

ORIGINAL

UNITED STATES NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

METROPOLITAN EDISON COMPANY

(Three Mile Island Station,
Unit 1)

DOCKET NO: 50-289-SP
(RESTART REMAND)

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

- - -

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| In the Matter of: |] |
| |] |
| METROPOLITAN EDISON COMPANY |] Docket No. 50-289SP |
| |] |
| (Three Mile Island Nuclear Station, Unit No. 1) |] (Restart Remand on Management) |
| |] |

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

Tuesday, November 13, 1984

The prehearing conference in the above-entitled
matter convened, pursuant to notice, at 1:00 o'clock p.m.

BEFORE:

JUDGE IVAN W. SMITH
Chairman, Atomic Safety and Licensing Board

JUDGE SHELDON J. WOLFE
Member, Atomic Safety and Licensing Board

JUDGE GUSTAVE A. LINENBERGER, JR.
Member, Atomic Safety and Licensing Board

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P R O C E E D I N G S

1
2 JUDGE SMITH: Good afternoon.

3 Judge Linenberger is not available this afternoon.
4 He will join us tomorrow at the beginning of the hearing. So
5 we will proceed on the quorum.

6 I guess we will begin with a status report. As
7 I understand, the dispute centers around the letter of, or
8 subject matter of the letter of November 1st, 1984, from TMIA,
9 Ms. Bernabei, to Mr. Blake, with their proposed list of
10 witnesses.

11 MS. BERNABEI: Judge Smith, the letter we have
12 actually been talking about is the letter of November 5th.

13 JUDGE SMITH: I didn't get a copy of the November
14 5th letter.

15 MS. BERNABEI: It was served on all parties.
16 Would you like to review a copy?

17 JUDGE SMITH: Yes, I think I should; if that is
18 what we are going to talk about.

19 MS. BERNABEI: Yes, sir. Essentially, what we
20 did November 5th, I had talked to Mr. Blake about providing a
21 list of witnesses. He said that he would have no objection to
22 providing us a list by November 5th as long as he had sort of
23 a rough list by November 1st. So the November 1st letter is
24 really sort of a rough copy.

25 MR. GOLDBERG: Judge Smith, I never got a copy of

1 that November 5th letter, either. I did get one this morning;
2 just minutes ago, from Mr. Blake. So I haven't had much of
3 an opportunity to review this.

4 JUDGE SMITH: Judge Wolfe received his about
5 11:30. He had not had it earlier, either.

6 MS. BERNABEI: Everyone was served with them.
7 I regret it wasn't received. I think it may have to do with
8 the Holiday mails. But everyone was served.

9 JUDGE WOLFE: Does your listing of November 5th
10 serve to reduce the number of proposed witnesses, or exhibits,
11 depositions, whatever?

12 MS. BERNABEI: It serves to reduce the number of
13 witnesses in that what we propose is the introduction of
14 questionnaires or interrogatory responses, or depositions in
15 lieu of witnesses' testimony. What we attempted to do is --

16 JUDGE WOLFE: That you had already done or pro-
17 posed in your letter of November 1.

18 I am asking how the letter of November 5 differs
19 from the letter of November 1.

20 MS. BERNABEI: And I was attempting to answer you.

21 JUDGE WOLFE: All right. Go ahead.

22 MS. BERNABEI: I did.

23 The letter of November 5th attempts to reduce the
24 number of witnesses who need to be called at the hearing to
25 commence the 14th, in that it suggests the introduction of

1 depositions in lieu of testimony of the witnesses; at the
2 hearing, or the introduction of questionnaires in lieu of
3 their testimony at the hearing.

4 JUDGE WOLFE: I do note in your letter of November
5 5th, you have added two names which I think do not appear on
6 the November 1 list. Is that correct? Namely, Messrs.
7 McConnell and McKee.

8 MS. BERNABEI: That's correct. Perhaps I can
9 state once again. The premise of the November 1st letter was
10 that it would be a rough list, largely based on conversations
11 between Mr. Blake and myself.

12 Mr. Blake stated that he would not object to a
13 complete list of witnesses being presented on November 5th,
14 as long as he had a rough list of the witnesses on November 1st.

15 MR. BLAKE: Let me state what Mr. Blake stated.
16 When Ms. Bernabei and I met, I believe the evening of October
17 30, I realized for the first time that individuals that TMIA
18 wanted to call as witnesses, but for whom they had no prepared
19 written testimony, she had not anticipated would need to be
20 identified prior to the hearing.

21 I stated my view, that I felt -- while the Board's
22 order specifically was limited to prepared written testimony,
23 a couple of weeks in advance of hearing, that there was
24 another obligation on the parties to identify, as well,
25 witnesses, even though they didn't have prepared testimony so

1 that the other parties would know what each party's case would
2 be.

3 I think for the first time she then realized that
4 she should do that.

5 In view of the date being October 30, I said,
6 "I think you are obligated to do that by November 1st. And I
7 expect you to give your best shot at what those witnesses are.
8 To the extent that you have to modify it by adding some or
9 deleting some over the weekend, and give me a final list on
10 November 5, you will not get another objection from me. But
11 I expect your best shot on November 1st."

12 M.S. BERNABEI: May I state, that was not the
13 context of the discussion.

14 Mr. Blake, for some period prior to November 1st,
15 misrepresentation on his part. Prior to November 1st, he had
16 attempted several different times to ask me to commit to a
17 November 1st date for our list of witnesses. I stated to him
18 that I could not do that. I did not think that was within the
19 purview of the Board's order.

20 However, I would identify prior to the hearing.
21 I had absolutely no expectation that I would not identify them
22 prior to the hearing. I did have an expectation it was not
23 covered by the Board's order, and therefore they did not have
24 to be identified by November 1.

25 Therefore, Mr. Blake's representation that I had

1 no intention of identifying prior to the hearing is false.

2 Secondly, the agreement between the two of us was
3 that I would attempt to give him a list of witnesses that I
4 believed we would call. There may be some witnesses excluded,
5 some additional witnesses. But it would be a rough list of our
6 witnesses. That is what I provided him.

7 There was also an agreement that on November 5th
8 I would provide him with what I believed to be a complete list
9 of witnesses.

10 JUDGE SMITH: Does anybody have a suggestion as
11 to how we might proceed, or another area of agreement we could
12 begin with?

13 MS. BERNABEI: Before we start, I would like to
14 place TMIA's objections on the record as to this method of
15 proceeding. I did state them during our telephone conference
16 call. For the record, I would like to state them at this time.

17 First of all, I don't think it is appropriate for
18 the Board at this time to make any determination, essentially
19 on the merits of the witness's testimony. I think the Board
20 has a responsibility to allow witnesses, as long as their
21 evidence is relevant and material, and non-cumulative, to
22 testify at the hearing.

23 I think that is the only determination you have
24 the authority to make prior to hearing. You do not have the
25 authority to make a determination on the merits of the

1 witness's testimony. That is how I perceive this hearing.

2 JUDGE WOLFE: Are you saying this both with
3 respect to live witnesses that you are going to tender, as well
4 as the entireties, or portions of depositions that we may not
5 look at, or rule upon it at this time?

6 MS. BERNABEI: I am sorry. I don't understand the
7 question, Judge.

8 JUDGE WOLFE: You are objecting to our ruling on
9 the admissibility of testimony. My question to you is, are you
10 objecting to our ruling on the proposed live testimony that you
11 plan to present, as well as objecting to our ruling on the
12 admissibility of portions or entireties of depositions that
13 might be offered at that time?

14 MS. BERNABEI: Perhaps the Board has misunderstood
15 our proposal. Our proposal is to propose all the people listed
16 in our letter of November 5th as live witnesses.

17 What we suggested to the licensee is that it might
18 be possible to introduce either that deposition testimony, or
19 questionnaires, in lieu of their live testimony. We have made
20 no motion to the Board to present the depositions in lieu of
21 the live testimony. Therefore, the matter before the Board,
22 all the individuals listed in the letter of November 5th appear
23 as witnesses. I think that is pretty clear.

24 We are not making any motion that any of these
25 individual's deposition testimony be introduced in lieu of

1 their live testimony. That was a matter of negotiation between
2 the Licensee and ourselves.

3 JUDGE SMITH: Ms. Bernabei, I have not regarded
4 this as a session to look at the merits of the testimony of
5 these witnesses. We could hardly do that, because we can only
6 infer what their testimony is proposed to be, in any event.

7 We are, I thought, doing exactly what you said we
8 are allowed to do. And that is, determine whether their testi-
9 mony is in any event relevant, and whether, if relevant, will
10 it be cumulative. That is what I regard our task for today
11 to be.

12 MS. BERNABEI: Okay. I should perhaps state our
13 other objections.

14 JUDGE SMITH: Well, does that satisfy you?

15 Does anybody disagree with my characterization of
16 the purpose of the session today?

17 Nobody does. I just think you misperceived that.

18 MS. BERNABEI: I don't understand that is the way
19 it is going to proceed. Perhaps I can be demonstrated to be
20 wrong.

21 JUDGE SMITH: Let me assure you that we are not
22 making any effort today to judge the merits, substantive merits
23 of any witness' testimony. I don't know how we could do that,
24 even if we were so inclined.

25 MS. BERNABEI: We have two other objections.

1 One has to do with, we believe this prehearing conference should
2 not have been scheduled so close to the time of hearing. As
3 you know, you modified a subpoena for Dr. Zabrowski's testimony,
4 or deposition testimony specifically on the grounds it was too
5 close to the hearing.

6 Would it not accommodate the parties and Board, in
7 preparation for the hearing. We are now in fact in a prehearing
8 conference a few hours before the scheduled deposition. I do
9 not think it is appropriate.

10 I also think it was inappropriate that we were
11 served yesterday with documents related to Mr. Lowe's testimony
12 which we will have to review prior to his presentation tomorrow
13 afternoon. I don't think it is an appropriate time.

14 The third matter I did not raise during the con-
15 ference call yesterday but about which I was disturbed. It was
16 comments by you, Judge Smith, in which you stated, and I recon-
17 structed it from my notes, that you could not imagine what
18 40 to 50 witnesses proposed by TMIA are going to say; and that
19 it was necessary before TMIA had any case to convince the Board
20 of the need for the witnesses and that we may be compelled to
21 submit our case through cross-examination.

22 I think the responsibility of this Board is to
23 determine on a witness-per-witness basis whether or not they
24 have relative, probative, and non-cumulative evidence.
25 I don't think it is to determine whether or not in the gross or

1 general sense, you feel the party has proposed too many
2 witnesses. I don't feel that is a proper exercise of authority.

3 So I would like to object also on the grounds that
4 I think the Board should be approaching the proposed witnesses
5 on a witness-by-witness basis.

6 JUDGE SMITH: Yes. Certainly my remark yesterday
7 in our telephone conference call was incomplete. I, having
8 followed discovery somewhat, but not thoroughly, do not believe
9 that, based upon what I know about it, that you are going to
10 have, likely to have so many witnesses who have knowledge
11 directly relating to the issues that we have described here
12 as we have described the issue, not as you have continued to
13 perceive it to be, but as we have described it.

14 However, the very fact that we scheduled a pre-
15 hearing conference to hear from you is in itself evidence that
16 you are going to have an opportunity to demonstrate the need
17 for your witnesses. But what I intended to say is that we are
18 not going to go up to Harrisburg, sit down at the hearing room,
19 call the hearing to order and begin to hear all these witnesses
20 on your assurance, with nothing more, that they will all have
21 relevant testimony, non-cumulative, relevant testimony.

22 That is just hard for me to believe that that
23 might be the case. Now is your chance to explain to us why
24 that is not the case. Our burden is not to prove our case to
25 this Board at this point. Is another evidentiary hearing, as

1 long as we prove we make a good faith representation, they have
2 relevant non-cumulative and material evidence, I think we are
3 entitled to call them.

4 JUDGE SMITH: To call them. Then we will find out
5 whether you were right in the representation when they appear.
6 Is that your scheme of it?

7 MS. BERNABEI: I am saying as long as we have a
8 theory of the case and are presenting evidence in light of that
9 theory, which goes to the issue before this Board, I think the
10 Board should hear those witnesses. And I don't think we have
11 the responsibility or burden at this point to prove to you the
12 merits of our case and I think that is what the Board is
13 requiring.

14 JUDGE SMITH: Not the merits. The merits of your
15 case? No. The relevance of your case.

16 It is rather traditional that parties, sometime
17 before hearing begin, explain what they intend to prove at the
18 hearing. That is all we are asking you to do. It is usually
19 done either by direct written testimony or by trial briefs or
20 something of that nature.

21 In this instance, you have elected to create much
22 of your case by calling these witnesses. Had we anticipated
23 that, we would have required some type of trial brief. I
24 didn't anticipate that. However, now that we perceive that is
25 what you intend to do, we are timely asking you to explain why

1 you need all those witnesses and you will have to do it.

2 There is another matter you may not overlook. Even
3 if you were to say we do not want any of these witnesses, the
4 Board has its own responsibilities to hear from some of them.

5 MS. BERNABEI: First of all, we offered to do a
6 trial brief. We asked, would we be able to present our case in
7 a trial brief. We made that recommendation to you in a confer-
8 ence call yesterday, and I think your answer was that you thought
9 it could be done orally at a prehearing conference.

10 JUDGE SMITH: Yes.

11 MS. BERNABEI: We would welcome an opportunity to
12 present a brief describing the relevance of the testimony.

13 Secondly, I have discussed with Mr. Blake, and he
14 said he had no objection, at least that is what he said to me;
15 I don't know what he says today, to some sort of opening state-
16 ment. I think one of the issues in this case, that is, the
17 accuracy of the statement of the DeCamp Mailogram as to
18 whether anyone interpreted the pressure spike to indicate core
19 damage is another issue that indicates some specific knowledge
20 of what was going on at TMI-2 on the date of the accident.
21 As such, I think it would aid the Board to have opening state-
22 ments that gave a blueprint to the party's case.

23 I have suggested to Mr. Blake. He apparently
24 had no opposition at the time I spoke to him. So I believe
25 this kind of prehearing conference would be done better with

1 a pretrial brief and with opening statements of counsel.

pad 2
2 JUDGE SMITH: I am confused about the mechanics
3 of it. How does it work? When do you expect these people to
4 appear? Let's say that you are persuasive and you convince us
5 that half of them should appear. When would they appear?

6 MS. BERNABEI: I assume the procedure is as in all
7 these cases; the licensee has the burden of proof. The
8 licensee goes first.

9 JUDGE SMITH: Yes, we have already worked that out.

10 MS. BERNABEI: Intervenor would then present its
11 witnesses and the staff would go last. I assume our witnesses,
12 therefore, Mr. Kemble would go first and then the adverse
13 witnesses would follow. I assume, given the present schedule,
14 that would occur somewhere around November 20.

15 JUDGE SMITH: I can't see how it is all going to
16 work. Since the conclusion of the licensee's case, for the
17 first time, the parties, other than you and the Board, begin
18 to hear what the theory of your case is. It doesn't appeal
19 to me as being a well-organized way to run a hearing.

20 MS. BERNABEI: I have no problem with telling you
21 I think it is pretty apparent, throughout this rather long
22 discovery process, what the theory of our case is. That is
23 not my problem. My problem is, I don't think we have the burden
24 at this point to prove the theory of our case, outside of
25 another evidentiary hearing.

1 JUDGE SMITH: Are you familiar at all with the
2 responsibility and the power of the presiding officer?

3 NRC hearings to determine in prehearing conferences
4 what the issues are and to provide for non-cumulative testimony,
5 and to provide for the narrowing of issues? Are you familiar
6 with that ever having taken place at NRC hearings; and, indeed,
7 other agencies and in the courts?

8 MS. BERNABEI: Yes.

9 JUDGE SMITH: Do you think there is anything
10 different about this hearing that should apply to your position/

11 MS. BERNABEI: Yes, I do.

12 JUDGE SMITH: Well, there is something we are
13 missing here.

14 I don't understand your case at all. I don't under-
15 stand your approach, your strategy. I don't understand what
16 you are asking us to do. We have come late to learn that you
17 intend to call, I don't know how many. Did anybody ever count
18 these up? There seem to be a lot. Some 40 people. And you
19 seem to be disinclined, the day before the hearing begins, to
20 share with the Board your aspirations in this case; and I think
21 it is time for you to do that.

22 MS. BERNABEI: I don't think that is a fair
23 characterization of our position. I have no problem; I suggested
24 written form and you rejected that.

25 JUDGE SMITH: You suggested it yesterday. Yesterday.

1 The hearing begins tomorrow.

2 MS. BERNABEI: I have no problem providing the
3 Board with the written brief.

4 JUDGE SMITH: When?

5 MS. BERNABEI: Some time either during or before
6 our case, which would start on the 20th.

7 JUDGE SMITH: What are you able to tell us now?

8 MS. BERNABEI: I can tell you of the outlines of
9 the case. What I am saying is that this Board does not have
10 the authority to make determination on the merits.

11 JUDGE SMITH: You have won that. Okay? Let's
12 simplify that. You have won that issue and you need not ever
13 return to it, today. We are not going to determine the value
14 of the testimony of this list of people on the merits.

15 Okay, you can just save that trouble now. Okay,
16 you have prevailed.

17 MS. BERNABEI: I will orally, and again, it is
18 under objection, I think it is better done in written form or
19 opening statement, I will give you the outline and witnesses
20 we intend to call on the various points of our case, leaving
21 aside the rebuttal case. I believe what we have a responsibility
22 to do is give the Board our direct case.

23 JUDGE SMITH: Before we rule, let's see what other
24 parties have to say. Maybe we are overlooking some method of
25 organizing this that hasn't been obvious to me, yet.

1 Does anybody else want to comment upon where we
2 are and Ms. Bernabei's proposal?

3 MR. BLAKE: Judge Smith, I think this is another
4 agonizing way to go through it and frankly, with a vague out-
5 line of the case, I don't know that when Ms. Bernabei finishes
6 that we will yet have in front of us sufficient information to
7 determine whether or not any or the vast bulk or all of these
8 40 or so people need to be called as witnesses.

9 As we have observed, the hearing is scheduled to
10 start tomorrow. As Ms. Bernabei has observed, these individuals
11 are slated, I would expect, to begin testifying as early as a
12 week from today.

13 JUDGE SMITH: Indeed. Maybe earlier.

14 MR. BLAKE: I would doubt earlier, based on
15 my conversations with Ms. Bernabei and the amount of cross-
16 examination she has of licensee's witnesses. But indeed, at
17 least a week from today.

18 I offered to argue about this last week, at least,
19 so we could know what witnesses would have to appear, so that
20 the parties and Board could prepare in an organized way to
21 approach the hearing, which is now upon us. I think the
22 witnesses themselves need to be alerted and told. There will
23 obviously be schedule conflicts. Not only haven't we deter-
24 mined what witnesses are to appear, but we haven't begun to
25 approach what the schedule for them will be, whether or not

1 they are available during that period, how many of them need
2 to be subpoenaed as opposed to coming voluntarily.

3 We are in a heck of a fix here, so close to the
4 hearing, and I think it is high time to get us far down the
5 road in determining the need for these people to appear as
6 we can.

7 MS. BERNABEI: May I correct Mr. Blake on several
8 points? First of all, I gave him a no indication of the
9 extent of my cross-examination of Licensee witnesses other
10 than to indicate to him that I saw no problem in Mr. Lowe,
11 Mr. Zebroski and Mr. Rogovin opening on three consecutive
12 days on this week. Other than that, I gave him no time
13 estimate on cross-examination.

14 Secondly, we find it somewhat surprising that
15 the Licensee, which has bene through the story of the accident
16 for the last five and a half years, is going to be surprised
17 by what our case is. We have taken depositions of, I would say,
18 95 percent of the people on our list. The only two that come
19 to mind are Mr. Crimmins and Mr. Keaten, we have not taken
20 depositions from.

21 We are going to provide or have any case the
22 Licensee is not well aware of. They have had these documents,
23 they have had these witnesses, they essentially know the story
24 of the accident a lot longer than we do.

25 JUDGE WOLFE: What about the poor Board? When are

1 you going to alert us what all this is about?

2 MS. BERNABEI: The third --

3 JUDGE WOLFE: Would you answer the question, please?

4 MS. BERNABEI: Yes. I said we would provide
5 another outline of our case.

6 Third, it is not correct for Mr. Blake to say that
7 we have refused to tell him the outlines of our case. In fact,
8 what we attempted to do in the November 5th letter was negotia-
9 tiate about certain witnesses. We did not talk about certain
10 witnesses because essentially the licensee cut off negotiations
11 after several days.

12 We talked first about depositions in lieu of
13 testimony. Mr. Blake said he would not agree to introduction
14 of any portion of those depositions in lieu of the testimony.
15 He basically said he couldn't agree to that.

16 In terms of the 3A individuals, these are people
17 who answered they learned on March 28 of the hydrogen explosion.
18 We could not reach any agreement on introduction of these
19 people's questionnaires and whatever supplemental responses
20 they had made. There obviously has been no cooperation on the
21 part of the licensee so that the representation that somehow we
22 refused to tell them our case is simply not true.

23 In any case, we have no problem at this time in
24 giving the outline of the case, understanding the Board is
25 not ruling on the merits at this time.

1 JUDGE SMITH: The merits of the case, as compared
2 to the merits of the witnesses' testimony. We may very well
3 advise you that you have a theory of the case as to which we
4 will not accept evidence if the theory of the case is beyond
5 the scope, as we have announced it to be. That is quite
6 possible. We shall see.

7 MR. BLAKE: I am not going to take now the time to
8 react to each one of the characterizations which Ms. Bernabei
9 has just made. But I do want to have the Board take one addi-
10 tional thing into account as they hear Ms. Bernabei's statement.

11 That is the massive, with the agreement of the
12 parties, job we have done in trying to hold together a lot of
13 past statements of these people. As you listen to what now
14 we are going to hear as their theory on the need for each of
15 these people, I think it is incumbent upon Ms. Bernabei to
16 indicate why there is a need now to hear from people who have
17 been questioned not once, four, five, six in the case of Gary
18 Miller, nine times. What are we going to hear now that is
19 new? What is the need to call these people now or to have
20 portions of their depositions?

21 Judge Smith, I think these are important before
22 we start calling these people, before accepting them. I think
23 the Board is deserving of knowing why.

24 JUDGE SMITH: I don't know if I entirely agree
25 with you, Mr. Blake. Even though Mr. Miller may have been

1 deposed five, six, seven times, I don't know. This Board has
2 never heard what he has to say about it. I would not think we
3 should welcome another effort by Ms. Bernabei to recognize that
4 Mr. Miller has been deposed on the issue four, five, six, se an
5 times; then hope to bring him into the hearing room and
6 develop new information. That would be -- we wouldn't tolerate
7 that.

8 We would expect a representation that before a
9 witness is proposed for the hearing, that there is either a
10 basis to believe, based upon depositions, that that witness
11 possesses information of relevance to the issue or based upon
12 documents. Based upon something.

13 But the discovery stage has long passed, and we are
14 not going to be hearing witnesses absent some particular justifi-
15 cation on speculation.

16 MR. BLAKE: I may, in using the term "deposition,"
17 which was the case in lots of these past interviews with
18 individuals, I may have misled you. These past interviews,
19 some of which were depositions by the various investigators
20 who have looked at the question, or related questions, are
21 part of our stipulation here. And are before the Board, and
22 are available to the parties to argue from.

23 JUDGE SMITH: Yes.

24 MR. BLAKE: That was my point.

25 JUDGE SMITH: Yes, I recognize that. And the

1 stipulation may end up being quite helpful.

2 However, if you recall the Appeal Board order,
3 seemed to feel that this Board had particular responsibilities
4 to hear from people. And I think we do. I think even if we
5 hear from people beyond which we normally would, I think that
6 it is necessary now to have a complete record on this case so
7 that the matter may either be pursued to the ultimate conclu-
8 sion by whomever has responsibility to do it; or laid to rest.

9 And even though you may have people who have been
10 interviewed by the staff before and by the investigative reports,
11 some of the people I think call into the category the Appeal
12 Board was referring to whether they told us to go find out
13 who knew what about this particular issue.

14 I think we should hear from them why.

15 MS. BERNABEI: I think that is right, Mr. Dieckamp
16 being a key name, Mr. Chwastyk being a key name who is on TMI's
17 list. There are those individuals, Judge Smith, but there
18 aren't 40 of them.

19 JUDGE SMITH: No, that's right. I haven't been
20 able to identify anywhere near that. I have a tentative list
21 of people I will throw out for discussion. A few of them are
22 essential in my view. Some would be put up for discussion to
23 see if my sense might be wrong of it.

24 But there are many names on this list that I would
25 not put on my list.

1 MS. BERNABEI: Perhaps it might be good to go
2 through our theory of the case. Then perhaps the Board can
3 make a decision.

4 JUDGE SMITH: Yes. Let's hear your theory of the
5 case.

6 MS. BERNABEI: What I can represent is that we,
7 except in two cases, have deposed the individuals. There is no
8 information we expect to get from the individuals other than
9 what has been provided in their depositions or prior interviews
10 or provided in the document production. These are adverse
11 witnesses in the true sense of that word.

12 First of all, TMIA has a direct case on the fact
13 that the statement of Mr. Dieckamp's Mailgram, that no one
14 interpreted the pressure spike to indicate core damage on
15 March 28 is false. That is a false statement. There were
16 individuals who understood the pressure spike in that sense.

17 Other witnesses we propose are Mr. Chwastyk,
18 Mr. Mehler, Mr. Illjes for the limited purpose of identifying
19 and explaining the log he maintained on the March 28, March 29
20 period. Mr. Arnold, for the limited purpose --

21 JUDGE SMITH: Wait a minute. Those three witnesses
22 are on -- on whether the statement was correct or not?

23 MS. BERNABEI: That's correct.

24 JUDGE SMITH: I think those are three individuals
25 we probably would have identified, ourselves. Indeed, if I am

1 not mistaken I think they were mentioned by name by the
2 Appeal Board.

3 MR. BLAKE: That's correct.

4 JUDGE SMITH: So I don't think you have to argue
5 those.

6 Does anybody object to those witnesses coming?
7 So we are going to have Chwastyk, Mehler; you don't even want
8 Illjes; but I think we better have those.

9 MR. BLAKE: No; we do want Illjes. We want Illjes
10 for -- we do want him to testify.

11 JUDGE SMITH: I thought you were willing to stipu-
12 late their deoposition in lieu of testimony. You were not?

13 MR. BLAKE: Yes, we want his testimony for the
14 limited purpose of identifying and explaining control of the
15 operating log.

16 JUDGE SMITH: I understand.

17 MR. BLAKE: We have no broad objection to
18 testimony beyond that scope. The other individuals would be
19 Mr. Arnold, with regard to a memo he sent to him and evidently
20 requested by him concerning Licensee's knowledge of core
21 damage on the first day of the accident. There was a memorandum
22 and an attachment to the memorandum that indicated there were
23 individuals that interpreted the pressure spike to indicate
24 core damage and hydrogen as well as more notes.

25 I think we need Mr. Arnold to identify the

1 JUDGE SMITH: All right.

2 MR. BLAKE: We also --

3 JUDGE SMITH: Wait a minute. Shouldn't we take
4 these up one at a time? Do you have the memorandum? What does
5 it say? Do you have the memorandum?

6 MS. BERNABEI: I don't have the list of documents
7 but I think all the parties are familiar with it. It is a
8 memorandum dated September 17, 1980.

9 MR. BLAKE: 1980; that's correct.

10 MS. BERNABEI: September 17, '80, from Mr. Arnold
11 to Mr. Wallace, who I believe at that time was licensing
12 manager. Mr. Wallace provided to Mr. Arnold this memorandum:
13 All materials concerning Licensee's knowledge of core damage.
14 Apparently, the early part of the accident.

15 The cover memorandum to Mr. Arnold indicates Mr.
16 Arnold requested some of the materials, or a portion of the
17 materials. Attachments include the so-called Moore notes;
18 that is, notes of James Moore which he took on the first day
19 of the accident at the time he was at TMI-2. It also
20 includes what is in the cover memorandum and entitled, Peace
21 by three Licensee representatives: Mr. Reppert, Mr. Gilbert
22 and Mr. Beryl about Licensee and NRC knowledge of core damage
23 and hydrogen production on March 28.

24 It is those two attachments to which we would like
25 to refer since they indicate Mr. Arnold requested and was

1 provide information of the Licensee. Some Licensee employees
2 knew about core damage on the first day of the accident.
3 That knowledge, I think the words of the memo are that they
4 may have interpreted the pressure spike to indicate core
5 damage.

6 We believe Mr. Arnold did this in his official
7 duties and as such certainly had that knowledge, and Mr.
8 Dieckamp could have acquainted himself with the same knowledge.

9 JUDGE SMITH: Okay. What is the significance
10 that Mr. Arnold had that, your statement Mr. Arnold had this
11 information in the exercise of his official duties? What is
12 the significance of that?

13 MS. BERNABEI: He apparently directed an inquiry
14 or investigation into Licensee's knowledge about interpretation
15 of the pressure spike on March 28. The results brought back
16 to him indicated there were Licensee personnel who believed
17 the pressure spike may have indicated core damage and hydrogen.

18 I think the evidence is that Mr. Arnold --
19 and apparently his people came to this conclusion, does not
20 reflect well on Mr. Dieckamp and Mr. Dieckamp is currently
21 contesting the position found in the internal GPU.

22 It also appears to me that that information was
23 available to Mr. Dieckamp and that certainly it was available
24 to him before this hearing and they should have corrected the
25 Mailgram if he did not know at the time he sent it it was

1 incorrect.

2 JUDGE SMITH: It is hard for me to analyze what
3 you have said, because I don't understand it. I just don't.

4 Start from the beginning, and follow it all the way through
5 to the end.

6 MS. BERNABEI: I will start once again. Mr. Arnold,
7 we can do this on every piece of evidence. Mr. Arnold authorized
8 or directed an investigation into Licensee's understanding of
9 the pressure spike on March 28. That is as I understand it,
10 the subject of the Dieckamp mailgram unless I missed something.
11 The results back to Mr. Arnold from his people were that there
12 were two individuals who may have interpreted the pressure
13 spike --

14 JUDGE SMITH: Who?

15 MS. BERNABEI: Mehler and Chwastyk.

16 JUDGE SMITH: We are going to have them.

17 MS. BERNABEI: It is important for the Board to under-
18 stand Mr. Arnold's own investigation came to that conclusion.

19 JUDGE SMITH: I see. Whether we trace, or
20 whether we trace the chain of evidence, to go from the two
21 individuals, and now you are trying to trace them through the
22 intervening points to Mr. Dieckamp, is that what you are
23 trying to do with Arnold?

24 MS. BERNABEI: Right. This is one way. That's
25 correct.

1 JUDGE SMITH: You seem to doubt that. Otherwise,
2 I don't see the relevance if you are trying to use him as
3 the conduit of the information from Chwastyk to Mehler to
4 Dieckamp.

5 MR. BLAKE: That is essentially correct.

6 JUDGE SMITH: Okay.

7 MR. BLAKE: Except, I think it has more authority
8 and weight than simply Mr. Arnold's knowledge of these witnesses.
9 It was an official company inquiry into the matter.

10 JUDGE SMITH: What is the relevance of the fact
11 it was an official company inquiry?

12 MS. BERNABEI: As such, it is more likely that Mr.
13 Dieckamp received information about it.

14 JUDGE SMITH: Rather than just a spontaneous
15 voluntary effort by Mr. Arnold?

16 MS. BERNABEI: That's correct.

17 JUDGE SMITH: Okay.

18 When did Mr. Arnold relay this information to Mr.
19 Dieckamp?

20 MS. BERNABEI: Mr. Arnold currently can't remember
21 anything about it. However, a copy of the memorandum with
22 attachments was sent to Mr. Blake. Mr. Blake indicated in his
23 deposition that he was on the distribution. It appears to me
24 that given it was sent to the attorney in charge of licensing
25 responsibilities that it would have found its way to Mr.

1 Dieckamp. Mr. Blake does not -- he would not answer his
2 questions about whether or not he discussed that memorandum
3 or attachments with Mr. Dieckamp.

4 JUDGE SMITH: So you wish to have us confront
5 Mr. Arnold? You have confronted him by deposition and you
6 want us to confront him and say, "All right, what is the
7 meaning of this memorandum? Are you sure you didn't know
8 anything about it?" Is that what you are trying -- if Arnold
9 has disclaimed knowledge about the memorandum, what help is
10 he going to be to us?

11 MS. BERNABEI: He is going to sponsor the memoran-
12 dum and I think the Board can see that given the memorandum,
13 the attachment is not credible.

14 JUDGE SMITH: Is authenticity of the memorandum
15 being denied?

16 MS. BERNABEI: Nobody remembers the memorandum
17 at this time. I don't know what Licensee's position is on it.

18 JUDGE SMITH: It doesn't seem like it is a winning
19 piece of evidence, if you are going to bring up a memorandum
20 nobody can identify, nobody remembers.

21 MS. BERNABEI: I think on its face, it is a
22 winning piece of evidence.

23 JUDGE SMITH: It is on the face of it. But it
24 hasn't been identified.

25 MS. BERNABEI: I think it is clear it has been

1 identified. It is a memorandum to Mr. Arnold that he no longer
2 remembers receiving or reading.

3 JUDGE SMITH: The authenticity is not denied?

4 MS. BERNABEI: I don't know what Licensee's
5 position is on it.

6 JUDGE SMITH: It's late. It seems to me that
7 should have been determined. Are you familiar with the memoran-
8 dum, Mr. Blake?

9 MR. BLAKE: Yes, sir.

10 JUDGE SMITH: Do you deny its authenticity?

11 MR. BLAKE: No.

12 JUDGE SMITH: So there you are.

13 You mean you didn't know this until now, that he
14 does not deny the authenticity?

15 MS. BERNABEI: That doesn't get us over other
16 problems in its introduction in the hearing or its use in the
17 hearing.

18 JUDGE SMITH: All right, there are other problems.
19 Right now we have authenticity. It is a corporate document
20 that may be produced if relevant in the hearing without regard
21 to its authenticity.

22 MS. BERNABEI: Okay.

23 JUDGE SMITH: If it is relevant, and not misleading,
24 why can't it just be produced as an exhibit?

25 MS. BERNABEI: I have no problem with that.

1 Mr. Arnold's testimony was proposed for, in part,
2 sponsoring the document. If there is no problem with using
3 the document or having it admitted, then I don't have a problem.

4 JUDGE SMITH: Mr. Blake, what is your view of that?

5 MR. BLAKE: I guess this is the first time that
6 I had understood that is what Mr. Arnold was going to be called
7 for. I have a couple views, observations. One is that this is
8 a September 1980 memorandum. The reports Ms. Bernabei refers
9 to as attachments to the memorandum, my recollection is, in
10 one case there is a draft report of some sort by individuals,
11 none of whom TMIA plans to call.

12 I don't know how probative or reliable Mr.
13 Arnold's views, as she indicated, he doesn't recall the
14 memorandum, will be in terms of what the memorandum means.

15 JUDGE SMITH: Okay. I think at least, and I
16 don't think we have to go into that, particularly, it is
17 her view that the memorandum on its face is damning. The
18 memorandum isn't here.

19 The thing we are trying to resolve is, should
20 Mr. Arnold be called? You are arguing it is not, it is vague,
21 late, and has other infirmities in it.

22 But with respect to the document itself, any
23 possible connection to Mr. Arnold or possible need for Mr.
24 Arnold has been obviated at this point, hasn't it? He doesn't
25 remember it, but the authenticity isn't denied. Apparently

1 it came from his files?

2 MS. BERNABEI: Oh yes, it came from his files.
3 Where it appears on its face -- I would just like to answer,
4 and I think we are going to be here late into the night if we
5 do this on every piece.

6 JUDGE SMITH: Indeed, we will be in Harrisburg
7 later if we schedule 40 witnesses and then learn for the first
8 time that your purpose is something that could have been
9 handled by stipulation of authenticity or more direct means.

10 MS. BERNABEI: Let me state in addition, perhaps
11 Licensee is willing to stipulate to this: The memorandum is
12 not vague at all. It is a memorandum from Mr. Wallace,
13 Licensing Manager, to Mr. Arnold. It said, "Per your request
14 I am providing you with all the information I currently have
15 about Licensee's knowledge of core damage on March 28."

16 I don't have it with me, but that is my best
17 memory of the words. It is not vague. Not only is it not
18 vague, it is specifically forwarded to Mr. Blake, apparently
19 as licensing attorney, and Mr. Beryl, who I understand is
20 another individual who tracks on licensing matters within
21 the company. It is not vague.

22 The attachment, at least three of the four attach-
23 ments to that memorandum are explained as to their relevance
24 to the matter.

25 In addition, what Mr. Wallace says in the memorandum

1 is that this is all the information we have as to Licensee's
2 knowledge. And he makes it clear Mr. Arnold requested the
3 information. It seems to me that if they have an internal
4 investigation or inquiry that turns up all the information
5 Licensee has about core damage and that information says they
6 knew two individuals believed the pressure spike to indicate
7 core damage, then they have a responsibility at this hearing
8 to make it plain.

9 Mr. Dieckamp has the responsibility to say
10 my statement in my Mailgram is incorrect.

11 JUDGE SMITH: Okay. I propose then that we do
12 not call Mr. Arnold for the sole purpose of repeating, as he
13 stated to you, that he has no memory of the memorandum.

14 What else you do with the memorandum, I don't know.
15 I think we should read it and look at it, and you should offer
16 it. And see what arguments are made against it.

17 As far as authenticity, and others -- I guess
18 there is a reason you don't bring Mr. Wallace into it. I
19 don't know. I am sure you thought of that, the author of it.

20 MS. BERNABEI: I am sure he wouldn't remember it,
21 either. No one seems to remember this particular memorandum.

22 JUDGE SMITH: You mean you didn't ask the author
23 of it if he remembered it?

24 MR. BLAKE: No, we decided not to go to the
25 expense of a third deposition on the memorandum since two of

1 the recipients did not remember it.

2 JUDGE SMITH: I don't see how the Board can
3 rule. We don't see the memorandum. We don't know what these
4 documents are. I think we can rule that you have no reason
5 to believe Mr. Arnold would throw light on the memorandum.

6 MS. BERNABEI: What you are saying is that there
7 would be no objections as to authorship, which I would take
8 to be authenticity -- are overcome.

9 JUDGE SMITH: I don't think they could resist.
10 Arnold was recipient. You want him here so that, number one,
11 he could say that it came from his files, he received it, or
12 that it came from his files, I guess. So that is authenticity.
13 And I guess it is in a sense hearsay. Then you want him to say,
14 what?

15 MS. BERNABEI: That it is a document produced
16 in the normal course of business to overcome -- as a business
17 record such that we can overcome the hearsay exception. I think
18 he did testify in his deposition, he said "Yes, it appears to
19 have come to me in my normal course of business from Mr.
20 Wallace."

21 JUDGE SMITH: That it was found in Mr. Arnold's
22 files; is that it?

23 MS. BERNABEI: He doesn't know if it was found
24 in his files, but he did say it appears to be a record that
25 would come to him in the normal course of business, which I

1 think would overcome the -- it would be a hearsay exception to
2 overcome that objection.

3 JUDGE SMITH: I don't think you really have to
4 worry about hearsay in the sense that you are using this
5 document that is conceded to have come from the company's files.
6 You still may have problems with the document as to what probity
7 and force it has. I don't know. I think you are just going to
8 have to offer it. You haven't justified bringing Mr. Arnold
9 in view of that stipulation.

10 MS. BERNABEI: If Licensee will stipulate that
11 we will -- they will stipulate to the introduction of the
12 document, then we do not want to call Mr. Arnold on this point.

13 JUDGE SMITH: Will you stipulate to the introduction
14 of the document?

15 MR. BLAKE: No. It appears in Ms. Bernabei's
16 November 6th letter as one of a large variety of exhibits
17 which TMIA plans to introduce. And we are sorting our way
18 through those to develop our position. But I am not prepared
19 today to stipulate to the admissibility of this document.

20 I don't contest its authenticity as I have
21 indicated, Judge Smith. But I question its probative worth,
22 reliability, and what it is going to mean here to have that
23 document in without somebody to explain what in the world the
24 statements in it mean or what people had in their minds.
25 I can't stipulate to it today.

1 MS. BERNABEI: That is exactly why we have to have
2 Mr. Arnold, and maybe we even have to have Mr. Wallace to
3 indicate it is a business record. Therefore, it is reliable
4 and it is probative. And it is in fact what it purports to be.

5 I would agree that if Licensee would agree to its
6 admissibility, we wouldn't have this problem.

7 JUDGE SMITH: You are not prepared to stipulate
8 that the memorandum is a record except in the normal course
9 of business. Is that what your reservation is?

10 MS. BERNABEI: Can I have a moment, please?

11 JUDGE SMITH: Sure.

12 (Pause.)

13 MR. BLAKE: Judge Smith, I am not prepared to
14 stipulate that that is a normal business record, as I under-
15 stand that term. I am prepared to stipulate that the document
16 is authentic; that we found it in the company's files; that
17 we provided it to TMIA in the course of discovery.

18 JUDGE SMITH: And that it was sent by the author
19 and received by the recipient?

20 MR. BLAKE: I can't tell about receipt for sure.
21 But that it exists in the company's files, I think as Mr.
22 Arnold testified in his deposition, he would expect just by
23 looking at the document itself that he would have received a
24 copy.

25 JUDGE SMITH: So you will stipulate Mr. Wallace,

1 you will stipulate it came from the company's files. You will
2 stipulate, then, that Mr. Arnold has no memory of it but would
3 expect that it would have ended up in his files?

4 MR. BLAKE: That's correct.

5 JUDGE SMITH: Does that meet your purpose? Then,
6 having done that, is it not another item of evidence? Does it
7 not, is it not entitled to be received in evidence? Give it
8 another exhibit number and receive it in evidence. Assuming
9 it is relevant.

10 MR. BLAKE: Well, yes. Relative, material,
11 probative, reliable. Those are questions which I continue to
12 have about this document. I can't stipulate as to those
13 factors, Judge Smith.

14 JUDGE SMITH: Okay.

15 MS. BERNABEI: Let me just state, Mr. Blake's
16 objections again are going to reliability. It is -- the only
17 basis for that is the hearsay exception or, well, I think if
18 it is -- if it is within the business record exception or some-
19 thing he can challenge on cross-examination. That is the only
20 basis to disagree about its reliability.

21 Again, if there are no authenticity or hearsay
22 objections, it should be received in evidence subject to what-
23 ever examination either of the parties have to either its
24 credibility or denigrate --

25 JUDGE SMITH: I can envision an absolutely

1 authentic document where the author and recipient are positively
2 known, and it is dated and everything else, and it is relevant;
3 yet not perhaps be reliable. I don't know. I mean, we have
4 to apply all those tests.

5 In the meantime, I think that you have probably
6 thrown the ball into their court. You have a document which
7 on the face of it seems to be relevant to some of the issues
8 here. I am concerned about the late date of it. Why don't
9 you just bring it to the hearing? I don't know. I don't
10 see how the Board can just walk away from it. How about Mr.
11 Wallace, the author? I am surprised the day before the hearing
12 the author of the document has not been asked about it.

13 MS. BERNABEI: Let me just say why we haven't
14 gone to the expense of a third deposition. We have had two
15 depositions on this. Mr. Arnold apparently requested the
16 information in the memorandum. It is absolutely clear; this
17 idea that somehow it is a vague memorandum is incomprehensible.
18 It is very clear; was produced in the course of discovery.
19 He didn't remember anything about it.

20 Mr. Blake was deposed. Since he is cc. with
21 all attachments as a recipient. He didn't remember anything
22 about it. Or what he did; he claims privilege and couldn't
23 talk about it.

24 We have no reason to believe Mr. Wallace would know
25 anything more than the other two individuals.

1 JUDGE SMITH: He is the author, though. Authors
2 tend to know more about their product than -- why didn't you
3 put Wallace down here, or did you?

4 MS. BERNABEI: I don't think we have to.

5 JUDGE SMITH: I beg your pardon?

6 MS. BERNABEI: I don't think that -- I think the
7 recipient of a memorandum such as this can sponsor the document.

8 JUDGE SMITH: Except this one can't, apparently.

9 MS. BERNABEI: I think he can. I think it is a
10 business record.

11 JUDGE SMITH: Well, you want to have Mr. Wallace
12 come in and testify about it?

13 MS. BERNABEI: So he can say he doesn't remember
14 anything more than Mr. Arnold? I think we have adequate
15 information for Mr. Arnold to sponsor the document.

16 JUDGE SMITH: You offer the document in the course
17 of the hearing. You have already said Arnold testified, you
18 told us what he testified. I don't think they are disputing
19 if it comes down to this. You will agree to what Mr. Arnold
20 said about the document?

21 MR. BLAKE: Yes, sir.

22 JUDGE SMITH: This is very hard for the Board to
23 make these rulings; without seeing the document, understanding
24 how it fits into your case, without understanding why you
25 haven't even touched upon the author of it except to defer

1 expense. And in your use of it, your use of the business
2 document rule may gain you, perhaps, another exhibit.

3 But what you do with that exhibit may not be
4 very much. I don't know. I guess you will just have to bring
5 the document and we will see.

6 MS. BERNABEI: The other information we would
7 seek from Mr. Arnold which he did have some information on, if
8 my memory is correct is, who the preparers of the untitled
9 piece, that is, Mr. Gilbert, Mr. Rappert and Mr. Beryl.

10 Now if Licensee will stipulate as to who those
11 people were that prepared that piece, I think we will not have
12 any need to call Mr. Arnold.

13 MR. BLAKE: I think the reference is to one of the
14 enclosures to the Wallace memorandum, which was generated by
15 -- from reviewing the document, three individuals. I would have
16 no problem in indicating on the record what the title was of
17 the three people whose names appear in the document. That
18 doesn't strike me as a need to call Mr. Arnold, either.

19 MS. BERNABEI: If I could suggest --

20 JUDGE SMITH: Would you pull the microphone
21 way across the table and put it right in front of you?

22 (Pause.)

23 MS. BERNABEI: If I could suggest, perhaps what
24 we should do is give you an overview of the arguments we
25 intend to make. That is, our theory of the case.

1 JUDGE SMITH: All right.

2 MS. BERNABEI: I think otherwise, it is not going
3 to be clear to the Board. Why don't I give an overview. Then
4 maybe we can talk about the particular witnesses.

5 JUDGE SMITH: I think that is a good idea, but
6 I thought that is what we were doing and I thought we were
7 now at Overview Point No. 1. And that is, did anyone in the
8 control room, or did anyone on the day of the pressure spike
9 interpret it as core damage.

10 MS. BERNABEI: That's correct.

11 JUDGE SMITH: That is what you were offering
12 three witnesses; had down a fourth. We understood that.

13 Now you want to continue to the other elements of
14 your case?

15 MS. BERNABEI: Well, there are other witnesses
16 that have relevant information on this.

17 JUDGE SMITH: I will just let you do it any way
18 that you think is best.

19 MS. BERNABEI: Why don't I just provide you the
20 general outlines? Then we can go back to the first point.

21 JUDGE SMITH: All right.

22 MS. BERNABEI: The second point -- the first point
23 being where the statement was accurate in the Mailgram.

24 The second point which would be in our direct case, would be
25 that apparently a portion of the five GPU Service Corporation

1 individuals sent to the site on the first day of the accident
2 analyzed, sent to there to provide technical support to site
3 personnel and to analyze the transient, appear to have deter-
4 mined that there was another explosion in the containment.

5 The way we have determined this, and the relevant
6 information, comes from our knowledge of the admission of the
7 five GPU Corporation individuals, their reporting to the
8 Mr. Arnold, and it appears from the Keaten notes the fact they
9 reported to Mr. Keaten on March 29 that there had been another
10 explosion in containment.

11 We believe this, with prior testimony of Mr. Keaten
12 indicates Mr. Dieckamp may have known or been told by Mr. Keaten
13 of these engineers' conclusions which apparently were reached
14 on March 28 or early on March 29.

15 The sub-part of this argument is that these five
16 engineers who were located largely in the observation center on
17 March 28 were believed by site personnel at temperatures
18 of 2500 degrees Fahrenheit, apparently with the indication
19 that these temperatures were believed and were accurate.

20 I think this, together with the other information
21 that they had available to them, would support a conclusion
22 that they did in fact conclude that there had been a hydrogen
23 burn or explosion of the containment on March 28.

24 The third argument has to do with the responses
25 to TMIA's interrogatories. Specifically, 20 individuals who

1 responded that they had learned or become aware of a hydrogen
2 burn or explosion at TMI-2, on March 28, the first day of the
3 accident. We have proposed that a few of the individuals be
4 called as witnesses and that their questionnaires and any
5 supplemental responses and/or their depositions be introduced
6 for those other individuals who did not personally testify.

7 JUDGE SMITH: These would be representative of
8 that group?

9 MS. BERNABEI: Excuse me? That's right. What
10 we intended to do is have a couple witnesses who we think
11 would be representative of that group.

12 JUDGE SMITH: All right.

13 Would you want all five GPU service people to
14 testify?

15 MS. BERNABEI: What we proposed is four. Four
16 of the five, since they had different functions and they all
17 appeared to remember somewhat different parts of the story.

18 JUDGE SMITH: Their depositions will support your
19 theory of the case?

20 MS. BERNABEI: Yes. Some of the other witnesses
21 we have listed we would propose as rebuttal witnesses.
22 Specifically Mr. Crimmins, Mr. McConnell and Mr. McKee, and
23 portions of Mr. Abramovici and Mr. Creitz's testimony.
24 I assume we are not here to discuss that today.

25 JUDGE SMITH: Well, I don't know if that assumption

1 is correct. If you know now you have rebuttal witnesses, under
2 our scheme of case presentation, you are supposed to have
3 anticipatory rebuttal along with direct. It is only when
4 the need for rebuttal arises in the course of the testimony
5 to be rebutted that you plan for it.

6 If you know now, today, that you have rebuttal
7 evidence, now is the time to explain it.

8 MS. BERNABEI: Okay. We did list witnesses in our
9 letter. I can state and outline their proposed testimony.

10 First of all, Mr. Crimmins and Mr. Abramovici
11 at least in part would testify or appear to have relevant
12 evidence about a meeting on the afternoon of March 29, the
13 second day of the accident, at which the pressure spike was
14 discussed.

15 Mr. Abramovici -- testified that there was discus-
16 sion about production of hydrogen above the 4 percent contain-
17 ment design. I think that rebuts Mr. Lowe and Mr. Dieckamp's,
18 or Mr. Lowe's, primarily, testimony that the first time anyone
19 interpreted the pressure spike to indicate core damage or to
20 indicate hydrogen production was 11 o'clock on March 29.

21 JUDGE SMITH: You are stating this just to give
22 us the outline of your case?

23 MS. BERNABEI: Right.

24 JUDGE SMITH: When we get to the individual
25 witnesses you will be more precise?

1 JUDGE SMITH: Now, shall we continue with your
2 witnesses? Point One?

3 MS. BERNABEI: Sure.

4 JUDGE SMITH: Point one.

5 MS. BERNABEI: We propose Mr. Marshall.

6 JUDGE SMITH: Mr. Who?

7 MS. BERNABEI: Marshall.

8 JUDGE SMITH: Marshall?

9 MS. BERNABEI: Walter Marshall.

10 JUDGE SMITH: Okay.

11 MS. BERNABEI: He is --

12 JUDGE SMITH: Is there any reason why you are not
13 following your November 5 list?

14 MS. BERNABEI: I am doing it according to the
15 points in our theory of the case.

16 JUDGE SMITH: All right.

17 MS. BERNABEI: The first point being that there
18 were site personnel who interpreted the pressure spike to
19 indicate core damage on March 28. Mr. Marshall was a control
20 room operator and is familiar with the pressure spike, contain-
21 ment sprays. The chronology of events, late night of March
22 28, early morning March 28 from another operator which includes
23 the pressure spike containment spray actuation.

24 He also has testimony about Gary Miller's apparent
25 awareness --

1 JUDGE SMITH: Would you please put the microphone
2 over? And you, Ms. Doroshow, if you see her put it at the
3 other end of the table, you watch that microphone. We really
4 need it. It will save you a lot of strain, I think, if you
5 use it.

6 MS. BERNABEI: Okay, so that is Walter Marshall.

7 JUDGE SMITH: Walter Marshall, again, he is going
8 to tell about the accumulated data which data will reflect
9 the fact that there was a pressure spike and containment spray
10 actuation? He won't?

11 MS. BERNABEI: No. He has to do with people's
12 awareness in the control room including Gary Miller's awareness
13 of the pressure spike.

14 JUDGE SMITH: Does anybody dispute that?

15 MS. BERNABEI: Yes, Gary Miller says he did not
16 know about it.

17 JUDGE SMITH: About the pressure spike?

18 MS. BERNABEI: Right. At the time it occurred.

19 JUDGE SMITH: What do we say about Mr. Marshall,
20 gentlemen? There is another important part of it, though. He
21 doesn't have any information about who interpreted, the inter-
22 pretation of the pressure spike.

23 MS. BERNABEI: No one witness in this case has all
24 the information to prove the case. That's correct. He observed
25 the pressure spike in actuation, spray. He also, I can state,

1 also does have information about interpretation in that he
2 corroborates Mr. Chwastyk's testimony that Chwastyk ordered
3 certain checks as a result of the pressure spike. He said in
4 fact Chwastyk did order him to do certain checks. He corroborates
5 Mr. Chwastyk's testimony to that extent.

6 JUDGE SMITH: All right.

7 MS. BERNABEI: He also has testimony about the --

8 MR. BLAKE: Judge Smith, I would like to read out
9 of Mr. Marshall's deposition, at page 10:

10 "Did you at or near this time, this is in the time
11 frame of the spike, discuss the pressure spike or
12 the engineering safeguards with Gary Miller?"

13 Answer: "I remember Gary Miller being on the other
14 side of the console."

15 Question: "Are you talking about the back side?"

16 Answer: "The back side of the console."

17 Question: "This was the lefthand portion of the
18 console?"

19 Answer: "Yes, ma'am, I don't specifically remember
20 discussing the pressure spike with Gary."

21 Question: Do you know whether he was aware of
22 the pressure spike?"

23 Answer: "I don't know if he was or not."

24 MS. BERNABEI: Let me read some more.

25 Question: "Do you know whether he was aware

1 of any noise or sound that accompanied the pressure
2 spike?"

3 Answer: I remember Gary Miller saying, 'Did you
4 hear that?' to you? Not necessarily to me, but I
5 remember him saying that."

6 This is hardly new news, and Miller from
7 Day One has testified that he heard a noise. There was discus-
8 sion about it.

9 MR. BLAKE: Ms. Bernabei's representation that
10 Mr. Marshall will say Gary Miller was aware of the pressure
11 spike is a far cry from what this gentleman's transcript discloses.

12 MS. BERNABEI: No, that is not true, and that is not
13 what I said. I said that Mr. Marshall indicates that he thought
14 Mr. Miller probably heard about the containment sprays in the
15 position he was and that there was general awareness --

16 MR. BLAKE: The transcript speaks for itself.

17 MS. BERNABEI: Excuse me. There was general
18 awareness in the control room of the pressure spike, he would
19 assume, Mr. Miller being where he was behind the console from
20 him would indicate would have understood about the containment
21 spray, did hear the noise.

22 JUDGE SMITH: Do you have deposition support for
23 your last statement?

24 MS. BERNABEI: Yes.

25 JUDGE SMITH: So what he is saying is he doesn't

1 know but he would assume that was the case?

2 MS. BERNABEI: He says more than that. He says
3 he knows he heard the thud. From where he was --

4 JUDGE SMITH: That is conceded by Mr. Miller.
5 Mr. Marshall will add to what Mr. Blake read that from his
6 position, in the core control room, and apparently from his
7 hearing of the thud, Mr. Marshall would assume that Mr. Miller
8 was aware of the pressure spike.

9 But that he did not, does not know that to be the
10 case. Is that what his testimony --

11 MS. BERNABEI: I'm sorry, Judge Smith. I really
12 don't think we should be getting into arguing every particular
13 point. I think essentially what we are doing is arguing the
14 merits of our case.

15 JUDGE SMITH: What else can we do? We have to
16 either argue it now or up at Harrisburg. But if we argue
17 it up in Harrisburg, what is the difference? You want to
18 bring him in and start asking him questions. Then after you
19 begin to ask the questions, then for the first time we learn what
20 the theory of your presentation is.

21 This, I concede, is going to drag. But doing it
22 while the live witness sits there on the witness stand is even
23 a greater waste.

24 MS. BERNABEI: Let me find the part about the
25 containment sprays where he says he would assume -- at page 16.

1 I am asking him about, do you know -- starting at page 15,
2 line 23. We are talking about the containment sprays.
3 For instance, do you know if Gary Miller was aware of them,
4 meaning acuation of the containment sprays? Answer: I don't
5 remember. I am not sure if Gary Miller was aware of them.

6 How about Fredric Anfaust? I am asking you
7 today, have you had occasion to discuss this with Gary Miller
8 since that time. Answer: Line 10. "I probably have had
9 occasion to do that."

10 Question on line 12: Well, from those discussions
11 or anything in regard to after the accident, do you believe
12 Gary Miller knew about the -- acquisition, should be --
13 acquisition of the containment sprays? Answer: I think he
14 did.

15 Question: Why do you think that? Answer, Line 22:
16 Because I believe Gary was in the vicinity of the panel at the
17 time. The conversation that I remember having would have been
18 on one side of the panel with Gary on the other side of the
19 panel. That is my recollection.

20 Now, Mr. Miller says, and he said this in his
21 deposition, prior testimony, that he did not know about
22 actuation of the sprays.

23 JUDGE SMITH: Well, given the rest of his depo-
24 sition, the value of the proposed testimony of Mr. Marshall
25 is that in his view, based upon Gary Miller's position in the

1 control room, he should have known about the pressure spike.
2 Although his particular testimony on it is that he does not
3 know that that is the case.

4 MS. BERNABEI: We are talking about containment
5 sprays.

6 JUDGE SMITH: All right, containment sprays.
7 Well, you were also talking about thud, too, or noise?

8 MS. BERNABEI: Gary Miller says he heard the thud
9 but nothing else.

10 JUDGE SMITH: All right. Now you would have
11 Marshall testify that in his opinion, based upon the position
12 of the two people in the control room, he believes Miller
13 knew about the containment spray actuation, but that in another
14 part of his deposition, when faced with the direct question,
15 he says he does not know if he knew or not?

16 MS. BERNABEI: No. No. He says he doesn't know
17 about the pressure spike. He does, it would be his opinion
18 that he did know about containment sprays based on his
19 location.

20 I would say Mr. Marshall's testimony, the reason
21 we want Mr. Marshall is because this testimony is not in the
22 record. There are many other people who have given testimony
23 that would indicate Mr. Miller knew about the pressure spike.
24 I could be wrong, but I think it actually comes to the conclusion
25 that Gary Miller probably did know. So there is corroborative

1 evidence.

2 JUDGE SMITH: Could it not be stipulated that if
3 Mr. Marshall testified he would testify that based upon their
4 relative position in the control room it is his view that Gary
5 Miller would have known about the containment spray actuation?

6 Now is Gary Miller going to testify? Does anyone
7 object to his testimony?

8 MR. BLAKE: Judge Smith, I don't know what he is
9 being called to testify about at the moment, and I think I
10 should know particularly in view of his having been questioned
11 about this subject nine prior times. Those interviews of which
12 are in the record.

13 MS. BERNABEI: If you know, we did propose in
14 large part because of what Mr. Blake is stating, that parts
15 of his deposition in this case be introduced in lieu of his
16 testimony.

17 JUDGE SMITH: I am sorry?

18 MS. BERNABEI: Parts of his deposition in this
19 proceeding be introduced in lieu of his testimony, so I think
20 Mr. Blake knows those portions of the deposition. They largely
21 have to do with in-core temperatures.

22 JUDGE SMITH: Mr. Miller?

23 MS. BERNABEI: Mr. Miller, right.

24 JUDGE SMITH: Mr. Miller is one of the officials
25 at Three Mile Island, who because of his position as station

1 manager, that I had identified as being one of the people,
2 regardless of what he has testified before in depositions,
3 should make an eyeball appearance before the Board and say
4 what he knows. He apparently was a conduit of information.

5 As station manager, he was a logical person to be
6 a conduit of information. He is one of the people that should
7 appear and explain what his perceptions were that day.

8 Given that, I see no need to bring Marshall in.
9 It seems to me that the basis for Marshall's conclusion that
10 Miller knew or didn't know something as compared to Miller's
11 physical presence in the hearing room is something that certainly
12 can be stipulated. I just don't believe Marshall's inferences
13 drawn from their relative positions is sufficient for you to
14 have to call him as a rebuttal witness, or to be a part of your
15 case in chief.

16 MS. BERNABEI: I would say there are other
17 portions. I don't have any problem with that. There are other
18 portions of his deposition testimony I think are relevant.

19 One, that he was ordered by Mr. Chwastyk to do
20 a check after the pressure spike, which corroborates Mr.
21 Chwastyk's testimony that he took significant actions after
22 the pressure spike occurred. And two --

23 JUDGE SMITH: Well, that seems to me to be
24 cumulative.

25 MS. BERNABEI: Okay. Well, the Licensee's position

1 I assume on this will be, as it has been in the prior
2 investigations, that Mr. Chwastyk did not in fact order checks
3 and that his testimony is that after the pressure spike, he
4 requested and obtained permission from Gary Miller to repres-
5 surize; that is, straining the strategy to bring the reactor
6 to stable condition.

7 He also said that he ordered people as the shift
8 supervisor to do certain checks. Licensee's position, and
9 I think it is in new Reg 7760, as well, is that there is not
10 a record of those checks. I think there is and I think there
11 is testimony to that effect. I think it corroborates Mr.
12 Chwastyk's testimony that he took major actions in response
13 to the pressure spike which in turn corroborates his story that
14 people understood it.

15 JUDGE SMITH: That his actions are consistent
16 with an understanding that the pressure spike was real?

17 MS. BERNABEI: That's correct.

18 JUDGE SMITH: And only that?

19 MS. BERNABEI: That's correct.

20 JUDGE SMITH: Not that the pressure spike was
21 indication of hydrogen burn or core damage, just that it was
22 real?

23 MS. BERNABEI: No, Chwastyk's testimony, which I
24 think comes out most clearly in his deposition, was that he
25 believed the pressure spike indicated the production of

1 hydrogen and in his mind he understood that that would mean
2 core damage. And that also he convinced Gary Miller to change
3 his strategy to bring the reactor to a stable condition; from
4 a depressurization strategy then being deployed to a repressuri-
5 zation.

6 He also said he ordered certain checks.

7 JUDGE SMITH: Chwastyk did?

8 MS. BERNABEI: Yes.

9 JUDGE SMITH: He is going to testify?

10 MS. BERNABEI: Right, but this corroborates his
11 testimony which I believe Licensee will refute. I think we --
12 we don't think Gary Miller is going to be telling -- we think
13 that he will not -- he will be telling a different story. We
14 think we have the right to call witnesses to corroborate our
15 theory of the case.

16 JUDGE SMITH: Mr. Blake? I guess I am not sure
17 what I am being asked to react to at this juncture. In reviewing
18 Mr. Marshall's deposition here, again, Mr. Marshall did not
19 testify Mr. Chwastyk directed him to make the checks. And I
20 refer you specifically to pages 7, 8, 9 in that time frame as
21 you thumb through the transcript.

22 He said that he saw the indication and as a result
23 of it, checked to see whether or not there were other indications
24 that they had had a rupture of some sort, which could have
25 caused the pressure -- checked portions of the panel to see if---

1 he looked at the water level in storage tank. Storage tank
2 levels to see if there will be a main coolant rupture or steam
3 rupture. What did he find? He found no other indications.
4 And came back and said that to Chwastyk.

5 He was asked again, did Chwastyk direct you to do
6 these checks? He said, I don't remember. I don't know what
7 this is worth or why there is a need for Marshall to come for
8 these purposes.

9 MS. BERNABEI: On page 8 it continues: Did you
10 report back your findings to anyone. Yes, ma'am, I did. Who
11 was that? Chwastyk.

12 Who was the shift supervisor at the time?

13 Yes, ma'am, I believe so.

14 He says he doesn't remember if Chwastyk gave him
15 the direction but he reported back to him.

16 There is, and you know I understand that the
17 Board has not yet read all the testimony given in the proceeding
18 at this point. I am talking now about all the interviews
19 from the investigations. But there is a controversy over
20 whether Mr. Chwastyk took actions as a result of the
21 pressure spike. And I think --

22 JUDGE SMITH: Well, but didn't you just before
23 Mr. Blake started reading in the transcript, didn't you
24 represent to the Board that Marshall would testify to something
25 different? In response to my question, you stated that

1 Chwastyk told Marshall to take certain actions which were
2 consistent with the interpretation of a real pressure spike.

3 And now, I don't know if that representation holds
4 up. Now, you seem to be centering on well, he reported back to
5 Chwastyk.

6 MS. BERNABEI: I stand corrected. Mr. Chwastyk
7 didn't correct him. He said he couldn't if Chwastyk directed
8 '...; however, he did report his findings to Chwastyk.

9 JUDGE SMITH: Really, I wish you would be very
10 careful in what you represent to the Board that you wish us to
11 subpoena or call a witness for. This is not discovery. This
12 is the presentation of your case. And you are asking leave
13 of the Board to bring witnesses to the hearing room in support
14 of your case.

15 Now, it is very important that you be accurate
16 in your representations.

17 MS. BERNABEI: This is a corroboration of
18 Chwastyk's story that there were checks, that he ordered checks
19 and there were checks taken as a result of the pressure spike.
20 Whether he directed, whether Mr. Marshall remembers whether
21 he directed, it is a corroboration that checks were made
22 which corroborates Chwastyk's story.

23 JUDGE SMITH: Relevance is too remote. We are
24 not going to hear from Mr. Marshall on that basis.

25 MS. BERNABEI: Would you also want his testimony

1 with regard to location of the chart recorders in the control
2 room?

3 JUDGE SMITH: I don't know. I have no idea.

4 MR. BLAKE: I can certainly stipulate to the
5 location of the chart records in the control room.

6 JUDGE SMITH: I think that Judge Linenberger would
7 be interested in that. He has indicated that if the testimony
8 is going to go in that direction, he would like to have
9 a reliable picture of the -- where the recorders are located,
10 and also if we get into it, I don't know the extent we are, but
11 he would like to have a better indication of the thermocouple
12 functions and what they monitor.

13 I am not sure if he wants the physical locations
14 of the readouts. But I think he would like to have a better
15 indication of their functions.

16 With that stipulation, I don't see any need for
17 Mr. Marshall's testimony.

18 MS. BERNABEI: Am I correct, the stipulation is
19 to that portion of the deposition which addresses Gary Miller's
20 awareness of the pressure, of the containment sprays and
21 pressure spike?

22 JUDGE SMITH: I would see no objection to a stipu-
23 lation, given Miller's presence and opportunity for cross-
24 examination and Board questions; I would see no objection as
25 far as the Board is concerned by a stipulation that, were

1 Marshall called as a witness he would testify that, in his
2 view, given their physical locations, he believed Miller knew
3 whatever it is he thinks he knows. Then, of course, if you
4 stipulated that, you certainly would have to stipulate the
5 points you read from his testimony.

6 Does that make sense? I might say, we don't want
7 to get into the merits of it; but you are not describing
8 red hot testimony on the part of Miller. His inference, based
9 upon where people stand and what they thought is not as strong
10 as you must think it is.

11 MS. BERNABEI: Oh, there is a lot of testimony
12 in the record to the cumulative effect which I think leads
13 one to conclude Mr. Miller knew.

14 JUDGE SMITH: All right.

15 MS. BERNABEI: Again, the Board is not familiar
16 with the numerous interviews. I can be corrected. I think
17 Rogovin does come to the conclusion Miller knew about the
18 pressure spike. It is not based on Miller's admission of
19 that. It is based on other people's saying he must have known
20 by being in the control room.

21 JUDGE SMITH: Okay.

22 MS. BERNABEI: Or I told him or I showed him.
23 It is not based on Mr. Miller's credible --

24 JUDGE SMITH: Let's get some of this, I showed him,
25 told him, from the witnesses.

1 MS. BERNABEI: Well, we have got some.

2 JUDGE SMITH: Would that be a satisfactory stipu-
3 lation, Mr. Blake?

4 MR. BLAKE: Yes. I think -- I will have to review
5 the specific portions of the Marshall deposition in order to
6 come up with a proposal to Ms. Bernabei on that. I think we
7 should report back.

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1 JUDGE SMITH: You are going to stipulate as to the
2 location of the recorder's thermocouple functions; thermo-
3 couple functions with respect to inferences of core damage,
4 or thermocouple functions with respect to inferences of core
5 condition.

6 Ms. Bernabei?

7 MS. BERNABEI: One additional point on Marshall.
8 There is a portion of the response to his questionnaire, which
9 I can't recount right now, that was information that I
10 remembered was not included within any of the prior testimony,
11 his prior testimony. It was one answer to his questionnaire.
12 I don't know if we want to address that with regard to Mr.
13 Marshall.

14 We consider the responses of the individuals to
15 the GPU questionnaire to be GPU's response to interrogatories,
16 and as such, information which if the Board finds relevant
17 should be introduced.

18 This was specifically in response to a question
19 about awareness of the pressure spike containment sprays,
20 direction not to activate equipment. It was one portion of
21 the answer I remember was not included within his prior
22 testimony and, therefore, is not in the record for the
23 stipulation.

24 So I would also request that that be included in
25 any stipulation between the parties.

2
1 JUDGE SMITH: But you don't remember what it is?

2 MS. BERNABEI: We dcn't have it here.

3 JUDGE SMITH: Well, of course there is no way for
4 us to rule on that, is there? Is there something I am
5 overlooking?

6 MS. BERNABEI: Yes. If he is not here as a live
7 witness, the only way we can introduce testimony is through
8 some kind of stipulation or through the interrogatory
9 response.

10 JUDGE SMITH: Well, the fact is you haven't given
11 us any reason to compel the attendance of Mr. Marshall.
12 We can certainly not order him to appear based upon your
13 representation that he has information the significance of
14 which you have forgot.

15 MS. BERNABEI: I didn't say that. I did not come
16 here ready to prove our case, and I am saying this Board
17 does not have the authority to force us to do that at this
18 point.

19 JUDGE SMITH: I think we have authority, which we
20 are exercising, for you to justify why you want us to order
21 appearances of all these witnesses.

22 MS. BERNABEI: What you are saying here is that
23 we have to produce today every single piece of documentary --

24 JUDGE SMITH: I am saying with respect to Walter
25 Marshall we cannot order his appearance based upon your

3
1 representation that he possesses some relevant information
2 which you have forgotten.

3 MS. BERNABEI: That was not my representation. My
4 representation was there was a relevant piece of information
5 in his questionnaire which we did not forget. We did not
6 bring it today because we did not feel we had the burden to
7 prove our case before two of the three members of the Board
8 at this time prior to the hearing.

9 JUDGE SMITH: Whatever you are saying to the Board,
10 you have not demonstrated a basis upon which we can order his
11 appearance to the hearing.

12 MS. BERNABEI: Then I would reserve the right to
13 bring this point up at another time.

14 JUDGE SMITH: If you represent that you were caught
15 by surprise, you can't do it, all right, that is fine. You
16 know, if you made a good faith effort to come here and
17 response and forgot something or didn't bring it, yes,
18 certainly. We don't want to foreclose. If you made a
19 mistake, fine. Just bring it up again.

20 But you certainly haven't told us now any basis
21 to bring it. You have to recognize that, don't you, Ms.
22 Bernabei? Don't you recognize that?

23 MS. BERNABEI: I'm afraid I don't, Judge Smith.
24 Our position is we did not come here today prepared, and
25 we don't think we have the need to come here today to prove

4
1 our case. That is, each portion of the deposition for which
2 we want witnesses.

3 We think a general showing of relevance, probitive
4 information is all we need. But the requirement you are
5 posing on us with regard to Mr. Marshall and the other
6 witnesses goes beyond what we need to do prior to the
7 hearing. I mean it is just basic disagreement.

8 JUDGE SMITH: Am I misunderstanding, or are you
9 not asking this Board that someplace in the hearing, probably
10 next week, you want a list of some 40 people? You want people,
11 some 40 people on a list to begin to appear at our hearing
12 and testify? Isn't that why we are here?

13 MS. BERNABEI: Again, the burden that this Board
14 is requiring of TMIA is different than the burden you have a
15 right to impose. That is, that we prove our case through
16 citation of specific deposition testimony and specific
17 documents.

18 We are going through every piece of evidence we
19 have in this case. I don't think we are required to do that,
20 for this Board to require attendance of adverse witnesses,
21 and we didn't come prepared to do that.

22 Obviously we were given less than 24 hours notice
23 that we would have to do this.

24 JUDGE SMITH: You were naive to believe -- no,
25 you were not naive. You were told at prehearing conference

5
1 over a week ago. Certainly you must understand the Board is
2 not going to listen to 40 or 50 witnesses. You are
3 experienced in these hearings. You know better than that.

4 You are asking this Board to use its authority to
5 bring these people to a hearing. All we are doing is giving
6 you a very good opportunity to justify that request. And
7 you have not done it with respect to Mr. Marshall.

8 Now, would you move on to your next one, please?

9 MS. BERNABEI: Taken as a group, Kunder, Ross and
10 Herbein, all three have relative testimony as to how the
11 repressurization strategy was implemented on the afternoon
12 of March 28. This corroborates Mr. Chwastyk's testimony
13 that as a result of the pressure spike he sought and received
14 permission from Gary Miller to repressurize.

15 JUDGE SMITH: Kunder was present. He was
16 Superintendent of Technical Support. He would testify as to
17 repressurization strategy.

18 I don't quite understand the significance of that.
19 I have heard you refer to it in the discovery. But first,
20 do you object to the appearance of Mr. Kunder?

21 MS. BERNABEI: I think it is better if we take the
22 three together, as a whole, since that is the general area
23 of their testimony.

24 JUDGE SMITH: You may have that facility, but I
25 have to -- I want to know first who they are, and it is

6
1 helpful to me.

2 Do you object to the appearance of Mr. Kunder?

3 MR. BLAKE: All I've heard is a reference to
4 Mr. Kunder's being able to testify about the repressurization
5 strategy. I don't know that it is not duplicative and
6 cumulative of what Mr. Kunder previously has testified.

7 I would like to be pointed to what would require that
8 witness' appearance now in view of the stipulated evidence
9 that we already are willing to put into the hearing.

10 MS. BERNABEI: He was one of the witnesses whose
11 deposition testimony we requested be stipulated to. We are
12 not prepared to point to precise pages since we have already
13 provided those to Mr. Blake.

14 If he could refer to his references, there is within
15 that a description of Mr. Kunder's knowledge about
16 repressurization, which we believe is relevant. The same goes
17 for Mr. Ross and Mr. Herbein.

18 MR. BLAKE: My question remains the same.

19 JUDGE SMITH: First, what is the significance of
20 the repressurization strategy?

21 MS. BERNABEI: Okay. Mr. Chwastyk's testimony,
22 and I'll go over this again and again because we think the
23 facts of the case support it, was that the pressure spike
24 occurred at 1:50 p.m. At that point the plant was in a
25 depressurization mode. Mr. Chwastyk, shift supervisor, as

7
1 well as every one in the control room, a large portion of
2 people in the control room saw the pressure spike, were
3 alarmed by it, did certain checks as a result of it.

4 Mr. Chwastyk's testimony is that he then, he
5 sent somebody back, first of all, to tell Gary Miller about
6 it. He then, himself, went and found Gary Miller in the
7 shift supervisor's office, brought him out to see the pressure
8 spike, and at that point convinced him to change his
9 strategy to bring the reactor to a stable condition; that is,
10 to repressurization strategy.

11 He said that because he realized the significance
12 of the pressure spike in terms of the hydrogen burn.

13 The industry study of the accident done by the
14 National Safety Analysis Center supports Mr. Chwastyk's
15 testimony that repressurization was begun in this period of
16 time. Approximately in the 2:30-3:00 o'clock time frame.

17 In addition, notes taken, which have been entered
18 into evidence in the stipulation from one of the operators,
19 Mr. McGovern, indicate that, in fact, repressurization was
20 started about 2:30. That is I think corroborative evidence
21 that people understood what the pressure spike meant and
22 they took serious actions regarding the reactor as a result of
23 the pressure spike.

24 JUDGE SMITH: I don't know what this physical
25 relationship between the repressurization strategy and the

8
1 perception of a pressure spike is.

2 MS. BERNABEI: Mr. Chwastyk will testify that he
3 understood that they were not getting circulation in the core,
4 or his understanding was that they were not getting adequate
5 cooling and therefore that they wanted to repressurize.

6 The licensee's position has always been that this
7 occurred much later in the afternoon. At various times it's
8 been suggested it occurred at the time Mr. Miller returned
9 to the site from the Lieutenant Governor's office.

10 If it occurred, as we think the record shows, when
11 Mr. Chwastyk said it occurred, shortly after the pressure
12 spike, and was done as a result of the pressure spike, I
13 think that is probitive of a serious understanding of the
14 significance of the pressure spike at the time it occurred.

15 JUDGE SMITH: You leap from pressure spike to
16 repressurization strategy with an ease that assumes you know
17 more about it. At least the two members of this Board knows
18 more about it than you do. There are several necessary
19 connecting concepts.

20 MS. BERNABEI: My understanding -- I can be
21 corrected certainly by those who have better technical
22 expertise than myself. My understanding is that the concern
23 was the core was not being adequately cooled in the method
24 they were then deploying, and that there was not adequate
25 circulation. And that is why they changed -- and that was

9
1 concluded in part because of the pressure spike.

2 Mr. Chwastyk testifies he had some concern before
3 but that demonstrated to him the situation was very serious
4 indeed, and he convinced Bary Miller to change his strategy
5 at that point.

6 This is the basis, I think, what actually happened
7 at TMI 2 supports Chwastyk's testimony that people understood
8 the pressure spike. And it does not support --

9 JUDGE SMITH: They understood that it was a
10 pressure spike, or that they understood it was a pressure
11 spike and interpreted it as core damage?

12 MS. BERNABEI: They understood it to indicate the
13 production of hydrogen, which means core damage.

14 JUDGE SMITH: They understood that?

15 MS. BERNABEI: That's right.

16 JUDGE SMITH: Which means, who is saying which --

17 JUDGE WOLFE: Chwastyk.

18 JUDGE SMITH: He is saying that. Now, you want to
19 corroborate his testimony by the testimony of Kunder,
20 Herbein and Ross to the effect that repressurization strategy
21 was employed. And I don't understand it. And you say, well,
22 repressurization strategy indicates that they were aware of
23 inadequate core cooling.

24 MS. BERNABEI: No.

25 JUDGE SMITH: I thought you said that.

10 1 MS. BERNABEI: What I said is that Chwastyk will
2 testify, as he did in his deposition, "I drug Gary Miller out
3 to the console to see the pressure spike. I used that as a
4 way to allow -- convince him to allow me to repressurize."

5 Okay. That was in fact done in that time period,
6 the 2:30-3:00 o'clock time frame, repressurization. That is
7 an indication of how Mr. Chwastyk and everybody else at that
8 site, at least Gary Miller, understood the pressure spike.
9 That they understood it to indicate a serious enough situation
10 that the core was not being cooled such that they had to change
11 strategy in order to get the reactor to stay --

12 JUDGE SMITH: So you're saying they inferred
13 hydrogen as being a product of insufficient core cooling?

14 MS. BERNABEI: No. As a result of the pressure
15 spike. Let me just go through it once again.

16 The pressure spike indicated production of
17 hydrogen, which can only be produced when temperatures
18 reach a point that there was a zirconium steam reaction. The
19 amount of hydrogen to produce a spike in a hydrogen burn or
20 explosion could only be created if there were zirconium
21 steam reaction. Chwastyk understood that.

22 He says Miller understood it. When he understood
23 that was the case, that there had been a hydrogen burn or
24 explosion, they changed the strategy bringing the reactor
25 under control, because they understood the core was not

11 1 being adequately cooled in the depressurization mode.

2 JUDGE SMITH: All right. So let me see if I
3 can state it, then. They go for a pressurization strategy
4 because they inferred inadequate core cooling. They inferred
5 inadequate core cooling from a pressure spike. The way to
6 infer inadequate core cooling from a pressure spike is to
7 confer production and combustion of hydrogen. Is that correct?

8 MS. BERNABEI: That's correct.

9 JUDGE SMITH: Mr. Blake?

10 MR. BLAKE: I keep going back to what -- we are
11 talking here about Herbein, Ross and Kunder. It will be
12 absolute news to me, despite the interviews, including
13 depositions of each of those people which Ms. Bernabei
14 has conducted, that they would testify to anything approaching
15 what she has just characterized.

16 JUDGE SMITH: Is that true?

17 MS. BERNABEI: What they testified to is that --
18 Herbein, again you have to take it from what is in the record
19 thus far. It is cumulative -- not cumulative, has to be
20 added to the licensee's position at this point. I'm talking
21 about this point in the record.

22 The licensee's position is that repressurization
23 did not begin until sometime in the late afternoon or early
24 evening with the start-up of a reactor coolant pump. I think
25 they talk about increasing HPI at 5:30 or 6:00, 6:20, and

12 1 restarting the reactor coolant pump at 7:30 in the evening.
2 That is their position.

3 We say it started when Chwastyk said it started,
4 shortly after the pressure spike.

5 The testimony of all these three gentlemen, the
6 reason I'm taking them as a group, is that site personnel
7 may have taken steps to repressurize prior to orders
8 filtering down from Arnold and Herbein to repressurize later
9 in the afternoon.

10 Arnold and Herbein's story in the record is that
11 they directed or ordered repressurization in the late
12 afternoon. What all these three have testified in their
13 depositions is that it may have been started by site personnel
14 earlier.

15 In fact, Ross is the clearest on this. He suggests--
16 not even in response to a direct question -- he suggests
17 site personnel before the orders came down from Parsippany
18 were already repressurizing. That supports Chwastyk's
19 testimony that they were repressurizing as a result of the
20 pressure spike and not as a result of an order from Herbein
21 or Arnold.

22 JUDGE SMITH: I think their proposed testimony
23 just became one step more removed than I had understood it
24 to be.

25 MS. BERNABEI: They testified about

13
1 repressurization, and I think their testimony together with
2 what is in the record indicates repressurization began first
3 with the site personnel before the orders in the late
4 afternoon.

5 JUDGE SMITH: So aren't you saying that Herbein
6 and Ross do not rule out the possibility that repressurization
7 took place earlier?

8 MS. BERNABEI: No. Ross is very direct.

9 JUDGE SMITH: All right.

10 Is that correct, Mr. Blake?

11 MR. BLAKE: I'm having a hard time jumping from
12 one to the next. I will have to check Ross. I need to check
13 each of these characterizations of individual's testimony
14 or deposition. But I stand on what I earlier said. That I
15 would be shocked to now have Kunder, Mr. Ross, Mr. Herbein,
16 testify that they embarked on a repressurization strategy
17 in view of the pressure spike or indications of learning
18 from the pressure spike that Mr. Chwastyk imparted to them
19 or that they developed themselves.

20 It just isn't there despite all of their --

21 MS. BERNABEI: That is not what I said. I said
22 that is our case. What Mr. Blake is misrepresenting what I
23 said.

24 What I said is those three gentlemen's testimony
25 supports the theory that site personnel started

14
1 repressurization before the orders came from Arnold and
2 Herbein, which is licensee's position in this case.

3 I did not say they said we started to pressurize
4 as a result of the pressure spike.

5 JUDGE SMITH: Didn't you say repressurization
6 could be demonstrated by objective chart strips, or something?

7 MS. BERNABEI: That's correct.

8 JUDGE SMITH: Then what do you need Ross for?

9 MS. BERNABEI: Because Ross counters the company's
10 theory. I believe he was assistant director, director,
11 chief of operations. He counters the licensee's theory
12 that Herbein and Arnold ordered it late in the afternoon.

13 Ross says, "I think it is possible that the site
14 personnel were in fact repressuring prior to those orders,"
15 or taking steps in that direction. There is objective
16 evidence.

17 JUDGE SMITH: Why is not the objective evidence
18 sufficient?

19 MS. BERNABEI: Because licensee is going to say
20 the objective evidence doesn't indicate that, I assume.

21 JUDGE SMITH: All right. Is that correct? Do
22 you have a theory as to when repressurization actually began?

23 MR. BLAKE: Yes. Late afternoon. I can't give
24 precisely the times, but there is a whole of a lot of
25 objective evidence on this. We have stipulated in NUREG 0760,

15
1 the NSAC report.

2 These are all charts developed not from what people
3 said, but from data. When did the pumps start? When did
4 they put water in? Let me ask Dr. Zebrowski when he appears
5 next week. He is one of the authors of the NSAC report
6 about the repressurization strategy and whether or not the
7 objective evidence indicates that.

8 JUDGE SMITH: I think, as the evidence unfolds
9 in this case, if you can walk up to the Board and say, all
10 right, look: here is what Mr. Ross said about this, and
11 it is consistent with this testimony, then maybe we will
12 bring Ross in, or whatever it is.

13 But every time we seem to have a point established
14 it goes sliding off to another point. The most we have right
15 now, as I understand it, Ross would testify that it is
16 possible they could have ordered repressurization earlier.

17 When they ordered repressurization is ascertainable,
18 definitely ascertainable, is it not?

19 MS. BERNABEI: No. They claim NSAC doesn't read
20 what it reads. They claim when NSAC, which is the industry
21 study of the accident, says repressurization began at 3:08,
22 the licensee contends that is not true. They are going
23 through some definition of NSAC which makes that not true.
24 We have a right to call witnesses which says it is true.

25 JUDGE SMITH: I think you are talking now about

16
1 what could very well be a legitimate rebuttal. If it
2 develops as you say, that repressurization permits the
3 inference of -- I forget how that chain goes, but permits
4 the inference of the chain of hydrogen combustion and hydrogen
5 production and core overheating; if, as you say, that comes
6 out to be the case and if, as you say, they fudge the
7 objective evidence and if, as you say, you can demonstrate
8 to the Board that you have deposition or discovery evidence
9 which commands a rebuttal, then I believe you could bring
10 it to the Board's attention. Then if necessary, we will
11 look at it and see what we need. Right now I think we have
12 to predict too much.

13 MS. BERNABEI: We don't have to predict --

14 JUDGE SMITH: I'm giving you exactly what you need.
15 You're asking to be relieved of the need here today, this
16 afternoon, to justify the appearance of your witnesses. I
17 am saying we will do what you want. I am saying we will
18 look at your argument at the time.

19 MS. BERNABEI: This is our direct case. The
20 direct case is that they did order repressurization. Licensee
21 can be expected to argue it didn't occur at this time. I
22 think we have a responsibility and the right to present the
23 best direct case --

24 JUDGE SMITH: You are presenting --

25 MS. BERNABEI: That site personnel is agreeing

17

1 with us.

2 JUDGE SMITH: That what?

3 MS. BERNABEI: That site personnel is agreeing as
4 to the time of repressurization.

5 JUDGE SMITH: But you're saying we should not
6 judge the softness of Mr. Ross' testimony. Is that what
7 you're saying?

8 MS. BERNABEI: That's right.

9 JUDGE SMITH: In view of the objective testimony.
10 I forget. What does Herbein say about this?

11 MS. BERNABEI: He now says he doesn't know when
12 repressurization began.

13 JUDGE SMITH: So what possible value would his
14 testimony have then?

15 MS. BERNABEI: It conflicts, his statement -- he
16 doesn't have any idea and says he never knew. It seems that
17 contradicts prior testimony he has in the record in this
18 case.

19 JUDGE SMITH: I see.

20 A different matter now. You introduce a new note.
21 That makes it very difficult. You were talking about Herbein
22 as coming in as testimony in corroboration or refutation.
23 You most certainly said that you wanted those three men to be
24 considered as a group.

25 MS. BERNABEI: That's right.

18

1 JUDGE SMITH: And that the relevance of their
2 testimony was to support Chwastyk's view that repressurization
3 was brought about by his recognition of pressure spike
4 and his assistance of that recognition by Gary Miller, and
5 they indeed employ a repressurization strategy, and these
6 three guys knew about it. That is what you're saying.

7 All right. First you read a very, very soft
8 statement by Ross.

9 MS. BERNABEI: No, no, no.

10 JUDGE SMITH: Now, you tell me about Herbein
11 saying to the contrary.

12 MS. BERNABEI: No. I think you misstated what I
13 said. What I said is that there is testimony in these
14 individual's depositions that indicate the repressurization
15 took place when Chwastyk said it did. Not that it took place
16 as a result of the pressure spike. That repressurization
17 took place in the 2:30 to 3:08 time frame.

18 There is testimony they gave in their depositions
19 that would indicate that. And that is contrary to licensee's
20 position up to this point.

21 JUDGE SMITH: And as part of your case-in-chief
22 Herbein will say he doesn't know anything?

23 MS. BERNABEI: That he didn't in the past know
24 when repressurization started, that's correct.

25 JUDGE SMITH: I don't see how that helps your case.

19 1 MS. BERNABEI: Because it discredits the licensee's
2 position that Herbein ordered --

3 JUDGE SMITH: I see. That tends to be rebuttal,
4 doesn't it?

5 How about Kunder?

6 MS. BERNABEI: Give me a moment.

7 (Pause.)

8 MS. BERNABEI: Mr. Kunder testified that he doesn't
9 know -- on page 6 of his deposition -- he doesn't know who
10 made the decision to repressurize. He can't remember how he
11 learned about it. He was asked about prior testimony,
12 saying Herbein and senior people were involved in a decision
13 to repressurize. That is his prior Senate testimony. He
14 basically says he doesn't really know about that testimony.

15 He says he has no reason to doubt it, but he
16 doesn't really know about orders to Gary Miller.

17 JUDGE SMITH: All right. That is not very good
18 for you.

19 MS. BERNABEI: It substantiates Herbein's
20 testimony that neither one, neither one of the prior testimony
21 of those gentlemen is credible as to the licensee's position
22 that Herbein and Arnold ordered repressurization.

23 JUDGE SMITH: Do you agree, Mr. Blake?

24 MR. BLAKE: No, I don't agree at all.

25 Judge Smith, I propose the following: The Board

20
1 should understand that even Mr. Chwastyk, in the course of
2 his deposition, testified to things like he doesn't recall
3 telling Miller whether or not there had been an explosion,
4 or hydrogen explosion, page 28. Page 29, he didn't talk
5 to Miller about core damage.

6 The whole starting point here is remarkable, and
7 to add to it these other inferences, I just don't know. I
8 make the following proposal.

9 MS. BERNABEI: This is really not -- let me just
10 counter what Mr. Blake said. What Mr. Chwastyk said is he
11 dragged Gary Miller out to the console to look at the pressure
12 spike. He knew it was a hydrogen explosion and understood.--
13 Gary Miller understood that. Okay.

14 He gives Mr. Miller the credit of his credentials
15 and his knowledge. And he says that he convinced Gary Miller
16 on the basis of their discussions to change his strategy for
17 the reactor.

18 For Mr. Blake to say, well, he doesn't remember
19 whether he talked about it explicitly, the whole premise of
20 his testimony is that he understood what the pressure spike
21 meant, Gary Miller understood, and they took serious action
22 on the first day of the accident.

23 To suggest they didn't discuss it specifically
24 and therefore there is no basis to the testimony, is really
25 beyond argument.

21

1 MR. BLAKE: We're going to hear from Mr. Chwastyk.

2 JUDGE SMITH: Yes, and I think we should also
3 hear from Mr. Herbein as a general witness. He will be
4 examined as a general witness. He was, in our view, a main
5 conduit of information; and if information was transmitted,
6 it may have been through him. He will be made available
7 for Board questions, and we will just ask him, generally,
8 was he aware of pressure spike, and we will ask him the
9 basic questions.

10 This is under the Appeal Board's mandate to us to
11 ask the people who were in a position to know, and I identify
12 him as one of the people who would have been in a position
13 to know.

14 With respect to Kunder and Ross, you haven't said
15 anything. If later on the case turns out the way you
16 represent it to be, you can ask the Board for leave to call
17 them as rebuttal people.

18 MS. BERNABEI: So you are refusing to allow us to
19 call Ross as to when repressurization took place; is that
20 correct?

21 JUDGE SMITH: Based upon your representation, yes.

22 MS. BERNABEI: Ross corroborates Chwastyk's
23 testimony, as part of our direct case.

24 JUDGE SMITH: I am going to tell you that you can
25 renew your motion with respect to Ross as the case unfolds

22
1 and we understand it better. Whether it be as an augment to
2 your case in chief or as a rebuttal, we don't close any doors.
3 As we understand the case better, the need for his testimony
4 may become more or less evident. It really is a deferral
5 ruling.

6 MS. BERNABEI: Fine.

7 MR. BLAKE: In this regard, Mr. Smith, and since
8 there have been characterizations made by licensee's
9 anticipated fudging with objective evidence, I encourage
10 Ms. Bernabei, and I'm going to argue that she did not take
11 advantage of the opportunity if she does not, to question
12 one of the authors of NSAC and the sequence of events upon
13 which she indicates they would rely about the repressurization
14 business from the objective evidence.

15 Dr. Zebrowski has indicated to Ms. Bernabei that
16 NSAC's approach to understanding the Three Mile Island
17 accident was not, not to interview operators and get involved
18 in what people knew or now say that they knew or didn't of
19 what was going on, but rather to go from the objective
20 evidence.

21 Dr. Zebrowski will be there this week, and I
22 encourage exploration of this repressurization business
23 from the objective evidence. And if Ms. Bernabei does
24 not question Dr. Zebrowski and later seeks to bring in Mr.
25 Kunder, Mr. Ross or others to talk about it, I'll -- that

23
1 will be one of my grounds for my opposing it.

2 We ought to get the facts out here.

3 MS. BERNABEI: I don't think we have to present
4 our testimony through the witness' licensee has retained or
5 hired or convinced to testify. We can present it through our
6 witnesses.

7 What we are proposing is the people who were in
8 the control room and understood what was going on. I don't
9 think we have to present our case through their witnesses.

10 JUDGE SMITH: That is what you're trying to do.

11 MS. BERNABEI: Some of the adverse witnesses.
12 Dr. Zabroski, it is unclear -- well, he wasn't there on
13 March 28. We know that.

14 JUDGE SMITH: Well, it is up to you. You follow
15 your own strategy. However, at least with respect to Kunder
16 and Ross, we suggested that one of the bases upon which you
17 might justify calling them would be as rebuttal. Unless
18 you make an effort to establish on cross-examination your
19 argument for rebuttal, it will have less force.

20 Okay. We will go on to the next one.

21 Mr. Blake, I think your proposal, you have made
22 your proposal. It is mooted. No. You made your proposal
23 You said I have a proposal. We just don't recall what it was.

24 MR. BLAKE: That was my proposal. Was we're
25 going to have an expert there on an objective way. Let us

24
1 ask him about this and find out where we are going.

2 MS. BERNABEI: Okay. I would propose Porter's
3 testimony -- Ivan Porter, who is the chief instrument
4 control engineer, for his interpretation of the pressure
5 spike. His testimony is that the first time he saw it he
6 interpreted it to be a real pressure spike. He is an
7 instrument man, and I think as such has expertise, and I
8 think it is relevant testimony.

9 Mr. Blake, do you agree?

10 MR. BLAKE: I have got to catch up. You will
11 have to give me a minute. Are you referring to his testimony
12 in his deposition?

13 MS. BERNABEI: I believe he repeats in there, yes.

14 (Pause.)

15 MR. BLAKE: Judge Smith, Mr. Porter is a more
16 central figure in the core thermocouple area than in the
17 pressure spike area. So I was caught a little off guard.

18 When I review Mr. Porter's deposition, I note
19 at pages 54 and 55 of that deposition questions by Ms.
20 Bernabei and responses by Mr. Porter to the effect that
21 when he was shown the chart of the pressure spike on
22 March 30, and he looked at it, he believed it was real and
23 not an electrical malfunction.

24 But his testimony there is "That's the first time
25 I saw it. And I think everybody believed it then." So I

25

1 don't get out of that very much of interest here in terms
2 of the mailgram or issue on the table.

3 MS. BERNABEI: Well, he goes further than that.

4 MR. BLAKE: I'm sorry. Go ahead and refer me,
5 if you would, please.

6 MS. BERNABEI: I would appreciate it if Mr.
7 Blake wouldn't mischaracterize what was said. What we want
8 his testimony, is that he understood there was a real pressure
9 spike and not electrical malfunction. That he was trained
10 and understood that the first time he saw that, whatever it
11 was.

12 JUDGE SMITH: What was the significance if he saw
13 it the following day, for example? When did he first see it?

14 MS. BERNABEI: On the 30th. Let me state what
15 he says.

16 He said when he saw it, first time he saw it,
17 he believed it was a real spike. Then he says, "I also
18 looked at the reactor coolant system, the pressure chart,
19 to see if it indicated a dip since the building pressure is
20 referenced."

21 Question: "So you're saying, based on your view
22 of the pressure spike as well as the reactor coolant system
23 pressure which had a complementary decrease, you believed
24 the spike was real; is that correct?"

25 Answer: "Yes."

26
1 Okay. His interpretation, the first time he saw
2 the spike was it wasn't a malfunction, it was a real spike.
3 He indicated what he did to verify that.

4 Seems to me that we have other testimony that
5 other people did that. We have other people, other people
6 believed it was real. It seems to me that is probitive of
7 the fact that the operator's training and, in fact, the
8 actions they would normally take in a situation such as
9 this would lead them to believe it was real and not an
10 electrical malfunction.

11 JUDGE SMITH: Couldn't this testimony be
12 stipulated?

13 MS. BERNABEI: That is fine with me on this point.

14 MR. BLAKE: Well, it's --

15 JUDGE SMITH: For whatever force of argument that
16 has. We know he was the lead instrument person and that
17 at least his experience was when he saw the -- he compared two
18 complementary readings, one confirming the other, and from
19 that he inferred a pressure spike and not a single anomaly.
20 Is that -- then --

21 MS. BERNABEI: As well as, I assume, the shape
22 of the pressure spike itself.

23 JUDGE SMITH: And shape.

24 MS. BERNABEI: I mean I assume he is saying from
25 his observance of what it looked like as well as his check

27
1 of the complimentary --

2 JUDGE SMITH: The actual shape of it.

3 MS. BERNADEI: Well, I mean that is what I would
4 draw --

5 JUDGE SMITH: It looked like one.

6 MS. BERNADEI: Right. He is an instrument man.
7 That is what he is looking at.

8 JUDGE SMITH: Just like the guy from California.

9 Then from that we can impute from those who saw it
10 on the 28th that people familiar with those things would have
11 interpreted it as a real pressure spike?

12 MS. BERNADEI: Right.

13 JUDGE SMITH: What would be the thing you would
14 ask us to impute and we would balance it against the whole
15 record. Could that not be stipulated?

16 MR. BLAKE: What I'm struggling over is, I think
17 it was Miller who asked him to review this and determine
18 whether or not it was real on March 30. I am not sure what
19 we would lose in translation by stipulating just the portion
20 that when Porter looked at this on March 30 and compared
21 it with other charts he determined that it was real.

22 There is other testimony, for example, that he
23 was never asked about his opinion on the 28th. But by
24 stipulating this one segment, Judge Smith, I don't know what
25 I'm doing in terms of the variety of Porter's statements.

28
1 I don't think it is sufficiently tied to the
2 Dieckamp mailgram about what people understood on March 28th
3 to --

4 JUDGE SMITH: See, we still don't have a complete
5 feeling for your case. Is your case --

6 MR. BLAKE: My case?

7 JUDGE SMITH: Right. Your case is no one
8 interpreted the pressure spike as real on the 28th?

9 MR. BLAKE: The pressure spike?

10 JUDGE SMITH: Yes, as real. It wasn't until the
11 night of the 29th and Porter says it looked like a hydrogen
12 spike to him.

13 MR. BLAKE: No, no.

14 JUDGE SMITH: On the 30th.

15 MR. BLAKE: It is a far cry between saying it was
16 a real pressure spike and saying what Mr. Dieckamp's
17 mailgram states.

18 JUDGE SMITH: I understand that. We understand
19 there is a long way to go.

20 MR. BLAKE: I think some people fall off the
21 bandwagon between never even hearing about it on the 28th,
22 and whether or not they interpreted that at the time it
23 occurred in terms of core damage at varying points. I think
24 several people have indicated in testimony that maybe not
25 immediately, but shortly thereafter, they thought it was a

1 real pressure spike. They couldn't get around the fact
2 that the coincident logic led to the spike being reflected
3 on more than one chart.

4 I think Mr. Mehler stands for that proposition,
5 is that correct, Ms. Bernabei? So that some of them thought
6 it was real but still couldn't explain it, much less
7 interpret it in terms of core damage.

8 JUDGE SMITH: But now she is offering Mr. Porter --

9 MR. BLAKE: We don't have to prove our whole case
10 through one witness. We are saying the people understood.
11 At least the first time Porter saw it, and Porter was in
12 the control room on March 28. The first time he saw it he
13 said that is a real pressure spike.

14 MS. BERNABEI: On the 30th. We have lots of
15 testimony from other people that, well, there is some
16 testimony people understood that is due to hydrogen. Okay.
17 You know, and that there is testimony that training
18 indicated that simultaneous actuation of the sprays and the
19 pressure spike would indicate a real increase in pressure.

20 And I think the training of the operators would
21 not teach them anything else that could create this kind of
22 sudden increase in pressure, or pressure spike. If licensee
23 has it, they can produce it.

24 JUDGE SMITH: It is my view that Mr. Porter's
25 testimony that the first time he saw the instrument data

30

1 he interpreted it as a genuine spike, and a hydrogen spike
2 at that, is relevant.

3 It is going to be your job to keep the Board from
4 falling off the wagon, as you say, and leaping from that to
5 the ultimate conclusion that all of this was interpreted
6 on the 28th and all of it was communicated to Dieckamp and
7 that he knew it, and all those things. We realize that.

8 But I think there is a point that there are two
9 types of cumulative. One, it is cumulative, just repetitious,
10 pointless. The other is it is cumulative where it is added
11 to. And I think they should have a right to argue that
12 aspect of the case and make that aspect of the case. That a
13 competent instrument man looked at the data and at the
14 first instance believed it.

15 MR. BLAKE: But Judge Smith, you just said when he
16 looked at it he thought that no other way that you could have
17 gotten these other than it was a real spike, and he attributed
18 it to hydrogen. I thought I heard you say.

19 JUDGE SMITH: Yes, that is what she says.

20 MR. BLAKE: Well, I don't even see that in his
21 deposition.

22 MS. BERNABEI: I'm not saying he attributed it to
23 hydrogen.

24 JUDGE SMITH: Oh, yes, you most certainly did. You
25 said it even looked like a hydrogen spike from the shape of it.

31'
1 MS. BERNABEI: If I said that, then I retract --
2 he did not -- he said it looked like a real pressure spike.

3 JUDGE SMITH: All right. That brings us one step
4 farther away from the basic issue. That is just -- the only
5 value of his testimony, then, is that Porter recognized
6 it not as an instrument anomaly but as a real spike.

7 But then you went on to say, well, because --

8 MS. BERNABEI: I said some other people say
9 that they interpret that to be caused by hydrogen. Chwastyk
10 and Mehler.

11 JUDGE SMITH: Okay.

12 MS. BERNABEI: In fact, there is no other
13 explanation for a pressure spike other than hydrogen. If
14 licensee can come up with something, they should do that.
15 There is no other technical explanation of a spike in the
16 containment of this nature --

17 JUDGE SMITH: We understand all that. It can be
18 argued. I am eager to get this transcript because I just
19 have a very strong memory that in answer to my question you
20 offered Porter not only for the realness of the spike, but
21 for the interpretation of -- I see now that I misunderstood.

22 MS. BERNABEI: I don't think I said that. If I
23 did that is not what I meant.

24 JUDGE SMITH: Then it is certainly my view Porter's
25 contribution to the record is greatly diminished, and I just

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1 don't have any feeling for it at all.

2 MS. BERNABEI: Let me just say what licensee's
3 position is, and unless it has changed from the last go
4 round, that most people interpreted the pressure spike to
5 be due to an electrical malfunction. And they said when
6 they looked at it in the control room that the relevant
7 technical personnel interpreted it to be an electrical
8 malfunction. That is their theory of the case.

9 We have a right to present a theory of an
10 instrument man that says, no, the first time I looked at it
11 I understood what it was.

12 JUDGE SMITH: I don't read that. Do I read in
13 your direct testimony that the spike chart and spray
14 actuation was interpreted as instrument anomaly? In your
15 direct testimony? I don't think so.

16 MR. BLAKE: I would have to review it. I don't
17 recall it being in there now.

18 JUDGE SMITH: To the extent, let us put it this
19 way. To the extent that the licensee's case is that
20 on March 28 the strip charts demonstrated, and I don't know
21 if pressure spray actuation is on a strip chart or what.
22 To the extent that your case is that that instrument
23 phenomenon was interpreted as an instrumentation anomaly,
24 to that extent, then, to that very same extent they should
25 be allowed to produce testimony or stipulation that Porter

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1 would not have interpreted it that way.

2 MS. BERNABEI: Thank you.

3 MR. BLAKE: I'm reminded by Mr. Trowbridge that
4 at least Mr. Lowe at one point in his prepared testimony
5 refers to the fact that somebody indicated that there was a
6 pressure spike and it was attributed to an electrical
7 malfunction at the time --

8 JUDGE SMITH: Yes. Well, see, recognize I have
9 only heard from Ms. Bernabei how much force is imputed to
10 you as to interpretation of anomalies. And I haven't heard
11 that myself from you. So I don't know.

12 But I am just saying to the extent that your
13 explanation of the activities of that day depends upon the
14 people there interpreting it as an instrumentation anomaly,
15 to that very extent you should be allowed to produce Mr.
16 Porter's reaction that that would not have been his.

17 You know, boy I tell you, this is, just isn't
18 very important. Until we see it all. And I think she
19 should be entitled to build her case. I think it is relevant
20 to that extent.

21 I think it ought to be stipulated. I don't think
22 this Board's going to go stampeding off in a side area
23 because of Porter's testimony that he would have had faith
24 in his instruments. I just don't think it is that important.

25 I think she should be allowed to make that part

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1 of her case. If it turns out that that is an irrelevant
2 part, then we will reconsider. I propose a stipulation on
3 that.

4 Okay. Who is next?

5 MS. BERNABEI: There is --

6 JUDGE SMITH: Mr. Porter, incidentally, was -- he
7 was indeed the lead instrument person on the day of the
8 accident. Was he there?

9 MR. BLAKE: I believe he was, in fact, the lead
10 instrument person and lead electrical type individual on the
11 plant staff. And I believe he was at TMI at the time.
12 I think I recall, although I am not certain, that he was not
13 in the control room.

14 JUDGE SMITH: No, he was out trying to get cross
15 cheks on thermocouples out in the plant.

16 MR. BLAKE: Might well have been that.

17 JUDGE SMITH: He wasn't at the other end reading
18 strip charts. He was out trying to determine whether
19 thermocouples were giving accurate readings and checking
20 different ones for comparison.

21 MS. BERNABEI: He was in the control room a
22 portion of March 28 in that he was giving orders to Mr.
23 Miller.

24 JUDGE SMITH: I'm just asking those questions
25 because we are wondering if he should be one -- my memory

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1 is that he was out in the plant tapping into various
2 thermocouple leads to see what could be learned.

3 But for this purpose, his interpretation, that
4 narrow purpose, I propose a stipulation.

5 Who is next?

6 MS. BERNABEI: This may be easily handled through
7 stipulation. Item 14 on the first page of the November 5th
8 letter --

9 MR. BLAKE: Judge? Judge Smith, Mr. Trowbridge
10 has pointed out to me that I don't know -- I want to take
11 the proposed, the words of a stipulation and try them out on
12 Ms. Bernabei to cure the Porter problem. But I don't know
13 that I can read even the deposition which I've referred to
14 here today and upon which Ms. Bernabei relies in part to
15 say that on that day he would have.

16 JUDGE SMITH: No. As I understand her representing
17 Porter, the only thing he said, the first time he saw the
18 indication of the -- saw the strip chart, he said to him it
19 looked like a real pressure spike, and he looked at other
20 data and they were consistent. That is all.

21 MS. BERNABEI: That's right.

22 JUDGE SMITH: He did not say I would have
23 interpreted that on the 28th or anybody else should have.

24 MS. BERNABEI: Right.

25 JUDGE SMITH: It is only offered that he at least--

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1 MS. BERNABEI: Did, the first time.

2 JUDGE SMITH: Yes.

3 MS. BERNABEI: What I would propose in terms of a
4 stipulation is that we stipulate the deposition. I don't
5 know what Mr. Blake is thinking in wording of a stipulation.

6 JUDGE SMITH: Yes. To the extent possible that
7 the relevant language from the deposition should be offered.

8 MR. BLAKE: Okay.

9 MS. BERNABEI: Item 14 has to do with individuals
10 who conducted an analysis of the electrical malfunctions. To
11 explain, the TMIA propounded two interrogatories which GPU
12 did answer on October 30, 1984.

13 The interrogatory had to do with what, if any,
14 electrical malfunction would create a pressure spike and
15 simultaneously actuation of the containment sprays.

16 The licensee by cover letter of October 30 provided
17 an analysis which indicated no electrical malfunction would
18 cause both containment pressure recorders to indicate a
19 pressure spike on both the wide range and narrow range scale,
20 and that there was no electrical or mechanical function
21 which would lead to a simultaneous occurrence of the
22 reporting of a reactor building pressure spike and initiation
23 of containment spray.

24 We would like to either stipulate in the analysis,
25 or we would like an individual who can explain the analysis.

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1 We think it is relevant because it indicates that in fact
2 the operators, together with other information, indicates
3 the operators had the training and information available to
4 them to properly interpret the pressure spike which some --

5 JUDGE SMITH: You just went off on a non sequitur
6 as far as I was concerned.

7 MR. BLAKE: I was doing all right with regard to
8 the analysis which, in fact, we did, but I can't tolerate
9 the next step.

10 JUDGE SMITH: Yes, the next step does not follow.
11 It seems to me what is relevant is that there probably was
12 no instrumentation anomaly. I didn't follow you to the next
13 point at all. I don't think that follows.

14 MS. BERNABEI: Well, let me just say we do intend
15 to ask some witnesses whether they had the training, and their
16 answers during depositions has been yes, they did have the
17 training to instruct them as to the fact that the pressure
18 spike indicated a real increase in pressure.

19 But in any case, all we are asking in terms of
20 these individuals, analyses, is stipulate to the analyses.
21 That is fine.

22 JUDGE SMITH: Okay. The inference that you
23 seek may or may not follow.

24 Is that all right?

25 MR. BLAKE: Yes. I will get back to Ms. Bernabei.

1 I don't have authority today to say that, but I anticipate
2 we will be able to do that. Yes.

3 JUDGE SMITH: All right.

4 MS. BERNABEI: This is a formal interrogatory
5 response under cover of the October 30 letter.

6 JUDGE SMITH: All right.

7 MS. BERNABEI: So I assume the presumption is
8 that it will be introduced or stipulated to?

9 JUDGE SMITH: That would be my expectation if it
10 is as you said. But Mr. Blake has to check it out. If
11 for some reason he doesn't follow through on that, you
12 certainly are at liberty to come back to us.

13 Next one?

14 MS. BERNABEI: There are a number of documents.
15 Should we go through them one by one?

16 JUDGE SMITH: How about witnesses?

17 MS. BERNABEI: Witnesses, okay. Those would be --

18 JUDGE SMITH: You wanted to finish out your first
19 point. Witnesses and documents.

20 MS. BERNABEI: Well, may not -- that, I think
21 that is it for witnesses.

22 Item 12 would be the custodian, author or someone
23 familiar essentially with the radiation and other logs
24 produced from March 28. Again, Chwastyk has testified as
25 a result of the pressure spike he ordered, I think his words

1 are containment check, apparently to see if the containment
2 had been breached by the explosion.

3 There is a record of a containment, radiation
4 reading one around the reactor building of the nature, I
5 would say of the nature that Chwastyk described at 2:08 p.m.,
6 a short time after the pressure spike, or 2:10 p.m.

7 We would propose that be introduced into evidence.
8 It is also referred to in a statement by Lee Rogers who was
9 the Babcock and Wilcox's representative on the site on that
10 day. This check. And corroborates Chwastyk's testimony
11 that he took the spike seriously and that he ordered certain
12 checks done as a result of the spike.

13 That proposition is refuted in 0760, and I believe
14 by licensee.

15 JUDGE SMITH: Mr. Blake?

16 MR. BLAKE: I believe Mr. Chwastyk did indeed
17 testify during the course of his deposition that he asked
18 that some checks be conducted. I think he testified that he
19 had no recollection of having asked for or received radiation
20 checks.

21 There is considerable dispute about the alleged
22 connection between an entry on a radiation log, which includes
23 a whole variety throughout the day of radiation checks that
24 were done all around the plant site, and picking out one
25 shortly after we now know that the spike occurred and

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1 connecting it out.

2 I think there is a lot of dispute.

3 MS. BERNABEI: There is a statement of the B&W
4 representative which is stipulated into evidence of Lee
5 Rogers. Lee Rogers makes the link-up. At least that is
6 the way I read his interview. He makes the link-up between
7 checks that were done after the pressure spike and this one
8 at 2:08, or 2:10.

9 In fact, licensee specifically identifies a check
10 Mr. Rogers identifies in his interview as this particular
11 check. My reading of the Roger's testimony, and unfortunately
12 he is not available in the area any longer, is that he leads
13 up to the time after the pressure spike and action is taken
14 in response to the spike. That is at least one reading of
15 the statement.

16 MR. BLAKE: I now find at Mr. Chwastyk's
17 deposition, page 23, response to Ms. Bernabei's question. "I
18 think you testified that there were, that you have asked for
19 radiation checks, is that correct?"

20 Mr. Chwastyk's answer: "I'm not certain of that.
21 I'm not certain that I asked it or if I made the assumption
22 that those radiation checks would be done along with the
23 operators who were checking containment."

24 MS. BERNABEI: In prior testimony Mr. Chwastyk
25 has said he ordered containment checks. He used those words.

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1 JUDGE SMITH: Prior interviews, prior depositions.

2 MS. BERNABEI: Right. In the course of NRC's
3 investigations. In any case, I think Mr. Rogers, if Mr.
4 Chwastyk hasn't made the case for its relevance. Mr. Rogers,
5 in his testimony, does since he links them up in terms of the
6 check having been made.

7 JUDGE SMITH: All of this is relevant to the
8 perception of what happened?

9 MS. BERNABEI: That's correct, interpretation of
10 the spike.

11 JUDGE SMITH: All right.

12 MR. BLAKE: I'm not sure exactly what the issue
13 is on the table. Is it whether or not we would call somebody
14 to testify about that entry in the log? Is that what we're
15 focused on here? And the need for such a person?

16 JUDGE SMITH: It would have to be narrowed
17 from what I have.

18 MS. BERNABEI: No. What we want is someone that
19 will identify the log and the check that was made.

20 JUDGE WOLFE: Isn't it possible to identify from
21 contemporaneous log entries, or log entries, whether or not
22 Chwastyk did order radiation checks?

23 MS. BERNABEI: He tried that. Nobody has been
24 able to do it so far.

25 JUDGE SMITH: So you want to do it in the hearing

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1 room, then?

2 MS. BERNABEI: No. What I am saying, he says
3 he ordered containment checks, which the use of that word
4 would indicate a radiation check of the reactor building.
5 There is a record of such a check.

6 Mr. Rogers, in a statement he made as a
7 definitive statement on the accident, links up this particular
8 check to the pressure spike. That is my reading of the
9 interview.

10 It seems to me that is relevant to corroborate
11 Chwastyk's testimony that he interpreted the pressure check
12 to be a hydrogen burn or explosion.

13 JUDGE SMITH: You said you tried to determine
14 whether there is objective evidence of a radiation contain-
15 ment check as a consequence of Chwastyk's appreciation of
16 the spike. And you have failed.

17 How do you think you are going to succeed this
18 time?

19 MS. BERNABEI: There is no person that we have
20 available to us that can take the radiation check, actual
21 reading, and say Chwastyk ordered this. I think if you saw
22 the check you would understand there is no, as far as I
23 know, no log of any radiation check being done as a result
24 of a direction from a particular person.

25 Mr. Mulleavy, who was one of the supervisors in

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1 terms of radiation that day, said that he received directions
2 to have checks done and ordered them done, but that none
3 of the logs would indicate who ordered it and who did it.

4 JUDGE SMITH: Something is missing. What is
5 this custodian/author going to do when he gets here?

6 MS. BERNABEI: Just say this was a radiation
7 check done.

8 JUDGE SMITH: At a certain time?

9 MS. BERNABEI: On March 28.

10 JUDGE SMITH: Cannot that be produced from the
11 log directly?

12 MS. BERNABEI: I think it is rather illegible.
13 What I can --

14 JUDGE SMITH: The more you talk the less value
15 there is to the person.

16 MS. BERNABEI: The licensee, in response to our
17 interrogatory, has identified this check and this log as
18 indicating a radiation check was done at 2:10, on March 28.

19 They have also said it -- identified it as a
20 check referred to in Lee Roger's statement. Those two
21 statements I think will link it up to the pressure spike.
22 If we can stipulate both the response and a representation
23 of what it reads, I think that that is sufficient.

24 JUDGE SMITH: Left to your own devices, however,
25 you would have the man bring the log to the hearing, let the

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1 Board look at it and see what we could tell from it?

2 MS. BERNABEI: I would propose this be
3 stipulated.

4 JUDGE SMITH: Can we stipulate that?

5 MS. BERNABEI: Stipulate it into evidence with an
6 explanation.

7 MR. BLAKE: What is it we are stipulating?
8 The one page out of this log?

9 JUDGE SMITH: That the log would reflect at 2:10
10 p.m. on March 28, 1979, was a containment radiation check.
11 It would not reflect who ordered it?

12 MR. BLAKE: No.

13 JUDGE SMITH: Can't stipulate to that?

14 MR. BLAKE: No.

15 MS. BERNABEI: I would suggest, also, licensee's
16 response that this check is in fact the check that was
17 referred to by Lee Rogers in his statement.

18 JUDGE SMITH: How about that? Isn't that a
19 form of an admission?

20 MR. BLAKE: First of all, Lee Rogers is an individual
21 from B&W who was in the control room on the day of the
22 accident. I think the statement Ms. Bernabei's now referring
23 to is a statement by Lee Rogers in June, maybe June 12 or
24 thereabouts, of 1979, where he tried to call what occurred
25 that day.

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1 I am not sure I have in front of me the portion
2 of the Rogers statement which would now cause us to be
3 stipulating about a page out of the log. But all I have in
4 front of me indicates, and I will read it to the Board,
5 an excerpt from his statement.

6 "Somewhere around 1350 hours a deep thump noise
7 was heard by a majority of the people in the control room
8 area. At first, in response to the question about the noise,
9 it was suspected some ventilation dampers had repositioned
10 which caused the noise. After fully checking the entire
11 plant conditions it was noted both reactor building spray
12 pumps had started, two of the reactor coolant pumps indicated
13 high temperature air cooling systems and source range
14 instrumentation showed a noise spike. The transient
15 conditions were a result of the rapid reaction between
16 hydrogen and oxygen containment and occurred with a continued
17 long period of system venting of the containment.

18 "Operator shutoff of the building spray pumps
19 after approximately 6 minutes of operation. Monitoring teams
20 reported no new high level activity. Therefore, it was
21 concluded that the containment had not been breached by the
22 pressure transient."

23 I don't know what -- that is the only thing that
24 I know of. I can't testify -- I can't stipulate as to the
25 meaning of that particular --

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1 JUDGE SMITH: She is alluding to a particular
2 interrogatory response that you made, as I understand it.

3 MS. BERNABEI: That's correct. It said here --
4 let me read you from the Rogers statement. Let me just
5 state it is not just some vague statement of Mr. Rogers.
6 It was, when he calls, this is the June 12, 1979 statement
7 to his employer, subject: "Statement of 2/28/79 Unit 2
8 Transient." He describes it as a description of my personal
9 statement relating to my contribution toward re-establishment
10 of stable plant conditions. Okay.

11 He explains how he came to write the statement.
12 He says, "I consider the times and events to be the most
13 accurate of any other time and event information I may have
14 personally either written or verbally described."
15 Apparently to Mr. Goers at the time he wrote this this was
16 his definitive statement.

17 At page 11 -- excuse me -- page 22, he states:
18 "Somewhere around 1350 hours a deep thump noise was heard
19 by the majority of people in the control room. At first in
20 response to questions about the noise it was suspected some
21 ventilation dampers had been repositioned which caused the
22 noise. After fully checking the entire plant conditions
23 it was noted that both reactor building spray pumps had
24 started, and containment sprays.

25 "Two of the reactor coolant pumps indicated high

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1 temperature air cooling systems and source range instrumen-
2 tation showed a noise spike. The transient conditions were
3 a result of a rapid reaction between the H₂, hydrogen, and
4 O₂, oxygen, in the containment, and occurred coincident with
5 a continued long period of system venting to the containment."

6 Then it goes on: "Monitoring teams reported no
7 new high level activities. Therefore, it was concluded
8 that the containment had not been breached by the pressure
9 transient."

10 I believe it is that particular check that is
11 referred to in the log. It indicates that the check was done
12 as a result of the spike, at least in my reading, and that
13 it was concluded as a result of it that it had not been
14 breached by the pressure transient.

15 JUDGE SMITH: Is it in dispute that the operators
16 made certain plant parameter checks after the thud?

17 MR. TROWBRIDGE: I don't know if they did or not.
18 But I'm reading precisely the statement here. "Monitoring
19 teams reported no new high level activities." To me, that
20 reads monitoring teams running around outside the
21 containment to see whether there was --

22 JUDGE SMITH: That's right. Outside containment.

23 JUDGE WOLFE: Right. But it is a radiation check
24 of the containment. That is exactly what you would do.

25 JUDGE SMITH: The relevance is that the operators

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1 believed that the thud was of such significance as to require
2 a monitoring check. Results of the monitoring check is not
3 relevant.

4 MS. BERNABEI: Right.

5 JUDGE SMITH: The fact of the check and where it
6 happened is relevant to the interpretation that they placed,
7 that they drew, interpretation of the noise.

8 MS. BERNABEI: And it corroborates Chwastyk's
9 testimony that he ordered checks and that he thought it
10 indicated a hydrogen burn.

11 JUDGE SMITH: How about that? Is that relevant?
12 Certainly isn't going to be produced by a custodian of
13 illegible logs. But is it relevant?

14 MS. BERNABEI: I think licensee's response to
15 the interrogatories together with the representation, words
16 on the log, would be all we would need.

17 MR. BLAKE: Judge Smith, my recollection is that
18 we know who the author of this log was, and I will find out
19 if that person is available and provide them to say what
20 does this entry mean. That is what we are really talking
21 about.

22 JUDGE SMITH: Is that how you want to handle it?

23 MR. BLAKE: Well, the difference here is not
24 whether or not there is such a log entry. It is whether or
25 not it was something specifically prompted by an order --

1 JUDGE SMITH: Right. That is why --

2 MR. BLAKE: That is what I can't stipulate to at
3 the moment.

4 MS. BERNABEI: Let me just say this is the
5 licensee's response. The licensee's response is that the
6 check Mr. Rogers refers to is this particular check.

7 JUDGE SMITH: Okay.

8 MS. BERNABEI: Also, this is the first time we,
9 as far as I know, know who the author is, because prior
10 responses have been that they don't know who the author is.

11 JUDGE SMITH: If indeed Rogers said that --

12 MR. BLAKE: I thought it was Beverly Good and
13 that you knew that. Am I wrong?

14 MS. BERNABEI: It was reported to her. She was
15 not the author, as I understood.

16 MR. BLAKE: All right.

17 JUDGE SMITH: If Rogers said that there was a
18 radiation check conducted as a consequence of hearing the
19 thurd, and if you said, and in response to discovery, that
20 the radiation check alluded to by Rogers is a radiation
21 check memorialized on the log, should that not be reduced
22 to a stipulation?

23 MR. BLAKE: No.

24 JUDGE SMITH: Within the context of this issue,
25 or is that oversimplification?

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1 MR. BLAKE: I am not going to have a problem
2 stipulating to some point along this line, but we have now
3 read twice Rogers' statement from his June, several months
4 after the accident, recollection. And I can't even read
5 that today, right now --

6 JUDGE SMITH: I thought I heard it said we were
7 all standing around the control room, heard a thud, wondered
8 if it was dampers. We had a radiation check outside
9 containment --

10 MR. BLAKE: That is precisely the difference. No.
11 I cannot read it as the last thing you indicated.

12 JUDGE SMITH: You have a post hoc ergo. You don't
13 have the two ideas connected?

14 MR. BLAKE: No, that is absolutely right. There
15 were monitoring teams as Mr. Trowbridge earlier indicated,
16 all over the plant site that day. All this statement says
17 is that subsequent to that thud monitoring teams reported
18 no new high level activities. I don't think that is a
19 check of containment.

20 MS. BERNABEI: They identified --

21 JUDGE SMITH: How about your interrogatory response?

22 MR. BLAKE: I have to identify that?

23 MS. BERNABEI: They asked what that was, and
24 they identified the check, what Mr. Rogers was referring to.

25 JUDGE SMITH: I wonder what the log would show,

51 1 whether there were readings made throughout the day or not.

2 MR. BLAKE: I think it would show that there
3 were, in fact, checks made all around the site and that
4 this one is in the vicinity of the containment or something.
5 I just don't know without having the language in front of me.

6 JUDGE SMITH: So the fact of the radiation check
7 standing alone is not very prohibitive?

8 MS. BERNABEI: It seems to me that it is a
9 radiation check that was identified as what Rogers referred
10 to in his statement. I think Mr. Blake's reading is totally
11 unacceptable. The only way you can read that is that it
12 was done as a result of the pressure spike. The whole
13 paragraph describes actions taken as a result of the pressure
14 spike.

15 JUDGE SMITH: That is how I read it.

16 MS. BERNABEI: I would also say there are some
17 notes which parties, well, sort of in a netherworld, but
18 I think there was some sense that if we had gotten them in
19 time we could have included in the stipulation, of an NRC
20 inspector, Mr. Nealey, that note, lone, all alone, standing
21 on their own, this same radiation check on March 28. So it
22 indicates it wasn't just one of a series.

23 JUDGE SMITH: I might point out while you are
24 quarreling about these things, and I appreciate counsel being
25 careful, but you are still an awful long way from getting

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1 close to the issue of the case which we are waiting to hear
2 about, and that is that the hydrogen spike was interpreted
3 as such and which, in turn, was interpreted as core damage.

4 You are still an awfully long way from it and
5 you are quibbling about these very low level perimeter facts.
6 And these seem to be redundant. They seem to be the base of
7 a pyramid which you are building, but you never get to the
8 next tier.

9 MS. BERNABEI: Judge Smith, there is no other way
10 people can believe this to be due to a hydrogen burn and
11 not understand that meant serious core damage.

12 JUDGE SMITH: I understand that. You have made
13 that point throughout. We want to hear about that. But we
14 never seem to get there. We seem to talk about the minutiae
15 of the case. I think you made the point. You are making the
16 point that actions were taken when they heard the thud. I
17 don't know. But here we are the night before the hearing,
18 and I haven't seen anything that lays a glove on Dieckamp,
19 that gets to him.

20 We are still talking about people running around
21 the containment with monitors and we are not getting to
22 Dieckamp.

23 MS. BERNABEI: Remember, this is the point where
24 the mailgram is accurate.

25 JUDGE SMITH: Yes, whether the mailgram was

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1 accurate. Okay.

2 MS. BERNABEI: We're saying it is not accurate.

3 JUDGE SMITH: Excuse me. I forgot. We're still
4 on issue number 1.

5 MR. GOLDBERG: Judge?

6 JUDGE SMITH: Excuse me. Mr. Goldberg wants to
7 be heard.

8 MR. GOLDBERG: I am informed that the NRC
9 interview of Mr. Rogers, September 2, 1980, which is
10 stipulated into evidence on the modified stipulation of the
11 parties on mailgram evidence directly addresses this point
12 and the significance of the radiation checks and whether
13 they were done in response to the pressure spike.

14 The NRC specifically asked Mr. Rogers about these
15 matters and the parties can read for themselves his answers
16 to these questions in that September 2nd, 1980 interview.

17 JUDGE SMITH: What did he say?

18 MR. GOLDBERG: Might not be necessary to speculate
19 about all this.

20 JUDGE SMITH: Yes.

21 MS. BERNABEI: We are not speculating. We have
22 his statement in evidence. We think that is better than any
23 interview conducted by the NRC in 1980.

24 JUDGE SMITH: I don't know about that.

25 MS. BERNABEI: It seems to me his personal

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1 statement --

2 JUDGE SMITH: We will hear them both, and we will
3 see.

4 MS. BERNABEI: Right. But I don't think it is
5 definitive in any case. The order of the Board was that
6 NUREG 0760 could not support a decision on Dieckamp mailgram
7 standing alone. I just think an interview in the course
8 of that investigation doesn't serve the same purpose.

9 JUDGE SMITH: We will see.

10 Next point. I know how how to resolve that one.

11 MR. BLAKE: What I need is the interrogatory
12 response in front of me, and I don't have it. And I think
13 Ms. cernabei does not have it.

14 MS. BERNABEI: It was the response to the first
15 set.

16 MR. BLAKE: Yes, I recall it. Yes. I can't do
17 it without that, Judge Smith.

18 JUDGE SMITH: Okay. Next one. So that is still
19 up in the air. We will have to come back if you are not
20 satisfied.

21 What is the next one?

22 MS. BERNABEI: Are you saing we cannot call a
23 witness? I thought your suggestion was we enter into a
24 stipulation.

25 JUDGE SMITH: Yes. The suggestion was that you

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1 enter into a stipulation which stands. The suggestion
2 stands. What is not resolved is whether a stipulation will
3 be reached.

4 In any event, I see no point in bringing the
5 custodian of the radiation logs. Okay.

6 Do you want to go on to the next one?

7 MS. BERNABEI: This again has to do with the
8 point of repressurization. There are training materials
9 on the TMI 2 accident which train the operators currently,
10 as I understand, that repressurization began in this 2:30
11 to 3:08 time period, shortly after the pressure spike. We
12 propose to introduce those.

13 I don't have them here with me.

14 MR. BLAKE: I'm sorry. Are you referring to an
15 individual now?

16 MS. BERNABEI: Item 18 on the list of exhibits.

17 MR. BLAKE: How did we get to the list of
18 exhibits?

19 JUDGE SMITH: She decided she wants to cover
20 everything as to the adequacy of the information.

21 MS. BERNABEI: Isn't that what we're doing? I'm
22 sorry. I thought that is what we were doing.

23 JUDGE SMITH: It's up to you. I think that
24 perhaps given the progress we are making and the most
25 important thing is to identify who is going to come as a

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1 witness or not, I think the better thing would be to go
2 through the witnesses, then the documents. That is not
3 quite as urgent because they are not people. So let's come
4 back to issue number 1.

5 MS. BERNABEI: Okay. Witnesses.

6 JUDGE SMITH: If we have time, with respect to
7 documents. Let's continue with witnesses.

8 MS. BERNABEI: The other witnesses, and I think
9 this can be handled through the questionnaires, that we
10 would propose is that questionnaires of individuals, both
11 licensee and B&W individuals who said they were aware on
12 March 28 either of the pressure spike, actuation of the
13 containment sprays or thud, that those questionnaires, or
14 at least those relevant portions, be introduced into evidenc-
15 in lieu of their testimony.

16 We have compiled a list of those individuals in
17 letter form to Mr. Blake.

18 JUDGE SMITH: What is your view of that, Mr.
19 Blake?

20 MR. BLAKE: I provided last Friday to --

21 MS. BERNABEI: This is the list of individuals
22 who answered yes that they were aware --

23 JUDGE SMITH: Does it include supplements? I
24 understood there were supplements?

25 MS. BERNABEI: No, this is not point 1. This is

57
1 those individuals who were aware of the pressure spike,
2 containment sprays or thud on March 28.

3 It seems to me there was widespread knowledge
4 as it seems there was at least three occurrences, that that
5 supports the case people understood the significance of
6 the pressure spike. It certainly goes against licensee's
7 case, which is it didn't know about the pressure spike.

8 JUDGE SMITH: In the first place, at least I
9 heard you suggest each of these people knew about all of
10 them.

11 MS. BERNABEI: No, I believe it says either.

12 JUDGE SMITH: Yes, it does. Right.

13 MS. BERNABEI: Yes.

14 MR. BLAKE: Judge Smith, this is the first time
15 I've ever seen this.

16 JUDGE SMITH: They are your questionnaires.

17 MR. BLAKE: They may be, but we sent out more
18 than 400 questionnaires. I haven't come to focus on it. I
19 don't know when this list was drawn up.

20 JUDGE SMITH: Then you are not in a position to
21 respond. You are going to have to confirm the accuracy of
22 it before you take a position. But assuming it is accurate,
23 what is your view?

24 MR. BLAKE: I don't know, Judge Smith, without
25 looking at these various questionnaires. I tell you, I

58
1 guess now is as good a time as any other, and I am sure
2 we're going to get to the questionnaire people one way or
3 the other, to discuss the questionnaire people.

4 Based, and on her list of witnesses she's divided
5 questionnaire people -- Ms. Bernabei, I mean, has divided
6 questionnaire people into three basic groups. Four individuals
7 she wants to call as witnesses. Four she would want to put
8 in their depositions. Another 10 she wanted to put in their
9 questionnaires.

10 I don't know how many people of this list I have
11 just gotten of 15 or 20 names are reflected in the other
12 groups or whether this is all brand-new or in addition.
13 But one way or the other I think we are going to get to how
14 many of these questionnaire people ought to have to play a
15 role in the hearing or what in fact we do about the
16 questionnaires.

17 Faced as we were with a broad set of questions
18 from TMIA early in the discovery phase, we generated a
19 questionnaire, sent it out to over 400 people to try to get
20 their knowledge or appreciation, awareness of the various
21 factors. We got the answers back from not all, I think a
22 very high, if not all of the current employees.

23 We didn't do as well as you might expect with
24 ex-employees in terms of getting them back, but we still got
25 a large number of them back, even from ex-employees. We

1 were surprised by some of the answers. Those are the
2 answers which received even press attention as answering,
3 on March 28, I think the question number was 3(a): I was
4 aware that there was a hydrogen explosion. That was the
5 essence of the question. I have the specific question here.

6 And we went and checked with those people, and
7 said, you were aware that there was a hydrogen explosion
8 on March 28? The answer that we got from these people varied
9 with the individual, but I think was consistent in one
10 respect. They had misread the question. They simply read
11 it to say were you aware that there was a hydrogen explosion
12 on arch 28, not on March 28 were you aware of or knowledgeable
13 of.

14 We then got some supplemental answers from them,
15 asked them to sign them, and we have those I believe for
16 most of the people who answered yes to question 3(a). But
17 we didn't go and requestion or search into the reasons for
18 people's answers to all of the various questions.

19 What it comes down to is this. With the exception
20 of those people who answeres yes, who we then went back and
21 checked with, I do not know the reliability of people's
22 information in response to those questionnaires, and I cannot
23 stipulate to the reliability or represent to you that we
24 are getting real probitive information by putting those into
25 evidence. I can certainly stipulate that we sent out the

60
1 questionnaire.

2 JUDGE SMITH: Okay.

3 MR. BLAKE: And that those were the answers we got.
4 Beyond that I just can't do it in view of what I know now
5 without having checked with some people.

6 MS. BERNABEI: May I address his point?

7 JUDGE SMITH: Just a moment.

8 Mr. Blake, just what is the licensee's position
9 as to whether on March 28, at 1:50 p.m., that there were
10 people there, or any place, who knew that there was a pressure
11 spike --

12 MR. BLAKE: Yes.

13 JUDGE SMITH: And that containment sprays were
14 acutated?

15 MR. BLAKE: Yes.

16 JUDGE SMITH: And that there was a thud?

17 MR. BLAKE: Yes. Yes to all of them.

18 JUDGE SMITH: There were people there?

19 MR. BLAKE: Yes, sir, who were aware in a variety
20 of ways of one or several. So this is not really in dispute.

21 (Recess.)

22 JUDGE SMITH: We had just arrived at the point
23 where we had identified that it is not in dispute in this
24 proceeding that persons in the control room, unspecified
25 but apparently significant numbers, were aware of a pressure

61 1 spike, actuation of containment sprays, or the thud.

2 I would imagine some persons were aware of all
3 three of them and some were aware of one or two of them.
4 Different combinations.

5 But none of this is really in dispute. That
6 being the case, isn't this a fertile area for stipulation?

7 MS. BERNABEI: We have no problem. In fact,
8 that is what we would suggest.

9 JUDGE SMITH: Is this the first you have known
10 that this is not in dispute?

11 MS. BERNABEI: Well --

12 JUDGE SMITH: I mean is this how the parties
13 have been, this far apart?

14 MS. BERNABEI: No, it's not quite that it is not
15 in dispute. The fact that there was widespread knowledge
16 on the site, and I would assume some of these individuals
17 were not in the control room, perhaps a large number
18 weren't.

19 JUDGE SMITH: Right. I said control room. I
20 don't really believe the location is controlling.

21 MS. BERNABEI: Right. I think it has been
22 contrary to licensee's previous position that information
23 about the pressure spike and containment sprays and thud was
24 widespread. In fact, Gary Miller's position today is as it
25 was five and a half years ago, that he did not know of the

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1 pressure spike.

2 JUDGE SMITH: He is going to appear?

3 MS. BERNABEI: Right. I understand that. But
4 I think, you know, stipulation is fine.

5 JUDGE SMITH: We seem to be going away, in any
6 event, from a theory imputed by you to the licensee, that
7 they are going to say that everybody in that control room
8 thought they had instrument anomalies, until an undisputed
9 situation where it was recognized that people in the control
10 room recognized a real spike, talking about a real spike,
11 on the day, on the 28th.

12 Mr. Blake? Yes?

13 MR. BLAKE: Yes, I believe we will have testimony
14 out of at least two individuals who we have already agreed
15 will appear to that effect.

16 JUDGE SMITH: Yes. That is why I keep coming
17 back to this, that I have never seen surface the case that
18 you have postulated. That is, the anomalous instrument case.

19 MR. BLAKE: It certainly is the case, and a
20 large number of people --

21 JUDGE SMITH: Right.

22 MR. BLAKE: -- have indicated they attributed
23 it to electrical anomaly.

24 JUDGE SMITH: Right.

25 MR. BLAKE: People in the control room and outside

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1 have heard that as well. So that is there. Is it another
2 reading.

3 JUDGE SMITH: Yes, I understand. The point I
4 was making is that it is not your litigant position that
5 on the day, March 28, 1979, that people in control did
6 not recognize a pressure spike. Some may have interpreted it
7 as an instrumentation anomaly but others did, in fact,
8 recognize it as a pressure spike.

9 MR. BLAKE: I believe that will be where we will
10 come out. Some of these people, we will have to await some
11 of these people's testimony. I think you are right, yes.

12 JUDGE SMITH: Have to wait. I thought maybe --
13 waiting. I am not aware we are going to have any testimony
14 on this, are we?

15 MR. BLAKE: I am sure --

16 JUDGE SMITH: You had your written testimony.

17 MR. BLAKE: I don't have any testimony beyond
18 what I have indicated. But when you say our litigative
19 position, in my findings I will reflect what the evidence
20 reflects.

21 MS. BERNABEI: Mr. Dieckamp's position in his
22 testimony is that it was my conclusion that the pressure
23 spike and its meaning was not understood on the day of the
24 accident, at least a part of the understanding of the
25 pressure spike was that, first of all, it indicated a real

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1 increase in pressure.

2 JUDGE SMITH: Oh, I read, when I read his
3 testimony I did not read him to be saying that his view
4 was that it was not recognized as a pressure spike. I read
5 him as saying that the meaning of the pressure spike was
6 not realized.

7 MS. BERNABEI: We will certainly agree to a
8 stipulation that there was a general understanding among
9 site personnel that the pressure spike indicated a real
10 increase in pressure.

11 MR. BLAKE: Oh, I'm not going to agree to that.
12 For goodness sake, I can't do that.

13 JUDGE SMITH: That is what I thought we were
14 talking about.

15 MR. BLAKE: Pardon?

16 JUDGE SMITH: I guess there had been -- I thought
17 we were talking about exactly what she proposed.

18 MR. BLAKE: That there was a general understanding
19 throughout the site that the pressure spike was real?

20 JUDGE SMITH: Yes.

21 MR. BLAKE: No, I cannot stipulate to that.

22 JUDGE SMITH: Okay.

23 MS. BERNABEI: Then I --

24 MR. BLAKE: I will undertake on this proposal
25 which I have just received from Ms. Bernabei that, on the

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1 November 13 letter, to propose a stipulation to her which
2 addresses this. It is my intention to break this down into
3 the questionnaire questions which were asked of these people,
4 and their answers.

5 I need to just check it. When I do it, I will
6 propose a stipulation.

7 JUDGE SMITH: For the Board's guidance, where did
8 we go astray? I thought we were having a meeting of the
9 minds and suddenly I see I surprised you by saying I thought
10 we had arrived at the understanding that there was general
11 understanding that there was a real pressure spike.

12 Not an exclusive understanding, I understand your
13 point, but at least a general understanding.

14 MR. BLAKE: No. In fact, I don't believe it was
15 so general. I think there were some people --

16 JUDGE SMITH: Some people, okay.

17 JUDGE WOLFE: -- who will say they believed it
18 was real because of this coincidence logic, but I don't
19 believe it was general at all.

20 MS. BERNABEI: On the questionnaires, and this is
21 a point Mr. Blake addressed at some length, our position is
22 that the licensee sent out a questionnaire in order to
23 respond to discovery. We received no other response on the
24 central questions that we asked them other than the
25 questionnaires.

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1 In other words, we were referred to the question-
2 naires for the response. We consider that is the official
3 response of the company to which they are bound.

4 It seems to me that as such either the witnesses
5 should be able to be called or their responses entered into
6 the record as reliable responses. If the company has reason
7 to believe they are unreliable or incorrect, I think they
8 have responsibility, since I think it binds the corporation,
9 to correct that response.

10 But the way I interpret the questionnaires, is it
11 has been represented to be the official response to TMI's
12 discovery certified to be correct and accurate by the company.
13 That is why the question about whether these are reliable
14 or not, I think at least they represent the position of the
15 company as it has been represented in discovery, and I will
16 address the 3(a) question later.

17 I think we have a right to expect it is true
18 and accurate to the best of the corporation's knowledge at
19 this time.

20 JUDGE SMITH: You are proposing we require the
21 attendance of Mulleavy, Rochino, DeMan, and Conrad, because
22 these people knew of a hydrogen explosion or combustion
23 according to their so-called 3(a) responses? Is that what
24 you're proposing?

25 MS. BERNABEI: Right. The 3(a) asked for the

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1 individuals, I think it was if they knew or were aware of a
2 hydrogen explosion or burn on March 28. It is did they
3 learn about it on that date.

4 The company has represented this is their response,
5 certified by the company to be true and accurate, to our
6 interrogatory about knowledge and awareness on that date of
7 a hydrogen burn.

8 We desposed a number of these individuals after
9 the company evidently, Mr. Lloyd, the company lawyer, talked
10 to the individuals and a number of them retracted their
11 testimony.

12 We found generally in their depositions that
13 some of them said they misread the question, others had other
14 explanations of why they did not know on March 28 of the *
15 hydrogen burn. Generally the testimony was of very poor
16 quality, and I would say incredible. In fact, it was so
17 bad that Mr. Blake remarked to Louise Bradford, the
18 intervenor in this proceeding, that he believed the testimony
19 was not consistent.

20 We believe that in addition reflects to the
21 credibility of the testimony given at deposition. We think
22 these people knew what they were answering. At least one
23 of the individuals, Mr. Rochino, is corporate. He is in
24 Parsippany. He specifically reviewed the event in question,
25 acuation of the sprays and pressure spike and knew what he

1 was answering when he answered yes, I learned of the hydrogen
2 burn.

3 I think we have a right to introduce the
4 interrogatory responses of the company with regard to these
5 individuals. What we would like to do is call a
6 representative sample; that is, four out of the 20 people
7 who answered yes.

8 For the Board's information, Mr. Mulleavy has
9 acknowledged, he has stated he was aware of the explosion in
10 the containment but he did not know on that date it was
11 caused by hydrogen. But he does stick with his answer that
12 he knew about the explosion on March 28.

13 The other individuals say in some respect they
14 misread the question and have varying stories. What is in
15 common is that they all understood they misread the question
16 after talking to the company lawyer.

17 We think --

18 JUDGE SMITH: You think that is incredible?

19 MS. BERNABEI: I don't think that alone is
20 incredible. I think when you see their testimony, and I
21 think the Board should have the opportunity to do that, you
22 will think it is incredible testimony.

23 JUDGE SMITH: Mr. Blake?

24 MR. BLAKE: Mr. Smith, let me just take Mr.
25 Rochino, who Ms. Bernabei has referred to. He is indeed an

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1 engineer at GPU's offices in New Jersey. During his
2 deposition and as she has indicated answered yes to question
3 3(a). And when asked whether or not his deposition would be
4 better evidence than my representation now, but when asked,
5 because he was asked by Ms. Bernabei, about whether he had
6 been contacted and queried on his answer to the question,
7 he said he simply misread it. And that he had been on
8 vacation. He came back. There was a large stack of papers
9 in his "In" box. Among them was this questionnaire. He
10 noted that the due date for responding was overdue. He
11 quickly went through it, gave answers. I don't think there
12 is any doubt that an individual of Mr. Rochino's caliber
13 understands about hydrogen and certainly today understands.
14 He simply misread the question.

15 And several people simply misread the question.
16 To attribute something beyond that to the company's having
17 inquired of these people as to whether or not they under-
18 stood the question, I think is wrong. And my suggestion with
19 respect to these 3(a) people, and I have made this proposal
20 to Ms. Bernabei and it has not been accepted, is that she
21 pick out some number of 3(a) people and have them come and
22 testify.

23 But before we call all of them or a large number
24 of these individuals to come who misunderstood, goofed, or
25 otherwise had incorrectly answered their questionnaire, I

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1 think the Board should see some of them. My proposal to
2 Ms. Bernabei was that she ask the Board to require two of
3 these people to come, and give testimony. Then we will
4 argue about the need for the remainder to appear.

5 JUDGE SMITH: She is only suggesting four.

6 MS. BERNABEI: That is right.

7 MR. BLAKE: But she said this is a representative
8 sample. I don't want it misunderstood. This is not a
9 representative sample. These are four that she thinks will
10 show the best, or the poorest, in other words. I don't
11 think that is a fair indication of these individuals. But
12 I have said two. If she wants four, so be it. I don't
13 think we should make decisions today about what we do about
14 all the other 3(a) people.

15 JUDGE SMITH: Well, no, we are not.

16 MR. BLAKE: Well, I think that is where we are
17 headed. That is the next slate, group of four and remaining
18 group of 10 questionnaires.

19 MS. BERNABEI: Let me represent what our position
20 is because it is as you suggested, Judge Smith. We only
21 propose four as witnesses. What we wish to do is stipulate
22 the deposition testimony of four -- four others we deposed
23 on the subject, together with their questionnaires and any
24 supplemental responses the company wishes to offer as well
25 as the questionnaires of other 3(a) individuals. I think

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1 those are -- stand as interrogatory responses. The company
2 is bound by them.

3 I have also said if they want to introduce the
4 retractions of these individuals, we have no problem with
5 that, or what they call supplemental responses. What we
6 are suggesting is four people. It is our argument those are
7 representative, one of whom sticks by his story he heard
8 about the explosion on March 28.

9 JUDGE SMITH: After careful questioning he sticks
10 by that he heard an explosion?

11 MS. BERNABEI: Right. Right.

12 JUDGE SMITH: And he regarded it as an explosion
13 on March 28.

14 MS. BERNABEI: As an explosion. He said he could
15 not connect it to hydrogen on that day. He did hear an
16 explosion. I believe he even said he told Beverly Good,
17 another individual, outside Unit 2. Our position is that
18 these individuals gave central evidence through their
19 questionnaires. They were giving it to their employer, while
20 Mr. Rochino and other individuals have said they understood
21 that the -- what they were suppose to do was important to
22 the company.

23 It came with a cover letter informing them it
24 was to be used in these proceedings. I think the questions
25 are quite clear and I think the individuals initially

1 answered them truthfully.

2 Let me give you an example of Mr. Rochino, why
3 we picked him out. Mr. Rochino is in corporate headquarters
4 at Parsippany. After the accident he did a study on the
5 actuation of the containment sprays so he is familiar with
6 this general event.

7 He answered in his question, not with regard to
8 one question, but if I am correct, three questions, he learned
9 about the pressure spike and the hydrogen burn in an 8:00
10 p.m. call between the Unit 1, TMI Unit 1 and Mountain Lakes;
11 that is the Parsippany office.

12 He gave a very specific answer to the question.
13 He said he learned about other information on March 28th
14 in that same manner. The pressure spike, and I believe it
15 was also the containment sprays, or some other event
16 connected with that. It was a very specific answer and I
17 think was very credible in the manner it is given.

18 In his deposition he only retracted the 3(a)
19 answer and said he misread it. He gave no credible
20 explanation of how he could have misread it. I think the
21 better explanation is that he understood it correctly and
22 answered it correctly.

23 JUDGE SMITH: So you want us to decide.

24 MS. BERNABEI: That's right.

25 JUDGE SMITH: I believe she is entitled to make

1 her point. I don't know if, precisely how. But she is
2 entitled to make her point.

3 MR. BLAKE: I agree.

4 JUDGE SMITH: Go on. Doesn't seem to me to be
5 a big dispute here. Seems to me it should be rather short
6 testimony, too. I can't imagine it being extensive
7 testimony.

8 MS. BERNABEI: It is not.

9 JUDGE SMITH: Would you object to the four she has
10 named here, to have them come?

11 MR. BLAKE: No.

12 JUDGE SMITH: Okay.

13 MR. BLAKE: As I say, my initial proposal was
14 that we take two of the three people, and she take her
15 best shot. But taking her best shot with four, that is
16 fine.

17 MS. BERNABEI: Can we address the other -- what
18 have come to be known as the 3(a) individuals?

19 What we propose for them is the introduction into
20 evidence of the depositions of four others. Again, they are
21 short depositions, and focus entirely on their knowledge of
22 hydrogen burn, pressure spike or containment sprays on
23 March 28. And the questionnaires and any supplemental
24 responses of the other 10 individuals.

25 JUDGE SMITH: Mr. Blake, I think the proposal is

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1 reasonable. I think it should be in an organized package,
2 though. That these are the questionnaires. If you want
3 to have, package them in perspective, and that is how many
4 questionnaires there were altogether, and supplements, it all
5 should be in.

6 I believe she is entitled to make the point.
7 Sa-ing that, I don't accept the representation, we will have
8 to wait until we see what the witnesses say and look at these.
9 I don't accept -- we are not doing this by being persuaded
10 that it is incredible that people make mistakes on
11 questionnaires. By no means. The mistakes are common.

12 In fact, it seems former Commissioner Bradford
13 had difficulty sorting out events in his deposition, that
14 sometimes people will speak rather vaguely, attaching dates
15 to time. I'm not persuaded one way or another. Simply that
16 it is a point that you are entitled to make, and I think they
17 should be placed before us in perspective.

18 MR. BLAKE: Judge Smith, as I understand it, it
19 is that the four people, four individuals will be called.

20 JUDGE SMITH: Called.

21 MR. BLAKE: To testify on this business.

22 JUDGE SMITH: Yes.

23 MR. BLAKE: And that in addition to that --

24 JUDGE SMITH: The relevant parts --

25 JUDGE WOLFE: You are at least encouraging the

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1 parties, if not directing the parties, to arrive at a
2 stipulation with regard to the questionnaires which would be
3 a whole package on the questionnaires.

4 JUDGE SMITH: Right.

5 MR. BLAKE: What was sent out, what the reactions
6 were, etc.

7 JUDGE SMITH: Yes, that is our recommendation.

8 MR. BLAKE: I will undertake --

9 JUDGE SMITH: I beg your pardon?

10 MR. BLAKE: I say, I will undertake to draft such
11 a stipulation.

12 MS. BERNABEI: I assume that would include the
13 proposal to introduce the four depositions as well?

14 JUDGE SMITH: That was our idea.

15 MR. BLAKE: That was not mine.

16 JUDGE SMITH: Well, it was mine. That she is
17 entitled to make the point as presented here. That Benner,
18 Boyer, Gingrich and Reich depositions, or relevant portions
19 of them, be offered; and the questionnaire, and it will be
20 a part of a package which demonstrates the total endeavor.
21 Any supplements you want to put to it, so it accurately
22 reflects what she is trying to demonstrate here; that some
23 people did answer those questions that way.

24 I don't understand what you heard me say that was
25 different.

76
1 MR. BLAKE: No, I had put it in two baskets with
2 the four individuals coming and then in addition overview of
3 the questionnaires.

4 JUDGE SMITH: Capturing her points here.

5 MR. BLAKE: And I had not meant to include we
6 would stipulate to the introduction into evidence of
7 depositions or portions of them.

8 JUDGE SMITH: I would just as soon see a
9 stipulated -- I don't know what your concern is. I would
10 just as soon see a stipulated presentation that Benner, Boyer,
11 Gingrich and Reich on depositions answered a certain way.

12 I don't understand the problem. It is a point
13 I think she is entitled to make. That the people answered
14 this way. If there is an explanation, you are entitled to
15 make the point. Then people can argue and go on from them.

16 It is our responsibility to let the parties make
17 their case. But I might say this whole area of when people
18 knew what when so long after the fact, going on six years
19 now, just leaves me somewhat uneasy about the reliability
20 of all of it.

21 But she is entitled to make the point. That was
22 the remand, that she is entitled to make it.

23 I point that out by both aspects of the case.
24 I am troubled by people coming up with their memories as
25 to what they remember when.

1 MR. BLAKE: I will undertake to draft something
2 that covers this. My obvious hesitancy about the depositions
3 is that I didn't conduct any discovery or cross-examination
4 of these people in the course of those depositions, or
5 certainly extend it. It may be that this will lead us to
6 have --

7 JUDGE SMITH: If you prefer to have some of those
8 people come as live witnesses instead of deposition --

9 MR. BLAKE: I was opposing the introduction of
10 the depositions.

11 JUDGE SMITH: If you feel the deposition did
12 not do the job, then we certainly don't want them as deposi-
13 tions, alone.

14 MR. BLAKE: And what I thought with these 3(a)
15 people was that the Board should see some number of them.
16 We are now agreed we will receive four. Then we argue about
17 whether or not there is a need to see others.

18 MS. BERNABEI: It seems to me --

19 MR. BLAKE: I think the Board needs to see these
20 individuals and just see -- the fact that they goofed on a
21 questionnaire really requires them to come and make
22 appearances as a witness now.

23 It seems that is really what it boils down to.

24 MS. BERNABEI: It is not a question of whether
25 they goofed on a questionnaire. It is a question of how

78
1 they answered. There was an opportunity for cross-
2 examination of which Mr. Blake did avail themselves in some
3 instances.

4 If they didn't avail themselves of that
5 opportunity, that is their problem. But I think they were
6 given an opportunity --

7 JUDGE SMITH: Keep your microphone over, please.

8 MS. BERNABEI: In some cases Mr. Blake did
9 cross-examine the individuals to bring out the points he
10 wished to, and it seems they are reliable and probitive.

11 JUDGE SMITH: They may be but the Board still
12 has difficulty no matter what form you present us this
13 testimony. The Board would still have a great deal of
14 difficulty of finding as a matter of fact in this case
15 that Mr. Benner, Mr. Boyer, Mr. Gingrich and Mr. Reich
16 indeed, in fact, knew that there was a hydrogen explosion
17 on that day.

18 I would have difficulty accepting that as being
19 a proven fact in this case. I could accept they believed that
20 might be the case in their depositions. But knowing what I
21 know about this case and all the confusion and all the
22 investigations, I would have difficulty predicating an
23 initial decision upon an avowed certainty that they knew
24 that happened on that day. That is my point about these
25 things over time.

79
1 The thing that I would like to see would be,
2 actually, maybe instead of the papers, have maybe some more
3 of them come, if that is your pleasure.

4 MR. GOLDBERG: Judge Smith?

5 JUDGE SMITH: I was thinking of efficiency.

6 MR. GOLDBERG: May I make a proposal to try to
7 maybe resolve this issue?

8 Ms. Bernabei says that these four are repre-
9 sentative of the answers. Mr. Blake had a proposal that two
10 individuals testify as representative.

11 Why don't we allow Ms. Bernabei to choose any two
12 of these four she wishes and have licensee add two that they
13 wish to have come testify, so that each of the parties has
14 two individuals who they believe are representative. After
15 they testify, the Board can make a judgment as to whether
16 we need to hear additional testimony on this matter.

17 MS. BERNABEI: This is our case. If they want
18 to present their people to talk about it, fine. This is
19 our case, and we have a right to present the witnesses we
20 think will help our case.

21 What I propose is to take up the least amount of
22 this Board's hearing time, but to get across the point we
23 wanted to get across. That is why we took depositions of
24 these people, to see if it was credible that they made
25 mistakes and retracted their answers.

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1 I think the depositions are a pretty good testing
2 of their credibility. The licensee and NRC staff, who came
3 to all, well, I would say at least four out of the six of
4 these 3(a) depositions, had a chance to question them.

5 JUDGE SMITH: Over licensee's objection, we
6 would be reluctant to introduce depositions and/or question-
7 naires into evidence. That is why I am pushing the effort
8 to capture, to capture the whole endeavor.

9 MS. BERNABEI: Which we support. We support
10 that.

11 JUDGE SMITH: The difficulty with your proposal,
12 Mr. Goldberg, is that two people who did not interpret it as
13 a hydrogen explosion on the day doesn't do much.

14 MR. GOLDBERG: Let each choose three.

15 JUDGE SMITH: I don't know, I mean you can have
16 30 of them who didn't interpret it as a hydrogen explosion,
17 and that is a whole --

18 MR. GOLDBERG: No, of the so-called 3(a) people,
19 the ones TMI believes are most favorable to their position
20 as to whether they indeed misinterpreted the position and
21 licensee proposes three who they believe was representative
22 of whether there was a mis interpretation of the question.

23 Then the judgment can be made whether it is worth
24 calling additional witnesses, having additional depositions
25 entered into evidence or all the questionnaires need to come in.

81

1 JUDGE SMITH: We used that approach in the
2 maintenance aspect of the case early on, and it seemed to
3 work out all right. But what, do you want to approach it
4 that way, Mr. Blake?

5 I don't know what prohibitive value there is going
6 to be if you give me three people who did not misinterpret the
7 questionnaire and answered correctly.

8 MR. BLAKE: No.

9 MR. GOLDBERG: That is not my suggestion.

10 JUDGE SMITH: I'm sorry. Try it once more.

11 MR. BLAKE: They were all, as I understood his
12 proposal, to be drawn from people who said yes, I understood
13 it was a hydrogen explosion on March 28 and later said --

14 JUDGE SMITH: I see. I missed that. I understand.

15 MR. GOLDBERG: TMIA chooses three from that list
16 that misinterpreted the question they want the Board to
17 hear, and the licensee chooses their three. That is six
18 of the total 20.

19 MS. BERNABEI: This is our case. We have a right
20 to call the witnesses we want.

21 JUDGE SMITH: All right, you call your witnesses
22 and we allowed that. Now, you want paper.

23 MS. BERNABEI: I understand that. But Mr.
24 Goldberg suggests we let licensing make up part of our case.
25 Obviously that is not fair.

1 JUDGE SMITH: Unless you arrive at some
2 accommodation which accurately captures the scene, then you
3 have big trouble. You can't do anything. Mr. Goldberg
4 was making a proposal in the spirit of helping you and the
5 Board and licensee. It is much appreciated, because you
6 have trouble with the depositions and questionnaires. You
7 want them in without the people.

8 MS. BERNABEI: I odn't care. I would take the
9 people instead of the questionnaires and the -- in fact,
10 what that is an attempt to do is to reduce the need to call
11 all of them.

12 JUDGE SMITH: Okay. Four are agreed upon.
13 Let's bring -- I'm just going to pick them at random.
14 Let's bring Boyer and Zeiter, okay, and forget it. I just
15 picked them at random.

16 MS. BERNABEI: Are we going to get into the
17 questionnaires as well, and whatever supplements?

18 JUDGE SMITH: We will ask them: Here's your
19 questionnaire, did you believe that there was a hydrogen
20 spike? You can use the questionnaire to briefly cross-
21 examine them, and there you are.

22 MS. BERNABEI: We didn't depose those two. Zeiter?

23 JUDGE SMITH: Right. I picked one from the
24 questionnaires and one from the deposed group. You've
25 got six live witnesses on the issue. Is that agreeable to

1 you, Mr. Blake?

2 MR. BLAKE: Yes, sir.

3 MS. BERNABEI: I assume we also are considering
4 continuing to talk about the introduction of all the
5 questionnaires --

6 JUDGE SMITH: No, we are not. Unless you work
7 it out. That is what I would really prefer, that you work
8 out a package capturing the results of the questionnaire
9 poll. If you can't do that, then that gives you a good shot
10 at it. Six live witnesses that answered it in the direction
11 of the way that you believe the evidence should go, and these
12 are samples selected from your sample.

13 Are there any objections to that approach, other
14 than your --

15 MS. BERNABEI: Well, we thought the proposal
16 we presented was reasonable and did capture what you're
17 trying to do; that is, capture the spirit of, that is,
18 the depositions, questionnaires and some live testimony.

19 JUDGE SMITH: I'm sorry, did you say it does
20 capture the spirit of what you're trying to do?

21 MS. BERNABEI: Well, it doesn't go as far as
22 we like, but we would --

23 JUDGE SMITH: Is that satisfactory, Mr. Blake?

24 MR. BLAKE: Yes, sir.

25 JUDGE SMITH: So Mr. Boyer and Mr. Zeiter, David E.

1 Zeiter, Mr. Boyer will be added -- and I would expect
2 these to be on and off appearances.

3 MS. BERNABEI: The only exception might be the
4 one that we haven't deposed, because we really haven't
5 talked to him. The ones we have deposed I think will be
6 very quick.

7 JUDGE SMITH: If you had some place somebody who
8 had demonstrated a biding certainty that would be one thing.
9 That is not what we are dealing with. The four that you
10 have, that you listed, I think I would, that would be the
11 one that you thought would make the best shot at your case.

12 We will hear from them. So I think you have
13 made out pretty well on this one.

14 MS. BERNABEI: Skipping back for the moment, the
15 other argument as to the Dieckamp mailgram was that the GPU
16 Service Corporation engineers, five of whom were sent to the
17 site on the first day of the accident, knew about the
18 explosion in the containment and transmitted that information
19 to their superiors in Parsippany.

20 Let me explain the nexus we intend to use to
21 demonstrate that. There were five GPU Service Corporation
22 engineers sent apparently by Mr. Arnold or Mr. Richard Wilson,
23 who worked directly under Mr. Arnold, to the site, various
24 recollection, from about 10:00 to 11:00 a.m. on March 28.
25 They were sent for the specific task of analyzing the accident

1 and provide technical support to the site. They arrived at
2 various times between about 2:00 p.m. and apparently 5:30,
3 or 5:20 p.m. on March 28, were stationed for a portion of
4 the time at the observation center.

5 One of the group, Richard Lentz, was sent by the
6 group or went into the Unit 2 control room for a period
7 the evening of March 28 in order to collect data for the group
8 to analyze.

9 We believe that group reported back to Mr.
10 Keaten at some time on March 29 what they had found, and that
11 report included a statement that there had been an explosion
12 in the containment the prior day. And we believe that the
13 information may well have been communicated from Mr. Keaten
14 to Mr. Dieckamp on that day or a short time after he received
15 it.

16 In addition, we would intend to present testimony
17 that at least two of this group of five engineers had
18 available to them -- well, that they had available to them
19 information about in core thermocouple temperatures in
20 excess of 2500 degrees on that date.

21 At least one of them believed, based on that
22 information, that there was some core damage, that those
23 temperatures in that range indicated core damage.

24 In addition, we believe that there is testimony
25 that those, at least some of those readings were obtained

1 by Mr. Porter, Ivan Porter, again, chief instrumentation
2 and control engineer, and transmitted to Gary Miller, the
3 station manaer.

4 In addition, we believe that through the
5 stipulation and through an understanding of these individual's
6 role on the site on the first day, it is an indication they
7 had information available to them through the alarm printout
8 for the period of the pressure spike and from the alarm
9 printout it is possible, in fact, it was determined that
10 there was a hydrogen production at that time. Hydrogen
11 burn at that time.

12 So the witnesses we would propose on this are
13 four of the five GPU engineers who went to the site: Gary
14 Broughton, James Moore, Richard Lentz and Julien
15 Abramovici.

16 Also, some testimony, we suggested introduction
17 of a portion of the deposition testimony of Mr. Creitz, who
18 was the Met Ed president at that time, located in Reading.

19 Mr. Creitz, I believe, accurately describes the
20 role of these engineers and the fact that they did not report
21 to him, but he assumed and understood they reported
22 to Mr. Arnold and Mr. Arnold's organization.

23 We would also request testimony of Mr. Keaten
24 to explain circumstances under which he took his notes.
25 We would also request the original of his notes be made

1 available during his testimony because we think the inference
2 is that the notation about the explosion in containment
3 was written March 29 and not March 30, and the original of
4 the notes indicate that.

5 We would also request testimony of Richard
6 Bensel, an electrical engineer at the site, apparently the
7 person who briefed the Service Corporation people about
8 the 2500 degree temperatures. In his testimony, in his
9 deposition, he stated from the alarm printout one could
10 determine hydrogen had been produced. We think that that
11 is relevant testimony as to the fact that not only the
12 site personnel apparently concluded hydrogen was produced
13 as a result of the pressure spike, but that individuals in
14 the observation center concluded that as well, and
15 apparently at some time on March 29 communicated that
16 information to Mr. Keaten.

17 JUDGE SMITH: Okay. Where does this appear on
18 your -- these people? Where are they grouped? They are
19 not grouped according to that?

20 MS. BERNABEI: No, they are not. The give GPU,
21 or four of the five we would propose to call would be
22 Mr. Broughton, Mr. Moore, Mr. Abramovici.

23 JUDGE SMITH: Keaten?

24 MS. BERNABEI: No, Keaten -- and Richard Lentz.

25 JUDGE SMITH: This is the GPU service group that

1 went on site?

2 MS. BERNABEI: That's correct.

3 JUDGE SMITH: Where does Lentz appear?

4 MS. BERNABEI: On page 2. Those individuals we
5 suggested, whose depositions we suggested in lieu of their
6 testimony.

7 We would propose Mr. Keaten at least insofar as
8 he could explain or sponsor his notes.

9 JUDGE SMITH: Well, he is also, isn't he, in your
10 view of the case, a direct conduit of information to
11 Mr. Dieckamp?

12 MS. BERNABEI: That's correct.

13 JUDGE SMITH: Is it your theory of the case that
14 there are two conduits directly to Dieckamp, Keaten and
15 Arnold; or just one?

16 MS. BERNABEI: Well, I guess I think if Mr.
17 Keaten and Mr. Arnold together. I mean I think it is one
18 organization.

19 JUDGE SMITH: Okay.

20 MS. BERNABEI: I think it is likely Mr. Miller,
21 Mr. Herbein, Mr. Clinger, may have told them about the
22 pressure spike and hydrogen burn when they met him --
23 because it is our contention Mr. Miller not only understood
24 before he left, but he took certain actions to allow
25 repressurization before he left.

1 I think it would be logical to assume that he
2 would tell Mr. Dieckamp when he met them when he knew about
3 the status of the reactor. So that is another conduit.

4 JUDGE SMITH: You are not using your microphone
5 again.

6 MS. BERNABEI: Sorry. That would be a second
7 conduit, Mr. Miller, Mr. Herbein.

8 JUDGE SMITH: Miller, Herbein, straight to
9 Dieckamp?

10 MS. BERNABEI: Yes.

11 JUDGE SMITH: Okay.

12 Mr. Blake?

13 MR. BLAKE: I will touch on a couple of the points.
14 Judge Smith, the procedure trail of these individuals, and
15 what their testimony stands for, and what they will reveal if
16 they come as witnesses, I think will be remembered by all
17 of us in view of what was indicated they will testify to
18 here today. Let me hit on a couple of the items.

19 The suggestion that the individual knew or
20 appreciated the hydrogen spike on March 28, which is the
21 Dieckamp mailgram, that these engineers understood, came in
22 contact with enough information, or did, in fact, understand
23 it in terms of core damage, is just not indicated by any of
24 their testimony.

25 It is true that Mr. Moore's notes of a briefing

1 late in the afternoon on March 28 had the notation of
2 2500 degrees. Mr. Moore was asked about that in the course
3 of his deposition, and he really had no information beyond
4 what his notes reflected to his present recollection.

5 He did indicate, I believe, at the time of his
6 deposition that the figure of 2500 degrees would indicate
7 to him core damage, although I do not recall specifically
8 his language. But he had no recollection, today, of what
9 his thoughts were.

10 More importantly, he had no recollection of ever
11 having communicated the information back to Parsippany
12 which he had learned apparently from that interview.

13 Nor am I aware of other engineers who have said
14 that they did, before the apparent conversation between
15 Mr. Broughton and Mr. Keaten have both indicated was on
16 the 30th. This is the red ink/blue ink question of the
17 Keaten notes where we now have an affidavit by Mr. Keaten
18 that those notes were from March 30.

19 Certainly this information deals with the subject
20 matter, but that these engineers are going to provide probitive
21 evidence of a greater degree of understanding in the course
22 of being now called as a witness and testifying than what
23 they have up to this point is just not credible to me.

24 That Mr. Creitz would be called for the purpose
25 of explaining these GPU Service Company engineers' roles

1 in going to the Island is remarkable. Here is Mr. Creitz,
2 Met Ed present up in Reading. I don't think he even knows
3 these fellows, let alone what their purpose was in going
4 there. So in the course of his deposition that he implies,
5 or states that they were there for one reason is a funny
6 way to understand why those engineers were at the plant,
7 or what information they had.

8 They never communicated with Mr. Creitz, nor
9 is there any testimony to indicate they did. If you want
10 to know what their purpose was, you have got to talk with
11 the engineers, or talk with Mr. Arnold. But to call
12 Mr. Creitz here for the purpose of identifying why these
13 engineers came from Parsippany, doesn't answer to Mr. Creitz,
14 to the plant, is I don't think a sensible reason to ask
15 Mr. Creitz to come to testify.

16 JUDGE SMITH: I wasn't much impressed by the
17 reason for Mr. Creitz, either. But I do think that as
18 they get to Broughton and Keaten, they are getting close
19 to Mr. Dieckamp.

20 As I understand it, Mr. Broughton was the
21 spokesman for Moore, Abramovici, Lentz, to Mr. Keaten?

22 MS. BERNABEI: That is what it appears to be.

23 JUDGE SMITH: Yes.

24 MS. BERNABEI: Mr. Moore testified that he
25 reported what he knew to Mr. Broughton, and that Mr. Moore

1 said that the 2500 degree temperatures he reported -- he
2 did tell Mr. Broughton about. Mr. Broughton, as it
3 appeared from the Keaten notes, and I think Mr. Keaten
4 has testified in other forums, was information transmitted
5 from Mr. Broughton.

6 We also have information from recent -- recent
7 testimony from Mr. Lentz that on the evening of March 28
8 Mr. Broughton went back to the hotel earlier than the other
9 engineers in order specifically to get through to Keaten
10 and Parsippany, although he didn't know whether he got
11 through that night or the following morning, but he did
12 know he went back specifically to talk to Keaten late that
13 night.

14 MR. BLAKE: Judge Smith, what you're really
15 being asked to do is determine whether or not there is a
16 need to call a rather large number of individuals who may
17 speculate that, maybe Mr. Broughton would, for example,
18 to take the last one, went back to his hotel room. Maybe
19 on this night or another time, and maybe to call Mr. Keaten.

20 JUDGE SMITH: I am speculating, I am suggesting
21 we should call Broughton and Keaten on this area.

22 MR. BLAKE: I can understand, if you find
23 something there, then you may have to check, track back.
24 But if you don't find anything there, what difference does
25 it make?

1 JUDGE SMITH: Well, what we are doing is obeying
2 the Appeal Board.

3 MR. BLAKE: Yes, I understand.

4 JUDGE SMITH: And we are giving them a chance --
5 as I see it, now what we have done is that we would be
6 working from the other end. From Dieckamp and to his two
7 main informants. That is a good capture point there.

8 Then we would have pretty well given a good
9 shot at the people on site who may have gathered and passed
10 information on. I think in a relatively efficient
11 presentation we will have covered all the bases, really.

12 MS. BERNABEI: If I could suggest, I think Mr.
13 Lentz, he has provided probably the most information, both
14 about the in-core thermocouple data and the alarm printout
15 or information that he collected in the Unit 2 control room
16 and made available to individuals in the observation center.

17 I would suggest since he is the link of the hard
18 data he be called as well.

19 JUDGE SMITH: Yes, but are you suggesting
20 Broughton communicated directly with Dieckamp?

21 MS. BERNABEI: No, he talked to Keaten.

22 JUDGE SMITH: All right. Keaten is the capture
23 point in discovery, and as a safeguard -- we have given
24 you Dieckamp, number one. He is coming, and you have
25 cross-examined him all over the place as to what he knew and

1 learned. Then we have given you one level away from him --
2 Keaten. You say you haven't deposed him. But you have a
3 good shot at cross-examining him on his notes and cross-
4 examining.

5 Broughton is a third level away from Dieckamp.
6 The information didn't pass through, I mean, of course,
7 documents. The information didn't pass through each of
8 those check points. But we are giving you a double shot
9 to the access of Dieckamp. And giving you a broad range of
10 exit information from the site.

11 I don't think you need Lentz.

12 MS. BERNABEI: He is the one that actually
13 collected the data which would lead them to understand that
14 there had been a hydrogen burn. In other words, he
15 collected the alarm printout.

16 In one of his early interviews --

17 JUDGE SMITH: He gave it to Broughton?

18 MS. BERNABEI: Right.

19 JUDGE SMITH: I think you probably have enough.
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dh(2)

1 (Pause.)

2 JUDGE SMITH: We think that that is sufficient,
3 absent some particular showing that you have to have Lentz.
4 Just not the nature of his role; but some demonstration that
5 we have to roll back and follow a trail back, which is always
6 open, if necessary, we will stop at that point.

7 MS. BERNABEI: Okay.

8 What I am assuming is that we will be able to
9 question each of these witnesses on the interviews or other
10 information that has been stipulated into evidence. In other
11 words, we don't really need Mr. Lentz for what -- well, if we
12 can use those other representations, interviews and statements
13 by Mr. Lentz in questioning Broughton, which I assume we can,
14 we might need him as a live witness.

15 JUDGE SMITH: It might depend on Mr. Broughton's
16 familiarity with the interviews, refreshing his memory or what-
17 ever. But it seems to me that is one of the purposes of stipu-
18 lating those documents; is so they can be available where relevant
19 and where used appropriately on cross-examination.

20 Am I wrong about that? Is there a limitation?

21 Okay.

22 Now what?

23 MS. BERNABEI: Now the other testimony Mr. Lentz
24 had goes to, and I would say this of Mr. Lentz and Mr. Yeager,
25 who was an instrument man who took some of the in-core

dh2

1 thermocouple temperatures on March 28. Both testimonies go
2 to the fact there was a second set of in-core thermocouples taken
3 by Mr. Lentz says, Ivan Porter, and that he things Porter told
4 him, Lentz, that he told Gary Miller about it.

5 I think that is, that, together with the Moore
6 notes, indicates site personnel briefed engineers in the operation
7 center about the in-core temperatures, indicates that there was
8 credence given to them by site personnel, and would corroborate
9 another interpretation of the pressure spike in terms of produc-
10 tion of hydrogen; since the temperastures in and of themselves
11 indicate production of significant amounts of hydrogen.

12 JUDGE SMITH: You are going back to Issue No. 1,
13 now.

14 MS. BERNABEI: Well, the way I see it it is, it
15 corroborates both the point the people interpreted the pressure
16 spike to indicate hydrogen, core damage, site personnel, and
17 corroborates the testimony that the individuals in the observa-
18 tion center, Service Corporation people; did as well.

19 JUDGE SMITH: It may be that it is just late in
20 the day and fatigue is setting in. But I am of the impression
21 that you have had a pretty good shot now. The Board is at
22 least satisfied with what you are going to establish; vis-a-vis
23 site personnel and what you are going to establish as a -- in a
24 channel of communication.

25 I would think you would have to defer anything

dh3

1 else from Lentz until we see it in the context of the evidence.
2 But it just doesn't impress me that you need that. That it is
3 -- it seems to me it is rather cumulative in both areas.

4 MS. BERNABEI: I guess I am again anticipating
5 the defense that the Licensee has had throughout these proceedings.

6 That is that -- I shouldn't say "proceedings," but
7 throughout the investigations, that there was only one set of
8 thermocouple temperatures available to Gary Miller, and that that
9 was not believed by the site personnel at the time of the accident.
10 I assume they are going to contend it as well during these
11 proceedings.

12 JUDGE SMITH: Then I have to ask you to defer it;
13 keep it in reservation until it comes up in context.

14 MS. BERNABEI: The only other point I would like
15 to make is Mr. Bensel, and Ms. Doroshov corrected me; who said
16 that Mr. Bensel, reading the alarm printout, saw that it --
17 indicated a real increase in pressure such that he became alarmed
18 and went to Mr. Lowe. That is sort of the low story of March
19 29.

20 In any case, I think Mr. Bensel's interpretation,
21 sort of expert opinion on what one could derive from the alarm
22 printout, as another electrical engineer, is relevant as to
23 what people in the observation center understood from it.

24 JUDGE SMITH: You want to impute to others the same
25 faculty of interpretation that Mr. Bensel had?

dh4

1 MS. BERNABEI: In that they were similarly trained
2 engineers. In fact, probably more tained than Mr. Bensel.

3 JUDGE SMITH: I don't believe that that -- we let
4 you do that with respect to Mr. Porter. And with a great deal of
5 concern on my part as to the reliability of that idea. I think
6 you are stretching it much farther now.

7 That one engineer would make a sophisticated
8 engineer. Therefore, we impute that capability to another group
9 of engineers? Have I stated it fairly?

10 MS. BERNABEI: Well, just a little bit. It's not
11 a very sophisticated analysis. Essentially what he does is he
12 looks at the alarm printout and says there is no way these kind
13 of alarms could have actuated at the same time.

14 JUDGE SMITH: This is on the afternoon of the 29th?

15 MS. BERNABEI: Well, that is when he says he
16 actually looked at it. But his analysis of what you would look
17 at and how you would draw that conclusion, I think, it is not
18 sophisticated at all. But I think it clearly within his exper-
19 tise for him to do that immediately upon seeing it.

20 I think similarly, it was within the expertise of
21 the Service Corporation people who were probably the top
22 technical personnel the Service Corporation had at that time.

23 JUDGE SMITH: It still depends upon imputing that
24 capability to others.

25 MS. BERNABEI: Well, only insofar as these were

dh5

1 engineers that were even more highly trained than Mr. Bensel.
2 I mean it does to some extent, but I think it is important to
3 understand what kind of training you would need in order to do
4 this and what kind of analysis you would do.

5 I think the GPU Corporation people, if anything,
6 were more highly trained than Mr. Bensel.

7 JUDGE SMITH: I don't know, Ms. Bernabei.
8 What is your view, Mr. Blake?

9 I am leary of the theory of imputing skills.
10 That is a basic weak link in your theory.

11 Mr. Blake?

12 MR. BLAKE: No, I would oppose this, Judge Smith.
13 I think we will hear from Mr. Porter on the subject as the Board
14 has observed. But beyond that, Mr. Bensel's testimony is not
15 that simple. The testimony during his deposition was he looked
16 at the chart. He then went to the alarm printout to confirm
17 whether or not the spike might be indicated as real. To see
18 if pressure switches in the range moved or activated, which was
19 reflected on the alarm printout.

20 It's not a straight forward, "I looked at the chart.
21 I thought about coincident logic, and realized that it had to
22 be real."

23 I don't even think it is that straight forward.

24 MS. BERNABEI: Well, I think it is even more
25 straight forward because I was a little surprised by his

dh6
1 testimony; as you go into the deposition, to question him at some
2 length about how one would look at the alarm printout and deter-
3 mine so quickly it was a real increase in pressure and he
4 explains it quite nicely.

5 In fact, I was sort of surprised at the ease with
6 which he explained how he made that conclusion with the alarm
7 printout and I think he made it pretty clear it was an easy
8 analysis to do. That is all we want. Perhaps it can be stipu-
9 lated that this is another engineer of Mr. Bensel's capabilities,
10 could make that interpretation from the alarm printout. I would
11 be willing to stipulate to that.

12 JUDGE SMITH: Is that another area of stipulation?

13 MR. BLAKE: I will look at that area. I doubt
14 it. But I will report back to Ms. Bernabei.

15 JUDGE SMITH: We are satisfied that you have a
16 well-rounded approach to the case right now without it. If you
17 can stipulate it, that would be fine. But I don't think that it
18 would require it. Does that take care of your witnesses, now?

19 MS. BERNABEI: There were two rebuttal witnesses,
20 or at least two. One was Mr. Abramovici. Again, this is -- he
21 was familiar with the meeting, testified about the meeting on
22 Thursday which I think discounts the Licensee's position
23 that there was not another understanding of production of
24 significant amounts of hydrogen until 11:30 or so.

25 JUDGE SMITH: Because he was present, you assert,

dh7 1 in the afternoon meeting --

2 MS. BERNABEI: At 3:30. That's correct.

3 JUDGE SMITH: Yes. This is rebuttal. Have you
4 deposed him?

5 MS. BERNABEI: Yes, we have.

6 JUDGE SMITH: His deposition testimony supports
7 that rebuttal?

8 MS. BERNABEI: Yes.

9 JUDGE SMITH: The last time this subject came up
10 it was in the context of we would permit his deposition. Is
11 that--

12 MS. BERNABEI: I think what we wanted is additional
13 discovery based on his deposition. I don't quite remember the
14 Board's ruling. What did happen is Mr. Crimmins, who was another
15 one of these consultants, perhaps he was with the company, another
16 of the task force members at the meeting; did provide another
17 additional interrogatory response about the meeting. We would
18 also propose him insofar as he could introduce the questionnaire;
19 talk about the meeting as a rebuttal witness as well. Again,
20 it is limited to the afternoon meeting.

21 JUDGE SMITH: Mr. Blake?

22 MR. BLAKE: Could I have a moment, Judge Smith?

23 (Pause.)

24 MR. BLAKE: What I was double checking, Judge
25 Smith, was what Mr. Abramovici testified to in the course of

dh8

1 his deposition. I recalled and have confirmed by reviewing
2 his deposition that Mr. Abramovici's recollection is that
3 hydrogen was discussed at that afternoon meeting. But that he
4 has no recollection of a discussion of the source of that hydrogen,
5 or, in fact, that it was due to zirc water or some other source.

6 So I don't know how meaningful or probative in
7 terms of the Mailgram it is going to be to require Mr. Abramovici
8 to come.

9 MS. BERNABEI: He said he didn't quite just testify
10 to hydrogen production. He said there was hydrogen production
11 above the four percent containment design limit. We ques'ioned
12 Mr. Lowe as a technical matter whether four percent, whether
13 the total containment volume could be reached in two days other
14 than by zirc water reaction. He said no. Okay.

15 They also apparently, I am getting this now from
16 Mr. Crimmins' questionnaire and my understanding both from Mr.
17 Lowe and Mr. Abramovici, the boundaries of the meeting, that
18 Mr. Kunder, at-site personnel briefed them on what was going on.
19 It seems we have enough in terms of the percentage of hydrogen
20 discussed, 4 percent; to indicate at least Mr. Lowe at that
21 meeting and probably other people understood the only way it
22 could be produced was with zirc water.

23 It seems from Crimmins' questionnaire that we have
24 additional evidence that the pressure spike was discussed,
25 although he said it was dismissed as another anomaly; that there

dh9

1 was discussion of the pressure spike and discussion of production
2 of hydrogen. It could only be caused by zirc water reaction.

3 JUDGE SMITH: Did you depose Mr. Lowe on Mr.
4 Abramovici, is it Abromobici?

5 MS. BERNABEI: I think Abramovici.

6 JUDGE SMITH: Abramovici, did you depose Mr. Lowe
7 with respect to Mr. Abramovici's recollection of that afternoon?

8 MS. BERNABEI: Yes.

9 JUDGE SMITH: What did he say?

10 MS. BERNABEI: If I am correct he said he couldn't
11 remember any discussion of hydrogen. He vaguely remembered
12 pressure spike might have been mentioned but dismissed as an
13 anomaly. That was the first mention we ever had from Mr. Lowe
14 that a pressure spike was mentioned from him prior to 11 p.m.,
15 on that date. In any case, I think Mr. Crimmins in response to
16 another interrogatory, response of Licensee, has said that he
17 remembers a discussion of the pressure spike and dismissal of
18 it as an anomaly or malfunction at the afternoon meeting.

19 That is my understanding of his interrogatory
20 response. So what we have essentially is Mr. Abromovici
21 testifying as to production of hydrogen over 4 percent which
22 could be created according to Mr. Lowe's expertise only by
23 zirc water reaction and simultaneous discussion of the pressure
24 spike.

25 JUDGE SMITH: Let's assume it was to exactly

dh10

1 to what you say. That he was at that meeting. There was a
2 discussion of hydrogen in excess of 4 percent. Just assume that
3 is the case.

4 I don't know where it takes you. I mean, does it
5 -- let's assume that that is the case; that that can only be
6 produced by zirc water reaction.

7 MS. BERNABEI: That meant they knew --

8 JUDGE SMITH: That meant they knew --

9 MS. BERNABEI: Does that destroy Mr. Lowe's
10 testimony?

11 MS. BERNABEI: I think it does.

12 JUDGE SMITH: Destroys it.

13 MS. BERNABEI: I think so, because Mr. Lowe has
14 said "Gee, we didn't think in terms of production of hydrogen
15 until after we looked at the pressure spike and interpret it
16 in that way."

17 Certainly if there was another understanding of
18 production of hydrogen caused by zirc water reaction on --
19 generally on the site at that time period, it wouldn't matter
20 if they interpreted the pressure spike anyway.

21 JUDGE SMITH: Mr. Abramovici is not going to
22 offer testimony that only zirc water reaction can produce hydrogen.
23 All he is going to testify is that at that meeting, hydrogen in
24 excess of 4 percent was discussed?

25 MS. BERNABEI: Mr. Lowe will testify, yes, that

dh11
1 the only way hydrogen in that quantity could be produced was
2 through zirc --

3 JUDGE SMITH: Right, but Mr. Abromovici himself
4 will only say, hydrogen, 4 percent, at the meeting?

5 MS. BERNABEI: He sayd he can't remember if the
6 source was discussed; that is correct.

7 JUDGE SMITH: Your what?

8 MS. BERNABEI: He said he can't remember, I believe,
9 if the source were discussed or not.

10 JUDGE SMITH: If the source?

11 MS. BERNABEI: That is, the source for the produc-
12 tion of hydrogen.

13 JUDGE SMITH: Yes. Mr. Abramovici would testify
14 only that, discussed at the afternoon meeting was the possibility
15 of the existence of hydrogen in excess of 4 percent. That is all.

16 MS. BERNABEI: Well --

17 JUDGE SMITH: Not the inferences to be drawn from
18 that, or --

19 MS. BERNABEI: No. He will also testify that he
20 was in charge of consulting with outside consultants in order to
21 install a hydrogen recombiner. In other words, it was realized
22 then that that was a serious condition about which action
23 should be taken.

24 JUDGE SMITH: Okay.

25 MS. BERNABEI: It seems to me that contradicts

dh12
1 Mr. Lowe's testimony that the first understanding of the
2 presence of significant amounts of hydrogen was through his
3 interpretation of the pressure spike.

4 JUDGE SMITH: But I am wondering what is in factual
5 dispute and what is in technical dispute.

6 Mr. Abramovici is not going to testify that the
7 only source, the only source of hydrogen in excess of 4 percent
8 is from zirc water reaction.

9 MS. BERNABEI: We will enter into a stipulation
10 as to that fact.

11 JUDGE SMITH: Right.

12 MS. BERNABEI: We have no problem with that. We
13 think we can get it from Mr. Lowe since --

14 JUDGE SMITH: Right. I am just trying to estab-
15 lish the limits of Mr. Abramovici's testimony. It will only
16 that they testified that, about the possibility of hydrogen
17 in excess of 4 percent. He will not testify, what that means,
18 is that correct?

19 MS. BERNABEI: That's right.

20 JUDGE SMITH: He will also testify there was
21 discussion of a hydrogen recombiner being put in place.

22 MS. BERNABEI: That's correct.

23 JUDGE SMITH: But he will not testify as to the
24 significance of that.

25 MS. BERNABEI: I'm sorry. Significance?

dh13

1 JUDGE SMITH: He will not testify that that
2 fact in itself supports another inference of larger amounts of
3 hydrogen or zirc.

4 MS. BERNABEI: You don't need any larger amounts
5 of hydrogen than 4 percent. That indicates --

6 JUDGE SMITH: I know, but let me separate these
7 little thoughts. We have already established that he will not
8 testify as to the significance of hydrogen in excess of 4
9 percent.

10 MS. BERNABEI: Right.

11 JUDGE SMITH: Will he testify as independent
12 significance to be derived from use of the hydrogen recombiner?

13 MS. BERNABEI: I think the testimony stands, in
14 other words, I guess I am having trouble with the question
15 because I understand the testimony to indicate there were
16 steps taken --

17 JUDGE SMITH: Right.

18 MS. BERNABEI: Licensee's steps taken.

19 JUDGE SMITH: Right. One of them was they
20 suggested use of hydrogen recombiner.

21 MS. BERNABEI: Right.

22 JUDGE SMITH: But he is not going to testify
23 anything more than that step was taken and, boy, you don't use
24 one of those babies until you have really got big hydrogen.
25 He's not going to testify that way, is he?

dhl4

1 MS. BERNABEI: Oh, yes.

2 JUDGE SMITH: He is?

3 MS. BERNABEI: Well, I guess I am sort of losing
4 the context of your question.

5 JUDGE SMITH: Is he going to offer any expert
6 opinion that the proposed use of a hydrogen recombiner is a
7 demonstration independent of excess of 4 percent, of zirc water
8 reaction?

9 MS. BERNABEI: Well, to the degree, to the degree
10 that there was a concern about using the hydrogen recombiner,
11 unless it were absolutely needed; because it might lead to the
12 release of radiation or hydrogen --

13 JUDGE SMITH: This is what he would testify to?

14 MS. BERNABEI: Yes. That was included in his
15 deposition.

16 JUDGE SMITH: All right.

17 Mr. Blake?

18 MR. BLAKE: Well, I guess there are a couple
19 things.

20 One, he didn't talk about hydrogen in excess
21 of 4 percent as has been represented.

22 JUDGE SMITH: The deposition does not support
23 that representation?

24 MR. BLAKE: What his testimony is, reading from
25 page 43, is to the best of my recollection he indicated they

dh15
1 took reactor building sample, and he was reading somewhere in
2 the vicinity of 4 percent hydrogen.

3 Also I would point out that I am unaware of such
4 a reactor building sample having been taken up to this point
5 in time which would support it.

6 In any event, there is no doubt as to the source
7 of Mr. Abramovici's information about hydrogen. It was clearly,
8 as he indicated, Mr. Kunder. Mr. Kunder, himself, in statements
9 which are not included in the stipulation of the parties, has
10 indicated that he had hydrogen on his mind --

11 JUDGE SMITH: At the afternoon meeting?

12 MR. BLAKE: Yes, sir, and they talked about
13 hydrogen. But he just as clearly has said he did not think
14 zirc water, and that wasn't the source. So I think we are
15 chasing not a very fruitful source in terms of the issue at
16 hand here to require Mr. Abramovici to come to testify.

17 MS. BERNABEI: That is Mr. Kunder's testimony, and
18 it is not credible because he -- well, Mr. Lowe and I think
19 any technical person in this case, they know that kind of
20 hydrogen can't be produced.

21 JUDGE SMITH: Right, but you are talking another
22 subject now. You just assured the Board, or failed to assure
23 the Board that Abramovici would testify as to zirc water.

24 MS. BERNABEI: No, no.

25 JUDGE SMITH: You said all he would have would be

dh16 1 4 percent. And offer no opinion as to what that means.

2 Now, you --

3 MS. BERNABEI: No, no.

4 JUDGE SMITH: We point out Kunder is going to
5 testify apparently somewhere along that line. You are saying
6 Well, everybody knows it takes zirc to produce it.

7 MS. BERNABEI: All I am saying is that we can get
8 into what people at that meeting knew 4 percent meant. It may
9 not be apparent to this Board, but 4 percent, even in 1979,
10 was considered way over acceptable limits.

11 JUDGE SMITH: I will accept that statement for the
12 purpose of this discussion.

13 MS. BERNABEI: Okay.

14 JUDGE SMITH: But Abramovici does not help you?

15 MS. BERNABEI: Well, he does to the extent he
16 was in a meeting where this 4 percent limit was discussed.
17 And linking up a hydrogen recombiner which had certain potential
18 dangers involved. And there were technical people at that
19 meeting who knew the only way to get those limits was through
20 zirc water reaction. I am stating right out; I don't think
21 it is credible; Mr. Kunder's statement, that somehow he --

22 JUDGE SMITH: Assuming Kunder's statement is
23 totally incredible, how does Abramovici help you?

24 MS. BERNABEI: That they were discussing production
25 of hydrogen in amounts that could only be produced through zirc

dh17
1 water reaction. Mr. Lowe is sitting at that meeting and Mr.
2 Lowe knows that. You assume Mr. Lowe, when he was sitting there,
3 had that knowledge he said he had on March 28. You also
4 assume Mr. Crimmins, when he answered his questionnaire, because
5 he is another rebuttal witness; he said that the discussion, the
6 way I understood his questionnaire to read, he understood the
7 discussion about the pressure spike, hydrogen production and
8 actuation of sprays to have begun with the briefing by Kunder
9 in that afternoon meeting, okay?

10 JUDGE SMITH: What is Kunder's role in this
11 hearing? He hasn't been called as a witness.

12 His interview is part of the stipulated testimony.
13 And the stipulated interview is that he did discuss hydrogen,
14 but not quantitatively. Is that --

15 MR. BLAKE: That's correct. And also that --

16 JUDGE SMITH: Except --

17 MR. BLAKE: Also that the source, I mean, he
18 wasn't thinking about, aware of, nor did he discuss zirc water
19 reaction.

20 MS. BERNABEI: The point, the reason no one really,
21 at least we didn't pay any attention to this; was that the
22 4 percent design limit; at least only became apparent in the
23 deposition of Mr. Abramovici. I did review his earlier interview
24 with the NRC and he did mention production of hydrogen.

25 However, the 4 percent, quantity being discussed,

dh18

1 didn't become apparent in significance until he testified in
2 his deposition about that amount of hydrogen. Mr. Lowe has
3 testified he knows in two days that is the only way you could
4 get 4 percent.

5 JUDGE SMITH: Abramovici would differ from Kunter
6 in that he puts a quantity on it; he talks about it; about 4
7 percent. You are going to elicit from Lowe that, on cross-
8 examination, that, yes; that is big hydrogen.

9 Okay. Well, I think you should be allowed to have
10 Abramovici for that limited purpose. If it can be stipulated,
11 it would be better. Apparently he testified to that in his
12 deposition and it should be stipulated.

13 MS. BERNABEI: The other --

14 JUDGE SMITH: Can you stipulate to that? That
15 Abramovici would testify that there was a discussion of hydrogen,
16 as you quoted, at about 4 percent. And let her do with it as
17 she will with the significance of it.

18 MR. BLAKE: I will as well look at that and discuss
19 it with my client and get back to Ms. Bernabei.

20 JUDGE SMITH: Is that satisfactory, Ms. Bernabei?

21 MS. BERNABEI: Yes. We also did propose Mr.
22 Crimmins, again for the limited purpose of talking about this
23 afternoon meeting.

24 JUDGE SMITH: You know, I'm sorry. You were
25 talking about Mr. Crimmins and I was thinking something else,

dh19

1 and I missed the whole point about Crimmins.

2 MS. BERNABEI: Okay. Mr. Crimmins has stated his
3 memory of that meeting on the pressure spike was discussed
4 although he remembers it being dismissed as an anomaly or mal-
5 function. He also states in response to a questionnaire he
6 submitted, again, to our interrogatories, that he remembers
7 discussions about the pressure spike containment sprays and
8 hydrogen production or burn to have started at a 3:30 meeting;
9 the Thursday afternoon meeting, with a briefing by George Kunder.
10 That is my reading of the questionnaire and I think that testimony
11 is relevant.

12 The whole discussion about my understanding of
13 the way the questionnaire was phrased and how he answered
14 was this whole discussion about the pressure spike and hydrogen
15 discussion started at this 3:30 meeting.

16 JUDGE SMITH: Did you say, did you depose him?

17 MS. BERNABEI: No, we requested we be able to.
18 I think we requested at the time, after Abramovici testified,
19 which was very late in discovery; we requested additional dis-
20 covery and I think the Board said Licensee had to answer one
21 interrogatory. And I think that is what we got. But we feel --
22 question him about his questionnaire.

23 JUDGE SMITH: That seems to be a very strong
24 representation Ms. Bernabei has made about Mr. Crimmins.

25 MR. BLAKE: I do not have Mr. Crimmins'

dh20
1 questionnaire here. But in my view here previously, Ms.
2 Bernabei mischaracterized Mr. Crimmins' questionnaire response.
3 I believe she's done so today. I think she flat misreads what
4 Mr. Crimmins said in response, in his questionnaire.

5 But we also have asked Mr. Crimmins about this
6 meeting in particular. And he has provided what we have now
7 distributed to Ms. Bernabei, to the Board and to the Staff,
8 his response. It is what she --

9 JUDGE SMITH: His questionnaire response?

10 MR. BLAKE: No. We earlier had distributed the
11 questionnaire response. Maybe I am wrong. Maybe it was just
12 3(a) people we distributed.

13 JUDGE SMITH: This was at Judge Linenberger's re-
14 quest. He wanted the questionnaires of everybody who answered
15 yes to that question.

16 MR. BLAKE: Okay, that would not have included--

17 MS. BERNABEI: I think we included it as another
18 exhibit to our motion for discovery.

19 MR. BLAKE: That's correct, it did.

20 MS. BERNABEI: My reading of the questionnaire,
21 and I am sure Licensee has a different reading, and you know
22 the question was phrased in the alternative so it is somewhat
23 unclear: Do you remember or were you aware of discussions about
24 the pressure spike containment sprays or production of hydrogen
25 on March 28, through March 30. The way I read his questionnaire

dh21
1 answer was that he said Yes, I remember these discussions in this
2 period initiated by a briefing by George Kunder on March 29 in
3 another afternoon meeting, which I interpret to be this meeting
4 where everyone acknowledges there was a briefing by George
5 Kunder.

6 So my reading of the questionnaire was there was
7 discussion of the pressure spray, containment spike. It is
8 in the disjunctive, so it may only be a couple but the way I
9 read the answer, it was general discussion about the subject
10 of the Mailgram starting in that afternoon meeting.

11 JUDGE SMITH: All right, if her reading is correct
12 is it not true that that is information that she should be
13 allowed to produce, if her reading is correct, at the hearing?
14 Or it should be somehow put to rest. Perhaps some other way.

15 You said you provide additional information other
16 than the questionnaire?

17 MR. BLAKE: Right.

18 JUDGE SMITH: What was your reference there?

19 MR. BLAKE: It was to the result of the long
20 prehearing conference we had where we discussed the fourth set,
21 newly discovered, et cetera.

22 JUDGE SMITH: Yes.

23 MR. BLAKE: One of the obligations that we went
24 away from that session with was that Ms. Bernabei would be
25 allowed to pick; wasn't that the one where you picked two people

dh22
1 to ask about --

2 MS. BERNABEI: I think so.

3 MR. BLAKE: About the afternoon meeting.

4 JUDGE SMITH: Right.

5 MR. BLAKE: One of whom was Crimmins and the
6 other I believe Richard Wilson.

7 JUDGE SMITH: Right, yes.

8 MR. BLAKE: We have provided that information to
9 her. And Crimmins speaks to that afternoon meeting and what
10 was discussed.

11 JUDGE SMITH: What does he say?

12 MR. BLAKE: He says hydrogen wasn't discussed;
13 but I recall somebody raising pressure spike, And dismissing it
14 as an electrical anomaly. That is what he says specifically.

15 JUDGE SMITH: Okay. Well --

16 MS. BERNABEI: This contradicts Mr. Lowe, I think
17 we have got two witnesses here. He can't recall any hydrogen
18 being discussed. Mr. Abramovici remembers it in great detail
19 being discussed. Mr. Crimmins says, I remember the pressure
20 spiking discussed and there being an assessment, it was a
21 spurious instrumentation problem. I think both those individuals'
22 testimony discounts Lowe's and Licensee's theory that Lowe
23 looked at the pressure spike chart at 11 p.m. that evening;
24 six hours, eight hours after this meeting, and figured out that
25 it indicated hydrogen production.

dh23

1 Lowe's testimony, the way I read it, is that he
2 realized that for the first time, he was the one to discover what
3 the pressure spike meant and that there had been significant
4 amounts of hydrogen.

5 JUDGE SMITH: And you are going to refute that by
6 Crimmins' statement that no hydrogen, but pressure spike came
7 up and was dismissed as a spurious signal? You are going to
8 refute with that?

9 MS. BERNABEI: No, he says as I recall the subject
10 of hydrogen was not discussed. This is Crimmins.

11 JUDGE SMITH: Right.

12 MS. BERNABEI: But I distinctly remember seeing and
13 discussing the containment pressure trace and spike in the trace.
14 So it sounds like he saw the pressure report.

15 JUDGE SMITH: Okay, but --

16 MS. BERNABEI: Then we have Abramovici --

17 JUDGE SMITH: Wait a minute. Let's finish Crimmins.
18 But?

19 MS. BERNABEI: That is it.

20 JUDGE SMITH: No, it is not the end of it.
21 Mr. Blake or somebody said it was discussed as a spurious signal.

22 MS. BERNABEI: That's right.

23 JUDGE SMITH: All right, but you just left that
24 out of your representation.

25 MS. BERNABEI: No, I had read that before.

dh24

1 JUDGE SMITH: Right.

2 MS. BERNABEI: The assessment at that time was it
3 must have been spurious instrumentation problem. That indicates
4 to me they saw the recorder, looked at it, and made an assessment
5 of it.

6 Together with that we have a representation of Mr.
7 Abramovici they discussed hydrogen production in significant
8 quantity, it could only be produced by zirc water reaction.
9 Lowe says I looked at, and does it in very vivid terms; I
10 looked at the pressure spike. The suggestion was that he looked
11 at it for the first time. I was the first one, the implication
12 as I read his testimony, I was the one who discovered it.
13 Here we have two individuals, one who said we looked --

14 JUDGE SMITH: That may add up to you. It doesn't
15 add up to me to be a refutation of it. Particularly whether it
16 dismisses it as being a spurious signal. I don't believe that
17 you have made your case for Crimmins.

18 MS. BERNABEI: Can we request we can introduce the
19 interrogatory response?

20 JUDGE SMITH: Interrogatory response?

21 MS. BERNABEI: You mean the questionnaire response?
22 The interrogatory response.

23 Interrogatory response on the meeting.

24 JUDGE SMITH: I don't see anything wrong with
25 that if Mr. Blake will accept that. It doesn't justify bringing

dh25

1 eyeball witness in.

2 MR. BLAKE: I, too, will carry that back as to what
3 our position would be on the introduction of what Mr. Crimmins
4 reaction to this most recent question would be and I will get
5 back to Ms. Bernabei.

6 JUDGE SMITH: Now what? What do you have left?

7 MR. GOLDBERG: Excuse me. Before we leave this
8 matter, if that is what we are going to do, it is Staff's
9 position, Mr. Kunder ought to appear and testify. His testimony
10 may be more significant than Mr. Abramovici's. I think it is
11 a significant point.

12 JUDGE SMITH: Well, yes. I was wondering about
13 that, Mr. Goldberg. Sometimes we, I don't understand why that
14 wasn't -- I had Kunder down as one of my possibilities. But
15 the parties, if -- satisfied with the stipulation. Both
16 Crimmins, if I am right, and Abramovici lay all this information
17 to Kunder.

18 Are you formally asking for Kunder's presence?

19 MR. GOLDBERG: Yes.

20 JUDGE SMITH: I think he is on obvious witness.
21 He was a superintendent of technical support and chairman of
22 that meeting, the meeting in dispute.

23 Is there a reason you didn't want him to come?

24 MS. BERNABEI: We don't think he is telling the
25 truth, frankly, and his testimony is already in the record about

6pm

dh26 1 aluminum. That is a source of production of hydrogen. I think
2 that is in one or several of the interviews.

3 JUDGE SMITH: If you want him to come, I think he
4 is another appropriate witness.

5 MR. GOLDBERG: Thank you.

6 JUDGE SMITH: Mr. Blake, do you object?

7 MR. BLAKE: No. I felt that we had sufficient
8 and straight forward testimony from him in the form of the prior
9 interviews, that his position was not in doubt; and that it
10 wouldn't be necessary to call him. It certainly isn't because
11 as Ms. Bernabei indicates, he hasn't told the truth.

12 If the Staff wants the individual there in person
13 and thinks that is important, I would not object.

14 JUDGE SMITH: All right. Next.

15 MS. BERNABEI: We have one additional; I think it
16 would be essentially a rebuttal witness to Mr. Dieckamp. Has
17 to do with Mr. Dieckamp's credibility. I don't think that
18 is included. That would be Mr. Creitz. I don't think that
19 is encompassed within the Board's requirement for identification
20 of witnesses.

21 JUDGE SMITH: I would agree.

22 MS. BERNABEI: We would propose Mr. Creitz, just
23 put the parties on notice, as a rebuttal witness as to Mr.
24 Dieckamp's credibility.

25 MR. BLAKE: You would agree that if now they

dh27

1 think they need a rebuttal witness that we not --

2 JUDGE SMITH: No, no. I am not saying --

3 MR. BLAKE: I thought that is what you just
4 agreed to.

5 JUDGE SMITH: No, I am not. I agree it does not
6 fall within the farmework of this afternoon's discussion. That
7 it is not a part of her affirmative case. It is rebuttal, and
8 I don't know what kind of demonstration. Rebuttal at NRC is
9 sort of a pick it up as you go type of thing.

10 MS. BERNABEI: This has to do with Mr. Dieckamp's
11 credibility.

12 JUDGE SMITH: Credibility. You are going to refute
13 some of his statements with Mr. Creitz?

14 MS. BERNABEI: I anticipate that.

15 JUDGE SMITH: Or Creitz will come in and say
16 Diecam' is not credible?

17 MS. BERNABEI: No, it will be a factual matter.

18 JUDGE SMITH: Factual dispute?

19 MS. BERNABEI: Right.

20 JUDGE SMITH: Straight out rebuttal.

21 Well, but the rule generally, as I have seen it,
22 is that if you know at the time, the whole concept of presenting
23 witnesses here before the NRC is that at the date that you
24 come forward with your witnesses, you are supposed to come forward
25 with both direct and anticipate rebuttal as you are doing.

dh28

1 MS. BERNABEI: That is what we did.

2 JUDGE SMITH: Right. You have done that correctly.
3 But you are also required, unless it comes up in the cross-
4 examination or oral testimony, required to provide the essence
5 of it. The essence of the rebuttal testimony. So I think you
6 should do that.

7 Now you don't have to do it now, but I think you
8 have to provide the parties notice. It's late night. But on
9 the general representation that you truly have rebuttal testimony,
10 if it truly is rebuttal, it is your prerogative. May be better
11 for you to go ahead and give it tonight. Then we would get it
12 all wrapped up.

13 MS. BERNABEI: I would propose we do it at another
14 time.

15 JUDGE SMITH: You can also make a representation
16 if you really feel that way that by revealing in advance the
17 nature of your rebuttal destroys your opportunity to impeach
18 that witness, you could make that representation. But make that
19 representation with reservation and care.

20 MS. BERNABEI: I tell you, that would be my
21 prediction; that is, to ask for the right to reserve announcing
22 the areas in which he would be a rebuttal witness. I do that
23 only because I think the Licensee at this point has some idea
24 since we have had lengthy depositions, both of Mr. Dieckamp
25 and Mr. Creitz.

dh29
1 So if I can, I would reserve the right to state
2 the specific area --

3 JUDGE SMITH: You can only reserve it in the area
4 in which you feel your cross-examination of Mr. Dieckamp would
5 be frustrated.

6 MS BERNABEI: Right.

7 JUDGE SMITH: To the extent that Mr. Dieckamp
8 has already presented direct testimony subject to rebuttal by
9 Mr. Creitz, it is your responsibility to come forward with
10 that.

11 MS. BERNABEI: No, he hasn't.

12 JUDGE SMITH: All right. Might also say that as
13 these other witnesses have been set down, some of them have
14 been there because the Board itself wishes them there and would
15 have been there in any event. Your opportunity to cross-examine
16 them on broader issues which you have revealed will aos be
17 present. You understand that?

18 MS. BERNABEI: Yes.

19 Let me just make it clear to Mr. Creitz, Mr.
20 Dieckamp does touch in his testimony on the area which we would
21 seek to cross-examine him. However, I don't envision it
22 as part of the Licensee's direct case, and I don't see that
23 they have made that appointment. They touch on it in terms
24 of his activities during the day.

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95
1 JUDGE SMITH: Given our discussion this afternoon,
2 why don't you go back and read Mr. Dieckamp's testimony,
3 and the extent that you wish to rebut the written part of it,
4 then you should notice the parties.

5 MS. BERNABEI: Okay.

6 MR. GOLDBERG: Judge Smith, before we leave the
7 subject of witnesses, rebuttal witnesses, in view of what
8 you said about identifying specifically the subject matter
9 of witnesses' testimony, and also the need to identify the
10 possibility of calling rebuttal witnesses when that
11 possibility is anticipated, I would like to address two
12 matters.

13 During this prehearing conference, maybe an hour
14 or so ago, I received a copy of TMIA's application for
15 issuance of a subpoena for Mr. Kemble. TMIA indicates in
16 there that he is being asked to testify with regard to
17 matters in his prefiled testimony and other relevant matters
18 regarding his official duties while he was at the NRC.

19 I take it from that that TMIA is now asking that
20 Mr. Kemble come in and testify as to matters beyond the scope
21 of what is contained in his prefiled testimony.

22 MS. BERNABEI: No, that is not true. Excuse me.
23 I perhaps can shorten this. That is not true. I put that
24 in in that the Board may wish to question him somewhat
25 beyond the prefiled testimony, or some of the parties.

96
1 We intend to present no additional testimony
2 with regard to Mr. Kemble.

3 JUDGE SMITH: In any event, if we issue this
4 subpoena, it is not intended to be advance approval of
5 Mr. Kemble's testimony, or to change any of the rules. It
6 is simply a recognition that he, before we could even bring
7 it into issue, he requires a subpoena. That is all.

8 MR. GOLDBERG: Okay.

9 JUDGE SMITH: All that does is get him there.

10 MR. GOLDBERG: That satisfies the first problem
11 I have.

12 The second matter is that as I indicated last
13 Friday, the staff doesn't believe that his testimony is
14 material, and we will oppose it on that basis.

15 If the Board does accept the testimony, however,
16 as I indicated on Friday, we will present some rebuttal
17 testimony. And I propose to do that, at least it is our
18 current intention, in two ways, perhaps. One is since
19 Mr. Moseley is already appearing as a witness as a part
20 of the staff's direct case, I would anticipate testimony
21 from Mr. Moseley to rebut Mr. Kemble's testimony.

22 Secondly, at this time it is the staff's intention,
23 if Mr. Kemble's testimony is accepted, to call additional
24 witnesses who were involved in the investigation and
25 information flow in the preparation of 0760 to rebut the

97
1 testimony.

2 MS. BERNABEI: Can we have identification of
3 those witnesses if they are known at this time?

4 MR. GOLDBERG: We don't know at this time who
5 among those involved in the investigation or preparation of
6 0760 will be called. That would be dependent upon the
7 extent to which Mr. Kemble's testimony was accepted, the
8 answers that are obtained on cross-examination, and our
9 judgment as to the further testimony we would ask Mr. Moseley
10 to give in connection with Mr. Kemble's testimony.

11 It may be that our judgment is we will need to
12 call additional witnesses beyond Mr. Moseley, too, to
13 sufficiently rebut Mr. Kemble's testimony.

14 MS. BERNABEI: If I could just seek guidance
15 from the Board. Judge Smith, I understood your ruling with
16 regard to our rebuttal testimony was that we were to disclose
17 that there were rebuttal witnesses and the areas.

18 If they had prefiled testimony, it went to
19 specific areas in that testimony. We don't intend to
20 produce any additional testimony from Mr. Kemble. I guess
21 the staff would be under the same responsibility; that is,
22 if the rebuttal testimony was to go to any portion of the
23 prefiled testimony, they should identify those witnesses.

24 JUDGE SMITH: I don't see how you are in different
25 positions at all. It seems you are in the same position.

98
1 The difficulty as I see it is that you are taking the
2 position, you are taking the planning position that the
3 testimony will be received a hundred percent. Mr. Goldberg
4 is taking the planning position that that may not be the
5 case.

6 But why don't you proceed on the assumption
7 that all of Mr. Kemble's testimony will be received for
8 purposes of notification.

9 MR. GOLDBERG: If that is the case, then the
10 staff rebuttal witnesses would certainly include Mr. Moseley.
11 And possibly include Mr. Harpster and Mr. Craig. At this
12 point that is what our intent would be.

13 JUDGE SMITH: Okay.

14 (Pause.)

15 JUDGE SMITH: Judge Wolfe is expressing a shared
16 concern. That here we are, we are talking about Mr. Kemble.
17 We are issuing a subpoena for him and everything, and the
18 Board has serious doubts about the competency of the
19 testimony that you have presented, the relevancy of the
20 testimony to issue before us.

21 But we also observe that the matter hasn't come
22 before us yet. We make that observation so that you don't
23 put Mr. Kemble to -- well, we will just have to decide it
24 when it comes up.

25 The fact we are issuing a subpoena is by no

1 means, as we have indicated, is assurance we believe that --
2 that the adequacy of 0760 is an appropriate issue before us.
3 We just have trouble with that. We will have to hear
4 arguments.

5 MS. BERNABEI: I assume, therefore, that portion
6 of Mr. Moseley's testimony, and as I see it the entire
7 testimony would be stricken on the same grounds.

8 JUDGE SMITH: Mr. Moseley's testimony?

9 JUDGE WOLFE: You can make that objection.

10 JUDGE SMITH: You can make that objection when it
11 comes up, but Mr. Moseley is going to be testifying as to
12 his knowledge of facts that he -- and to the extent -- now,
13 we have already had this discussion. To the extent Mr.
14 Moseley relies upon other portions of the NUREG, you can
15 cross-examine him. But as I read Mr. Kemble he just says,
16 "Boy, these were bad guys and the whole report is deficient."

17 Let's just wait until it comes up. You are going
18 to have big trouble getting that testimony in.

19 MS. BERNABEI: We refer the Board to the
20 memorandum which refers to specific portions of the report
21 concerning the pressure spike, hydrogen production. There
22 is a specific section of NUREG 0760 which addresses this
23 matter.

24 Mr. Kemble specifically addresses that in his
25 memorandum. I think the other deficiencies in the

1 investigation report which he addresses go to problems which
2 would expect the report overall and orientation of the
3 report and certainly Mr. Moseley's conclusions in the
4 report and reliance on the report.

5 I don't see there is any way this Board can
6 accept Moseley's opinion based on that report and not
7 look into the adequacy --

8 JUDGE SMITH: Let's wait and see how Moseley
9 testifies and what the basis of his testimony is.

10 MS. BERNABEI: Okay.

11 JUDGE WOLFE: And let's see what your objection
12 is to his testimony.

13 MS. BERNABEI: Well, there are --

14 JUDGE SMITH: There are many aspects of NUREG 0760
15 which are not in dispute. Not in dispute by anybody.

16 MS. BERNABEI: I would just say, Mr. Kemble will
17 come before Mr. Moseley. I mean I assume --

18 JUDGE WOLFE: Mr. Kemble will do that? I didn't
19 hear you.

20 MS. BERNABEI: I assume intervenors will present
21 our witnesses prior to staff's?

22 JUDGE SMITH: I would think that in this
23 particular -- you're going to have Kemble to come in and
24 disparage the report and then Moseley -- I think with respect
25 to the purpose of it, you're really offering Kemble as a

1 rebuttal to Moseley.

2 MS. BERNABEI: That's correct.

3 JUDGE SMITH: So I think that even though the
4 normal sequence is for intervenor, then staff, I would
5 think that the logical sequence here would be to reverse
6 that.

7 MS. BERNABEI: Okay. In that case, then we should
8 be somewhat concerned about the date on the subpoena.

9 JUDGE SMITH: Well, the subpoena dates, these are
10 both -- is this a friendly subpoena to Chwastyk? Is he
11 cooperating? I mean he complied with the last subpoena.
12 He doesn't have any control over him. I assume he will
13 comply with the subpoena as well.

14 JUDGE SMITH: As is always the case, it is very
15 hard to predict an exact hour and time. If you are in good
16 communication with him both witnesses should understand that
17 is subject to --

18 MS. BERNABEI: That is fine.

19 JUDGE SMITH: -- to updating.

20 MS. BERNABEI: Okay.

21 JUDGE SMITH: That would be the case with Mr.
22 Kemble, too. That he is being subpoenaed for a time, then
23 it will be actually under control. If you have trouble
24 with that, we will issue another subpoena.

25 MS. BERNABEI: Okay. We also would like to

102

1 identify at this time a number of documents which were
2 recently disclosed by the NRC staff which are referenced in
3 support of Mr. Kemble's testimony.

4 If you will remember, the last time we were here
5 we indicated that there was some negotiation going on between
6 the staff and ourselves. They were trying to get us certain
7 documents which were referred to in the testimony. Those
8 documents you have been produced.

9 What we would like to do is identify them for the
10 parties and attach them as exhibits to his testimony.
11 Understanding that that testimony will not be heard for
12 some time.

13 MR. GOLDBERG: Well, we produced for TMIA documents
14 that they had requested in certain telephone conversations.
15 I certainly would not agree that the documents are favorable
16 to Mr. Kemble's testimony. There were various documents
17 produced, some of which TMIA may view as favorable to his
18 testimony. Some of which I certainly view as directly
19 contradicting his testimony.

20 I can't agree without seeing what specific
21 documents TMIA has in mind that wants at this date to attach
22 to Mr. Kemble's testimony.

23 MS. BERNABEI: Maybe Mr. Goldberg misunderstood
24 me. I said these were documents either referred to or that
25 otherwise support his testimony. I wanted to identify them

1 for the parties and propose we attach them as exhibits,
2 and I would provide all the necessary copies.

3 I didn't say they were favorable to his testimony.
4 I think they support his testimony. So what I was proposing
5 is to give all parties adequate notice of our intention,
6 identify them at this time and provide them to you.

7 JUDGE SMITH: All right. That is consistent with
8 our rulings.

9 MS. BERNABEI: There is an April 1, 1980 --

10 JUDGE SMITH: How long is this list?

11 MS. BERNABEI: Five documents. April 1, 1980
12 memorandum for Mr. Moseley, for Mr. Stello, regarding
13 subject completion of IE investigation information flow at
14 TMI during March 1979 accident.

15 April 18, 1980, memorandum for IE TMI Task Force
16 from Mr. Moseley, subject, "Draft Reports, Task Group Meeting."
17 Three draft reports. One which is identified at the top as
18 a "Haynes Draft." Title, "Investigation of Information Flow
19 During the Three Mile Island March 1979 Accident." Then two
20 which appear to be two different drafts of the section,
21 "Reportability of a Predicted Off Site Exposure Rate. Top
22 of the first it has "Correction, Rewrite Copy."

23 JUDGE SMITH: Anything further this evening?

24 MR. TROWBRIDGE: Mr. Chairman, I would just like
25 to make sure that the name of Ernest Blake has disappeared

1 from TMI's witness list. I'm not going up to Harrisburg
2 for the hearing. If there is going to be any effort to call
3 Mr. Blake, I would like to have the argument now.

4 MS. BERNABEI: Mr. Blake's testimony was proposed,
5 and we did suggestion deposition testimony because of the
6 awkwardness of the situation. Being proposed for his
7 comments about the inconsistency of the individuals, the
8 so-called 3(a) individuals who were, I understand, called
9 to testify before the Board.

10 I would propose that that section of his testimony
11 on his statement about the inconsistency of their testimony
12 be introduced. I understand the awkwardness of the situation
13 considering he is the licensee's attorney.

14 MR. TROWBRIDGE: I would object to the introduction
15 of that portion of the testimony. The inconsistency, it
16 does not explain what inconsistency Mr. Blake was talking
17 about, what portions. And it certainly does not follow
18 that the inconsistency had to do with the testimony of
19 witnesses to the effect that they had misread the questionnaire.

20 MS. BERNABEI: Perhaps for the Board --

21 JUDGE SMITH: Would you read the statement? Just
22 read the statement verbatim. This is Mr. Blake commenting.
23 What is the document you are reading?

24 MS. BERNABEI: This is his deposition.

25 JUDGE SMITH: Blake's deposition?

1 MS. BERNABEI: Of October 12.

2 JUDGE SMITH: Neither of us understood Mr. Blake
3 was going to be deposed. But go ahead. Just go ahead with
4 the statement.

5 MS. BERNABEI: I'm starting with the first question
6 of the series about Mr. Blake's representations.

7 Question -- this is page 121, line 14.

8 Question: "Mr. Blake, you were present and
9 participated in depositions conducted in Harrisburg on
10 October 4, 1984; is that correct?"

11 Answer, after an objection -- well, should I
12 leave out the --

13 MR. TROWBRIDGE: Please don't leave out the
14 objections. Objection to the relevance.

15 "The Witness: Which day was October 4?"

16 Question: "It was Thursday. Thursday of last
17 week."

18 The Witness: "Yes."

19 Question, page 122: "Now, on that date, if you
20 remember, there were four individuals among others that were
21 deposed concerning their responses to question 3(a) of the
22 questionnaire sent to them in the course of this discovery."

23 Answer: "What is your question?"

24 MS. BERNABEI: Question: "On that date do you
25 remember that there were four individuals, so-called 3(a)

1 individuals that had answered yes to question 3(a) on
2 licensee's questionnaire? I am just trying to jog your
3 memory today."

4 Answer: "Yes."

5 Question: "Those included Ms. Gingrich, Mr.
6 Boyer, Mr. Conrad, and Mr. DeMan. Is that your memory?"

7 Answer: "Yes."

8 Question: "Okay. If I can characterize them
9 as a group, you characterized them in the past as the 3(a)
10 group, is that fair to say; that is, those individuals who
11 answered yes to question 3(a) the previous time?"

12 Mr. Lenhart: "Objection."

13 The Witness: "Yes."

14 Question: "Okay. Now all of those individuals
15 at the time of the deposition had determined that they either
16 misread the question 3(a) or had not, in fact, their answer
17 was in some other respect incorrect; is that correct? I
18 am asking you now on October 4th."

19 Mr. Lenhart: "Objection to the form."

20 The Witness: "Ask your question again."

21 Question: "Sure. At the time of the depositions
22 all of those individuals, the four I've mentioned, determined
23 at the time of deposition that they had either misread the
24 question or otherwise could not at that time answer yes to
25 the question."

1 Mr. Lenhart: "Objection to the form.

2 JUDGE SMITH: It is very ahrd for me to anticipate
3 we are going to receive his comments. You are getting at his
4 express view of what those questionnaires did?

5 MS. BERNABEI: No.

6 MR. TROWBRIDGE: No.

7 MS. BERNABEI: Is express view of the credibility
8 of the witness at the deposition.

9 JUDGE SMITH: What would we do with that testimony?

10 MS. BERNABEI: The lawyer for the company
11 expressed at least the view, well, in the context of the
12 conversation, it is a view of their credibility, that the
13 testimony is inconsistent.

14 JUDGE SMITH: You are making this as an
15 admission of counsel, binding in the case?

16 MS. BERNABEI: Not making it binding in the case.
17 I think it is evidence for the Board to consider.

18 JUDGE SMITH: Not unless you are offering it as
19 a litigative position or statement of counsel. But I --
20 this is the same type of consideration we have had all along
21 in this case.

22 If we decide things --

23 MS. BERNABEI: I agree. It is probitive evidence
24 on the credibility of these people. Obviously the Board has
25 the responsibility and authority to decide the case. This

108
1 is just another piece of evidence about the credibility
2 of the 3(a) people who retracted their answers.

3 JUDGE SMITH: His view of the credibility of those
4 people is irrelevant to us. Unless he is taking a different
5 posture, which I don't see there.

6 If he comes to the Board and says, gee, we cannot
7 represent to you that these witnesses who are -- were our
8 employees or are our employees are credible, therefore we
9 don't offer them, or something like that, that is one thing.

10 But a comment he makes in a deposition as to
11 the credibility of witnesses is entirely different. It is
12 not a litigative position or admission of counsel. It is
13 simply, apparently, a person's view. Now, the reasons why
14 he might have felt that way, I don't know if you explored
15 those or not. But his testimony I don't see how that helps
16 us. His opinion testimony as to the credibility of those
17 witnesses is what you want us to accept.

18 MS. BERNABEI: Yes.

19 JUDGE SMITH: Have I characterized the matter
20 correctly, Mr. Trowbridge?

21 MR. TROWBRIDGE: I'm sorry, Judge. I have been
22 looking for, and unable to find yet, any statement by Mr.
23 Blake about the credibility of the witnesses.

24 MS. BERNABEI: The conversation is about the
25 credibility.

1 MR. TROWBRIDGE: The conversation --

2 MS. BERNABEI: To which he said, he asked Ms.
3 Bradford, Louise Bradford, what she thinks about the
4 credibility.

5 She says she does not think they are credible,
6 and she asked his opinion and he said, well, they are not
7 consistent. There is some divergence at that point between
8 Ms. Bradford and Mr. Blake as to what the conversation said,
9 but we do have his testimony in deposition that they are
10 inconsistent.

11 JUDGE SMITH: We don't want that. No. Overruled.

12 You are offering it as -- I mean if you are
13 offering that as evidence in this case, we don't want it.
14 It doesn't help us. It doesn't help you. You are not
15 restrained in the slightest from pursuing the reasons. It
16 just clutters things up.

17 Not only that, but, you know, it is not very nice,
18 either.

19 MS. BERNABEI: Judge Smith, I do not -- did not
20 ask -- I frankly am shocked. I am fairly new to this case,
21 but I was shocked by the testimony of those witnesses,
22 and I don't think they are credible, and I think --

23 JUDGE SMITH: That is one thing, pursuing the
24 credibility of the witness is one thing. I am talking about
25 your relationship with Mr. Blake. That is the thing that I

110
1 am referring to. And to try to convince the Board we should
2 find the witnesses incredible because of Mr. Blake's
3 statement of, in that context, of inconsistency is just a
4 waste of all of our time, you know. And it must be a strain.
5 It must be a strain for Mr. Blake to do business with you
6 if you seize upon remarks like that.

7 I just don't think it is necessary. It would
8 add nothing to your case. What would it add to your case?

9 MS. BERNABEI: I understand the ruling of the
10 Board.

11 JUDGE SMITH: Well, answer my question. What
12 would it add to your case?

13 MS. BERNABEI: We don't believe that that was the
14 full extent of the conversation. That it was a longer
15 conversation and Ms. Bradford recounts it in a different
16 manner. I think it is relevant if the attorney for the
17 company doesn't believe the witnesses he is presenting in
18 this case.

19 JUDGE SMITH: All right. I guess I shouldn't
20 have asked. Our ruling stands.

21 Anything further? All right, we are adjourned
22 then. We will meet tomorrow at 1:30 p.m. in Harrisburg.

23 (Whereupon, at 6:20 p.m., the conference was
24 adjourned.)
25

