staff is -- embodies for
14 these purposes, the Nuclear Regulatory Commission. It
15 is indeed the executive director for operations who is
16 responsible to designate someone to answer the
17 interrogatories. We do not see the rules as limiting
18 that person to obtaining information only from the
19 staff of EDO. And, therefore, that individual should
20 be able to obtain information from wherever within the
21 Nuclear Regulatory Commission the information resides.

22 JUDGE SMITH: How about the --

23 MR. JORDAN: With respect to --

24 JUDGE SMITH: How about former people, do
25 you appoint them to --

1 MR. JORDAN: Yes, I was going to get to --
2 I'm afraid I do not have the regulation at hand. It
3 is my understanding, however, that within, I believe
4 standards of conduct, there is a provision for the
5 responsibilities of former employees that would allow
6 the NRC to reach them to obtain the information that
7 was within their -- that would be within their
8 control.

9 Unfortunately, I have not specifically
10 researched that. I could not take you to it.

11 JUDGE SMITH: Well, both of the discovery
12 rules -- 2.720 and then I think the staff made a
13 mistake in the citation to -- I think you met to cite
14 the 2.74 -- 2.740(a)(i).

15 MR. GOLDBERG: 2.720(h)(2)(ii) is the
16 provision which addresses the interrogatory of the NRC
17 staff and 2.720(h)(2)(ii) -- if you look at 2.740(b)
18 on interrogatories to the parties, there's a footnote
19 that says this provision doesn't apply to the staff
20 and interrogatories addressed to the staff are the
21 subject of 2.720(h)(2)(ii).

22 And then, if you go to 2.720(h)(2)(ii) it
23 says quote, "In addition a party may file with the
24 presiding officer written interrogatories to be
25 answered by NRC personnel with knowledge of facts

1 designated by the executive director for operations.
2 Upon a finding by the presiding officer that answers to
3 the interrogatories are necessary for a proper
4 decision in the proceeding and that answers to the
5 interrogatories are not reasonably attainable from any
6 other source, the presiding officer may require that
7 the staff answer the interrogatories."

8 JUDGE SMITH: Okay. Now, to capture all of
9 the relevant discovery sections, you cite, I believe
10 incorrectly, on page 2 of your motion for a protective
11 order, section 2.740(a) and I think that the citation
12 that you intended to make was 2.740a without a
13 parentheses, parentheses (i), which is -- that's
14 depositions upon oral examination and upon written
15 interrogatories.

16 Excuse me. I meant to say "j". I said "i".
17 And 2.741aj, it says "The provisions of paragraphs a
18 through i of this section are now applicable to NRC
19 personnel."

20 MR. GOLDBERG: Right. And that then refers
21 to 2.720(h) which does deal with discovery against the
22 staff.

23 JUDGE SMITH: That's correct. And it says
24 that 2.74 -- 2.720(h)(1) and it says "The provisions of
25 paragraph a through g are subpoena paragraphs of this

1 section, are not applicable to the attendance and
2 testimony of the commissioners or NRC personnel or the
3 production of documents or documents in the custody
4 thereof."

5 MR. GOLDBERG: Correct. That deals with
6 them telling NRC witnesses to testify and it deals
7 with production of documents by the NRC. And the
8 specific provision in 2.720 that deals with the
9 interrogatories to the staff which is what we have
10 before us now is 2.720h(2)(ii).

11 JUDGE SMITH: Yes. I realize there are two.
12 The point I'm trying to make out is that virtually
13 every other approach is wiped out leaving this one and
14 only this one.

15 MR. GOLDBERG: Yes, and it describes the
16 mechanism for the staff answering interrogatories
17 after the appropriate findings by the board and that
18 is that the executive director for operations
19 designates a knowledgeable person to answer the
20 interrogatories.

21 JUDGE SMITH: All right. Now, the executive
22 director for operations cannot order the commissioners
23 to answer interrogatories or produce documents or to
24 testify. We may not because subpoena power over
25 commissioners and then our NRC personnel is taken away

1 from us. Moreover, the authority to direct
2 interrogatories is taken away from us, leaving it only
3 with 2.720(h)(2)(ii), which does allow for the
4 executive director for operations to designate persons
5 with knowledge to respond to interrogatories.

6 That's the only authority that I can find
7 for us to require interrogatories of anybody in the
8 NRC. Unless you can point out something, I don't
9 think we can do what you're asking. I'll come back to
10 that, however, I think we may have a little bit of a
11 problem. But, I don't think we can -- I don't see any
12 authority to require the commissioners to do anything.

13 MR. JORDAN: In our view, you have certainly
14 cited the correct sections. We see nothing that
15 prevents EDO from going to those appropriate offices
16 and getting this information. That's what we would
17 have the staff do.

18 JUDGE SMITH: Just gather it for you as an
19 accommodation.

20 MR. JORDAN: I don't see anything in that
21 provision that limits EDO from undertaking that task.
22 Not as an accommodation, but as an answer.

23 JUDGE SMITH: Okay.

24 With respect to the Office of
25 Investigations, are we likely to have an issue arise

1 here where they possess information which is relevant
2 to this remand?

3 MR. GOLDBERG: I don't believe so with
4 respect to the training issue. It's been the staff
5 that's evaluated the likes of these training testing
6 programs and that's set forth in detail in supplement
7 five. As far as the extended, I'm not aware of
8 anything that OI would have to contribute on the
9 remanded issue on training.

10 Even if they did, and the answer to whether
11 OI has something on an issue that will be before this
12 board is certainly -- would be different when we get
13 to the de con mailgram and the leak rate matters
14 because they are intimately involved in the
15 investigations which the staff has used as a basis for
16 its position. But, even if OI does have information,
17 OI is a commission level office not subject to the
18 customer control of the EDO and we can't compel them
19 to --

20 JUDGE SMITH: You can't.

21 MR. GOLDBERG: That's correct.

22 JUDGE SMITH: But what is the licensing
23 board going to do when it's -- if it is faced with a
24 situation where persons possess information necessary
25 to a decision and we can't produce it?

1 Do you know? That's not your responsibility
2 to advise if you don't choose to.

3 MR. GOLDBERG: I haven't thought about leak
4 rate matters and what kind of case the staff would put
5 on with respect to leak rate matters, but it's
6 certainly possible that we would have someone from OI
7 testify. We had, at the cheating proceeding,
8 investigators testify about their investigations.
9 That would be done with the cooperation of that
10 office.

11 JUDGE SMITH: You know, it just occurred to
12 me that we're violating the promise we made to TMIA
13 not to stray from these issues and get into matters
14 that would affect them, so I think that was unfair on
15 my part to go that direction.

16 MR. GOLDBERG: Well, I don't know. The
17 rules seem clear that the staff is the party to the
18 proceeding and there is a mechanism under appropriate
19 circumstances in findings for the discovery against
20 the staff, but it does not extend to commissioners or
21 commission level offices and there simply is no
22 authority for the board to direct such a discovery.

23 JUDGE SMITH: So, you would have us then
24 give you a protective order that you don't have to go
25 to the commissioners -- Office of Investigations?

1 MR. GOLDBERG: Anyone other than the
2 executive director for operations and his staff and
3 his present staff.

4 JUDGE SMITH: Simply to put an end to it, we
5 will grant the protective order. Judge Linenberger
6 points out that we don't have the authority and he
7 don't have the authority, an order may not be needed.
8 However, for the purpose of making the case neat, we
9 rule that you're not able nor required to contact
10 former employees, former commissioners, present
11 commissioners or the Office of Investigations.

12 However, I expect that before this case is
13 over, the question about Office of Investigations
14 might come up and I would ask that you be prepared to
15 address the problem that we might have, if they have
16 information needed in the hearing.

17 MR. AU: Judge Smith, will you make the
18 order limited to this set of interrogatories since
19 there may be others?

20 JUDGE SMITH: That's all we're doing today.
21 Yes.

22 MR. GOLDBERG: The only problem with that,
23 Judge Smith, is every time we get a discovery request
24 it has the same boiler plate about go to former
25 commissioners and Office of Investigations and gather

1 all the information and then we're forced to do
2 something the board has indicated they don't want to
3 do and that is file the very same objection.

4 JUDGE SMITH: Well, all right. I wouldn't
5 be opposed to making it a general ruling in the case
6 except we promised that TMIA or any party that didn't
7 choose to come today would not have their rights
8 affected.

9 JUDGE SMITH: If it comes up again, they
10 can expect the same ruling, perhaps, unless they have
11 arguments we haven't looked at. But the protective
12 order applies to this party, and as a matter of fact,
13 I assured Miss Weiss that if she decided not to come,
14 the matters that UCS was handling outside this
15 interrogatory would not come up either.

16 However, I don't think we should have to go
17 into that. We know what the arguments are. We know
18 what the ruling has been, and if a similar situation
19 arises, you can anticipate a similar ruling.

20 MR. GOLDBERG: There's one other thing I
21 want to point out, and that is that today we are, the
22 staff is filing a response to TMIA interrogatories on
23 training. Those are being prepared back in our
24 offices and may have already been sent back. Our
25 objections to TMIA's interrogatories on training are

1 similar to the ones we filed with respect to UCS's
2 interrogatories on training.

3 Naturally, because the board is ruling now
4 on these, our response, TMIA's interrogatories which
5 is being filed today, does not reflect today's ruling
6 by the board. So I didn't want the board to think in
7 a day or two when they read that, that we've ignored
8 their rulings. But because the necessity that we
9 complete that response and file it today in the
10 board's prehearing conference today, there's no way we
11 could have incorporated today's ruling in the response
12 that has to be filed today.

13 What we will do is to the extent that
14 anything we said in there is inconsistent with today's
15 rulings, we will supplement our response.

16 MR. WOLFE: We would hope we would get
17 together with Miss Bernabei shortly and go through
18 your responses to TMIA's interrogatories, and bring
19 you in tight on what the board did discuss today if
20 she hasn't already, or will not have already read the
21 transcript of this conference.

22 JUDGE SMITH: Now, Mr. Goldberg, it still
23 remains that the staff's argument that none of this is
24 necessary to a decision. The difficulty is the
25 argument has all been based upon scope and relevance

1 and materiality and burdens and the practicalities.
2 Do you wish to pursue the necessary decision aspect of
3 it?

4 MR. GOLDBERG: I don't think that it needs
5 any further discussion. We stated our reasons why we
6 think the scope of discovery on this issue goes beyond
7 the issue as it was defined by the appeal's board and
8 this licensing board. Because much of it goes beyond
9 the scope of the issue in our view, it was not
10 necessary.

11 JUDGE SMITH: That was the context in which
12 necessary decision was made?

13 MR. GOLDBERG: Yes.

14 JUDGE SMITH: All right.

15 MR. GOLDBERG: And to the extent that the
16 board disagrees with us and they find it necessary,
17 then we'll certainly cooperate with that.

18 JUDGE SMITH: I though there was another
19 standard perhaps you were using.

20 MR. GOLDBERG: No, it was simply because we
21 view it as beyond the scope of the issue, that to the
22 extent the board agrees with us, that to the extent
23 the board agreed with us, they wouldn't find it
24 necessary for proper decision. If the board
25 disagreed, naturally, then we would comply.

1 JUDGE SMITH: All right.

2 Miss Bauser?

3 MS. BAUSER: Mr. Chairman, I just wanted to
4 give the board an update on the matter we brought to
5 your attention the end of last week. This is really
6 just a progress report. Miss Weiss and I met on
7 Friday, and I think we have reached an agreement both
8 on our motion to compel and licensee's and UCS's
9 interest in licensee supplementing its response to
10 UCS's interrogatories.

11 We have a letter in draft right now that
12 we're going to discuss and finalize hopefully
13 tomorrow. And at that time, I expect to be able to
14 ask the board -- to withdraw our motion. But I'll
15 wait and let the board know.

16 JUDGE SMITH: Now your motions for
17 sanctions. Do you continue to pursue that?

18 MR. JORDAN: Your Honor, my feeling on that
19 is that for the most -- our view is that this is un-
20 necessary, that the positions were frivolous, and
21 that we would seek the extension that we referred to
22 in the motion.

23 JUDGE SMITH: As punishment?

24 MR. JORDAN: It wouldn't be so much as
25 punishment. Well, actually I was going to seek

1 punishment in the nature of having the staff denied an
2 opportunity to participate in the training of
3 litigation, but I was overruled. So we're not seeking
4 punishment, we would really be seeking relief. It
5 doesn't particularly punish anyone.

6 JUDGE SMITH: So as far as relief is
7 concerned, does this position put you behind in your
8 discoveries? Is that the point that you're making?

9 MR. JORDAN: Yes, it would -- I don't know
10 when we would get the answers, but it would be however
11 many days that is after September 19th.

12 JUDGE SMITH: I think that the staff is
13 going pretty far, and I'm sure they're going to go
14 even farther by pointing out to you where in the
15 previous testimony and published documents, that other
16 places where information is available. And they will
17 go beyond, I'm sure, what they have to do. I think
18 you'll come out whole on it, so we'll deny this issue.

19 MR. JORDAN: Okay.

20 Actually, I was going to withdraw it and
21 that say let's forget it until what the -- where the
22 crunch comes.

23 JUDGE SMITH: Anything further this
24 afternoon?

25 Okay.

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We're adjourned. Off the record.

(Whereupon, on September 24, 1984, the
hearing was adjourned.)

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CERTIFICATE OF PROCEEDINGS:

This is to certify that the attached proceedings,
IN THE MATTER OF: METROPOLITAN EDISON COMPANY
(THREE MILE ISLAND NUCLEAR
STATION, UNIT NO. 1)

DOCKET NO. 50-289-SP

DATE: 24 SEPTEMBER 1984

PLACE: BETHESDA, MD

were held as herein appears and that this is the original
transcript for the file of the Commission.

REPORTER: JOHN CRASS

SIGNED: John CrassTRANSCRIBER: Neal R. GrossSIGNED: Neal R. Gross