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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

TEXAS UTILITIES ELECTRIC COMPANY
(COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 & 2)
PRE-HEARING CONFERENCE CALL

LOCATION: BETHESDA, MARYLAND

PAGES: 19263-
19364

DATE: OCTOBER 24, 1984

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1 UNITED STATES OF AMERICA

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3 NUCLEAR REGULATORY COMMISSION

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5 PRE-HEARING CONFERENCE CALL

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7 In the Matter of:	:	
	:	
8 TEXAS UTILITIES ELECTRIC	:	Docket Nos.
COMPANY, et al.	:	50-445-2
9 (Comanche Peak Steam Electric	:	50-446-2
Station, Units 1 and 2)	:	
	:	

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11

12 Fourth Floor
 13 4350 East-West Highway
 Bethesda, Maryland
 14 Wednesday, October 24, 1984

15 The above-entitled matter came on for
 16 hearing, pursuant to notice, at 1:30 p.m.

17

18 BEFORE: PETER BLOCH
 HERBERT GROSSMAN
 WALTER JORDAN
 19 Atomic Safety Licensing Board

20 APPEARANCES:

21 On behalf of the Nuclear Regulatory
 22 Commission:

23 STUART A. TREBY, ESQUIRE
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 24 United States Nuclear Regulatory Commission
 Washington, D.C. 20555

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8 Washington, D.C. 200369 On behalf of Texas Utilities Electric
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16 On behalf of O.B. Cannon:

17 JOSEPH GALLO, ESQUIRE
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22 ALSO PRESENT:

23 Ellen Ginsberg, Law Clerk
24 Nuclear Regulatory Commission
25

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

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2
3 CHAIRMAN BLOCH: Good afternoon. This is
4 Peter Bloch, Chairman of the Licensing Board for the
5 Comanche Peak Intimidation hearing. The purpose of
6 today's conference is to discuss procedural matters
7 related to the holding or deferral of the hearing
8 scheduled for next Monday.

9 We have searched the transcript for the
10 purpose of ascertaining relevant sections governing
11 one aspect of the procedural matters before us. And
12 this is Case's motion for discovery. The transcript
13 citations we have found are transcript 18509 through
14 18515 in which the applicants explained to the Board
15 that they could not file Mr. Brandt's testimony on the
16 date set. And then again transcript 18757 through
17 18760 in which there is a discussion of the proper
18 procedure for taking Mr. Brandt's testimony.

19 And I would point out that on page 18758,
20 line 21 it should say "Judge Bloch" because the
21 following five lines were words that I said.

22 The agenda for today's meeting will include,
23 first, Case's motion for discovery; second, the
24 staff's motion to postpone indefinitely next week's
25 hearing, and third, Mr. Gallo's motion of just the

1 Board has learned in the pre-hearing informal
2 conference that the hearing be deferred for either two
3 or three weeks because of the problems of availability
4 of Mr. Roisman.

5 There will not be on today's agenda Mr.
6 Gallo's motion to strike. The Board ascertained in
7 the informal session that the parties desire this to
8 be done in the ordinary course of the response to
9 motions.

10 MR. GALLO: Judge Bloch.

11 CHAIRMAN BLOCH: Furthermore -- yes, one
12 second, Mr. Gallo.

13 We have also ascertained in the pre-hearing
14 conference that the -- Mr. Roisman's motion for
15 sanctions may or may not involve questions of deferral
16 of portions of the proceeding depending on the Board's
17 action on page two, item two of Case's motion for
18 sanctions due to repeated untimely filings by
19 applicant dated October 18, 1984. So we can defer for
20 awhile deciding whether that will be part of the
21 agenda.

22 Mr. Gallo?

23 MR. GALLO: I just wanted to make it clear
24 that my seeking additional time is not due to Mr.
25 Roisman's schedule. How his schedule fits in is that

1 at the time I was seeking, it conflicts with a
2 schedule he's already established. And there I was
3 adjusting my request accordingly.

4 CHAIRMAN BLOCH: Thank you for clarifying
5 that aspect of the Board's statement.

6 On Case's discovery motion I would request
7 that the total time allotted to each party be strictly
8 limited to six minutes, subject to possibly extension
9 for Board interruptions only. I ask that there be no
10 interruptions from the other parties. We will take a
11 total of six minutes, which means that if you stop
12 short of that you may reserve some rebuttal time.

13 Mr. Roisman?

14 MR. ROISMAN: Mr. Chairman, I now have the
15 applicant's response to the motion for discovery.
16 They have answered question one, question two. With
17 regard to question three, they have answered with the
18 exception of the -- what they call the hearing
19 transcript and the matrix prepared by counsel. As to
20 the matrix we do not press into that, and our motion
21 should not be interpreted as reaching to that.

22 As to the hearing transcript, if I
23 understand it, they indicate that the -- I'm not
24 clear, but I think they mean the September 18th
25 hearing transcript, that they shouldn't have to

1 produce that. We did not intend that they would have
2 to produce portions of the actual transcript of this
3 record. So that we don't have any problem with that
4 we have a copy of the September 18th transcript.

5 And that's the only real issue that remains,
6 is whether or not testimony taken by Mr. Brandt and
7 not being offered is subject to discovery. So I'll
8 limit myself to discussing that one point.

9 I do not believe that the prefiled testimony
10 draft is excludable under the attorney work product
11 privilege, first and most importantly because if I
12 understand it it was actually statements taken under
13 oath from Mr. Brandt. That is a discoverable matter.
14 He has sworn to those, and we are entitled to see what
15 he swore to.

16 That really is the end of the matter. But I
17 would go on and point out as we will in more detail in
18 our Friday finding that the attorney work product
19 exception to discovery is a very limited one as
20 applicant's own filing on the request with regard to
21 O.B. Cannon documents indicate that, one, it must be
22 the party who is asserting it is able to demonstrate
23 that the person who would normally have discovery can
24 get readily the information some other way.

25 Obviously there's only one source of what

1 Mr. Brandt said under oath on October the 3rd, and
2 that is the transcript of what he said. And secondly,
3 it must be that is it fairly important for the
4 proceeding. And I would say, although I do not have
5 those transcript pages that you specifically cited
6 there in front of you, it's my clear understanding of
7 the applicant's commitment it was that they would sit
8 Mr. Brandt down and it would be just as though we had
9 all been sitting around and hearing it ourselves.

10 Mr. Brandt would answer the question. Mr.
11 Downey would attempt to lead him as he did in the
12 testimony. I would object. He wouldn't get led quite
13 as much. But we'd hear all the same things. Now, he
14 apparently did that. It all took place on the 3rd of
15 October according to the reporter's transcript of the
16 excised portion of this, and I don't see how Mr.
17 Downey can exclude it.

18 Finally, it if happens that counsel's notes
19 are all over there, then I would say somebody's got a
20 real big white-out job to do. But I don't think that
21 that precludes us from seeing the document. I think
22 we are entitled to know everything that Mr. Brandt
23 said under oath with regard to the liner plate.
24 That's the end of my argument.

25 CHAIRMAN BLOCH: You've reserved three

1 minutes that you may use for rebuttal.

2 Mr. Gallo, I take it you don't want to be
3 heard on this at all; is that correct?

4 MR. GALLO: No, I -- that's correct, Judge
5 Bloch.

6 CHAIRMAN BLOCH: So then Mr. Downey?

7 MR. DOWNEY: Yes, Your Honor. I would take
8 issue with several of the points that Mr. Roisman made
9 at his presentation.

10 First, I think it's clear that what Mr.
11 Brandt has sworn to is his final estimate. And that
12 has been submitted. In the interest -- and I will be
13 candid in the interest of being succinct, we in his
14 testimony attempted to address in a generic way many
15 of the allegations. And I think that is reflected in
16 the transcript. There was a lot of give and take in
17 the draft session that subsequently shortened his
18 testimony by several factors, several orders of
19 magnitude.

20 And I believe that there was no feeling of
21 Mr. Brandt nor myself nor the Court Reporter that at
22 the time he was giving this draft testimony he was
23 under oath. Rather he was swearing to his final
24 testimony which I think is clear in the way that pre-
25 filed testimony is normally handled at the Agency.

1 CHAIRMAN BLOCH: Mr. Downey, have you
2 decided that after reviewing transcript 18757 through
3 18760?

4 MR. DOWNEY: I have not. Let me tell us
5 just what we did, Your Honor. As you will recall, we
6 went -- during the hearing we -- I was giving -- Mr.
7 Brandt was giving testimony where we took lists of
8 materials that -- the various lists that Case
9 produced.

10 CHAIRMAN BLOCH: Okay.

11 No, I don't care to hear what you did. I
12 care to hear the interpretation of the obligation that
13 you undertook in 18757 through 18760.

14 MR. DOWNEY: I don't have that before me,
15 Your Honor.

16 CHAIRMAN BLOCH: Well, I suggest you get it.

17 MR. DOWNEY: So I did not --

18 CHAIRMAN BLOCH: Get it. We'll take a ten
19 minute recess. I told you yesterday that we were
20 going to use what the Board said on the record as the

21

22 MR. DOWNEY: I'd be happy to get that, Your
23 Honor, 18750.

24 CHAIRMAN BLOCH: It's 18757 through 18760.

25 MR. ROISMAN: Mr. Chairman, this is Mr.

1 Roisman. I'll also try to get a copy in front of me.
2 But do you know the date of that?

3 CHAIRMAN BLOCH: Yes, the date is October 1,
4 1984, and I would point out, Mr. Downey, that -- I
5 will repeat again that line 21 of 18758 was the
6 Board's words. That should say "Judge Bloch:" and
7 then the words are mine.

8 MR. DOWNEY: I have a notation from what you
9 said, so I'll get that.

10 CHAIRMAN BLOCH: Okay.

11 So we will resume this conference at 1:57.

12 On my watch I have 1:47 now.

13 MR. DOWNEY: All right. Thank you.

14 (Discussion off the record.)

15 MR. DOWNEY: Your Honor, before the recess
16 you referred me to transcript pages 18757 through
17 18760, as I was explaining how the transcript was
18 prepared, the pre-file testimony was prepared. And on
19 page 18759 of the colloquy among counsel and the
20 Court, I informed the Court that we had been at it,
21 Mr. Brandt and I, on the 1st of October going traveler
22 by traveler. And I say at the transcript 759, we
23 planned to work straight through, which we did, except
24 for the hearing time.

25 To be perfectly honest, I've asked Mr.

1 Brandt to look at a way that might be more efficient
2 than going traveler by traveler, allegation by
3 allegation, which is what we're trying to do, the way
4 we started. I will say we are prepared to start now
5 if that's what the Board wants of the applicant and do
6 a lot. I don't know if that's what the Board or the
7 intervenor wants. Then you go on to say, it sounds to
8 me as if you've just persuaded me why we shouldn't do
9 it live.

10 We did, as I informed the Board at one
11 transcript page 18759, organize the testimony because
12 of --

13 CHAIRMAN BLOCH: Well, how do you think this
14 relates to the 18758 where Mr. Roisman talks about
15 your not having an indefinite period of time, that it
16 should be done as quickly as possible. And the Board
17 said, if they're not able to produce it before the end
18 of this hearing process that it be produced as soon as
19 it's done and that it be done expeditiously.

20 MR. DOWNEY: Yes, Your Honor, and let me, if
21 I may, I thought we were arguing about the question of
22 the discoverability of draft pre-file testimony, not
23 the question of whether we were timely in filing the
24 testimony.

25 CHAIRMAN BLOCH: Well, the real question is

1 whether it was expected that whatever you did with Mr.
2 Downey with respect to whether you were going to work
3 on traveler by traveler or not, that you were going to
4 do it immediately and efficiently, and as soon as it
5 was done transmit it to us. And that you weren't
6 going to be doing it and redoing it.

7 MR. DOWNEY: And, Your Honor, we did do just
8 that. If I may, we -- I want to get to the points of
9 privilege, which I think are the critical points here.
10 But if I can respond to the Court's inquiry the --
11 over the course of the evening of the 2nd and early
12 morning of the 3rd I prepared the matrix which we
13 described in our interrogatory answers. That matrix
14 was really in draft form. I went through the
15 transcript, the handwritten list of allegations, and
16 the memorandum and tried to put together and organize
17 all of the various allegations from all the various
18 sources in a way that we could address them
19 generically.

20 What that did, that organizational effort, I
21 think reduced Mr. Brandt's testimony by a factor of
22 four or five. So instead of having 6 or 700 pages of
23 transcript, which we couldn't have done in that short
24 period of time, we ended up with something like 130
25 pages.

1 Now, having prepared that draft matrix, we
2 went through, Mr. Brandt and I, the travelers and the
3 examination based on that draft matrix. While the
4 court reporter was preparing the draft we -- I double
5 checked the matrix. There were some additions; there
6 were some corrections to the matrix that that caused
7 the testimony to be in error in certain respects. And
8 we made some changes.

9 Also in doing Mr. Brandt's testimony, we did
10 it, as we said, hurriedly. We thought the best was
11 the fastest way. And the most expeditious way to do
12 it was to do it the matrix way and to do it straight
13 through, not Mr. Brandt taking 20 minutes to review a
14 traveler but to look at it. And there were some
15 mistakes in his testimony, which were corrected in the
16 final draft. Now, that's what we did. I don't think
17 we misled the Board. We tried to do exactly what we
18 committed to do.

19 But on the question of privilege -- and all
20 this led me to say that Mr. Brandt swore to his final
21 testimony. We could have at the hearing, and we could
22 have started on the 3rd and done a traveler by
23 traveler and had a 600 page transcript. And we could
24 have gone straight through and done it that way. We
25 could have done it live that way. I don't think

1 that's the most useful way for the parties or the
2 Board to proceed.

3 Now, as to the question of privilege I think
4 it's quite clearly privileged. I'll refer the Board
5 to the decision of the Appeal Board and reported at 16
6 NRC 1144 (1982), the matter of Long Island Lighting
7 Company and particularly to the discussion that is at
8 pages 1159 and 11 -- through 1162 where the Appeal
9 Board, I concede, does not decide the issue but
10 intimates very strongly that in its view draft pre-
11 file testimony is subject to the work product
12 privilege and takes issue with a ruling of the
13 Licensing Board contrary without actually deciding the
14 issue.

15 So I believe that a fair reading of the
16 Appeal Board's decision that I've cited to the Board
17 compels the conclusion of that under the jurisprudence
18 of the NRC. Draft pre-file testimony is privileged on
19 the work product doctrine.

20 CHAIRMAN BLOCH: Well, you have a
21 prerequisite to that, and that is that we have to
22 consider what you were doing was pre-file testimony.
23 And as I understand the procedure we set up, that was
24 not what my understanding was.

25 Mr. Roisman said, "What I want to do --"

1 this is on line 14 at 18758, " though is to have the
2 Board order them to do it one after the other without
3 any break. They should not have a week or ten days or
4 some indefinite period of time. That they should be
5 doing it as quickly as they possibly can without any
6 breaks since that's the rule under which we produced
7 the filing that we did last Thursday."

8 And I said, if they're not able to produce
9 it before the end of the hearing process that it be
10 produced as soon as it's done and that it be done
11 expeditiously. Now, what I was thinking of was the
12 same as you're testifying before us, that you were
13 going to sit down and testify.

14 MR. DOWNEY: Well, Your Honor, we had a -- I
15 guess I was operating on a clear impression that what
16 we were doing was preparing pre-file testimony. As to
17 the time, I think it's useful to note that there were
18 various allegations that we had all this time to
19 prepare the testimony. As a matter of fact, Mr.
20 Brandt was not -- he was out of the country for the
21 period beginning Saturday after this hearing closed
22 until the next Sunday. There was no further
23 consultation with Mr. Brandt after we -- I left Glen
24 Rose on that Friday afternoon, which I think was the
25 4th or 5th, whatever day it is. I'm not sure of the

1 exact date.

2 CHAIRMAN BLOCH: Well, would it surprise you
3 to know that the Board had the impression that you
4 would have been done by that Friday, and that if you
5 weren't going to be done by that Friday you might have
6 told us that?

7 MR. DOWNEY: Your Honor, I believe in at
8 least two phone conversations, one of which was
9 transcribed, we have informed the Board of the
10 progress on that -- preparing the testimony. And as I
11 recall, in the last conversation on that subject I
12 confessed that one of the reasons -- I made an error.
13 One of the reasons that held this up from the previous
14 Friday was that I had a correction that the court
15 reporter needed that I neglected or failed to give
16 her. And I apologize for that.

17 CHAIRMAN BLOCH: No, the problem is that you
18 were supposed to do it continuously?

19 MR. DOWNEY: Well, you did do it
20 continuously, Your Honor, in the sense that we
21 finished on that Friday. Now, had we gone traveler by
22 traveler we would not have finished by that Friday.
23 What we did was adopted an approach which I think I
24 explained to the Board we were trying to come up with
25 on page 18759, not surreptitiously off in a corner

1 somewhere but quite out in the open. We're trying to
2 find a way to deal with this very large number of what
3 we think are unsubstantiated allegations in a way that
4 was cogent, concise, and would be useful to the Board.

5 CHAIRMAN BLOCH: Can you hold it one second,
6 please, Mr. Downey.

7 Off the record.

8 (Discussion off the record.)

9 CHAIRMAN BLOCH: In light of the Board's
10 interruptions, Mr. Downey, we've gone overtime. But
11 you may have a minute to wrap up.

12 MR. DOWNEY: Yes, I have one additional
13 point to make, Your Honor, and that is that the draft
14 transcript, the draft pre-file testimony contains
15 certain matters that are subject to the
16 attorney/client privilege. It's not -- it's colloquy
17 between myself and Mr. Brandt where I would instruct
18 the court reporter to dictate a notation in the
19 transcript to check the traveler numbers, to check
20 other kinds of things to make sure that the pre-file
21 testimony we'd be offering was complete, accurate, and
22 was responsive to all the various allegations that
23 were made, these kinds of --

24 CHAIRMAN BLOCH: Just dictation relating to
25 information that would have to be checked.

1 MR. DOWNEY: Information that would have to
2 be checked and travelers that would have to be checked
3 as we went through this in order to get it out as fast
4 as we possibly could. Rather than take the time there
5 we moved forward, going through the matrix, addressing
6 each of the issues.

7 And where there was a question where it
8 appeared that there was some ambiguity in the matrix
9 where you had missed something or where I may have
10 misstated an allegation or my understanding of the
11 allegation was different from Mr. Brandt's, we would
12 dictate something like review this, that, or the other
13 thing and check this, that, or the other thing. And
14 these kinds of communications between counsel and
15 client I think are fully protected by the
16 attorney/client privilege.

17 I don't think there's any justification for
18 producing transcripts -- a draft pre-file testimony
19 which is what we were talking about in light of both
20 the attorney work product privilege and the
21 attorney/client privilege. And that's really the
22 issue here.

23 CHAIRMAN BLOCH: Thank you.

24 Mr. Treby?

25 MR. TREBY: Yes. It seems to the staff that

1 we've been discussing two matters here. The first
2 matter is one of timeliness.

3 And with regard to the question of
4 timeliness, my reading of the transcript pages that
5 have been cited by the Board here as relevant to this
6 matter indicated that Mr. Roisman raised to confer
7 that he on behalf of the intervenors was being
8 required to file his pleading. I believe it was on
9 the Thursday after the hearing concluded. So that was
10 about six calendar days, and he had to do it on a very
11 tight schedule. And that he wanted the applicants
12 also to be filing on a tight schedule. And that is
13 reflected on lines 17 through 20 on transcript page
14 18514.

15 CHAIRMAN BLOCH: Incidentally, Mr. Treby,
16 before you continue I've just read back to 18757,
17 lines 10 through 13 in which Mr. Downey described what
18 was being done as direct testimony. He said in an
19 hour and a half of direct testimony before a court
20 reporter I was able to cover seven of those with Mr.
21 Brandt before I interrupted my efforts to try and pin
22 down this.

23 Was it your understanding when we had this
24 discussion that we were talking about direct testimony
25 or stuff that would be worked over and then pre-filed?

1 MR. TREBY: It was -- well, I guess my
2 understanding at the time was that the applicants were
3 sitting down with a court reporter and that they were
4 essentially asking questions and having Mr. Brandt
5 answer the questions and, therefore, preparing their
6 response as promptly as they could. However, I was
7 not under the assumption that it was necessarily under
8 oath.

9 It is traditional that pre-file testimony in
10 NRC proceedings is not filed in the form of an
11 affidavit, and that it is sworn to at the time it is
12 presented. In this case because of pressure of time
13 we've had a number of pieces of pre-file testimony
14 that has been filed in the form of questions and
15 answers before a court reporter. And I haven't looked
16 over all of the pre-file testimony to see if in each
17 and every case it is always sworn. I guess that's the
18 standard practice of the court reporters to swear in
19 the witness.

20 But it was my understanding, in answer to
21 your question, that when the applicants were preparing
22 their testimony they were sitting in a room before a
23 court reporter. And a question was being asked by the
24 attorney, and the response was being given by Mr.
25 Brandt. As to whether or not it was being sworn

1 testimony, I guess I didn't think about that very much
2 at the time.

3 CHAIRMAN BLOCH: Did you think about whether
4 it was going to be re-worked?

5 MR. TREBY: I -- at the time of the hearing
6 I guess my expectation was that the -- that as soon as
7 the court reporter had transcribed it it was going to
8 be presented to us. However, once it appeared that we
9 were going to be leaving and going back to Washington,
10 obviously it wasn't going to be presented to us at
11 that moment because it then would have to be mailed.
12 So I guess I did not expect while I was at the hearing
13 that it was going to be re-worked.

14 I do recall, though, having a subsequent
15 conversation with Mr. Downey in which he indicated
16 that they were going to check the transcript for
17 accuracies to the extent that -- and I took that to
18 mean that they were going to check it to make sure
19 that the traveler number was the right number and that
20 there hadn't been any typographical errors by the
21 court reporter's transcribing a number or something to
22 that effect.

23 I did not expect that they would use that as
24 a first draft and then come up with a final version.
25 I expected that any corrections that would be made

1 would be of a typographical type.

2 CHAIRMAN BLOCH: Now, the question is, under
3 the circumstances, should the process of correction be
4 available through discovery?

5 MR. TREBY: I guess -- normally, I wouldn't
6 think that you would need to go by discovery on
7 different drafts of testimony. My expectation here is
8 that any corrections were of those minor types, and
9 I'm not sure that it makes for a lot of difference.

10 CHAIRMAN BLOCH: Well, let me ask Mr. Downey
11 if your assumption is correct. Are all of the
12 corrections of very minor typographical types?

13 MR. DOWNEY: No, Your Honor, there were some
14 written out in longhand testimony that corrected --
15 Mr. Brandt wrote out two or three pages of testimony
16 that corrected two or three pages that were in error.
17 And there were questions that were inserted to make --
18 where we discovered that in reviewing the draft that
19 there were allegations left unanswered. So there were
20 additional handwritten questions and answers that were
21 inserted to address those omissions in the draft
22 matrix.

23 If I may -- if I could go back just one
24 point to make, the transcript of what we did on
25 October 1 was never transcribed. That is where we

1 started, as I said before, making the first allegation
2 in the first traveler and trying to do it in that way.
3 And that's what took an hour and a half to do a very,
4 very minor part of the overall response. What we did,
5 as I'd indicated on this transcript, was change that
6 format to make it more succinct and to try and
7 consolidate the allegations into categories and deal
8 with them in that way.

9 MR. JORDAN: Mr. Downey, this is Walter
10 Jordan. In doing that part it was not done in
11 question and answer form; is that correct?

12 MR. DOWNEY: Well, the organization is a
13 matrix that I prepared by reviewing the various
14 sources of the allegation. And so I had down the left
15 column traveler numbers, and I've listed all the
16 travelers and got them in sequence. And across the
17 vertical axis I listed all of the various allegations
18 from the various sources.

19 And then that created the matrix with boxes,
20 and I went through each of the various places where
21 the intervenor made allegations, checked in the
22 appropriate box where it appeared. That gave us an
23 organizational framework that allowed us to do more
24 efficiently what we started to do on October 1 in a
25 guess a you call it disorganized way, but a way that

1 dealt with allegations individually rather than
2 generically.

3 CHAIRMAN BLOCH: Okay.

4 Mr. Treby, with that clarification would you
5 comment on whether the process other than, I take it,
6 the first seven -- let's say the deposition on the
7 first seven where they actually started doing the
8 response to the Board's request. Do you think the
9 process should be available to discovery?

10 MR. TREBY: It sounds like, from Mr.
11 Downey's description, that what we have are some
12 errata to pre-file testimony. That is having looked
13 at it some corrections were made which is a normal
14 thing that's sometimes done in hearing. I guess the
15 staff would have no objection to seeing that. I don't
16 think, though, that it is necessary for that
17 transcript that was never made on the 1st to be now
18 produced for discovery.

19 CHAIRMAN BLOCH: Okay.

20 Now, Mr. Grossman -- Judge Grossman, excuse
21 me, discovered the citation that the applicants gave
22 us in the LILCO decision.

23 MR. DOWNEY: Yes, Your Honor.

24 CHAIRMAN BLOCH: It's on page 1162. I
25 wanted Mr. Treby's comments right now. The first

1 paragraph sets some requirements for attorney work
2 products.

3 "And the document must be prepared by an
4 attorney or by a person working at the direction of an
5 attorney and prepared in anticipation of litigation.
6 Ordinary work product, which does not include the
7 mental impressions, conclusions, legal theories, or
8 opinions of the attorney may be obtained by an adverse
9 party upon a showing of substantial need of the
10 materials."

11 I'll continue. "In preparation of this case
12 and that he is unable without due hardship to obtain
13 the substantial equivalent to the materials by other
14 means." Is that the standard that you would believe
15 to be acceptable on this discovery request, Mr. Treby?

16 MR. TREBY: From what you've said it seems
17 to me that the kind of attorney work product they're
18 talking about there is something that the attorney
19 himself does. It is work that the attorney does in
20 preparing for a case, whatever notes he may take based
21 on his review of earlier transcript or something like
22 that. I don't think that that's what we're talking
23 about here. It seems to me that what we're talking
24 about here is the -- an earlier draft of the witness'
25 work and whatever corrections or errata the witness is

1 making.

2 MR. DOWNEY: Your Honor, what page did you
3 cite there to Mr. --

4 CHAIRMAN BLOCH: Top of 1162.

5 MR. DOWNEY: I was -- if I cited that, that
6 is another -- I was -- my citation. But I'd also like
7 to direct the Board's attention to I guess the
8 principal citation which I rely on is Consumers'
9 Power, 16 NRC 897 --

10 MR. TREBY: What you're saying, Bruce, 16
11 NRC 897 at 917 where it specifically addresses this
12 question of --

13 CHAIRMAN BLOCH: What's the page cite?

14 MR. DOWNEY: -- the question of
15 discoverability of draft testimony, and particularly
16 footnote 27, the bottom of 7 -- of 917.

17 CHAIRMAN BLOCH: Okay.

18 But is there a ruling on the merit of the
19 objection? This apparently is a lawyer discipline
20 case?

21 MR. DOWNEY: No, it's a question -- the
22 question is -- there were two questions presented, one
23 below or two below and one on appeal. The first
24 question was a proper for the lawyer to do work on
25 language and that sort of thing and draft testimony

1 under the -- I think the unequivocal answer is yes as
2 given by the Appeal Board on these pages.

3 The second question which was not directly
4 addressed was not at issue, but we have but
5 the only indication so far as I know of the NRC of
6 what the Appeal Board thinks of this issue is in
7 footnote 27 where it indicates, I think, citing a
8 Sixth Circuit opinion at the preparation of submission
9 should not be construed narrowly to et
10 cetera that -- and went on to say the documents
11 excluded in the Grand Jury case cited very much like
12 the pre-file testimony of Mr. Temple, in this case
13 where they're preparing factual statements jointly
14 between counsel and the witness.

15 The key question as the Appeal Board notes
16 in its decision is whether or not the final product is
17 true and accurate. And that's certainly what Mr.
18 Brandt undertook to ensure. Now, I think the fair
19 reading of the Consumer Power's case there indicates
20 that draft pre-file testimony is the subject of the
21 attorney work product privilege.

22 CHAIRMAN BLOCH: The privilege that applies,
23 I take it, is the one stated in our rules?

24 MR. DOWNEY: They're both stated in the
25 Hickman -- I think both the opinions sort of cite the

1 United States Supreme Court case of Hickman versus
2 Taylor --

3 CHAIRMAN BLOCH: Well, what does that do 10
4 C.F.R. 2.740(b)(2), which is the NRC rule governing
5 trial preparation materials?

6 MR. DOWNEY: I think that rule reflects the
7 Hickman decision, the common law privilege, one of the
8 privileges recognized in the Federal Rules of --
9 Procedure, Rule 26.

10 CHAIRMAN BLOCH: So if there is a showing
11 that the party seeking discovery has substantial need
12 and is unable without undue hardship to attain a
13 substantial equivalent, then discovery may be ordered?

14 MR. DOWNEY: That is correct.

15 CHAIRMAN BLOCH So so far we have not yet
16 had a statement by Mr. Roisman of the substantial
17 need, is that --

18 MR. DOWNEY: I don't believe so, no. I have
19 not attempted to respond to that.

20 CHAIRMAN BLOCH: Let's take a three minute
21 recess to look at 917.

22 MR. ROISMAN: Mr. Chairman?

23 CHAIRMAN BLOCH: Yes, Mr. Roisman?

24 MR. ROISMAN: On the LILCO decision I didn't
25 get the volume number.

1 MR. DOWNEY: I'm sorry, it's 16 --

2 MR. ROISMAN: No, no. Yours is not LILCO,
3 Mr. Downey, yours is Consumer's Power. The Board
4 cited LILCO Case.

5 CHAIRMAN BLOCH: Its both in the same
6 volume, one is at 1162 and the other is at 917. Both
7 volumn 16. That's book one of two. Now let's take
8 three minutes.

9 (Off the record for a short recess.)

10 CHAIRMAN BLOCH: Mr. Treby, do you need a
11 couple more minutes?

12 Hello, Mr. Treby?

13 MR. TREBY: Yes. I'm having some problem
14 with this concept of attorney work product. The
15 classical example of attorney work product that we
16 generally learn about in law school is where an
17 attorney goes out and interviews certain witnesses,
18 prepares his notes and then the attorneys for the
19 other side is not able to interview those witnesses
20 and seeks to get the first attorney's notes. And
21 under the rules of attorney work product he can't get
22 those notes unless he makes the appropriate showing.

23 That's not what we're dealing with here. As
24 I understand what we're dealing with here we have a
25 witness who prepared his testimony, I guess after this

1 matrix was made up, and after the testimony was
2 completed he's now reviewed it and he's made certain
3 corrections to that testimony and I don't, in my view,
4 that's not attorney work product. That change that
5 the witness is making to his testimony --

6 Now, I have looked at the case on page 916
7 in the Consumer's Power case which apparently deals
8 with seeking draft of some witness' testimony. And
9 apparently the allegation in that case, the Consumer
10 Power case, was that the testimony was not really the
11 testimony of the witness but it was the testimony of
12 the attorney. And that they had massaged it and they
13 were seeking to get the earlier draft of the testimony
14 perhaps to show that.

15 In any case, what I understand the holding of
16 this case to be is that the attorney may assist in the
17 preparation of the testimony. Not to the extent that
18 it becomes the attorney's testimony, it's to be the
19 witness' testimony but they can assist the witness in
20 the preparation of his testimony by making sure he's
21 covering the appropriate areas.

22 In sum, the staff's position is that what we
23 appear to be talking about here are just an earlier
24 draft of Mr. Brandt's testimony and the attorney work
25 product privilege should not apply to that and

1 therefore it should be discoverable.

2 CHAIRMAN BLOCH: Mr. Roisman, you have three
3 minutes. Thank you, Mr. Treby.

4 MR. ROISMAN: Mr. Chairman, let me start by
5 asking the Board to note that in the Brandt testimony
6 as actually filed, it begins with the statement, "C.
7 Thomas Brandt, the witness herein before named, being
8 first duly cautioned and sworn to testify the truth,
9 the whole truth and nothing but the truth, testified
10 on his oath as follows: ". Now I assume that if he
11 was first duly cautioned and sworn to testify, that
12 that occurred on October 1 and October 2 as well.

13 Now, what we have is a sworn statement even
14 not yet transcribed as to part of it but all of it
15 sworn by the witness. That is clearly discoverable.
16 A prior sworn statement is usable to impeach the
17 credibility of the witness as a certainly discoverable
18 material. It's not as though Mr. Downey wrote out a
19 draft of the testimony, sent it to Mr. Brandt; Mr.
20 Brandt wrote back a second draft, Mr. Downey then
21 changed that and wrote back and forth and that's
22 another issue and we'll be briefing that in the O.B.
23 Cannon context. Here what we have is a sworn
24 statement of the witness.

25 Secondly, it seems to me that the question

1 is whether or not what we have had represented to us
2 is somehow or another different than what is now being
3 represented to us. And in that regard I think it's
4 instructive to look at the transcript of the
5 conference call on October 11, 1984, starting around
6 page 19275 and going to 19277.

7 What's important, I think, is that I explain
8 on 19275 and 276 what I understood was going to happen
9 and that the applicant would prepare their statements
10 one after the other and they would then produce that
11 for us. Mr. Downey, in responding to that and in fact
12 I say at 19276, lines 8 to 12, I think the applicant
13 should now produce everything that Mr. Brandt produced
14 in those transcripts and then it shouldn't be
15 massaged. And I remember asking on the record, are
16 you doing this on daily transcripts and I was told
17 yes.

18 Now I'm being told no. And then Mr. Downey
19 responds. He said "We finished the deposition of Mr.
20 Brandt a week ago today. We worked as we were
21 admonished to do by the court except when I was in
22 hearing, and I guess Wednesday and Thursday finished
23 it up. And what we did was try and make an effort to
24 get the transcript back which Mr. Brandt did. And
25 worked, as I understand it, most of the weekend to

1 make sure most of the numbers were there. And then we
2 got back to the court reporter."

3 Now, it is clear that what Mr. Downey is
4 representing to us is that everything that Mr. Brandt
5 said was transcribed and the Mr. Brandt wanted to make
6 sure that the numbers were there. And he was supposed
7 to look at the transcript. Clearly Mr. Downey
8 represented that to us.

9 Now, they can have no prejudice in producing
10 for us a draft of the transcript that shows where
11 there were some numbers missing. As to the question
12 of need, it will be remembered that we have as a
13 finding in this record already, the finding of the
14 Department of Labor. That on a prior occasion, Mr.
15 Brandt, by changing his justification for conduct
16 taken with regard to Mr. Acheson, made himself an
17 incredible witness. The Department of Labor was
18 unwilling to accept his last explanation.

19 We think, therefore, that it is quite
20 pertinent to know whether Mr. Brandt, in the liner
21 plate incident, has fallen back into his old ways.
22 Did he have one explanation for why the liner plate
23 was okay. Then after some thought or messaging, or
24 what have you, he comes up with a different one. And
25 our ability to test the credibility of Mr. Brandt's

1 testimony is severely limited if we don't see
2 everything that Mr. Brandt said.

3 That would be the case if we were dealing
4 with attorney work product. But I believe, as Mr.
5 Treby accurately pointed out, we are not here dealing
6 with attorney work product. We're dealing with a
7 number of versions or perhaps two versions of Mr.
8 Brandt's version of the answer to questions put to him
9 by Mr. Downey while Mr. Brandt was under oath. That
10 is discoverable. And if it's now been transcribed we
11 are entitled to the transcription or at least to the
12 reporters notes in a form that would allow another
13 reporter to transcribe it.

14 CHAIRMAN BLOCH: Thank you, Mr. Roisman.
15 Mr. Downey, four minutes of additional
16 rebuttal?

17 MR. DOWNEY: I don't know what else I can
18 say other than what we have done, try and present to
19 the board a full response, unsworn, unsubstantiated
20 allegation in a kindly way. We organized the
21 material, there are some -- efforts to get this --
22 way.

23 When we got the transcript draft Mr. Brandt
24 and I looked at it. Mr. Brandt did go back and check
25 through additional things. We made some additions

1 because w had not covered every question. There were
2 a couple of mistakes that Mr. Brandt made because I
3 urged him to move forward. The draft transcript is
4 not -- it is the final transcript that is reflected of
5 Mr. Brandt. It is not the draft transcript.

6 Now, if I may, the clear impression that
7 both Mr. Brandt and I had as we sat in the room of the
8 motel on that Wednesday, Thursday and Friday working
9 on this essay was that it was his final sworn -- the
10 final submission which was sworn, not the dictated
11 draft.

12 Now there is no -- it is not that he wasn't
13 untruthful. It is that there were errors in that and
14 I don't think that it is appropriate to produce those
15 a draft which is, in fact, a substantial part of the
16 result of my working with Mr. Brandt. It is work
17 product. It subject to the privilege. It is not
18 discoverable.

19 In addition to the numbers of colloquies
20 back and forth, check this, we need to look at that to
21 see if they make this allegation with such a such a
22 traveler, those kinds of things that reflect the
23 interplay between client and attorney that are simply
24 not discoverable.

25 I haven't heard anything from Mr. Roisman

1 that changes that fact nor indicates that he can
2 explore, on cross-examination with Mr. Brandt, fully,
3 his views on the liner plates an opportunity which I
4 would point out that we have never had since the
5 intervenor has never put on any evidence with respect
6 to the liner plates.

7 MR. ROISMAN: That is not true.

8 MR. DOWNEY: Not with respect to this aspect
9 of the liner plates.

10 MR. ROISMAN: That is not true. We put all
11 the liner plates in evidence, the traveler.

12 CHAIRMAN BLOCH: At any rate, would you
13 conclude Mr. Downey.

14 MR. DOWNEY: I have concluded, Your Honor.

15 CHAIRMAN BLOCH: Thank you. We will take a
16 decision --

17 MR. ROISMAN: Mr. Chairman?

18 CHAIRMAN BLOCH: Yes.

19 MR. ROISMAN: I just want to ask a point of
20 clarification.

21 CHAIRMAN BLOCH: Yes, sir.

22 MR. ROISMAN: I am sorry that I spoke
23 directly to Mr. Downey.

24 I am going to ask you if you would ask him,
25 how many pages is contained in the draft that we are

1 requesting, putting aside for a moment that hour and a
2 half of testimony that wasn't transcribed.

3 CHAIRMAN BLOCH: I am not going to ask that
4 because the time has expired and I don't consider that
5 relevant.

6 There will be a decisional recess. Judge
7 Jordan?

8 MR. JORDAN: Do you have a quorum?

9 CHAIRMAN BLOCH: Yes, if we have problem we
10 will be back on and tell you that we would like you to
11 join us.

12 MR. JORDAN: Fine.

13 CHAIRMAN BLOCH: Thank you.

14 (Whereupon, a decisional recess was taken.)

15 CHAIRMAN BLOCH: The Board is prepared to
16 proceed with a decision.

17 At the time that arrangements were made for
18 the testimony of Mr. Brandt to be taken, applicants
19 state that they were prepared for Mr. Brandt to go
20 forward on the witness stand. That was the
21 understanding of the Board. In that context we
22 understood that the testimony to be given was purely
23 the witness' testimony without substantial attorney
24 input in the course of the delivery of that testimony.

25 We also understood that Mr. Downey had given

1 his assent to this basic procedure throughout on the
2 transcript except possibly for arrangements he would
3 make before questions were asked to see that things
4 would be done in a more concise fashion. We analogize
5 this to the type of testimony that the Board arranged
6 to be taken at Glen Rose where testimony was taken
7 before reporters in sworn form. And we do not
8 consider this to be the normal kind of pre-trial
9 testimony which is prepared in some instances for NRC
10 proceedings.

11 If Mr. Brandt had made mistakes in the
12 course of delivering his testimony on the stand, as
13 any witness could, then the proper way to deal with
14 that is through redirect which could have been done at
15 the end of the transcript, possibly with the
16 permission of the Board after some delay in the midst
17 of the transcript.

18 We agree with Mr. Treby for the staff that
19 we have a witness who prepared his testimony after
20 attorney's matrix was completely made up. After the
21 testimony was completed the witness reviewed the
22 testimony and made certain corrections. It is not
23 attorney work product, it is changes he is making in
24 his testimony.

25 What we are talking about is an earlier

1 draft of the Brandt testimony. The attorney work
2 product privilege does not apply and it should be
3 discoverable.

4 Now even if we were not to feel that there
5 were special arrangements under which this testimony
6 were discoverable we would nevertheless feel that Mr.
7 Brandt made statements and that as a party opponent
8 his statements are discoverable.

9 We may even find, as Mr. Roisman has
10 suggested, that in each instance his statements were
11 made under oath in which case they are probative
12 evidence, probative value would be even greater.

13 Considering the entire procedural context,
14 it is clear to us that these matters are discoverable.
15 And we believe that the discovery right goes even to
16 the statements that were made and transcribed on
17 October 1st, with respect to seven supports. We
18 therefore direct that by this Friday, October 26th,
19 applicants shall deliver to the Board and parties the
20 transcript of the October 1st testimony and of all of
21 the other Brandt testimony.

22 They need not include handwritten notes but
23 that they should include the testimony in the form
24 given to the reporter. They may provide this either
25 by requesting fresh copies from the reporting service

1 or by making appropriate alterations to delete
2 handwritten notes from their own drafts.

3 The next matter on our agenda --

4 MR. DOWNEY: Your Honor, I want a point of
5 clarification.

6 CHAIRMAN BLOCH: Yes, sir.

7 MR. DOWNEY: What about those matters where
8 in the course of the testimony where I dictated notes
9 to myself concerning what should be checked, that sort
10 of thing?

11 CHAIRMAN BLOCH: Providing, Mr. Downey, that
12 they are purely notes with respect to what is to be
13 checked and that they reflect only your comments and
14 not statements made to you by Mr. Brandt, then your
15 comments on what needs to be checked may be deleted.
16 To the extent that it goes anywhere beyond it being
17 your own notes to yourself that things should be
18 checked and it reflects in any way the comments of Mr.
19 Brandt about his testimony, then those things should
20 not be deleted.

21 MR. DOWNEY: All right.

22 CHAIRMAN BLOCH: The next matter on our
23 agenda is staff's motion to postpone.

24 MR. DOWNEY: Your Honor, let me add that
25 I'll have to check with the court reporting service to

1 see the status of the October 1 matter that has never
2 been transcribed.

3 CHAIRMAN BLOCH: Okay.

4 Now I would state, incidentally, that if
5 there is a time problem, the Board has been generous
6 when approached before the deadline expires, and we
7 expect parties to come to us when there are time
8 problems and they we expect to find us reasonable on
9 those things.

10 So if there is a time problem with respect
11 to Friday or, in fact, if there is an impossibility
12 problem, which is a possible contingency here, we
13 would expect to be approached and we would understand
14 that.

15 MR. DOWNEY: Very well, Your Honor.

16 CHAIRMAN BLOCH: The second matter is
17 staff's motion to postpone.

18 Mr. Treby, I suspect that you only need
19 about four minutes on that?

20 MR. TREBY: Well, I am not sure that I need
21 that much, sir. I believe that everything the staff
22 intends to say or is necessary to say on the subject
23 is in our pleading.

24 CHAIRMAN BLOCH: Okay.

25 I would like to ask you a couple of

1 questions then.

2 One is the statement on why we should delay
3 the O.B. Cannon testimony seems one-directional? It
4 would seem to me that the reason the O.B. Cannon
5 testimony might be important in this proceeding is
6 because it might reflect on management of the QA
7 program. The importance of the management of the QA
8 program is not that it reflects on the O.B. Cannon
9 testimony.

10 How do you feel about that?

11 MR. TREBY: Well, the subject that is before
12 the Board is the QA/QC program of the applicant. And
13 one of the subissues of that is what is management's
14 commitment to quality assurance and what efforts has
15 it been taking to insure a program that is in
16 conformance with -- appendix D. To the extent that
17 the O.B. Cannon relationship with the applicant
18 reflects on management's commitment to quality, then
19 it is an appropriate issue in this proceeding and that
20 is one of the things that is being looked at by the
21 technical review team, that is, management's
22 commitment to quality.

23 CHAIRMAN BLOCH: Okay.

24 But if I have read correctly in your filing
25 you said that you were not going to examine the

1 implication of the O.B. Cannon incident for
2 management's commitment to quality. So that if we
3 don't do it first you will never get to it.

4 MR. TREBY: I am not sure --

5 CHAIRMAN BLOCH: Page three of your filing.

6 MR. TREBY: What? Where it states that it
7 is true the staff is not specifically investigating
8 the question of why Mr. Lipinsky changed his mind?

9 CHAIRMAN BLOCH: Yes.

10 You then say you think that maybe management
11 of applicant's QA program may have relevance to the
12 reason underlying Mr. Lipinsky's change of position
13 but we are not worried about that. We are worried
14 about the implications of the contract work to O.B.
15 Cannon and whether or not the applicant listened to it
16 and whether they placed pressure on Mr. Lipinsky for
17 the management of the QA program. It is the other
18 direction we are worried about and if you don't look
19 at the O.B. Cannon incident -- you need us to look at
20 it first, don't you?

21 MR. TREBY: No.

22 CHAIRMAN BLOCH: No, why?

23 MR. TREBY: Because --

24 MR. DOWNEY: I am sorry, I can't hear that.

25 CHAIRMAN BLOCH: I don't think you are

1 intended to, Mr. Downey.

2 MR. TREBY: I am sorry. I apologize for the
3 whispering. We were getting some suggestions from co-
4 counsel.

5 The question is that it is management's
6 commitment to the QA program is appropriate. If we
7 find that there has been improper attention to given
8 to -- appendix B then the fact that Mr. Lipinsky is
9 changing his mind is not relevant. The important
10 question is the applicant's commitment to their
11 quality assurance program.

12 To the extent that the Board is trying to
13 look into the question of what impact the so-called
14 management may have had on Mr. Lipinsky changing his
15 mind, I guess I would have to agree that that may be
16 an appropriate matter.

17 CHAIRMAN BLOCH: Okay.

18 We were also concerned that there was
19 a \$100,000 contract and that it appears that all of
20 the work was not done on the contract and that the
21 reason was that some of the findings were communicated
22 to the company and they weren't interested anymore.
23 And the question is whether they adequately reacted to
24 the quality information that they obtained in a
25 partial form from Mr. Lipinsky and O.B. Cannon.

1 Now on the other matter, which is the liner
2 plates, I am not sure I understand why taking the
3 applicant's sworn statements about the liner plates
4 would interfere with the staff reaching expert
5 conclusions on whether their handling of the liner
6 plates was appropriate under the regulations. It
7 would seem to me that it would facilitate the staff's
8 work rather than interfere with it.

9 MR. TREBY: I guess the point is that the
10 staff is looking at the traveler question and the
11 liner plates. It is a matter that the technical
12 review team has been aware of and has been working on
13 while they have been at the site.

14 The concern we have is that if we continue
15 holding hearings, getting some testimony without the
16 staff having concluded its review, having a position
17 and providing some input into this hearing process
18 other than whatever input is being provided by staff
19 counsel being present at these hearings and asking
20 questions, that this may not be the best use of the
21 resources of both the staff, the Board and the other
22 parties in the sense that when the staff finally
23 concludes its review, finds a position and comes in
24 and presents that to the Board, that has a possibility
25 of causing or resulting in the record needing to be

1 reopened and remitigating this matter that everyone
2 has extended resources earlier and that it seems more
3 efficient to await the conclusion of the staff's
4 efforts, the determination of the staff's position and
5 providing that to the Board and parties before we go
6 into the hearing and then have a hearing rather than
7 just continuing as we have done in some areas in the
8 past where we have gotten the views of the other
9 parties but not the views of the staff.

10 CHAIRMAN BLOCH: Okay.

11 With respect to these questions -- are you
12 finished, Mr. Treby?

13 MR. TREBY: I am.

14 CHAIRMAN BLOCH: Mr. Roisman?

15 MR. ROISMAN: Mr. Chairman, if I understand
16 the staff's position, it is that staff's counsel
17 believes that as to the matters that the staff is
18 itself conducting an investigation into that first,
19 staff counsel, itself, is somewhat limited in his
20 ability to conduct appropriate cross-examination of a
21 witness because staff counsel doesn't have the benefit
22 of his technical staff's input into those questions
23 and that thus his participation at this phase in the
24 hearing is somewhat truncated by not having access to
25 that technical expertise because the technical people

1 are still looking at it.

2 Number two, as I understand it and from what
3 I understand from the T.R.T team goal and mission as
4 well, the T.R.T. team is not limiting its
5 investigation of any of these incidents to just what
6 Case alleges. They are, as properly so, looking at
7 the totality of the question, so let's take the liner
8 plates as an example, they are trying to find out
9 whether the entire liner plate problem is a problem or
10 is a nonproblem.

11 Now maybe we missed the ball, maybe Mr.
12 Brandt missed the ball and the staff experts find that
13 oh, we've got the ball here. And if they -- if I
14 understand Mr. Treby's position, if we wait until the
15 staff completes that work then we will have every
16 parties' position on the liner plates and if there are
17 more allegations that come out of the staff
18 investigation then Mr. Brandt's testimony will occur
19 only once at which time he will be responding not only
20 to ours but in supplementally pre-filed testimony to
21 the staff and we will have one round. Otherwise, we
22 will have potentially two rounds and that may
23 necessitate overlapping because the staff may put a
24 slightly different twist on an earlier issue and there
25 will be a lot of arguments about, you know, well, you

1 could have argued that before or not.

2 I think both of those points insofar as the
3 staff is making those points are legitimate. They, in
4 some instances, would not be compelling. The
5 commission has laid down rules about moving
6 expeditiously to resolve licensing issues and alike.
7 But those conditions which at one point appeared to
8 prevail in this case at this point do not appear to
9 prevail. That is, were the licensing hearings was in
10 some way or another going to be the critical path
11 item. It would appear at this point that the critical
12 path item in our case is going to be the T.R.T.
13 report, its conclusions and then some hearings on
14 that.

15 If we were looking at months of hearings
16 that we were postponing until after the T.R.T. report
17 came down we would also be looking at a different
18 situation.

19 CHAIRMAN BLOCH: Okay.

20 Mr. Roisman, in this specific case, though,
21 where applicants are offering their testimony about
22 what is true about the liner plate documents, I guess
23 I don't see why I would expect that cross-examination
24 by staff counsel would be very useful in the final
25 conclusions that would be reached. That is they will

1 have the basic documents to examine themselves and if
2 their testimony is in agreement with Mr. Brandt or in
3 conflict, we will have direct testimony about the
4 principal evidence.

5 Do you think that it is really a strong
6 argument with respect to the liner plate testimony?

7 MR. ROISMAN: I do for this reason and I
8 might add, by the way, I don't think it is for the
9 O.B. Cannon testimony. I think it is for the liner
10 plate incident because what Mr. Brandt is purporting
11 to do is to respond to the allegations of Case.

12 Those may not represent either the --
13 allegations or even the best articulation of those
14 allegations. If I were in staff counsel's position
15 and I was conducting cross-examination of Mr. Brandt
16 and Mr. Brandt makes a statement as he does in the
17 course of his testimony that a particular "problem"
18 like the writing of the word, "sat" on the lines
19 without a signature next to it doesn't matter.

20 For all I know the staff may have
21 information that by doing that is a violation of some
22 procedure or that is raises other kinds of problems in
23 which we would not be familiar.

24 Mr. Treby might not be aware of that unless
25 and until his people have completed their review of

1 the documents. Maybe there is something about writing
2 "sat" on there which on its face looks innocent but
3 when you have a bigger look is not so innocent.

4 So Mr. Treby holds his tongue because he
5 knows nothing about that and then later his T.R.T.
6 team reports back to him and he says, now I want to
7 ask Brandt about that statement. We have got to call
8 Brandt back in.

9 Mr. Brandt himself, if the staff comes up
10 with new allegations unrelated to ones that we made
11 will want to come back or some applicant witness and
12 explain their position, state oh, this is how we feel.
13 We may want to come back if they have a witness that
14 -- if the staff has a witness to put on on the liner
15 plates with something of our own with regard to it.

16 Up until now we haven't felt that that was
17 necessary but the staff may come up with something
18 that would make us want to do that. And so it does
19 remain an open issue and the T.R.T. is addressing it
20 and we have consistently argued that the T.R.T's work
21 on the issues that it is looking at is relevant.
22 Conversely, although I share the Board's apparent
23 difficulty with understanding why the staff feels this
24 way, apparently the staff is not going to look at the
25 issue as the board frame with regard to Mr. Lipinsky

1 any more than it has already been looked at by the
2 staff and thus there would not appear to be any good
3 justification to postpone the further testimony of
4 O.B. Cannon's witnesses since you cannot link it to
5 something that is coming from the staff later.

6 It is true that the staff is going to talk
7 about the generic issue of whether or not you do or do
8 not have intimidation in the plant site and the like
9 but I do not assume that it is the staff's position
10 that if they came and said that we have concluded that
11 there isn't any, then anybody who testified that said
12 there was isn't really relevant testimony because the
13 staff has put the cap on the problem. That theory
14 would have said you would have had no hearings until
15 they completed their work and argued about the
16 adequacy of their work.

17 So I think that O.B. Cannon is a separate
18 item. It represents an inquiry that the Board has
19 lodged and I think it should be completed and frankly,
20 I think if it is completed it may give the staff
21 T.R.T. people reason to want to look further at that
22 issue, a reason which they don't apparently now have.

23 CHAIRMAN BLOCH: Mr. Downey? Thank you, Mr.
24 Roisman.

25 MR. DOWNEY: Yes, Your Honor.

1 I think as a preliminary matter I would like
2 to note that I think that the problem that the staff
3 is raising is a direct result of the
4 harassment/intimidation hearing expanding to something
5 far beyond that.

6 They, as I understand their papers and their
7 argument presented by Mr. Treby, they say the Cannon
8 matter and the liner plate matter, for example, are
9 things that require delay.

10 This hearing as structured was limited to
11 the question of whether the intimidation of -- there
12 was a pervasive finding of the QC inspectors. Neither
13 of these issues addressed that question.

14 I realize the Board, over our objection, has
15 launched into these two particular areas. We see no
16 reason to delay adjudication of those questions until
17 some indeterminate time when the T.R.T. team finishes
18 its work.

19 We have been litigating the issue of
20 intimidation now for over several months. There is
21 simply a -- notification for the kind of delay being
22 sought by the staff.

23 We have all proceeded to develop a record on
24 this issue and I see no reason to deviate from that
25 course. If the T.R.T team results indicate something

1 that should be addressed in the hearings then by a
2 motion the staff could bring that to the Board's
3 attention and it could rule one way or another at the
4 appropriate time.

5 CHAIRMAN BLOCH: Is your position the same
6 even if we were to rule that we were to go ahead with
7 the hearing but would wait for the T.R.T. team to
8 conclude its work before we close the record?

9 MR. DOWNEY: No, we would oppose that, Your
10 Honor.

11 We think that there is an adequate basis for
12 the Board to make its decision. The parties in this
13 case have subpoena power available to them, Case has
14 subpoena power available to it, they could have called
15 any witnesses they put on their case of liner plate
16 which consisted of -- very limited testimony.

17 They listed Mr. Lipinsky as a witness of
18 theirs. For whatever reason known only to them,
19 deciding not to call. Those issues could have been
20 litigated. They were identified by the intervenor and
21 they chose nothing. The Board has, I think, to
22 content itself with the evidence that the parties seek
23 to adduce on the issues.

24 Experienced trial counsel like Mr. Roisman
25 make judgments everytime they go to trial about what

1 it is they will and will not put on. And in this case
2 that decision was not to put it on and there is no
3 reason to wait until the T.R.T. team addresses those
4 issues that could have been raised here.

5 I don't see any reason to hold the record
6 open. To the contrary, we have now been at this for
7 several thousands and thousands of pages of
8 transcripts, issues have been expanded and looked at
9 from every possible aspect. I don't see any reason to
10 hold the record open. I think we ought to move
11 forward. I am not -- to a Monday hearing date. But I
12 think any kind of delay to January is simply not
13 appropriate. I don't the staff has made its case for
14 that.

15 As I recall, the early orders of the Board
16 contemplated this entire issue to be submitted in
17 September but for various reasons it has not been. But
18 we think the Board ought to be forward with an
19 expeditious schedule.

20 CHAIRMAN BLOCH: Well, Mr. Downey, at least
21 with respect to the Idaho study --

22 MR. DOWNEY: Yes?

23 CHAIRMAN BLOCH: -- the staff isn't ready to
24 go forward with that and we have all agreed, I think,
25 that that is an essential element of the case.

1 MR. DOWNEY: That is right but I think the
2 staff should be made to go forward with that. They
3 have submitted the testimony of these people, they
4 have looked at the records. As I understand it they
5 have been receiving copies of the transcript. There
6 is no reason why we can't take their testimony.

7 If there is some issue that comes up with
8 the liner plate or O.B. Cannon or something unknown or
9 un-noble to us at this time, if that meets the
10 requirements for reopening the record, requirements
11 that have been very clearly established in the
12 agency's case law, then that is something the staff
13 could bring out. Or the intervenor or us.

14 But the fact is we ought to go forward. I
15 see nothing in their papers or their argument that
16 suggests that we ought to deviate from the schedule
17 that we originally set and I see nothing in their
18 papers that suggest -- or in the argument that would
19 justify holding open the record for evidence or some
20 report that may or may not be even relevant.

21 The parties have full resources available to
22 them now to litigate the issues. If some newly
23 discovered facts become available at some unknown time
24 then there are standards established by the agency for
25 reopening the record to address them and we ought to

1 conform ourselves to those rules.

2 CHAIRMAN BLOCH: Mr. Treby, do you have any
3 brief rebuttal on this last point that the staff's
4 testimony is not necessary?

5 MR. TREBY: Yes. The staff believes that
6 its testimony is necessary. The staff is an effective
7 participant to this proceeding. It is going out and
8 gathering a substantial amount of information with
9 regard to the construction activities and the design
10 activities. I think management -- it has devoted many
11 man-hours for gathering that information. And we
12 think that in order for the Board to make a fully
13 informed decision it needs the testimony and
14 assistance that the staff can provide to it.

15 And I also further add that with regard to
16 the O.B. Cannon information and why Mr. Lipinsky may
17 have changed his mind, well, it is true that the staff
18 is not further investigating O.B. Cannon nor further
19 investigating Mr. Lipinsky in the sense that we do not
20 have the office of investigation going and talking to
21 those people, the T.R.T in the course of looking at the
22 liner -- the coding question has been aware of Mr.
23 Lipinsky's memo. It has been looking into the various
24 matters that are raised in that memo to see whether
25 they had any substance or not. And to the extent that

1 they develop information along that area we believe
2 that is very relevant and it may well be relevant as
3 to why Mr. Lipinsky changes his mind.

4 We heard some indications from the testimony
5 of Mr. Norris that Mr. Lipinsky became aware of
6 additional information and that may have been one of
7 the reasons that caused him to change his mind later
8 on to the extent that the staff is looking at the
9 subjects that are raised in his memorandum to
10 determine the validity of his initial impression
11 comments of whether there is any other information
12 relevant to them, that of course is relevant to the
13 question that the Board is looking at.

14 I guess in sum what I'm saying is that while
15 I cannot represent to the board that the staff is
16 looking into why Mr. Lipinsky changed his mind in the
17 sense that I can tell you that there is an OI
18 investigation into that matter, I can tell you that
19 the T.R.T team, as part of its looking into the coding
20 area, is looking into some of Mr. Lipinsky's returns
21 and that their findings may well be relevant to some
22 of their testimony that we hear from O.B. Cannon.

23 CHAIRMAN BLOCH: Dr. Jordan, you were going
24 to make a comment?

25 MR. JORDAN: I had, as Mr. Treby was

1 speaking it occurs to me that of course we have, in
2 the other side of the case, we have for summary
3 disposition part of the Lipinsky trip report. And
4 I presume that the staff will be making a filing with
5 respect to that motion for summary disposition. On
6 the other hand, in fact, I guess I don't see the staff
7 doing anything that would be helping us in the case of
8 the questions that we have for Mr. Lipinsky as to why
9 he changed his mind, what were the pressures and so
10 on. Since I don't see any evidence of the staff or
11 the T.R.T's working on that, I'm not at all convinced
12 that it would -- the -- would save the time and say,
13 go ahead and get that part done now.

14 Now as far as the liners are concerned that
15 is a different situation and I think we could -- we
16 would have a problem if we went ahead without the
17 staff's testimony on that, particularly if we tried to
18 make a decision, a partial decision on that. We would
19 be endanger being told to go back because there was
20 evidence we didn't look into out of the -- case. So
21 those are the only two observations I have at the
22 moment.

23 CHAIRMAN BLOCH: The Board is prepared to
24 rule. Dr. Jordan, if you should disagree with any part
25 of my ruling you can either state it on the record or

1 we can arrange for a recess to discuss it.

2 MR. ROISMAN: Mr. Chairman, this is Mr.
3 Roisman.

4 CHAIRMAN BLOCH: Yes, sir.

5 MR. ROISMAN: Mr. Downey raised what I think
6 is at the relevant point here which was T.R.T report
7 is crucial or not crucial before this phase of the
8 hearing can be decided. We didn't speak to it. We
9 think if Mr. Downey has a position on that that the
10 Board should not rule on that point of Mr. Downey's
11 which I don't think is crucial in deciding the staff's
12 question. In the context of this we would like an
13 opportunity to brief that question and would suggest
14 if Mr. Downey feels strongly about it then he ought to
15 file a piece of paper or something.

16 My understanding is, in fact, that the Board
17 has already ruled that the record will remain open
18 until the T.R.T document is received. And that the
19 T.R.T document does not represent something about
20 which the parties are forced to go through the
21 somewhat draconian procedures implicable to reopening
22 but rather is further evidence to be received and that
23 that procedure doesn't imply.

24 I just want to make sure that the Board
25 isn't about to rule on that issue in the context of

1 answering the staff's request for the postponement. I
2 don't want to debate the issue now. If the Board
3 thinks it has to decide that issue to answer the
4 staff's motion then I would ask for need to brief the
5 issue and I would propose that the applicant brief it
6 first.

7 CHAIRMAN BLOCH: The Board is prepared to
8 rule. I would like to state that the first few
9 remarks that we make are by way of explanation of our
10 ruling and that if a party wishes to raise the issue
11 Mr. Downey has raised informally here that it may do
12 so subsequently.

13 It is our view that, in general, the staff
14 testimony on important subjects is necessary to an
15 adequate record in this proceedings.

16 The staff is gathering substantial
17 information and has substantial expertise with which
18 to interpret that information. It has devoted many
19 hours to gathering the information and we expect that
20 its findings will be essential to the Board's
21 understanding of the complex issues before us.
22 Furthermore, we are counting on thorough staff work so
23 that our job of deciding this case will be made,
24 thereby, simpler.

25 With respect to the questions affected by

1 Mr. Treby's motion, we understand that there are three
2 matter on which the staff may report to us. First,
3 they will report to us in the form of testimony from
4 the Idaho Testing Laboratories. And that testimony is
5 not yet ready to be presented to the Board. We expect
6 to be told when it is ready.

7 Second, we understand that there is a great
8 deal of staff effort being put into the liner plate
9 question and we will be looking forward to hearing
10 from the staff about that question.

11 And similarly we understand that there may
12 be some aspects of what the Board considers to be the
13 Lipinsky memo issue that may be illuminated by the
14 staff's reports on painting.

15 However, the matter immediately before us is
16 not the question of the value of staff work, the issue
17 here is the extent to which it will contribute to an
18 efficient proceeding to go forward with testimony
19 about the liner plates and about O.B. Cannon matters.
20 And without ruling on exactly what the timing of that
21 should be because that matter is still before us, we
22 think that there is no reason at this time to grant an
23 indefinite postponement.

24 The Lipinsky memo matters being heard in
25 this case should contribute in a positive way to the

1 staff's resolution of quality assurance management
2 issues. And we believe that the liner plate testimony
3 which consists of applicants position on the
4 acceptability of their documentation practices on the
5 liner plates also should be helpful to the staff's
6 continuing study of the liner plates.

7 And we don't think that this is a situation
8 where the staff is losing an important opportunity of
9 cross-examination because it hasn't finished its work
10 first. And although there is a possibility that the
11 witnesses may have to be recalled, we don't consider
12 that possibility overriding. We would mention that
13 there has been no discussion of the handwriting expert
14 who also is expected to appear and we see no reason to
15 delay his testimony. As a consequence, the staff's
16 motion is denied.

17 The next matter before us is Mr. Gallo's
18 motion for an extension of time. Mr. Gallo?

19 MR. GALLO: Thank you, Judge Bloch.

20 CHAIRMAN BLOCH: I'm sorry, before you go
21 ahead, --

22 MR. GALLO: Yes.

23 CHAIRMAN BLOCH: Judge Jordan, was there any
24 problem with the ruling?

25 MR. JORDAN: Oh, no, that's fine.

1 CHAIRMAN BLOCH: Okay.

2 Please proceed.

3 MR. GALLO: Judge Bloch, I am at this time
4 moving for an extension of the hearing date for the
5 O.B. Cannon matter from the 29th of November -- I'm
6 sorry, the 29th of October to a period in November
7 which I think can best be, instead of setting the
8 date, can best be established after you hear my
9 explanation and perhaps hear from the parties with
10 respect to the availability, assuming they support the
11 motion with respect to scheduling availability.

12 As good cause for the request for the delay
13 I offer the following. I find that at this point in
14 case preparation that we need an additional two weeks
15 in order to properly prepare and be able to address
16 the issues that the Board has raised with respect to
17 the O.B. Cannon matter.

18 If the Board will recall, I was retained by
19 O.B. Cannon on November -- I keep saying November --
20 October 10 in the late afternoon and on October 11 we
21 convened a telephone conference call for purposes of
22 requesting a delay for the production of documents
23 which were due that day from O.B. Cannon as well as a
24 delay with respect to a hearing that was scheduled I
25 believe on approximately October 22nd.

1 The grounds for the delay at that time were
2 that I had been newly retained and needed the time to
3 get up the speed and prepare for the case. At that
4 time I requested a delay of one week for the
5 commencement of the hearing from the 22nd of October
6 until the 29th. I had been new to the case and I must
7 concede at this point that I underestimated the task
8 at hand. A one week delay is simply not enough. I
9 find that the complicated fact situation that I must
10 deal with expands over a number of months, almost a
11 year, thus requires more time than I had estimated on
12 October 11th.

13 Similar matters --

14 CHAIRMAN BLOCH: Mr. Gallo --

15 MR. GALLO: -- have arisen that I was not
16 confronted with at the time of the scheduled
17 conference call on October 11th. Having now gone
18 through the documents --

19 CHAIRMAN BLOCH: Could you explain that a
20 little bit?

21 MR. GALLO: I'm sorry.

22 CHAIRMAN BLOCH: You say a number of matters
23 have arisen, are you going to explain what they are?

24 MR. GALLO: I am now going to explain what
25 they are.

1 I believe that a fourth witness could be
2 presented on behalf of O.B. Cannon in addition to the
3 three that have been subpoenaed. The fourth witness
4 is Mr. Ralph Trallo, T-R-A-L-L-O. Mr. Trallo was a
5 task force chairman appointed by Mr. Roth to head up a
6 team of O.B. Cannon employees to address matters
7 raised in the Lipinsky trip report. And Mr. Trallo
8 was a participant in the activities and the meetings
9 that were held down at the Comanche Peak site on
10 November 10 and 11.

11 CHAIRMAN BLOCH: May I ask, I don't recall
12 seeing any documents from Mr. Trallo, am I wrong?

13 MR. GALLO: Yes. There are documents,
14 documents that were produced that were generated by
15 Mr. Trallo who comes to mind specifically is a report
16 that Mr. Trallo originated which is, in essence, a
17 report of his task force and the results of the task
18 force's effort.

19 I believe there's also one or two other
20 documents that are in that same early November, 1983
21 time frame which he originated, but the report that
22 deals with the results of the task force's activities
23 was written and prepared by Mr. Trallo and is, indeed,
24 in the documents produced so far.

25 And I would -- I believe he should be called

1 as a witness. Now his impact on schedule is is that I
2 have not had the opportunity to interview Mr. Trallo
3 and discuss his -- any proposed testimony with him to
4 superimpose that work effort on top of the already
5 heavy workload of dealing with the other three
6 witnesses just makes the going to hearing on the 29th
7 of October impossible.

8 CHAIRMAN BLOCH: It sounds to me a little
9 bit like you're giving reasons for one week's delay,
10 but not two. You're talking about the preparation of
11 one additional witness?

12 MR. GALLO: Well, the -- that's reason
13 number one. Reason number two, which I've already
14 stated, is the underestimate of what it would take to
15 prepare for the hearing. I find that the time I
16 requested initially is not enough.

17 Third reason is that I now find that there
18 are certain documents within the custody of O.B.
19 Cannon and within the purview of the subpoena issued
20 by the Licensing Board which have not been produced.
21 Some of these documents are sitting today on my desk,
22 others are being sent to me.

23 I need time to review these documents to
24 determine if any privileges could be asserted and, of
25 course, to produce to the Board, the Board, the

1 parties would, of course, need some time to review
2 these documents.

3 CHAIRMAN BLOCH: May I ask out of curiosity
4 whether any of them are August notes of Mr. Lipinsky,
5 August, '83?

6 MR. GALLO: Indeed, the nature of the notes
7 are -- well, what it is are weekly summary report that
8 O.B. Cannon employees routinely in the course of
9 business provide to Mr. Roth, the president of the
10 company.

11 Some of these weekly summary reports are,
12 indeed, Mr. Lipinsky's and they have not been provided
13 and produced the Board and the parties and, of course,
14 they should be.

15 CHAIRMAN BLOCH: I take it Mr. Lipinsky's
16 notes from his August trip to the site have not been
17 found?

18 MR. GALLO: That is correct. However, since
19 I have uncovered actually Mr. Lipinsky was quite
20 candid and brought to my attention the fact that these
21 further documents existed and that he had simply
22 forgot to bring them to my attention when I was up in
23 Philadelphia last week going through the process of
24 determining what documents should be produced.

25 So he brought them to my attention and, of

1 course, they need to be produced. They will be
2 produced, but it takes time to deal with those
3 documents and to present them to the Board and for the
4 Board and the parties to review them.

5 Finally, the Board has asked for a brief on
6 the question of privilege. That is the privilege that
7 we have asserted on behalf of Mr. Lipinsky, with
8 respect to attorney-client relationship matters. That
9 is the relationship between Mr. Lipinsky and attorneys
10 Mr. Reynolds and Mr. Watkins.

11 All of these tasks have simply overloaded
12 the system and we're just not able to proceed on the
13 29th in a fashion that would adequately protect the
14 rights of my client.

15 For these reasons I've thought seriously
16 about it. I believe a two week extension of time is
17 necessary and that's what I'm requesting.

18 CHAIRMAN BLOCH: Now, under that two week
19 extension, would we expect a prefile testimony on the
20 31st?

21 MR. GALLO: Well, I would suggest that the
22 prefile testimony on the four witnesses, assuming the
23 Board grants my motion to include Mr. Trallo as a
24 witness, would be one week before whatever hearing
25 date is established.

1 CHAIRMAN BLOCH: Well, now that doesn't make
2 any sense to me. There's a certain amount of time to
3 prepare it and the day we actually have the hearing is
4 not related to that.

5 MR. GALLO: Well, I'm just hearkening to NRC
6 practice, but I am flexible as to the file date as
7 long as the -- I have enough time within which to file
8 it.

9 CHAIRMAN BLOCH: Well, will you have time by
10 October 31st?

11 MR. GALLO: Now let me check this calendar.
12 A week from today. Okay. I think it's a week from
13 today. Yeah, I would prefer -- I think that that may
14 shave it too close and I would prefer to Monday,
15 November 5, especially if the hearing date, Judge
16 Bloch, is going to, assuming that the Board grants the
17 motion and we get to the question of when we might
18 resume the hearing after the 29th of October.

19 I understand that the date that my two week
20 request would ordinarily fall on, that is October
21 12th, is a federal holiday and in addition, Mr.
22 Roisman's schedule simply does not permit him
23 proceeding on that -- during that week.

24 I would then, in view of that, propose that
25 we commence on the 19th of October, I'm sorry,

1 November, the 19th of November.

2 CHAIRMAN BLOCH: So then you'd prefile on
3 the 5th that includes the brief and, of course, the
4 brief is accompanied by whatever affidavits are
5 necessary to -- I'm sorry, we got a cassette problem
6 here -- the brief will be accompanied by whatever
7 affidavits are necessary to establish the underlying
8 facts and those would all be filed by November 5th?

9 MR. GALLO: Yes. Now the brief you're
10 referring to, Your Honor, is the privileged brief.

11 CHAIRMAN BLOCH: Correct. One reason I was
12 concerned about the prefiling date is that if things
13 are so complex for you to analyze and present, they
14 may be complex for the Board to understand as well and
15 we want to understand it before we go to hearing.

16 MR. GALLO: Well, I appreciate that point
17 and if the hearing date were to commence on the 19th
18 the Board and the parties would have two weeks to
19 unravel the facts.

20 JUDGE JORDAN: Recognizing, of course, that
21 the 19th is the first week.

22 MR. GALLO: Yes, I'm aware that Thursday of
23 that week is Thanksgiving.

24 CHAIRMAN BLOCH: And what is the 15th -- I
25 mean, excuse me, what is the 14th?

1 MR. GALLO: The 14th.

2 CHAIRMAN BLOCH: The 12th, I'm sorry.
3 Veteran's Day?

4 MR. GALLO: Yes, apparently it's Veteran's
5 Day.

6 MR. DOWNEY: It's my birthday.

7 CHAIRMAN BLOCH: That's okay. We had a
8 hearing on my birthday, Sunday the 9th of September.

9 MR. GALLO: So to sum up, Judge Bloch, the
10 good cause argument, first and most importantly, I
11 underestimated the time it would take to get up the
12 speed and prepare and submit the testimony and to have
13 the witnesses appear.

14 The one week delay that I requested simply
15 wasn't enough. Secondly, adding Mr. Trallo as a
16 fourth witness, which I think is essential to the
17 presentation of the facts on this matter dealing with
18 the documents that have newly been discovered as
19 falling within the purview of the subpoenas, but not
20 yet produced and finally, the brief all have
21 overloaded the system to the point that I think the
22 two week delay that I'm requesting is reasonable.

23 CHAIRMAN BLOCH: Okay.

24 First, is there any objection to the
25 presentation of testimony of Mr. Trallo?

1 MR. DOWNEY: Your Honor, we, of course,
2 object to all of this testimony and that would extend
3 to Mr. Trallo, but I would add that if counsel
4 believes that his testimony having gotten across that
5 threshold and overruled our objection, if his
6 testimony is essential to a full hearing of the issue
7 then we would not object to extending to Mr. Trallo
8 the Board's ruling.

9 CHAIRMAN BLOCH: Thank you, Mr. Downey.

10 MR. TREBY: The staff has no objection.

11 MR. ROISMAN: CASE has no objection.

12 CHAIRMAN BLOCH: Then that -- to that extent
13 the motion is granted. On the scheduling question,
14 Mr. Downey, your comments?

15 MR. DOWNEY: Your Honor, I would offer two
16 comments, I guess. I accept Mr. Gallo's
17 representation that he needs more time. I, too, have
18 found this case more complicated than I originally
19 thought it would be. Am I to understand his need, I
20 share the Board's observation that we're sounding more
21 like a one week extension than a two week extension.

22 The -- if Mr. Gallo were able to file by
23 next Friday, we would be prepared to go forward on the
24 fourth. As to his exact date, scheduling for the 12th
25 or the 13th, depending on we -- had testimony -- had

1 the hearing on the holiday, the week of the 12th I am
2 currently scheduled to be in Fairbanks and Juno and
3 Anchorage, three different stops that week in Alaska.

4 I could probably change that schedule,
5 although, I prefer not to which I guess brings us to
6 the point of either the week of the 4th or the week of
7 the 19th, the week of the 12th being our least
8 favorite of the three options, assuming the Board is
9 prepared to grant any extension.

10 CHAIRMAN BLOCH: Now if we go on the week of
11 the 19th, would we go the previous week on Mr. Brant
12 and the liner plates.

13 MR. DOWNEY: My preference would be to --
14 because of my schedule if we're going to have him on
15 the 19th that we do it all that week so that I could
16 make my commitment in --

17 CHAIRMAN BLOCH: You don't want to skip
18 Thanksgiving, do you?

19 MR. DOWNEY: Stay here at Thanksgiving?
20 Actually, I'd prefer Thanksgiving over the 12th, 13th
21 and 14th.

22 CHAIRMAN BLOCH: It sounds to me like if we
23 start on the 19th what we're going to have to do is
24 continue the following week because I don't think we
25 will have a hearing on Thursday. We may not finish.

1 I think probably not Friday either. Is that what
2 you're suggesting, Mr. Downey?

3 MR. DOWNEY: Well, I think my first
4 preference would be to start the week of the fourth
5 with --

6 CHAIRMAN BLOCH: Right, but that's with --

7 MR. DOWNEY: We could start with Mr. Brant
8 and the handwriting expert and others and continue
9 later in the week with O.B. Cannon. That would be my
10 first preference. My second preference would be for
11 the week of the 19th continuing day to day with
12 whatever leave or choose for the holidays interrupting
13 that.

14 CHAIRMAN BLOCH: Okay.

15 We could also go on the fourth with Brant
16 and the 19th with O.B. Cannon, right?

17 MR. DOWNEY: That's also possible.

18 JUDGE JORDAN: That's what I was going to
19 suggest. We go on the 5th day with -- or we could
20 delay Brant --

21 CHAIRMAN BLOCH: Fifth.

22 JUDGE JORDAN: -- seventh or eighth.

23 MR. DOWNEY: Well, as I understand it,
24 there's a briefing scheduled. I neglected that.
25 There's a briefing on the EGG report scheduled for

1 that week, is there not, Mr. Treby?

2 MR. TREBY: That is correct. The EGG
3 personnel will be in the Washington area on the eight
4 and ninth available for this briefing.

5 CHAIRMAN BLOCH: Well, we would hope to
6 finish with Mr. Brant.

7 MR. TREBY: It's very difficult to gather
8 those five people together at one time.

9 CHAIRMAN BLOCH: But then we could just stop
10 on the seventh.

11 MR. TREBY: No, we could do that five, six
12 and --

13 MR. ROISMAN: Mr. Chairman, this is Mr.
14 Roisman, I'm going to have impossible problems with
15 the week of the fifth.

16 CHAIRMAN BLOCH: Oh.

17 MR. ROISMAN: All right. Just before you
18 get into it very deeply I know I'm out of turn, but
19 I've had an oral argument in the Court of Appeals on
20 the morning of the seventh and I must spend the day of
21 the sixth preparing for the argument. So the only
22 conceivable day for me is the fifth and I do have some
23 other conflicts, although, I can probably work those
24 out.

25 CHAIRMAN BLOCH: And if we start on the

1 19th, how about the week after that for concluding,
2 Mr. Roisman?

3 MR. ROISMAN: I don't have any problem with
4 that, nor do I have any problem with trying to find a
5 couple of days, you know, to squeeze in those other
6 people.

7 CHAIRMAN BLOCH: We could find a couple of
8 days on the Brant witnesses next week; couldn't we?

9 MR. ROISMAN: Yes. No.

10 CHAIRMAN BLOCH: Because your discovery
11 won't be --

12 MR. ROISMAN: No, no, I'm sorry. I'd have
13 no problem at the end of the week, but I would not
14 like to do it at the front, but I don't mind the end.

15 CHAIRMAN BLOCH: So we could go with
16 November 1st for the Brant -- for Brant.

17 MR. ROISMAN: Is that Thursday, Your Honor?

18 CHAIRMAN BLOCH: That's Thursday.

19 MR. ROISMAN: And the handwriting expert on
20 Friday?

21 CHAIRMAN BLOCH: Well, whenever Brant
22 concludes it. You might even want to put him on
23 first, unless why don't you talk to Mr. Roisman, he
24 may be a very short witness.

25 MR. ROISMAN: I've never seen him, I don't

1 know that, Mr. Chairman.

2 CHAIRMAN BLOCH: Yes, Mr. Roisman, we
3 understand.

4 MR. ROISMAN: I don't have much for him, I
5 don't -- but I can't tell until I know what he answers
6 to my questions whether it's a big thing or a little
7 thing. I mean I still don't think it's more than an
8 hour or something like that. In other words, because
9 he's retained by the hour, if it's agreeable to the
10 parties, why don't we start with the -- assuming he's
11 available.

12 CHAIRMAN BLOCH: I guess there is a
13 possibility that you won't be able to finish with
14 Brant on the first and second depending on what
15 happens with the discovery that we just ordered.

16 MR. ROISMAN: Well, let me say I know that
17 Mr. Chaney has a fairly demanding schedule. I would
18 have to check with him to sure he didn't have some
19 prior quote, "commitment," for the first. Assuming he
20 does not, I would propose that we start with him on
21 Thursday morning and continue with Mr. Brant on
22 Thursday and Friday, if need be.

23 CHAIRMAN BLOCH: Okay. Mr. --

24 MR. DOWNEY: Let me --

25 CHAIRMAN BLOCH: Yes?

1 MR. DOWNEY: -- ask a question of Mr.
2 Roisman, Your Honor. We also prefiled some -- a short
3 six or eight pages of testimony which I -- when was
4 down at the site on another matter of -- I forget the
5 witness' name now, Cecil Manning.

6 MR. ROISMAN: Yes, Ms. Garde is the one
7 who's reviewing that and if your question was are we
8 going to want to cross him. I don't know the answer
9 yet.

10 MR. DOWNEY: What's my question?

11 MR. ROISMAN: I said if that was your
12 question.

13 MR. DOWNEY: Well, you anticipated it. I --
14 okay. All right. I don't know, Bruce, I can try to
15 give you an answer to that. I'd certainly give it to
16 you before the time to bring the witness up.

17 MR. ROISMAN: Right.

18 MR. DOWNEY: That's, another matter that we
19 could take up though on that Thursday and Friday.

20 CHAIRMAN BLOCH: Okay.

21 Mr. Roisman, are you finished with your
22 statement as a result of your indisbursing remarks?

23 MR. ROISMAN: Well, I guess I essentially
24 am. I mean I don't know how much you need to know of
25 my schedule. The week of the 12th was also impossible

1 for me and I noticed Mr. Downey had a problem. I have
2 no problem with the first three days of the week of
3 November the 19th.

4 I could do -- Brant and other people
5 starting on Monday, November the 26th and going until
6 we're done with them without fear of running into an
7 irreconcilable conflict until Thursday the 29th. So
8 if the Board thought that all of that might -- would
9 probably require three days instead of two just to
10 avoid a lot of fractionating -- I might have a slight
11 preference for that time, but I'm willing to go on
12 November one and two.

13 CHAIRMAN BLOCH: The fraction -- what was
14 your suggestion on the other day, the extra day?

15 MR. ROISMAN: Well, it's that if the
16 combination of Brant, the handwriting expert. Brant
17 is not only on the liner plates, but also there is
18 Corey Allen testimony of Brand and the additional
19 Corey Allen testimony from Cecil Manning.

20 If the Board's judgment is that there's a
21 good chance that that will finish in two days, I would
22 prefer that we not break that testimony up and then
23 pick up one more day of it at sometime in the future,
24 but rather set aside a full three days for that --

25 CHAIRMAN BLOCH: Starting on the 31st?

1 MR. DOWNEY: That would be fine with us,
2 Your Honor.

3 MR. ROISMAN: Well, some of that depends
4 upon what you're going to do, Mr. Chairman, on our
5 sanctions motion. It begins to become somewhat
6 relevant. We put into the sanctions motion on item
7 number two our willing less to -- our prefiled
8 supplemented in two days. They put their prefiled
9 supplement in two days with the expectation that there
10 would be a ruling and then since we have that week of
11 the 29th set for the hearings that we would go with it
12 then.

13 If the hearing is now clearly not all going
14 to take place on the week of the 29th, obviously I'd
15 rather have four days then two and as we -- so playing
16 around with next week for the Brant testimony
17 depending upon what you do with that motion could have
18 a substantial impact on us. I don't like doing things
19 in two days.

20 CHAIRMAN BLOCH: Well, why don't you tell me
21 what you have in mind in terms of supplementing?

22 MR. ROISMAN: Okay. Well, that's what I'm
23 saying is that starting the week of the 19th taking
24 three days to do the O.B. Cannon witnesses picking up
25 Monday, the 26th of November and taking three days to

1 do the Applicant witnesses is what I would propose.

2 CHAIRMAN BLOCH: Yeah, but I still want to
3 have some idea of what it is you are asking for on
4 your number two, the supplement to the filing. What
5 is the need for that?

6 MR. ROISMAN: The only reason that -- well,
7 first of all it comes up in the context of sanctions.

8 CHAIRMAN BLOCH: Well, I know that, but as I
9 mean -- you know, sanctions can be anything. What is
10 it you're --

11 MR. ROISMAN: I understand. I've thought of
12 a number of other things.

13 CHAIRMAN BLOCH: We can have thumb hanging,
14 you know, but what is the --

15 MR. ROISMAN: I -- the reason for it is that
16 when we filed on Thursday we filed on the basis of
17 basically having those documents only from the
18 preceding weekend on for intensive study. I've got
19 sitting here in my office eight more pages of analysis
20 that's been done by our people and I'm told by Ms.
21 Garde that there is further analysis that they've done
22 as they've further reviewed the document.

23 We feel prejudiced by the fact that we met
24 that deadline, but we were willing to do it and we
25 would have lived by it if the Applicant had met their

1 deadline. Now they haven't and the time period has
2 been substantially longer.

3 CHAIRMAN BLOCH: Okay and --

4 MR. ROISMAN: And so we think if we were
5 given more time that we would be able to put that
6 finding together, but if you give me two days from
7 this afternoon, I still have a very difficult
8 logistics problem which is I've got to physically get
9 information up from Dallas, Fortworth. It has to be
10 reviewed and filed. So if I add more time, I can do
11 it better.

12 So that's why I don't like the idea of
13 having to go next week early, but I -- and I would be
14 willing if I were convinced that the last two days of
15 next week we would finish everything to do that
16 consistent with CASE's position throughout which is
17 that we were willing to move things along, but I don't
18 want to move them along just for the sake of that.

19 If there's a high probability that we're
20 going to have to move into that first week after
21 Thanksgiving anyway, let's put the three days over
22 there. Mr. Downey will have more time for Mr. Brant
23 if he wants to file additional testimony in opposition
24 to what we file and no one will feel as rushed as
25 we're feeling now, but rushing is not in the best

1 interest of justice, sometimes it's warranted here.
2 It doesn't seem to be so I don't favor it.

3 CHAIRMAN BLOCH: Mr. Treby --

4 MR. DOWNEY: Your Honor, this is Bruce
5 Downey. I would be happy to put -- assuming the Board
6 grants a motion that some additional allegations I
7 would be happy to put Mr. Brant on live, with respect
8 to these allegations or another witness is required.
9 I don't know.

10 And we'd also be willing to work Saturday,
11 the third -- it carries on to a third day.

12 CHAIRMAN BLOCH: Is your problem, Mr.
13 Roisman, that in order to file those additional
14 allegations, you would be unable to finish that by
15 early next week?

16 MR. ROISMAN: No. I think that -- I don't
17 -- I've already said that I would finish it in two
18 days from when you ruled and we would, but I made that
19 because I didn't want to be the source of a change in
20 the schedule.

21 CHAIRMAN BLOCH: And assuming we were to
22 file it on -- that you would have to file that by
23 Friday?

24 MR. ROISMAN: Friday of this week.

25 CHAIRMAN BLOCH: Of this week?

1 MR. ROISMAN: Yes.

2 CHAIRMAN BLOCH: Under those circumstances,
3 is there a problem starting on the 31st?

4 MR. ROISMAN: Well, that all has to do with
5 my further point which is that the Applicant two days
6 later would have to file their -- anything that they
7 were going to say with respect to those allegations,
8 not do it light without prefiling.

9 CHAIRMAN BLOCH: Okay. You want to be able
10 to examine their answers too?

11 MR. ROISMAN: Precisely.

12 CHAIRMAN BLOCH: Mr. Downey, I take it that
13 if we were to grant both parts of the motion we just
14 couldn't do what you're saying?

15 MR. DOWNEY: Well, I -- Your Honor, I would
16 say that in response to the prefiling requirement
17 throughout this proceeding we were called upon to
18 respond to the witnesses without the benefit of a
19 prefiled testimony and I see no reason why that
20 shouldn't be imposed on Mr. Roisman if the Court would
21 find to grant this motion.

22 I would urge the Board to order that any of
23 these contentions be filed with the new testimony,
24 direct testimony of somebody who is competent to
25 testify about the assertions they're making. We

1 haven't had that yet.

2 CHAIRMAN BLOCH: Would you like to do that,
3 Mr. Roisman, and then he would not have a chance to
4 study your testimony either?

5 MR. ROISMAN: Well, Mr. Chairman, our
6 position is that the documents speak for themselves.
7 And we got into this whole thing when we said we were
8 willing to simply put our allegations in. You have
9 now accepted the liner plate documents into evidence.
10 We're ready to do proposed finding from the liner
11 plate.

12 CHAIRMAN BLOCH: Well, if you were to give a
13 statement of additional allegations on the liner
14 plates that are already in evidence and you were to do
15 it just the day before we started, would you then be
16 able to waive the response, the prefiling of the
17 response?

18 MR. ROISMAN: No. Not efficiently.

19 Our intent was that the parties -- Mr. Brant
20 is now starting to give us his opinions. He's not
21 just -- he's not giving us facts if you take a look at
22 the prefile testimony.

23 If I'm to be able to adequately examine him
24 as to those opinions, I need the access to the people
25 who may or may not be qualified as witnesses to

1 testify but are more than adequately qualified to find
2 the flaws in Mr. Brant's reasoning about site
3 procedures related to these liner plates.

4 So if I put those allegations in and I'm
5 going to have testimony in opposition to it, then I
6 want the testimony to come in in advance. If I can
7 rely on those liner plates that are in and take my
8 chances that they don't speak for themselves and make
9 my arguments in the form of my proposed findings of
10 fact at the conclusion of the case, then I don't have
11 any problem with that.

12 CHAIRMAN BLOCH: Okay.

13 Mr. Treby, you'll unravel this knot for us,
14 please.

15 MR. TREBY: I will try, Judge Bloch.

16 First the easy one. That is with regard to
17 Mr. Gallo's motion, which I guess started all of this
18 discussion. I think Mr. Gallo has shown good cause.
19 I would support him having until November 5th to file
20 his prefiled direct testimony and that we go to
21 hearing on November 19th through 21st on the O.B.
22 Cannon witnesses.

23 With regard to the travelers -- the
24 handwriting expert and the rebuttal to Corey Allen,
25 it's my judgment that that may well take more than a

1 day and a half or so. And therefore I would not be in
2 favor of doing that on Thursday and Friday, November
3 1st and 2nd, since I suspect that Friday would tend to
4 be a shorter day.

5 And based on the past experience in this
6 case, if we're talking about that many witnesses and
7 subjects, I really don't believe they'll get done in
8 that kind of timeframe.

9 Now we haven't yet discussed whether or not
10 the sanctions are going to be granted. So we're
11 somewhat speculating as to whether or not Mr. Roisman
12 is going to be able to file some additional materials.
13 But if we make the assumption that he is going to be
14 able to file some additional materials, I see no
15 benefit in having him do that in a rushed fashion and
16 then having the Applicant respond in a very rushed
17 fashion. I don't believe we're going to get the best
18 record that way.

19 I would think that while it need not be done
20 in a very leisurely way, it can be done in a
21 reasonable fashion. And I would think that when one
22 considers all of those factors, my vote would be that
23 we take up those four subjects beginning November
24 26th. And that we then frame a schedule whereby Mr.
25 Roisman can provide his additional information and Mr.

1 Downey can expeditiously respond to it. And all
2 parties having a reasonable period of time to study
3 that so that they are fully prepared to go to hearing.
4 And that would be the fairest proposal.

5 I have not filled in the date for when Mr.
6 Roisman could make his filing and when Mr. Downey
7 could make his filing because that's somewhat
8 premature, since we've not yet made any ruling on
9 whether or not those sanctions are going to be
10 granted.

11 CHAIRMAN BLOCH: Okay.

12 Before we --

13 MR. TREBY: And that concludes my
14 suggestions.

15 CHAIRMAN BLOCH: Okay.

16 Before we go to the main question, I'd like
17 to know if we can establish an expedited schedule for
18 responding to the sanctions motion.

19 Mr. Downey, what's feasible?

20 MR. DOWNEY: I would think that Tuesday is
21 feasible, Your Honor. I am scheduled to leave here
22 tonight at 7:00.

23 CHAIRMAN BLOCH: November 6th?

24 Can the staff meet that?

25 MR. DOWNEY: Oh no, I can file --

1 CHAIRMAN BLOCH: That's all right.

2 That's October 30th?

3 MR. DOWNEY: Right.

4 I anticipate -- I'll be leaving here
5 tonight. And I'll be back late Friday night. I plan
6 to work over the weekend some. If we're talking about
7 -- Wednesday would be better.

8 I was going to suggest a schedule for
9 responding to all of these motions. I tried to do
10 that before today's hearing. I have drafts of all of
11 the responses except the sanctions motion which --
12 I've got an outline for that, not -- and the paper.

13 CHAIRMAN BLOCH: Would you like to propose
14 the other dates for response?

15 MR. DOWNEY: Yes.

16 I would like to -- I would file the other
17 responses on Monday.

18 CHAIRMAN BLOCH: That's the 28th.

19 MR. DOWNEY: They're for concerning referral
20 to O.I. -- what Mr. Roisman calls the Ron Jones
21 incident -- the discovery request concerning Mr. Cole.
22 I believe those are the only two.

23 There's also the motion to strike testimony
24 from Mr. Gallo, which I have not yet reviewed and Mr.
25 Watkins will be responding to. I think that Mr.

1 Watkins could respond to that by -- I'll speak for him
2 -- next Wednesday. And I would like to have until, I
3 suppose, close of business Tuesday to respond to the
4 sanctions motion.

5 CHAIRMAN BLOCH: Does that response schedule
6 suit the staff?

7 MR. TREBY: I guess the staff would prefer
8 Wednesday for responding to the sanction motion.

9 CHAIRMAN BLOCH: That's the 31st?

10 MR. TREBY: Thirty-first.

11 CHAIRMAN BLOCH: Ron Jones and Cole on the
12 28th?

13 MR. TREBY: That's -- no, we're talking
14 about the 29th.

15 CHAIRMAN BLOCH: Twenty-ninth.

16 MR. TREBY: I guess I would prefer the 30th.
17 I'm not sure I know Mr. Cole. I've seen the Ron Jones
18 one.

19 MR. JORDAN: It's a discovery request.

20 MR. TREBY: Well, the only discovery request
21 I am aware of is the -- oh, all right. I'm sorry.
22 Now I know what happened to Mr. Cole. That is
23 discovery of the intervenors -- against the Applicant.
24 I believe we sent the letter indicating that the staff
25 is not involved in that one.

1 CHAIRMAN BLOCH: So October 30th on Ron
2 Jones and the motion to strike testimony by October
3 30th?

4 MR. TREBY: Yes.

5 CHAIRMAN BLOCH: Okay.

6 Then that schedule is adopted. I'll repeat
7 it. October 31st for responses to the sanctions
8 motion. That's the time of receipt by the parties and
9 the Board. These are all receipt times. October 30th
10 for response on Ron Jones and Cole, although the staff
11 won't be responding to that. And the motion to strike
12 testimony should be responded to by October 30th.

13 On the main question, Mr. Gallo's motion for
14 an extension of time is granted. He shall prefile
15 testimony by November 5th and shall file his brief on
16 the confidentiality question on that same date.

17 We'll take the O.B. Cannon witnesses on the
18 beginning on the 19th and expect to conclude on the
19 21st. And we'll take the Applicant witnesses starting
20 on the 26th. And it's the Board's judgment that that
21 will take three days.

22 MR. GALLO: A point of clarification, Judge
23 Bloch.

24 CHAIRMAN BLOCH: Yes.

25 MR. GALLO: During the argument, you

1 mentioned whether or not certain Lapinsky notes had
2 been uncovered. And I said they had not. I want to
3 check it.

4 Was the date you referred to August 8th?

5 CHAIRMAN BLOCH: No.

6 It was August of '83, when he was out there
7 in the field doing the notes that led up to the
8 Lapinsky memo.

9 MR. GALLO: Oh, that has to be July of '83.

10 CHAIRMAN BLOCH: Okay.

11 Sorry about that.

12 MR. GALLO: Okay.

13 I understand what you're -- what you were
14 talking about. All right.

15 Thank you.

16 CHAIRMAN BLOCH: Are there any further
17 matters that must be handled?

18 MR. ROISMAN: Mr. Chairman, this is Mr.
19 Roisman.

20 CHAIRMAN BLOCH: Yes, sir.

21 MR. ROISMAN: I have one. It does not
22 involve Mr. Gallo at all. It relates to a Witness F
23 matter.

24 CHAIRMAN BLOCH: Mr. Gallo, you're welcome
25 to leave or stay.

1 MR. GALLO: Well, I think, with the leave of
2 the Board and the parties, and I thank them for their
3 time, I will leave.

4 CHAIRMAN BLOCH: So long.

5 MR. GALLO: Bye-bye.

6 MR. ROISMAN: Mr. Chairman?

7 CHAIRMAN BLOCH: Yes.

8 MR. ROISMAN: Two communications between my
9 office and Mr. Davidson and Mr. Downey's office, an
10 additional person had been proposed to sign a
11 protective order by -- with regard to seeing testimony
12 about Witness F.

13 And we had indicated in the communication
14 back to Mr. Davidson, none of which by the way was
15 served on the parties because it did not seem to us
16 that there was any reason to burden the record with it
17 -- it was between us and them -- indicated that we
18 were opposed to that based on what we knew but that we
19 might be willing to, depending upon certain events
20 taking place, there were then some telephone
21 conversations between Ms. Garde and Mr. Davidson.

22 And now I received in my office today a
23 handwritten -- a hand delivered letter from Mr.
24 Davidson indicating that he had tried to reach Ms.
25 Garde on Tuesday and also this morning -- as far as I

1 know, he did not try to reach me -- to indicate that
2 Mr. Beck had agreed to a particular request which I
3 didn't -- which I do not believe. But I've not spoken
4 to Ms. Garde who's, in fact, the request we have made.

5 And then he says in his letter, "With this
6 agreement, no objection can exist to Mr. Beck becoming
7 a signatory to the protective order. Accordingly, I
8 provided him with a copy asking to execute the same
9 and return it to me." I do not believe that that
10 conforms with the proper procedure.

11 And I am concerned that whatever it is that
12 Mr. Davidson has represented is the condition which we
13 felt needed to be met. It is not adequate. My
14 understanding of the position, as articulated in
15 a letter to him, was that we needed to know was there
16 a reason for yet another person to have access to the
17 Witness F testimony and that we needed to meet with
18 Mr. Beck to ascertain that.

19 It is not, in our judgment, proper procedure
20 for Mr. Davidson to unilaterally decide that there's
21 no longer any objection and that he can expose another
22 person to Witness F and the testimony. I'm therefore
23 requesting that the Board grant at least a three day
24 hold in the form of an injunction on any further
25 disclosures to Mr. Beck than have already made of

1 anything related to Witness F until the matter can be
2 straightened out.

3 If the conditions that we think need to be
4 met are met, we of course will have no objection to
5 him signing it. If they are not, we believe the
6 Applicants are required to make application to the
7 Board.

8 JUDGE BLOCH: Mr. Downey, do you know what
9 we're talking about?

10 MR. DOWNEY: I know something of it, Your
11 Honor.

12 Let me identify for the record Mr. Beck. He
13 is now -- he has recently been assigned the job of
14 head of licensing for Texas Utilities in this
15 proceeding.

16 JUDGE BLOCH: I'm sorry. That was Mr.
17 Tolson's job?

18 MR. DOWNEY: No, no, no, no.

19 He is an assistant to Mr. Spence and has
20 been actively involved in licensing matters. His
21 position, as I recall, was formerly held by Mr.
22 Schmidt. But I'm not certain of the executives.

23 I know what his position is. His title is
24 head of licensing. It's not -- it is a job that's in
25 Dallas, not a job that's at the site. And it's, to my

1 knowledge, always been in Dallas.

2 JUDGE BLOCH: And the purpose of his looking
3 at this is with respect to the start-up problems?

4 MR. DOWNEY: No, his purpose is to give him,
5 by virtue of his position, he needs access to the
6 entire licensing record. And the purpose of the
7 request was to assure that he had that access. And it
8 was part of taking up his responsibilities. He wants
9 to review the state of the record on the open issues.

10 Now as to the request --

11 JUDGE BLOCH: Well, before --

12 MR. DOWNEY: -- it's my understanding that
13 there was a request made --

14 JUDGE BLOCH: Before we go to that.

15 Mr. Roisman, now that you understand who Mr.
16 Beck is, does that --

17 MR. ROISMAN: I understood that all along,
18 Mr. Chairman. What I did not understand, one, we had
19 put the question to Mr. Davidson, did his predecessor
20 have this permission? I'm not sure that he did.

21 Number two, there's no problem with Mr. Beck
22 knowing what the concerns are that Witness F raises.
23 Reading the transcripts, knowing who he is, is an
24 entirely different matter. In fact, I think some of
25 the concerns have been spelled out in nonsealed

1 matters.

2 The Board has an order out on the pre -- on
3 the start-up matters. There's a fair amount. We are
4 just concerned that yet another individual completely
5 outside the scope of the intended purpose of the
6 disclosure. The purpose of the disclosure as
7 justified by the Applicant in the first instance was,
8 we needed to prepare our case in opposition to your
9 position in this proceeding. Their case has now been
10 prepared. It has been presented. Absent some motion
11 to reopen, there's no further testimony being
12 presented on the Witness F allegation.

13 JUDGE BLOCH: Okay.

14 Mr. Downey, it seems to me that we should
15 short-circuit this. That unless you're prepared to
16 present your case now orally --

17 MR. DOWNEY: Well, I am, Your Honor, as I
18 understand. Let me just say --

19 JUDGE BLOCH: Okay.

20 MR. DOWNEY: -- what I --

21 Mr. Roisman has given to the Board his
22 understanding of what Ms. Garde thinks happened. Let
23 me give my understanding of what I believe through Mr.
24 Davidson happened.

25 JUDGE BLOCH: I'll do that in a moment if

1 you think it's worth doing. My point is that either
2 there is a stipulation between the parties that
3 someone can sign the protective order or a Board order
4 is required.

5 MR. DOWNEY: That's right.

6 And it's my understanding from reviewing,
7 before I sent it onto the file, the letter as it came
8 to me, a copy circulated by me as all correspondence
9 in the case does, Mr. Davidson indicated in his letter
10 that he had met the condition imposed by Ms. Garde
11 which was that Mr. Beck agreed to meet with her and
12 Mr. F for the purposes of hearing Mr. F's allegations
13 firsthand. And we have agreed to that condition. And
14 I believe that's what the letter stated.

15 JUDGE BLOCH: What Mr. Roisman tells you is
16 that there is no agreement and therefore there is no
17 stipulation. And if you need to do anything about
18 that, you've got to make a proper motion through the
19 Board.

20 MR. DOWNEY: Your Honor, I'd also add, and
21 we diligently tried to reach agreement. And I think
22 we have. I haven't heard Ms. Garde say yet that we
23 have not met the condition that she imposed on adding
24 Mr. Beck to the protective order.

25 I mean, I believe that to be true. Mr. --

1 JUDGE BLOCH: Well, at any rate, he cannot
2 have access to anything until either there is a
3 stipulation, and in this case I want you to make it
4 clear that there is actually a stipulation and not a
5 condition precedent that you think you've met. I want
6 it to be clear that both sides agreed to it. Or you
7 need a Board order.

8 So there is really no reason to act on a
9 request for an injunction. Either you will reach or
10 an agreement on this or you won't. And if you won't,
11 there'll be a motion before the Board.

12 MR. DOWNEY: Your Honor, let me -- I think
13 the time has come, and perhaps we should just file a
14 motion.

15 Mr. F has filed a Section 210 case against
16 Comanche Peak. And when he's made certain
17 allegations, he's identified himself for the need to
18 protect -- on the public record. The need to protect
19 his anonymity seems to me to be completely gone now.

20 And perhaps we should just file a formal
21 motion. But in response to Mr. Roisman's point, it's
22 my understanding that all of the conditions were fully
23 met and the letter confirms that. And I'd be happy to
24 call Ms. Garde myself right now, if I could have from
25 Mr. Roisman her location, to make sure that that's

1 true.

2 MR. ROISMAN: I think she's at about 34,000
3 feet somewhere between here and Boston.

4 MR. DOWNEY: Well, that's where I'll be
5 tomorrow afternoon. I'm going to Texas tonight.

6 JUDGE BLOCH: Okay.

7 I have a feeling we've reached a point of
8 diminishing returns on this discussion and that we're
9 not going to resolve anything further.

10 MR. ROISMAN: Do I understand, Mr. Chairman,
11 that what you're saying is that Mr. Beck's -- at this
12 point, Mr. Beck should be instructed if he has started
13 to look at material, to stop. And if he hasn't, not
14 to start.

15 JUDGE BLOCH: That's --

16 MR. ROISMAN: When there is a confirmation
17 from us that there is a satisfaction of whatever we
18 felt was needed --

19 JUDGE BLOCH: That is correct.

20 MR. ROISMAN: If the Board has ordered that
21 we must allow the disclosure?

22 JUDGE BLOCH: It's clear on the record that
23 there is no stipulation between the parties and no
24 basis to go forward under the protective order.

25 MR. DOWNEY: Tony, could I have a number

1 where I could reach Billie tomorrow?

2 MR. ROISMAN: You can reach her here.

3 MR. DOWNEY: She'll be in?

4 MR. ROISMAN: She should be in.

5 MR. DOWNEY: Fix.

6 I don't know the time because I don't wear a
7 watch but I may have difficulty both meeting my plane
8 and getting the quote reporter in Texas on a
9 transcription. In light of the other schedules that
10 have been set, could I have until Monday to serve
11 these papers?

12 MR. ROISMAN: You're talking about the
13 response to the discovery?

14 MR. DOWNEY: Yes.

15 JUDGE BLOCH: I'll grant --

16 MR. ROISMAN: Mr. Chairman, I have no
17 objection to that being granted.

18 JUDGE BLOCH: It is granted.

19 If you can obtain it faster, I assume you
20 won't delay it until Monday?

21 MR. DOWNEY: No, I will not.

22 JUDGE BLOCH: Then with that said, I believe
23 it's appropriate to adjourn the hearing. I'd like --

24 MR. TREBY: One moment please.

25 JUDGE BLOCH: Yes.

1 MR. TREBY: I guess I also find that I have
2 a plane to catch tonight. I should know better, but I
3 had not anticipated the conference going as long as it
4 did.

5 The staff is making a filing of discovery
6 with regard to EG and G Idaho papers today. There is
7 still a stack of papers that I've not yet reviewed to
8 make sure that they are relevant to the discovery.
9 And I have no way of being able to do that today.

10 JUDGE BLOCH: So your extension is granted.
11 When do you want it until?

12 MR. TREBY: Well, Monday for that stack.
13 But we will be filing at least 1,000 pages of
14 discovery today. Those things I didn't forget to look
15 at.

16 JUDGE BLOCH: All right.

17 Then you have an extension on the additional
18 stack until Monday.

19 MR. TREBY: Thank you.

20 JUDGE BLOCH: There being no other matters,
21 the hearing is adjourned.

22 (Whereupon, at 4:09 p.m., the hearing was
23 adjourned.)

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CERTIFICATE OF PROCEEDINGS:

This is to certify that the attached proceedings,

IN THE MATTER OF:

TEXAS UTILITIES ELECTRIC COMPANY

COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 & 2

PRE-HEARING CONFERENCE CALL

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

REPORTER: STEPHEN A. CAIN

SIGNED: *Stephen A. Cain*

TRANSCRIBER: NEAL R. GROSS

SIGNED: *Neal R. Gross*