

ORIGINAL

UNITED STATES  
NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF:

DOCKET NO: 50-289 (CH)

GENERAL PUBLIC UTILITIES NUCLEAR

(Three Mile Island Nuclear  
Station, Unit No. 1)

LOCATION: HARRISBURG, PENNSYLVANIA PAGES: 1 - 70

DATE: WEDNESDAY, FEBRUARY 19, 1986

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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:           :
:                           :   Docket Number
GENERAL PUBLIC UTILITIES NULCEAR :   50-289 (CH)
:                           :
(Three Mile Island Nulcear   :
Station, Unit No. 1)        :
:                           :
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Commonwealth Court  
Courtroom Number 2  
Fifth Floor  
South Office Building  
Harrisburg, Pennsylvania 17120

Wednesday, February 19, 1986

The above-entitled matter came on for hearing at  
10:15 a.m.

BEFORE:

JUDGE MORTON B. MARGULIES, Chairman  
Atomic Safety and Licensing Board  
U. S. Nuclear Regulatory Commission  
Washington, D. C.

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APPEARANCES:

On behalf of Charles Husted:

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On behalf of the Nuclear Regulatory Commission:

GEORGE E. JOHNSON, ESQ.  
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E X H I B I T S

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Charles Husted Exhibit 1	p. 9	

P R O C E E D I N G S

1  
2 JUDGE MARGULIES: Good morning. I'm  
3 Administrative Law Judge Martin B. Margulies, who has been  
4 assigned to hear this proceeding which has been docketed by  
5 the Nuclear Regulatory Commission as Number 50-289 CH, in the  
6 matter of General Public Utilities Nuclear, Three Mile Island  
7 Nuclear Station Unit Number 1.

8 We are getting started 45 minutes late this  
9 morning due to the late arrival of the reporter.

10 Speaking very broadly, this proceeding is  
11 concerned with events going back to 1981, when the Nuclear  
12 Regulatory Commission ordered reactor operator examinations  
13 at the facility. Without reciting the documents as to what  
14 transpired, in 1984 the Atomic Safety and Licensing Appeal  
15 Board ordered that Charles Husted, a licensed operator  
16 training instructor should have no supervisory  
17 responsibilities insofar as the training of nonlicensed  
18 personnel. Mr. Husted was not a party to that proceeding.

19 The Commission, by notice of hearing issued  
20 September 5, 1985, instituted this proceeding to determine,  
21 one, whether the appeal board's conditions should be vacated,  
22 and, two, whether he is barred by concerns about his attitude  
23 and integrity as an NRC-licensed operator or licensed  
24 operator instructor or training supervisor.

25 As to two, the Commonwealth of Pennsylvania and

1 the licensee entered into a stipulation wherein it was agreed  
2 that the licensee would not use him in those capacities.

3 In instituting this proceeding, the Commission  
4 directed that the Nuclear Regulatory Commission Staff  
5 participate as a full party.

6 Provision was made for interested parties to  
7 intervene.

8 Three Mile Island Alert, Inc., and General Public  
9 Utilities Nuclear Corporation filed petitions to intervene.

10 In my order of December 6, 1985, it was found that  
11 both petitioners satisfied standing and interest requirements  
12 to participate as parties. Except as to the need for filing  
13 litigable contentions as provided for in 10 CFR, 2.71-4-B,  
14 both petitioners have filed proposed contentions which we  
15 will consider during this prehearing conference.

16 Before we do so, I would like to take oral  
17 appearances.

18 Who appears for the Staff?

19 MR. JOHNSON: Judge, good morning, I'm George E.  
20 Johnson, counsel for the NRC Staff.

21 JUDGE MARGULIES: Mr. Johnson, could you tell us  
22 whether or not you are admitted to the bar? I make the same  
23 request of all the other representatives.

24 MR. JOHNSON: I am admitted to the bar of the  
25 states of New York and Maryland.

1 JUDGE MARGULIES: Who appears for TMIA?

2 MS. BRADFORD: Good morning, Judge, Louise  
3 Bradford. I will represent TMI Alert. I am not an  
4 attorney.

5 JUDGE MARGULIES: Who appears for GPU Nuclear?

6 MS. BAUSER: Good morning, Judge, my name is  
7 Deborah Bauser, with me is Ernest Blake, from the firm of  
8 Shaw, Pittman, Potts & Trowbridge. I'm a member of the bar  
9 of the District of Columbia and so is Mr. Blake.

10 MR. JOHNSON: If I may add, your Honor, I am also  
11 a member of the District of Columbia bar.

12 JUDGE MARGULIES: It will be so noted.

13 Who appears for Mr. Husted?

14 MR. MAUPIN: My name is Michael W. Maupin, and  
15 with me this morning is Maria Christina Hensley. We are with  
16 the law firm of Hunton & Williams. We have both been  
17 admitted to practice before the bar of the Supreme Court of  
18 Virginia.

19 JUDGE MARGULIES: Thank you.

20 This proceeding does not follow a usual format, so  
21 there are matters to be discussed that go beyond those  
22 normally considered at an initial prehearing conference.

23 The matters to be considered were outlined in the  
24 December 1985 order. I also encouraged the parties to meet  
25 in advance of this prehearing conference to attempt to narrow

1 and simplify the issues.

2 I received a letter yesterday afternoon from  
3 Mr. Maupin, in which he outlined the matters that were  
4 considered by the participants.

5 The efforts are evidently very considerable. The  
6 issues were treated by the parties in a very orderly fashion  
7 and in a comprehensive manner, and I agree with the  
8 conclusion that a good deal of progress was made and it will  
9 ease the decision-making process.

10 I believe it would assist the record if we include  
11 the letter in the record, in that we will be making  
12 references to it throughout the conference this morning.

13 One of the things that I do wish to clarify is the  
14 last statement in the letter, the last paragraph, which says,  
15 "As you can see, while we have not relieved you entirely of  
16 the responsibility to make decisions, we did make a good deal  
17 of progress."

18 I just want to state, clarifying the record, that  
19 although the parties may agree as to what the issues are and  
20 as to what procedure to follow, the ultimate decision on  
21 those matters is mine as the administrative law judge and  
22 with that comes the final responsibility on those decisions.  
23 It's just a matter of clarification, not a matter of  
24 admonition.

25 Is there any objection to including this in the

1 record?

2 MR. JOHNSON: No, sir.

3 JUDGE MARGULIES: Are there any changes to it that  
4 you wish to make at this time?

5 MR. MAUPIN: Judge, perhaps I ought to say that I  
6 have sent copies of this letter to each of the other parties  
7 and I have now determined that each of the parties agrees --  
8 I believe it's fair to say -- that the letter is accurate as  
9 far as it goes, though one or more parties may wish to  
10 supplement the views stated in this letter on one or more of  
11 the issues dealt with in the letter during the course of this  
12 prehearing conference.

13 JUDGE MARGULIES: We will mark the letter as  
14 Exhibit Number 1, and have it appended to the record.

15 Mr. Maupin, would you have an additional copy? I  
16 have the original which I will put into the record and I  
17 would appreciate it if you would supply one more copy to the  
18 reporter.

19 MR. JOHNSON: Would you like to attribute it to a  
20 particular party? I assume that later on we will have  
21 applicants -- not applicants, but Staff exhibits and  
22 different parties' exhibits.

23 JUDGE MARGULIES: Well, if Mr. Maupin has no  
24 objection we will designate it as -- how are you going to  
25 designate your exhibits, Mr. Maupin?

1 MR. MAUPIN: Well, I suppose as Husted Exhibits,  
2 CH --

3 JUDGE MARGULIES: CH-1 would be fine.

4 (CH Exhibit 1 identified.)

5 JUDGE MARGULIES: The first matter we will take up  
6 is the litigability of the proposed contentions. Does the  
7 letter supersede the prior filings?

8 MR. MAUPIN: That's probably directed in  
9 particular towards me because I suggested some rephrasing of  
10 the contentions filed by TMIA. I think it's fair that my  
11 present position is that I hold by what was said in CH-1,  
12 under heading one, namely, that the contentions stated by the  
13 parties -- the two contentions by TMIA, one contention by GPU  
14 Nuclear -- are litigable as far as I'm concerned and I  
15 reserved, until we get to heading two, the question of  
16 exactly how we articulate the factual issues and legal issues  
17 that are implicit in those contentions.

18 JUDGE MARGULIES: Do you have something you wish  
19 to add, Ms. Bradford?

20 MS. BRADFORD: On the first point, I am in  
21 agreement that the contentions are litigable.

22 JUDGE MARGULIES: I find a problem with the  
23 contentions in that it may be an oversight, but the  
24 contentions do not deal with Mr. Husted acting as a licensed  
25 operator instructor or training supervisor. Was it your

1 intention to cover those activities?

2 MS. BRADFORD: Yes, it was. I'm sorry, I should  
3 have looked more closely. I thought this was a restatement  
4 of the contentions as I had phrased them.

5 JUDGE MARGULIES: Do the parties have anything  
6 further to offer on that? As I read them, they don't cover  
7 the activities of a licensed operator instructor or training  
8 supervisor.

9 Yes?

10 MS. BAUSER: Judge Margulies, I think one could  
11 interpret our contention as excluding the issue of training  
12 of non-licensed personnel who were not operators, and I think  
13 the intention, both by TMIA and by us, if I can suggest this,  
14 is to track the language in the original Commission order  
15 which, under issue 1, raised the question of Mr. Husted's  
16 responsibilities towards nonlicensed-related duties. And the  
17 second issue raised the matter that Mr. Husted himself  
18 raised, the broader issue beyond the original ALAB-772, and  
19 encompassed the licensed operator-related duties.

20 Between the two, that was intended to encompass  
21 the whole universe. I think if you look closely, it appears  
22 that they possibly may not, but I think that's the  
23 intention.

24 JUDGE MARGULIES: Well, I think we should rephrase  
25 both contentions, then, to incorporate all job categories.

1 I think the TMIA contention would read, "Husted  
2 should be barred from serving as an NRC-licensed operator or  
3 licensed operator instructor or training supervisor by reason  
4 of his demonstrated bad attitude and lack of integrity."

5 Is that satisfactory to the parties?

6 MR. MAUPIN: Yes.

7 JUDGE MARGULIES: I also have a problem with  
8 proposed contention 1 -- and it may be form rather than  
9 substance, but it doesn't really contain a rationale -- as to  
10 why the appeal board's condition should not be vacated and  
11 probably the addition of the language "by reason of his  
12 demonstrated bad attitude and lack of integrity" would  
13 complete that contention.

14 Is there any objection to adding that to the  
15 contention to give it a rationale?

16 MR. MAUPIN: I have no objection. It's of course  
17 not my contention.

18 MS. BRADFORD: I have no objection.

19 JUDGE MARGULIES: There being no objections, the  
20 two contentions will be rephrased in the manner indicated.

21 Ms. Bauser, do you wish to rephrase your  
22 contention?

23 MS. BAUSER: I think that if the phrase "an  
24 instructor of licensed or nonlicensed operators" was changed  
25 to "nonlicensed personnel" that that would accomplish the

1 clarification that I was referring to.

2 JUDGE MARGULIES: "An instructor of licensed or  
3 nonlicensed personnel"? It's a matter of adding the word  
4 personnel?

5 MS. BAUSER: Yes.

6 JUDGE MARGULIES: Is there any objection to that?

7 MR. MAUPIN: No.

8 MR. JOHNSON: No.

9 JUDGE MARGULIES: The modification will be made.

10 As to the contention of GPU Nuclear, I have a  
11 problem with it in terms as to whether there is a time limit  
12 as to the evidence you would wish to present, as to  
13 Mr. Husted's history with the licensee.

14 In other words, does this proceeding -- was it the  
15 intention of the Commission, in instituting this proceeding,  
16 to freeze the time as to all events that occurred prior to  
17 the appeal board coming out with their decision and not to  
18 hear any evidence that goes beyond that period? The way your  
19 contention is phrased, it is open-ended.

20 MS. BAUSER: Yes, sir.

21 MR. MAUPIN: Let me make sure I understand that.  
22 It is limited, I take it -- no, it's not, sorry. I withdraw  
23 that.

24 MR. JOHNSON: This was a subject, your Honor, that  
25 we discussed at some length at the meeting.

1           Correct me if I'm wrong -- concerning the issues,  
2 the factual issues in controversy, and we all agreed in  
3 conjunction with the statement of the factual issues on page  
4 3 of CH-1, that it would not only encompass the four factual  
5 questions that are contained in the Commission's notice of  
6 hearing of September 5th but, in addition, the question of  
7 Mr. Husted's performance of his responsibilities, and that  
8 fifth matter would encompass the sort of time frame that  
9 Ms. Bauser was referring to. It is not frozen to the time  
10 frame of the four questions that were denominated in the  
11 order of the Commission.

12           If I'm wrong, I would like it to be supplemented.

13           MS. BAUSER: Judge Margulies, the contention as  
14 proposed is intended to include information pertinent to the  
15 issues of his -- of Mr. Husted's conduct and attitude which  
16 might in fact postdate the issuance of the ALAB, and I think  
17 that that is reasonably within the scope of issue -- subissue  
18 B in your memorandum and order of December 6th.

19           JUDGE MARGULIES: How do you square that with the  
20 four concerns that the Commission asked us to focus on, all  
21 of which relate to matters that predated the appeal board's  
22 decision?

23           MS. BAUSER: I think that it goes more to the  
24 remedy, if I might say, to those issues. That is, once one  
25 discovers the answers to those issues, it's not clear what

1 the outcome should be and I think part of the evaluation of  
2 the outcome should be other facts pertinent to Mr. Husted's  
3 conduct which, in my view, include subsequent performance.  
4 Also concurrent performance.

5 MS. BRADFORD: Judge Margulies?

6 JUDGE MARGULIES: Yes?

7 MS. BRADFORD: I think the initial question of the  
8 Commission was a very narrowly stated question, that is,  
9 whether the appeal board condition should be vacated. And on  
10 that question one would have to look only at the issues that  
11 led to that condition and not to the events after that  
12 condition was imposed.

13 MR. MAUPIN: May I step up?

14 JUDGE MARGULIES: Certainly.

15 MR. MAUPIN: I think the lead-off to the statement  
16 of the four issues that are to be focused on -- and I'm  
17 referring, now, to the notice of hearing; I think it's  
18 repeated in your memorandum and order --

19 JUDGE MARGULIES: Yes.

20 MR. MAUPIN: It says either hearing would focus on  
21 whether any of the four following concerns regarding  
22 Mr. Husted are true and, if so, they require that he not be  
23 employed in the jobs in question.

24 So I suppose my approach to this has been -- I'm  
25 not sure I parsed it quite as closely as your question

1 required me to, now, but my view is that we address these  
2 four focus issues. If any of those is determined adversely  
3 to Husted, then we move onto the more general question stated  
4 in the second clause of the introduction to those four  
5 issues, namely, whether those findings require that he not be  
6 employed.

7 I guess, as a practical matter, what I had  
8 anticipated coming in in this case, perhaps producing --  
9 would be evidence, really, beginning with the time in which  
10 he began to serve, certainly in a training role and  
11 continuing through the present, since my view has been that  
12 the question is, based on what we know today about his  
13 attitude and integrity: What remedy, if any, is required in  
14 this case?

15 JUDGE MARGULIES: Do you wish to be heard,  
16 Mr. Johnson?

17 MR. JOHNSON: Yes. I have been contemplating your  
18 question and I don't think it was considered at our meeting  
19 in the way in which you posed it, and the question of whether  
20 the appeal board's order ought to be vacated or not depending  
21 on the record on which it is relying seems to raise the  
22 question whether we can uphold or not uphold the appeal  
23 board's order, based on evidence that goes beyond the time of  
24 the appeal board order because we, obviously, can't hold the  
25 appeal board to subsequent time frame information.

1           But that also goes to the question of the scope of  
2 the proceeding that the Commission has contemplated and I  
3 don't believe that there is an express bar in the Commission  
4 order that would prevent us or prevent you from considering  
5 information going beyond the date of the appeal board's  
6 order, although the question, as framed: Should the appeal  
7 board's order be vacated or not? -- it doesn't expressly say  
8 you can't consider events beyond the date of the order in  
9 deciding on the entirety of the record that you assemble that  
10 it is proper or improper to have that order stand.

11           MS. BAUSER: Judge Margulies, if I could add  
12 something, I think that the first issue as to whether the  
13 appeal board's order should be vacated is both a legal  
14 question and a factual question and it's my understanding  
15 that the Commission decided not to resolve the legal question  
16 but to move on and have this hearing in order to resolve the  
17 underlying factual matters. The factual matters specific to  
18 ALAB-772 is whether Mr. Husted is qualified to serve in  
19 nonlicensed operator instructor positions -- in that  
20 position. And I think that the -- at least my reading of the  
21 orders that have been issued is, looking at the matter today  
22 with the evidence that the appeal board, in fact, had, and  
23 any other evidence, including more current evidence and  
24 possibly other evidence from the past. How should that  
25 factual question be answered?

1 MS. BRADFORD: Judge Margulies, may I just state  
2 TMIA's position on that issue? It is our position that the  
3 Commission originally raised this issue in the framework of  
4 whether the appeal board had the legal authority to impose  
5 such condition. In order to answer the question of whether  
6 that condition may be vacated, I believe they must answer the  
7 question as to the appeal board's legal authority and the  
8 Commission has not answered that question. Until that  
9 question is answered, it appears that the appeal board's  
10 condition stands. It has not been overturned and so the very  
11 narrow question that the Commission posed in its February 25,  
12 1985 order, as to whether the conditions should be vacated,  
13 really can't be answered until the question of the appeal  
14 board's authority is.

15 Further, I think by expanding the hearing to  
16 encompass factual issues, the Commission has exceeded its  
17 authority or its jurisdiction. Those issues have been  
18 decided and are res judicata, at least the three issues that  
19 are outlined here on page 7 of CH Exhibit 1, that is issues  
20 2, 3, and 4. Those issues have been decided and Husted did  
21 have an opportunity to participate and to confront those  
22 issues at the time that the hearing was being held under  
23 189(a) of the Atomic Energy Act, Husted did have the  
24 opportunity to confront those issues but he chose not to. It  
25 doesn't alter the fact that he had the opportunity.

1                   JUDGE MARGULIES: I do want to come back.  
2                   Mr. Johnson, is there anything you can point to in the notice  
3                   of hearing and in the Commission's prior holding, in which  
4                   they gave Mr. Husted the opportunity to request the hearing  
5                   that would indicate they intended to go beyond what was  
6                   available to the appeal board?

7                   MR. JOHNSON: If I may have just a moment?

8                   JUDGE MARGULIES: Certainly. And I extend the  
9                   same invitation to the other participants.

10                  MR. JOHNSON: If I may, your Honor, there are in a  
11                  way contrary indications in the notice, I mean on both sides  
12                  of the question.

13                  At two points the Commission, in deciding whether  
14                  to allow Mr. Husted to expand the scope of the proceeding,  
15                  determined that it shouldn't involve or require additional  
16                  agency resources to treat the questions that he asked to be  
17                  put into consideration because it would involve, as it says  
18                  on page 2 of the order, the same factual issues as the  
19                  proffered hearing. Then it goes on to say either hearing  
20                  would focus on whether the following four concerns regarding  
21                  Mr. Husted are true, and, if so, whether they require that he  
22                  not be employed in the jobs in question. And then you have  
23                  the four factual matters.

24                  But, at the same time, on page 3 the Commission  
25                  also states in the middle paragraph there, in the middle of

1 it: "This will provide Mr. Husted with an opportunity to  
2 demonstrate his fitness for the positions at issue." Those  
3 are the words that I'm particularly focusing on. And that  
4 was relating to the matters underlying the stipulation.

5 I think that on the one hand, additional agency  
6 resources seemed to be involved if one goes beyond the scope  
7 of those four questions to looking to his, Mr. Husted's  
8 conduct on the job for a lengthy period of time; additional  
9 evidence, additional pretrial work, et cetera; on the other  
10 hand, Mr. Husted's being offered an opportunity to  
11 demonstrate his fitness for the positions at issue, and it  
12 seems to me that kind of evidence with regard to his  
13 performance on the job is pertinent to the question that --  
14 one of the questions, in any event, that the appeal board  
15 raised in its decision, which was that it drew an inference  
16 from his conduct at the hearing concerning his effect on  
17 those he would be supervising.

18 It seems to me that it was an inference that is  
19 open to challenge in this proceeding, since it formed the  
20 basis for the appeal board's order.

21 I'm not saying that this order directly addresses  
22 that question, because it doesn't. But it seems to me one  
23 might interpret the Commission's order to allow it.

24 JUDGE MARGULIES: Do any of the other participants  
25 have comments?

1 MR. MAUPIN: I suppose I have to say -- as I say,  
2 it hadn't occurred to me until I walked into this room that  
3 one might take that view, namely that no evidence could be  
4 put on with respect to his job performance after, let's just  
5 say arbitrarily the date on which the appeal board order was  
6 issued. It strikes me, first of all, that Ms. Bauser, first  
7 of all, has made a valid point. The second of the two issues  
8 here, that dealing with the licensed positions, really has  
9 nothing to do with the effective date of the appeal board  
10 order.

11 Number 2, if Mr. Husted is permitted to assume one  
12 of the positions, any one of the positions described in the  
13 notice of hearing at some future date, it seems to me just  
14 necessarily to contemplate that his taking that job would  
15 have depended in part on his performance up until the time  
16 that that decision is made, or so much of it as we can  
17 identify and introduce evidence about.

18 In addition, it seems to me just as a practical  
19 matter, suppose we finish the evidentiary hearing on the four  
20 principal focus issues and you decide that Mr. Husted's  
21 attitude in the course of the hearing was not a desirable  
22 attitude. It seems to me it is very difficult -- it would be  
23 very difficult, if that were the sole unfavorable finding, it  
24 might be very difficult to decide that in 1986 he is not  
25 entitled, on account of that event, to serve in one of these

1 positions, regardless of what might be said about his  
2 attitude and his integrity since the date of that -- of the  
3 original hearing.

4 It seems to me it would be a fairly severe and  
5 uncalled-for limitation not to permit, certainly, evidence of  
6 his job performance during the period since the appeal board  
7 order was made.

8 JUDGE MARGULIES: Is there any further comment on  
9 that aspect?

10 MS. BRADFORD: I just want to reiterate my  
11 position the question raised by the Commission was whether  
12 the appeal board's conditions should be vacated. I don't  
13 think that issue can be decided on what has transpired since  
14 the appeal board made its decision.

15 JUDGE MARGULIES: I think we have pretty well  
16 exhausted the subject at this point. I will get back to the  
17 litigability of the proposed contentions. In regard to  
18 TMIA's proposed contentions, I find that they are admissible,  
19 and as a result of their being admissible, TMIA is admitted  
20 as a party.

21 In regard to the proposed contention by GPU  
22 Nuclear, there is enough in the contention to make it  
23 litigable in terms of its dealing with what happened up until  
24 the appeal board's decision. That's a matter that you would  
25 develop.

1           As to whether the record should be opened as to  
2 what occurred subsequently, I will reserve decision on that  
3 and come out with my decision in the order summarizing what  
4 transpired at this proceeding. So, GPU Nuclear is also  
5 admitted as a party to this proceeding.

6           MS. HENSLEY: Your Honor?

7           JUDGE MARGULIES: Yes?

8           MS. HENSLEY: May I point out, in the licensing  
9 board's decision, they were obviously concerned with  
10 Mr. Husted's subsequent job performance because they directed  
11 that "GPUN's training program include the establishment of  
12 criteria for qualifications of training instructors and the  
13 auditing of training at the point of delivery. We recommend  
14 that the qualifications and delivery performance of  
15 Mr. Husted receive particular attention during the  
16 forthcoming review of the TMI training program."

17           So they were obviously interested in how  
18 Mr. Husted performed his subsequent job duties.

19           JUDGE MARGULIES: Could you give us a citation to  
20 that so we can look it up and consider it?

21           MS. HENSLEY: 16 NRC 281, at page 320. That's  
22 Licensing Board Manual 82-56.

23           MS. BRADFORD: Judge Margulies, I would just like  
24 to note, of course, the Licensing Board decision was  
25 superseded by both the stipulated agreement and the appeal

1 board's ruling.

2 JUDGE MARGULIES: I think the appeal board makes  
3 reference to that comment by the licensing board in their  
4 decision. The point you make, though, Mrs. Bradford, is  
5 noted.

6 We next move on to area 2, identification of the  
7 key factual and legal questions.

8 I think the whole purpose of the notice of hearing  
9 is to litigate those two categories. That's the purpose of  
10 the proceeding. If it wasn't the purpose of the proceeding,  
11 to litigate those two categories, there would be no notice of  
12 hearing. Could the parties expound further on what they  
13 consider questions of remedy to be?

14 MR. MAUPIN: Are you referring to the last  
15 paragraph on page 3 -- well, the first full paragraph on page  
16 3?

17 JUDGE MARGULIES: Yes.

18 MR. MAUPIN: I can do that.

19 There are certain questions of remedy that are  
20 identified later in the letter. I think this point, though,  
21 is the first point at which I might supplement the positions  
22 I have set out in the letter.

23 It seems to me there is a legal issue not  
24 adequately addressed in the letter that has to do with  
25 remedy. It basically comes down to this: What standards

1 should be applied in determining whether Husted should be  
2 barred from any of the positions named in the hearing? My  
3 own position at this juncture is that the standard that would  
4 have to be applied is whether, in light of the facts that  
5 have been developed in the record, his serving in any one of  
6 the designated positions would endanger the public health and  
7 safety. Beyond that, Mr. Husted's views on remedy, I think,  
8 are set out in the letter.

9 JUDGE MARGULIES: Would you get into the question  
10 as to whether it would be appropriate to be barred for a  
11 particular period of time? Or you are faced with a permanent  
12 disbarment? Or you haven't given any thought to those areas  
13 as yet?

14 In other words, does it have to be all or  
15 nothing?

16 MR. MAUPIN: No, I have given some thought to  
17 that. I don't think it has to be all or nothing. I don't  
18 think anything in the letter suggests that it has to be all  
19 or nothing. It seems to me that there could be, in theory, a  
20 range of remedies.

21 JUDGE MARGULIES: Do the other parties wish to be  
22 heard on that?

23 MS. BRADFORD: Of course we are not considering,  
24 or Mr. Maupin is not considering the stipulation, which I  
25 think we all agreed cannot be affected by any NRC

1 proceeding. And that has no time limitations. It is  
2 strictly a bar to certain activities on the part of  
3 Mr. Husted. So, I mean, that is certainly going to affect  
4 what remedy is sought and what remedy can be provided by any  
5 proceeding -- by this proceeding, rather.

6 JUDGE MARGULIES: Mr. Johnson?

7 MR. JOHNSON: Well, I agree, I think, with both  
8 points: That the stipulation is something that the  
9 Commission determined in its notice of hearing that it didn't  
10 anticipate directly affecting; that the stipulation was, in a  
11 sense, a contract between the parties; and that the evidence  
12 adduced in this proceeding could be used by Mr. Husted in  
13 dealing with those two parties.

14 With respect to the range of remedies, I agree  
15 that a range of remedies is possible. However, there are  
16 certain things, also, again, that would be beyond your  
17 authority. For example, I don't believe you would be able to  
18 award a monetary judgment. But, in terms of whether you  
19 could determine or recommend that he be permanently barred,  
20 temporarily barred for a specific period of time, that he be  
21 put on a probationary status with respect to one or more  
22 positions -- I think those are all within your authority to  
23 do; and I would just cite as an example the type of condition  
24 -- I think it was a condition -- that Mr. Husted's counsel  
25 referred to, imposed by the licensing board, which was to

1 monitor his activities, which was something less than  
2 probation. So I think there is a range that you can choose a  
3 remedy from.

4 JUDGE MARGULIES: There is nothing in that  
5 category that needs an immediate determination, so we will  
6 move on to the factual issues. Under paragraph (b), as to 1,  
7 2, 3 -- and those just repeat the items the Commission asked  
8 us to focus upon.

9 5 contains the element which we discussed earlier,  
10 and which I will reserve decision on; and we have discussed  
11 remedial action very briefly. Does anyone want to expound  
12 any further on remedial action?

13 Moving on to 3, "determining the parties to the  
14 proceeding." All the participants are parties to the  
15 proceeding.

16 MS. BRADFORD: Judge Margulies, if we could go  
17 back just one moment, I'm sorry, to the factual issues?  
18 Mr. Maupin has said that TMIA agrees that if you reject its  
19 position on the legal question you should then address the  
20 following factual questions. And I think that might be a  
21 slight misstatement of my position, and so I would like to  
22 clarify it.

23 JUDGE MARGULIES: Please do.

24 MS. BRADFORD: It seems to me that the notice of  
25 hearing, the Commission's notice of hearing allows these

1 issues to be addressed but not necessarily to be relitigated,  
2 that in fact they should be taken into consideration but not  
3 relitigated. I believe the facts are fully developed on the  
4 record and do not need to be relitigated. And, again, I  
5 would state my position that Mr. Husted did have the  
6 opportunity, at the time of the hearing, to litigate these  
7 issues.

8 JUDGE MARGULIES: The Commission has made the  
9 determination that the fact that Mr. Husted did not  
10 participate and was not a party to the proceeding, the way I  
11 read the notice of hearing, gives him the right to relitigate  
12 both categories set forth in the notice of hearing.

13 MS. BRADFORD: But as a matter of fact, Mr. Husted  
14 did have the opportunity under 199(a), and in fact was given  
15 actual notice after the special master's report.

16 JUDGE MARGULIES: I appreciate that. But  
17 evidently the Commission did not feel that it was  
18 satisfactory in dealing with the mandate of the Commission.  
19 It isn't our purpose or intent to go beyond the Commission's  
20 reason for doing what it did. We are accepting the mandate  
21 of the Commission and proceeding from there.

22 MR. MAUPIN: May I add one thing at this point? I  
23 must confess it is not entirely clear to me how we have  
24 disposed of, or whether you have disposed of both of the  
25 Roman numbered issues under 2(a), on page 2. You said, as I

1 understood, it was the Commission's purpose to relitigate  
2 both categories. And I'm not sure I know what that means.

3 JUDGE MARGULIES: How about as to Roman numeral  
4 I?

5 MR. MAUPIN: As to Roman numeral 1, as you will  
6 see, Ms. Bradford has restated the position she states here,  
7 and I think her position is adequately stated. The other  
8 parties, as you will see, believe that that issue is rendered  
9 moot by the fact that the Commission has provided this  
10 hearing in an effort to cure the perceived defects in the  
11 earlier proceeding.

12 JUDGE MARGULIES: I should have been more  
13 specific. When I said "relitigate," it was my purpose to  
14 treat this matter de novo rather than -- well -- that's, to  
15 me, the mandate of the Commission, to treat the matter de  
16 novo. It gives Husted the opportunity to have the matter  
17 treated de novo.

18 MS. BAUSER: Judge Margulies, I may be beating a  
19 dead horse here, but if I could, I think the Roman numeral I  
20 statement under 2 is a rephrasing of what you referred to as  
21 category 1, focusing only on the legal examination of the  
22 appeal board's decision and not the examination of the  
23 underlying factual issues looked at by the appeal board.

24 If I understand you correctly, when you say "both  
25 categories," you are talking about including the factual

1 issue underlying ALAB-772 and then the other issues, namely  
2 2, 3, and 4? Is that it?

3 JUDGE MARGULIES: That is correct.

4 MS. BAUSER: Okay.

5 JUDGE MARGULIES: Does that satisfy you?

6 MS. BAUSER: Yes, sir.

7 MR. JOHNSON: I must say now I'm a little  
8 confused. Could you state that again for my benefit?

9 MS. BAUSER: The issue of Roman I, under 2 on page  
10 2 on Husted Exhibit 1, states the first of the two issues  
11 identified by the Commission more narrowly. That is, it  
12 doesn't say whether the ALAB order by Husted should be  
13 vacated. It says that they have the authority, which is  
14 purely the legal part of that question, not the question of  
15 whether the facts support suspension or barring of Mr. Husted  
16 from supervision. And it's that factual issue which is also  
17 included in this proceeding de novo.

18 MR. JOHNSON: But with respect to the other  
19 category, you are not intending to exclude the first issue,  
20 are you?

21 MS. BAUSER: No.

22 MR. JOHNSON: Okay. Because what you said was 2,  
23 3, and 4, but you mean 1, 2, 3 and 4?

24 MS. BAUSER: Yes.

25 JUDGE MARGULIES: Let me back up, and maybe in

1 backing up I should jump forward. I view the appeal board's  
2 action as having imposed a sanction, and I look upon this  
3 proceeding to be an enforcement proceeding. And, in terms of  
4 looking strictly to the appeal board's legal authority to do  
5 what they did, I don't know if it has -- it matters much in  
6 this proceeding. They did what they did and whether they had  
7 the legal authority to do it is, to me, academic. And I  
8 think because this is an enforcement type proceeding in which  
9 a sanction had been imposed previously, in which Husted did  
10 not participate and he was the subject of the sanction, he  
11 has the authority to relitigate the factual question all over  
12 again, de novo.

13 Does that clarify the picture?

14 MR. MAUPIN: Yes, sir.

15 MR. JOHNSON: Thank you.

16 JUDGE MARGULIES: Moving on to 4, defining the  
17 nature of the proceeding and the relief that can be granted.  
18 In a sense you can say that we are reviewing what the appeal  
19 board did, but the real nature of proceeding is one of an  
20 enforcement proceeding. That is to be handled on the record  
21 made before us and not to go back to the record that the  
22 appeal board acted upon. It's a matter of due process, in  
23 that Mr. Husted was not a party to the proceeding.

24 I recognize your feeling in that you feel, because  
25 he was given the opportunity to do so that he was -- he

1 waived, in effect, his right to participate and would be  
2 bound by what happened. But I believe the Commission  
3 intended something differently and we will follow the  
4 procedure that I outlined, that there will be a de novo  
5 record. When I say a de novo record, that doesn't mean the  
6 parties can't work into the de novo record parts of the old  
7 record if it suits their purposes.

8 Looking at 4(b), subparagraphs (1) and (2), I  
9 agree with (1); I agree with (2); and the notice of hearing  
10 states that Mr. Husted has the option of taking the findings  
11 if they are favorable to him and bringing them to the  
12 attention of the commonwealth of Pennsylvania, but that's his  
13 option and does not play a part in this proceeding.

14 I think it would be appropriate to take a 15  
15 minute recess at this point.

16 (Recess.)

17 JUDGE MARGULIES: Back on the record.

18 What do the parties have to say about 5? Let me  
19 start out. Mr. Johnson, do you envision a time when you  
20 would take an affirmative position in this proceeding?

21 MR. JOHNSON: Yes, with respect to at least one of  
22 the issues, as we have agreed in paragraph 2, we intend to  
23 conduct an inspection with regard to the performance of  
24 Mr. Husted, and on the basis of that, address that issue,  
25 number 5, there under -- with affirmative evidence. So that

1 on the specific question that is indicated there, based on  
2 that inspection we will have a witness, Staff witness who  
3 will testify as to the conclusions that he reached based on  
4 that inspection.

5 With respect to the other factual questions, I  
6 couldn't say at this time whether we will or will not have a  
7 position.

8 JUDGE MARGULIES: Will you know before we go to  
9 hearing?

10 MR. JOHNSON: I doubt it. If I may just add the  
11 reason why, and that is that assuming we have witnesses and  
12 there is cross-examination and rebuttal witnesses on the  
13 factual questions, that those will influence the result and  
14 the outcome, and our position will -- assuming that we  
15 ultimately take a position on some of those questions, it  
16 will probably be after the hearing rather than before it.

17 JUDGE MARGULIES: Well, in terms of the order of  
18 presentation, is there any problem right off in having Staff  
19 go first and Mr. Husted last? That would seem logical. Do  
20 the parties have any problem with that?

21 MR. JOHNSON: If I may respond to that? What the  
22 Staff had in mind with respect to the order was that the  
23 Staff would offer the record for itself, without requesting  
24 that it be accepted for the truth of the matter stated  
25 therein, but as the record, and that that would constitute a

1 -- or might serve as a prima facie case in support of the  
2 order, so to speak.

3           The Staff is not the proponent of the order, may I  
4 reiterate. To the extent that there's any proponent to the  
5 order in this proceeding, at this point it would be those  
6 parties, particularly TMIA, which is, in fact, a proponent of  
7 the order of sanction. I don't believe any of the other  
8 parties before you are a proponent of that order. The  
9 sanction was imposed by the appeal board, but the mandate of  
10 the Staff is not to make the case for the order of the appeal  
11 board, but only to ensure that the record is fully developed  
12 as per the Commission notice of hearing. And we don't  
13 interpret that as requiring us to take a position in favor of  
14 the sanction or against the sanction.

15           JUDGE MARGULIES: In terms of developing the  
16 record, it would certainly have to be a record that is  
17 legally admissible and to present matters that are not being  
18 offered for their truth, I don't see what they are  
19 accomplishing.

20           MR. JOHNSON: The thought here was that the record  
21 as it exists is subject to some procedural or due process  
22 deficiencies. There was no notice to Mr. Husted, no  
23 opportunity to be heard, no cross-examination, opportunity to  
24 present rebuttal witnesses -- these are the defects in the  
25 record and why I believe that we are having this proceeding.

1           If those deficiencies weren't present, or aren't  
2 challenged in this proceeding, hypothetically, there isn't  
3 anything inherent in the record which would prevent its being  
4 used as credible evidence, based on the weight and probative  
5 value that you would assign. Certainly some of the evidence  
6 may be more weighty, because of its nature, than other of the  
7 evidence. But it is our position that you could admit  
8 provisionally the record, subject to establishing the truth  
9 of the matters asserted therein upon offering Mr. Husted and  
10 others the opportunity to call witnesses, to cross-examine  
11 those witnesses whose testimony is in the record, and so on.

12           And then once that is accomplished, then if the  
13 deficiencies are removed, that is, he has notice, he has the  
14 opportunity to rebut any evidence that is in there, to  
15 cross-examine those persons whose testimony is in the record,  
16 I'm not sure why that -- certain of that evidence couldn't be  
17 admitted for the truth of the matters stated therein.

18           JUDGE MARGULIES: I'm certainly not speaking for  
19 Mr. Husted, but what if he decides not to do anything? How  
20 have you developed the record?

21           MR. JOHNSON: I'm not sure I understood "not to do  
22 anything."

23           JUDGE MARGULIES: He just sits back and does  
24 nothing.

25           MR. JOHNSON: Oh, he decides to sit back and do

1 nothing?

2 JUDGE MARGULIES: Yes.

3 MR. JOHNSON: I think it would be upon the Staff  
4 in that circumstance, and perhaps other parties. As the  
5 regulations say, the burden is on the proponent or as the  
6 presiding officer may otherwise allocate, and it would be up  
7 to you to allocate the burden. But if you could, among those  
8 allocations and consistent with the Commission's order that  
9 we, the Staff fully develop -- make sure that the record is  
10 fully developed, call on the Staff to call those witnesses  
11 that are necessary to remove the deficiencies.

12 JUDGE MARGULIES: Don't you already have that  
13 responsibility by the notice of the hearing?

14 MR. JOHNSON: I don't interpret it to be  
15 necessarily that we call the witnesses. But, if necessary,  
16 yes. If you are saying that no one else calls the witnesses,  
17 then I would agree. Then, if we didn't -- well, let me  
18 backtrack a second. Maybe I don't agree with that.

19 The question of whether there is a deficiency or  
20 taint on the record might be affected by the fact that  
21 Mr. Husted didn't come forward at all, if that were to be the  
22 case. And then we are in the position of the situation  
23 before he requested the opportunity for a hearing. At that  
24 point the Commission had said: We are going to offer him an  
25 opportunity for a hearing. We will stay the effect of the

1 sanction order and proceed with the hearing and it will be  
2 stayed during that time. But, if we may suppose that  
3 Mr. Husted did not ask for a hearing, I don't see any bar,  
4 then, for the order to have been effectuated. So that in  
5 that sense, if you would say that Mr. Husted, then, waived  
6 his opportunity to remove the deficiencies in the record,  
7 then perhaps the record does stand -- could be used to stand  
8 for the propositions that the appeal board relied upon in  
9 making its sanction order.

10 JUDGE MARGULIES: Did you wish to be heard,  
11 Mr. Maupin?

12 MR. MAUPIN: Well, we covered a lot of the  
13 issues. It might be appropriate to begin by saying that it  
14 seems to me there are two fundamentally different ways one  
15 can approach this proceeding conceptually. The first is to  
16 view it in the way that Mr. Johnson just suggested it might  
17 be viewed, that is the case in which Mr. Husted is given an  
18 opportunity -- one would characterize it as a case in which  
19 Mr. Husted is given an opportunity to come forth and show why  
20 incorrect conclusions were reached in the previous  
21 proceeding.

22 The other is to view it in this way. It starts  
23 with the premise that the prior proceeding was fundamentally  
24 flawed, insofar as it dealt with Mr. Husted, and it follows  
25 from that that what is required from here is a de novo

1 proceeding designed, to the extent practicable, to avoid the  
2 taint of the earlier proceeding and that, given that it is de  
3 novo, if someone wants to establish that Mr. Husted has  
4 committed this transgression or that transgression, it is  
5 principally their burden to do so.

6 If one starts from that latter proposition -- and  
7 I -- if we look at the questions of burden of proof and  
8 burden of going forward, they are not as clear; the  
9 principles are not as clearly defined in NRC case law as one  
10 would like.

11 There are two cases I know of that I think all of  
12 us here would characterize as enforcement proceedings, in  
13 which the burden of persuasion is put on the licensee, as  
14 opposed to the Staff. I believe there's a rational argument  
15 where those cases should not be controlling in this case.

16 I start with the principle that what is intended  
17 here is a de novo proceeding and that leads me to a couple of  
18 conclusions.

19 One is that it is the burden of others, whether it  
20 be the Staff or TMIA, and I guess at today's juncture TMIA is  
21 the only party that is prepared to say now that it would like  
22 to see adverse findings to Husted come out of this  
23 proceeding. When I start with the idea that there ought to  
24 be a de novo proceeding, though, I say that the burden is on  
25 others to go forward and to satisfy you by a preponderance of

1 the evidence that Husted has done one or more of the items  
2 addressed in the first four issues.

3 It also, though, directs my thinking on the issue  
4 of what should be done with the record of the prior  
5 proceeding. I think this is a difference of substance  
6 between Mr. Johnson and myself. I guess my approach would be  
7 that we avoid any decision, that the record comes in en masse  
8 at the threshold, and that we, instead, develop our cases  
9 through discovery and, in the typical ways lawyers do, let  
10 each of us see what parts of the record we want to use to  
11 support our cases and let each of us make those -- try to  
12 have those portions of the record admitted, recognizing that  
13 our arguments will have to pass muster under the rules of  
14 evidence that will govern this proceeding.

15 MS. BRADFORD: Well, as the nonlawyer here, I have  
16 a few questions rather than a statement.

17 First of all, it seems to me that implicit in the  
18 term "enforcement hearing," there is a charge that is about  
19 to be enforced and, therefore, it would be Mr. Husted's  
20 position to defend against that and that is what colored my  
21 thinking, that he would have the burden of proof. And, in  
22 fact, those charges would be the earlier record and the  
23 decisions that came out of that record. And in that case, as  
24 I said, it would seem that he would have the burden of  
25 proving that those should be overturned.

1           If there is another subtle difference in  
2 enforcement hearing that I am misinterpreting, perhaps -- and  
3 perhaps someone could explain that to me.

4           JUDGE MARGULIES: Well, it's the general rule when  
5 someone wants to impose sanctions against a party, in our  
6 form of government it isn't the so-called respondent or  
7 defendant or whatever you want to call him, that he has the  
8 burden of proof to establish his innocence. It's generally a  
9 matter of the one making the charges has to substantiate  
10 them, and to place the burden of proof on Mr. Husted would be  
11 depriving him of due process, in my opinion.

12           MR. JOHNSON: Judge Margulies, this question is  
13 also dealt with in the legislative history of the  
14 Administrative Procedure Act which I believe is controlling  
15 in this case because of the APA's importation into Section  
16 181 of the Atomic Energy Act.

17           In the legislative history, on the burden of proof  
18 section, Section 7(c), which is codified as 556(g), it not  
19 only speaks to the burden of going forward but also the  
20 question of sanctions that you just spoke to. And I just  
21 would like to quote from the Senate committee report on the  
22 Administrative Procedure Act which deals with this:

23           "That the proponent of a rule or order has the  
24 burden of proof means not only that the party initiating the  
25 proceeding has the general burden of coming forward with a

1 prima facie case but that other parties, who are proponents  
2 of some different result, also for that purpose have a burden  
3 to maintain."

4 Let me read the entire paragraph but it's the last  
5 sentence which I would like to focus on:

6 "Similarly, the requirement that no sanction be  
7 imposed or rule or order be issued upon evidence of the kind  
8 specified means that the proponents of a denial of relief  
9 must sustain such denial by that kind of evidence. For  
10 example, credible and credited evidence submitted by the  
11 applicant for a license may not be ignored except upon the  
12 requisite kind and quality of contrary evidence. No agency  
13 is authorized to stand mute and arbitrarily disbelieve  
14 credible evidence. Except as applicants for a license or  
15 other privilege may be required to come forward with a prima  
16 facie showing, no agency is entitled to presume that the  
17 conduct of any person or status of any enterprise is unlawful  
18 or improper."

19 I believe that language has been accepted by the  
20 federal courts and should be controlling here.

21 JUDGE MARGULIES: There is language in the notice  
22 of hearing that speaks in terms of Mr. Husted being given the  
23 opportunity to establish his fitness, but I really don't  
24 think it means he has the burden of establishing that the  
25 sanction shouldn't be made applicable to him.

1                   MR. JOHNSON: We agree with that. The Staff  
2 would, however, take the position that in allocating the  
3 burden of going forward, that the proponent of the order,  
4 that is, the sanction or some party or person standing in  
5 lieu of that proponent, would have the burden initially of  
6 going forward with a prima facie case that would support the  
7 result of the sanction. But once that is done, then the  
8 burden shifts to Mr. Husted to present the same kind of  
9 evidence and a similar, contrary burden.

10                   The only difference -- well, not the only  
11 difference, but a principal difference between the types of  
12 cases Mr. Maupin referred to and this is that,  
13 notwithstanding allocation of the burden in going forward,  
14 as, for example, in the Midland case decided by the appeal  
15 board, the burden of persuasion was seen to lie, at least in  
16 at all times prior to the issuance of an operating license,  
17 upon the licensee or permittee.

18                   And there are similar cases involving the  
19 Environmental Protection Agency in mining appeals that also  
20 distinguish between the burden of going forward and the  
21 burden of persuasion in a regulatory climate. We don't  
22 believe that that distinction per se, in the burden of  
23 persuasion and burden of going forward applies here, for the  
24 reason Mr. Maupin suggested, that is, that Mr. Husted is not  
25 a licensee. So he does not, at least initially, have the

1     burden of going forward and he does not, for legislative  
2     policy reasons, have a burden of persuasion independent of  
3     that.

4             MS. BAUSER: Judge Margulies, if I might add? I  
5     have some question which may be a difference of opinion  
6     that's not clear to me -- with the Staff over the position  
7     that they intend to take in the proceeding. It is my  
8     understanding that the Commission, in their notice of  
9     hearing, intended the Staff to participate as a full party in  
10    addition to ensuring that the record was complete. I'm not  
11    sure as a practical matter -- I don't believe, as a practical  
12    matter, that means they have to put witnesses on the stand.  
13    But I do have some question about their not formulating a  
14    position at the same time that the other parties do. And I  
15    think that it would be unfortunate if Mr. Husted and GPU  
16    Nuclear did not know what the Staff's position was until the  
17    evidentiary hearing was over on some of these issues.

18            I would think, as a party, they would look at the  
19    evidence that all of us are going to be looking at through  
20    the discovery process and then formulate a position which,  
21    indeed, could change if something came up that they had not  
22    appreciated before. They need not be an advocate before or  
23    against Mr. Husted, but based on their evaluation of the  
24    record they have a view on the issues, factual issues that  
25    are the subject of the litigation. I'm not sure, as I say,

1 whether that's a substantive difference or not -- I think it  
2 may well be -- with the Staff.

3 MR. JOHNSON: I'd be glad to respond to that. It  
4 raises an interesting point. I would just want to  
5 distinguish between having positions on questions that are  
6 propounded to us, and being the proponent of the sanction or  
7 not -- opponent of the sanction.

8 It may be that we can take positions on specific  
9 questions but not feel that we are able to take a position in  
10 favor or against the sanction.

11 MS. BRADFORD: Judge Margulies?

12 JUDGE MARGULIES: Yes?

13 MS. BRADFORD: I would just like to ask the Staff  
14 who would have the burden of proof in their eyes if TMIA were  
15 not a party to this proceeding? Who then would have -- bear  
16 the burden of proof?

17 JUDGE MARGULIES: Do you wish to respond?

18 MR. JOHNSON: Okay. In terms of burden of proof  
19 meaning the burden of going forward with evidence, I would  
20 say that whoever had a contention would have a burden of  
21 going forward with the appropriate kind of evidence in  
22 support of the contention. If you weren't in the proceeding  
23 then whoever else as an intervenor would have that burden of  
24 going forward.

25 The burden of persuasion, still, I believe, would

1 not be allocated to Mr. Husted, at least at the outset; and  
2 if there were just the Staff and Mr. Husted, as I indicated  
3 before, I think one is left with the inevitable conclusion  
4 that the Staff has the burden of going forward.

5 MS. BRADFORD: In its earlier decision, CLR84-18,  
6 the Commission specifically stated that it was not interested  
7 in the underlying justification of the question, the legal  
8 question that they pose. They expanded the scope of the  
9 hearing specifically at the request of Mr. Husted.  
10 Therefore, those factual issues which he outlined in his  
11 request appear, then -- an appeal of those earlier  
12 decisions. In its order, the Commission is stating that it  
13 doesn't question the factual issues, merely the appeal  
14 board's legal authority to impose a condition in light of  
15 those factual issues. Then, as a discretionary matter, the  
16 Commission expanded the scope of the hearing at Mr. Husted's  
17 request. And therefore, that is -- his request becomes an  
18 appeal of those underlying factual issues and it is in that  
19 sense that it appears to me that he has the burden of proof,  
20 that those earlier issues, those factual issues, should be  
21 overturned.

22 JUDGE MARGULIES: You would split the proceeding  
23 in terms of the appeal board's condition vis-a-vis the  
24 matters that Mr. Husted raised?

25 MS. BRADFORD: Yes.

1           JUDGE MARGULIES: Aren't the matters that  
2 Mr. Husted raised really in the nature of seeking an advisory  
3 opinion from the administrative law judge? And isn't it sort  
4 of implied that the evidence on one will form the basis of  
5 the result of the other? Do you see the point that I'm  
6 making? One will carry the other.

7           MR. MAUPIN: Yes, sir. I think that's correct.  
8 I'd also point out that the only reason Mr. Husted has to be  
9 concerned about his qualifications for the licensed operators  
10 positions arises from the proceedings in the cheating hearing  
11 which were, again, the tainted proceeding.

12           JUDGE MARGULIES: I'm troubled, Mr. Johnson, with  
13 the concept of just bringing in a lot of prior record and  
14 then starting to go through with determining what is  
15 acceptable and what is not acceptable to Mr. Husted as a  
16 means of developing the record.

17           MR. JOHNSON: When I said bringing in the record,  
18 I really was only referring to the pertinent testimony and  
19 exhibits. I was not intending to include the entire record  
20 of the proceeding.

21           JUDGE MARGULIES: Yes, I understand that. I don't  
22 know how much it constitutes, but I'm sure it is  
23 considerable, even in terms of that limited area.

24           MR. JOHNSON: Well, my understanding from the  
25 record that I have read, it encompasses parts of three days

1 of proceedings back in December 1981 and it is, I would say  
2 -- a guess -- several hundred pages. But it's not 500 pages,  
3 for example.

4 JUDGE MARGULIES: I wouldn't consider 500 pages  
5 excessive, considering the time of records that we work with  
6 in the Commission. I thought it was a lot more than that. I  
7 don't know. I didn't --

8 MR. JOHNSON: My recollection is that the evidence  
9 is testimony of Staff Investigator William Ward, Mr. Husted,  
10 a man designated as P, who took an exam with Mr. Husted on  
11 the same day, and I can't recall another witness that's  
12 involved. It's just basically Mr. Husted's testimony -- he  
13 testified, was asked about the cheating incident. Of course,  
14 his testimony and cross-examination were -- served as a basis  
15 for the special master's conclusions concerning his  
16 forthrightness and his attitude. Testimony of Mr. P  
17 concerned the events of the day -- I think it was April 1,  
18 1981 -- in which Mr. Husted and Mr. P took an exam together.  
19 And Mr. Ward testified concerning his interview with Mr. P.  
20 And may I add, also, Mr. Husted testified concerning the  
21 subject of two interviews between Mr. Husted and the Staff  
22 which related to an incident that occurred in the hall. That  
23 related to the alleged possibility of some cheating by  
24 others. It really is a discrete bit of evidence that is  
25 easily identified.

1 MS. BRADFORD: I agree. I think there are only  
2 three days. But in addition there are the Staff reports.  
3 Those are part of the record.

4 MR. JOHNSON: The two exhibits, yes. Those are  
5 reports of investigation which have a couple of pages of  
6 relevant --

7 JUDGE MARGULIES: Do you understand the record to  
8 be of that size?

9 MS. BAUSER: Yes. I think there may be some other  
10 pieces that as the parties here get into it they might find  
11 pertinent. I think those are the central ones.

12 I would also like to say that I suspect -- I am  
13 quite optimistic that the parties can stipulate together and  
14 introduce certain evidence. I think other evidence will  
15 probably be raised by various parties when they are  
16 questioning the very same witnesses who may testify now for  
17 the second time on the same subject. But I would agree with  
18 Mr. Maupin, and what I understood you to suggest earlier,  
19 that in order to look at this in the usual de novo way, one  
20 should proceed with an affirmative case in this record and  
21 use the other record either as a piece of that or for  
22 impeachment purposes or for whatever purposes they might be  
23 useful for, and not begin with the prior record and try to  
24 work from there and look at what in that is right and what  
25 isn't, and where pieces are missing.

1 I just -- as a practical matter, I'm not sure how  
2 much difference that is going to make in terms of what goes  
3 in and what doesn't. But it's not the orientation, at least,  
4 that I have towards this proceeding.

5 MR. JOHNSON: If I may just chime in, whether it's  
6 the Staff that calls a particular person or it is Mr. Husted  
7 that calls a particular person or some other party, it seems  
8 to me that what would be contemplated -- whether my procedure  
9 is followed or Mr. Maupin's procedure is followed, I think,  
10 is that the person would be called whose testimony appeared  
11 on the record and that person might be asked, did he testify  
12 to that and he would say yes or no. Then he would be asked  
13 questions concerning that by the person who is putting on the  
14 witness and then the cross-examination would proceed. It may  
15 be that, depending on who the person is, the burden of  
16 putting on the person would -- should shift. I'm not sure.

17 JUDGE MARGULIES: Isn't that different from what  
18 you initially proposed? I can see no problem with that. I  
19 see no problem with calling someone who testified previously  
20 and asking him if his testimony would be any different  
21 today. I have no problem with that.

22 MR. JOHNSON: I suppose that what I was indicating  
23 is that even without some person sponsoring, that is, the  
24 author of the testimony sponsoring it, that that's what I  
25 said, that that formality would be skipped and the record

1 would be there for the fact that it is the record, to stand  
2 for the record of what was said in an earlier proceeding.

3 But then, the person -- to remove the deficiency  
4 from the perspective of process -- you still would have to  
5 have that person available to be cross-examined if Mr. Husted  
6 so desires. So the practical distinctions are very slight,  
7 it seems to me, between the two positions.

8 MR. MAUPIN: Let me ask a question, if I may?  
9 Would you anticipate or would you expect to receive written  
10 testimony in this proceeding?

11 JUDGE MARGULIES: I really haven't given it any  
12 thought. That's the usual practice.

13 MR. MAUPIN: That's right.

14 JUDGE MARGULIES: And the usual reason for it is  
15 it's so voluminous and it provides an opportunity for all  
16 parties to examine it in advance of the hearing and it just  
17 saves a lot of time on hearing and it makes for a much more  
18 orderly procedure.

19 MR. MAUPIN: Just as a general proposition it  
20 seems -- well, off the top of my head, it strikes me that  
21 most of the testimony that was given in the prior proceeding  
22 by people who I might want to call in this proceeding was  
23 given in the form of cross-examination and I think the  
24 chances that I would want to put any witness on the stand and  
25 say: You read what you said three years ago, is that okay

1 with you now?

2 I just think it's unlikely that that's the way --  
3 that that would be the most effective way to put on a case.  
4 If Mr. Johnson wanted to have Mr. Ward adopt his testimony  
5 given in 1981 as his testimony in this proceeding, then that  
6 would be one way of putting it in in written form, I  
7 suppose.

8 But let me back in and come in on the letter of  
9 the letter. It seems to me that there are a couple of  
10 respects in which I would concede that a significant part of  
11 the prior record will be part of this record. I mentioned  
12 one of those -- we mentioned one of those in the letter. We  
13 mentioned that to the extent that forthrightness in the prior  
14 testimony is concerned, we have to know what the prior  
15 testimony was. And the best way of determining that is to  
16 look at the transcript. So it seems to me the transcript of  
17 certain portions of Mr. Husted's testimony would become part  
18 of the record. Not for the purpose of showing the truth of  
19 what he said, but for the purpose of showing what he said.

20 I'm a little more at a loss right now on the  
21 question of what would be required or the question of  
22 attitude at the hearing. It may be that we would stipulate  
23 that everything Husted said ought to go into the record now  
24 for whatever it might show about his attitude, if anything.  
25 My guess is we probably could reach agreement on that based

1 upon the brief experience we have had talking with each other  
2 thus far.

3 My present thinking about the inspection and  
4 enforcement reports is that they were preexisting documents.  
5 They were not shaped in any way by the way the hearing  
6 proceeded or the way the questions were asked or whether  
7 there was representation by counsel at the hearing. And so I  
8 could probably -- I'm sure we could work out some basis for  
9 stipulating into the record the interviews. But I don't see  
10 any basis for going beyond that, really, or that we are  
11 achieving anything material by way of speeding up the  
12 proceeding or by way of ensuring more reliable testimony.

13 MR. JOHNSON: If I may comment on that? That  
14 really leaves the two other factual questions -- of the four,  
15 to the extent we are limiting ourselves to those four factual  
16 questions that were specifically raised -- the cheating  
17 incident and testimony about cooperation. It seems to me  
18 that one could make an argument that the recollections of the  
19 persons testifying concerning those events, the cheating  
20 events and so -- the so-called cheating events and the  
21 cooperation with the NRC investigators -- that the  
22 recollections of the parties or the individuals who testified  
23 in 1982 were fresher recollections, at least, than we will  
24 have in 1986 and therefore, certainly are worthy of  
25 presentation and consideration, subject to the opportunity to

1 cross-examine and rebut.

2 JUDGE MARGULIES: It is certainly not my  
3 intention, Mr. Johnson, to tell you what your responsibility  
4 is in terms of developing a record. That's your  
5 responsibility and, as any other counsel, you make your own  
6 case in terms of what you understand your responsibilities to  
7 be. The only thing that I'm pointing out is that I may have  
8 difficulty in terms of admitting documents into the record  
9 that are not being offered for their truth but only that  
10 constitute the record, especially where the whole import of  
11 the proceeding is that that prior record is tainted in some  
12 respect or may be tainted by Mr. Husted not being a party to  
13 its preparation.

14 MR. JOHNSON: That kind of judgment reflects, it  
15 seems to me, directly on the question of who has the burden  
16 to go forward and whether the record as I proposed could in  
17 this provisional form, serve as the prima facie case since --  
18 in support of the sanction.

19 JUDGE MARGULIES: Well, if it isn't being offered  
20 for its truth, I don't see how it can constitute a prima  
21 facie case.

22 MR. JOHNSON: Well, what I said earlier was that  
23 at least initially it wouldn't be offered for that purpose.  
24 But what I then said is if, hypothetically, no one sought to  
25 rebut or cross-examine, other than the record, then it would

1 in fact be offered for that purpose.

2 JUDGE MARGULIES: Under what rule of law? I know  
3 of know rule of law that would permit it to be offered for  
4 other than its truth and then all of a sudden because no one  
5 questions it, it becomes acceptable for its truth?

6 I can see it having historical significance, but  
7 if it's not offered for its truth I don't see how it goes to  
8 the merits of the proceeding.

9 MR. JOHNSON: If I may just think out loud,  
10 because this is kind of a difficult question --

11 JUDGE MARGULIES: Sure.

12 MR. JOHNSON: -- what would be the practical  
13 import of our offering matters for the truth of the matter  
14 stated therein, but with the proviso that the testimony --  
15 the opportunity to examine on that and rebut that testimony  
16 be afforded?

17 JUDGE MARGULIES: The other side?

18 MR. MAUPIN: I have no problem with that.

19 JUDGE MARGULIES: I see. Because whether it's  
20 offered for the truth of the matters stated therein or not,  
21 you still would have the opportunity to remove any procedural  
22 deficiency. What that doesn't answer for me is whether the  
23 Staff would want to offer that -- all that evidence for the  
24 truth of the matter stated therein. I haven't considered  
25 that.

1           But I don't see offering some of these interviews  
2 for the truth necessarily having a bearing on the matter of  
3 persuasion. You may just want to do so for developing a  
4 record as to what transpired. I don't see how it would  
5 compromise -- necessarily compromise your concern about  
6 merely developing the record and not becoming an advocate for  
7 one side or the other.

8           MR. JOHNSON: Yes, I see. That may be a way out,  
9 a way to proceed.

10           (Discussion off the record.)

11           JUDGE MARGULIES: Have we made any progress in  
12 this area? It appears that the parties can work out  
13 something, but I'm just troubled with the idea, Mr. Johnson,  
14 in terms of making records available for purposes other than  
15 their truth and expecting them to have any bearing on the  
16 merits of the proceeding.

17           MR. JOHNSON: Okay. I agree that that is an  
18 important point and accept it. But I don't believe we are  
19 going to reach agreement here, I don't believe. I don't  
20 know. I don't think it is, as I would -- if I were standing  
21 in Mr. Husted's shoes -- I don't think his counsel would want  
22 to offer the record for the truth of the matter stated  
23 therein.

24           Let him speak for himself. But if I were to do  
25 that, I don't think he would agree to it.

1 MR. MAUPIN: I don't know whether we can reach  
2 agreement today on the record or not on this. I certainly  
3 agree with a couple of points that have been made. In the  
4 cosmic sense of NRC proceedings, we are talking about a  
5 relatively small batch of paper. Other than named numbers of  
6 pages, I would say less than two inches. We are talking  
7 about three or four principal witnesses and I agree with  
8 Ms. Bauser that there could be three or four others that  
9 could emerge from a more careful look at the transcript. And  
10 we are off on a relatively cooperative footing, I think.

11 We are going to learn more about our cases in the  
12 weeks ahead, I think, and our respective thoughts are going  
13 to begin to jell on just what type of cases we have. We will  
14 talk to potential witnesses. We may be assuming what they  
15 remember now about those events or what they think about what  
16 they said previously. We may find they have very different  
17 memories or whatever. And I don't want to postpone decision  
18 simply for the sake of postponing it, but I have a relatively  
19 high degree of confidence that we could reach agreement on  
20 this. In any event, we have a more rational basis for trying  
21 to.

22 JUDGE MARGULIES: I just wanted to express the  
23 problem I had with Staff's position and I have done so. As I  
24 said, it's not my intention to try anyone's case. Each one  
25 has their own responsibilities. When the time comes for

1 hearings, someone is going to have to step up and lead off  
2 and, in my mind, basically in terms of leading off, it would  
3 be in the nature of Staff and TMIA. And in terms of  
4 responding, it would be GPU Nuclear and Husted. That would  
5 generally be the order of procedure that I would  
6 contemplate.

7 MR. JOHNSON: Jumping ahead just a bit, we are  
8 proposing in the joint exhibit -- a schedule. It has a  
9 prehearing conference scheduled for -- I think it's May  
10 12th. It may be that we could postpone the order of  
11 presentation issue until that time.

12 JUDGE MARGULIES: I don't have any problem with  
13 that. It's just something we all ought to be cognizant of,  
14 just that when the day comes for a hearing, someone is going  
15 to have to step forward.

16 MR. JOHNSON: Correct.

17 JUDGE MARGULIES: Would the parties want to break  
18 for lunch now?

19 MR. JOHNSON: That's fine with me.

20 JUDGE MARGULIES: Mrs. Bauser?

21 MS. BAUSER: I'm never one who would not be  
22 interested in eating, but it seems to me that we don't have  
23 more than 45 minutes more to go. I don't know what you have  
24 on your schedule but --

25 JUDGE MARGULIES: Let me just read what we have

1 before us on our agenda and see whether we can finish it up  
2 and adjourn.

3 I believe what we have we can finish up before  
4 lunch. It seems that many of the other items are really  
5 intricately related to 5 and should be considered when item 5  
6 is discussed.

7 For example, extent of participation. Certainly  
8 that bears on the order of procedure and who has the burden  
9 of going forward and persuasion and things like that. So  
10 there is nothing to come up with on that item now, as I see  
11 it, unless the parties feel otherwise. Do you agree? That  
12 it really is connected with 5?

13 MR. MAUPIN: I agree with that.

14 JUDGE MARGULIES: Do the other parties agree?

15 MR. JOHNSON: Yes.

16 JUDGE MARGULIES: And we have pretty well gone  
17 over 6(b), and we are not going to come to an ultimate  
18 conclusion on that today. And once again, 7 relates to 5.

19 MS. BRADFORD: Judge Margulies, with regard to 7,  
20 I had talked this morning with Mr. Maupin about some  
21 additional documents that TMIA would propose for the record.

22 JUDGE MARGULIES: Yes?

23 MS. BRADFORD: Those would be the special master's  
24 report and the Licencing Board's decision and the stipulation  
25 which was the basis for the appeal board's ruling.

1           JUDGE MARGULIES: And you will consider that,  
2 counsel? I mean you are not going to make a decision on that  
3 now, but it's something that you will evaluate?

4           MR. MAUPIN: On those items? Well, maybe I should  
5 think about it more, but my instinctive reaction was that the  
6 special master's report and the ASLB decision are NRC case  
7 law at this stage and are there for whatever they say, but  
8 would not be considered evidence in any conventional sense of  
9 the word.

10           The stipulation, I'm less sure on that, but I  
11 guess I don't understand for what purpose the stipulation --  
12 I don't understand what probative value the stipulation would  
13 have on any issue in the case. I guess I'm inclined to think  
14 it does not belong in the record. I think Ms. Bauser  
15 mentioned to me this morning, after Ms. Bradford and I had  
16 discussed this point, she thinks the stipulation may be  
17 described in either the license -- no -- in the appeal board  
18 decision. I simply haven't checked out on whether that is  
19 true or not.

20           JUDGE MARGULIES: Yes, it is. It is set out  
21 specifically. Well, it isn't set out in its totality, but in  
22 terms of provisions 2 and 3, 2 reading "Now and at any time  
23 in the future licensee will not utilize Mr. Husted, whose  
24 attitude was criticized by the ASLBP to operate TMI 1 or to  
25 train operators or" -- and it goes on in that vein. It is in

1 the ASLBP decision.

2 MR. MAUPIN: That being so, I would be certainly  
3 open to hearing any suggestions as to why that is important  
4 as a matter of evidence, but I'm skeptical right now that it  
5 is.

6 JUDGE MARGULIES: Do you wish to respond,  
7 Ms. Bradford?

8 MS. BRADFORD: With respect to the special  
9 master's report, it's my recollection that his findings and  
10 conclusions with regard to Mr. Husted were based in part on  
11 demeanor observations and with regard to attitude; then that  
12 would be important, as to the question of his attitude during  
13 the hearing.

14 JUDGE MARGULIES: I'm not going to rule on  
15 anything like that at this time. I have no familiarity with  
16 the record per se. It would have to be looked at in the  
17 perspective of the record that's before me, so I couldn't  
18 possibly rule on anything like that today, but there is no  
19 reason that both parties cannot discuss it and give their  
20 reasons for what they want to do with it. And that doesn't  
21 mean it cannot be raised at the hearing.

22 MS. BRADFORD: I simply raised it now so that we  
23 could consider it.

24 JUDGE MARGULIES: Yes.

25 The parties seek discovery. I know of no reason

1 not to have discovery. So the answer in terms of 8 is yes.

2 In terms of the schedule, there should be minor  
3 modification. Number 1, with the hearing given on June 15,  
4 which is on a Sunday and Father's Day, I don't think we'll  
5 want to start on June 15th.

6 MR. MAUPIN: When the going gets tough the tough  
7 get going.

8 (Laughter.)

9 JUDGE MARGULIES: I know everyone is anxious to  
10 get going with the hearing, but it has to be within limits.  
11 My calendar is such that I would like to start the following  
12 Monday, that would be June 23rd. But other than that, the  
13 dates look fine.

14 Are they agreeable to the other parties?

15 MS. BRADFORD: I had onc, because of the  
16 uncertainty as to who has the burden of proof, et cetera,  
17 when we discussed this when we met informally, I had said  
18 that there might be a possibility that I would request  
19 further time and I think, perhaps, that's built in to this  
20 schedule, that we wouldn't have to change any of the other  
21 dates. But perhaps someone has a different recollection? I  
22 think we talked about two months plus a possibility of an  
23 extra two weeks in there.

24 MS. BAUSER: Judge Margulies?

25 JUDGE MARGULIES: Yes.

1 MS. BAUSER: I would like to respond to what  
2 Ms. Bradford said and also raise another point. The  
3 discovery schedule, I think everyone agreed, was going to  
4 probably affect licensee -- GPU Nuclear's -- resources more  
5 than others, since we tend to have the documents at issue  
6 here. The intention of the schedule is to provide in it the  
7 opportunity for two rounds as we state. I -- the intention  
8 was not to -- my understanding was the main one would not  
9 slide, absent some good cause. In other words, something  
10 that comes up that couldn't have been presented earlier, for  
11 example.

12 I would like to point out that this schedule was  
13 essentially modeled after a -- on the basis of a two-week  
14 response time to discovery request, which is what the rules  
15 provide for interrogatories. It did not account for the  
16 30-day time period provided for in the rules for document  
17 production.

18 GPU Nuclear, and I think the other parties agree  
19 as well, to provide production documents within the two-week  
20 time frame as well in order to meet this schedule -- and of  
21 course if we are unable to do it, that would constitute good  
22 cause, for example, why another party could not then file  
23 their second round until after they had the opportunity to  
24 look at the documents that they asked for.

25 JUDGE MARGULIES: Is that agreeable to the other

1 parties or do we want to set a firmer schedule?

2 MR. MAUPIN: That's agreeable to me. Let me say  
3 something, because if I understood what Ms. Bauser said, she  
4 said she understood it was agreeable to the parties.

5 The four of us did not address this precise issue  
6 -- the length of time for production of documents -- at our  
7 meeting. That came up after I produced the first draft of  
8 this letter.

9 Ms. Bauser got back to me first with her client's  
10 comments and I believe I told her -- I may have told her that  
11 I wasn't going to address this issue in the letter, but that  
12 I was going to tell Ms. Bradford that Ms. Bauser was going to  
13 make this proposal, and I think I neglected to do that and I  
14 apologize for that.

15 MS. BRADFORD: You did.

16 MR. MAUPIN: I apologize for that. That just  
17 dawned on me. So she is obviously free in any event, but  
18 she's certainly free in this case to agree or disagree  
19 because this is, I think, the first she's heard of this  
20 proposal.

21 MS. BRADFORD: May I? As you just heard, this is  
22 the first time I'm hearing this proposition.

23 JUDGE MARGULIES: You want a few minutes to think  
24 about it?

25 MS. BRADFORD: Yes.

1 JUDGE MARGULIES: Let's just take a five-minute  
2 recess -- or 10-minute recess. If there's anything else that  
3 the parties want to bring up, we can do so at that time,  
4 too. So you think about that. We'll see where we go.

5 (Recess.)

6 JUDGE MARGULIES: Back on the record.

7 MS. BRADFORD: Ms. Bauser explained it to me and  
8 as she explained it to me, it is agreeable. Her proposal is  
9 agreeable.

10 JUDGE MARGULIES: Do you wish to state for the  
11 record what your understanding is?

12 MS. BRADFORD: That I would -- instead of the  
13 30-day production there would be a 15-day production schedule  
14 and those documents would then be hand-delivered to the  
15 parties who had requested them. Is that an accurate  
16 restatement?

17 MS. BAUSER: I failed to mention one thing which  
18 is something that I raised with Mr. Maupin during our review  
19 of this draft, was the possibility of making all deadlines  
20 receipt days and that would mean delivery by whatever means  
21 the parties sought as long as they got it there on that day.

22 We have in the past worked out an arrangement with  
23 TMIA where we have had hand delivery back and forth between  
24 us and I was proposing to her that we continue with that. So  
25 that all of our deadlines, receipt of interrogatories, as

1 well as interrogatory responses, for example, would be  
2 governed by this time period.

3 The other thing is I just can't remember whether  
4 it's 14 days or 15 days -- I thought it was 14 in the rules  
5 instead of 15, but whatever the interrogatory time period is,  
6 that's the way we would treat -- we would treat any document  
7 requests of us as if they were interrogatories.

8 JUDGE MARGULIES: Okay?

9 MS. BRADFORD: Yes.

10 JUDGE MARGULIES: Fine.

11 Is there anything additional that the parties  
12 would want to bring up at this time?

13 MR. JOHNSON: I would just say that we are talking  
14 about discovery among all the parties and not just between  
15 GPU Nuclear and TMIA, and although I have no problem with the  
16 14-day schedule for production of documents, I would not want  
17 to be on record as saying that we wouldn't follow the rules  
18 of procedure, particularly with respect to the burdens of the  
19 Staff with respect to discovery. We would have every  
20 intention to follow the schedule, but there are certain  
21 special provisions in the regulations which apply only to the  
22 Staff and we reserve the right to assert those regulations as  
23 may be appropriate.

24 MS. BAUSER: If I understand what you are saying,  
25 which I may not, are you talking about designating who

1 responds to discovery requests as opposed to the time  
2 period?

3 JUDGE MARGULIES: Why don't you spell out what  
4 those reservations are?

5 MR. JOHNSON: There are several pertinent ones.  
6 One has to do with the designation of witnesses and  
7 respondents. However, the one that I was principally  
8 alluding to was the fact that there is a provision in the  
9 regulations which specifies that discovery against the Staff  
10 is not -- has to be -- required by the presiding officer.  
11 I'm a little rusty on the exact wording. But what I intended  
12 to say was that although we are not waiving here the  
13 provisions -- those provisions of the regulations, we would  
14 intend to voluntarily comply with discovery requests.

15 JUDGE MARGULIES: This is generally a different  
16 type proceeding than those proceedings where the Staff  
17 usually invokes those provisions of the regulations; isn't  
18 that so, Mr. Johnson? I mean, generally in licensing  
19 proceedings, the Staff may or may not invoke those  
20 provisions. Although legally you may invoke those provisions  
21 in this proceeding as well, it generally isn't the type of  
22 proceeding that you would normally invoke those.

23 MR. JOHNSON: I agree and I don't think the Staff  
24 will, in fact, have a difficulty supplying documents -- that  
25 would be just my guess -- and answering questions if we get

1 questions. I just wanted to be on the record as not waiving  
2 the provisions of the regulations.

3 I do have a couple of other matters that I would  
4 also like to just clarify, if I may? One was, I was speaking  
5 with Ms. Bauser during the intermission we had with regard to  
6 the question of freezing the record as a certain date. It  
7 isn't clear in my mind when it was that you were considering  
8 whether to freeze the record; whether it was the date, the  
9 end of the proceeding or the date of the hearing below,  
10 preceding hearing, or the date on which the appeal board  
11 order was issued, which is sometime in 1984, I believe. I  
12 think we would benefit from clarifying that point.

13 But in addition, we were discussing the  
14 advisability of imposing such a freeze with respect to  
15 whether the record would be fully developed if it were cut  
16 off. I think there is some thought on our part and also on  
17 GPU's part that if we were to arbitrarily cut off the date we  
18 might risk the possibility of excluding some evidence that,  
19 if -- were this a new proceeding, would be admissible for the  
20 purposes of showing the fitness of Mr. Husted or not.

21 Lastly, I wanted to ask whether you intend to rule  
22 on the burden of going forward in your prehearing conference  
23 order? Because it seems to me that that would be very  
24 pertinent -- a very pertinent factor which would influence  
25 our case preparation immediately and, therefore, I would like

1 to see some kind of -- I'm not sure whether you anticipated  
2 ruling on the allocation of burden of going forward after  
3 this conference. I would like to know whether you intended  
4 to do that.

5 JUDGE MARGULIES: I hadn't intended to, but if you  
6 want me to I will. I thought maybe the parties could come to  
7 terms with it.

8 MR. JOHNSON: I would like to hear what the other  
9 parties think.

10 MR. MAUPIN: I suppose I would like to have you  
11 decide that issue. I cannot candidly say it makes a whole  
12 lot of difference to the way I'm going to prepare.

13 JUDGE MARGULIES: Okay. Then I will decide that  
14 issue. In terms of the cutoff period, once again I'm totally  
15 unfamiliar with the record below. How about the date of the  
16 closing of the record before the licensing board? It is  
17 somewhat arbitrary, but it puts it in point of time in  
18 proximity to the testimony that was taken in the proceeding  
19 and it resulted in the record that went before the appeal  
20 panel. Yes?

21 MS. BAUSER: I don't know, Judge Margulies,  
22 whether you are still entertaining argument on that point.

23 JUDGE MARGULIES: This is solely to set a date. I  
24 don't want to hear any additional argument as to why we  
25 shouldn't set a date. But if you do want to make argument as

1 to why that date is inappropriate I would certainly listen to  
2 you.

3 MS. BAUSER: Are you saying you are not deciding  
4 the issue itself as to whether there will be a cutoff, but  
5 what should the cutoff be if there is one?

6 JUDGE MARGULIES: Right.

7 MS. BAUSER: The evidentiary record in this case  
8 was taken before the special master was appointed by the  
9 licensing board. That decision was April, I believe, of  
10 '82. The licensing board decision came out several months  
11 later. It included a number of additional pleadings by the  
12 parties but did not include any more evidence. So for  
13 evidentiary purposes --

14 JUDGE MARGULIES: I wanted to place it at the time  
15 the evidentiary record is closed.

16 MS. BAUSER: I think that would be shortly before  
17 the special master's decision came out.

18 MR. BLAKE: December of '81?

19 MS. BRADFORD: I think in addition to that there  
20 were comments that the licensing board requested, comments  
21 from individuals. And those comments were part --.

22 JUDGE MARGULIES: Then it might be more  
23 appropriate to put the date at the date of the licensing  
24 board's initial decision, and then we wouldn't get into all  
25 these various problems as to when additional evidence came in

1 and things of that sort.

2 MS. BAUSER: I don't think there was any  
3 additional evidence, but there were pleadings of various  
4 sorts on the evidence that came in up to that time.

5 JUDGE MARGULIES: Let's place it at the date the  
6 licensing board issued its initial decision. Is there any  
7 problem with that? It is a readily offerable date. Is there  
8 anything further?

9 MR. MAUPIN: Is it your intent to resolve the  
10 question of whether there should be a freeze date in your  
11 prehearing conference order?

12 JUDGE MARGULIES: Whether there should be a freeze  
13 date? Yes.

14 Well, I want to thank the parties for the spirit  
15 of cooperation they evidenced here today and I just hope it  
16 continues.

17 One other thing, the place of hearing. Do the  
18 parties want to continue holding these proceedings at  
19 Harrisburg?

20 MS. BRADFORD: Certainly I do. I have a  
21 considerable problem with transportation, but in addition, I  
22 think that the public who might be affected by a ruling are  
23 -- should be able to come to the hearings.

24 JUDGE MARGULIES: Well, without unanimous consult,  
25 we will continue to hold the hearings here in Harrisburg.

1                   There being nothing further, the prehearing  
2 conference is over, thank you very much.

3                   (Whereupon, at 1:10 p.m., the prehearing  
4 conference was concluded.)

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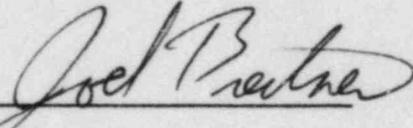
NAME OF PROCEEDING: GENERAL PUBLIC UTILITIES NUCLEAR  
(Three Mile Island Nuclear  
Station, Unit No. 1)

DOCKET NO.: 50-289 (CH)

PLACE: HARRISBURG, PENNSYLVANIA

DATE: WENDESDAY, FEBRUARY 19, 1986

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