

ORIGINAL  
UNITED STATES  
NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF:

DOCKET NO: 50-354-OL

PUBLIC SERVICE ELECTRIC & GAS COMPANY

(Hope Creek Generating Station)

PREHEARING CONFERENCE

LOCATION: BETHESDA, MARYLAND

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DATE: MONDAY, DECEMBER 17, 1984

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: :  
PUBLIC SERVICE ELECTRIC & GAS : Docket No. 50-354-OL  
COMPANY :  
(Hope Creek Generating Station) :  
-----X

Nuclear Regulatory Commission  
Fifth Floor Hearing Room  
4350 East-West Highway  
Bethesda, Maryland

Monday, December 17, 1984

The Prehearing Conference in the above-entitled matter  
convened at 9:00 a.m.

BEFORE:

MARSHALL E. MILLER, Chairman  
Atomic Safety and Licensing Board

PETER A. MORRIS, Member  
Atomic Safety and Licensing Board

DAVID R. SCHINK, Member  
Atomic Safety and Licensing Board

APPEARANCES:

On behalf of the Applicant:

TROY CONNER, JR., ESQ.  
JESSICA H. LAVERTY, ESQ.  
Conner & Wetterhahn  
1747 Pennsylvania Avenue, N.W.  
Suite 1050  
Washington, D. C. 20006

RICHARD FRYLING, JR., ESQ.  
Law Department  
Public Service Electric & Gas Company  
80 Park Plaza  
P. O. Box 570  
Newark, New Jersey 07101

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APPEARANCES (Continued):

On behalf of Intervenor:

RICHARD E. SHAPIRO, ESQ.  
SUSAN C. REMIS, ESQ.  
JOHN P. THURBER, ESQ.  
Department of the Public Advocate  
Division of Public Interest Advocacy  
CN-850, Justice Complex  
Trenton, New Jersey 06825

On behalf of the Nuclear Regulatory  
Commission Staff:

LEE SCOTT DEWEY, ESQ.  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

DAVID WAGNER  
Project Manager, Hope Creek  
Generating Station

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| Board Exhibit 12 - Document, Public hearing<br>on Review of the Status of Hope Creek<br>Nuclear Power Plant | 322               | 323             |

P R O C E E D I N G S

1  
2 JUDGE MILLER: Good morning, ladies and  
3 gentlemen. This is a proceeding in the matter of Public  
4 Service Electric and Gas Company, et al, the Hope Creek  
5 Generating Station, Unit 1.

6 As you know, this Board has held a previous  
7 meeting with Counsel representing parties about year ago.  
8 Since then Dr. David Schink, to my right, has been made a  
9 member of the Board and you've met Dr. Peter Morris. My  
10 name is Marshall Miller.

11 The Board, on November 21, 1984, with several  
12 semi-motions apparently somewhere in the proceeding, entered  
13 an order to show cause that these operating proceedings not  
14 be dismissed, with notice published in the Federal Register  
15 and duly given to all parties. We also asked that there be  
16 status reports and permitted parties to file whatever they  
17 wanted to by a week before. I think we had one filing. I  
18 asked Counsel to be prepared to discuss certain matters and  
19 the like. We will now have the Counsel identify themselves  
20 for the record, please, starting with the Applicants.

21 MR. CONNER: If the Board please, my name is Troy  
22 B. Conner, Jr. With me is Jessica Laverty from our firm of  
23 Conner and Wetterhahn. Also present is Richard Fryling,  
24 Jr. from Public Service Electric and Gas legal department.

25 Our appearance have already been made in the

1 record.

2 JUDGE MILLER: Who's representing now the Public  
3 Advocate?

4 MR. SHAPIRO: Yes, your Honor. My name is  
5 Richard Shapiro with the Department of the Public Advocate.  
6 With me today is Susan Remis, also John Thurber. They are  
7 also attorneys with the Department of the Public Advocate.

8 JUDGE MILLER: Staff?

9 MR. DEWEY: My name is Lee Dewey. I'm the  
10 attorney for the Staff in this case. With me is David  
11 Wagner, the Project Manager for Hope Creek.

12 JUDGE MILLER: Is there anyone else who expects  
13 or desires to be heard in any way? If so, we'll have them  
14 identified. Anyone in the courtroom or anyone known to  
15 Counsel?

16 (No response.)

17 JUDGE MILLER: I take it then, this concludes the  
18 cast in this proceeding. The Board would like, first of  
19 all, to direct your attention to the order that was entered  
20 by the Board on December 21, 1983. That's the order to  
21 which I alluded entitled special pre-hearing conference  
22 order. There was a proceeding, as you know, with most of  
23 you held November 22, 1983 at Salem, New Jersey. There we  
24 discussed a number of matters pertaining to issues,  
25 contentions, and the like. Some rulings were made from the

1 bench as to many of those matters at any rate. They were  
2 filed out with the special pre-hearing conference order of  
3 December 21 which I mentioned, and on page 19 of the Board's  
4 order it was provided, "The parties are directed to commence  
5 discovery immediately and to proceed with expedition. They  
6 are encouraged to make a voluntary disclosure both formally  
7 and informally of all information, data, documents, and the  
8 like which could reasonably be relevant to the admitted  
9 issues.

10 We note that relevance for discovery purposes may  
11 be somewhat broader than the legal principles of relevance  
12 and materiality that may govern the admissibility of  
13 evidence. The Board incorporates by reference the discovery  
14 directions and nine rules set forth in Texas Utilities  
15 Generating Company, et al, Commanche Peak Steam Electric  
16 Station Units, 1 and 2, which was Licensing Board Panel  
17 30-31-22 reported as published in 14 NRC 150 at pages 154 to  
18 57. For the convenience of the parties, a copy of such  
19 discovery rules is appended here to Attachment A. That's  
20 the end of the quoted portion of the order. There was  
21 attached to the discovery directives which the Board had  
22 established in the Commanche Peak case 14 NRC 150 starting  
23 at page 154 which, among other things, directed the parties  
24 to confer directly and immediately regarding all discovery  
25 matters or any other subject of motions to endeavor to

1 resolve them, not to file motions until they had and could  
2 recite what efforts had been made and the like. These are  
3 specific rules developed in another proceeding and made  
4 applicable here and brought to the attention of Counsel on  
5 more than one occasion since then.

6           What we'd like to know, first of all, is what has  
7 happened in that ensuing one-year period with reference to  
8 the various matters, the discovery, the motions, the  
9 compliance or non-compliance with the rules of procedure  
10 which the Board has set up in Commanche Peak and adopted by  
11 reference and the like so we can find out from that  
12 background where we are today. We will then get into  
13 whatever specific motions there are and we know of at least  
14 several that are pending.

15           For this purpose I guess we should look first to  
16 the Applicant.

17           MR. SHAPIRO: Judge Miller, to date there have  
18 been several sets of interrogatories.

19           JUDGE MILLER: That will be discussed. I'm  
20 talking now to the Applicant.

21           MR. SHAPIRO: I'm sorry.

22           JUDGE MILLER: Each of you in turn will advise  
23 the Board fully as to what has transpired and you will  
24 refer, of course, to whatever matters there are including  
25 the ones you alluded to. But we'll start out first of all

1 hearing from Applicant's Counsel Mr. Conner.

2 MR. CONNER: If the Board please, if the record  
3 will reflect in the case immediately following the Board's  
4 order of December 21, 1983, we filed preliminary  
5 interrogatories on January 3, 1984 which were responded to  
6 by the Public Advocate on the 18th of January.

7 JUDGE MILLER: How many interrogatories were  
8 there in their first set of preliminary interrogatories?

9 MR. CONNER: About eight. Those were primarily  
10 to identify the witnesses and the documentation they relied  
11 upon. Having obtained what there was we then filed --

12 JUDGE MILLER: Wait a minute. Maybe you could  
13 tell us as you go along what did you obtain? If you can't  
14 find it readily we'll, of course, get it when we hear from  
15 the Intervenor. But if you can do it sequentially as we go  
16 it will give us a more complete record, perhaps.

17 MR. CONNER: We were advised on contentions 1  
18 through 3.

19 JUDGE MILLER: Which are what in substance? What  
20 were you asking for?

21 MR. CONNER: We were asking for the names of the  
22 individual witnesses and the documentation. On 1 through 3  
23 the Public Advocate stated that it will inform the Applicant  
24 of the identities of all experts to be called. As soon as  
25 we complete the consultant's selection and contract

1 negotiation process the Public Advocate anticipates that  
2 this will be accomplished in the near future.

3 JUDGE MILLER: What was the date of that  
4 communication?

5 MR. CONNER: January 18th.

6 JUDGE MILLER: 1984?

7 MR. CONNER: 1984.

8 JUDGE MILLER: Proceed.

9 MR. CONNER: On contention 4, the Public Advocate  
10 noted that there were two individuals identified. I can go  
11 through this but this was a contention that was dropped.

12 JUDGE MILLER: In light of that you may shorten  
13 your response.

14 MR. CONNER: Then it simply referred generally to  
15 various documents but not by name and then following this  
16 basic information we filed a full set of interrogatories to  
17 be based upon what information we had on January the 30th,  
18 1984, which were 10 pages long.

19 JUDGE MILLER: How many interrogatories or  
20 sub-interrogatories, approximately?

21 MR. CONNER: They were broken down by  
22 contentions.

23 JUDGE MILLER: All right.

24 MR. CONNER: There were approximately 25  
25 interrogatories with subdivisions under three pertinent

1 contentions. We received a response to this about a month  
2 later on March 18, 1984 and this had various information and  
3 referred to possible testimony by Dr. Stephen Hanauer.

4 JUDGE MILLER: Spell that, would you please?

5 MR. CONNER: H-a-n-a-u-e-r, and a p-h for  
6 Stephen. That attached certain documentation or parts  
7 thereof. The Staff also filed certain interrogatories but  
8 that, I guess, you will get from them. While we were  
9 waiting on these responses to come in and pursuant to the  
10 Board's suggestion that we not pursue all discovery by  
11 interrogatories, we requested the application for the  
12 subpoena of the Intervenor, Mr. Rodriguez, on March 13,  
13 1984. The Board issued the subpoena two days thereafter.

14 A motion to quash was filed by the Public  
15 Advocate on March 26 and accompanying that was an affidavit  
16 which is in the record and which, in effect, said, he had no  
17 personal knowledge and relied only on the information given  
18 to him from two of his Staff attorneys and some  
19 documentation.

20 On that basis, given the fact that the Public  
21 Advocate admitted having no personal knowledge of his  
22 contentions we filed a motion to dismiss because of the  
23 failure to show a legitimate basis pursuant to 2.714. The  
24 Board denied our motion on June 18, 1984.

25 On July 3, 1984 there was an intervening

1 withdrawal of Counsel by the Public Advocate. So it was not  
2 until July 3, 1984 that we again requested identification of  
3 the Public Advocate's witnesses.

4 On July 11, 1984, we were informed by a  
5 letter from one of the Public Advocate's lawyers that the  
6 Applicants would be informed as soon as the lead counsel and  
7 expert witnesses were selected. This was in July of 1984.

8 We then filed a motion dated July 30th to compel  
9 the designation of witnesses or in the alternative, to  
10 dismiss the proceeding. The response to that was a motion  
11 for extension to respond to the Applicant's motion filed by  
12 the Public Advocate on August 3, 1984.

13 The Board, on August 10th, issued an order  
14 directing that the Public Advocate would have until August  
15 20th "to identify it's witnesses and to make them reasonably  
16 available for depositions within two weeks thereafter.  
17 Noncompliance with such dates may be grounds for dismissal  
18 or other sanctions." It's on pages 2 and 3 of that order.

19 The response by the Public Advocate was to  
20 request additional time. They did identify three witnesses.

21 JUDGE MILLER: Pardon me. What's the problem  
22 back there?

23 (Discussion off the record.)

24 JUDGE MILLER: Proceed.

25 MR. CONNER: The three named witnesses were not

1 made available for depositions.

2 JUDGE MILLER: Who were the three named  
3 witnesses?

4 MR. CONNER: Bridenbaugh, Minor, and Hubbard, who  
5 have a firm in California.

6 JUDGE MILLER: What's the name of the firm?

7 MR. CONNER: I knew you were going to ask that.  
8 The MHB Associates. I'm never sure what sequence they're  
9 in.

10 JUDGE MILLER: Okay.

11 MR. CONNER: Then we filed the motion for default  
12 and then on September 11, 1984 -- well, I should note that  
13 prior to the Public Advocate's response the Staff filed a  
14 response on September 10 opposing any dismissal. A day  
15 later the Public Advocate responded in opposing the  
16 motion. It, in that motion, suggested that it be given  
17 essentially through the month of October to get ready.

18 JUDGE MILLER: Rather than paraphrasing, perhaps  
19 you'd better be a little more precise and read what they  
20 actually said in their written either motion or response.

21 MR. CONNER: If I may have just one second. Here  
22 it is.

23 (Pause.)

24

25

2 DAVbur 1                   They said on page 12 of their response, dated  
2 August 20, 1984, that in effect Mr. Bridenbaugh was  
3 preparing two cases. Quote: "Mr. Hubbard and  
4 Mr. Bridenbaugh anticipate that they will have little, if  
5 any, time to begin review of the materials relating to Hope  
6 Creek Station during their heavy schedules in late August  
7 and September. They will first be able to prepare for this  
8 licensing proceeding at the beginning of October 1984."

9                   Continuing to quote: "As is evidenced from the  
10 heavy schedule and other commitments of our three experts,  
11 the Public Advocate respectfully requests that the time for  
12 depositions, which are detailed above, be extended until the  
13 month of October 1984."

14                   The Public Advocate noted that they would actively  
15 pursue all other means of discovery available within the  
16 next several weeks. That is on page 15. They requested  
17 that the depositions be scheduled in this matter during the  
18 month of October.

19                   Now, given the fact that the Public Advocate had  
20 filed this and having no other guidance, we waited until the  
21 month of October had expired and filed our amended motion to  
22 dismiss, based upon the availability of the witnesses being  
23 made available for deposition.

24                   I would note that we were surprised, given the  
25 Board's order of August 20th, that the Public Advocate now

1 takes the position that we were somehow supposed to notice  
2 taking depositions when they had asked that they have this  
3 time to avoid it.

4 JUDGE MILLER: We were a little surprised, too,  
5 but we are deferring any consideration of that until we hear  
6 directly from counsel.

7 Proceed.

8 MR. CONNER: We then -- well, that of course led  
9 to the Board's order of November 21, 1984, setting down a  
10 show cause order.

11 The only other matter to note is that now the  
12 Public Advocate has filed its second set of interrogatories  
13 and request for production of documents last week, December  
14 13th, 1984.

15 That completes the basic chronology.

16 I would note the Board in its order suggested that  
17 we file any information we have, any progress reports we  
18 have. We filed nothing because we had nothing to report,  
19 except I can now advise the Board that the Advisory  
20 Committee on Reactor Safeguards met to consider the  
21 technical aspects of the case and has stated to the  
22 Applicant that it will receive its letter and sign-off by  
23 the ACRS at the meeting -- well, the meeting was Thursday  
24 and Saturday.

25 JUDGE MILLER: Last week?

1 DAVbur

1 MR. CONNER: Of last week, yes, sir.

2 JUDGE MILLER: Perhaps we will have some  
3 information from the Board. We will see when we get to  
4 that. I am sorry, from Staff. That is correct.

5 MR. CONNER: That serves the basic chronology. I  
6 don't know if you want any further statement from us at this  
7 time or not.

8 JUDGE MILLER: You are free to do so. First of  
9 all, we did want the basic chronology of these various  
10 orders, and so forth.

11 If you are prepared to go forward -- if no one has  
12 any objection -- you may proceed to argue whatever matters  
13 are pending before the Board.

14 MR. SHAPIRO: Judge Miller, if I may, I think it  
15 would be helpful if we review the status of the record with  
16 the other parties first, only because --

17 JUDGE MILLER: That is all right. We have no  
18 problem with that.

19 MR. SHAPIRO: There is an emphasis that Mr. Conner  
20 has given to the chronology which is not entirely  
21 objective. It reflects his view of the chronology. I think  
22 there are other views, and I would think that the Board  
23 would want to have all of those.

24 JUDGE MILLER: As I say, we have no problem.  
25 Don't flog a dead horse before it bites you.

1 MR. SHAPIRO: Thank you.

2 JUDGE MILLER: You and your colleagues may proceed  
3 now with the same description of what occurred in much the  
4 same fashion. Then I will give everyone an opportunity to  
5 argue.

6 But you may go ahead and present your  
7 information.

8 MR. SHAPIRO: Thank you, Judge Miller.

9 Just for a slight bit of background because I  
10 know Dr. Schink has not had an opportunity to appear at a  
11 hearing with the Public Advocate before.

12 JUDGE MILLER: Hardly anybody has. We have only  
13 had one time a year ago. We do appreciate it, if you feel  
14 that anything might be helpful.

15 MR. SHAPIRO: The Public Advocate is a cabinet  
16 level official in the State of New Jersey who has a  
17 statutory responsibility to protect the public interest of  
18 the citizens of New Jersey.

19 The Public Advocate intervened in these  
20 proceedings because he made a determination that  
21 intervention would be appropriate to present the claims and  
22 concerns that New Jersey citizens may have about the safety  
23 and health implications of the operation of a facility  
24 within the State of New Jersey.

25 JUDGE MILLER: At this point, this has been done,

1 DAVbur

1 I think, before for the record, but for utter clarity I  
2 think we were told before by counsel representing the Public  
3 Advocate of the State of New Jersey that he did not purport  
4 to represent the State of New Jersey as such but that this  
5 was an intervention in accordance with his statutory powers  
6 as a party, not on behalf of an interested state, under  
7 Section 2.715.

8 I think at that same -- only other meeting we have  
9 had with counsel and parties -- that some other  
10 department -- I forget who it was -- but it said the views  
11 expressed may not be the same. They didn't go into it, and  
12 so forth.

13 Is that a correct description of the role as you  
14 now understand it?

15 MR. SHAPIRO: Yes, with one exception, and that is  
16 why the Public Advocate, by virtue of the Board's procedures  
17 and the Commission's procedures, intervenes in a particular  
18 intervenor status.

19 JUDGE MILLER: He intervenes as a full party.

20 MR. SHAPIRO: He intervenes as a full party, but  
21 the Public Advocate is a state level official who is charged  
22 under deposit of law in the State of New Jersey with  
23 representing the interests of the citizens of New Jersey.  
24 He is an independent state official.

25 So necessarily, by virtue of the statutory

1 framework in New Jersey, he would not be designated by the  
2 Governor. That would be the Attorney General.

3 But the Public Advocate, in order to maintain and  
4 preserve the independence of this position, does take a  
5 position on behalf of the citizens of the state.

6 JUDGE MILLER: As distinguished from the state per  
7 se?

8 MR. SHAPIRO: Does not take instructions from the  
9 state, and that is because the nature of the office requires  
10 that type of independence.

11 JUDGE MILLER: The nature of the office requires  
12 whatever it requires. We ruled a long time ago -- I think  
13 maybe at your client's request -- that we weren't going to  
14 go into the construction or intricacies of the statute or  
15 statutory role of the Public Advocate of the State of New  
16 Jersey, although there were a number of citations.

17 It has been our understanding -- and I think your  
18 associate has been very helpful in keeping us informed as to  
19 the proceedings and status of the proceedings in the state  
20 court of New Jersey. In fact, I think she left a note --  
21 you might just put that into the record -- as to the present  
22 pendency of whatever action or proceeding there is in the  
23 State of New Jersey.

24 MR. SHAPIRO: At the present time there is a  
25 petition for certification that was granted by the New

1 Jersey Supreme Court from a decision of the Appellate  
2 Division of the New Jersey Codes that the Public Advocate  
3 properly exercised his discretion.

4 That just essentially means under New Jersey  
5 procedure that the State Supreme Court will review that  
6 decision of the Appellate Division.

7 JUDGE MILLER: Is that similar to a certiorari?

8 MR. SHAPIRO: Precisely.

9 JUDGE MILLER: Has there been a filing of briefs?

10 MR. SHAPIRO: No, they decide the case on the  
11 record in the Appellate Division unless the parties want to  
12 file supplemental briefs. In this case it was exhaustively  
13 briefed in the Appellate Division.

14 The only reason I raise the status of the office  
15 is because there has been a certain amount of ambiguity, I  
16 think, in the past about precisely what -- and this has led,  
17 I think --

18 JUDGE MILLER: We didn't think so because we  
19 sought to eliminate ambiguity at our last meeting. We have  
20 discerned none since. But that is why I asked you very  
21 precisely. I want to be absolutely certain we have got a  
22 record here.

23 We go back, we think we understand the status of  
24 the Public Advocate of New Jersey as a full party, with the  
25 responsibilities of a full party, and that he does not

1 represent nor purport to represent the State of New Jersey,  
2 either per se or pursuant to 2.715, which is an interested  
3 state which need not file contentions, and whatever else.

4 I just want to be sure there has been no change in  
5 your perception because there is no ambiguity. Now, if  
6 there is any, let's find out right now.

7 MR. SHAPIRO: What I am saying is that the Public  
8 Advocate does not purport to represent the state's  
9 interest. He purports to represent and does represent under  
10 statutory law the interest of New Jersey citizens.

11 JUDGE MILLER: Doesn't every intervenor purport to  
12 do the same thing, every intervening party we have ever seen  
13 in an NRC proceeding?

14 MR. SHAPIRO: Yes, but I think in very few  
15 situations -- in fact, since the Public Advocate is unique,  
16 I can say with some degree of confidence, in very few  
17 situations does the Public Advocate also have positive  
18 statutory law from the state legislature giving it the  
19 specific authority which it seeks to exercise in these  
20 proceedings, which is to intervene on behalf of the public  
21 interest of New Jersey citizens.

22 There is an ambiguity about whether the Public  
23 Advocate can intervene in federal proceedings. That is the  
24 state court question that has to be resolved.

25 JUDGE MILLER: We don't want to get into that.

1 MR. SHAPIRO: There is no question that the Public  
2 Advocate has the authority and the responsibility under  
3 state law to take appropriate measures to protect the health  
4 and safety of New Jersey citizens.

5 I only raise that because Dr. Schink is new on the  
6 panel and I just wanted to clarify our status.

7 JUDGE MILLER: He is new, but I am old, and I just  
8 want to be very clear because I have had lawyers go hence  
9 and start arguing a month later about what they said the  
10 Board said. I want to very clear there is no ambiguity in  
11 the Board's mind, it is as I have stated it, and you will  
12 find it, I think, in the transcript of the proceedings  
13 unless you are injecting some ambiguity, and I understand  
14 now that you are not.

15 Is that correct?

16 MR. SHAPIRO: There is no ambiguity in my mind.

17 JUDGE MILLER: In my mind either.

18 MR. SHAPIRO: The Public Advocate is representing  
19 New Jersey citizens under statutory authority vested in him  
20 to do that.

21 JUDGE MILLER: I don't care about the statutory  
22 authority. If you seek any special preference because of  
23 statute, you had better say so now. As of now, we regard  
24 your client as any other intervenor granted intervention  
25 with now, at least, viable contentions, no better, no

1 DAVbur 1 worse.

2 MR. SHAPIRO: We cannot purport to represent that  
3 the Governor or state official --

4 JUDGE MILLER: Which would be the Attorney  
5 General?

6 MR. SHAPIRO: Which would be the Attorney General  
7 under New Jersey law.

8 But again I am not trying to create ambiguity  
9 where none exists, but I am trying to clarify some our  
10 status.

11 JUDGE MILLER: What are you trying to clarify?  
12 That is why I am trying to be very precise with you because  
13 we can go on very rapidly unless you have got some residual  
14 matter that is on your mind and that is not in the record.  
15 If we have covered the record, fine. We don't want to  
16 belabor the point.

17 But I seem to detect some overtone here, and I  
18 don't like to have potential ambiguities in the record as we  
19 go along. That is why we meet with counsel.

20 I think it is clear that you have been dragging  
21 along some concept that doesn't seem to me to be either  
22 necessary or necessarily valid, and I want to be sure about  
23 that.

24 You are going to be treated the same, and your  
25 client, as a participant, as an intervenor, under NRC

1 regulations, is going to be treated the same as any other  
2 party intervenor, no better, no worse.

3 Is this consistent with your understanding of your  
4 role or not?

5 MR. SHAPIRO: Let me just --

6 JUDGE MILLER: You can't answer me yes or no?

7 MR. SHAPIRO: Your Honor, yes, but.

8 JUDGE MILLER: Give me your "but."

9 MR. SHAPIRO: The "but" is that I think in  
10 considering the matters before the Board -- and I hope when  
11 we get to argument we will raise this again -- but I think  
12 in considering the matter before the Board, I don't think  
13 the Board -- or I respectfully request that the Board not  
14 ignore the fact that the Public Advocate appears as a state  
15 official to protect the health and safety of New Jersey  
16 citizens under statutory law.

17 JUDGE MILLER: We may not ignore it, but I am  
18 pointing out to you now it is not going to buy anything,  
19 even a cup of coffee, if you are seeking to differentiate  
20 the role of the Public Advocate as an admitted intervenor  
21 with admitted contentions. No better, no worse.

22 Now, I remind you, the Staff is a party, too.  
23 They may have a lot of other roles, but we are independent.  
24 The Board is independent from the NRC Staff, and the Staff  
25 here is treated as a party, except for regulations, but we

1 wouldn't expect to have requests for special consideration  
2 from anyone unless some reason is given, and we would like  
3 to have the reason, if any, given in advance so we don't  
4 have to spend time in the future on sorting out the  
5 adjudicatory roles.

6 MR. SHAPIRO: As I understand the law of the  
7 Commission and the Board, in some of these cases there is a  
8 special concern given to state parties that represent  
9 statewide interests.

10 JUDGE MILLER: Parties that represent the state, I  
11 believe, are interests that descend from the state. That is  
12 why I have been carefully differentiating your statutory  
13 role. You represent or purport to represent, quite  
14 properly, the interests of the citizens, consumers, and the  
15 like of the State of New Jersey. So do many intervenors, by  
16 the way.

17 X, Y, Z intervenor can come in and say we  
18 represent the public interest and here is why. There is no  
19 problem with that because we look to see what the public  
20 interest is.

21 But if you are seeking some special status, I  
22 might as well tell you right now I don't think we will give  
23 it to you.

24 MR. SHAPIRO: I think our authority fairly can be  
25 said to descend from the state in that the state legislature

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1 has given us our author'ity. My understanding is that that  
2 is a factor that the Board is appropriately supposed to  
3 consider in determining how to approach a party.

4 JUDGE MILLER: I don't agree with you there, but  
5 we will give all of you a chance to brief that out and be  
6 heard. We do not agree with that concept.

7 You may be given a lot of things, but when you  
8 come here and seek to be a party, you are a party, no  
9 better, no worse, unless you come in as a representative of  
10 the sovereign state. That is a different status, yes, under  
11 both law and under regulation, but you are not there. We  
12 told you and your predecessor that a year ago, and I just  
13 wanted to be sure there was no existing or continuing  
14 confusion, or if there is, we will give you a chance to  
15 brief it and be heard.

16 But as of now, you and everybody else is going to  
17 be treated as an intervening party, with contentions, with  
18 the responsibilities that flow. As I say, you will be  
19 treated the same as any other admitted party.

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1 MR. SHAPIRO: If I can defer any further  
2 discussion of that argument, your Honor.

3 Now with respect to the chronology presented by  
4 Mr. Conner, I think in terms of dates and in terms of maybe  
5 an overview of the contents, it is somewhat correct.

6 I just want to clarify a couple of things in the  
7 record. First of all, we, at all times, have attempted to  
8 comply with the rules of the Commission. So at the point at  
9 which we named our expert witnesses in August and also filed  
10 an extension of time, we were proceeding under 10 CFR  
11 2.7111, raising an obvious difficulty. And that was our  
12 witnesses would not be available because of other  
13 commitments. That was something that in litigation occurs.  
14 It's a problem, a difficulty, but we at that point said that  
15 while our witnesses are not available immediately for  
16 depositions, they would be available in October.

17 I think that in response to that, the Staff's  
18 position throughout these proceedings --

19 JUDGE MILLER: Staff can speak for itself. You  
20 just tell us the chronology as you understand it and as your  
21 client wants the record to be maintained. Hopefully, when  
22 we get into argument, we'll be hearing from the Staff, but  
23 let's not start relying on others. Come in on the strength  
24 of your own case.

25 MR. SHAPIRO: I then, in terms of the month of

1 October, I can harken back to a statement by the Chairman at  
2 the prior hearing, in which you emphasized on a number of  
3 occasions that there is much a lawyer can and should do with  
4 a telephone. And I think that while Mr. Conner --

5 JUDGE MILLER: We did say that, and we do adhere  
6 to it. If you've got some references to telephonic  
7 conferences, let us have the date and the substance of it.

8 MR. SHAPIRO: My point was, that while the  
9 Applicants said that they waited until October had expired  
10 and then fired an additional motion --

11 JUDGE MILLER: What do you say? You're using this  
12 as an argument. I asked if you people wanted to argue as  
13 you went along, and you wanted to separate it. You wanted  
14 to separate, present the facts in an objective fashion and  
15 then argument. Now you're trying to have both.

16 Let's get just the facts. If you're going to talk  
17 about telephones, tell us when, where and whom, or whatever  
18 facts you want. Go ahead. Give us the facts as you  
19 understand them.

20 MR. SHAPIRO: With all due respect, I think  
21 Mr. Conner's presentation was hardly objective in that  
22 respect.

23 JUDGE MILLER: We didn't ask for your comments  
24 about other counsel, and we don't want you commenting on  
25 them; we don't want them commenting on you. Now you're not

1 being objective. Get down to the facts, first of all, by  
2 background, and then we'll give you the chance to argue to  
3 your heart's content. This is not argument.

4 MR. SHAPIRO: Fine. Thank you.

5 With respect to October, we received no contact,  
6 and the record will reflect that there was no effort on the  
7 part of the Applicant to depose any of our witnesses who  
8 were available.

9 JUDGE MILLER: Was there any effort on your part  
10 to make any of them available? If so, how, where and when?

11 MR. SHAPIRO: Well, your Honor, if I can lapse  
12 into argument --

13 JUDGE MILLER: I'm just asking you, was there any  
14 effort made by you or your client to make them available?  
15 If so, just specify. If not, just say no.

16 MR. SHAPIRO: There's no legal responsibility.

17 JUDGE MILLER: You're arguing reasons now. I'm  
18 only asking you objectively, what effort, if any, did you  
19 make. If you made none, okay.

20 MR. SHAPIRO: We made no effort, because there's  
21 no legal responsibility to do so.

22 JUDGE MILLER: We'll determine the latter, but the  
23 former -- we'll have the record show you made no effort to  
24 comply with our order to make available.

25 Proceed.

1 MR. SHAPIRO: We made it clear in our motion --

2 JUDGE MILLER: We read your motion.

3 Go ahead. You're giving us facts.

4 MR. SHAPIRO: Your Honor --

5 JUDGE MILLER: Hold it. When we speak -- the  
6 reporter can't get two people. Now we reserve the right to  
7 intervene where we think you're not addressing what the  
8 Board feels will be helpful. I'm sorry. We mean no  
9 discourtesy, but we reserve that right throughout.

10 What we're trying to get you to do at this phase  
11 of the hearing, of the discussion, is to state objectively  
12 the facts as you understand them, much like an opening  
13 statement, not argument. And we'll get the same from the  
14 Staff. We will then give you plenty of opportunity to draw  
15 inferences therefrom, to argue who has what duty, and so  
16 forth.

17 This isn't the time that you're allotted.

18 MR. SHAPIRO: I'm not trying to argue. I'm trying  
19 to relate to you the contents of a motion.

20 JUDGE MILLER: I'm telling you, we've read the  
21 motion. We don't need that, because your gloss on it is  
22 argument, objectively and factually. We've read your  
23 motion. So go ahead with what you haven't told us.

24 MR. SHAPIRO: Could the record reflect that  
25 Mr. Conner was able to present the contents of motions and

1 that you are not allowing me to present the contents of  
2 motions?

3 JUDGE MILLER: We asked him to present the  
4 contents of motions, because he was describing motions. And  
5 when he came to something that was purporting to paraphrase  
6 your client's motion, we did stop him, just as we stopped  
7 you. And we said, if you're going to refer to what another  
8 lawyer said, we don't want to paraphrase. Get it. He dug  
9 it. Now we're saying the same thing to you.

10 If you've got some motion -- well, your own motion  
11 would be self-serving. If you got some portion of any  
12 motion that you want to read into the record, read it in.  
13 never mind the gloss. Don't argue it -- you'll get a  
14 chance later -- but go ahead and put it in the record.

15 MR. SHAPIRO: As we will explain in detail, this  
16 is from page 10 of the Intervenors' Petition for Additional  
17 Time within which to make expert witnesses available for  
18 deposition.

19 JUDGE MILLER: Is this an exact quote now that  
20 you're reading?

21 MR. SHAPIRO: The quote begins on page 10. "As we  
22 will explain in detail, our experts' previous commitments  
23 make it impossible for them to be available for depositions  
24 until October 1984."

25 JUDGE MILLER: Is that the end of the quote?

1 MR. SHAPIRO: That's the end of the quotation;  
2 yes, your Honor.

3 JUDGE MILLER: Is that the same quote that I had  
4 in Reed? Is there any difference? If so, tell us. I'm not  
5 trying to belabor it, but if you didn't read it accurately,  
6 tell us that.

7 MR. SHAPIRO: I don't recall the quote that he  
8 read, but with respect to Mr. Minor, one of our experts, on  
9 page 11, at the top of the page, we said that while  
10 Mr. Minor might have some time to commence his review of  
11 materials in the Hope Creek operation license matter during  
12 this time, he will not have adequate opportunity to prepare  
13 for the instant case until the month of September 1984.

14 We then stated with respect to Mr. Hubbard, and I  
15 quote from page 11, from September 5, 1984, until September  
16 28, 1984, Mr. Hubbard will be presenting testimony,  
17 assisting counsel in cross-examination and preparing for the  
18 case regarding the Shoreham Nuclear Facility."

19 With respect to Dale Bridenbaugh --

20 JUDGE MILLER: Does that close the quote?

21 MR. SHAPIRO: That's close quote. Thank you.

22 With respect to Dale Bridenbaugh --

23 JUDGE MILLER: Page what?

24 MR. SHAPIRO: This is on page 11 through 12, "From  
25 August 27th to September 1984, he will be preparing

1 testimony for a case before the Texas Public Utilities  
2 Commission concerning the Houston Light & Power Company.  
3 From September 7th to September 20, 1984, Mr. Bridenbaugh  
4 will be preparing for two cases. One concerns the Peach  
5 Bottom Nuclear Station and the other concerns a proceeding  
6 on the Clinton Nuclear Plant before the Illinois Commerce  
7 Commission. The hearing for both the Peach Bottom case and  
8 the Clinton case will be held during the week of September  
9 24, 1984."

10 In the middle of that page: "As is evidenced from  
11 the heavy schedule and other commitments of our three  
12 experts, the Public Advocate respectfully requests that the  
13 time for depositions which are detailed above be extended  
14 until the month of October 1984."

15 In the requested relief, we state on page 17 of  
16 the motion, "Due to our experts' heavy schedules, the  
17 parties' interests in opening discussions in this case and  
18 the need to have adequate time to prepare for meaningful and  
19 productive depositions, the Public Advocate respectfully  
20 requests that depositions be scheduled in this matter during  
21 the month of October."

22 And there was no subsequent notice in the record  
23 of any depositions by the Applicants.

24 So while it is our position -- well, the experts  
25 --

1 JUDGE MILLER: You can state your position, if you  
2 want.

3 MR. SHAPIRO: As stated in the emotion, the experts  
4 were available during the month of October for depositions.  
5 There was no notice of depositions. There was no telephone  
6 call to us to even informally schedule this. There was no  
7 effort to obtain information, to obtain a specific date, or  
8 to set a specific date. There's nothing in the record to  
9 reflect that.

10 Then subsequently, without any additional  
11 notification from the Applicant, we received the amended  
12 motion to dismiss the proceeding. That was filed in  
13 November 1984. I might add that from the date of our filing  
14 of our motion for extension of time to date, today, December  
15 17th, we have not received any notice of deposition or any  
16 indication from the Applicant as to when the Applicants wish  
17 to depose our experts.

18 I think with respect -- at the same time, one  
19 other point, your Honor. Then I'm finished. At the same  
20 time, as the Board is well aware, we filed a response to the  
21 Applicant's amended motion to dismiss the proceeding,  
22 setting forth the three essential facts, three essential  
23 positions.

24 JUDGE MILLER: Which page?

25 MR. SHAPIRO: This is the motion -- I'm sorry. We

1 have filed an Intervenor's Response to Applicant's Third  
2 Motion to Dismiss.

3 JUDGE MILLER: What day did you file that motion,  
4 Counsel?

5 MR. SHAPIRO: That motion was filed on September  
6 11, 1984.

7 JUDGE MILLER: Are there any portions of that you  
8 want to quote for the record?

9 MR. SHAPIRO: No, I can present that in argument.  
10 Thank you.

11 Then subsequently, November 21st, we filed  
12 Intervenor's Response to an Applicant's Amended Motion to  
13 Dismiss the proceeding. And in response to the Board's  
14 order to show cause, we filed a response to the order to  
15 show cause which basically reiterated the essential points  
16 that were made in our two previous motions, which have not  
17 yet been ruled on by the Board.

18 Thank you, your Honor.

19 JUDGE MILLER: Staff, we'd like for you to keep it  
20 also factual at this point. We will then subsequently open  
21 it up for argument.

22 MR. DEWEY: There's only two other matters in this  
23 chronology that I don't think were mentioned by the  
24 parties. That is, on January 30th of this year, we filed  
25 Interrogatories with the Public Advocate. The Public

1 Advocate responded to these interrogatories on March 16.

2 JUDGE MILLER: Can you tell us generally what were  
3 the nature of the interrogatories? Were they responses?

4 MR. DEWEY: They were broken down by the three  
5 contentions. We asked approximately 15 interrogatories in  
6 all, I think. The responses were, in general,  
7 satisfactory. I showed them to our reviewers afterwards.  
8 They felt that they had enough information at that point.

9 I asked them if they wanted me to ask any follow  
10 ups, and they said, no, they were satisfied.

11 JUDGE MILLER: Good.

12 We have divided up this portion of our conference  
13 with counsel, for the reasons that the record will reflect.

14 I think now that we will permit all counsel  
15 seriatim to argue their positions, draw whatever inferences  
16 they want and engage in flights of rhetoric or anything else  
17 that's reasonably relevant to the overall items.

18 So proceed.

19 MR. CONNER: I hope I will not disappoint the  
20 Board.

21 JUDGE MILLER: Since there have been no  
22 preconceptions, that's very difficult.

23 MR. CONNER: I would note quickly that Mr. Shapiro  
24 referred to a date as to Mr. Minor's availability, of  
25 September 19, 1984. His response at page 11 shows that

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1 should be September 17, 1984.

2 We have little enough to add to what is stated  
3 in our motion.

4 JUDGE MILLER: You're all going to be entitled now  
5 to argue directly to the Board. So you need no longer rely  
6 upon your documentation or the contents of your various  
7 motions. You don't have to repeat or reiterate. If you  
8 want to avoid redundancy, that's your choice, but I want to  
9 make it clear that the Board is imposing no inhibitions upon  
10 counsel's right to be heard and be heard fully on these  
11 matters.

12 MR. CONNER: The Board, after the first prehearing  
13 conference, as has already been noted, ordered the parties  
14 to proceed with discovery and confer informally and do as  
15 much as possible to expedite the proceedings. We tried to  
16 do that. We got motions for continuanc s. We sought to  
17 take the deposition of the Public Advocate, because, as we  
18 had pointed out with regard to Contention 4, we found, as  
19 shown by the Public Advocate, that it's entire position was  
20 based upon its lawyer's review of technical issues and  
21 contentions filed thereon.

22 I will not pursue the fact that I think we  
23 established that and made a motion that it be dismissed for  
24 lack of bases, because the Board denied our motion on that  
25 ground.

1                   Thereafter we again actively sought to take  
2 the depositions of their witnesses because we wanted to get  
3 this case over.

4                   JUDGE MILLER: Which witnesses?

5                   MR. CONNER: The three that have been identified.  
6 When we first sought to find out they were we had had some  
7 informal information to the effect that it would be the  
8 people from MHB Technical Associates, that's why we filed  
9 these additional motions and that's when we got more motions  
10 for continuance and delay.

11                   The fact that our counsel was gone was used as a  
12 big excuse for all kinds of things but there is no excuse  
13 for the fact than an organization financed by the taxpayers  
14 of New Jersey with as many lawyers as it had, could delay  
15 the case for approximately seven months because of the  
16 departure of Mr. Potter who had been the lead Counsel at one  
17 time. I cannot believe that this was unknown to the Public  
18 Advocates office that Mr. Potter might be moving.

19                   In our opinion, it is equally inexcusable that  
20 the Public Advocate did not get around to seriously trying  
21 to line up the MHB individuals until, apparently, some time  
22 in August and September when they first learned about their  
23 schedule and the fact that some of them were on vacation and  
24 involved in other proceedings. In other words, from the  
25 time that the intervention was filed over a year ago and

1 following the Board's pre-hearing order, it was apparently  
2 not until last summer that the Public Advocate got around to  
3 seriously pursuing, bringing these individuals into this  
4 case as their experts. In fact, we do not know yet that  
5 these gentlemen are, in fact, signed up and are going to  
6 be their experts because we haven't been advised of this.

7 Now, I bring this up because we have a duty of  
8 continuing to add to answers to interrogatories. We were  
9 informed last winter -- a year ago, approximately -- that  
10 these people weren't there yet. We were informed in  
11 September that these three gentlemen were going to be  
12 witnesses but we have not seen anything more than that one  
13 way or the other, which brings us down to the point which I  
14 find almost unbelievable, that when the Board orders that  
15 these individuals be made available for deposition, the  
16 Public Advocate now sits back and says that, oh, well, you  
17 should have called us to let us know when you wanted to to  
18 it. Well, we didn't know when they were available.

19 We were given the schedule on September 11, I  
20 think it was. They want a month's delay. Were we supposed  
21 to subpoena them for depositions on October the 1st? How do  
22 we know when they're available. Our people are ready, more  
23 or less at any time, to take the depositions of those  
24 individuals if they have, in fact, done their homework and  
25 are up to speed in whatever may or may not be necessary.

1 But to us it looks like falling just short of a deliberate  
2 attempt by the Public Advocate to delay this proceeding for  
3 whatever reasons.

4 Now, on this point, the Public Advocate started  
5 out this morning by saying the statutory virtues of the  
6 Public Advocate's office in New Jersey and their duty to  
7 monitor the case for the citizenry thereof, the fact remains  
8 --

9 JUDGE MILLER: That's the first time I've heard  
10 the word "monitor" this morning. Was it used before?

11 MR. CONNER: I may be wrong because I was coming  
12 to what the Board said in its order.

13 JUDGE MILLER: Jog my memory. Attached to one of  
14 your responses was what proported to be a transcript of  
15 certain testimony of the Public Advocate before some  
16 legislative committee, I believe, in the State of New  
17 Jersey. Without going into that a the moment, do you have a  
18 copy which we would like to have made part of the record of  
19 the testimony.

20 MR. CONNER: I'm trying to remember if that was  
21 attached.

22 JUDGE MILLER: It was attached to something that  
23 you filed.

24 MR. SHAPIRO: Judge Miller, if I may?

25 JUDGE MILLER: Do you have a copy of it?

1 MR. CONNER: It's attached to our answer to  
2 motion by the Public Advocate for extension of time to  
3 respond to Applicant's motion to compel dated August 7,  
4 1984.

5 JUDGE MILLER: Let me ask Counsel for the Public  
6 Advocate. Do you have a copy that you'd prefer? I want to  
7 have it made part of the record. If you have a copy that  
8 you could identify, a transcript, whatever the ramifications  
9 would be, we would like to have it marked as a Board's  
10 exhibit if necessary.

11 MR. SHAPIRO: I do have a copy here.

12 JUDGE MILLER: Do you have any objection to  
13 handing that copy to the reporter for the purpose I've  
14 indicated. It may be there are portions of it.

15 MR. SHAPIRO: No, I don't have any problem with  
16 making that copy available to the Board.

17 JUDGE MILLER: We would like to have it made  
18 available to the reporter because we want to make it part of  
19 the transcript either as an exhibit or if it's short enough,  
20 we could even do it verbatim. So, you can consult on that  
21 and decide which portions of it bear upon this matter.

22 MR. SHAPIRO: If the record could reflect I've  
23 made our copy available to Mr. Connor, who can choose to do  
24 whatever he wants with it.

25 JUDGE MILLER: The record will so reflect.

1 MR. SHAPIRO: For purposes of the record, though,  
2 I'd also like to point out that on pages 3 through 5 in our  
3 Intervenor's response to Applicant's third motion to  
4 dismiss, the Intervenor Public Advocate response directly to  
5 the point that the Applicant's have previously tried to  
6 make.

7 JUDGE MILLER: I saw that. That's why I'm now  
8 putting it in the record as a Board exhibit prior to hearing  
9 from you in argument. So all of you will be free to discuss  
10 it whatever way you deem material.

11 MR. SHAPIRO: Thank you, your Honor.

12 JUDGE MILLER: Can you identify for the record  
13 now, I think the record shows from statements of Counsel for  
14 the Public Advocate that this transcript is an accurate  
15 transcript of what it proports to show; is that correct?  
16 A transcript or copy which you handed over is an accurate  
17 transcript of what it proports to show; is that correct?  
18 I'm speaking only of foundation.

19 MR. SHAPIRO: Yes, sir.

20 JUDGE MILLER: The Board wishes to have that  
21 transcript or portions of it because it well may go into  
22 matters that are of no concern to this proceeding or this  
23 Board and we're not trying to encumber the record  
24 unnecessarily. Is it possible that Counsel at recess could  
25 get together and stipulate the pages that might have some

1 bearing; would that be helpful?

2 MR. SHAPIRO: Yes.

3 JUDGE MILLER: We'll leave it at that for the  
4 moment.

5 MR. CONNER: Do you want me to identify the  
6 document formally?

7 JUDGE MILLER: No. We will after you've had the  
8 conference with Counsel at recess and you're then able to  
9 tell us which portions, perhaps, have no bearing because we  
10 want it to come into the record, but there were some  
11 portions that were handed out by you that might have. That  
12 will give Counsel a chance to discuss at recess. Proceed  
13 now.

14 MR. CONNER: Then, sir, the point that I was  
15 coming to on that particular point is that the Board in its  
16 order of August 10, 1984 emphasized and I'll quote, "We  
17 further take note of the Public Advocate's testimony  
18 regarding his role in 'monitoring' this proceeding given May  
19 10, 1984 before the New Jersey Senate Energy and Environment  
20 Committee. Contested operating license adjudicatory  
21 hearings are provided by the NRC only if there is at least  
22 one admitted Intervenor and one or more viable contentions.  
23 Such adjudicatory hearings are expensive and time consuming  
24 for rate payers and tax payers and are not held merely to  
25 provide a Public Advocate with a less expensive opportunity

1 to "monitor" the NRC staff."

2 I say that because here we have a situation where  
3 the Applicant wants to go forward with its application. The  
4 Advisory Committee on Reactor Safeguards has signed off on  
5 it now. We are ready to go forward with fuel loading.

6 We are, nevertheless, faced with a situation for  
7 over one year where we have been unable to come to grips  
8 with these contentions which we are confident we can answer  
9 wholly and completely as soon as we have some idea as to  
10 what the MHB Technical Associates may or may not have in  
11 mind.

12 At the moment all we have to deal with are the  
13 legal theories of the Public Advocate as set forth in its  
14 contentions. That I submit, sir, is an improper adherence  
15 to the requirements regulations in general and this Board's  
16 specific orders. I think that's all we would say at this  
17 point.

18 JUDGE MILLER: Counsel?

19 MR. SHAPIRO: Thank you, your Honor.

20 First of all, I would just like to point out  
21 again that the Public Advocate is a statutory level official  
22 in the State of New Jersey who, having done these  
23 proceedings for a very particular purpose, while I concede  
24 that Intervenors usually proposit to have a variety of public  
25 concerns in mind, I would submit that the Public Advocate is

1 unique in the respect that he has the statutory authority  
2 and the statutory responsibility under New Jersey law to  
3 take appropriate steps to protect the public interest so  
4 there is a deep and abiding concern for the Public Health  
5 and Safety in this case.

6 At the same time we recognize and have attempted  
7 to fully adhere to the rules and regulations governing the  
8 conduct of these proceedings that there are appropriate time  
9 procedures which have been set forth and to the best of our  
10 ability, given our circumstances, we have attempted to  
11 comply with them and we have definitely complied with all  
12 the Board's rules in any circumstances where, for one reason  
13 or another, we were unable to comply with a particular time  
14 period. We've asked for appropriate extensions of time  
15 under the procedures of the Commission.

16 Having said this, I think it's important to put  
17 into prospective what is the extraordinary relief that the  
18 Applicants are asking for in this proceeding.

19 The Staff will certainly speak for itself but I  
20 think that both the Staff and the Intervenor have pointed  
21 out that the Applicant's request for relief in these  
22 circumstances has no legal basis and has no factual support  
23 in the record. Now, by no legal basis, I would point out  
24 that dismissal is considered to be an extreme sanction.  
25 That's what the Applicant has sought to have. I think we

1 ought to put this into prospective. The Applicant is  
2 seeking dismissal of these proceedings.

3 Now, that's an extreme sanction. It's only  
4 required in appropriate and extreme circumstances. I think  
5 that a fair reading of the cases -- prior cases which we  
6 have extensively briefed and I don't think have to be  
7 repeated here -- demonstrates that whatever allegations the  
8 Applicants have made about the Advocates conduct or lack of  
9 action or inaction in this case, they do not rise to the  
10 level of situations where dismissal is deemed appropriate.

11 The second point that I'd like to make clear is  
12 that the Intervenor has never failed to comply with the  
13 procedural rules. When we needed additional time, we  
14 requested that additional time under the Commission's rules.

15 JUDGE MILLER: Which rules?

16 MR. SHAPIRO: 10 CFR 2.7111.

17 JUDGE MILLER: 711. Maybe you have a paren  
18 there.

19 MR. SHAPIRO: Excuse me.

20 JUDGE MILLER: There's only A and B in the paren.

21 MR. SHAPIRO: Yes.

22 JUDGE MILLER: Which do you mean, A or B, 711?

23 MR. SHAPIRO: A.

24 JUDGE MILLER: Okay.

25 MR. SHAPIRO: I don't think it's a fair statement

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1 to say that on this record there has been no activity during  
2 the period of time that these proceedings have commenced.  
3 There's been a series of interrogatories that have been  
4 served among the parties. There have been a variety of  
5 motions most of which have been denied by this Board or  
6 by appropriate appeals boards most of which have been  
7 decided unfavorably toward the Applicant.

8 JUDGE MILLER: Appeal boards in this case?

9 MR. SHAPIRO: The motion for disqualification of  
10 Judge Carpenter.

11 JUDGE MILLER: What's that have to do with  
12 scheduling or with depositions?

13 MR. SHAPIRO: Pardon?

14 JUDGE MILLER: What does that have to do with  
15 your depositions?

16 MR. SHAPIRO: My own report is that there has  
17 been activity in this case. That the activity has, for the  
18 most part, required the Public Advocate to respond in  
19 certain circumstances to a variety of motions by the  
20 Applicants which have been ultimately decided unfavorably to  
21 the Applicants. So --

22 JUDGE MILLER: Wait a minute. Let's just get the  
23 record straight if you're talking about the disqualification  
24 of Judge Carpenter -- is that what you're talking about?

25 MR. SHAPIRO: I'm talking about that and I'm

1 talking about the motion.

2 JUDGE MILLER: How was that decided favorably  
3 to the Applicant?

4 MR. SHAPIRO: Unfavorably to the Applicant.

5 JUDGE MILLER: How was it decided unfavorably?

6 MR. SHAPIRO: The Applicants sought to uphold the  
7 continued presence and participation of Judge Carpenter on  
8 the Panel. The Appeals Board stated that Judge Carpenter  
9 should recuse himself.

10 JUDGE MILLER: My memory -- and I'm going solely  
11 on memory -- at the very end of the refile the Applicants  
12 said that it was better since there's so much to do that it  
13 would be better to replace the Judge; do you recall that?

14 MR. SHAPIRO: I don't recall that.

15 JUDGE MILLER: Well, look it up. I don't think  
16 that you're giving a full record on appeal because I think  
17 very definitely it was the Applicants. Go ahead.

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1 MR. SHAPIRO: Thank you.

2 Now, with respect to the specific issue of the  
3 availability of witnesses for deposition, in response to the  
4 Board's order we did indicate who the expert witnesses were  
5 and that they would be available in October.

6 Now, the Applicants seem to engraft an additional  
7 requirement that once having made a statement that the  
8 witnesses would be available for depositions in October,  
9 somehow we have to serve notices upon ourselves as to the  
10 time and place of the deposition. I think that is the  
11 Applicant's responsibility under every rule of civil  
12 procedure for this Board or federal district courts that I  
13 have ever been aware of.

14 They had full notice that the witnesses would be  
15 available during October. They could have served a notice  
16 of deposition then. They could have served a notice of  
17 deposition to depose the witnesses in November. They could  
18 have done it in December.

19 They chose not to do that. They chose instead to  
20 come back to the Board and somehow plead an inability to  
21 really get these witnesses to deposition when they refused  
22 to take the minimal procedural step.

23 I know of no rule under the rules of the procedure  
24 here, the cases interpreting those rules, or any rule of  
25 procedure that I have ever been aware of that requires a

1 party to notice his own witnesses for deposition when he has  
2 already previously maintained that those witnesses would be  
3 available after a certain time period.

4 But I think beyond that, really, the Applicants  
5 are trying to get a dismissal without any showing of any  
6 prejudice to themselves in these proceedings. They maintain  
7 somehow that they can't proceed, but, as again I said, they  
8 haven't come to that issue with particularly clean hands  
9 because they haven't sought to proceed expeditiously by  
10 noticing depositions.

11 But in any event, as I understand it, the  
12 environmental qualification information won't even be  
13 available until April 1985. So with respect to that  
14 information, there is really nothing that a deposition could  
15 productively serve on that contention.

16 There are three contentions, as the Board  
17 recalls. There is the management competence issue, the pipe  
18 cracks issue, and the environmental qualification.

19 So with respect to one, the information is not  
20 presently available to the Applicants, the Staff, or the  
21 Intervenor to make any reasoned assessment as to whether the  
22 Applicant will comply with the appropriate rules in the CFR  
23 or will comply with the appropriate standards requested by  
24 the Intervenor.

25 With respect to the other two issues, the

1 Applicant simply has not demonstrated that there has been  
2 any prejudice.

3 That is why we have requested -- and the Staff has  
4 joined us in this request -- that we should appropriately  
5 look forward to the joining of issues as quickly as  
6 possible, to the resolution of disputed questions, and  
7 movement towards assessing these issues on their merits in  
8 the future.

9 That is why we have requested the Board as early  
10 as August to set a discovery schedule to which all parties  
11 will adhere and to move this issue --

12 JUDGE MILLER: We set that in December, a year  
13 ago. You had better address that point.

14 MR. SHAPIRO: Well, you set a schedule for initial  
15 interrogatories.

16 JUDGE MILLER: Initial? Where do you see that in  
17 the order?

18 MR. SHAPIRO: The last page, your Honor, refers to  
19 "All initial interrogatories, document requests, notices of  
20 depositions, and the like shall be filed not later than  
21 January 31st, 1984."

22 JUDGE MILLER: Wait a minute.

23 MR. SHAPIRO: Page 20 of the order of December  
24 21st.

25 JUDGE MILLER: What about page 19, "Commence

1 discovery immediately and proceed with expedition. Make  
2 voluntary disclosure formally and informally of all  
3 information, dated documents which could reasonably be  
4 relevant to the admitted issues, which are broad"?

5 MR. SHAPIRO: My only point, your Honor, is at  
6 this point in the proceeding we have to look at what the  
7 Applicants are requesting and what the record reflects in  
8 support of that request.

9 They are requesting an extraordinary sanction when  
10 they haven't been able to point to either a failure on our  
11 part to comply with the rules in these proceedings or any  
12 prejudice to themselves from the lack of depositions to this  
13 date, nor have they been able to show that they took the  
14 appropriate steps that are required under the rules to  
15 depose these witnesses during the time they were available.

16 I am saying to the Board, I am submitting to the  
17 Board that we really have to strip away rhetoric that seems  
18 to kind of overlay these proceedings and look at the  
19 substance.

20 The substance of this case, and I think the  
21 substance of the Board's responsibility, is to ensure -- and  
22 the concern of the Public Advocate, the deep concern of the  
23 Public Advocate -- and I will get to the monitoring point in  
24 a minute.

25 The deep concern of the Public Advocate is to

1 assure that Hope Creek Generating Station is operating in a  
2 safe manner, in a manner that adequately protects the health  
3 and safety of the New Jersey citizens.

4 We are requesting, and we seek, that we get beyond  
5 this point where there is posturing and rhetoric  
6 substituting for substance in terms of the proceedings in  
7 this case, that we can set a schedule -- Staff has requested  
8 that that schedule be set -- we can move forward  
9 expeditiously, and we can conduct and the Board can conduct  
10 appropriate operating license hearings that address the  
11 merits of these contentions and not the kind of rhetorical  
12 gloss that has been placed on these proceedings.

13 Now, with respect to the statements of Mr. Conner,  
14 which he persists in maintaining even after we have  
15 responded to them, about the Intervenors' statement or the  
16 Public Advocate's statement at a legislative hearing, that  
17 always he was concerned about us monitoring, I think I  
18 request that the Board read the Intervenors' response to the  
19 Applicants' third motion to dismiss, pages 3 to 5. I think  
20 a fair reading rather than kind of the fractured, fragmented  
21 reading that Mr. Conner has tried to give to this  
22 transcript --

23 JUDGE MILLER: Why don't you give us what you  
24 consider to be a fair position?

25 MR. SHAPIRO: A fair reading of that is stated --

1 to paraphrase that is the Public Advocate was taking the  
2 position that we could not duplicate the functions of the  
3 NRC.

4 That is an obvious truth. We do not have the  
5 expertise or the staff resources to perform all the  
6 functions that the NRC does. That is not to say that the  
7 Public Advocate was a spectator at an event in this case.  
8 The Public Advocate has intervened and seeks to participate  
9 as an intervenor, as an active participant.

10 What the Public Advocate seeks to do now is  
11 requesting that we move forward towards a resolution of the  
12 merits of this case that will ensure to the citizens of the  
13 State of New Jersey that the Hope Creek generating facility  
14 is being operated in a safe manner, and I think that that  
15 should be -- and I fail to understand why that is not -- the  
16 Applicant's principle concern, to restore public confidence  
17 in the citizens of New Jersey about PSE&G's conduct, which  
18 seemed to me to be very, very important.

19 We have had a utility that in a variety of  
20 situations has either operated in a way that its  
21 management -- there have been serious questions about its  
22 managerial capabilities and serious questions about the  
23 burdens on the ratepayers.

24 It seems to me, rather, that this kind of  
25 sparring --

1 JUDGE MILLER: Let me inquire at the moment,  
2 Counsel, in that regard: what evidence does the Public  
3 Advocate have that forms the basis for the statement of the  
4 contention?

5 MR. SHAPIRO: With respect to the pipe cracks --

6 JUDGE MILLER: No, with respect to what you have  
7 just stated.

8 MR. SHAPIRO: The management implications?

9 JUDGE MILLER: Yes. Why do you, a year later,  
10 have no information for the record on that?

11 MR. SHAPIRO: Well, we have some information, and  
12 some of the information suggests that there has been some  
13 response to some of what the problems were at Salem, but  
14 there has not been the comprehensive response and change in  
15 approach that is called for by the events that occurred at  
16 Salem and the management failures that were identified at  
17 Salem.

18 JUDGE MILLER: What discovery has been sought by  
19 either the Applicant or the Staff, whatever the state of the  
20 record is, with regard to that information, of a discovery  
21 nature if not an evidentiary nature?

22 If you happen to know --

23 MR. SHAPIRO: We filed one set of interrogatories  
24 several months ago in which we requested some preliminary  
25 information, and we filed a very extensive set of

1 DAVbur 1 interrogatories.

2 JUDGE MILLER: This is you filing questions to the  
3 other parties, is that right?

4 MR. SHAPIRO: Yes.

5 JUDGE MILLER: Have any been filed or have you  
6 furnished any information as a party the other way?

7 MR. SHAPIRO: Yes.

8 JUDGE MILLER: What would those be? Just identify  
9 them.

10 MR. SHAPIRO: We filed a response to the  
11 Applicants' first set of interrogatories, undated.

12 JUDGE MILLER: Which portions of that response  
13 address the question of management responsibility, or  
14 whatever your contention is?

15 MR. SHAPIRO: If I may have a moment, your Honor?

16 JUDGE MILLER: Sure, go ahead.

17 (Pause.)

18 MR. SHAPIRO: In the undated set of  
19 interrogatories, the first response is to the Applicants'  
20 first set of interrogatories. There are approximately eight  
21 pages of responses, including the questions to five  
22 interrogatories, that were filed.

23 JUDGE MILLER: Could you identify either the  
24 number of the interrogatory or the pages of your response  
25 for the record?

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1 MR. SHAPIRO: Interrogatories under Contention 2,  
2 starting at page 9. It is Interrogatories-Responses 1  
3 through 5, ending at the top of page 18.

4 JUDGE MILLER: Thank you. You may proceed.

5 MR. SHAPIRO: These interrogatories were responded  
6 to in a timely fashion and identified the issues, and I  
7 think -- I know the Applicants are shrugging their  
8 shoulders, and they say they don't understand what the heart  
9 of this contention is. But the heart of this contention is  
10 obvious from the beginning; that is, that there was a  
11 failure at Salem in ATWS that was attributed to management  
12 failures in the manner of anticipating and responding to  
13 this event. That resulted in one of the largest fines, if  
14 not the largest fine, that the NRC has ever imposed on a  
15 utility.

16 And what we don't want to do at Hope Creek -- that  
17 PSE&G will use Hope Creek as a cautionary experience for  
18 those kinds of management operations activities. PSE&G has  
19 had its first lesson in that we want to make sure that  
20 those lessons have been adequately and appropriately applied  
21 to the operation and management of the Hope Creek facility.

22 I don't think that is a vague contention or one  
23 that Mr. Conner or any members of his staff haven't been  
24 able to discern from our responses to the interrogatories.

25 As the Staff maintained before, as Mr. Dewey

1 maintained before, the NRC certainly had enough of a sense  
2 of our interrogatories, from our responses to their  
3 interrogatories, so as not to feel that there was any need  
4 for follow-up questions.

5 JUDGE MILLER: Pardon me just a minute. Now, you  
6 are talking about interrogatories addressed, as I understand  
7 you, to pleadings or contentions, aren't you?

8 MR. SHAPIRO: Yes.

9 JUDGE MILLER: What about the evidentiary bases  
10 for the contentions? What information do you have or have  
11 you furnished about that?

12 MR. SHAPIRO: There are two aspects of our case.  
13 One will be to take what came out of Salem and not to retry  
14 Salem. The Board has made it clear from the beginning that  
15 that is not the issue, but the purpose is to isolate from  
16 Salem both the recommendations and the lessons, if I may,  
17 that might result from that experience and to see to what  
18 extent, to determine to what extent PSE&G has responded  
19 properly to what occurred at Salem by adjusting or  
20 realigning or taking appropriate steps to respond to that  
21 situation.

22 Salem was a serious event. It is our position it  
23 should be responded to by PSE&G as a serious event of the  
24 highest magnitude, and that would require appropriate  
25 management adjustments and steps in response to the Salem

1 occurrences.

2           What we have now is we have the information from  
3 Salem. From our interrogatories, the second set of  
4 interrogatories, which were sent out last week, we hope to  
5 obtain a better idea of what steps PSE&G has taken in  
6 response to Salem, and then that information, evaluated by  
7 our expert, will form the basis of our contention.

8           JUDGE MILLER: Which expert is going to evaluate  
9 that testimony, and how?

10           MR. SHAPIRO: As we have identified before in our  
11 response of August 20th, contrary to Mr. Conner's  
12 representation, we have made it clear who our experts will  
13 be in this proceeding. They will be Mr. Bridenbaugh,  
14 Mr. Minor, and Mr. Hubbard.

15           Mr. Bridenbaugh and Mr. Hubbard will testify to  
16 the management competence issues.

17           JUDGE MILLER: What competence do they have to  
18 give that form of expert testimony?

19           MR. SHAPIRO: They have had experience in  
20 assessing the management and operations at other nuclear  
21 facilities.

22           JUDGE MILLER: Does that necessarily qualify them  
23 as experts to give opinion testimony?

24           MR. SHAPIRO: Well, no. It may or may not, and at  
25 the point in the operating license hearing we will make our

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1 proffer and we will try to qualify them, and hopefully the  
2 Board will admit them.

3 But beyond that, I think our case is not going to  
4 be simply one that relies extensively on the expert. It  
5 will rely on the expertise of this Board as well. It is a  
6 case of here is the information and here are the license  
7 from Salem and the responses that should have been taken by  
8 a responsible utility, and without taking --

9 JUDGE MILLER: To Hope Creek?

10 MR. SHAPIRO: To Hope Creek.

11 JUDGE MILLER: You have acknowledged that we have  
12 asked that we don't want to retry Salem. We do expect all  
13 counsel to show us the connection, the linkage to Hope Creek  
14 of whatever it is you wish to proffer in the way of  
15 evidence, whether it be expert opinion testimony, nonopinion  
16 testimony, or whatever.

17 So you have this in mind, I am sure.

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1 MR. SHAPIRO: Yes. We'll then ask the Board to  
2 look at what has been done at Hope Creek and that is where  
3 our expert opinion will be used. The Board ultimately will  
4 have to make a determination whether the lessons learned  
5 from Salem that should have been applied to Hope Creek have  
6 been applied to Hope Creek in a responsible way. That's the  
7 basis of our contention.

8 JUDGE MILLER: Why does that require one year's  
9 inaction in regard to discovery as to that contention? Why  
10 couldn't this have been done nine months ago or ten months  
11 ago?

12 MR. SHAPIRO: I think it has been, your Honor.

13 JUDGE MILLER: That's what I wanted to hear.  
14 Now, when are you ready to go to trial on that contention.  
15 One month, 30 days from now?

16 MR. SHAPIRO: May I complete my response?

17 JUDGE MILLER: Not until you answer my question,  
18 which is, when will you be ready to go to trial on that  
19 contention? That's what my question is and you may explain  
20 it any way you want to but I want to know when. That calls  
21 for a date.

22 MR. SHAPIRO: The end of March or the early part  
23 of April.

24 JUDGE MILLER: Of what year?

25 MR. SHAPIRO: Of next year.

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1 JUDGE MILLER: I'm not sure that that's  
2 reasonable under the circumstances but at any rate we're  
3 getting some of the facts. Proceed.

4 MR. SHAPIRO: Now may I complete my response?

5 JUDGE MILLER: Yes.

6 MR. SHAPIRO: My point was not that the  
7 evidentiary record is complete. That's why I say the end of  
8 March or the early part of April. My point was not that  
9 the evidentiary part of that record is complete. My point  
10 is that the essence of that contention has been identified  
11 for the Applicants. It's not mysterious. It's not  
12 something where we've been obfuscating the issue. It's been  
13 clear at least since our response to the first set of  
14 interrogatories.

15 JUDGE MILLER: That's why I asked you the  
16 question. If it's so clear -- you were told a year ago to  
17 get ready for trial by getting through discovery. I want to  
18 know why you're not ready to go to trial in 30 days, the  
19 middle of January of 1985.

20 MR. SHAPIRO: Because we're waiting to get  
21 information from the Applicants as to their responses to our  
22 interrogatories.

23 JUDGE MILLER: Why didn't you try to take any  
24 depositions of the Applicant or try to find out as of a  
25 particular date, not a few weeks ago, when this order to

1 show cause was pending, what the underlying evidentiary  
2 basis for it was.

3 MR. SHAPIRO: Yes, we've made some steps.

4 JUDGE MILLER: Okay. Go ahead. When and what?

5 MR. SHAPIRO: We filed our first set of  
6 interrogatories.

7 JUDGE MILLER: On this point?

8 MR. SHAPIRO: On this and the other two  
9 contentions.

10 JUDGE MILLER: Now, on this point we're going to  
11 take these contentions one at a time. I can see you've done a  
12 lot of slopping over. Let's take that point.

13 MR. SHAPIRO: Our first set of interrogatories  
14 was filed January 30th, 1984.

15 JUDGE MILLER: That's your response that was  
16 filed?

17 MR. SHAPIRO: No, our first set of  
18 interrogatories was filed to the Applicant's on January  
19 30th, 1984.

20 JUDGE MILLER: When did you get the information  
21 -- whatever it was you sought -- on this particular  
22 contention?

23 MR. SHAPIRO: February 13, 1984.

24 JUDGE MILLER: What happened after that in the  
25 way of being ready for trial?

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1 MR. SHAPIRO: After that we'd gone through the  
2 procedural history.

3 JUDGE MILLER: I know all that. I'm inquiring on  
4 that particular contention, what else could you do to get  
5 ready for trial, you and your client?

6 MR. SHAPIRO: At that point we were faced with a  
7 series of motions that the department had to respond to by  
8 the Applicants so there was an effort to depose the  
9 Commissioner of our department. There was the continuing  
10 effort with respect to motions to dismiss filed by the  
11 Applicants. Then, that was the response to the Board's  
12 order about making our witnesses available for depositions  
13 and we made those names available on August 20th and we've  
14 gone through this several times.

15 JUDGE MILLER: We know all that. We're not  
16 asking you to regurgitate. We're asking you to tell us  
17 what, if anything, you did between the obtaining of the  
18 information in February of 1984 as you described it to go to  
19 trial on that issue. These issues are separable, you know.  
20 What, if anything, besides what you've already told us did  
21 you do?

22 MR. SHAPIRO: We've had conferences with our  
23 experts.

24 JUDGE MILLER: Which experts and when did you  
25 have conferences regarding that contention?

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MR. SHAPIRO: I don't know the precise dates.

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JUDGE MILLER: Try to figure it out because we want precise information. We want Counsel to come to this conference prepared to give us details, specific data, where we want to know what witness we're talking about, when there were conferences, what if any arrangements have been made, whether or not there are any contracts or other agreements with these witnesses, and the full details. These things have to be forthcoming. You can do it not; you can do it later. I'm warning you now that we want that information.

MR. SHAPIRO: All the information we have we've made available to the Board in the submissions.

JUDGE MILLER: When did you sign a contract with any of these three experts?

MR. SHAPIRO: We don't have a written contract. We have oral commitments with them.

JUDGE MILLER: When and what is the nature of the oral commitments which you regard as being binding in nature?

MR. SHAPIRO: That they will participate and testify as of August 20th when we made the representation to the Board that they would be available.

JUDGE MILLER: Wait a minute. As of August, you said they'd be available a couple of months later.

MR. SHAPIRO: We said that they would be

DAVpp 1 available in that statement just now. I didn't say when  
2 they would be available.

3 JUDGE MILLER: I'm asking when you made an  
4 agreement with them and how much you're going to pay them.  
5 That's what we should address.

6 MR. SHAPIRO: The Board wants to know how much  
7 we're going to pay our experts?

8 JUDGE MILLER: Absolutely. This bears on  
9 credibility since these experts are in a lot of other cases  
10 before NRC. We certainly want to know since you're using --  
11 this is in our notice.

12 MR. SHAPIRO: I didn't see anything in the notice  
13 about it, the cost of experts --

14 JUDGE MILLER: You'll see it in a minute because  
15 we asked you to identify -- oh, I'll get to that in a  
16 moment.

17 MR. SHAPIRO: Could I --

18 JUDGE MILLER: Just a moment. Let me state the  
19 proposition so you understand it. You are using the  
20 prospective testimony of expert witnesses who, it appears  
21 now and I recall using the term "professional witnesses",  
22 because it appears they have or will testify in a number of  
23 NRC proceedings. We ask because we are interested in the  
24 credibility of these witnesses. We're not expressing any  
25 views but if you're going to use the availability of these

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1 witnesses to testify in this proceeding we want to know all  
2 about them, what you've done, what their area of expertise  
3 is, yes, your professional arrangements, which all bears  
4 upon the merits of your further delaying getting this  
5 proceeding to trial on this one issue for example. It  
6 appears March or April -- whatever answer you gave -- on  
7 matters that have been pending for a year. We want the  
8 precise information for the record.

9           It's one thing to have a telephone conversation  
10 with a punitive expert and another thing to say we have  
11 hired this expert and he's going to do so-and-so and we're  
12 paying him approximately so much or if it's open-ended, tell  
13 us.

14           MR. SHAPIRO: I'm making a representation on  
15 behalf of the Public Advocate as an officer of this Board  
16 and as an officer of the Court of New Jersey that we have  
17 arranged with experts to testify in these proceedings. We  
18 have not signed a formal --

19           JUDGE MILLER: Let me stop you there. I want you  
20 to be precise. That's why I'm stopping you. Since you say  
21 you have made arrangements we want to know when and what  
22 kind of arrangements were made by whom. So if you'll give  
23 us that data that's what we're asking for.

24           MR. SHAPIRO: When we talked with him on August  
25 20th we said that we wanted him to participate in these

1 proceedings or prior to August 20th when we made our  
2 submission at that time, we had made arrangements for them  
3 to participate.

4 JUDGE MILLER: What do you mean you made  
5 arrangements? Don't use conclusions. Tell me the facts.

6 MR. SHAPIRO: We talked with the witnesses and we  
7 asked them to participate in these proceedings as experts at  
8 their usual rates for participating in such proceedings as  
9 experts.

10 JUDGE MILLER: What were those rates, as you  
11 understood them?

12 MR. SHAPIRO: May I have a minute to consult?

13 JUDGE MILLER: What I'm inquiring now is whether  
14 it's an open-ended kind of thing or whether you made it up  
15 in the arrangement. I'm not so much interested in the  
16 details as I am in the nature of the arrangement, if there  
17 be an arrangement.

18 MR. SHAPIRO: My understanding is that it's \$75  
19 an hour.

20 JUDGE MILLER: The question is is that open-ended,  
21 or for how much time? What are they supposed to do? You  
22 see, these are witnesses that you're basing your motion or  
23 your responding to our order to show cause on. These are  
24 not just simple matters that you're going to say I had a  
25 phone call. We're asking you for precise data as the

1 representative of the Public Advocate of the State of New  
2 Jersey with all your statutory powers. We're saying, what  
3 did you do about it and I think we're going to take a recess  
4 because I suspect that you may need to consult with your  
5 associates or look at your files because we want precise  
6 data from you as Counsel now.

7 We'll stop at this moment.

8 MR. SHAPIRO: May I ask a question before we  
9 recess?

10 JUDGE MILLER: Yes.

11 MR. SHAPIRO: With all due respect, if you would  
12 please make it clear what is the precise information you  
13 want and we'll do our best to identify it.

14 JUDGE MILLER: All right.

15 MR. SHAPIRO: As I give information I get the  
16 sense that it may be my shortcoming. I apologize that our  
17 information we give is inadequate and I want to make sure  
18 that if we're going --

19 JUDGE MILLER: It is superficial, let's put it  
20 that way.

21 MR. SHAPIRO: -- if we're going to provide this  
22 information that we have a clear idea of what the Board is  
23 asking us to do.

24 JUDGE MILLER: When you get to the end of your  
25 question, let me know. Raise your hand so I can respond to

DAVpp 1 it. You were asking me a question but you keep going on and  
2 on and you started giving me some more. I just simply  
3 wanted an answer.

4 MR. SHAPIRO: I didn't see it in response to the  
5 order to show cause that we had to come up with this type of  
6 information so I'm prepared at this point. I would like to  
7 know what specific information you are requesting us to  
8 provide about our experts in this proceeding.

9 (Pause.)

10 JUDGE MILLER: The portion I am referring to is  
11 the latter portion of part 3. Counsel should be prepared to  
12 address the question of whether the proliferating NRC  
13 schedules of professional witnesses should be permitted to  
14 cause delays in this OL proceeding.

15 MR. SHAPIRO: We've addressed that in our  
16 response.

17 JUDGE MILLER: We don't consider that you have.  
18 I'm giving you an opportunity. What you've given us is  
19 superficial and conclusory in nature and definitely lacking  
20 in data of which I suggested part. It isn't going to do you  
21 any good to come in here. This is a serious proceeding.

22 MR. SHAPIRO: I'm taking it with a tremendous  
23 degree of seriousness.

24 JUDGE MILLER: Pardon me. Wait a minute.  
25 You've had your chance and you're going to have some more.

1 DAVpp

1 Just listen for a minute. You've come here to justify the  
2 lapse of a year as to discovery. You've come here to  
3 justify a two-week time interval given to make witnesses  
4 available to do that.

5 We're going to want to know with precision and in  
6 reasonable professional detail just what attempts were made  
7 by you or your office and we don't mean by that some  
8 telephone call Joe Blow made maybe sometime. We're going to  
9 want to know where, when, who you talked to. You say these  
10 witnesses -- right from the start, you're not being  
11 precise. There were four whose names were mentioned, three  
12 in one category for -- we want to know on each of those how  
13 the communications were made, whether you have anything in  
14 writing, what if anything has been done to get binding  
15 commitments by these witnesses and for what, and our  
16 inquiry as to their professional fees. We're not concerned  
17 about the amount per hour, that's all right.

18 What we are concerned about is whether this is  
19 just open-ended, goes on forever; whether there are certain  
20 limitations; what objectively the terms are insofar as this  
21 proceeding is concerned. We've called your attention to the  
22 fact that their schedules seem to be proliferating in other  
23 NRC proceedings where we have had information.

24 I say this both in the context both of the year's  
25 lapse and I state it in the context of that testimony

1 that we want to get together and mark that for the record.  
2 We want it in the record because we want to know concretely  
3 what the difference is between monitor -- that's a wide term  
4 -- and participation here as a party. And we want not just  
5 rhetoric on that, we want the factual data.

6 I think I've outlined for you the kind of thing  
7 that you as an attorney would be able to do when you're  
8 coming in and telling us as a fact -- a mixed question of  
9 fact and law -- that you have arrangements. We want to know  
10 if they're binding arrangements, when and how they were  
11 made, and we're going to test the quality of them in part by  
12 the financial commitments. Because that was one matter that  
13 came up in the monitoring.

14 Now, you've asked the question; you've gotten the  
15 answer. We're going to give you a 15-minute recess. If you  
16 need more time tell us. You've got at least two things to  
17 do. One of them is to confer with Applicant's Counsel on  
18 this transcript. That shouldn't take you too long.

19 Secondly, you may want to do whatever you wish to  
20 furnish us the detailed information about the specific named  
21 witnesses such as when, where, how much, and how long.

22 MR. SHAPIRO: May I ask a question of the Board?

23 JUDGE MILLER: Another question. That ought to  
24 keep you busy.

25 MR. SHAPIRO: That's going to definitely keep me

DAVpp 1 busy.

2 I just have one other question in terms of the  
3 specific inquiry then since we're really before the Board.  
4 On the Applicant's motion to dismiss I'll assume at some  
5 point the Board will question the Applicant as specifically  
6 and as carefully about what showings of prejudice the  
7 Applicants can demonstrate to meet legal standard.

8 JUDGE MILLER: That is not a question. The Board  
9 doesn't rule in advance. We're ruling as matters come  
10 along. We will make appropriate rulings when there's  
11 necessity for them but don't you in the guise of the  
12 question start cross-examining the Board. Just give us the  
13 information we ask of you. You're already prolonged this  
14 thing another 5 minutes from the time I tried to give you  
15 the information.

16 I'll suggest that you just sit down, talk to your  
17 colleagues, take 15 minutes to reflect on what we've been  
18 trying to tell you, and take it to heart. You keep  
19 answering instead of asking.

20 MR. SHAPIRO: Your Honor, I think it would help  
21 me in this short break to clarify and crystallize my  
22 arguments.

23 JUDGE MILLER: Let's not persist in trying to  
24 cross-examine the Board. We don't intend to let you or any  
25 Counsel cross-examine the Board. We've made our ruling.

1 DAVpp

1 We've given you the admonitions. We've given you the  
2 time. We suggest that you make use of it.

3 MR. SHAPIRO: May I be heard on the record?

4 JUDGE MILLER: We're very serious.

5 MR. SHAPIRO: May I be heard on the record?

6 JUDGE MILLER: Not now. You might want to come  
7 back.

8 MR. SHAPIRO: Mr. Chairman?

9 JUDGE MILLER: We're taking a recess, and  
10 at this time. We're taking a 15-minute recess.

11 (Recess.)

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JUDGE MILLER: We are on the record now.

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Counsel is being given the opportunity to state whatever it was. He had something in mind, I think, at the time that we recessed. The Board wanted to recess at that point and have him state it later.

You are now welcome to do so.

MR. SHAPIRO: Thank you, Mr. Chairman.

I just had wanted to raise the point that under the appropriate legal standards for a dismissal proceeding, which is one of the issues -- one of the motions, pending motions before the Board, that I was requesting that the Applicant be questioned as to any showing of prejudice, any other showing of our failure to comply with the rules when we were faced with an unexpected delay and just attempting to flesh out -- since this is a motion to dismiss that is principally before the Board, trying to flesh out what factual support there is.

So I can respond to that, not to cross-examine the Board in any sense of the word. I certainly don't want to give that impression, and I am sorry if I gave that impression. But I just want to make sure that I have an opportunity to respond to everything that the Board needs to know to make an informed decision.

So far I have not heard any information from the Applicant on a couple of points, and it is hard to respond

DAVbur 1 in a vacuum.

2 That is all I was raising.

3 Thank you for the opportunity.

4 JUDGE MILLER: Very well. You are certainly  
5 entitled to have the chance to make a fair response to any  
6 questions raised by the Board or by any party or counsel.  
7 So don't ever hesitate to inquire. We will give you a full  
8 and fair opportunity.

9 Does anybody else want to get on TV?

10 (Laughter.)

11 MR. SHAPIRO: Do we have an option not to be on  
12 TV?

13 (Laughter.)

14 JUDGE MILLER: Yes, you do.

15 (Discussion off the record.)

16 JUDGE MILLER: You are on the record.

17 MR. SHAPIRO: I do want to go first. Thank you,  
18 your Honor.

19 The Public Advocate's position in this proceeding  
20 is that there have been in the past -- strike that -- the  
21 Public Advocate's position in this proceeding is that we  
22 should look not at the past but at the future and in terms  
23 of the contentions that are before the Board. We should  
24 develop a discovery schedule, an appropriate way of  
25 proceeding, so that the merits of these contentions can be

DAVbur 1 fully addressed and we can ensure that the issues affecting  
2 health and safety of New Jersey citizens have been fully and  
3 fairly and adequately addressed by the Board.

4 We don't think either in law or fact that a motion  
5 to dismiss is appropriate in these circumstances.

6 Thank you.

7 JUDGE MILLER: A slight modification: this is not  
8 only a hearing upon a motion to dismiss; it is a response to  
9 an order to show cause why your client's contention  
10 shouldn't be dismissed. So in order to be completely  
11 accurate, I am indicating that also.

12 Staff, do you have a position you want to state  
13 for the record at this time?

14 MR. DEWEY: Staff takes the position that there is  
15 nothing that has taken place in discovery up to this point  
16 which would warrant the extraordinary sanction of dismissing  
17 the contentions of the Public Advocate and ending this  
18 proceeding.

19 JUDGE MILLER: Applicant?

20 MR. CONNER: Applicants. To summarize the  
21 argument that we will probably wish to expand on later, we  
22 believe that the Public Advocate has wholly failed to  
23 justify its status as a party in this proceeding, having  
24 dragged its feet for roughly the last year in not coming  
25 forward in compliance with the Board's prehearing conference

DAVbur 1 order and in not making its witnesses available for us to  
2 take their depositions.

3 The Public Advocate has admitted the weakness of  
4 his position in referring to the fact that he would think  
5 that Public Service would want to restore public confidence  
6 of the citizens of New Jersey.

7 I submit, sir, that that is an absolute abuse of  
8 the NRC licensing process. It is not the function of this  
9 Board to worry about the public image of an Applicant, and  
10 it is certainly not the function of the Applicant to seek  
11 any image improvement before a federal agency.

12 We would also note that his comments as to public  
13 confidence are misplaced because despite the fact, as we  
14 have shown, that the Public Advocate had no technical  
15 expertise backing his contentions until perhaps these lately  
16 obtained witnesses, that no other agency of the State of New  
17 Jersey takes the position that there is any technical  
18 deficiency with the Hope Creek application.

19 And, in fact, I would remind the Board that at the  
20 prehearing conference a representative of the Board of  
21 Public Utilities made a limited appearance in favor of the  
22 project.

23 JUDGE MILLER: Very well, thank you.

24 I think now we will ask counsel to continue with  
25 his argument addressed to the Board. We had asked for

DAVbur 1 certain information about witnesses. We do not, however,  
2 mean that you have to do it at this time. If you wish to  
3 argue other matters and come back to it, we leave that to  
4 your own judgment.

5 MR. SHAPIRO: Your Honor, before the break you  
6 requested that we reach some agreement on this transcript,  
7 and I think, while really the first some 23 pages are  
8 devoted to the testimony of the Commissioner and then  
9 there's some additional comments Commissioner Rodriguez, the  
10 Public Advocate of the State of New Jersey makes, 29 to 30,  
11 we have no objections to the admission of pages 1 through  
12 30, and I think the Applicants have also agreed that they  
13 have no problems with that.

14 And I must confess, I did not show this transcript  
15 to the Staff.

16 JUDGE MILLER: We will inquire first. Let me ask  
17 the Applicants' counsel, are you singular or plural  
18 Applicants here?

19 MR. CONNER: Plural, "s'."

20 JUDGE MILLER: Do you have anything to say as to  
21 the proffer that the counsel for the Public Advocate makes  
22 about pages 1 to 30?

23 MR. CONNER: At the recess, we suggested pages 1  
24 to 30. We based this upon the Board's statement that  
25 anything relating to this monitoring aspect -- I basically

DAVbur 1 agree it was mostly on pages 1 to 23, but there is a little  
2 more beyond that. That is why we selected 1 to 30.

3 JUDGE MILLER: Staff?

4 MR. DEWEY: Staff has no objection for pages 1  
5 through 30.

6 JUDGE MILLER: Let pages 1 through 30 be  
7 appropriately marked as Board Exhibit 12 and appropriate  
8 copies handed to the reporter as an exhibit, which the Board  
9 will make part of the record, and all parties are free to  
10 use it any way that they see fit.

11 I selected 12. I am sure we don't have 11  
12 previous Board exhibits in the record in case you have a  
13 problem with the numbers.

14 (Board Exhibit 12 identified.)

15 MR. CONNOR: Is that sufficient for the Board for  
16 the identification of the document?

17 JUDGE MILLER: It isn't just identified. The  
18 Board is making it a part of the record as Board Exhibit  
19 12 for all purposes, whatever they may be. All parties and  
20 the Board are free to refer to it as part of the record  
21 insofar as it is or might become relevant.

22 MR. SHAPIRO: Do you want me to read what is on  
23 the cover page of that exhibit?

24 JUDGE MILLER: Please describe it.

25 MR. SHAPIRO: May I approach the recorder?

DAVbur 1

JUDGE MILLER: Yes.

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MR. SHAPIRO: Board Exhibit 12 is captioned

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"Public Hearing Before Senate Energy and Environment

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Committee and Senate Legislative Oversight Committee on

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Review of the Status of Hope Creek Nuclear Power Plant,"

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held May 10th, 1984 in the State House Annex in Trenton, New

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Jersey. This is pages 1 through 30 of the public hearing.

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JUDGE MILLER: Thank you. It will be received.

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(Board Exhibit 12 received.)

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JUDGE MILLER: You may proceed.

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MR. SHAPIRO: Before the recess, the Board also

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asked us to address the contacts that we have had with our

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proposed experts in this proceeding.

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We have tried to piece this together as best we

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can from the information available to us now. Certainly if

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the Board wants further documentation or thinks that further

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documentation is appropriate, we could present more specific

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information and certainly would be willing to.

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JUDGE MILLER: Let's see what you have. Probably

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it wouldn't be necessary if you are giving us the essential

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data.

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MR. SHAPIRO: As the Board is aware, prior to the

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prehearing conference, there were conversations between

24

Mr. Potter, the former Assistant Commissioner in the Public

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Advocate's office, and representatives of the MHB Company

DAVbur 1 regarding the contentions. Subsequently, because there was  
2 some concern about the vagueness of the contentions, I think  
3 actually during the prehearing conference there were  
4 additional telephone conversations between Mr. Potter and  
5 one of the experts.

6 JUDGE MILLER: Yes, I think that is correct, as I  
7 recall.

8 MR. SHAPIRO: After the prehearing conference, it  
9 is our understanding -- and this is something we don't have  
10 specific information on -- that during the next several  
11 months there were conversations between Mr. Potter and the  
12 experts at MHB.

13 I think one of the problems that occurred at this  
14 point was obtaining the specific authorization to hire the  
15 experts as opposed to consult with the experts about the  
16 nature of the proceedings. They were the experts we  
17 intended to -- but unfortunately we deal with a state  
18 bureaucracy that sometimes encumbers. In this case we  
19 didn't have that specific authorization. We did during that  
20 period respond to interrogatories and sent out appropriate  
21 interrogatories.

22 After the Board's order of August 10th, I think  
23 that we then recognized that basically, based on some of the  
24 assertions made by the Applicants, that we were giving an  
25 incorrect impression to the Board about the nature and role

DAVbur 1 of the Public Advocate in these proceedings, or at least the  
2 Applicants were using our silence before the Board to  
3 suggest that there was some lack of concern about the  
4 serious issues we had raised in the contentions.

5 We then had extensive conversations with the MHB  
6 people and attempted to obtain appropriate schedules for  
7 them. We did obtain at that point a commitment from them  
8 that they would testify as expert witnesses for us on the  
9 three contentions, that Mr. Bridenbaugh would be the  
10 principle witness on the pipe cracks, that Mr. Bridenbaugh  
11 and Mr. Hubbard would be the witnesses on the management  
12 competence issue, and Mr. Bridenbaugh and Mr. Minor would be  
13 the witnesses on the environmental qualification issue.

14 Then in response, at that point we served both our  
15 notice of the witnesses that were going to testify as  
16 experts, also our request for an extension of time.

17 During that period of time, we heard from neither  
18 the Applicants about when they wanted to conduct a  
19 deposition, nor did we receive any response from the Board  
20 to our motions or any response from the Board to the  
21 Applicants' motion to dismiss.

22 Without having heard from either the Board or the  
23 Applicants, we then had a series of lengthy phone  
24 conversations and correspondence was exchanged between the  
25 experts and ourselves. We sent them copies of FSAR. We put

DAVbur 1       them on the service list approximately around this time. We  
2       sent them copies of the preliminary and final environmental  
3       statement.

4                At that time we were prepared for them to come to  
5       depositions in October. We were preparing them to come to  
6       depositions because we had made that representation to the  
7       Board and to the Applicants.

8                When nothing transpired, we had a lengthy meeting  
9       with Mr. Bridenbaugh in late October, and we reviewed in  
10      detail the contentions and the appropriate gaps in our case,  
11      as developed to that point in time, and what additional  
12      information he would need. He advised us that a lot of the  
13      information he would need would be in the SER, which at that  
14      point we understood was forthcoming in either October of  
15      November.

16               We had made it clear prior to that time, between  
17      the August 10th and August 20th period, that we would  
18      proceed in this case in an open-ended manner, in the sense  
19      that there was no cap that we were going to place on how  
20      much we would pay for expert testimony. We would do what is  
21      appropriate to protect the health and safety of New Jersey  
22      citizens, as deemed necessary in the course of the  
23      proceedings.

24               We did make it clear, though, that as a state  
25      agency -- well, it is all Intervenors or all participants,

DAVbur 1 but certainly as a state agency, with a limited budget, that  
2 we would have to review the manner in which the case was  
3 proceeding through both the discovery and the hearing phases  
4 to make sure we had appropriate money allocated in our state  
5 budget.

6 We don't have the ability to just go out  
7 immediately and raise additional money. We have to go back  
8 to the legislature, and we have to prepare the legislature  
9 in advance for requests for additional funding.

10 So we made it clear that we wanted to review  
11 through the discovery phase to make an assessment and then  
12 through the hearing phase to make an assessment of the  
13 probable costs.

14 After this discussion with Mr. Bridenbaugh, we  
15 have tried, very frankly, to determine where are the  
16 appropriate points of agreement.

17 I don't bring this in as a wild card or a red  
18 herring to distract the Board. I am just trying to be as  
19 factual as I can in presenting history. I realize that what  
20 occurs in terms of negotiations and settlements is not  
21 relevant.

22 I don't raise it for any relevance. So we can  
23 kind of maybe cut off the counterattack at the pass by  
24 saying that I raise it only to explain that part of our  
25 effort and part of our concern is to protect the health and

DAVbur 1 safety of New Jersey citizens. But also, if we can assure  
2 that PSE&G will be responsive to our concerns in this  
3 proceeding, perhaps we can all save the taxpayers and the  
4 ratepayers some money by at least resolving this.

5 There have been some discussions occurring  
6 separately, and again we have run into this in the past. I  
7 just want to make sure that I am not using this as a reason  
8 for any kind of delays that the Board may perceive. I am  
9 just explaining what has occurred and to convey a sense of  
10 our credibility, that we are trying to proceed in a manner  
11 that will address the contentions on their merits.

12 We think that is appropriate; we think that is  
13 necessary.

14 I raised the issue before with respect to the  
15 Applicants, not to suggest that that is an appropriate issue  
16 for this Board to rule on but just to raise in my own mind  
17 or to suggest in my own mind I am quite confused as to why  
18 we can't move on to resolve these issues on the merits so  
19 that everyone can be satisfied that adequate health and  
20 safety measures have been taken, not that I suggest that the  
21 Board reviews the public confidence that the Applicant may  
22 or may not have.

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1                   Our position now is that we've been in extensive  
2 regular contact with our experts. We are prepared again,  
3 now that we've gone through the October-November period, we  
4 have our experts who once again tell us -- oh, not once  
5 again, but who have other commitments and their schedules,  
6 may have responsibilities in other hearings. So were trying  
7 to, as much as possible, avoid in the future, a variety of  
8 diversionary motions from the merits of the case.

9                   That's why we suggested that our time today, we  
10 would very much invite the Board, and I think our time today  
11 could be productively spent in determining an appropriate  
12 schedule that realistically recognizes what are the  
13 limitations, the demands on the witnesses, recognizes the  
14 obligations of all parties and the Intervenor to respond  
15 appropriately to the Commission's rules and regulations and  
16 the Board's concerns in moving this proceeding along  
17 expeditiously. But also moves towards a resolution of these  
18 issues on the merits which is, after all, I think  
19 everyone's ultimate concern.

20                   We're not concerned about brush fires. We're  
21 concerned about nuclear health and the safety and health of  
22 people who are going to have some contact or be closely  
23 associated or proximate to a nuclear facility.

24                   I don't know if that's sufficient. I've tried, to  
25 the best of my ability, to lay out our contacts.

1 JUDGE MILLER: I have just a couple of questions.  
2 I may confer with my colleagues, but I think you've probably  
3 covered the areas.

4 (Discussion off the record.)

5 JUDGE MILLER: Let me inquire whether you have the  
6 information. The Board would like to know the number of  
7 hours, the approximate number, fairly closely, of time which  
8 has been devoted to the matters of the experts which you  
9 have described, the approximate amount of the billing.  
10 We're not interested so much per hour. We're interested to  
11 see, though, how much money has been charged and allocated,  
12 whether or not paid, by the experts. The three experts,  
13 because I take your first one now, you said will not be  
14 available. This professor.

15 MR. SHAPIRO: Yes, sir.

16 JUDGE MILLER: We would also like to know -- you  
17 mentioned, we realize, that due to the legislative process you  
18 have problems of appropriation and the like. We would like  
19 to know how much has been appropriated. We seem to have a  
20 vague memory there was something here in the transcript, but  
21 we haven't looked at it, and we know that you haven't  
22 spelled out, because you have a fairly opened-ended amount  
23 of time. But we'd like to know how much has been allocated  
24 and how much will be allocated in the budget or however your  
25 state handles such matters.

DAVbw

1                   Do you have that information now, or would you  
2                   like to submit it in writing within a week? What's your  
3                   pleasure?

4                   MR. SHAPIRO: With respect to the first question,  
5                   I think that approximately 30 to 35 hours, I think, of  
6                   experts' time in conversation.

7                   JUDGE MILLER: With all of the three?

8                   MR. SHAPIRO: I think that's right. I think it's  
9                   probably between 40 and 50 hours of expert time at this  
10                  point.

11                  JUDGE MILLER: Have there been any billings made  
12                  on time basis?

13                  MR. SHAPIRO: Yes.

14                  JUDGE MILLER: Do you now approximately what those  
15                  are?

16                  MR. SHAPIRO: I only know the most recent  
17                  billing. At our lengthy meeting on the 24th and 25th, which  
18                  was approximately for something like 15 to 16 hours of work,  
19                  as I recall.

20                  JUDGE MILLER: What have you, on behalf of your  
21                  client and these witnesses or any or either of them,  
22                  projected as to time and/or available money to pay experts?  
23                  Do you have any kind of a projection on that?

24                  MR. SHAPIRO: Based on what we understand the  
25                  costs could be if this proceeding goes to a hearing, I think

DAVbw 1 we've allocated in the neighborhood of \$30,000 for this  
2 fiscal year.

3 JUDGE MILLER: What is the fiscal year?

4 MR. SHAPIRO: The fiscal year ends June 30, 1985.

5 JUDGE MILLER: What if we go to trial now prior to  
6 that and extend beyond that date? Do you have some way of  
7 projecting on behalf of your client your replacement costs  
8 within a range?

9 MR. SHAPIRO: I think we've made it clear that if  
10 we go to a hearing and the hearing moves within this fiscal  
11 year, that the expenses could be substantially greater. I  
12 think that that's been made clearer to the Commissioner.

13 JUDGE MILLER: To the Commissioner?

14 MR. SHAPIRO: To the Public Advocate.

15 JUDGE MILLER: Is he prepared, so far as you know,  
16 to meet those additional expenses for commencement or  
17 conclusion of trial or adjudication?

18 MR. SHAPIRO: He's prepared to meet whatever  
19 expenses are appropriate or necessary to present our  
20 contentions. I might add, as any state official who has to  
21 go before a legislature and ask for more money, he would  
22 rather have us see as much as possible what areas of  
23 similarity there are and what issues could be addressed  
24 through appropriate discussions and settlement. But I think  
25 that he is prepared and has always been prepared, contrary

DAVbw 1 to the kind of fractured reading of his testimony, he's  
2 always been prepared to take whatever appropriate steps are  
3 necessary and to spend whatever money is necessary to  
4 fulfill his statutory responsibility. He has never seen  
5 that his responsibility in this proceeding is to be a  
6 duplicate of the NRC.

7 He recognizes the NRC's expertise and the Staff  
8 size committed and devoted to this kind of issue. And also,  
9 contrary to Mr. Conner's representation, we don't have a lot  
10 of people kind of looking around the corridors talking about  
11 Hope Creek. It really is something in which it did present  
12 some difficulty in mustering, putting together a group of  
13 people after Mr. Potter left, because he has been talking  
14 sole -- with limited assistance from Ms. Remis, he'd been  
15 assuming sole responsibility for this case. But he is  
16 prepared to do what is appropriate to fulfill -- he  
17 recognizes his statutory responsibilities. He will spend  
18 whatever is necessary. Again, he has a background as a  
19 trial lawyer. He sees room for settlement, room for  
20 negotiation, but he also knows that we are not prepared to  
21 negotiate out of a position of weakness in this proceeding.  
22 We're prepared to negotiate out of a position of willingness  
23 to spend and take what steps are necessary to ensure that  
24 the facility is operated in a safe and efficient manner.

25 JUDGE MILLER: Let me ask now, you've give us

1 some feel, at least, of the situation with regard to fees,  
2 the costs through the fiscal year, which I think -- was  
3 that June 1, 1985, or June 30. Okay.

4 What arrangements, if any, have you made for  
5 authorization or appropriation of monies of a substantial  
6 nature beyond the end of that fiscal year and into the  
7 next?

8 MR. SHAPIRO: We have advised him, and I think  
9 it's been reflected in our budget. there is a professional  
10 services account that there may be an additional up to  
11 \$30,000 to \$50,000 that may have to be spent in the  
12 following fiscal year, if this case continues to a full  
13 hearing. I think he is prepared to again spend whatever  
14 money is necessary and has taken that into account in  
15 determining what his professional services budget is.

16 JUDGE MILLER: Can you advise the Board that if  
17 the charges for professional services of MHB Technical  
18 Associates should go into the hundreds of thousands of  
19 dollars, is this within the budget and intentions of your  
20 client?

21 MR. SHAPIRO: I could advise the Board, yes, we  
22 will never abandon this proceeding or walk away from this  
23 proceeding, because of the cost of the proceeding in  
24 exercising the statutory responsibility of the Public  
25 Advocate. I've been advised that he will not do anything

DAVbw 1 to jeopardize the appropriate presentation of this case to  
2 the Board.

3 JUDGE MILLER: Let me call your attention, not in  
4 any evidentiary way, but simply an exchange of information,  
5 to a table published in "Newsday," which is Long Island,  
6 August 31, 1984, and your experts could probably help you on  
7 this, which shows a number of very substantial charges in  
8 the Shoreham proceeding. I'm not trying to analogize, but  
9 I'm pointing out simply that in that proceeding MHB  
10 Technical Associates had been paid, I think it was through  
11 July 31, 1984, \$827,793 for technical advice in licensing  
12 and PSC prudency hearings. Of course, there are other  
13 licensing hearings within the prudence hearings.

14 So I'm not in any sense asking you to accept these  
15 as being necessarily what your bill might wind up being. On  
16 the other hand, I'm asking you in good faith, and you've  
17 shown good faith as counsel.

18 Suppose that the costs of an adjudicatory as  
19 opposed to an administrative hearing, are in the hundreds of  
20 thousands of dollars, is there a commitment in the sense of  
21 intending to go forward as an active party in an  
22 adjudicatory proceeding, within your contemplation, such a  
23 range of possible costs?

24 MR. SHAPIRO: Yes. Of course, with that kind of  
25 billing in the Shoreham proceeding, maybe MHB will do it pro

1 bono for the Public Advocate.

2 (Laughter.)

3 JUDGE MILLER: MHB? No, we've heard MHB testify  
4 on Shoreham in one respect myself. We know the people we're  
5 talking about. We're casting no aspersions now. We're  
6 simply pointing out that expert fees, the cost of  
7 litigation, can be very substantial. I want you to have  
8 this in mind when you're making representations to the  
9 Board. I understand that you have.

10 MR. SHAPIRO: Thank you.

11 JUDGE SCHINK: If I could comment at this point.  
12 Other than being concerned with the absolute amount that  
13 you're prepared to invest, I would express some concern with  
14 the relative amounts that have been spent to date. We're  
15 looking at, you said, something on the order of 40 hours of  
16 investment by your advisers. That looks to me as if it's  
17 something on the order of 10 percent of what you have in  
18 mind up until the end of this fiscal year. This Board's  
19 concern is with the rate of progress in this place. It  
20 seems to me that you would want to be further into your  
21 investment at this point.

22 I'm curious as to the progress of your interaction  
23 with the consultants from here. Do you envision it as being  
24 almost entirely concerned with answering interrogatories  
25 from the Applicant, or what are you going to do to make this

DAVbw 1 thing go forward?

2 MR. SHAPIRO: For one, we've already tried to do  
3 something to make it go forward by filing our second set of  
4 interrogatories, which will obtain for us the information  
5 that our experts have advised us that they need for further  
6 determinations in this case. I think we are going to engage  
7 in extensive consultations. We are somewhat hampered by the  
8 distance, but I think we can engage in substantial  
9 consultations with them over provisions in the SER which  
10 they have received independently of us, because I think they  
11 are already on the service list, so they have the SER  
12 discussing the manner in which the contentions are joined  
13 between us and Public Service, in their view.

14 The remaining areas of inquiry, I think we will be  
15 moving on depositions as soon as we get our responses to the  
16 interrogatories back. I don't mean to suggest in any way,  
17 you know, that looking back, that there aren't things that  
18 we could have, should have done. I'm not using that as our  
19 defense. I'm saying that whatever it is, it's not  
20 appropriate for dismissal. But I think we have a clear idea  
21 from the Board as to what it expects. I think today has  
22 been very, very helpful for us in kind of addressing some of  
23 the serious concerns that the Board has, and I think we're  
24 prepared, as we're obligated to, under our statutory  
25 mandate, to move forward. We have a group of people, an

DAVbw 1 identifiable group of people which, hopefully, unless one of  
2 my colleagues is planning to take another job in the near  
3 future, will remain fixed throughout the next year, year and  
4 a half, through the completion of these proceedings.

5 We are trying to work together, productively and  
6 efficiently, in this case.

7 So we're prepared to move through interrogatories,  
8 to move through the depositions, to have our witnesses  
9 prepare for depositions and to confirm with a schedule that  
10 would provide for a hearing in the early part of next year.

11 JUDGE MILLER: 1985?

12 MR. SHAPIRO: 1985; yes.

13 JUDGE SCHINK: While I have the microphone on  
14 here, let me ask another question about your expert  
15 witnesses.

16 I note that you had at one time mentioned Robert  
17 Anderson, a metallurgist, as a possible witness, and he will  
18 not be a part of your case.

19 You say that Mr. Bridenbaugh is going to present  
20 your arguments or help you in your arguments with respect to  
21 the pipe-cracking issue.

22 Is he a metallurgist?

23 MR. SHAPIRO: I'm sorry. May I have a moment?

24 JUDGE SCHINK: Sure.

25 (Pause.)

DAV/bc

1 MR. SHAPIRO: He's testified extensively as an  
2 expert on pipe cracks in the past. He is not a  
3 metallurgist, to my knowledge.

4 JUDGE MILLER: You may proceed.

5 MR. SHAPIRO: I don't want to be repetitious. I  
6 just would point out that in the course of our presentation  
7 today, I hope we have made it clear that we think that the  
8 contentions should move forward to a hearing on their  
9 merits. We hope that the Board will develop with the  
10 parties an appropriate discovery schedule that accomplishes  
11 that goal. And we think that under the applicable law, as  
12 we understand it, they have not demonstrated either legally  
13 or factually a basis on this record for the extraordinary  
14 sanction of dismissal. And that we hope that the Board will  
15 deny the motions, will assist us in developing the schedule,  
16 or, if the Board desires, have us develop it among the  
17 parties and then bring it to the Board's attention, but that  
18 we move forward to what is the ultimate concern of what I  
19 believe is the Board, the staff, intervenors, and I would  
20 hope, the applicants.

21 And that is that the contentions are addressed on  
22 their merits, that we receive the necessary assurances that  
23 there will be appropriate response to the public advocate  
24 concerns about pipe cracks, management competence and  
25 environmental qualification of the Hope Creek Nuclear

DAV/bc 1       Generating Station.

2                   Thank you.

3                   JUDGE MILLER: Are those pipe cracks generic in  
4 nature or are you zeroing in on Hope Creek?

5                   MR. SHAPIRO: We are zeroing in on the specific  
6 type of piping used on Hope Creek.

7                   JUDGE MILLER: Are there any depositions that you  
8 and your colleagues wish to take on behalf of your client of  
9 any of the other parties' witnesses or experts, which would  
10 be significant in getting rather promptly into the merits of  
11 these matters?

12                   MR. SHAPIRO: May I have a moment?

13                   JUDGE MILLER: Sure.

14                   (Discussion off the record.)

15                   JUDGE MILLER: Did you get the information,  
16 counsel, that you wished?

17                   MR. SHAPIRO: In our recent set of  
18 interrogatories, we requested the names of any witnesses and  
19 the backgrounds of witnesses that the applicants are  
20 prepared to present on the three contentions. Now,  
21 depending on that information, I would think that we would  
22 be deposing whatever witnesses they plan to present. In  
23 addition, I think, depending on some of the answers to the  
24 other interrogatories, particularly on management  
25 competence, on the response of PSE&G to the Salem

1 incident, that we would be deposing the corporate personnel  
2 in PSE&G to determine why if they haven't taken appropriate  
3 steps to Salem, why they haven't, and to further amplify  
4 upon the interrogatories.

5 With respect to environmental qualification, I  
6 think we are slightly hampered, because, the information, as  
7 I understand that, will not be available until April 1985,  
8 which would almost make it premature to go through an  
9 extensive deposition process. It might be a reason for  
10 conducting this proceeding in a bifurcated manner.

11 But I think we will definitely be prepared in  
12 response to these interrogatories to move forward on  
13 depositions in the month of January.

14 JUDGE MILLER: The Board has not  
15 reached a decision and wishes to do some thinking, to see  
16 the transcript and the like, as to whether or not this  
17 proceeding should be dismissed, as was alluded to hence.

18 What I and my colleagues may say about scheduling  
19 is not to be taken to mean in any way, to imply in any way,  
20 that we have reached a decision that we are going to be  
21 having a trial. However, I think the Board's idea of  
22 expeditious proceedings are probably not those that counsel  
23 may have, which is understandable.

24 We are all busy in our daily lives and other  
25 things.

26 Frankly, the Board doesn't see any reason why

1 discovery couldn't be completed within 30 days. You have  
2 had plenty of time. None of these things are a surprise to  
3 you, even including some of the things that they staff may  
4 not have yet filed. We'll hear from the staff on that in a  
5 moment.

6 I know that lawyers always scream bloody murder  
7 but I notice also that when you get to trial, they are able  
8 to go to trial, and they do a pretty good job. However,  
9 something else has occurred.

10 You talk about dismissals. There haven't been  
11 that many cases involving us, so that there aren't too many  
12 precedents doesn't mean a great deal. The question isn't  
13 whether or not it's unprecedented. The question is whether  
14 or not it was warranted in view of the two-week time  
15 deadline given in our August order. I'm not going into that  
16 at the moment.

17 I wish to inquire of you, and I will ask also  
18 other counsel, whether or not there is any good and  
19 sufficient reason why you couldn't, in consultation with  
20 your colleagues and your client, whom I'm happy to learn is  
21 a trial lawyer, select those depositions of opposing  
22 witnesses, experts, whoever they are, that are most  
23 significant to one or more of the contentions, and take them  
24 rather speedily in the presence of the Board here.

25 Think about it.

DAV/bc 1

MR. SHAPIRO: Take the depositions.

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JUDGE MILLER: Of whoever you say is necessary to have a full, fair hearing right from that witness stand. In the presence of the Board. We can cut through an awful lot of procedure if we get you right down to the merits that you and we want to get to speedily.

MR. SHAPIRO: I appreciate that. It also seems to run counter to the general concept of depositions, which is to develop appropriate discovery material.

JUDGE MILLER: That's all right. We wouldn't be ruling on the merits. The rulings, and we might not have to make any, would be simply from a deposition informational or discovery point of view.

That would certainly enable you and all counsel to get to the merits of this testimony instead of talking in the abstract. And, in a speedy time. We are going to ask the same thing now of other counsel. You can tell me now or you can wait, if you wish, until others have thought about it.

I'm saying take the depositions right in front of the Board, or at least a representative of the Board, and here, right in Bethesda, right now, get on the phone, make your arrangements, get them in, we'll swear them, go right ahead.

MR. SHAPIRO: Are you talking about today?

DAV/bc

1 JUDGE MILLER: No. Maybe, next week. No, I am  
2 talking about by January. Quickly. Speedily. You people  
3 have all had time and you are all telling us your reasons.  
4 We've all practiced law. We know there are problems. We  
5 know also that when the period of gestation is up, you know  
6 very well you're going to get to trial. And we're  
7 suggesting trial is a lot sooner if we get to trial than you  
8 may be thinking.

9 So we're trying to open your minds to give it some  
10 thought. If you want to think about it, we don't want to  
11 press you now but we would like to hear from all of you  
12 probably after lunch on that.

13 MR. SHAPIRO: I would like the opportunity to  
14 think about that. Thank you.

15 JUDGE MILLER: Now, staff, we haven't heard from  
16 you.

17 MR. DEWEY: Yes, sir. Well, I won't reiterate  
18 what we have already stated in our briefs. I would just  
19 like to once again make the point that we would like to see  
20 that this proceeding moves along expeditiously. We urge  
21 that a swift discovery schedule be set and a hearing  
22 schedule be set as well.

23 We would like to point out and note that up to  
24 this point, the fuel load date for this unit does not appear  
25 to be jeopardized.

DAV/bc 1

JUDGE MILLER: We regard that as being  
2 nonrelevant.

3 MR. DEWEY: All right, sir, but I would like to  
4 point out that in the event that there is a dismissal of  
5 this proceeding and the Appeal Board reverses and a great  
6 deal of time is taken and it goes back to hearing, then the  
7 fuel load date might be jeopardized. As a practical matter,  
8 I would like to point that out.

9 JUDGE MILLER: Well, as a practical matter, none  
10 of us know what the Appeal Board is going to do or how  
11 swiftly they are going to do it.

12 MR. DEWEY: Yes, sir.

13 JUDGE MILLER: I point out also that in the Byron  
14 case, as you know, that was a dismissal. In that case, the  
15 Appeal Board essentially held that fixed dates had not been  
16 given by the Licensing Board. I thought we had but we  
17 didn't. Two weeks was specified in August.

18 Secondly, staff counsel in that proceeding both  
19 before the Board and on appeal took the position that that  
20 was a quarrel between the parties and that staff took no  
21 position.

22 They rather proudly announced that. So I suggest  
23 also, when you are talking about appeals, you feed that into  
24 hopper, unless the staff is changing its procedures. I have  
25 no reason to suppose that it is.

DAV/bc 1

Do you have anything further to add?

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MR. DEWEY: That's basically all I have.

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JUDGE MILLER: Okay. Counsel, we are thinking of recessing for lunch. We'll take about an hour and a half because it might be helpful to all counsel to have a chance to reflect upon where we are.

7

Would this be an appropriate place to take a recess for lunch of about an hour and a half?

9

MR. CONNER: Could I make a couple of preliminary points if there's going to be a recess, that the Board might want to think about and interrogate about over noon.

12

This is not all of the things I want to mention but I specifically want to note that we have been providing information routinely on these technical issues throughout...well, since the application was filed, of course, but certainly to the intervenor since they were admitted as parties.

18

And I am concerned that what I have learned for the first time this morning that the intervenors' MHB witnesses have had only 40-50 hours, which was raised from 30-35 by Mr. Shapiro. And he noted that 24-25 of those were in a meeting that they had in a recent meeting, if I heard him correctly.

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The point is that this is very, very superficial technical review which would give them little chance to do

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DAV/bc 1 more than a first reading of the technical information,  
2 particularly for the one individual who was present on all  
3 three contentions.

4 In this contention, I would note -- well, let me  
5 say first about our response to the interrogatories  
6 initially filed by the Public Advocate on February 14th. We  
7 identified all of the documentation that was pertinent as of  
8 that point and said that they were available for review in  
9 Mr. Fryling's office. That was never done.

10 Two, we were asked about the individuals from the  
11 company, or consultants, who had participated essentially in  
12 each of the three contentions. We, for example, on the ATWS  
13 contention or the management qualification contention  
14 related to Salem on the ATWS point identified, I think it's  
15 132 witnesses. There were less identified for the other two  
16 contentions. None of them have been sought for deposition.

17 We have pooled together the management information  
18 in what we call the Management Overview Report, which was  
19 published in July of '84, consolidating -- we'll call it the  
20 lessons learned from Salem, and so forth, which was  
21 distributed to everybody then.

22 We have heard no further information on that. We  
23 are ready to go to depositions or hearing now, right now.  
24 We had hoped to take the depositions earlier or the updated  
25 discovery which we didn't get in order to perhaps dispose of

DAV/bc 1 the matters by motions for summary disposition.

2 I would only note that we believe that there is  
3 not enough time really to do that, and that we would prefer  
4 to go directly to an evidentiary hearing.

5 JUDGE MILLER: How soon could you file your  
6 written testimony insofar as you intended to file written  
7 testimony?

8 MR. CONNER: That, sir, is exactly the point I was  
9 coming to. As Mr. Shapiro admitted, he wants to find out  
10 what the bases for their contentions are so that he can have  
11 the contentions joined, is the way I wrote it in my notes.

12 The point is we still don't know what they want to  
13 argue about. All we can do at hearing is identify the  
14 pertinent portions of the FSAR and the supporting documents,  
15 such as the Management Overview Report that I mentioned.  
16 And any other document like that. And say we rest our case  
17 because we don't know what, if anything, specifically they  
18 are aiming at.

19 So, on that basis, we could go to trial this  
20 afternoon. But I need to emphasize to the Board that we  
21 really don't know what they want to argue about. And I  
22 submit, if the Board will read the advocate's response to  
23 our interrogatories, you find only generalities and saying  
24 "We're going to look into this."

25 MR. SHAPIRO: May I have a moment, your Honor?

DAV/bc 1

JUDGE MILLER: Yes.

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MR. SHAPIRO: Just with respect to Mr. Conner's presentation, there is an outstanding set of interrogatories which I feel that we've submitted to the applicants and are awaiting responses to those. I think that the contentions, while Mr. Conner says he really doesn't know, I think the contentions have already been approved by the Board.

They are clarified through editing and in the prehearing conference, and we have set forth our position. I'll be glad to state our position on each of the contentions for Mr. Conner today during the recess if he has any problems in understanding what we're asking about.

I think, in terms of completing discovery, we are waiting for the responses. And once we have the opportunity to review the responses, to send us a list of 112, 120, whatever it is, and say that we should play some type of roulette and identify -- and to pose some of those people when they may have nothing meaning to say doesn't really add to what the Board's goal is here today.

I think that we have filed interrogatories. A copy has been made available to the Board, which really focuses on the witnesses that we need to dispose.

The only thing I can't speak for--I can speak to our commitment--the only thing I can't speak for, and I hesitate to say this but it is a fact of existence in our

DAV/bc 1 position, is I cannot speak for our experts' schedules.  
2 PSE&G has its people inhouse. They can tell them to jump  
3 through hoops and do triple sommersaults, if they want, and  
4 they'll do it to get their next check. But we don't have  
5 that control over MHB.

6 I can only say that we will do everything possible  
7 at the next available date that those people are able to be  
8 disposed, that we will be ready for depositions at that  
9 time.

10 JUDGE MILLER: We've asked you to do a little more  
11 than that. That's why in our order we asked counsel to be  
12 prepared to address whether or not these ever-increasing  
13 schedules in NRC of these particular three witnesses should  
14 have any bearing on this case. We haven't heard much  
15 addressed to that.

16 You talk about the usual and traditional, "These  
17 are busy people." We know they're busy people. We've heard  
18 them testify in cases. And we have some feeling of what  
19 their background and expertise is.

20 We are at the point where we ask you -- you'll be  
21 given a chance after lunch in case you haven't finished your  
22 remarks to that -- but we've asked why we should even look  
23 at their other schedules.

24 We've given everybody notice. We have given you  
25 two weeks as of August. We are not at all prepared to say

DAV/bc 1 that there's any room or any latitude there. We're going  
2 to give you a chance to respond. But I don't think that you  
3 have up to now. You have given the traditional point that  
4 lawyers take that the experts are busy.

5 We know that but that's only the beginning of the  
6 inquiry, not the end. And I think we are approaching the  
7 point without prejudice to anybody and without cutting you  
8 off where we should take our lunch recess so you can  
9 fine-tune and sharpen on the matters that you wish to bring  
10 to the Board's attention, unless there's something unusual  
11 that you want the Board to think about. And we're thinking  
12 about lunch at the moment, we suggest this would be a good  
13 time to suspend in the sense of taking the lunch recess.  
14 And we'll be prepared to hear from all of you thereafter.

15 MR. SHAPIRO: The only brief statement I would  
16 make is that on page 4 of our response to the order to show  
17 cause, which was filed last week, we state our position on,  
18 as the Board has termed it, professional witnesses. And I  
19 think that, paraphrasing our position, it is that these  
20 witnesses should not be treated any differently than  
21 any other witnesses, but there is a good cause standard,  
22 which, in considering availability of these witnesses,  
23 should take into account the fact that they are tied up in  
24 other proceedings.

25 And while I think that they have tremendous

DAV/bc 1 expertise in their particular areas, I haven't seen them  
2 demonstrate the ability to be in two places at the same  
3 time. Now, maybe they have that.

4 JUDGE MILLER: The question is, since August,  
5 should they not have been here first and primarily as far as  
6 this Board is concerned, to give your excuses or give their  
7 excuses to some other Board?

8 That will be the situation. You can address that  
9 when we get back.

10 MR. SHAPIRO: Thank you.

11 MR. CONNER: Mr. Chairman, I would make just one  
12 point. Mr. Shapiro has just said he is waiting for our  
13 responses to his latest interrogatories, which he mailed  
14 from his office last Thursday, December the 13th, and which  
15 we received last Friday.

16 I will say that, in a quick review of them, it  
17 appears that most of the questions were answered in our  
18 first answers to his interrogatories a year ago.

19 JUDGE MILLER: Very well. We'll take a recess for  
20 lunch; 1:30, please.

21 (Whereuopn, at 12:00 p.m., the prehearing  
22 conference was recessed, to reconvene at 1:30 p.m., this  
23 same day.)

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DAVbur 1

## AFTERNOON SESSION

2 JUDGE MILLER: It is 1:30. So we will resume our  
3 conference with the parties and counsel.

4 Who wishes to go first this afternoon?

5 MR. SHAPIRO: With the leave of the Board, I just  
6 wanted to correct one part of the record. In discussing our  
7 experts, I made an error, and I would like to state the  
8 correct information with respect to what experts will  
9 testify on what contentions.

10 JUDGE MILLER: You may do so.

11 MR. SHAPIRO: Dale Bridenbaugh will testify on the  
12 first contention regarding pipe cracks; Dale Bridenbaugh and  
13 Richard Hubbard will testify on the second contention  
14 regarding management competence; and Richard Hubbard and  
15 Gregory Minor will testify on the third contention regarding  
16 environmental qualifications.

17 The mistake I made was substituting  
18 Mr. Bridenbaugh for Mr. Hubbard on the third contention. I  
19 just wanted to clarify the record.

20 JUDGE MILLER: The record will reflect the  
21 correction which was stated by counsel.

22 Who wishes to proceed now?

23 MR. CONNER: I would like to note two or three  
24 points that I did not cover before lunch based upon  
25 Mr. Shapiro's earlier argument.

DAVbur 1

2 I would simply note that following the service of  
3 our management overview report last July, we received no  
4 further input in response to interrogatories that we had  
5 filed earlier as to whether or not that affected whatever  
6 their positions were.

7 We would note that although the negotiations -- I  
8 will call them -- that Mr. Shapiro noted in dealing with the  
9 MHB Technical Associates, which apparently started shortly  
10 after the prehearing conference if not before, it was still  
11 not until apparently sometime in September or October that  
12 they were sent the FSAR and the other documents Mr. Shapiro  
13 referred to.

14 I would also note there was a reference to the  
15 SER, which was in fact published the first week in  
16 November. So that has been available since then. I don't  
17 have the exact date we received it.

18 There was also a reference to settlement  
19 negotiations that I was not going to allude to, since I  
20 believe that should be considered outside the record until  
21 and unless there is something appropriate to present to the  
22 Board for consideration.

23 Nevertheless, since Mr. Shapiro brought that up, I  
24 would note that there seems to be an equal inability on the  
25 part of the Public Advocate to come to grips with something  
like that because we have -- not through my office but

DAVbur 1 through Mr. Selover, the Vice President - Law for the  
2 Applicant, was pursuing that and learned when Mr. Rodriguez  
3 returned his call last Thursday or Friday that Mr. Rodriguez  
4 said he didn't even know of the existence of the show cause  
5 order and at that time saw no particular need for rapid  
6 action.

7 I would also ask that the Board note in Board  
8 Exhibit 12, around page 9, the reference to the costs of  
9 this proceeding, wherein Mr. Rodriguez indicates that if the  
10 Public Advocate got really involved it would be in the  
11 neighborhood of \$3 million, and then there is a colloquy  
12 that follows on, wherein Mr. Rodriguez says, quote, at about  
13 the middle of the page, referring to his experts, whoever  
14 that meant at that time: "They have sufficient confidence  
15 in the NRC as a result of recent developments that it would  
16 be a waste of taxpayers' money to use \$3 million to  
17 duplicate NRC's service."

18 The purpose I am bringing this up is, is that the  
19 number of \$3 million was in some way calculated as a  
20 possible cost for the Public Advocate's involvement in this  
21 proceeding, and I thought that might supplement the  
22 questions that you asked of Mr. Shapiro.

23 MR. SHAPIRO: Mr. Chairman, if I may?

24 JUDGE MILLER: Wait. I am not sure he has  
25 finished.

DAVbur

1 MR. CONNER: Again, we would simply state our  
2 readiness. We believe the case should be dismissed because  
3 of the failure to prosecute on the part of the Public  
4 Advocate's office, and we think that should be done because,  
5 absent their carrying out the responsibility of the parties,  
6 there is no need for a public hearing. We believe they have  
7 had more than ample chance to pursue that. Having failed to  
8 do so, we believe the case should be dismissed.

9 On the other hand, given the Board's suggestion or  
10 statement that it had not made up its mind on this, I will  
11 simply reiterate that we are ready at any time to take the  
12 depositions of their witnesses in an effort to find out what  
13 the areas in controversy are or to provide whatever  
14 discovery may or may not be necessary.

15 We like the idea of the Board taking depositions  
16 itself because I have found in the past NRC proceedings that  
17 does in fact expedite the proceeding.

18 I think that is all we need to respond.

19 Oh, I am sorry, excuse me.

20 We learned for the first time this morning from  
21 Mr. Dewey that the Staff now believes it could not have its  
22 testimony on environmental qualifications ready until a  
23 submission from us, which we didn't realize was tied  
24 directly to the hearing in consideration, which our  
25 engineers have said would come in probably in April, but we

DAVbur 1 will endeavor to expedite that.

2 In the event the Board were to go to a hearing, as  
3 indicated, in January or the first of February, something  
4 like that, we would suggest that everything go forward and,  
5 if there is some need for the Staff to supplement its  
6 testimony thereafter, that the record be held open for that  
7 purpose.

8 JUDGE MILLER: On the environmental contention?

9 MR. CONNER: Yes, sir.

10 JUDGE MILLER: Are you finished?

11 MR. CONNER: Yes, sir.

12 JUDGE MILLER: Mr. Shapiro.

13 MR. SHAPIRO: Just to respond to some remarks of  
14 Mr. Conner and then to move forward again, hopefully.

15 One, with respect to settlement. I think that  
16 Mr. Selover and a representative of our office, a director  
17 of the Division of Rate Counsel, have engaged in a series of  
18 discussions, that there has been an exchange of documents on  
19 at least two occasions. I think it is simply untrue to  
20 suggest that there has been no effort or no movement or no  
21 meetings on that. They haven't involved the Commissioner or  
22 the Public Advocate because the documents have not reached  
23 the point where there is a concrete nature of a settlement  
24 that could be presented to him, that it is not through any  
25 inaction on the part of the Advocate.

DAVbur 1

2 The staff -- as in most large organizations, the  
3 staff has to take a lot of the initiatives and move these  
4 things through the proceedings before it gets to the Public  
5 Advocate.

6 I think the record should reflect that there is  
7 something more extensive there, although again it is  
8 marginal. I just wanted to correct a factual  
9 misunderstanding.

10 JUDGE MILLER: That is all right.

11 Let me state that the Board of course does not get  
12 into negotiations, but on the other hand, the Commission,  
13 our regulations, and the Board do encourage negotiations to  
14 settle in whole or in part issues, parts of issues, and so  
15 forth.

16 So without getting the Board involved on the  
17 record, we do want to encourage all parties to do whatever  
18 is possible in the way of negotiation or partial settlements  
19 or whatever.

20 MR. SHAPIRO: Thank you, Mr. Chairman.

21 Then with respect to the Public Advocate's  
22 testimony, Mr. Conner keeps returning to that, and I just  
23 wanted to reemphasize what I think we have submitted to the  
24 Board already in writing, what I think I have tried to  
25 clarify on several occasions today, that the Public Advocate  
was speaking in terms of duplicating the NRC's functions,

DAVbur 1 essentially. He was not speaking in terms of the monitoring  
2 of a case. He was not talking in terms of what an  
3 intervenor would do. He was speaking in terms of  
4 duplicating, and in his reference to monitoring, he was  
5 monitoring in terms of duplicating that effort.

6 Since no one has ever quoted a figure that I am  
7 aware of, or that I have heard, of \$3 million to represent  
8 us as Intervenors in this proceeding and since I have tried  
9 as an officer of this Board and an officer of the Court to  
10 make a representation as to the information we have, I think  
11 we should try to move forward with the information before  
12 the Board rather than trying to, in the Chairman's words,  
13 flog a dead horse here today.

14 I think with respect to the depositions, while  
15 obviously I am not sure how the financial arrangements would  
16 be worked out vis-a-vis the parties, if the depositions are  
17 conducted here as opposed to normally the way in which  
18 depositions would be conducted and the expenses that would  
19 be chargeable to the respective parties -- but beyond that I  
20 think our major concern is not whether they are conducted  
21 here or in New Jersey.

22 But realistically, given what the experts that we  
23 are seeking to assist us in this case or that we have been  
24 working with -- what their schedules will permit them to  
25 do, if they are in other hearings at that time -- and I

DAVbur 1 think we have tried to piece together as best we can their  
2 schedules, and in the case of Dick Hubbard the earliest  
3 availability that we are aware of is the week of January  
4 21st. Pretty much the same kind of availability holds true  
5 for the other two.

6 So if we are talking about scheduling depositions  
7 toward the end of January, I think --

8 JUDGE MILLER: Wait a minute. I thought these  
9 witnesses, according to your proffered information to the  
10 Board, were or could be made available in the month of  
11 October.

12 MR. SHAPIRO: They could.

13 JUDGE MILLER: Then why can't you produce them in  
14 two to three weeks?

15 MR. SHAPIRO: Because at that point in time when  
16 we had an August date and we talked with our witnesses, we  
17 asked them when they would be available at that time. We  
18 can't hold their schedules open permanently.

19 JUDGE MILLER: We can't hold this Board open at  
20 all.

21 Now, when we said make them available within two  
22 weeks in August, you had a clear responsibility as counsel  
23 to make them available, not to wait for motions.

24 Did you communicate that fact?

25 MR. SHAPIRO: We communicated that in our motion

DAVbur 1 to the Board and our request for extension, that the  
2 witnesses would be available in October.

3 JUDGE MILLER: That is a "would be" as of August  
4 or maybe early September?

5 MR. SHAPIRO: Yes.

6 JUDGE MILLER: What I am saying is when did you  
7 advise anybody that they were in fact available?

8 MR. SHAPIRO: In that note.

9 JUDGE MILLER: Come, that is no note. You are a  
10 practicing lawyer. The Board issued an order we expect you  
11 to fulfill. That order said within two weeks make them  
12 available.

13 That doesn't mean sit around and wait for a  
14 Valentine or an invitation or a notice of anything. It  
15 meant for you affirmatively to act.

16 Now, let's get that clear right now. You didn't  
17 do so.

18 MR. SHAPIRO: We did. The witnesses were  
19 available in October. We requested an extension. In  
20 accordance with the rules of the Commission, we requested an  
21 extension, explaining the reasons why that extension was not  
22 ruled on by the Board.

23 JUDGE MILLER: What was the effect of the Board  
24 not ruling on it?

25 MR. SHAPIRO: I would assume it was, in effect, to

DAVbur 1 grant it.

2 JUDGE MILLER: Now, wait a minute. You are  
3 talking about the regulations. You are certainly familiar  
4 with the fact that the filing of a motion doesn't stay the  
5 time for anything, under 2.730(G). You are familiar -- you  
6 are a lawyer -- with our regulations. Filing the motion  
7 didn't suspend the time, the two weeks or any other time.

8 There was no action by the Board, so there was  
9 nothing done to change or alter the two weeks. You were in  
10 default at the end of the two weeks, and you are in default  
11 today.

12 MR. SHAPIRO: Is it the Board's position, then,  
13 that if we file a request for an extension of time, saying  
14 our witnesses are unavailable and it is physically  
15 impossible because of representations made in good faith --

16 JUDGE MILLER: We don't care, whatever reason.

17 MR. SHAPIRO: They are unavailable and the Board  
18 has not ruled on that extension.

19 JUDGE MILLER: That the time is not extended.

20 MR. SHAPIRO: That the time is not extended and we  
21 have to produce witnesses where we have asked the Board to  
22 rule on our motion and the Board hasn't ruled?

23 JUDGE MILLER: Correct. This is true in court.  
24 This is true here.

25 The filing of a motion for an extension of time

DAVbur 1 does not in and of itself suspend the running of the time.

2 MR. SHAPIRO: With all due respect, that is not my  
3 experience.

4 JUDGE MILLER: It is my experience, and look at  
5 2.730(G) right there. Look at it. Don't talk about it,  
6 look at it.

7 (Pause.)

8 In my experience, that is consistent with the  
9 Rules of Practice, both in federal courts and state courts.

10 MR. SHAPIRO: In my experience, judicial  
11 decisionmakers rule on motions for extension of time within  
12 the period because that is the whole purpose of the motion  
13 for extension of time. If you can't do something, it is  
14 physically impossible, you ask the decisionmaker to  
15 understand that and to rule on the good cause, or whatever  
16 basis you have presented.

17 JUDGE MILLER: You don't rule on your own motion.  
18 You don't grant your own motion. You don't rule on it  
19 unless there is action by the Board to extend the time.  
20 There is no extension of time. Within two weeks you were in  
21 technical default.

22 The Board did withhold ruling to give you an  
23 opportunity to produce those witnesses, not to sit and wait  
24 for an invitation or notice but to produce them, to make  
25 them available. You are assuming the affirmative duty. We

DAVbur 1 regard you as being in default for not having done that.

2 Let me put it very plainly. We are looking at the  
3 whole picture. We are trying to see where we stand, in  
4 fairness, to everybody, but you, your client, was in  
5 default.

6 MR. SHAPIRO: Your Honor, with all due respect,  
7 because I am not familiar with the rule, if you could point  
8 out to me the rule --

9 JUDGE MILLER: Now, look, I am not conducting a  
10 course in law school. I have cited to you the section. I  
11 have told you the Board's belief.

12 MR. SHAPIRO: Now --

13 JUDGE MILLER: Why do you keep interrupting?  
14 Where do you get that right?

15 MR. SHAPIRO: I apologize.

16 JUDGE MILLER: I told you before, we want the same  
17 kind of decorum as in court. When a Board or a member  
18 thereof is speaking, we wish you or any counsel to stop  
19 speaking, to at least listen to what the Board is saying.  
20 We regard this as a part of the maintenance of decorum. It  
21 is not meant as a discourtesy to you, but it is meant so  
22 that we are not engaging in debate with you or any other  
23 counsel.

24 We are trying to make rulings. We are trying to  
25 get information. We will ask you -- if something that you

DAVbur 1 say isn't clear or requires clarification, we will ask you  
2 to do it, but that doesn't mean we expect you to take the  
3 floor like you were in the U.S. Senate or something.

4 I am not saying this now to you personally. This  
5 is to all counsel.

6 The point is this: the Board has ruled and has  
7 told you we ruled that under 2.730(G) as well as our own  
8 concept of proper practice, that the making of a motion does  
9 not supersede time or anything else. The Board's not having  
10 acted; in fact, holding in abeyance a ruling, which in  
11 effect gave you an opportunity to come up with something  
12 sensible in the production of these witnesses, in no way  
13 extended your time or meant that you or your client were not  
14 in default of the Board's ruling.

15 We regard the fact as important. The two weeks  
16 were there. In the Byron case, the Staff was mentioning --  
17 I am not trying to be over-technical with this thing, but on  
18 the other hand, we regard it to be very important for the  
19 obedience of all parties to the Board's orders. We regard  
20 that as being rather a flagrant disregard, and to sit there  
21 for two months and say I was waiting for a phone call  
22 trivializes our practice, if not worse.

23 MR. SHAPIRO: May I be heard now?

24 JUDGE MILLER: No, I am telling you what the  
25 position of the Board is. Then you may be heard.

DAVbur 1

2 As a consequence, the Board's view is: we have  
3 heard your explanation, and we will consider it. We are far  
4 from convinced that either counsel or the party, who is a  
5 lawyer in this case, obeyed or attempted to obey the Board's  
6 clear order. Two weeks means two weeks, no matter how thin  
7 you slice it, and the extension of time doesn't follow the  
8 filing of a motion.

9 Therefore, the Board deliberately did not rule  
10 upon it. That left it at that situation. Now, we are  
11 trying to figure out where we are going in a practical and  
12 reasonable manner, but we are not about to have this process  
13 of our orders dealt with in anything except a prompt and  
14 obedient fashion by all parties.

15 With that as the background, we are asking all  
16 counsel -- and we will give you all a chance to be heard on  
17 it -- what suggestions do you have in a practical way to get  
18 this procedure where we can get to an early and expeditious  
19 trial, which we regard as having been delayed for reasons  
20 we do not accept as excuses?

21 We are willing to give consideration to what all  
22 counsel will say on this point. We are not making any  
23 commitments. We are not going to engage in debate with any  
24 counsel, but you will all be heard on it.

25 In that regard, if you have anything further on  
that point, we will hear from you. You have been heard from

DAVbur 1 quite a bit. We haven't heard from the Staff. We are going  
2 to make a full circuit, but we will leave that to your  
3 judgment.

4 Do you wish to be heard on that very narrow point  
5 at this stage?

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1 MR. SHAPIRO: I do but I'll defer to the Staff at  
2 this point.

3 JUDGE MILLER: We're giving you the opportunity.

4 MR. SHAPIRO: I'm not suggesting you're not. I  
5 would just like to defer to the Staff at this point.

6 MR. DEWEY: The Staff would like to propose what  
7 we think would be an expeditious and efficient schedule for  
8 the remainder of the proceeding. We would like to propose  
9 that the length of January be devoted to discovery and the  
10 completion of discovery. This would include the  
11 depositions.

12 JUDGE MILLER: All discovery in all forms?

13 MR. DEWEY: All discovery in all forms.

14 JUDGE MILLER: To be completed by what date?

15 MR. DEWEY: January 31.

16 JUDGE MILLER: That's on a Thursday.

17 MR. DEWEY: We can make it February 1st.

18 JUDGE MILLER: Let's make it January.

19 MR. DEWEY: Staff would be ready to go to hearing  
20 on contentions 1 and 2 by, for example, the 1st of March.

21 JUDGE MILLER: What are 1 and 2?

22 MR. DEWEY: Contention 1 is the pipe-cracking.  
23 Contention 2 is the management implications of the Salem  
24 ATWS event.

25 With respect to Contention 3, the Staff is in the

1 process of obtaining additional information from the  
2 Applicants which we need to complete our SER review. The  
3 Applicant should have been aware that this information was  
4 necessary. He was aware that this was necessary for our SER  
5 review. He should have been aware that this was necessary  
6 for this hearing.

7 As a matter of fact, we were at a meeting  
8 involving environmental qualifications approximately 6  
9 months ago. The Applicant's experts were there. I believe  
10 one of the Applicant's attorneys was there and I said how  
11 important it was that that information be forthcoming  
12 because that is a contention in this proceeding. I'd like  
13 to make the record perfectly clear on that.

14 We have checked and when I say we -- our  
15 technical staff has checked with the Applicants to determine  
16 when that information is presently due, the information we  
17 need to complete our technical review. It is my  
18 understanding that it is due in April. I have talked to our  
19 expert witnesses on this point. It will take the staff  
20 approximately two months to review this information. Then  
21 also an audit will be necessary.

22 And so with the review and having the audit  
23 necessary, we're talking about three months to go to hearing  
24 on that contention once the information is in which would  
25 put us in hearing around July unless the Applicant can get

1 us the information earlier.

2 Now, I suggest to expedite this proceeding, we  
3 have a bifurcated hearing in which we perhaps go to hearing  
4 on Contentions 1 and 2 in March, then go to hearing as soon  
5 as we can on Contention 3.

6 JUDGE MILLER: Does that conclude Staff's  
7 recommendations?

8 MR. DEWEY: Yes, sir. Oh, no, one other thing,  
9 sir.

10 In all due respect, I have talked through this  
11 with some of the ELD staff back in Bethesda having to do  
12 with the taking of depositions while a Board member is  
13 present. We do believe that this could add to  
14 efficiencies in the deposition process.

15 However, we're somewhat concerned that because of  
16 the broad aspects of discovery that as much information is  
17 allowable in discovery that would not be admitted in the  
18 proceeding. So if some of this information tended to have a  
19 prejudicial quality which the Board would hear during the  
20 deposition, we're afraid that that might prejudice the Board  
21 during the hearing. We think the Board should be aware of  
22 this potential problem. Perhaps if all the parties could  
23 stipulate, however, to allowing the Board members to be  
24 there that would take care of any subsequent legal  
25 arguments on that particular point.

1 JUDGE MILLER: Applicants?

2 MR. CONNER: May I have just one second? I want  
3 to clarify a point on that environmental qualification.

4 (Discussion off the record.)

5 MR. CONNER: Thank you.

6 Let me address this environmental qualification  
7 question. This, of course, is information that has been  
8 included in the FSAR and has further been included, I am  
9 informed, that a document which is dated August 2, 1984  
10 which contains a great deal of information on environmental  
11 qualification was given to the Staff in September for its  
12 review. I cannot, of course, say how much additional  
13 information the Staff wants to consider. We do, however,  
14 know that there's a great deal of information in there.  
15 Obviously, the Staff has to have additional information to  
16 complete its review for licensing.

17 The point I want to make -- there is a  
18 distinction which should be recognized between what the  
19 Staff may ultimately need, such as the details for technical  
20 specifications and so forth, as distinguished from what  
21 would be required to resolve a contention. We are back to  
22 the same problem. I don't know how Mr. Dewey can tell what  
23 information he needs for the hearing because at this point I  
24 don't think any of us know what MHB Associates are going to  
25 come up with as their deficiencies which they perceive.

1                   So what I am suggesting is an alternative for the  
2 Board to consider would be something like having the MHB  
3 individuals submit their testimony -- their canned testimony  
4 -- on whatever their perceived difficulties are, say, in  
5 roughly January the 15th, that we review them, submit the  
6 prepared testimony responding to them, and submit that to  
7 the Board and proceed to hearing on the issues.

8                   Now, I would rather determine by the  
9 understanding in the background that we would normally have  
10 in discovery because that's what we intended to do  
11 throughout 1984 given the fact that we have not had this  
12 opportunity. It may be quicker in the long run to have  
13 them write their testimony as to perceive deficiencies and  
14 we'll just take them on in hearing the old-fashioned way  
15 without going through formal discovery.

16                   With regard to, as I suggested earlier, it might  
17 or might not be necessary to keep the record open to add  
18 information on the environmental qualification. I simply  
19 don't know at this point. Certainly that could be done. In  
20 any event we could break the back of whatever their  
21 arguments are this winter without having to wait till spring  
22 and thereafter to see what would happen. So I would suggest  
23 that is one approach.

24                   Failing that we could start discovery next week,  
25 start discovery this week, but starting in January it would

1 give the Intervenors time to get their witnesses ready.  
2 So, conceivably, it might make efficiency on a comparative  
3 basis if we were to start taking depositions, say, on  
4 January the 2nd and go until completed.

5 But I will here, again, want to avoid -- the  
6 difficulty is that depositions in my experience in NRC  
7 proceedings over the past 25-odd years is that an awful lot  
8 of extraneous material is gone into in an effort to develop  
9 new theories or something like that. That's why I come back  
10 to the idea if these gentlemen are, in fact, experts let  
11 them state what their real deficiencies are perceived to be  
12 and let's deal with them and deal with them promptly.

13 JUDGE MILLER: Does that conclude your remarks?

14 MR. CONNER: Yes, sir.

15 JUDGE MILLER: Intervenors?

16 MR. SHAPIRO: Mr. Chairman, Members of the  
17 Board.

18 First of all, Mr. Connor has interrogatories in  
19 his possession which he knows and which he's fully aware,  
20 the answers to which we need before our experts are  
21 prepared.

22 JUDGE MILLER: Hold it when you finish your  
23 sentence. I'm going to find out what you're getting to.

24 MR. SHAPIRO: Which we need to insure that our  
25 experts are prepared to the interrogatories.

1 JUDGE MILLER: When will the answers to those  
2 interrogatories be available to transmit by hand to Counsel  
3 for Intervenors? We got our copies and we looked them over  
4 during lunch so we know generally what you're talking about.

5 MR. CONNER: If I were in Federal Court I might  
6 suggest these may be intended for the purposes of  
7 harrassment because there's 50-odd pages, they're not  
8 numbered sequentially to find all kinds of interesting  
9 things which will be difficult to answer in two weeks under  
10 the Board rules.

11 JUDGE MILLER: We've offered to expedite by  
12 sitting in. We'll just sit right in on your  
13 interrogatories, go through them, tell us which ones you  
14 think we should caste out and we'll rule right now.

15 MR. CONNER: I'm sorry, I'm just not prepared to  
16 do that because we haven't had our technical input on it and  
17 having received them in the noon mail in Friday.

18 JUDGE MILLER: You are referring to interesting  
19 things. I thought you were perceiving some sort of  
20 extraneous matters. You can get a ruling right now on  
21 that on discovery.

22 MR. CONNER: I'd like take you up on your offer  
23 but I regret that I'm not prepared. What I will say is that  
24 our cursory review reflects that an awful lot of these --  
25 the documents have been identified, the sections of FSAR and

1 so on. Secondly --

2 JUDGE MILLER: You've got good help, I'm sure, in  
3 your law firm. You can get people going right through those  
4 and if you can turn up the citations we don't regard that as  
5 a great obstacle.

6 MR. CONNER: We do, though, want to come to one  
7 point if I may. We are now asked -- I'm turning at random  
8 to management competence number 8 -- provide copies of any  
9 written letters, notes, reports, memoranda, et cetera,  
10 relating to management training for any and all personnel  
11 involved in either Salem generating station or the Hope  
12 Creek generating station.

13 JUDGE MILLER: That's too broad. You'll have to  
14 narrow that.

15 MR. CONNER: The point is --

16 JUDGE MILLER: Wait a minute. I'm ruling. You  
17 have to narrow that. You're going to have to think about  
18 what you want if it's narrowed appropriately.

19 MR. SHAPIRO: If Mr. Conner goes through the  
20 interrogatories in a thorough fashion and then contacts us  
21 we'd be happy to talk about how to restrict them. I'm not  
22 sure what purpose this serves by his kind of random skimming  
23 of them now.

24 JUDGE MILLER: He's found one that he thinks  
25 would be objectionable and too broad.

1 Having it say the same thing it will say now, it's too  
2 broad. We'll sustain the objection but we'll give you an  
3 opportunity to narrow it reasonably.

4 MR. CONNER: I would note again that in the  
5 interrogatories on number 1 they go beyond the recirc piping  
6 and have made it broad in covering everything. They've gone  
7 beyond the contention.

8 JUDGE MILLER: Wait a minute. We can't tell from  
9 that whether or not it has a reasonable relationship or  
10 not so we can't rule unless we have more information.

11 MR. CONNER: This is why I made the basic  
12 suggestion that rather than fight through this usual stuff  
13 which a year ago would have been reasonable that we -- and  
14 I'm not even sure I have yet to hear that the Intervenor  
15 witnesses participated in this. I assume maybe they did or  
16 didn't -- in any event, the idea of cutting through this  
17 kind of unnecessary material which has been available for  
18 them to examine.

19 JUDGE MILLER: We understand that. But we're  
20 trying in a practical way to say the future is now.

21 MR. CONNER: That, sir, is why I come back to my  
22 basic point. The simplest way to skin this particular cat  
23 would be to have them submit their canned testimony of the  
24 perceived deficiencies and litigate them.

25 JUDGE MILLER: I don't know whether we can or

1 should do that. I'll have to hear from Counsel. I'm not  
2 sure that would save time overall if, indeed, they do need  
3 information that they're entitled to by way of discovery.  
4 Our question then if that be true is if they prefer to  
5 handle it that way why not the proferred direct written  
6 testimony. Then we've got to get and should get a  
7 reasonable opportunity but we're going to shorten the time.

8 Now, all of you -- not just you -- but remember  
9 2.7711B, the Board does have the right as does the Presiding  
10 Officer of the Board to vary times. We intend to vary times  
11 like crazy.

12 In other words, we're going to foreshorten all  
13 the times for everybody because we think this thing should  
14 move along and we're a year late. So we're reserving the  
15 right under the rules to foreshorten times. They don't give  
16 us regulations and say I've got 30 days or 20 days because  
17 we're going to shorten it. But we're going to do it in a  
18 reasonable manner so approach this from the point of view of  
19 all of you seeking discovery and getting to an early trial  
20 of what is reasonable to experienced lawyers trying to  
21 accomplish it and not to sit on technical rules of  
22 procedure. This is going to be our framework from now on  
23 in. It's going to apply to all of you.

24 Go ahead, now. What was your proposition?

25 MR. CONNER: I was restating -- as I said,

1 Mr. Shapiro brought this up as a first item that he was  
2 discussing. The point I wanted to make is that I thought  
3 the Staff's idea of doing everything in January would cut  
4 through that type of thing and my idea of simply having the  
5 canned testimony from MHB identify what they really want to  
6 litigate we could not waste time going through these dents.

7 JUDGE MILLER: How are they going to give you  
8 canned testimony until they get the information they say is  
9 necessary for them to develop their own expert's testimony  
10 which, I guess, is what you're calling the canned testimony;  
11 is it not?

12 MR. CONNER: Yes, sir, and it's available to them  
13 now in our judgment.

14 JUDGE MILLER: Well, let's ask.

15 MR. CONNER: It's all in the FSAR.

16 JUDGE MILLER: Are you able to do that?

17 MR. SHAPIRO: No.

18 JUDGE MILLER: Why not?

19 MR. SHAPIRO: Because I've never been in a  
20 position in litigation where we're asked to form our experts  
21 theory before or our expert's position before we receive  
22 information from the opposing party. It is necessary for  
23 the expert to form his or her judgment as the Chairman has  
24 just expressed it. I think that's our position. How do we  
25 possibly determine what our expert's testimony will be for

1 crystallization and effective presentation to the Board  
2 until we know what the information is that our experts need  
3 in order to form their testimony.

4 JUDGE MILLER: Of course, the response to that is  
5 how were you able to do that a year ago on contentions and  
6 giving the bases for it you did exactly that.

7 MR. SHAPIRO: We were able to get some of the  
8 basics but we're trying to flush out the basics. As the  
9 Chairman has pointed out there's a broad difference and  
10 as one of the Board's notices points out there's a broad  
11 difference between the contention stage and the hearing  
12 stage and we want to prepare our case for the hearing  
13 stage.

14 JUDGE MILLER: That again is correct. That  
15 again is one year old. We'll adhere to the principal but we  
16 said that a year ago.

17 MR. SHAPIRO: I appreciate that.

18 JUDGE MILLER: We want to foreshorten everything  
19 so don't look at the wrong end of the telescope. Look how  
20 fast you can reasonably do it. That's all we're asking of  
21 you and others. But reasonably because remember we've got  
22 all these questions of credibility that go throughout our  
23 whole complex case. We want all of you to be reasonable  
24 not just one or two.

25 Okay. Now, you've heard the response and there  
26 is no way in which we can ask Counsel by agreement to

1 proffer canned or direct written testimony when, as he says,  
2 he doesn't have the information he deems necessary. All  
3 right, that would not be reasonable. Now, what's your next  
4 step then if that's to be held unreasonable? Let's look at  
5 now rather than January.

6 MR. CONNER: As I say, the Staff's suggestion of  
7 completing discovery in January.

8 JUDGE MILLER: Completing all discovery by  
9 January 31 I think was the bottom line; was it not?

10 MR. DEWEY: Yes, sir.

11 JUDGE MILLER: You go through all the motion you  
12 want, you call each other, you don't call each other, I  
13 don't care what you do but all discovery in every form --  
14 depositions, interrogatories, drop-dead motions. January 31  
15 comes, we all turn into pumpkins. You understand that?

16 MR. CONNER: This information that basically is  
17 asked for by the Public Advocate as I say, the basic part of  
18 it was available a year ago.

19 JUDGE MILLER: How are we going forward to  
20 January 31? Let's take not a leap but a faltering step  
21 forward.

22 MR. CONNER: They can come up and look at it just  
23 as soon as Mr. Fryling gets home.

24

25

1 JUDGE MILLER: What are we going to do about  
2 completing everything in the month of January? Are we able  
3 to do it by supplying the requested information and saying I  
4 have an expert, and he will be available to go on  
5 such-and-such a day and make available all deposition  
6 witnesses and everything, admissions, requests for  
7 admissions, all that, during the month of January.

8 January 31. Are you going to be able to do that?  
9 Will you commit to do that?

10 MR. CONNER: We will commit to make every witness  
11 they ask for available.

12 JUDGE MILLER: I just want a few samples. I'll  
13 discover in every kind of character that's requested by you  
14 and supplied by you by January 31.

15 MR. CONNER: Yes, sir. They will be made  
16 available for copying at our office, for them to do. I  
17 don't want to be misunderstood.

18 JUDGE MILLER: Where copying is reasonable; yes.  
19 We're not going into the nitty-gritty of discovery. Where  
20 copying is reasonable, all lawyers know in many  
21 circumstances, this is it. That may be it. I don't want  
22 any quibbling.

23 MR. CONNER: And we would be ready to take the  
24 depositions of their witnesses, but I don't think, from what  
25 I've heard, that Mr. Shapiro will be ready to have them

1       deposed until they have the answers to the information they  
2       want, because apparently --

3                 JUDGE MILLER: That will be two weeks, and you're  
4       still not even starting in January. Okay? You've got the  
5       whole month of January, to January 31, to go from there.

6                 MR. CONNER: If they don't have their theory of  
7       the case yet --

8                 JUDGE MILLER: If they don't, we'll all know  
9       about.

10                Now you're committed; is that correct?

11                MR. CONNER: Yes, sir.

12                JUDGE MILLER: I want to hear the same addressed  
13       to our questions from Mr. Shapiro, counsel for the Public  
14       Advocate.

15                MR. SHAPIRO: Yes. I think the Staff's suggestion  
16       for a discovery schedule is reasonable, if I can add one  
17       modification or amendment to that, and that is, that given  
18       the particular schedule of some of our witnesses, we work  
19       out among the parties reasonable dates within the month of  
20       January with the goal of completing discovery by the end of  
21       the month of January.

22                JUDGE MILLER: Pardon me. You're going to have to  
23       tell your witnesses, this one takes priority over all those  
24       other NRC cases. There are various chairmen. We know we  
25       can give them right-of-way, if we have to. And we're

1 telling you it's going to be a January right-of-way.  
2 Witnesses come in and testify and get out. There are many  
3 things that can happen. We're all trying to do the same  
4 thing, and fairly.

5 MR. SHAPIRO: I appreciate that.

6 JUDGE MILLER: You're going to have to tell your  
7 witnesses that this is it.

8 MR. SHAPIRO: But what I would want to make sure  
9 that the Board understands as far as our position is  
10 concerned, so we don't have a situation where, if I get back  
11 to New Jersey this afternoon, Mr. Conner has Zap mailed a  
12 deposition for January 2nd, when I've made it clear that a  
13 witness --

14 JUDGE MILLER: I think we've said that counsel  
15 should and will be directed to confer to make reasonable  
16 adjustments, but within that January 31 framework.

17 Now we've said, discuss these things among  
18 yourselves. When you're talking to the Board, tell us what  
19 you've done and where the hangup is, which you haven't done  
20 so far on some of these motions, but now we're going to  
21 start enforcing the Comanche Peak, because that will put the  
22 burden on all of you to make sure you just don't come up  
23 with superficial argument. In the event that in good faith  
24 you try and you've got something superduper you can't  
25 resolve, then we'll arrange a conference call. We do that

1 reluctantly, because we don't like conference calls.  
2 Everybody gets misquoted. But we will do that. In the last  
3 analysis, it turns out to be analysis to cut some Gordian  
4 knot of availability of a witness, expert or otherwise, to  
5 complete all discovery by January 31, 1985.

6 We offer this to you as a possible accommodation.  
7 We've also offered the opportunity for one or more, which is  
8 to say the Chairman and/or other Board members, if  
9 available, depending on hearing schedules, to sit in on some  
10 of your most important depositions, where you think it would  
11 be helpful to move it along. And in some cases, we might  
12 want to give rulings. And I've already told you, it's  
13 discovery. We're not going to rule on admissibility, but  
14 sometimes it's helpful to get rulings as you go on.

15 So if it will accommodate the parties, we are  
16 willing to do it. We're not trying to sell it. We're not  
17 going to penalize anybody, but we think it might help you on  
18 some of these depositions. You can consider that when you  
19 make your arrangements.

20 MR. SHAPIRO: I have one question. Since  
21 information is obviously not totally within my control,  
22 because we have to talk to the MHB people, will the Board be  
23 talking or could the Board take a brief recess, and we would  
24 telephonically communicate?

25 JUDGE MILLER: You mean now?

1 MR. SHAPIRO: At the Board's convenience.

2 JUDGE MILLER: Today?

3 MR. SHAPIRO: Sometime today. Allow us to defer  
4 any final commitment on that one, until we have a chance to  
5 call them and make it clear what the Board's position is and  
6 get the confirmation from them.

7 JUDGE MILLER: Are they in San Jose?

8 MR. SHAPIRO: Yes.

9 JUDGE MILLER: That's three hours. You'd probably  
10 better go put through a call, if you're going to try to get  
11 them before they go to lunch. We'll give you five or ten  
12 minutes for that purpose.

13 MR. SHAPIRO: Thank you very much.

14 (Recess.)

15 JUDGE MILLER: All right, ladies and gentlemen.  
16 Have you succeeded in reaching MHB?

17 MR. SHAPIRO: Yes, we have, Mr. Chairman.

18 After discussing this matter with our experts, I  
19 would like to revise my amendment to the Staff's suggestion  
20 and request that all discovery -- not we'll try, we'll  
21 complete all discovery, other discovery, with the exception  
22 of the depositions of our experts by the end of January.  
23 And if we could depose our experts during the week of  
24 February 4 and then complete the discovery by the end of  
25 that week, complete the depositions of our experts.

1 Recognizing the Chairman's request that I explain to them  
2 the priority that this has, I have, and I've discussed it  
3 with them. And it's just simply impossible for them to  
4 adjust their schedules. That is the time that they can  
5 guarantee that we can complete depositions.

6 JUDGE MILLER: Suppose we waive depositions. When  
7 can you have your prefiled written direct testimony,  
8 assuming that you wish to do so?

9 MR. SHAPIRO: Waive their depositions?

10 JUDGE MILLER: Suppose the other side waives their  
11 depositions. Suppose you knock depositions out, because  
12 that seems to be where they have a little bit of a time  
13 problem. Suppose they said, okay, forget the deposition,  
14 we're going to testify.

15 MR. SHAPIRO: I didn't ask them that. I  
16 apologize.

17 JUDGE MILLER: If they can come in to be deposed,  
18 I suppose they can come in and take the oath and testify, if  
19 that were the wish of the parties. So either then, I  
20 think. They would have done whatever.

21 MR. SHAPIRO: Yes. I appreciate that  
22 clarification, because the point I'm trying to make is that  
23 they will be available for appropriate examination on the  
24 contentions that week.

25 JUDGE MILLER: Except for environmental.

1 MR. SHAPIRO: I specifically asked about  
2 environmental, because that issue had arisen.

3 JUDGE MILLER: Did you get any information?

4 MR. SHAPIRO: Mr. Minor advised me that, really,  
5 without the information that PSE&G still has to submit, it  
6 wouldn't make more than theoretical sense for them to  
7 testify, because they would be testifying in the abstract.

8 JUDGE MILLER: What the Board is considering is  
9 removing from the trial setting, Contention 3, I guess it  
10 is, of the Environmental, because there are matters to be  
11 resolved between and among the parties, Staff and your  
12 client, and Applicant.

13 So therefore, it seems sensible at this point to  
14 bifurcate, in that sense. We're talking now about  
15 Contentions 1 and 2. We had discovery completed. All  
16 discovery, as you've modified now, with the exception of  
17 depositions, will have to go with that. But essentially  
18 complete all of the discovery by January 31, looking towards  
19 a commencement of trial sometime in March, on Contentions 1  
20 and 2, excluding, at least for this purpose, scheduling as  
21 to Contention 3, which is environmental.

22 Are we in agreement so far among counsel?

23 MR. CONNER: I would have to say that we, the  
24 applicant do not know what is in the mind of Mr. Miner about  
25 environmental qualification.

1 JUDGE MILLER: Environmental?

2 MR. CONNER: Yes, sir. So if he has to wait until  
3 whenever that filing is, it would be before April, I can  
4 assure you. And we're talking hypothetically. We're having  
5 difficulty trying to articulate our position, because I  
6 don't know what they want to argue about.

7 JUDGE MILLER: Wait a minute. I thought we were  
8 excluding trying environmental on the schedule now, because  
9 of the Staff's position on getting information, plus the  
10 three months, or whatever. They're outside the gambit of  
11 our now-proposed commencement of trial.

12 MR. CONNER: I'm trying to clarify in my own mind,  
13 sir, whether we're taking the deposition, whether discovery  
14 applies to Contention 3 or not.

15 JUDGE MILLER: No.

16 MR. CONNER: That's one point. We would still  
17 adhere to our basic position that we should do as much as  
18 possible with Contention 3 and hold the record open, if  
19 necessary.

20 JUDGE MILLER: Well, I think we don't want to get  
21 into the nitty-gritty of it, but it appears that the Staff  
22 believes that there is certain information they need, in  
23 order to make their examination. And after getting that  
24 information whenever and however soon it is -- plus, I think  
25 I have three months. Information plus three months, plus

1 audit. Plus two months, whatever it is. It gives three  
2 months after the information available.

3 MR. CONNER: Yes, sir.

4 JUDGE MILLER: Three months after the information  
5 is available. We don't know what it is. Assuming that the  
6 Applicants and the Staff will have to be working on it. You  
7 can't trigger anything as far as the Intervenor is concerned  
8 until the basic information is in some usable form and made  
9 available to them. That also is deferred item.

10 MR. CONNER: The point I'm trying to make and not  
11 doing very well at articulating, is that a lot of this  
12 information has been provided, more of it has been provided  
13 in September in this document I referred to.

14 JUDGE MILLER: You don't know. You're arguing on  
15 the merits of it. We have simply the Staff saying that they  
16 require certain information. X factor. We don't know.  
17 maybe you can convince them that you've given them X minus  
18 1, or whatever, but until that is done, you don't even have  
19 the Staff grinding their wheels, which precedes. Therefore,  
20 there is no sense in the Board getting involved in it at  
21 this point.

22 MR. CONNER: I have a feeling, though, that  
23 environmental qualification on the Staff side is  
24 significantly more comprehensive than probably Mr. Minor has  
25 in mind or will have in mind, and that to me is the missing

1 link.

2 JUDGE MILLER: Who can say? We're offering you  
3 two out of three links, and the Board wants to get those  
4 two links and a partial initial decision as soon as is  
5 reasonably possible, respecting the rights of the parties to  
6 make a record.

7 Now I think we're getting there. So why bog us  
8 down with link 3, that we're not even considering?

9 That you should take up with the Staff.

10 MR. CONNER: We would like to depose Mr. Minor as  
11 part of this initial --

12 JUDGE MILLER: You can't propose Mr. Minor until  
13 you give Mr. Minor the information which the Staff says  
14 isn't there and at least three months. You're grabbing the  
15 wrong end of the handle. Talk to the Staff. Then get into  
16 Mr. Minor. We don't want Mr. Minor on any generalities. We  
17 don't want him on the generic thing. We want him on exactly  
18 what the staff initially says they need. Resolve that  
19 between you. Then whenever that is resolved, in whatever  
20 form. Get that information available. If you want to make  
21 a record, send a letter to the Board, then transmit it to  
22 Mr. Minor and counsel, and that would start the  
23 triggering of the time factor by the Intervenor. But that's  
24 going to come after you and Staff have come to terms.

25 MR. CONNER: Sir, I would like one more time to

1 try.

2 JUDGE MILLER: One more.

3 MR. CONNER: Mr. Shapiro said that Mr. Minor only  
4 knows his theoretical problems; he doesn't know if the  
5 nitty-gritty, that might ahve been the terms. There's no  
6 showing what the Staff wants and what Mr. Minor had any  
7 necessary resemblance to each other, other than the title.  
8 We would like to find this out to save time in the long  
9 run, by saying, "Mr. Minor, of all the information you have  
10 seen so far, just what do you see as difficiencies?" If he  
11 can answer that, it won't take very long. If he says,  
12 "Well, I haven't started to read it yet, because I'm waiting  
13 for whatever the Staff wants, so I can come up with a  
14 position." We would like to establish that as early as  
15 possible. That's the point I want to make.

16 JUDGE MILLER: What I say is, when you put your  
17 hand in the cookie jar don't grab too much. We're giving  
18 you one and two. I don't want to get into any arguments  
19 about whether Mr. Minor is on matters other than  
20 environmental. I think he is. In any event, I don't want  
21 to get into who knows what on Contention 3, environmental,  
22 until Mr. Minor is affirmatively, through counsel, given the  
23 information that the Staff says they need. At least that's  
24 a minimum. Until you do that, I just think that you're  
25 reaching too far.

1           Get the Staff satisfied. Let me know when it got  
2 technical people and that we're not talking about some  
3 amorphous blob of information. But satisfy the Staff,  
4 because they have technical people who are saying, "We need  
5 X." Once you've got "X" worked out with the Staff on  
6 whatever form and whatever date you do it, then we suggest  
7 you make that information available in a reasonable form and  
8 time to counsel for the Intervenors, so he can use it with  
9 whatever experts. He may be tired of Mr. Minor and hire  
10 somebody else.

11           I don't know. Make it available and it will start  
12 the triggering, if there be discovery and getting it set for  
13 trial, but that has nothing to do right now with the  
14 starting of the trial, looking for the conclusion of all  
15 discovery on Contentions 1 and 2 and getting to an early  
16 trial. That's as far as we think we can go.

17           Is everybody able to live with that formulation?

18           MR. SHAPIRO: Yes, your Honor.

19           JUDGE MILLER: That's what I really will be. As a  
20 matter of fact, in order to save time, we're ruling from  
21 the Bench. If there's any lack of precision, ask us and we  
22 can formulate it, but we don't want you to sit around and  
23 wait, because with the season and my secretary out, and so  
24 forth, don't wait till you get an instrument from us in  
25 writing. Go right ahead with the things we've agreed to or

1 DAVbw

1 we've directed, please.

2 It'll be a short order. We'll try to confirm it.

3 Let's get everything coming today, get an understanding, at

4 least a communication.

5 MR. SHAPIRO: The only remaining issue in my mind  
6 is whether the Bridenbaugh and Hubbard depositions can be  
7 conducted the week of February 4th through 8th.

8 JUDGE MILLER: My suggestion to you there was, why  
9 not just prepare? They're going to have to go through the  
10 same intellectual exercise. Why don't you prepare on that  
11 date and file with everybody their proffered direct written  
12 testimony? That will tell everybody, and that well may be  
13 sufficient to enable Staff using that in a anchor point to  
14 get you a trial date and still respect the rights of  
15 everybody and your witnesses to be prepared for trial.

16 I think that'll cover it.

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1 MR. SHAPIRO: It probably did. I may just not  
2 have picked it up, Mr. Chairman.

3 JUDGE MILLER: That will cover what your expert  
4 needs because we know he needs to analyze the information.  
5 I think, by that date -- what? The 4th of February? We  
6 think, instead of bringing him for deposition at that time,  
7 he's going to go through the exercise later.

8 These gentlemen are capable. He's going to be  
9 ready to precedently write down; if you tell him what the  
10 questions are that you're going to ask him on direct, he's  
11 going to write down the answers for you. You file that and  
12 you've got it covered.

13 I suggest that you seriously consider that that  
14 doesn't take the place of the deposition of the gentleman.  
15 You'll have the information.

16 MR. CONNER: Here, again, without having seen it,  
17 I can't say that it will take the place of depositions, but  
18 it's probably sufficient for us to answer.

19 JUDGE MILLER: Not only to answer but get ready  
20 for trial. We're talking about a trial. If you're ready  
21 for trial right now, then you're even more ready on  
22 February 4th, plus a week, or whatever.

23 MR. CONNER: We'll have our rebuttal testimony in  
24 advance.

25 JUDGE MILLER: You can save it for rebuttal if you

1 want. If it shows a logical reason, we don't want you to  
2 hold it back in segments. But, if there's a reason, just as  
3 we give intervenor the right to see what the case is before  
4 they come, so they don't have to put out written direct and  
5 all their witnesses back for rebuttal. We'd rather have  
6 everyone have a fair shot, that's all we're trying to do.

7 That's what our rules are for, so cooperate with  
8 each other and with the Board to that end. You'll get an  
9 early trial on at least two or the three contentions. And,  
10 by then, you'll know what you're going to do more on the  
11 remaining end contention.

12 Isn't this feasible?

13 MR. SHAPIRO: Mr. Chairman. Also, are the experts  
14 for the applicants, will they be available within the  
15 period?

16 JUDGE MILLER: I think they should be to the  
17 extent that they can be. There, you see, they're going to  
18 say they don't know what your people are going to say. So I  
19 don't want to get into this ring-around-the-rosy business.

20 So far as it's reasonably possible, Mr. Conner, do  
21 you know who your experts are going to be that you're going  
22 to put on primarily, and that they will be available for  
23 information whether it be by deposition in January or some  
24 other reasonable form in those time parameters?

25 MR. CONNER: The witnesses that we would use are

1 DAV/bc 1 among those listed in response.

2 JUDGE MILLER: You and I both read the Purloined  
3 Letter that Poe was ahead of both of us. He said, "If you  
4 want to hide something, put it into a lot of letters."

5 If I want to hide the name of witness, I'll give  
6 you 100. I used to do it with the phonebook. Who are you  
7 really going to call?

8 (Laughter.)

9 MR. CONNER: We'll identify that I will call our  
10 likely key witnesses and have the backup witnesses for the  
11 panel; as we always do, probably within reason, one of those  
12 can respond to whatever the questions turn out to be.

13 JUDGE MILLER: Do it on a reasonable basis, just  
14 as you would have it done to you. And see if we can't get a  
15 little professional cooperation here because we want a fair  
16 trial and an expeditious trial.

17 You are all capable, confident, good lawyers and  
18 as lawyers, start making noises like a lawyer and get this  
19 thing moving. A lot of things will occur. Cut the  
20 corners. You have to live together in a professional sense  
21 so the rule you set up today isn't going to bite you  
22 tomorrow.

23 Get together and work it out. Let's get things  
24 done. Any suggestions now other than what we have already  
25 discussed to that end?

1 MR. CONNER: Is the Board agreeing to have the  
2 discovery other than those three witnesses complete before  
3 the end of January, and the prepared testimony of those  
4 three witnesses submitted on February 4th?

5 JUDGE MILLER: We're nine-tenths. We haven't  
6 caucused, but we're pretty much in agreement. We're nine-  
7 tenths in favor of adopting that as the schedule. We want  
8 to be sure you have all fought through your own problems  
9 now. We think you have but we're keeping it slightly open  
10 at the moment. That is preliminarily and provisionally our  
11 intention on scheduling, yes.

12 MR. SHAPIRO: My own problem is the hard  
13 February 4th date. I would just want to have a little  
14 flexibility getting that testimony in.

15 JUDGE MILLER: That's for the prepared written  
16 testimony of those three experts.

17 MR. SHAPIRO: The two because mine are on  
18 environmental qualification. It's separated, Bridenbaugh on  
19 pipe cracks, Bridenbaugh and Hubbard on management  
20 competence. Their testimony, the testimony of those two  
21 people on the two contentions, will be presented. But...

22 JUDGE MILLER: You are worried about March the  
23 4th?

24 MR. SHAPIRO: February 4th.

25 JUDGE MILLER: Solid, February 4th.

1 MR. SHAPIRO: I was just worried about that being  
2 a hard and fast date.

3 JUDGE MILLER: Why don't we make you more  
4 comfortable? Could you do it without any quibble or  
5 question by either the 8th, Friday, or no later than the  
6 11th, Monday?

7 MR. SHAPIRO: Yes.

8 JUDGE MILLER: Which do you prefer?

9 MR. SHAPIRO: I prefer the 11th.

10 JUDGE MILLER: All right, so you have got until  
11 the 11th of February for that purpose. Do you have any  
12 other problems with the scheduling that we are erecting?

13 MR. CONNER: I have one question I want  
14 clarified. Are we precluded from taking the depositions of  
15 these two witnesses in the month of January? I can assure  
16 the Board we would not try to get into what they don't know  
17 yet, but into their background and qualifications.

18 JUDGE MILLER: I'm inclined to say yes because if  
19 we're going to do it a certain way. If you try to do it two  
20 ways and reserve the right to you to take it in January, we  
21 can get into very sticky situations. I think we should make  
22 a clean-cut decision.

23 MR. CONNER: I was thinking more of bias,  
24 prejudice background, and so forth, type of questions as  
25 distinguished from the nuts and bolts of the technical

2 DAV/bc 1 issues.

2 JUDGE MILLER: You can do that when they're on the  
3 witness stand.

4 MR. CONNER: Fine, as long as it's left open.

5 JUDGE MILLER: That kind of thing will be  
6 preserved for all counsel because credibility in our  
7 presence directly is always an issue and it's always  
8 available. Appearance, demeanor, directness of response,  
9 candor, all the things that courts as well as our  
10 proceedings could bear upon credibility, probative value.  
11 This would be available to all of you.

12 MR. CONNER: The other question I have, is it  
13 implicit that in what the Public Advocate has stated that  
14 there will be no other witnesses?

15 If there are, I think that ought to be --

16 JUDGE MILLER: Implicit in there is the statement  
17 that these are the experts that they plan to call as they  
18 previously represented. I don't think that we should quite  
19 say, "You can't bring anybody else."

20 I would require reasonable notice and opportunity  
21 if there were such a thing. I don't expect it from what  
22 they said but I'm a little reluctant to say this is  
23 forever. So there's a slight area there upon a pretty tough  
24 showing of good cause because these really are the ones that  
25 you want, are they not, counsel? These are your experts?

1 MR. SHAPIRO: Yes. And we recognize the burden on  
2 us if we should choose to present anyone else at this point  
3 in time, that these are the ones we're relying on.

4 JUDGE MILLER: I think that's fair. We'll leave  
5 it at that.

6 Any other questions?

7 (No response.)

8 JUDGE MILLER: Staff?

9 MR. DEWEY: The proposals sound good to staff.

10 JUDGE MILLER: Just so we have utmost clarity,  
11 let's have what we are agreeing to stated by one of you  
12 lawyers. State it now from the record now that we have gone  
13 through the various ramifications.

14 Actually, let's have it stated clearly in this  
15 place in the transcript, and this will be our guide.

16 MR. DEWEY: I propose that since the burden  
17 appears to be on the Public Advocate, that he state the  
18 proposal.

19 JUDGE MILLER: All right. Mr. Shapiro, you may  
20 state it.

21 MR. SHAPIRO: Thank you, with the understanding  
22 that, obviously, I will be corrected where I'm in error.  
23 But, as I understand the Board's ruling, it is to, first of  
24 all, bifurcate 1 and 2 from No. 3, and also in 2(B) in  
25 the contentions dealing with pipe cracks and management

1 competence. Number 3 is the contention addressed to  
2 environmental qualification.

3 For the time being, the scheduling of No. 3 will  
4 be held in abeyance, pending receipt of certain materials  
5 that both the staff and Mr. Minor have deemed significant in  
6 their view.

7 With respect to contentions No. 1 and 2, all  
8 discovery that's interrogatories and depositions will be  
9 completed by January 31, 1985 and written testimony of  
10 Bridenbaugh on pipe cracks and of Bridenbaugh and Hubbard on  
11 management competence will be submitted in the late then  
12 February 11, 1985. And we are looking for the commencement  
13 of a hearing sometime in March on contentions No. 1 and 2;  
14 that counsel should cooperate with each other and confer as  
15 much as possible to ensure that the schedules of both the  
16 witnesses and counsel are appropriately accommodated.

17 And I think that completes my understanding of  
18 what the sense of the Board's order is.

19 JUDGE MILLER: We believe that you stated it  
20 accurately. Let's see if there are any additional matters  
21 that occur to counsel so we have in one place now the order.

22 MR. CONNER: I may have missed it. I did not hear  
23 a commitment for the Public Advocate to file its prepared  
24 testimony not later than February 11th.

25 JUDGE MILLER: I heard that. Let me be sure I

1 heard you say that. I guess it wasn't clear.

2 MR. SHAPIRO: I recall stating it.

3 JUDGE MILLER: Very well.

4 MR. CONNER: Then, I do not recall the Board  
5 saying that we had to wait on contention 3 until we had  
6 satisfied Mr. Minor. I heard it was only that we work it  
7 out with the staff. And Mr. Minor would have to come along  
8 behind and do whatever he does. We will certainly file  
9 anything --

10 JUDGE MILLER: What we certainly said was and what  
11 our ruling will be, we will defer any requirements of  
12 discovery or action by counsel on contention 3 until certain  
13 information which the staff has, or may request for its own  
14 analysis, has been supplied and copies of it -- either the  
15 totality or the substance of it -- communicated directly to  
16 counsel for intervenor for transmission to whoever he  
17 wishes.

18 That will be the treatment.

19 MR. CONNER: The other point we would make is that  
20 I think it should be articulated that we believe that the  
21 responses to interrogatories by the Public Advocate should  
22 be updated based on the new information specifically with  
23 regard to the documentation upon which the MHB Technical  
24 Associates will rely.

25 JUDGE MILLER: We impose that duty on all counsel

1 by our standing order. There should be updating of all  
2 discovery information, including in response to  
3 interrogatories. All of you have that with you.

4 Since we are approaching now the conclusion of  
5 discovery, in fact, it's well that we all be reminded that  
6 you have that affirmative duty yourself without it being  
7 triggered by someone else filing a motion.

8 We did that pursuant to the authority given us by  
9 the regulation and we made it directly in this case, both I  
10 think in our first prehearing conference order as well as in  
11 the pickup of Comanche Peak. So update everything in any  
12 form that is reasonably required to make it current and  
13 accurate.

14 Anything further?

15 MR. CONNER: I would simply note that we will have  
16 the documentary material available. If you will call  
17 Mr. Fryling at his office, there will be a room there where  
18 this information can be examined.

19 JUDGE MILLER: We'll accept that. We will request  
20 you to put it in writing to all parties and copies to the  
21 service list -- where, when, what it is, and confirm it in  
22 writing.

23 MR. CONNER: Do you mean, whenever they wish?

24 JUDGE MILLER: You confirm it in writing upon its  
25 availability. Send a letter and copy it. Copy everything.

1 Anything further, staff?

2 MR. DEWEY: Everything seems to be fairly clear  
3 for the record, your Honor.

4 JUDGE MILLER: Anything we've omitted?

5 MR. DEWEY: I don't believe so.

6 JUDGE MILLER: Mr. Shapiro.

7 MR. SHAPIRO: My colleagues have raised two other  
8 matters. One is I assume that, in accordance with the  
9 rules, the PSE&G's responses will be filed two weeks from  
10 the date on which they receive them, so that we should  
11 anticipate those --

12 JUDGE MILLER: What is this?

13 MR. SHAPIRO: Responses to interrogatories will be  
14 filed two weeks from the date we received them so we should  
15 anticipate those before the end of the month.

16 JUDGE MILLER: We would expect them to be filed  
17 not later than two weeks, and direct overnight delivery or  
18 hand-delivered.

19 We told you now we're going to keep the time  
20 intervals as short as possible, if necessary, cutting  
21 through what the rules would normally permit.

22 MR. SHAPIRO: And repeating what the chairman has  
23 said before, if Mr. Conner wants to contact us  
24 telephonically, after he has reviewed these, and explain any  
25 areas where he has problems, we will do our best with Mr.

1 Conner to narrow the contentions where he thinks, or where  
2 he submits and we agree that they may be broad.

3 If not, presumably, we'll be addressing that to  
4 the Board in terms of the scope of the interrogatories.

5 JUDGE MILLER: We encourage that practice, yes, on  
6 that and other matters. We also will expect that any  
7 responses deemed unsatisfactory be brought directly to the  
8 Board's attention in writing not later than five days from  
9 their receipt, with copies to all parties. And that any  
10 problems that are going to be the subject of such motion be  
11 in the form of -- I think, under our rules -- a motion for  
12 protective order.

13 So that you would be required on your initial  
14 filing within five days to state in full the reasons, what  
15 it is, any citations of authority, so we would want a  
16 response thereto within three days of receipt so the Board  
17 can rule.

18 MR. CONNER: Mr. Chairman, I do not want to fall  
19 into a trap by agreeing. On Friday, we received 50 odd  
20 pages...

21 JUDGE MILLER: We'll exclude Saturday and Sunday.  
22 These are five days to file a motion for a protective  
23 order. Cite everything, points of authority. This is your  
24 one and only shot at it. Response, three days, excluding  
25 Saturday and Sunday, to have in the Board's hands the

1 response to that request. And the Board reserves the  
2 right...if you think we need argument, we will call you.  
3 But, nine times out of ten, we will rule upon the receipt of  
4 those two things. But we want the full information. Give  
5 us everything you have.

6 MR. CONNER: Sir, I do not believe that Clarence  
7 Darrow or Oliver Wendell Holmes could respond to what has  
8 obviously been worked on for quite a long time. I have, at  
9 random again, turned to 11, which wants every document  
10 referred to and any meeting referred to, and a meeting  
11 between the staff and PSE&G and a whole string of things.  
12 And the subs on it go on for two pages.

13 The point is, by the time we analyze that, to be  
14 sure, it would be two years from now.

15 JUDGE MILLER: I think that is broad, too. That's  
16 why I gave you the chance to look through for overly broad  
17 matters during the lunch hour.

18 MR. CONNER: This is another example of it. We're  
19 going to have many in this category unless they're outside  
20 the contention.

21 JUDGE MILLER: Let me state the principle again.

22 I want you to get together on it. We don't want  
23 to have these big, sweeping kind of interrogatories with  
24 every document ever filed in regard to X, Y or Z. This is  
25 too time-consuming, too voluminous and at the stage we're

1 in, we're asking and directing all counsel to proceed  
2 expeditiously.

3 We think that is something you should take up  
4 directly and say, "Now, look, what do you really need?  
5 Here's where we have the information. If you've got an  
6 index or something, work something out reasonable."

7 We think that is much too broad. We've already  
8 told counsel that and he expects to hear from you to work  
9 something out that's sensible.

10 MR. CONNER: As long as he understands it's on a  
11 sensible. As long as on this basis it can be done.

12 JUDGE MILLER: That was stated. We said you've  
13 got the boilerplate on everything from Adam and Eve. Get it  
14 and specify it and you can do it most quickly and fairly by  
15 talking to the people who know what you're talking about.

16 MR. SHAPIRO: Just so we understand, I don't  
17 necessarily equate Mr. Conner's view of the interrogatories  
18 with something that's sensible or not sensible. I think  
19 that's something that has to be worked out, when he says "So  
20 long as he understands the sensible view."

21 I hope there is area for dispute as to what is  
22 sensible.

23 JUDGE MILLER: We hope so but we intend to narrow  
24 that area of dispute rather than either leaving it where it  
25 is or permit it to expand. And let any fair-minded lawyer

1 see what each of you have done in the effort to focus and I  
2 think we will darned soon be able to tell who is acting  
3 reasonably and who is not, if that be the situation.

4 MR. SHAPIRO: And I appreciate that, Mr. Chairman.

5 The only other residual matter, and I'm not sure  
6 this has to be addressed at this time, I just raise it in  
7 case it does, is written testimony by PSE&G. I assume that  
8 will be submitted sometime during the month of February far  
9 enough in advance of the hearing date.

10 JUDGE MILLER: I would think so. Let me inquire  
11 what are the intentions in that regard?

12 MR. CONNER: To fire responsive testimony as soon  
13 as we know what they are talking about. But I cannot say  
14 now...

15 JUDGE MILLER: Which will be approximately what  
16 date? The dates are there to give you the information.

17 MR. CONNER: I'd have to say 30 days because, here  
18 again, I have no idea what they are going to say.  
19 Hopefully, it will be much sooner than that. We have no  
20 desire to delay going to hearing and resolving this. But I  
21 haven't any idea what they are going to say.

22 JUDGE MILLER: When is it that they are going to  
23 give you that information?

24 MR. CONNER: In the middle of February. Oh, I  
25 hope the Board's statement of dates means in hand.

1 JUDGE MILLER: It does mean in hand in all cases.

2 MR. DEWEY: That was February 11th, your Honor.

3 JUDGE MILLER: February 11th.

4 MR. CONNER: We'd expect to have responsive  
5 testimony, I guess, not later than March 11th.

6 JUDGE MILLER: I'm not so sure you shouldn't take  
7 them up on it. We sure wouldn't give you 30 days to  
8 contemplate it. This is in lieu of in part. I would think  
9 a reasonable time there, you get it by the 11th of February,  
10 I should think three weeks ought to be adequate.

11 You've got a lot of capable assistants and  
12 experts. You're going to have to speed it up.

13 MR. CONNER: That would be then March the 4th.

14 JUDGE MILLER: March the 4th, I think, is the  
15 date, correct.

16 MR. CONNER: And if they put in more than we think  
17 they'll put in, we might have to ask for more time, but I  
18 doubt it.

19 JUDGE MILLER: Ask for it after the first week of  
20 trial. If I find there's a lot of threshing out of issues  
21 and things loom larger or smaller, or vice-versa, give it to  
22 us the Friday after the first week of trial. Then we can  
23 all make judgments over the weekend.

24 In other words, let's see the importance...

25

1 MR. SHAPIRO: Forgive me. I just didn't  
2 understand your last colloquy with Mr. Conner.

3 JUDGE MILLER: He was raising questions. If  
4 everything looks gloomy at that point, he wants to do  
5 something else, and when could he do it? I suggest, let's  
6 do that when we start trial because by then I think you will  
7 find a lot of this history is past, you are going to be  
8 watching that bouncing ball, and I think in fairness you  
9 ought to be able to do it.

10 I know what you can do. I know what trial lawyers  
11 can do. I am saying I don't want to be delayed by a lot of  
12 suppositious questions. If it really hurts, you can tell us  
13 at trial because then we can form a judgment, believe me.

14 MR. CONNER: Sir, I would like to suggest, given  
15 the peculiar turn this has taken, that the Public Advocate  
16 go forward with its testimony first.

17 JUDGE MILLER: Hold it. Let me inquire if he  
18 wants to. Sometimes there aren't arguments.

19 You are getting yourself some pretty good  
20 witnesses and getting yourself in shape. Do you want to go  
21 first? We can control the order, in fairness, and since  
22 this is where you are going to be firing your shots you  
23 might want to. I suggest you might want to consider it.

24 MR. SHAPIRO: I would like to consider that,  
25 Mr. Chairman. It certainly is something we will give

1 DAVbur 1 serious consideration to.

2 JUDGE MILLER: It will also help you to schedule  
3 your witnesses.

4 MR. SHAPIRO: I don't want to commit ourselves in  
5 any way at this point.

6 JUDGE MILLER: I am not asking for that, but I  
7 suggest you consider it. It might be of help both in the  
8 course of the trial and the schedule of your own experts.  
9 You are paying for them. So the ability to schedule, if you  
10 are able to do that, might be helpful to you.

11 We won't rule at this time, Mr. Conner. We would  
12 suggest that counsel give it some thought. You are going to  
13 be working with each other on predictions as to the length  
14 of time you are going to take and the number of witnesses so  
15 that you could do your own scheduling and maybe bring people  
16 in and pay them their costs.

17 I don't know where these witnesses all come from,  
18 but let's keep this thing both reasonable, moving along,  
19 addressing the heart of the questions, and let's have the  
20 window dressing come later if necessary. Get right to the  
21 heart of these things, and let's keep it -- I won't say  
22 cheap, but let's keep it the least expensive that we can,  
23 consistent with the whole public interest and your own  
24 clients' interest.

25 There is a lot of things you can do to help in

1 that regard without hurting your own clients' interests.

2 Is there anything further?

3 MR. DEWEY: Yes, your Honor. We haven't set a  
4 date for the Staff witnesses to file their testimony.

5 JUDGE MILLER: What will you be able to do on  
6 that?

7 MR. DEWEY: The Applicant says he will do his on  
8 March 4th. I would prefer to have a week after that, March  
9 11th, but I guess we could do it on the 4th if necessary.

10 JUDGE MILLER: Let's see, March the 4th, what are  
11 we considering now, as a trial date?

12 MR. DEWEY: You said in March. I don't think you  
13 set a trial date.

14 JUDGE MILLER: We will give the Staff a week.  
15 That will make -- Staff's prefiled written testimony then  
16 would be on the 11th. The 11th then will be the Staff's  
17 prefiled direct testimony.

18 Are there any other dates that should be fixed  
19 before we discuss with you the commencement of trial?

20 MR. CONNER: Well, yes, there's other dates. I  
21 think that in line with what the Board has talked about on  
22 shortening schedules, that we should definitely look to  
23 shortened filings of proposed findings, and so forth, by all  
24 parties.

25 JUDGE MILLER: What I favor is having those

1 before you start a trial because it focuses the attention  
2 significantly.

3 MR. CONNER: That is why I wanted to identify it.

4 JUDGE MILLER: We are asking you to do so much in  
5 a short time before trial. That is why I didn't mention  
6 it.

7 Yes, the Board feels that the findings of fact and  
8 conclusions of law are matters known to trial counsel in  
9 advance of trial because really this is what you are looking  
10 for with your own testimony and your projected  
11 cross-examination. So we feel you are in a position  
12 really -- we have done this in a few cases -- to have at  
13 least the initial proposed findings filed at or shortly  
14 before the commencement of trial.

15 Since we are expediting the proceedings here and  
16 we are asking counsel and witnesses to do many things to  
17 prepare for an expeditious trial, we hesitated to go into  
18 that as such unless you as lawyers have some comments.

19 MR. DEWEY: Yes. I think we are going to have a  
20 lot of things to do in this very expedited schedule without  
21 having to file extensive proposed findings before the  
22 trial.

23 JUDGE MILLER: As I say, that is the reason we  
24 didn't discuss with you findings. This means, however, that  
25 we would like to have proposed findings shortly after the

1 trial is concluded. There is no reason -- you don't have to  
2 sit down and think of a lot of things. By then all counsel  
3 know pretty well what the findings are they want the Board  
4 to make. So we would think that two weeks after trial,  
5 after we close the record, should be adequate.

6 MR. CONNER: The only point I am making is that it  
7 would be well for the Board to express at least their  
8 philosophy on findings and getting them in shortly because I  
9 don't want the filings delayed by vacation schedules or  
10 something like that.

11 JUDGE MILLER: I have got something better for you  
12 than that. We are going to expect to have closing  
13 arguments. We are going to expect those closing arguments  
14 to be meaningful, to be keyed to transcript and decision and  
15 authority references, to lay out your case, which is going  
16 to be the guts of your proposed findings, and we expect to  
17 have that right while the case is hot before you.

18 The last day, in other words, of trial, we are  
19 going to expect to have significant closing arguments by  
20 counsel representing all parties.

21 MR. CONNER: We would be willing to stipulate, if  
22 the other parties would agree, that the oral argument be in  
23 lieu of formal findings.

24 JUDGE MILLER: I don't want to go that far. I  
25 think you should be able to see what the evidence is and

1 DAVbur 1 how it shapes up.

2 I think we will withhold ruling on that. I may  
3 take it up if counsel wish, but I think there we had better  
4 wait and let everybody see what it is so they can evaluate  
5 it in terms of their own capability and from their clients'  
6 interests. I had rather keep that one open.

7 Who has the overall burden of proof? You,  
8 Mr. Conner. Anything further from you at this time?

9 MR. CONNER: Of course, we have the burden of  
10 proof. I think in terms of expediting the proceeding, given  
11 the default already referred to by the Board, it might  
12 really expedite the matter if the MHB people went first.  
13 That really should expedite things.

14 JUDGE MILLER: We won't rule on that, but we have  
15 encouraged counsel to consider it. But we are not going to  
16 compel him.

17 We do think that in a sense probably the  
18 Intervenor has the burden of going forward because you are  
19 raising serious questions, and you will have your evidence,  
20 and the sooner you get that made part of the record, the  
21 sooner we will have it addressed by others.

22 But we are not going to foreclose you. So  
23 presently we will keep open the normal practice, which is  
24 for the one with the ultimate burden of proof; namely, the  
25 Applicant, to put on his or her witnesses first, subject to

1 reevaluation as we get closer to trial.

2           There again we always have the question of the  
3 Staff. You don't mind the Staff putting its evidence on  
4 last unless it is going to be substantially similar to that  
5 by the Applicant. If so, we would rather have it come in  
6 there so cross-examination, and so forth, would address both  
7 sets of witnesses at the time rather than them have to bring  
8 their people back.

9           So give that some thought. We will protect you if  
10 there is any witness or anything where the Staff says we  
11 don't agree with it or we have a significant question,  
12 whether it be credibility or whatever. At that point we  
13 would reorder.

14           But if you don't really need it and your evidence  
15 is going to be substantially similar, then we would rather  
16 have Applicant and Staff and then give the first and  
17 hopefully the fullest shot of cross-examination and the  
18 presentation of evidence going to the Intervenor. That is  
19 our preference. Think about it.

20           Anything further?

21           MR. SHAPIRO: Nothing on behalf of the  
22 Intervenors. Thank you, Mr. Chairman and members of the  
23 Board.

24           JUDGE MILLER: Very well, we appreciate -- pardon  
25 me, here is a question.

1 JUDGE MORRIS: Mr. Dewey, I just wanted to ask a  
2 couple of questions for clarification with respect to the  
3 review of the environmental qualification.

4 Do you contemplate a separate report on that, or  
5 would that be combined in an SER supplement?

6 MR. DEWEY: Yes, sir, the SER supplement.

7 JUDGE MORRIS: Is there any reason it could not be  
8 separated out?

9 MR. DEWEY: By "separated out," what do you mean,  
10 sir?

11 JUDGE MORRIS: My concern is that the schedule for  
12 proceeding on the basis of information, first to be supplied  
13 by the Applicant, then to be reviewed by the Staff, then to  
14 be reviewed by the Intervenor, is that that schedule would  
15 be delayed because of attachment to a larger review.

16 MR. DEWEY: No, sir. It is my understanding that  
17 the clock would begin to run on the Intervenor when he gets  
18 the same information that the Staff gets. At that point the  
19 Intervenor will be able to look at the information we get  
20 and decide whether there is anything in there that is part  
21 of his case.

22 So his preparation of his case should not have to  
23 wait for the SER. He has the information from the Applicant  
24 at the same time we have.

25 JUDGE MORRIS: All right. Let's suppose that is

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1 the case. Then in a Staff review -- and I think the word  
2 "audit" was mentioned -- that covered a period of three  
3 months?

4 MR. DEWEY: Yes, sir.

5 JUDGE MORRIS: Is that tied to anything else in  
6 the SER supplement, or is that separable?

7 MR. DEWEY: The audit is part of the supplement.  
8 When we get the information, we have -- I believe we usually  
9 hire an outside consultant to go over the information and  
10 look it up, and we also have an audit team that goes up to  
11 the site to check out, so to speak, this and that to make  
12 sure everything is okay.

13 JUDGE MORRIS: I understand the steps, but do you  
14 understand my concern of those steps being delayed because  
15 they are tied to some other aspect of the Staff's review?

16 (Discussion off the record.)

17 MR. DEWEY: We don't believe that it would be a  
18 delaying factor.

19 Did we answer your question?

20 JUDGE MORRIS: Well, your statement "I don't  
21 believe" is not totally satisfying to me because it appears  
22 to me, with respect to the conclusion of this proceeding,  
23 this is a gating item. I am wondering if there are steps  
24 that could be taken to collapse that schedule of three  
25 months.

1 For example, does the audit, the field audit, have  
2 to wait until review in Bethesda? Are there steps that  
3 could be taken to shorten that process?

4 MR. WAGNER: What we are doing, we have requests  
5 for additional information outstanding to the Applicant.  
6 Once we do get this information back, we review it with our  
7 contractor.

8 Following this review, we go on our audit. It is  
9 more of a confirmatory audit in nature. We review their  
10 environmental qualifications records, and so on and so  
11 forth, at the site, and we report on the audit and the  
12 conclusions of our review in the supplement to the SER.

13 We do need the information before we can have the  
14 audit.

15 JUDGE MORRIS: I understand that, also, but  
16 supposing the audit is complete and the results of that  
17 audit will be reported in an SER supplement.

18 MR. WAGNER: Yes, they will be.

19 JUDGE MORRIS: Is that supplement confined only to  
20 the environmental qualification, or would there be other  
21 matters that would be related?

22 MR. WAGNER: There would be other matters in that  
23 supplement.

24 JUDGE MORRIS: Would those be timed in such a way  
25 that they would not control the process?

1 MR. WAGNER: I believe so. They certainly can be  
2 because the supplements beyond Supplement No. 1 there are no  
3 set schedules for. They are issued as contact becomes  
4 available, and certainly the environmental qualifications  
5 will give us a very large part of the total review effort, a  
6 very important part.

7 I am sure other items that are listed as open or  
8 confirmatory right now in the SER will be combined with  
9 environmental qualifications review and reported in the  
10 supplement.

11 MR. DEWEY: I think your concern, however, is that  
12 the Staff can ensure that the other items that would be in  
13 that supplement would not be pacing items or delay the  
14 issuance of the supplement, and we can see to that, your  
15 Honor, because if there's other items we would just let  
16 those other items come out in another supplement if it would  
17 slow down the supplement that this one is going to come out  
18 in.

19 So I think that will take care of the problem. We  
20 will make sure that it doesn't slow it down.

21 JUDGE MORRIS: Let me ask one further question.  
22 Is there any way of transmitting the information which  
23 discusses the results of the audit to the parties before  
24 issuance of the supplement in draft form or whatever?

25 MR. WAGNER: Just a moment, please.

(Pause.)

2 MR. CONNER: After Mr. Dewey and Mr. Wagner  
3 confer, I would like to make a suggestion along those lines,  
4 Dr. Morris.

5 MR. DEWEY: Sir, subject to some type of policy  
6 that we are not aware of, we think that we could send out an  
7 early draft to the parties and expedite it in that manner.  
8 If it turns out that there is some kind of policy we are not  
9 aware of, we will write a letter to the Board immediately  
10 and advise the Board. But I don't think that will be the  
11 case. I think we can probably send all the parties a  
12 draft.

13 JUDGE MORRIS: I think you recognize my concern  
14 and would take steps accordingly.

15 Mr. Conner, you had a suggestion?

16 MR. CONNER: Yes. As I think has been done in  
17 other cases, and given the fact that the Staff's review will  
18 almost certainly be more comprehensive than the contentions  
19 raised by MHB, I would simply suggest that the Staff submit  
20 its testimony -- I mean, submit its position on the  
21 contentions as testimony as soon as possible and let the  
22 SSER take its own course, and in the event something were to  
23 come up in the SSER which contradicted what the Staff said  
24 earlier, then we could deal with it as appropriate at that  
25 time.

1 But I believe your concern is well-founded as to  
2 the time it takes to get the SSER, with all the people who  
3 have to look at it, out, and it is not designed to  
4 accommodate the hearing process; whereas, testimony would  
5 have pertinent information and is designed to meet the  
6 contentions.

7 MR. DEWEY: I am not sure exactly of all the  
8 ramifications of what Mr. Conner is asking for, but I will  
9 say our reviewer has said he needs that April information,  
10 the information the Applicant is supposed to supply in  
11 April, in order for him to write his testimony. So we have  
12 to have that first.

13 JUDGE MORRIS: I think the point is one that can  
14 be discussed between you outside of this room, but I think  
15 as a final remark, Mr. Conner, it seems that the next gate  
16 is one that the Applicant has to cross.

17 MR. CONNER: We will not wait for the Kentucky  
18 Derby.

19 JUDGE MILLER: Anything further?

20 (No response.)

21 MR. SHAPIRO: Nothing on behalf of the  
22 Intervenors.

23 JUDGE MILLER: Has everyone concluded his or her  
24 remarks?

25 MR. CONNER: I only say that I hope the Board will

1 make all this latest discussion of schedule academic by  
2 ruling to dismiss the case.

3 JUDGE MILLER: We are going to think about that  
4 one; however, we do appreciate all of you giving us the  
5 benefit of your views. They have been very helpful. As I  
6 say, I hope you will proceed immediately on discovery and  
7 don't wait for a formal order.

8 MR. CONNER: We will call Mr. Shapiro tomorrow on  
9 their latest interrogatories.

10 JUDGE MILLER: Very well. Thank you very much.  
11 We are adjourned.

12 (Whereupon, at 3:30 p.m., the prehearing  
13 conference was adjourned.)

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CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before the UNITED STATES NUCLEAR REGULATORY COMMISSION in the matter of:

NAME OF PROCEEDING: PUBLIC SERVICE ELECTRIC & GAS COMPANY  
(Hope Creek Generating Station)

DOCKET NO.: 50-354-OL

PLACE: BETHESDA, MARYLAND

DATE: MONDAY, DECEMBER 17, 1984

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission.

(sig) David L. Hoffman *D.L.H.*  
(TYPED)  
DAVID L. HOFFMAN

Official Reporter  
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**PUBLIC HEARING**

before

**SENATE ENERGY AND ENVIRONMENT COMMITTEE**

and

**SENATE LEGISLATIVE OVERSIGHT COMMITTEE**

on

**(Review of the Status of Hope Creek Nuclear Power Plant)**

Held:  
May 10, 1984  
Room 348  
State House Annex  
Trenton, New Jersey

**MEMBERS OF SENATE ENERGY & ENVIRONMENT COMMITTEE PRESENT:**

Senator Daniel J. Dalton, Chairman  
Senator Catherine A Costa, Vice Chairwoman  
Senator Peter P. Garibaldi

**MEMBER OF SENATE LEGISLATIVE OVERSIGHT COMMITTEE PRESENT:**

Senator Gerald R. Stockman, Chairman

**ALSO PRESENT:**

Mark T. Connelly, Research Associate  
Office of Legislative Services  
Aide, Senate Energy and Environment Committee

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SENATOR GERALD R. STOCKMAN (Cochairman): I would like to begin this hearing. I understand the Public Advocate has a time problem, and we would like to try and accommodate him. We will, in fact, put him on first.

I will introduce myself. I am Gerry Stockman, Chairman of the Senate Legislative Oversight Committee. To my right is Senator Dalton, Chairman of the Senate Energy and Environment Committee. To my left is Senator Cathy Costa, a member of the Senate Energy and Environment Committee.

Before I read a brief statement to explain why we are here today, I would like to say that I am always pleased to sit beside Dan Dalton, who is Chairman of the Energy Committee. He has shown a great deal of interest in this area. The interest of the Oversight Committee relates back to discussion of the Cost Containment Agreement. I think this is a kind of cooperative effort between committees in the Senate, and that is the way it should work. You will hear from Senator Dalton also.

The issue of the need and the cost of the Hope Creek I Power Plant has, in different ways and at different times, been the concern of both Committees here today -- the Senate Energy and Environment Committee, and the Senate Legislative Oversight Committee.

The Senate Energy and Environment Committee dealt with Hope Creek I in the course of the deliberations concerning the Certificate of Need legislation in 1982, and the Senate Legislative Oversight Committee deals with, and has dealt with, Hope Creek I in its examination of the Cost Containment Agreement, entered into by the Department of Energy, the Public Advocate, and Public Service Electric and Gas.

The purpose of the Cost Containment Agreement was to impose a limit on the steady cost escalation, which had been a hallmark of the years during which the plant was under construction. The Committees hope to learn today how the construction of the plant is faring under the Cost Containment Agreement.

But, the Committees would also like those most involved with the construction of Hope Creek -- Public Service, the Board of Public

Utilities, the Department of Energy, and the Public Advocate -- to discuss the plant in a context that is somewhat broader than the Cost Containment Agreement.

The last year has not been kind to the nuclear power industry. In our own State, we witnessed the highly-publicized circuit breaker failure of the Salem I Plant, and the Nuclear Regulatory Commission's criticism of Public Service's management and operating procedures. In the pages of Time, the Wall Street Journal, the New York Times, and Fortune we read of plants denied operating permits because of safety and quality control problems; plants abandoned because of high costs and lack of need; impending "rate shock" on consumers as the multi-billion dollar plants are put in service; and, utility companies, with heavy nuclear construction programs, brought to the brink of bankruptcy.

The Committees are aware that each utility company's problems are, to a certain sense, unique. A virtually identical nuclear power plant could bankrupt one utility company and impose intolerable costs on its rate payers, while presenting much less of a strain on another utility company, in different financial circumstances and with a different service area profile.

We realize, in short, that Hope Creek I is not Shoreham, or the Marble Hill Plant in Indiana, or any other of the many nuclear plants now in trouble across the nation.

At the same time, however, it would be irresponsible for us to ignore the troubles that are plaguing the nuclear industry and utility companies nationwide and hope, "That it doesn't happen in New Jersey." We are looking at almost a \$4 billion investment, which we will have to contend with for the next 30 years, and the earlier we are aware of what the future holds the better.

The most obvious issue we are concerned about is this plant's effect on rates: What will it do to electricity rates in Public Service's service area? We also need to know what steps are being taken to assure quality control, in both the construction and operation of this plant. We have seen our existing nuclear plants sitting idle for long periods of time -- but these plants cost a fraction of Hope

Creek I's cost. A \$4 billion plant sitting idle would be an economic catastrophe. We also need proof that Public Service is addressing the shortcomings which the Nuclear Regulatory Commission identified as being related to the problems at the Salem I Plant.

We hope that these, as well as other issues which will surely be raised today, will be fully discussed, and will enable us to form a clearer picture of what impact Hope Creek I will have on New Jersey.

I would now like to turn to Senator Dalton, who may also want to say something further. That statement was prepared for both of us, and only one of us could read it, so I took the honor. Dan, do you want to add anything to the statement?

**SENATOR DANIEL J. DALTON (Cochairman):** I think the statement says it all, Gerry. As a result, I am looking forward to hearing the testimony from the Executive Branch, as well as from PSE&G, relative to how this plant is coming along. So, let's get to it.

**SENATOR STOCKMAN:** Okay. Joe, why don't you come join us? I would like to tell you at the outset, Joe, that I asked Bill Potter to be present and available to share some information with us on this question. I just heard that for some reason he can't be here, is that correct?

**COMMISSIONER JOSEPH H. RODRIGUEZ:** Well, I imagined that you wanted me here as the Public Advocate, as the person who states the policy for the Department; that is why I am here.

**SENATOR STOCKMAN:** That is not what I was talking about. Let me ask the question again. It is my understanding that Bill Potter has been deeply involved; and, in your behalf -- as a matter of fact, back during the time we first discussed the issue of the Cost Containment Agreement -- was a key figure in the Public Advocate's office on the policies set from the time of the Cost Containment Agreement, up to the present time. On that basis, and because of my understanding of his awareness and interest in this area, I asked -- and I believe I was joined by Senator Dalton -- if Mr. Potter could be here to participate. That was my question to you. It has nothing to do with you being here. I am delighted to see Joe Rodriguez, and I understand the buck stops with Joe Rodriguez, vis-a-vis the policies of the Public Advocate. But, I think this is a separate issue.

COMMISSIONER RODRIGUEZ: That's true, the buck stops with me, and I state the policy for the Department. I spent the last two weeks making sure that the policies we established two years ago, when we entered into the Cost Containment Agreement, were still accurate and viable, as far as my responsibility to the public is concerned. That was reaffirmed, as late as yesterday, with the experts I have talked to.

Now, I am not only stating my personal opinion, I am stating the opinion and the position of the entire Office of the Public Advocate.

SENATOR STOCKMAN: Including Mr. Potter?

COMMISSIONER RODRIGUEZ: I don't know whether it includes Mr. Potter, but let me say this to you--

SENATOR STOCKMAN: (interrupting) How can you talk about the full Public Advocate's office if it doesn't include Bill Potter?

COMMISSIONER RODRIGUEZ: Because I set the policy, Senator Stockman. Let me simply say this to you, I think I know what you are after. If you want to produce someone who finally feels that the presence of a nuclear plant is repugnant, you will find that kind of testimony.

SENATOR STOCKMAN: From Bill Potter?

COMMISSIONER RODRIGUEZ: From whomever. If you want testimony as to the balanced responsible position of the Office of the Public Advocate, one that has to deal with taxpayers' money, I am here to state that position.

SENATOR STOCKMAN: Well, if Mr. Potter isn't going to give balanced and -- I forget the other word you used -- position on the subject, certainly I don't want him here. If it is your suggestion that he wouldn't, well, that is news to me and we will have to deal with it, and the public will have to deal with it.

Joe, when you said it is the Public Advocates office's position, and the position of everyone in it, I had to ask that question. I gather that the position you are going to articulate is not Mr. Potter's position on the question.

COMMISSIONER RODRIGUEZ: My position is one that has come about as a result of consultation with all our experts, and from what I could legitimately prove if, in fact, as a lawyer with a decent responsibility to the Code of Ethics and the taxpayers' money, I was called upon to prove my case. I am simply stating the position we are taking as a result of studied effort; and, I am here to state that position.

SENATOR STOCKMAN: Again, the Code of Ethics and things of that sort-- We may be getting far afield. I won't belabor the point now. I am disappointed that Mr. Potter isn't here, and I think I can speak for Senator Dalton when I say that we both asked for his presence.

But, let's get on with some questions since you are here.

SENATOR DALTON: If I can just jump in for one second, Gerry-- I think the point that Gerry is making and that I would like to make, Commissioner -- and I have had the opportunity to work with you on many different occasions, and I have worked very well with you -- is that we would like to hear from a person with whom we have had the opportunity to hear from before in the Energy and Environment Committee, someone who has given us testimony -- and I think it was balanced testimony -- on some of the concerns we were addressing.

We, as a result, asked him to appear today in order to continue to hear from him. As a result, his not appearing today is somewhat of an affront to us, because we wanted him here. We felt that we, as the Legislative Branch, should have the opportunity to hear not only from you -- because we certainly wanted to hear from you today -- but from someone whom we have come to know as a person who has a great deal of interest, and some very strong opinions. We felt that in order to get the complete story, we also wanted to hear from him.

COMMISSIONER RODRIGUEZ: Senator, you are free to call Mr. Potter. What I am suggesting to you is, at the outset you said you wanted to hear my position, as a member of the Executive Branch -- I would assume -- and, more important than being a member of the Executive Branch, as someone who has some responsibility to the ratepayers in this area, and who will make a rational judgment

regarding independent analysis from experts. I am suggesting to you that's exactly what I have done. You are free to hear from anyone.

SENATOR DALTON: We are not debating that, Joe.

SENATOR STOCKMAN: Joe, doesn't Bill Potter have that same responsibility -- a responsibility to the ratepayers and to the public? You are confusing me more and more. The more this exchange goes on, I can frankly tell you--

COMMISSIONER RODRIGUEZ: Listen, I am the Public Advocate; I state the policy for my Department. The thing is for you to challenge the information I have, and not simply to produce someone who you think is going to challenge me.

SENATOR DALTON: We intend to do that, Joe. The thing is, we also wanted to hear from Bill Potter. We, as the Legislative Branch, think we should have the opportunity to call on any member of the Executive Branch to appear before not only this Committee, but before Senator Stockman's Committee as well, in order for us to be able to get their considered opinion.

COMMISSIONER RODRIGUEZ: And, you are free to do that; you are free to do it.

SENATOR DALTON: Then why isn't he here?

SENATOR STOCKMAN: Mr. Public Advocate, I don't think you meant to upset us by telling us what our responsibility is. Hopefully, we can grasp that. So, I want to diminish-- I think the record is clear now as to your position. Mr. Potter isn't here. We will deal with that. Let's get on with the subject at hand, but before we do, I would like to invite Senator Costa to make an observation.

SENATOR COSTA: Yes. I don't know this Mr. Potter at all, but in listening to you just now, it seems he has a different point of view insofar as nuclear power is concerned. I think it is very important that we get all points of view, so I would appreciate it if someone would call this Mr. Potter. Maybe we can also hear him today.

COMMISSIONER RODRIGUEZ: You are certainly free to hear from him.

SENATOR COSTA: You are in charge.

COMMISSIONER RODRIGUEZ: Yes.

SENATOR COSTA: You have to give him approval in order for him to be here, because he is going to listen to you. Am I correct in that assumption?

COMMISSIONER RODRIGUEZ: You are certainly free, and I indicated that to Senator Stockman, to hear from Mr. Potter.

SENATOR STOCKMAN: Joe, under the terms of the 1982 Cost Containment Agreement, agreed to by Public Service Electric and Gas, the Public Advocate, and the Department of Energy, the Public Advocate agreed not to "challenge the need for Hope Creek I before any Federal or State agencies...." The Advocate is currently challenging Public Service Electric and Gas' application for an operating permit, which is now before the Federal Atomic Safety and Licensing Board. The Advocate is challenging the permit on safety and management competency grounds. The Atomic Safety and Licensing Board is a three-member panel, from which a utility must receive 1) a construction permit; and 2) an operation permit for a nuclear power plant. The Atomic Safety and Licensing Board conducts judicial proceedings, similar to an Administrative Law Judge. My question is this:

What are the issues the Public Advocate is raising before the Atomic Safety and Licensing Board concerning Public Service Electric and Gas' application for an operating permit for Hope Creek I?

COMMISSIONER RODRIGUEZ: Do you want me to expose all the details of our litigation here? We are in litigation, so I would assume you would have to give us enough credit to suggest that we are doing something.

SENATOR STOCKMAN: Is that your answer to the question?

COMMISSIONER RODRIGUEZ: Do you want me to expose the details of the litigation?

SENATOR STOCKMAN: What I would like is an answer to this question: What are the issues the Public Advocate is now raising before the Atomic Safety and Licensing Board concerning Public Service Electric and Gas' application for an operating permit for Hope Creek I? Now, are you suggesting that is something the public isn't entitled to know?

COMMISSIONER RODRIGUEZ: We are raising the issue of the safety factors at the plant; we are raising the issue of the environmental impact of the plant; and we are raising the issue of the competency of management for the plant. They are the issues.

Incidentally, generated from the Salem outage -- where we did bring an action -- we have, as a result of our experts' opinions, arrived at certain determinations in the case. So, we certainly weren't silent when that occurred. As a result of that, questions were raised regarding Hope Creek I, and we are into those matters now; they are in litigation. So, I would assume that would suggest affirmative action.

SENATOR STOCKMAN: Can you describe for us the Public Advocate's activities in general, to date, before the Atomic Safety and Licensing Board?

COMMISSIONER RODRIGUEZ: Filing the necessary documents to get a hearing on the issues I have just mentioned.

SENATOR STOCKMAN: And those are safety issues, environmental issues -- and what was the third?

COMMISSIONER RODRIGUEZ: Management issues.

SENATOR STOCKMAN: Management issues -- Public Service management?

COMMISSIONER RODRIGUEZ: Yes.

SENATOR STOCKMAN: What does the Advocate hope to achieve by its involvement in the Atomic Safety and Licensing Board proceedings?

COMMISSIONER RODRIGUEZ: As a result of the latest conversation with all our experts, a monitoring function.

SENATOR STOCKMAN: Monitoring?

COMMISSIONER RODRIGUEZ: Monitoring, which we are doing.

SENATOR STOCKMAN: That would be true of the safety questions Hope Creek I presents to the public; that would be true of the environmental issues that are raised; and, that would be true of the question of management competency of Public Service Electric and Gas to operate a nuclear power plant?

COMMISSIONER RODRIGUEZ: Right.

SENATOR STOCKMAN: How much will the Public Advocate's involvement in the Atomic Safety and Licensing Board's proceedings cost? Is there adequate money in the Department's budget to cover this cost?

COMMISSIONER RODRIGUEZ: I just made that analysis with our experts yesterday, and to do it the way I know you would suggest we do it, the amount would be in the neighborhood of \$3 million.

SENATOR STOCKMAN: Is that already in your budget?

COMMISSIONER RODRIGUEZ: No.

SENATOR STOCKMAN: Do I take from that you will be appearing before either the Joint Appropriations Committee or the Legislature with a request for a supplement of \$3 million to accomplish this?

COMMISSIONER RODRIGUEZ: No.

SENATOR STOCKMAN: You will not?

COMMISSIONER RODRIGUEZ: I will not, because my experts have told me, as late as yesterday, that I would simply be trying to make myself the NRC. They have sufficient confidence in the NRC, as a result of recent developments, that it would be a waste of taxpayers' money for me to use \$3 million to duplicate NRC's service.

SENATOR STOCKMAN: Do I understand that to mean the Public Advocate is going to back out of the proceedings before the Atomic Safety and Licensing Board?

COMMISSIONER RODRIGUEZ: No, I am saying we are going to continue to monitor them, but we can't become the NRC.

SENATOR STOCKMAN: I misunderstood you. I didn't think you said that with \$3 million you would become the NRC. I thought I asked you what you would need to be effective in--

COMMISSIONER RODRIGUEZ: (interrupting) To monitor it?

SENATOR STOCKMAN: Let me run through this again. You said your purpose was monitoring, monitoring very important issues, namely safety, environment, and management. I thought you suggested that in order to do this you would need \$3 million, and I assumed you would be asking for that amount. You now tell us you wouldn't, because that would turn you into the NRC. How much would allow you to stop short of turning yourself into the NRC, but be effective in monitoring these major issues?

COMMISSIONER RODRIGUEZ: We have the money now to monitor it, and to react if something goes wrong.

But, if you are suggesting that I should go there and examine the plant in order to determine whether it is safe or not, I would need the capability of 23 disciplines to go into that plant and duplicate the NRC. I am suggesting to you that unless you have a total lack of confidence in the NRC, New Jersey shouldn't duplicate their work. We should monitor; we should never once yield our position to monitor in order to see that safety is taken care of.

You can't suggest, as a lawyer, what issue I raise. What issue do I raise?

SENATOR STOCKMAN: Joe, I am not a lawyer here. For the benefit of everyone who is here, Joe and I go back many years as trial lawyers. That is really kind of semi-irrelevant. Joe, make no mistake, I am not here as a lawyer. Forget me as a lawyer. I don't understand--

COMMISSIONER RODRIGUEZ: But, Senator, you can't forget that I am a lawyer. The Advocate, to make a claim, has to make a charge that he then has to prove. How do I go through there -- simply by virtue of my office? Or, do I make a charge, a complaint, an allegation, or a contention, and have them say to me, "Prove it?" Then I must produce the proof, or the contentions get dropped, as some of them already have. So, I am suggesting that what should be done in behalf of the public interest, calls for a very careful analysis. I am suggesting to you that I have been going through a two-year effort on this.

I suggested, two years ago, that if the concern was that great, the Legislature should have moved for a moratorium, because there is no legal--

SENATOR STOCKMAN: (interrupting) Some of us did, Joe, but it takes 21, 41, and 1.

COMMISSIONER RODRIGUEZ: (continuing) --forum to which I could go as a lawyer. There are preemption statutes by the Federal government. I don't know what you want me to do with the law. I certainly can't twist it to my benefit. But, there are legitimate

things I can do. We did it at Salem. We monitored. We got the agreement. We are going to be there, and the experts tell me there is nothing further to do. We then translated that, to make sure it didn't happen in Hope Creek. We are there; we are monitoring; we are looking. I don't know what else you want us to do. ✓

SENATOR STOCKMAN: Joe, I don't think at this point I suggested anything. That is what this hearing is all about. Maybe when it is over, based on your testimony and the testimony of other witnesses, I and/or the Committee will have something very specific to suggest. But, we are not at that point yet.

COMMISSIONER RODRIGUEZ: I beg you to put up whatever funds are necessary in order to contact whatever experts are available to arrive at the determinations that will satisfy you. I beg you to do that.

SENATOR STOCKMAN: That's what we are trying to get at. As I understand it, you have enough money in the budget -- I don't know what that is yet, and I don't know whether you can tell me -- to move forward with this challenge before the Atomic Safety and Licensing Board, and, in fact, you are doing that. I gather you are doing it to monitor the safety, the environment, and the management skills of Public Service. I simply asked you, to start this whole dialogue, what that sum was, or if you needed more money. That's where we seemed to-- That's where we are.

If you have enough money -- you are telling me you have enough -- that is one thing. I am not looking to spend, and I am sure this Committee is not either, unnecessary money in that area. But, if you don't have enough money, we certainly want to know it because the stakes are high.

I gather your testimony is that you are in there, you are pressing the public interest before that Board, based on safety concerns, based on environment concerns, and based on management competency concerns; and, in your opinion, you have the funds to adequately staff that participation. Is that your testimony?

COMMISSIONER RODRIGUEZ: Yes, but I want you to completely understand it so there is no misunderstanding. To the extent we are

there monitoring within our capabilities, we are there. If you were to suggest to me, however, that you really don't know it was safe -- if they are meeting the containment agreement -- because they are cheating on safety, I think that would be an irresponsible statement and an irresponsible position for me to take, without following it up with the \$3 million it takes to look for what I don't know I'm looking for.

Now, what I am suggesting to you is, to monitor until we see there is something we can legitimately move on, with a contention and with an expert -- we are there. But, I am not going to create an issue, to then spend money in order to see if it is there, when the NRC is now doing that -- unless I can challenge the credibility of the NRC, and I am not yet prepared to do that.

SENATOR STOCKMAN: I am having a very difficult time understanding you, Joe. It may be me this morning. My difficulty revolves around the question of just what you, on behalf of New Jersey, are doing concerning this monitoring of safety, environment, and management.

On the one hand, I get the impression that you are suggesting, "Look, the NRC is competent; I have faith in them" -- and I am not here to say they are not competent or that I don't have faith in them. However, you seem to be saying they are doing it; we should respect that. Well, that is a position you certainly have a right to take, and if that is what is happening, the public should know it and we should decide whether that is what we want or not.

On the other hand, you suggest that you are in there; you are participating. In a certain sense, we are trying to get to that -- to what degree are you participating?

COMMISSIONER RODRIGUEZ: Let me be brutally frank, because I understand what you are trying to do. The question is--

SENATOR STOCKMAN: (interrupting) Tell me, what I am trying to do?

COMMISSIONER RODRIGUEZ: (continuing) --with child abuse, I move in on it; I prove it; and, I put the person in jail. I don't sit here and say, "I can't prove child abuse. Why not let me come back?" Wife beater: "Oh, I can't prove it; let me come back." What I am

suggesting to you is, when I see the problem, I will move aggressively. But, when someone says, "You know that thing isn't safe," I want to know why, how, and what do I need in order to prove it?

What I am suggesting is, if I am to simply duplicate what has been done in that statement that some people accept -- and legitimately, because there are people who have individual points of view, and I respect them-- My job is to balance the public interest. If there is something I can show, such as Salem, we are there.

Why are we in Hope Creek then? Because we are trying to carry over the problems of Salem, to be sure they don't occur. Will they occur? I don't know. Are we there? Yes, we are there. If there is a problem, I will be there again. We were there at Salem.

But, I can't have someone throw me a generic statement, that some people want to believe, and be held to prove that statement with the taxpayers' money, when there is no other reason to direct me there but that statement. That is what I am saying.

So, if I were to allege child abuse and lose; wife beater and lose; neighbor beater and lose, violent person and lose, I am mugging someone with my legal abilities. But, if a man beats his wife, I will put him in jail. You see, that is the difference. So, we are there. We are there. I am not suggesting to you that we are there for any single person's reason; we are there because of my responsibility to the taxpayers of this State, utilizing their money. That is the difference I am talking about.

SENATOR STOCKMAN: Can you tell me, or can you give me an estimate of how much of their money you are utilizing in this monitoring effort?

COMMISSIONER RODRIGUEZ: It is hard for me to say, but it is within our budget, and we use a responsible amount to represent their interest. I haven't calculated it all out, because some of it is a strain. This isn't money you can charge to the utilities. The Rate Council charges utilities for their presence before it. This would simply be the Advocate's budget, where the entire budget for the five divisions is only \$2 million.

SENATOR STOCKMAN: I would appreciate it, and I think the Committee would also, if you could supply us hereafter with a brief statement, breaking down what the actual cost for this effort on the part of the Public Advocate is.

COMMISSIONER RODRIGUEZ: And, I would appreciate someone telling me what it is I am not doing, from a legitimate direction, concerning the problem.

SENATOR STOCKMAN: Well, I don't know how to answer that, Joe.

COMMISSIONER RODRIGUEZ: What is it you want me to find?

SENATOR STOCKMAN: I thought I asked you to get us the amount of expenses the Public Advocate is--

COMMISSIONER RODRIGUEZ: (interrupting) Okay. I will do that.

SENATOR STOCKMAN: In the 1982 Cost Containment Agreement the Public Advocate agreed not to challenge the "need" for the plant before "Federal or State agencies which may have jurisdiction." The Legislature is not a state "agency," and therefore the Public Advocate is free to discuss the "need" for the plant here today. In this light, do you believe that the Hope Creek I plant is needed to meet the electrical needs of Public Service Electric and Gas' electricity customers, or the State's customers?

COMMISSIONER RODRIGUEZ: Let me relate to a conversation with an expert, because I don't profess to know the answer myself. That is why I sometimes feel my personal credibility--

SENATOR STOCKMAN: (interrupting) That we are beating up on you, right?

COMMISSIONER RODRIGUEZ: Sure.

SENATOR STOCKMAN: We don't mean to beat up on you.

COMMISSIONER RODRIGUEZ: My experts tell me this: Hope Creek I is a 1,000 megawatt facility. What is a megawatt? Well, if one million people take an iron and turn it on, that is 1,000 megawatts -- one million people with an iron. Now, how many people are there with irons, televisions, and air conditioners? What does the reinvestment credit mean to Atlantic City with the influx of redevelopment? What

does casino mean to South Jersey? What is my responsibility, as an official, to prevent an emergency crisis in this State? Where do they peak? Well, very definitely, by 1993 they will need something. They will definitely need something.

If we bring this plant down now, then the taxpayer will pay billions in abandonment and billions to correct something else by 1990. You see, offhand, that doesn't sound like a very safe place to run now, because we are dealing with 1,000 megawatts. What will be the cost? Well, I am going to leave Roger Camacho here, because I think we should all realize I was asked just last week -- on Friday -- what the issues would be, and I have a schedule I have promised to some consumer groups that I have to keep. That is why I do not have a prepared statement.

They tell me that by 1993, it would be dangerous not to have something. So, now you have to see what it is you do have, and how you are going to phase it in. My experts have not said to me that it would not be needed by 1993; so, I don't know where else to go with that answer. This is what they have told me, and they have given me calculations. I know that if it only takes one million people to turn on an iron, and we are asking this State to redevelop in the South -- we are asking for commerce, we are asking for industry, we are asking to put people to work -- I could not responsibly say that with a one million iron capacity -- irons; one million irons; just turn them on -- we don't need it. I don't know how to make sense out of that in my mind, so I have to rely on others, and that is what they have told me -- that is what I have.

The question is then one of cost. Interestingly enough -- and we seem to forget that when I took office, that plant had already been surrendered in December of 1981, because it was needed at this time. We have had hearings on what "at this time" meant. The Cost Containment Agreement contained the figures they agreed upon in December of 1981. We moved responsibly, I thought. When all avenues to defeat the plant were lost-- And don't forget, out of some ten plants that were projected, there are only four, so the Advocate has a successful record. That successful record yielded to the need for Hope

Creek I in December of 1981. I came into office and made the horrendous mistake of questioning the need -- the very thing I am getting killed for now.

SENATOR STOCKMAN: Who is killing you?

COMMISSIONER RODRIGUEZ: Well, okay.

SENATOR DALTON: You are so defensive, Commissioner. We haven't said one thing about--

COMMISSIONER RODRIGUEZ: (interrupting) Okay. Please allow me to finish. So, we contained it at that price. Everything I have read, up to last night -- independent analysts, magazines that look for economy -- all look to New Jersey and say the reason New Jersey is a good buy is because they have been contained.

I feel rather comforted by that statement because then I don't feel as though I sold the soul of the public interest by arriving at that agreement. The question then is, are they on target? From everything I have been able to determine, they are. So, sitting here two years later, I can't suggest to you that they are not on target. They are within that containment, and if they are, we should be addressing how to phase it in -- which we will.

Some of your questions go to that. Number one, do we know, by all indications, that it is being built on schedule? The answer is, from everything I have -- from outside analysts, from economic markets that do this independent of me, you, and this Committee -- everyone says it is, and they applaud it.

Are we constantly present? Are we concerned with the rates? Of course we are. Now, beyond that, I don't really know where to go. I don't want to get into too much detail regarding the cases in litigation; I think I spoke enough to that issue.

SENATOR DALTON: Commissioner, our purpose today is to get information from you as to the status of the Cost Containment Agreement. Now if you feel we are beating you over the head by trying to get that information, then I would suggest you are wrong. What we are trying to do here today is to obtain your judgment, relative to this agreement. Okay? Now, we may have beaten you over the head because we asked for somebody to be here today who is not here, and I

think we have a legitimate right to hit you over the head on that. regard to this issue, we are only trying to get information.

COMMISSIONER RODRIGUEZ: And, you certainly have a right to hear from him, but only after you have heard clearly from me as to the effort I have made in order to arrive at my judgment. This is not a personal feeling I am expressing. I think it was a responsibility I had to undertake in order to arrive at some of these conclusions.

SENATOR STOCKMAN: Joe, I am not overly offended at you telling us again how this Committee should function -- that is, we must first hear from you before we ask any questions. I don't think you really mean to insult us with those comments. You seem to feel very much under pressure here today. When you say, "I'm getting killed," and when you make the suggestion that "You sold the soul of the public interest," I must tell you that I am frankly troubled by that. I am troubled by the old notion of -- and maybe I shouldn't be; maybe by the time these hearings are over and history is written the feeling will go -- "Thou doest protests too loudly." We are here to gather facts, and I don't really understand.

I do want to say something publicly that should be made clear, and that is that you are here on rather short notice, and I -- and I am sure the Committee does also -- appreciate that fact. I just wish we hadn't gotten off on the foot we are on.

Senator Costa, do you want to ask any questions?

SENATOR COSTA: Yes.

SENATOR STOCKMAN: I know you have to leave soon, Joe, and we don't want to disrupt your schedule; so, if you have to go we understand, and we will pick up with other witnesses.

SENATOR COSTA: Mr. Public Advocate, on cost containment -- it sounds great to say cost containment, but I always like to take a big number and bring it down to where most people can understand what we are talking about. I don't look at government as being any different from running my own household, only magnified many times. When you speak of cost containment, one looks at the difference between your saying a plant will cost \$300 million, and then saying you are going to contain it at \$3.8 billion. That, to me, is like -- bringing

it down to very small terms -- saying I can do it for \$10, and you saying, "Hey, you have a cost containment of \$50." That's great; I love it. What kind of monitoring do we have, and where did we get this figure of \$3.8 billion, when the plant costs \$300 million? Also, when we talk about the inflation rate in the '70's and the '80's escalating so much, we have to remember that we have also been able to contain inflation. Did we make any provisions as far as that containment is concerned, or do we have to stay at the higher level of \$3.8 billion? Where is the public being protected as far as that is concerned?

COMMISSIONER RODRIGUEZ: Because the figures--

SENATOR COSTA: (interrupting) I'm sorry, but I feel that the Public Advocate, by signing off a cost containment at that figure, really left the public in a quandary because of the other aspects of inflation rates going down, etc. That was not taken into consideration.

COMMISSIONER RODRIGUEZ: Again -- and I think this point was missed -- in 1981, before I got here, that figure was arrived at and agreed upon.

SENATOR COSTA: By whom?

COMMISSIONER RODRIGUEZ: By my predecessors, not by me. Therefore, you have to understand that once there is an agreement and the cases are lost, there is no further forum. It is just like many other cases that are decided by the Supreme Court. I know Bay Head probably wishes they could still close the beaches, but at some point the forum is closed. The forum was closed, so we seized the 1981 figure that was agreed upon by others and said, "If we, in the production date of 1986, can hold them to that figure, that will be in the public interest," because it is going off at that, whether we like it or not.

Now, the concern of other states that are not contained is that prices keep going through the roof -- but not in New Jersey. That's why all the analysts are looking to New Jersey and saying, "It is not happening there."

SENATOR COSTA: I contend it has already gone through the roof, when you have a cost containment of \$3.8 billion.

COMMISSIONER RODRIGUEZ: But, you see, that was already done.

SENATOR STOCKMAN: That issue -- and this is understandable because you were not part of the Oversight Committee -- took three days' of hearings, and there are lengthy transcripts on it. In all fairness to the Committee, I personally had a disagreement with -- and it is a matter of record -- our entering into that agreement. But, I think that is beyond us now. I think the questions really do go to what has happened since, and the major changes that have occurred throughout the country.

SENATOR COSTA: My point is, I don't believe we are beyond that point, or that we have to stay there. I think there is cause for reevaluation.

SENATOR STOCKMAN: I absolutely agree.

SENATOR COSTA: That is why you are having this meeting.

SENATOR STOCKMAN: I agree.

SENATOR COSTA: My other question relates to when you spoke about the ability of the NRC to do it: "We don't have the money to do it; why duplicate it?" I also heard you say that "we are right there." Does that mean that you have someone there monitoring, someone who is involved with the NRC in all the steps of the way toward the nuclear plant?

COMMISSIONER RODRIGUEZ: No. The only way we can do it is by monitoring the reports, and being very alert to the fact that if there is a problem, we will go in and find out what the problem is.

SENATOR COSTA: Could we not have a member of the Public Advocate's office involved in everything the NRC is doing?

COMMISSIONER RODRIGUEZ: No, Senator. I am afraid that what we would then do is-- It is like me looking at this building and telling you whether that wall is going to fall down tomorrow. The lawyers aren't capable of doing that. You would need--

SENATOR COSTA: (interrupting) I am not speaking of a lawyer. Don't you have someone -- an engineer, a nuclear engineer -- who is versed in that direction?

COMMISSIONER RODRIGUEZ: Yes, and they would have to be paid.

SENATOR COSTA: I am not an engineer, and I don't think any of us are; however, I really feel we have to have that kind of a resource.

COMMISSIONER RODRIGUEZ: Sure. And, I would suggest it would be very easy for the Legislature to determine how many people of what disciplines you need, and then put up the money to send them there.

SENATOR COSTA: Well, I think that is of utmost importance, because as we see it, what is happening is, we have no one to protect us.

COMMISSIONER RODRIGUEZ: Oh, yes.

SENATOR COSTA: Well, if you are not versed in it, if you are an attorney and you are dealing with engineering problems, especially in the nuclear field, you are certainly not protecting me.

COMMISSIONER RODRIGUEZ: Senator, I don't treat a patient when I sue a doctor for malpractice. I am there to make sure that it doesn't occur again, but I am not the doctor.

Really, the point is, if the State wants to monitor what is going on, it has to pay people who are in that discipline, and who know what it is they are looking at in order to monitor it. We are a lawyers' office. There is a big difference there. A lawyers' office means that when an allegation is made, we have to prove it. That is what our law is all about. But, monitoring should be done by someone who knows what he is seeing.

I could go myself, but I don't know what it is I am seeing.

SENATOR COSTA: That's what I am addressing, and I am surprised we don't have someone in that field. You know, I come from a county government background, and that always amazed me. I fought very hard to get someone who knew what they were doing when we were in the business of building buildings. Yet, we didn't have an engineer on our staff who was watching. I feel this is the same type of thing as far as our nuclear plants are concerned.

COMMISSIONER RODRIGUEZ: We could calculate that. Let's step back a minute. Whose function should it be? Should it be the function of a lawyer, or should the State provide that capability? I don't know everything the other departments are doing. I am saying that as a lawyer if I knock down someone's door, they will say: "Where is the search warrant?"

What I am trying to say is, there has to be a reason for me to trigger the law. I am saying that we are watching with the eyes of a hawk. That is why we are already in Salem. That is why we are already before these regulatory bodies with whatever issues we feel should be pursued.

There is a suggestion we are not doing enough, and I say that "enough" has to be something I can responsibly look at, short of hiring experts to go down there. That is why I say it comes to about \$3 million.

SENATOR COSTA: Senator, may I ask you a question?

SENATOR DALTON: I don't know if I will answer a question, but go ahead.

SENATOR COSTA: My question once again is, do we have, anywhere in State government, whether it be in the energy division or not, someone who is qualified to monitor this?

MEMBER OF AUDIENCE: I would like to answer that question, Senator. We do have a monitoring process.

SENATOR COSTA: Do we have anybody who is versed as a nuclear engineer?

MEMBER OF AUDIENCE: What we do have is a monitoring process where we are immediately notified of anything that occurs at a nuclear plant.

SENATOR COSTA: I think it is too late at that point. I think we really have to have someone on line from our State, someone who is there constantly with the NRC, monitoring it all along. That's my feeling.

COMMISSIONER RODRIGUEZ: Except that we have to again remember this -- and I don't want to get technical with this, please; I don't intend to be technical -- if we had someone monitoring and if I went down there today and said: "I don't think this is safe," I have to then go to the NRC. The NRC has preempted the question of safety in the Federal forum. It is not even in the State forum, unless the State does it for other reasons.

So, there has to be a tie-in with the Federal forum on the issue of safety. They explore whether or not you have proven your case, or whether they will proceed. That has been preempted.

Incidentally, our office, under my direction, did, in the Karen Silkwood case, as a result of punitive damages -- if, in fact, a nuclear plant does something outrageous -- put in an amicus brief before the Supreme Court of the United States for this State to have the right to impose liability, and we won. So, we are not walking away from our responsibility -- please. But, there is a limit to what a lawyer can do.

SENATOR COSTA: I think you have just shown that we are lacking in a certain direction. You cannot protect the public without a knowledgeable person working on your side -- not on the other side -- for the public. You need that. You definitely need it, whether it is in your Department or in another department.

SENATOR STOCKMAN: There is a suggestion that DEP has some participation, and Larry Schmidt has been anxiously waving his hand. We may be hear from him later today, but I think the point has been made.

I think Senator Dalton has been anxiously waiting to ask at least one, or several, questions, because I know he has to leave. I would like to turn this over to him. But, before I do, I would like to welcome Senator Garibaldi, who came in moments after we got started. Things were going so hot and heavy, we didn't have time to introduce him at that time. We are delighted to have him here. He is a tireless member of the Energy and Environment Committee. Welcome, Senator.

SENATOR GARIBALDI: I have some questions also.

SENATOR STOCKMAN: All right. Why don't we yield to Senator Dalton, and then we will come back to you.

SENATOR DALTON: Thank you, Senator. Commissioner, has the Public Advocate made any studies to determine the economic impact the operation of Hope Creek I will have on Public Service customers?

COMMISSIONER RODRIGUEZ: We have made an analysis of what we call the phase-in. That is why I wanted our Director who is responsible for that here. I am going to leave him here, because my time constraints are not the same as his.

SENATOR DALTON: Okay. Mr. Camacho, what will the financial impact of Hope Creek I be on the customers in the Public Service Electric and Gas Service area?

ROGER CAMACHO: Again, Senator, I have to operate within certain assumptions and certain presuppositions as to the future, when--

SENATOR DALTON: (interrupting) I understand that.

MR. CAMACHO: (continuing) --in essence, responding to some of the things provided to us by Public Service. From what our people have indicated to me, at this preliminary stage -- and I will put many caveats on this in terms of many of the things that are going on -- one can operate within a range of-- If you assume what we are led to assume right now, that plant is coming in at 3.7 or 3.8. I think you will hear later on today, Public Service testify that it will be a range of from 10 percent to 15 percent.

SENATOR DALTON: So, there will be a 10 to 15 percent increase in rates when Hope Creek I comes on line?

MR. CAMACHO: On a discreet item basis for the unit, with several assumptions -- one being another rate case disposition -- now and then. That would have an upward pressure on rates.

Also, as you have been aware most recently, we are coping with problems of replacement power costs from the outages. That too can be decided as being another element to watch. I am placing caveats on this all along the line. I am really pointing to the pressure points which could impact on that.

SENATOR DALTON: Sure.

MR. CAMACHO: I am not saying that is acceptable on a discreet item basis either, and that it is the basis of our talking about a phase-in. We are talking about this 10 to 15 percent range?

SENATOR DALTON: Right.

MR. CAMACHO: When one looks at all the upward pressures, I believe it would be wise for us to plan on that phase-in because of the aggregate effect of all this -- that is, to soften the blow. I don't want to leave you with the impression that I consider it acceptable at that level. Many of those assumptions, again, have been provided by Public Service, insofar as what will occur in that first year of impact.

SENATOR DALTON: Okay. Believe me, I am aware of the fact, in many cases, that your estimates are just that -- they are estimates,

and they are based upon certain assumptions. To a certain extent, we refer to this as sophisticated crystal-balling; so, I understand that.

MR. CAMACHO: I specifically refer to the other case -- the intervening case along those lines -- because it requires certain assumptions as to the different elements of that case and what will happen. So, it is a very rough-gauge type of element. I think we are better off just looking at those caveats -- those upward pressures -- and try to plan as best we can.

SENATOR STOCKMAN: If I may add something here, would you say that those assumptions tend to be sort of optimistic assumptions? In other words, if things go well, there will be a 10 to 15 percent increase. If any one of these many variables don't go so well, would that be a fair categorization of where we are now?

MR. CAMACHO: Yes. In other words, I couched it in terms of bringing this plant in at the \$3.8 billion level, which, as the Commissioner has testified, is our indication at this point.

But, the other assumptions appear to be fairly reasonable in terms of that.

SENATOR STOCKMAN: And, the other assumptions are with no planned phase-in? In other words, we are talking about -- if you don't phase in, and if everything goes well -- a 10 to 15 percent jump in rates when it goes on line?

MR. CAMACHO: Yes. And again, Senator, I am not saying that is acceptable, because there are other upward pressures that we are going to have to face. Again, if we assume everything is fine, and we look at the period from July, 1985 to July, 1986 -- again, the assumption is this plant is coming on line in June, 1986 -- I will have to speculate a little bit. What will happen to the deferred fuel balance with the replacement power cost? How will it be treated? We will have to go before the BPU next June to talk about a reconciliation to the next period, where there is an under-recovery right now -- which you alluded to earlier on.

SENATOR DALTON: Now, does that 10 to 15 percent figure include the CWIP that is presently in the plant?

MR. CAMACHO: Yes.

SENATOR DALTON: That the company has received?

MR. CAMACHO: And, Senator, the reason I am couching my caveats in terms of the next case is, it assumes the inclusion of further CWIP in that next rate case.

SENATOR DALTON: What is your assumption on that next rate case?

MR. CAMACHO: The assumption, right now, is about \$1 billion, roughly -- \$908 million at this posture.

I think, from what I understand, if you assume the figure goes to about \$1.3 billion in that next case, we would wind up roughly with a figure of 12.2 to a 13 percent increase. The company -- and you know from our past discussions that we always debate with the company regarding how much should go in -- would have great aspirations in that regard. So, when you get down to the low end of that range, they would assert that they were entitled to more, in advance. That is why I am being so careful with my caveats. I have to project as to what is going to happen a year from now.

SENATOR DALTON: I understand that. Now, given that once a plant goes on line, the ratepayers experience a 10 to 15 percent increase -- once the plant is on line and is operating -- what would the experience be, and what would the rate impact be on the ratepayers? Have you looked at that?

MR. CAMACHO: Just in general. We looked at the first-year impact of that, in terms of the first-year increase. That is what I am talking about in terms of the first-year increase, the impact when this comes on line.

SENATOR DALTON: Let me ask you this, regarding the assumption you are basing this increase on: What percent of Hope Creek do you assume will be on line in that first year?

MR. CAMACHO: Entirely -- the entire plant, at the cost which is projected under the agreement, the \$3.7 or the \$3.8.

SENATOR DALTON: So, you are projecting that Hope Creek will be entirely on line that first year?

MR. CAMACHO: That is built into these figures. Senator, I can't indicate to you that anyone has done a study with regard to that. I don't want to infer any load-type study into that as to what will go into effect at this point.

SENATOR DALTON: Isn't it a fact that we are assuming that Hope Creek I will run that first year, or for many years to come, and it will be on line for a great percentage of the time? Isn't the suggestion there that it is cost efficient and that this plant will be on-line and will provide the consumers of the PSE&G service territory with cost-efficient energy?

MR. CAMACHO: Those figures I read out, Senator, would be restricted to the very first year. When you talk about a cost study, that would go far into time. But, the figures I read to you would assume the plant functioned at a 60 percent or 65 percent capacity factor during that year.

SENATOR DALTON: Now you are saying it is not 100 percent; you are saying it is 60 or 65 percent?

MR. CAMACHO: Yes, 100 percent of the cost in rate base. They never operate at 100 percent, Senator. As you know, they come down for fuel and there are always certain planned outages that would occur.

SENATOR DALTON: And, you are assuming there will be planned outages during the first year of this plan?

MR. CAMACHO: In that sometimes these things occur. I might add, Commissioner, one of the--

SENATOR DALTON: (interrupting) No, I am a Senator; your Commissioner is on your left side.

MR. CAMACHO: I'm sorry. (laughter) It is an old habit I have.

One of our arguments on the phase-in type of scenario is, it would give us some leverage to talk about what you are getting to: Assume the plant doesn't function at that rate. That would provide us with some leverage to go before the BPU and argue for some remedy on behalf of our ratepayers. So, through that phase-in technique, we would be trying to cope with the very item you are speaking about.

If the whole plant were not phased in, in terms of total dollars, and should something unforeseen happen -- or foreseen, or whatever; if the plant should go down terribly -- we would have leverage to go before the Commissioners and ask them to take some action with regard to holding back and maybe deferring that phase-in.

Also, another concept-- And, again, we just started these studies; I have nothing definitive on the specific phase-in. We talked about incentives in our cost-containment agreement as perhaps another incentive. A troublesome matter was mentioned by the entire panel: What type of incentive would keep the plant operating? Once we are paying the capital cost, we certainly don't want to bear power replacement costs for energy. We want it to run well.

SENATOR DALTON: That's right.

MR. CAMACHO: What type of incentive can one provide, or think about, to keep it running well?

SENATOR DALTON: That's right.

MR. CAMACHO: Assume you have that phase-in, and assume the phase-in was premised on the level of operation of the plant -- i.e., to operate at such and such a level, put this much in -- if it doesn't operate so well, do we say: "Sorry, we will recommend to the Commissioners that they better not put quite that much in?"

Again, the basic concept I have been trying to press is, let's put the proper incentive into the regulation.

SENATOR STOCKMAN: Shouldn't that have been in the cost containment agreement?

MR. CAMACHO: Excuse me?

SENATOR STOCKMAN: Shouldn't that have been in the cost containment agreement?

MR. CAMACHO: No, this is really the operation, Senator. Again, we are dealing at arms length with the cost containment. Once you get the plant in, once you are building the plant and you are getting it in, then you talk about how well this plant -- or any other plant -- runs. Why not, at that point, look for any item you can reach in order to get some leverage for an incentive?

SENATOR STOCKMAN: But, once this \$3.8 billion becomes a real burden to the taxpayers when it goes on line, that does not strike me as the ideal time to start talking about: "All right, now we have it; now it is going to cost dearly; let's try and figure out a way to make sure it runs well."

MR. CAMACHO: No, I separate the two, Senator, in terms of dealing with construction -- with building. They have started it already. We are constantly looking at ways to try and improve regulation with regard to incentives.

SENATOR STOCKMAN: But, you are not suggesting that it could not have been included in the cost containment agreement, are you?

MR. CAMACHO: That and many other items, perhaps. But, remember, this has to be negotiated across the table, with all due respect.

SENATOR STOCKMAN: Let's stay with that for just a minute, because I think it is tremendously important. You agree that could have been fashioned and incorporated in as part of the cost containment agreement?

MR. CAMACHO: Only if the other side is willing to do that as part of the agreement. There are two sides here.

SENATOR STOCKMAN: All right. It could have been negotiated. I gather it was not at all talked about.

MR. CAMACHO: At that posture, we were dealing with the cost. Remember, there is a LEAC -- a Levelized Energy Adjustment Clause -- in place to deal with the replacement power cost, and the purchasing and production costs.

SENATOR STOCKMAN: We are talking about the phase-in time, and I want to remind you that one of my complaints, and one of my discomforts, expressed publicly, was the seeming speed at which we went from the question of whether the plant should be built, to a "cost containment agreement," and the time frame within which the Public Advocate -- and that is in the transcript -- got into this negotiation and resolved it.

One of my concerns was whether that was too rapid a development. I must say that in listening to this question about our concern regarding this plant running well, and your strong suggestion that incentives are particularly important, I am puzzled as to why this wasn't at least attempted to be negotiated into the cost containment agreement.

COMMISSIONER RODRIGUEZ: I will answer that again, Senator, as I have attempted to over the last two years. We had stipulated that this was already put into the agreement, and we didn't dispute the three point "something" billion. Now, we are going to negotiate. If, in fact, we had done nothing, and lost the opportunity to stop the plant -- which we did -- why wouldn't we be another Shoreham? Why wouldn't we be another Marble Hill? Why should they have agreed any more to-- What happened was, that figure was there, to go wherever the figure would take it. We capped it. We capped the construction at a time when we had already yielded the figure. So, nothing was done fast.

What was fast, was to cap it. Now, what if we didn't have the cap, and the costs were experiencing that upward pressure, without the cap? Where might that \$3 billion be today? It would have been less responsible if I had left it open, and continued to pursue an avenue that had already been foreclosed. So, we capped it.

This would suggest that when you ask, "Why wasn't it in? Why didn't you do it?", you are assuming that we came to the bargaining with an upper hand. Responsibility dictated that the top cap was already surrendered, so make them build within it.

SENATOR STOCKMAN: I couldn't disagree with you more, Joe. I am talking about negotiating something. I didn't suggest it had to be in there, or should have been. Maybe Public Service wouldn't have stood still for it -- that is interesting. But, it appears that it was not, and that again raises the gnawing question about the circumstances surrounding the entry into that agreement. Now, I don't want to get bogged down with that.

COMMISSIONER RODRIGUEZ: Wait a minute. You don't get the best of both worlds from me. You don't sit here and tell me I am trying to assume something that is not occurring, when every opportunity you get to go back and suggest something sinister, you do. I am saying there was nothing sinister in this.

SENATOR STOCKMAN: What is sinister about the possibility of having--

COMMISSIONER RODRIGUEZ: The gnawing concern as to what

happened so quickly two years ago, and I am trying to suggest to you that maybe you should have the people who surrendered the plant at \$3 billion dollars here, rather than asking me why I contained it. Senator, really, I am sorry; that is another question. I am very late now, but I don't want to leave an unanswered question.

SENATOR DALTON: Let me talk about the future here -- the present and the future. I want to go back to this cost issue.

COMMISSIONER RODRIGUEZ: Excuse me, Senator. Are you going to need my presence if you are going to be addressing questions to Mr. Comacho?

SENATOR DALTON: Commissioner, we are aware of your schedule, so if you have to be on your way, please feel free to do so. Thank you for your appearance here today.

Roger, given the cost figure again of 10 to 15 percent, what I am asking you is, does 10 to 15 percent include the percentage increases in CWIP that PSE&G has already received?

MR. CAMACHO: Yes. This is an incremental piece, on top of what has already been awarded.

SENATOR DALTON: Okay. In other words, let me ask it another way. This incremental piece that you anticipate being awarded, what percentage in increase will that be?

MR. CAMACHO: I'm sorry, I don't know if we are talking about the same item, Senator. What this assumed was one more addition of about \$300 million in CWIP. Again, the company provided that. I can get into the technicalities on this. There is something called "Old AFDC" which keeps accruing between the test years, which will, by then be up at that level.

This was the incremental piece after that case. Assume that a case is decided beginning in 1976, and there is a rate award at that point in time. As part of the rate award, there is an assumption that "x" amount of additional CWIP is in. So, we are no longer dealing with \$1 billion; we are dealing with \$1.3 billion.

SENATOR DALTON: Right.

MR. CAMACHO: Then, in June of '86, suppose the plant comes in; what is the incremental rate impact at that point in time of just that June '86 portion?