

ORIGINAL

UNITED STATES NUCLEAR REGULATORY COMMISSION

In the Matter of:)

PUBLIC SERVICE COMPANY OF)
NEW HAMPSHIRE, et al.,)

(SEABROOK STATION, UNITS 1 AND 2))

TELECONFERENCE)

Docket Nos.: 50-443-OL
50-444-OL

OFF-SITE EMERGENCY PLANNING

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1 UNITED STATES NUCLEAR REGULATORY COMMISSION
2 ATOMIC SAFETY AND LICENSING BOARD

3
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9 Monday,
10 May 10, 1988

11 Room 428
12 West Tower
4350 East West Highway
Bethesda, Maryland

13 The above-entitled matter came on for hearing,
14 pursuant to notice, at 2:36 p.m.

15 BEFORE: JUDGE IVAN W. SMITH, CHAIRMAN
16 Atomic Safety and Licensing Board
17 U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

18 JUDGE GUSTAVE A. LINENBERGER, JR., MEMBER
19 Atomic Safety and Licensing Board
20 U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

21 JUDGE JERRY HARBOUR, MEMBER
22 Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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APPEARANCES:

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APPEARANCES: (Continued)

For the Seacoast Anti-Pollution League:

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For the Town of Hampton:

(No appearance)

For the Town of Kensington:

(No appearance)

For the Towns of Hampton Falls and North
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For the Town of Amesbury:

(No Appearance)

P R O C E E D I N G S

(2:36 p.m.)

1
2
3 JUDGE SMITH: We're on the record now.

4 Mr. Backus explained that he cannot join us until
5 3:00 o'clock, because he's in court. We decided to start at
6 2:30 to take up the Sholly-Beyea testimony.

7 MR. OLESKEY: Mr. Traficonte will be here in a
8 moment, Judge.

9 JUDGE SMITH: Okay.

10 MR. OLESKEY: He obviously wants to hear, and be
11 prepared to say anything appropriate. If you'll wait just a
12 second, I just heard a car there.

13 JUDGE SMITH: All right. And I also want to report
14 that Mr. Brock called a short while ago saying that he will not
15 be able to join us this afternoon because his client, the Town
16 of Hampton, voted yesterday not to fund -- I don't know if I'm
17 quoting him exactly -- but the essence is at least not to fund
18 for now the intervention. He still represents the --

19 Not to provide the legal costs of the intervention.
20 He still represents the Town of Amesbury, however, and we'll be
21 seeing him.

22 Would you let me know when Mr. Traficonte arrives?

23 MR. OLESKEY: He just arrived, Judge. Thank you.

24 JUDGE SMITH: We have just had a conversation off the
25 record about starting the hearings on Monday morning rather

1 than Monday afternoon, and we'll come back to that at the end
2 of this.

3 Okay, we're going to take up the new -- well, I guess
4 it's actually Mr. Dignan's Objections in Limine to not receive
5 the testimony of Sholly-Beyea, and we've already indicated, I
6 believe, you understand that we're not going to receive it.
7 And now we're going to give you our reasons.

8 OPERATOR: Sir, I have Mr. Bisbee on the line for
9 Mr. Huntington.

10 JUDGE SMITH: That's fine.

11 Welcome, MR. Bisbee.

12 MR. BISBEE: Thank you very much.

13 Good afternoon, everybody.

14 JUDGE SMITH: You haven't missed anything. I'm about
15 ready to rule on the Sholly-Beyea testimony. We will not take
16 up the other matters until 3:00 o'clock when Mr. Backus will
17 join us.

18 MR. BISBEE: All right. Thank you.

19 JUDGE SMITH: Firstly, we'll take it up pretty much
20 chronologically.

21 Let me state that we, going over the transcript, more
22 than once, we still find it difficult to understand portions of
23 the arguments. And I'll point out some parts where we just
24 simply have lost the thread of the logic.

25 Beginning with Mr. Traficonte's arguments, there's no

1 question it's the same arguments as rejected by the Board
2 earlier based upon fundamentally our understanding of the
3 Commission's ruling in CLI-86-13 Shoreham case in the Statement
4 of Considerations for the new rule.

5 This time, however, Mr. Traficonte states that it's
6 offered only as rebuttal to FEMA's position. And we understand
7 the argument to be sort of a rough syllogism, and that is,
8 according to Mr. Traficonte FEMA's testimony is based upon by
9 implication some assessment of the level of risk measured by
10 dose consequences to the beach population. That was their
11 first testimony he's alluding to.

12 Now, comes a new position which he points out is
13 based in part upon the Board's ruling. Now, it's before where
14 Massachusetts AG was supporting FEMA and now wishes to oppose
15 it. And the FEMA's postulated position opposed by
16 Massachusetts Attorney General is that FEMA is defending its
17 new position again by a dose consequence analysis because,

18 a) it's based upon a generic view across the spectrum
19 of plant sites in the United States that evacuation only is the
20 appropriate protective action for fast paced core melts.

21 b) The foregoing is a dose generic consequence
22 analysis taken from NUREG 1210.

23 And, three, that such an analysis is inappropriate
24 for Seabrook because of the large populations within three
25 miles compared to, as he states it, somewhere around 300 in the

1 1210 generic rule close in.

2 Mr. Traficonte argues that NUREG 1210 prohibits
3 decisionmaker from pondering over sheltering viz a viz
4 evacuation, that the choice must be evacuation. And that I
5 think he may be arguing that this flows from the argument that,
6 he's making the argument, if we understand, although that was a
7 little bit confusing, although he agreed with my assessment of
8 it, that the Massachusetts Attorney General says that those
9 consequence assessments are essential to make a choice between
10 protective actions.

11 Therefore, the argument goes, that the Massachusetts
12 Attorney General needs to show by dose consequence analysis
13 that generic 1210 recommendations, NUREG 1210 recommendations
14 is inappropriate to Seabrook.

15 Mr. Flynn argues on behalf of FEMA that FEMA disavows
16 a dose consequence analysis, in part because of the Board's
17 ruling. What is required is generic planning for a broad range
18 of accidents so that some scenarios are not overlooked. He
19 goes on that NUREG 1210 recognizes that in the early stages, it
20 is nearly impossible to project doses, and that FEMA has relied
21 upon 1210 only for the early decisions based upon plant status
22 in closed-in sites.

23 He points out that FEMA is not able to support a dose
24 consequence analysis for the selection of sheltering versus
25 evacuation. If that's what the Board wanted, FEMA cannot

1 provide it.

2 Then on page 10268, Mr. Flynn came back and said FEMA
3 does not rely upon NUREG 1210 for the proposition that
4 evacuation is a preferred protective action for closed in
5 areas. He states, after consultation apparently with Mr. Turk,
6 that that proposition is not found in 1210. This did not seem
7 to be what everybody else agrees is found in 1210. But we
8 don't understand that point.

9 We turned to Mr. Turk's arguments, and I might say
10 that we agree with most of his points. He states that NUREG
11 1210 is a training manual and that it is predicated upon the
12 premise that it is difficult to predict source terms and the
13 nature of releases. And that only plant status can be used in
14 the early stages. One should not go through dose projections
15 or a flow tree analysis at the early stages on the making the
16 decision of shelter versus evacuation.

17 He says that the 300-person three-mile presumption
18 attributed to NUREG 1210 by Mr. Traficonte is not accurate. He
19 says it is a severe entrapment problem expected to be rare that
20 is being addressed. And he points out situations such as
21 hospitals and that there are few hospitals close in.
22 Therefore, as I understand Mr. Turk's argument, evacuation
23 would not be a problem, and that the best and perhaps only
24 protective action that can afford basic radiation protection
25 would be in evacuation.

1 In fact, he points out that NUREG 1210 recognizes
2 that the density at some sites is higher, and that apparently
3 something other than evacuation, that is, something in addition
4 to evacuation, as I understand him, should be considered.

5 The basic thrust that Mr. Turk would have us
6 understand from NUREG 1210 is that one doesn't wait. You act
7 on plant conditions, that those consequence assessments cannot
8 be made until after release. Therefore, he states, NUREG 1210
9 cannot be a generic dose consequence document.

10 And we'll come back to that because we agree with
11 that reasoning and that's important to our decision.

12 Mr. Turk distinguishes the Sholly-Beyea testimony
13 which undertakes those consequence analysis for particular
14 accident sequences. And we agree that that is a point to
15 distinguish.

16 Then he makes his point that if FEMA's testimony is
17 in fact a dose consequence analysis, while we may not want to
18 accept it. However, he does not believe that it is a dose
19 consequence analysis. And in any event, a simple reference to
20 NUREG 1210 itself would not support the litigation anticipated
21 by the Sholly-Beyea testimony.

22 Mr. Dignan says that, he echoes that point that the
23 reference 1210, NUREG 1210 in FEMA's testimony is only slight,
24 and it's simply meant to be a common sense matter, recognizing
25 that at early stages of an accident, you don't know much. And

1 whatever the case is, we're still obliged to comply with the
2 Commission law, and we cannot compare Seabrook with either
3 another specific site or even to a generic site.

4 I apologize to everybody for trashing up your
5 arguments the way I have. But we're just trying to put our
6 ruling in context.

7 And we considered carefully Ms. Weiss' arguments.
8 She made it clear she supports Mr. Traficonte in his arguments,
9 but goes on to argue that the Sholly-Beyea testimony should
10 stand on its own for reasons similar to Mr. Traficonte's
11 earlier argument last November, which we're familiar with.

12 She states that early actions before release, before
13 dose projections even at the alter level would not achieve
14 maximum or significant dose savings in a fast-breaking severe
15 accident. Therefore, if the early action, be it either shelter
16 or evacuation, cannot provide dose savings, the plant is not
17 adequate.

18 Here again, we come into a little bit of confusion.
19 Ms. Weiss seems to endorse Mr. Turk's representation of the
20 limit to the reach of NUREG 1210 but she says that FEMA may
21 have not properly used NUREG 1210, that she learns apparently
22 from discovery that FEMA sees a generic dose consequence
23 analysis in NUREG 1210.

24 Mr. Flynn disputes this and says it's simply a method
25 of addressing the early inherent uncertainties of dose

1 projecting and is needed to make a rational decision promptly
2 for the population close in.

3 Mr. Traficonte gets back into the argument and points
4 out that where entrapment may be the case, that would include
5 open air entrapment such as one might find at Seabrook and that
6 sheltering is needed. Then, Mr. Traficonte goes into a
7 discussion we found to be very confusing.

8 And I'm going to read from the transcript beginning
9 at page 10,289 on this point, or at least allude to it.

10 Beginning at the bottom of page 10,288,
11 Mr. Traficonte quotes from a part of apparently Volume 4 of
12 that NUREG, and states, while large population density makes
13 entrapment outside the open air very likely, we won't have a
14 severe entrapment problem anticipated NUREG 1210.

15 But then he goes on to say, NUREG 1210 makes two
16 statements. This is on page 10,289. It makes one, the first
17 statement is that in a generic site where there are 300 people
18 within three miles on a predetermined basis, not on the basis
19 of dose consequences or dose analysis at the time of the
20 emergency, but on a predetermined basis at the generic site,
21 you would order evacuation for the severe fast-paced accident.

22 That seems to me that Mr. Traficonte is agreeing with
23 Mr. Turk on that point.

24 Then he goes on to say there are exceptions to that,
25 however, and the exceptions which you would want to have a

1 showing option available include entrapment conditions that we
2 believe are identical to the conditions that would develop if
3 an evacuation was ordered at Seabrook in the summer months.

4 So I am escaping one of his arguments there. I mean,
5 one of his arguments escapes us.

6 In any event, he goes on to summarize the argument
7 made last November, and that is, if evacuation is inadequate,
8 they should be able to show it, it's an open issue, and they
9 should be able to show it by Sholly-Beyea.

10 Our ruling is as follows and our reasoning.

11 The Board has not researched NUREG 1210. We don't
12 even have it. The parties do not seem to really in the last
13 analysis disagree what it says. But in any event, it's not an
14 NRC regulation. It doesn't have any status in our hearing.
15 It's not even a planning document.

16 I have to back up on that because it does have status
17 in our hearing; only, however, as a reference in FEMA's
18 testimony. We agree with Mr. Flynn and Mr. Turk that if in
19 fact, FEMA has made a comparison through generic dose
20 consequences at a generic plant site with Seabrook, then FEMA's
21 position contradicts the NRC's guidance that we received in the
22 Shoreham case. And that the Board may not follow FEMA in that
23 direction.

24 If that were the case, we would have expected
25 appropriate motions to be before us when the evidence is

1 presented. But a better reading of FEMA's testimony,
2 particular with Mr. Flynn explaining it, is that FEMA looks at
3 NUREG 1210 not as a generic dose consequence analysis, but
4 simply as a common sense statement that early action should be
5 taken before a dose projection can be made, therefore, before a
6 choice between sheltering versus evacuation. Or perhaps -- and
7 this is our own observation -- or perhaps between protective
8 action and no protective action can be made.

9 We look at the message from NUREG 1210 in two ways:
10 perhaps, and probably not, it has a non-specific dose
11 consequence considerations and analysis inherent in it. But
12 the better reading of FEMA's reliance upon NUREG 1210 is that
13 it is the other side of the coin, that it is manifestly without
14 regard to dose consequence analysis, and in the absence of
15 reliable projected doses, source terms and other information,
16 it is prudent to take whatever action may be taken. And that
17 is, evacuation of the close in population as soon as the plant
18 condition indicates that protective actions might later be
19 necessary.

20 That is our ruling on it. We, as it indicated, it
21 was difficult to follow the arguments at all times, although
22 I'm confident that we got the essence of them. I don't know if
23 you want to ask for clarification.

24 I might state that the most important part of our
25 ruling is that even if it is what Mr. Traficonte says it is,

1 that does not mean that we're going to go into such a
2 litigation. We cannot. And it's not what he says it is
3 anyway.

4 Anything further on this point?

5 MR. TURK: Your Honor, this is Sherwin Turk. Just
6 one clarification. You made reference to page 10,268 in which
7 Mr. Flynn indicated some remark that had been made to him
8 during a break, and you had believed that I personally had made
9 the remark to him.

10 I don't think that's correct. I don't recall having
11 a discussion with Mr. Flynn and he doesn't indicate it in the
12 transcript.

13 JUDGE SMITH: No, he doesn't.

14 MR. FLYNN: I can clear that up, Your Honor.

15 My conversation in fact was with Mr. Dignan. I was
16 careful on the record to cast my remark in the passive voice
17 rather than active, so I didn't have to say who it was who had
18 talked to me. And Mr. Dignan had some concern about the two
19 points that I indicated FEMA relied on 1210 for.

20 And he was explaining to me that the words of our
21 prefiled testimony made it clear that there was in fact only
22 one point that we relied on 1210 for, namely, that early
23 decisions should be made on plant conditions rather than dose
24 projections.

25 And he was concerned about the impression that I

1 created in my argument that we used 1210 as the basis for our
2 conclusion in the testimony that it was always or almost always
3 appropriate to use evacuation for the close in areas, rather
4 than sheltering as the protective action. And I think he
5 developed that point himself later.

6 I realized when I went back over the transcript that
7 the way I explained that problem was frankly inconsistent with
8 the remarks of Mr. Turk that followed immediately. So to the
9 extent that what I said was confusing, I apologize, but I don't
10 think it has a great deal of affect on the ruling.

11 I think you have correctly understood the points that
12 I was trying to make.

13 JUDGE SMITH: Anybody further on this point?

14 (No response)

15 JUDGE SMITH: Is everybody -- let me see. Let's take
16 the roll again.

17 Are you here, Mr. Traficonte?

18 MR. TRAFICONTE: Yes, I am, Your Honor.

19 JUDGE SMITH: Ms. Weiss?

20 MS. WEISS: Yes.

21 JUDGE SMITH: Okay.

22 We're ready to go into the motion for subpoenas and
23 the other relief sought with respect to FEMA's testimony. I
24 wanted Mr. Backus to be present. It's not. It's basically his
25 motion.

1 Let's take up the matter of the scheduling.

2 Mr. Traficonte and Mr. Oleskey?

3 MR. TRAFICONTE: Yes, Judge?

4 JUDGE SMITH: We were contemplating the possibility
5 of starting the hearings at 9:00 Monday morning rather than
6 1:00 because we find that there's very efficient transportation
7 up there and we feel that we need more efficiency for next
8 week. We have a very big week ahead of us.

9 Would that be much of a problem for you?

10 MR. TRAFICONTE: How about 10:00, Judge. That will
11 give us a little more time.

12 JUDGE SMITH: 10:00 o'clock?

13 MR. TRAF'CONTE: Yes.

14 JUDGE SMITH: That'll give us two hours. It's
15 marginal, you know.

16 We're also of the impression, we want to discuss
17 whether we think we're going to need a third week, and we'll
18 defer that until we hear what is going to be needed to resolve
19 the problems of FEMA's testimony.

20 I guess, Ms. Weiss, you're not all that eager to gain
21 two hours?

22 MS. WEISS: I'd prefer to stay home that evening, but
23 I can do it.

24 JUDGE SMITH: I know.

25 All right. We will stay connected and everything but

1 take a short break while we're waiting for Mr. Backus to come
2 aboard.

3 (Brief recess is taken.)

4 JUDGE SMITH: Back on the record.

5 The Board was talking about the scheduling and it may
6 be that when we look at the way the testimony on the FEMA
7 prefiled testimony falls, that we may not have a full week next
8 week. But we will need in any event a third week to handle all
9 the problems attendant to scheduling everybody.

10 So the way things stand right now, we're inclined to
11 leave matters rest as they are and start at 1:00 o'clock on
12 Monday. I think every appreciates the extra time, too.

13 MR. TRAFICONTE: Your Honor, John Traficonte in
14 Boston. We're not sure we understood the import of that last
15 remark. Is it the intention of the Board then to begin this
16 coming week with the FEMA testimony?

17 JUDGE SMITH: No.

18 MR. TRAFICONTE: And FEMA witnesses as presently put
19 together?

20 JUDGE SMITH: No. As soon as Mr. Backus gets on,
21 we'll take that up. But the intention would be to continue
22 this panel and then there's another witness, Eckert, by
23 himself.

24 And then that's about it, isn't it?

25 MR. OLESKEY: Yes, Judge, it is.

1 JUDGE SMITH: And then move to the next phase.

2 There's no rebuttal testimony, no.

3 Move to the next phase which I think when we get into
4 the discussion you might find to be severable and then complete
5 the final phase of the FEMA testimony in yet another week. So
6 we may have a short week next week. But we'll come to that as
7 soon as Mr. Backus joins us.

8 MR. FLYNN: Your Honor, I think there is one other
9 matter that we can take up in the meantime, and that is the
10 pending motion by Matthew Brock on behalf of the Town of
11 Hampton to reopen the deposition of Edward Thomas.

12 In view of the decision of the Town of Hampton to
13 withdraw at this time, I take it that particular motion is
14 withdrawn.

15 MS. WEISS: No, that's not true. It's a joint
16 motion.

17 JUDGE SMITH: Yes, I understood it to be a joint
18 motion, and in any event, it's mooted. It will have been
19 mooted.

20 MR. TURK: Your Honor, just so I'm clear on this, are
21 we to start at 1:00 o'clock on Monday?

22 JUDGE SMITH: One o'clock on Monday as previously
23 scheduled.

24 MR. TURK: Hello?

25 JUDGE SMITH: I'm scrry. My mute button was on. I

1 have a button here I can use for muting and mooting, both. And
2 while I was muted, we recognized that the motion with respect
3 to Mr. Thomas is moot.

4 But we're going to hold to the 1:00 o'clock on
5 Monday.

6 MR. TURK: Thank you.

7 MR. OLESKEY: Did you indicate why his motion was
8 moot, Judge?

9 JUDGE SMITH: We'll come to that.

10 MR. OLESKEY: Okay.

11 JUDGE SMITH: Because he's going to come to see us
12 anyway.

13 MR. TRAFICONTE: While we're waiting for Mr. Backus,
14 I've been sitting here digesting the Board's ruling on the
15 Sholly-Beyea. I just, as a point of clarification, if I've
16 understood the thrust of the ruling, has the Board made --
17 well, let me put it this way. As the FEMA testimony unfolds
18 and when the witnesses appear to defend that testimony and in
19 particular what appears on pages 7 through 11, I take it that
20 we would always be free to, other parties would be free at that
21 point if it appears that the understanding of that testimony by
22 those witnesses is that it is a form of dose consequence
23 analysis, and that for example, 1210 is based in some fashion
24 on a generic dose consequence analysis, that we would be free
25 at that juncture to move to strike that technical basis.

1 The Board's not ruling on that issue, then?

2 JUDGE SMITH: Yes. You're certainly going to be free
3 to move it, and we're not ruling on that. I think we've
4 probably pretty well ruled that no matter what NUREG 1210 has
5 to say, you'd have to tie it pretty close to FEMA. But we're
6 not trying to anticipate what motion you might make with
7 respect to FEMA's testimony.

8 MR. TRAFICONTE: You haven't judged the issue now as
9 to whether or not the technical support that FEMA has cited is
10 a form of dose consequence analysis? That issue is still an
11 open one.

12 JUDGE SMITH: Yes.

13 MR. TRAFICONTE: And if it turns out that the
14 witnesses that defend that portion of this testimony testify
15 that they view it as a dose consequence analysis of a kind,
16 that we would be free to move to strike at that point?

17 JUDGE SMITH: Yes. We haven't foreclosed that.
18 We've only had Mr. Flynn's.

19 MR. TRAFICONTE: Right. We've heard Mr. Flynn
20 explain what it means. I understand that.

21 JUDGE SMITH: That's all we have.

22 Well, look, I think we should proceed on these
23 matters. It's been a joint intervenors endeavor. I think that
24 the Massachusetts Attorney General Mr. Oleskey, you were the
25 main person on it, weren't you? You're present, aren't you?

1 MR. OLESKEY: Yes, I am, Judge. But I will have to
2 leave at quarter of, and Mr. Traficonte would carry on at that
3 time if we're still going.

4 JUDGE SMITH: Well, then I think that if you have to
5 leave, we should go ahead without Mr. Backus and I'll leave it
6 up to the intervenors and he can read the transcript. And if
7 he has some problems, he can bring it up with us.

8 But I don't think we have too much time, so I'm just
9 going to go ahead.

10 As we had indicated earlier, the Board is stepping
11 into this dispute and taking our own affirmative actions in an
12 effort to come to a broader and a better resolution of it,
13 rather than trying to handle all these problems piecemeal in
14 the context of individual motions.

15 And we have in fact, as you will see and as you
16 already know, indicated we're going to take some actions which
17 would substantially grant the relief that intervenors have
18 asked for, and for that matter, some of the relief that
19 Mr. Dignan has asked for.

20 And let me give you some of our reasons for doing
21 that so you understand the context of our statements further
22 on.

23 In reading the briefs, particularly those briefs that
24 were filed by Ms. Weiss on the motion for directed
25 certification, it came clear to us that we didn't have good

1 communication that the credibility of the FEMA witnesses could
2 be explored thoroughly. That was alluded to in passing. As a
3 matter of fact, I noted in reading the transcript that I hadn't
4 captured Ms. Weiss' argument. Mr. Cumming has come to the
5 hearing, for example, given a chronology, and he should be,
6 there should be an opportunity to explore that.

7 But in any event, it has not been understood I don't
8 believe by the intervenors that it has been our view and is our
9 view that there's more than one path to due process and
10 confrontation of the case that you're facing in prehearing
11 discovery is not always that path.

12 Courtroom confrontation discovery is time honored and
13 perfectly satisfactory if it functionally does the job. And we
14 think that in this situation it can do it. Further, we've
15 reconsidered our legal position.

16 We think that it is still good law that any
17 rebuttable presumption of the correctness of FEMA's position
18 will diminish and perhaps even vanish when met by reliable
19 evidence. And we made a prediction, based upon what we know
20 about matters on the record, in the record already and probably
21 in the wings of the record that our prediction will probably be
22 sound, that there probably will be no presumption either way.
23 But that is based in large part upon matters not yet in
24 evidence.

25 And we believe with greater reflection on the matter

1 that judgments as to the survival of the rebuttable presumption
2 either way should be based upon a reasonably complete
3 evidentiary record, not our predictions of it, and particularly
4 upon simple discovery matters.

5 And then another reason is, we had previously implied
6 that we had been making an evenhanded determination that one,
7 at the beginning, the intervenors had going for them a
8 rebuttable presumption attendant to FEMA's position. And we had
9 trouble with that, and wondered if they would have that
10 rebuttable presumption.

11 And now, on the other hand, applicant has a
12 rebuttable presumption which we're not very happy with that
13 either. So we thought the score is zero to zero. Nobody has a
14 rebuttable presumption, nobody's hurt, and so we cannot find
15 then any overwhelming need to invade the deliberative process
16 when it was not likely to affect the outcome of the hearing.

17 But the fact is, we recognize now that at one time,
18 intervenors did have a rebuttable presumption, and now they
19 don't. So they're not even. They had one to zero before, and
20 now they have nothing. And they're not satisfied with that.

21 Also, Mr. Dignan has made it clear that he's
22 reluctant to give up what he sees is a rebuttable presumption,
23 although I don't hear him arguing with quite the fervor along
24 that line that intervenors do. But he nevertheless has argued
25 it.

1 And therefore, we believe that the needs of the
2 parties can be better met by ventilation of the reasons for
3 FEMA's change.

4 Then we have a third reason, and this is I think is
5 also very important that we believe that there's a substantial
6 probability that the quality of the evidence presented and
7 about to be presented by FEMA does not satisfy the standards
8 that the evidence presented to us must be fully forthcoming and
9 accurate, particularly by a Government agency in its
10 presentation in a Federal proceeding under the Administrative
11 Procedures Act.

12 And we begin with a review of Mr. Thomas' testimony
13 on October 7th. Mr. Thomas came to the hearing representing
14 that he is a single witness on the beach population sheltering
15 issue because that issue has largely involved matters of
16 policy. And that he was the FEMA person responsible for
17 explaining implementing FEMA policy.

18 And he went on to explain that the FEMA position was
19 arrived at in a collegial process after consultation with the
20 Regional Assistance Committee, and that the process involves a
21 RAC review and a RAC position. And that review is done by a
22 consensus within the Regional Assistance Committee.

23 Although Mr. Thomas did explain that the FEMA
24 position involved more than RAC review, he did point out on
25 several occasions that the RAC review is the bulk of the FEMA

1 collegium, as he stated it. He did make it clear that the RAC
2 review is central but not all of the factors leading to the
3 FEMA position.

4 We did not learn until Mr. Thomas was cross examined
5 for the second time, that's the time on November 4th, that the
6 RAC review constituted, "non-agreement" by the other
7 participants in the proceeding, except for FEMA, of course.

8 But we had learned also through what we called
9 belabored cross examination, I mean, hard work, earlier that
10 the NRC was in disagreement. We then received the applicant's
11 motion to subpoena Lazarus and Bores. And those matters are
12 not in evidence.

13 But we are concerned that Mr. Thomas, when he
14 testified the third time about the RAC meeting in early January
15 in answer to my question, said he did not believe that there
16 was any difference between his account of the July 30 RAC
17 meeting and the account represented by Dr. Bores in the Bores
18 Memorandum to Mr. Turk, which Mr. Thomas was familiar with.

19 So we have really some serious concerns about
20 Mr. Thomas' perception of what had happened in the RAC. And we
21 today have based upon the evidentiary record so far have very
22 large concerns about Mr. Thomas' forthrightness and candor on
23 this subject. We leave unresolved further doubts about that
24 matter until we've been able to hear from Dr. Bores and
25 Mr. Lazarus on this subject.

1 So we have no fixed opinion on that point.

2 However, it was against that background that we were
3 asked by intervenors to authorize a very large discovery
4 endeavor against FEMA and NRC officials based upon Mr. Thomas'
5 deposition whose candor already in doubt was speaking from
6 third-hand knowledge that has become so important, the meeting
7 of January 19, 1988.

8 In essence there we simply did not believe that that
9 was sufficient to set aside the value of the executive
10 privilege and authorize the very large discovery effort that
11 intervenors had in mind.

12 Then our concerns shifted to several aspects of
13 FEMA's testimony on March 14th. First, Mr. Cumming would come
14 to the hearing and testify, and I have a quote here, "as
15 accurately as I can, the history of how FEMA developed its
16 position." And he gives a chronology. And the chronology
17 leaves out events that we believe should have been included in
18 any full history of how FEMA developed its position.

19 As a minor point, relatively minor point, he left out
20 the NRC's differing difference with FEMA at the RAC meeting of
21 July 30, '87, although we recognized that Mr. Cumming knows
22 full well -- and I'm not making any suggestions there because
23 that is a matter that had been largely gone into in the public
24 hearing -- but we thought it was very remarkable that
25 Mr. Cumming does not even allude to the meeting of January 19,

1 1988, between the NRC and FEMA.

2 And we simply don't understand this.

3 We know from General Becton's privileged affidavit
4 that the FEMA NRC meeting was important enough that it had an
5 agenda and even had preplanned FEMA talking points. And that
6 the meeting involved high ranking decisionmakers from both
7 agencies. And we wonder how any history of how FEMA changed
8 its position could at least not report that matter, when it
9 reported other matters that we'd regard of lesser significance.

10 We believe that that meeting should have been
11 reported. If anyone undertakes to report the history, that
12 omission was inappropriate.

13 And we have some words to the NRC Staff. We have ben
14 generally confused about what the NRC Staff has been doing in
15 this proceeding. We know that the Staff filed a rebuttal plan
16 inadvertently at the beginning of this hearing. Now that
17 rebuttal plan was never received by any Board member. We don't
18 know what it says.

19 Presumably, Staff may argue that that rebuttal plan
20 put the Board on notice that there was difficulties that it was
21 experiencing with the quality of FEMA's testimony. We are also
22 aware that Mr. Turk, at least on one occasion and that occasion
23 was at the end of Mr. Thomas' testimony in January, informed
24 the board that the "NRC is aware of other facts."

25 We're also cognizant that the NRC does not exert

1 executive privilege. We believe that what the NRC Staff
2 believes to be the case, presumably with Mr. Bores and
3 Mr. Lazarus, that there's a state of affairs existing here that
4 would not be tolerated by the NRC if FEMA were not involved.

5 The memorandum of understanding requires a situation
6 of I would allude to it as privity or somebody else might call
7 it identity between NRC and FEMA, and it's our view that the
8 NRC Staff has not served the Board well in bringing to our
9 attention what may be important credibility problems with
10 FEMA's early testimony.

11 We will be asking the NRC Staff to on its own using
12 its own imagination and judgment to come forward with a full
13 explanation of its view of these matters. But we have certain
14 minimum requests which we will go to later.

15 Minimally and in this sequence, we would like to
16 begin hearing from Bores and Lazarus as to their differences
17 and particularly the events leading up to and including the
18 July 30th RAC meeting and later events. I think that if you
19 need further clarification of what events we're talking about,
20 you can ask for them.

21 We will direct that forthwith that Mr. Thomas' notes
22 that were the subject of the deposition which was interrupted
23 by the claim of privilege be produced. After Bores and Lazarus
24 appear, we will require the attendance of Mr. Thomas in part to
25 complete the deposition, and in part to address the Bores and

1 Lazarus testimony.

2 And on this point, we've harbored serious enough
3 question about Mr. Thomas' candor and forthrightness that we
4 would like to remind him of his right to bring counsel. And
5 the Board will entertain and welcome and accommodate counsel to
6 Mr. Thomas if he elects to bring it.

7 The NRC Staff should produce a person designated by
8 the Executive Director for Operations, other than Dr. Bores,
9 Mr. Lazarus or Mr. Turk, somebody who can explain what happened
10 in full context the circumstances surrounding the July 19th
11 meeting, firsthand knowledge.

12 MR. OLESKEY: January 19th, Judge?

13 JUDGE SMITH: I beg your pardon?

14 MR. OLESKEY: January 19th?

15 JUDGE SMITH: Yes. I'm sorry. What did I say?

16 MR. OLESKEY: You said July.

17 JUDGE SMITH: Oh, I'm sorry, January 19, 1988 meeting
18 between NRC and FEMA.

19 Mr. Stello can designate whoever he feels can give a
20 full perspective and accounting of it. Mr. Stello himself has
21 been quoted. He of course is very welcome to come if he should
22 choose. However, our requirement is only that he select
23 somebody who has good knowledge of those events.

24 We will want Mr. Peterson and Mr. McLaughlin. From
25 hereon in, we don't have firm choices or requirements. We

1 think a choice can be made between Messrs. Krimm and Vickers.
2 We would not welcome or demand for General Becton or Mr. Watson
3 to appear or Mr. Flynn.

4 We don't know if Mr. Wingo is needed in addition to
5 Peterson and McLaughlin. We just simply don't know. We would
6 think not, but we'll hear arguments.

7 Lawless seems to be cumulative or in addition. She
8 seems to be an observer to events that can be testified by
9 others, so we don't have any feeling that her attendance is
10 required.

11 We don't really understand very well why Mr. Congel,
12 although we understand from his position, we don't understand
13 by his activities why he would be essential.

14 We think that those attendances should satisfy the
15 needs of the parties, and we also believe that that testimony
16 in a public hearing will go far to afford public confidence in
17 our proceeding, which we think is, in addition to the needs of
18 the parties, is also a matter of some importance.

19 Now, we're willing to be heard.

20 Let us begin with Mr. Flynn.

21 MR. FLYNN: Thank you, Your Honor.

22 MR. DIGNAN: Your Honor, before Mr. Flynn begins,
23 this is Mr. Dignan. There was a cut out there, and I wanted to
24 be sure I heard the right sequence.

25 You indicated that you were going to request the NRC

1 to produce a witness on the famous meeting. And then the next
2 thing I understand you to have said is that Messrs. Peterson
3 and McLaughlin would be required to attend. Did I miss any
4 witnesses in between those?

5 JUDGE SMITH: No. No witnesses. We pointed out that
6 Mr. Stello was quoted by Mr. Thomas and quoted in other places
7 and he would be welcome to attend if he wished. However,
8 that's not our requirement. That he should designate a person
9 who would not just know understanding of the words that passed
10 at the meeting, but in the context of the meeting.

11 MR. DIGNAN: Thank you, and I'm sorry for the
12 interruption, Your Honor.

13 MR. TURK: Your Honor, one further clarification.
14 After Peterson and McLaughlin, did you indicate that either or
15 Krimm or Vickers will have to attend or are you leaving off
16 anyone but Peterson and McLaughlin?

17 JUDGE SMITH: No, we don't believe that both Krimm
18 and Vickers are required.

19 MR. TURK: So either one would be coming?

20 JUDGE SMITH: The Board wants to consult on that.

21 Our position without benefit of argument by reading
22 the Motion for subpoenas is that either Krimm or Vickers is
23 likely, on balance without further argument, we do not see the
24 need for both of them. Yet, we're willing to entertain
25 arguments that neither should appear or that both should.

1 appear.

2 But if we were to rule right now, we would allow the
3 appearance of one of them, without making the choice.

4 MR. TRAFICONTE: Your Honor, I'm sorry. That last
5 word was dropped up here. If you were to rule right now, you
6 would permit or demand the attendance of one of them?

7 JUDGE SMITH: Either Vickers or Krimm.

8 MR. TRAFICONTE: But one of them would have to attend
9 if you were going to rule now?

10 JUDGE SMITH: Right.

11 MR. TRAFICONTE: Okay. I wanted to make sure I heard
12 that.

13 MR. OLESKEY: If we had to choose right now, Judge,
14 we'd choose Krimm, just to give Mr. Flynn some advance warning.

15 MR. FLYNN: May I proceed, Your Honor?

16 JUDGE SMITH: Mr. Flynn.

17 MR. FLYNN: In addressing the issues that you've
18 raised, I find that I have a great need for some clarification
19 of what the subject matter would be for Mr. Peterson and
20 Mr. McLaughlin. Or another way of putting it, what the
21 boundaries would be on the matter of their examination.

22 In my conversation with them this morning, they
23 reminded me rather strongly that they are not technical people
24 and they're not prepared to answer technical questions beyond
25 reciting the advice that was given to them in the formulation

1 of their position, or FEMA's position.

2 Another point that was made in my conversation with
3 them this morning is that Mr. Peterson was confirmed late in
4 December, and the policy decisions that were made prior to that
5 time were Mr. McLaughlin's responsibility. He carried that out
6 and then after the date of confirmation, the responsibility
7 shifted to Mr. Peterson. So that's just another thing to be
8 taken into account in establishing what the boundaries are.

9 JUDGE SMITH: Yes. I think you've just identified
10 exactly why we'd like to have both of them.

11 We had indicated earlier that one of our concerns
12 about depositions is remaining in bounds, and we'd suggested
13 that one of the solutions might be a Board supervised
14 deposition. This is our next best thing. We want them here.

15 And you know what the issues are. What happened. I
16 mean, that's just exactly what the intervenors are going to be
17 asking. What happened here.

18 MR. FLYNN: Well, I perceive different sets of needs
19 here. The intervenors have clearly focused on the meeting of
20 January 19th as support for their argument that what FEMA is
21 saying in its prefiled testimony and saying in public otherwise
22 is not the real story.

23 That's different from what the Board is saying about
24 trying to understand the relationship between the testimony
25 filed in September '87 and what was filed in March.

1 So that's one of the reasons why I'm asking for some
2 clarification. It, I take it, is already established that
3 Mr. Peterson and Mr. McLaughlin will need to appear. But when
4 they do, what is it that they will be asked about?

5 Now, I've already answered my own question in part by
6 identifying the meeting of January 19th as an obvious subject
7 that will be gone into.

8 JUDGE SMITH: In the first place, I'm looking right
9 now at the motion to have the testimony of Grant Peterson. I
10 think it's rather narrow. We would expect him to be somewhat
11 broader. But he's reported by Mr. Thomas to have been the
12 person who, quote, negotiated away a negative finding in a
13 meeting with Stello.

14 We have a basic set of facts here where Mr. Thomas
15 came to the hearing, presented a FEMA position largely a matter
16 of policy. Mr. Thomas suddenly does not seem to exist
17 officially any more. And you have a couple of new witnesses,
18 and I forgot to mention that. A couple of new witnesses who
19 are new on the scene in lieu of Mr. Thomas. And intervenors
20 want to know what happened here.

21 And we agree that a public ventilation of that is
22 wholesome and good for the health of public confidence in these
23 very important hearings.

24 MR. FLYNN: Yes, Your Honor. I find that helpful.

25 JUDGE SMITH: Now, if they're going to argue about

1 Mr. Peterson's irrelevant aspects of his life, that's why the
2 Board wants to be there.

3 Mr. Flynn, if you'll recall some of the history here,
4 first we suggested that maybe Mr. Peterson, we'd just do away
5 with this whole problem, Mr. Peterson would give an affidavit
6 you know, that the only thing that entered his decision was the
7 advice of his staff, and the staff is being deposed, and
8 there's no problem there.

9 But Mr. Thomas has made some important allegations as
10 to the process. And there's enough objective indications that
11 we believe, without prejudging them at all, we believe that,
12 number one, the intervenors and the applicant are entitled to
13 have the full story. And number two, to the limited extent --
14 and we recognize the limitations -- to the limited extent that
15 there is to be public confidence in our proceedings, we wish to
16 assure it.

17 Furthermore, no matter what happens, it is still our
18 responsibility that we cannot ever be relieved of, of number
19 one, making a decision upon evidence we believe in. And number
20 two, protecting the integrity of our process.

21 MR. FLYNN: Your Honor, I'm not arguing against any
22 of that. As I say, I take it as established that they will
23 have to appear, although I will have something a little later
24 to say about a jurisdictional question.

25 What I'm trying to understand is what the focus of

1 their testimony will be. Now, clearly without any question,
2 the meeting of January 19, 1988 is very much an issue. I
3 accept that that is an issue.

4 You've identified another issue, namely, why is
5 Mr. Thomas not a witness at this point.

6 JUDGE SMITH: Well, maybe you'd better ask the
7 intervenors. My questions would be quite simple to him if I
8 were the examiner. I'd say, can you tell us from your
9 perspective what you know about the change in FEMA's position
10 from that presented by Mr. Thomas in September to that
11 presented now. And I would then ask him, are there any other
12 bases upon which he himself relied.

13 And we already indicated that a person like him may
14 receive phone calls from different people, but he's not a
15 judicial officer, and he might routinely receive phone calls
16 which he disregards. He's allowed to receive phone calls. You
17 see, there's no ex parte rule operating on him like there is
18 judicial officers.

19 We want to know what did he rely upon.

20 MR. FLYNN: Yes, Your Honor. I understand that. And
21 I think you have clarified for me the questions that I had
22 about scope.

23 The next subject that I want to go on to is the
24 scheduling within the hearing, that is, not only on what dates
25 will people appear, but also in what order will people appear.

1 JUDGE SMITH: We'll begin with Bores and Lazarus,
2 then with Thomas, then with an NRC witness, and then Peterson
3 and McLaughlin is my feeling. That's open for recommendation.
4 We're not making that ruling yes, but that was our --

5 MR. FLYNN: When does that mean our panel, the whole
6 Cumming Keller panel would appear?

7 JUDGE SMITH: Oh, I forgot that. That's a very good
8 point. Well, I think that they should go last.

9 MS. WEISS: I would agree.

10 MR. FLYNN: Okay. Clearly, there's more there than
11 we can accomplish in one week of hearings.

12 JUDGE SMITH: That's right. I think there's a
13 logical breaking point.

14 MR. FLYNN: There's another component to this which
15 we have not talked about before, and that is the conflicting
16 time demands on the FEMA headquarters staff. We are preparing
17 for two exercises, one in Shoreham and one in Seabrook.

18 The Seabrook one is the most complicated one we've
19 ever tried to get ready for because it involves not only a
20 utility plan but the coordination of a utility plan with a
21 state-sponsored plan in a neighboring state. We've never
22 encountered that situation before. The tentative date for the
23 Seabrook exercise is the week of June 27th. And that sounds to
24 me like it's in the same period of time that the second week of
25 the hearings we're talking about would take place.

1 JUDGE SMITH: No. I anticipate that we'll have
2 roughly half of it done next week. And then the rest of it
3 done -- we may even have two or three day sessions the
4 following week up there. We'll work it out. But I would
5 imagine that we perhaps could go back up for a couple days the
6 following week, a couple days the week after that, or whatever.

7 And there's a Memorial Day weekend coming up. It's
8 hard to travel then, but we'll just have to work it out. But I
9 would expect it to be done well before then.

10 MR. FLYNN: Well, actually the time before the
11 exercise is worse for us than afterwards. The point is that
12 Peterson and McLaughlin and certainly Krimm and Vickers are
13 involved in preparing for the exercise.

14 Not only that, their staffs are involved and
15 McLaughlin and Peterson would need their staff to help them get
16 ready for the hearing. And that conflicts with the need to go
17 full speed ahead on the exercise.

18 I just want to bring that to the Board's attention.

19 JUDGE SMITH: Well, are you saying that we should put
20 this whole thing off until July?

21 MR. FLYNN: I'm suggesting that we would put off the
22 testimony of Peterson, McLaughlin and whoever would come after
23 them until the middle of July. That would still allow Bores,
24 Lazarus and Thomas to testify during the time which is already
25 allotted or scheduled.

1 JUDGE SMITH: No. We just don't agree, Mr. Flynn.
2 We feel a greater need for dispatch.

3 MR. FLYNN: I understand that. The final point that
4 I want to make is to echo what I said in the brief that was
5 filed before the Appeal Board and to elaborate a little bit on
6 the question of the in personam jurisdiction of the Board.

7 I want to suggest as I did then in the brief that the
8 Licensing Board has in personam jurisdiction over FEMA
9 officials only through its voluntary cooperation through the
10 Memorandum of Understanding. And I suggest that the
11 appropriate mechanism for the issuance of the subpoenas is
12 through the NRC Rule 2.720(h) which allows the Executive
13 Director of Operations to designate those witnesses who are to
14 appear.

15 Now, I don't mean to suggest by this that we think
16 your choices of witnesses is inappropriate. I'm thinking more
17 to the precedential value of the ruling which you are in the
18 process of making. And I think that it is important to FEMA
19 that it be established that that is the only mechanism by which
20 subpoenas may be issued to compel the attendance of people
21 other than those we've identified as witnesses.

22 JUDGE SMITH: To the extent that that section does
23 apply, 2.7, it has so many subparts, lots of little i's, we
24 believe that the test has been met for issuing subpoenas to
25 people other than those designated by the Executive Director

1 for Operations when those people have -- I don't have that
2 section before me right now -- but where the people are
3 singularly possessed of the factual background needed to
4 develop a reliable record, we don't need to go through the
5 Executive Director for Operations for his designation. That's
6 the exception to it.

7 MR. FLYNN: The point I'm trying to make, Your Honor,
8 is that for the precedential value of the ruling, we think it's
9 important that it be established that we are being --

10 (Audio interruption)

11 MR. DIGNAN: Your Honor?

12 JUDGE SMITH: Yes?

13 MR. DIGNAN: I would respectfully suggest with all
14 due deference to Mr. Flynn that the concern he's raising isn't
15 a real one. Because the .720(h) is where the provision comes
16 out of and there's no need for a subpoena. The 1.720(h)(ii)
17 after going through the usual way about the EDO directing
18 witnesses goes on to say that the presiding officer may, upon a
19 showing of exceptional circumstances, such as the case in which
20 a particular named NRC employee has direct personal knowledge
21 of a material fact not known to the witnesses made available by
22 the EDO -- the testimony of named NRC personnel.

23 So whether 2.720(h) is deemed to apply or not to
24 apply, to me, the Board order of today is perfectly sufficient
25 to do the job.

1 JUDGE SMITH: Any way you want to approach it, we can
2 approach it if it makes you happy. I understand that there is
3 some thought and some valid tradition that FEMA is here as if
4 it were the NRC staff. If that's the case, then just come on,
5 because we're making the finding that the circumstances exist.

6 However, I think that there may be a problem in this
7 case. And that is, is there still privity or identity between
8 NRC and FEMA on this issue. Should the concept that FEMA is a
9 part of the NRC staff for this purpose apply.

10 I don't know. I mean, if in fact, the FEMA witnesses
11 were under the umbrella of the NRC staff for this hearing, then
12 our criticism of the NRC staff is greater. I don't know
13 what's happening. I've asked Mr. Turk repeatedly during this
14 hearing, what's happening between the NRC and FEMA. Is there a
15 problem. No, no problem, no. And there is a problem.

16 MR. TURK: Your Honor, I'd like to respond. I don't
17 know if Mr. Flynn has finished his comment.

18 MR. FLYNN: Yes, I have finished my comment. Thank
19 you.

20 JUDGE SMITH: Mr. Turk?

21 MR. TURK: Yes, Your Honor.

22 Let me first of all offer you a personal apology and
23 apology to members of the Board. It has never been my
24 intention to lead you anywhere but to the truth. The Staff has
25 --

1 JUDGE SMITH: Mr. Turk, I'm not suggesting to the
2 contrary. Going back over the record, I can see that the
3 trouble is there. It was not emphatic enough to get our
4 attention.

5 MR. TURK: Your Honor, I certainly apologize for
6 that.

7 I'd like to explain very briefly that I personally
8 was on the horns of a dilemma. I don't take the view that the
9 FEMA witnesses appear as NRC personnel in the sense that an NRC
10 staff witness would appear as part of my presentation. If I
11 had an NRC staff witness go before you and present an
12 accounting of fact which I believed was incorrect, I would have
13 brought that to your attention immediately.

14 The Board has commented upon Mr. Thomas' testimony of
15 last fall. I indicated in the first voir dire, you may find a
16 reference in the transcript, Mr. Flynn turned to me and asked
17 me if the Staff wanted to exert executive privilege.

18 JUDGE SMITH: I recall what you're going to say.

19 MR. TURK: And my response is most emphatic. I think
20 the facts should come out.

21 There are other instances where I sought not -- I
22 suppose the best way to characterize it would be to say I
23 didn't want to be part of the presentation of a factual
24 accounting as was being given, but I really didn't see that I
25 had an appropriate course other than to let the matter unfold

1 through cross examination.

2 And subsequently, when the Massachusetts Attorney
3 General served us, the Staff, with a discovery request, and I
4 at that point had in my possession the Board's Lazarus and
5 Schomacher memo, in my decision to release those memos rather
6 than to assert attorney client privilege, it was my belief that
7 this was an appropriate means to get the matter before the
8 Board's attention. And that's a slow way of getting it to you.

9 And I hope there's no prejudice on the outcome. And
10 I apologize for the delay and the misperceptions which the
11 Board may have had before those matters were brought to your
12 attention.

13 I should note also that I discussed the matter with
14 Mr. Flynn on repeated occasions, and I was hoping that FEMA
15 would be able to resolve any problem with the testimony on its
16 own without my having to become involved in bringing the matter
17 to your attention by myself.

18 Now, let me ask that if the Board would allow me at
19 this point, and address some of the things that we've been
20 talking about more substantively today.

21 JUDGE SMITH: All right, Mr. Turk. Let me interrupt
22 there and say, I acknowledge that had we looked hard enough, we
23 would have seen some signs that there was a problem. But what
24 we saw was that Mr. Thomas began with the testimony that the
25 FEMA's testimony was a product of a RAC review.

1 And at the end of Mr. Dignan's second voir dire, the
2 state of affairs as we understood it to be was that there was
3 non-agreements by some and a disagreement by the NRC Staff, and
4 nothing more. That is the different view that we thought that
5 the NRC Staff was alluding to.

6 It was not indeed until you responded to discovery
7 that we learned that the NRC Staff was in fact sitting on
8 information which from the very first day of Mr. Thomas'
9 testimony was certainly relevant to our considerations.

10 I don't want to second guess you, and I'm not
11 suggesting that we don't understand the dilemma you were in,
12 but I don't believe that the NRC Staff in this case has lived
13 up to the high standards that we've come to expect on informing
14 the Board on being there to clean up and make sure the record
15 is complete.

16 However, I do recall now that you did not argue
17 against producing the memorandum that has given rise to this
18 discussion, the memoranda.

19 Go ahead, Mr. Turk.

20 MR. TURK: All right. One other point on that, Your
21 Honor. You mentioned the Staff's rebuttal outline which was
22 inadvertently served. In fact, it was served during the first
23 week of the hearing. I had left instructions for my secretary
24 to mail it out while I was away. And I believe it was on
25 Tuesday of that first week of hearings that the Board indicated

1 they did not need the rebuttal outline. I called back to the
2 office to see if it had gone out yet, and in fact, it had.

3 But I'm surprised that Your Honor had not received it
4 because it was mailed to the service list.

5 JUDGE SMITH: It's entirely, it's possible that the
6 rebuttal outline was in fact somehow delivered to this office.
7 If you recall, it's the time that the Chairman was changing.
8 There was a lot of confusion and it just somehow got dropped.

9 In any event, when we found out that the submittal of
10 rebuttal outlines was not really necessary, we did not want to
11 read it. We deliberately made no effort to find it because it
12 was not intended. It would have been an extra outside the
13 record communication.

14 MR. TURK: Well, Your Honor, the parties do have it,
15 and if you like, I can send you an extra copy just so you'll
16 see what it is that the parties have had all these many months.

17 JUDGE SMITH: If you'd like to.

18 MR. TURK: I'll undertake to do that today, Your
19 Honor.

20 JUDGE SMITH: Go ahead, Mr. Turk.

21 MR. TURK: I'd like to address very briefly the
22 discussion of 2.720(h) if that's necessary. I think you've
23 resolved it already but I do want to note that there's only one
24 case as I indicated at the hearing last week, there's only one
25 case in which FEMA has been found to be part of 2.720(h) or to

1 appear as a Staff witness. That was the Shoreham Licensing
2 Board decision in 1983.

3 And I also indicated at the hearing last week that
4 there was a subsequent unpublished licensing Board decision in
5 Shoreham which held that FEMA was a party all to its own in the
6 NRC proceeding because it had conducted itself in the manner in
7 which a party does so, that is, with full counsel, with cross
8 examination, with active participation in litigation. Also, in
9 that case, they had been filing independent appeals and motions
10 of their own.

11 I don't think we have to reach a determination now as
12 to whether or not they're part of the 2.720(h) provision, but I
13 just wanted to note that in the Shoreham proceeding as I also
14 indicated at the hearing last week, it was the Staff's position
15 that FEMA did not appear as an NRC Staff witness under the
16 provisions of 2.720(h).

17 One thing I'd like a clarification on, Your Honor,
18 and that is in the appearance of Dr. Bores and Mr. Lazarus, I
19 assume that they're to appear to discuss the July RAC meeting?

20 JUDGE SMITH: I don't know if it's that narrow.
21 Their memoranda goes a little bit beyond that. It goes to the
22 two Bores' memorandums, Mr. Thomas' understanding of what NRC's
23 position was. I don't know if we would limit it to just the
24 words that were spoken on July 30th. The testimony that places
25 that meeting in context.

1 MR. TURK: All right. The reason I'm asking for
2 clarification is the subpoena directed to Dr. Bores, as well as
3 the other Staff witnesses, asked for notes concerning the
4 Staff's rebuttal testimony which might have been presented had
5 the Staff filed testimony in the proceeding. And I think
6 that's reaching broader than Your Honor's ruling today. As I
7 read it, you're looking for the historical evolution of the RAC
8 position, including the NRC staff's position as expressed in
9 the RAC meetings.

10 JUDGE SMITH: Yes, but I'm afraid I don't appreciate
11 the point.

12 Off the record for a moment.

13 (Discussion held off the record.)

14 JUDGE SMITH: We have no desire that they be cross
15 examined on the previously unsubmitted testimony, whatever that
16 was. We believe that our rulings here subsume all of the
17 motions and we're not ruling on the details of any particular
18 motion before us.

19 Mr. Dignan would probably, if he feels he needs
20 something more than we're giving him, I'll let him, I mean,
21 this rules on all the motions. Any additional relief will
22 have to be reargued and resubmitted. We regard this as
23 disposing of all the motions.

24 MR. BACKUS: This is Bob Backus up in Rockingham
25 Superior Court in Equitor, New Hampshire. I got on here a

1 little late because I had to leave a hearing which is currently
2 underway. And I'd like to return.

3 But I'd just like to offer a few things. I gather
4 that when I got on, there has not been any oral argument on the
5 motions. The Board just decided to tell us its thinking on
6 where it was going.

7 MR. DIGNAN: Your Honor?

8 JUDGE SMITH: Yes?

9 MR. DIGNAN: Is somebody talking, because I can hear
10 a faint voice breaking up.

11 JUDGE SMITH: Okay. Well, that was Mr. Backus who I
12 think that you're still over at the Court?

13 MR. BACKUS: Yes, I am.

14 JUDGE SMITH: And he is very faint, but I can hear
15 him. And let's state that you're correct. The Board has, on
16 its own initiative, decided what we believe the appropriate
17 relief should be to resolve all the motions pending before us,
18 including yours, Mr. Brock's and Mr. Dignan's.

19 MR. BACKUS: All right. Well, let me make my
20 comments on this.

21 JUDGE SMITH: I'm going to have to restate whatever
22 you're saying, because I assume that nobody else can hear you
23 as well.

24 MR. BACKUS: All right. I can hear you clearly and
25 the other parties so far.

1 JUDGE SMITH: Speak up, would you please?

2 MR. BACKUS: Yes. Well, I'm being summoned.

3 I would just say, Your Honor, first of all, I have to
4 take exception to your comments.

5 MR. DIGNAN: Your Honor, I cannot hear Mr. Backus at
6 all. This is Mr. Dignan in Boston.

7 JUDGE SMITH: All right. Mr. Backus is taking
8 exception to something I did. I don't know what it is yet.

9 MR. BACKUS: Well, it has to do with your
10 characterization of Mr. Thomas' not testifying with candor,
11 Your Honor.

12 JUDGE SMITH: Well, go ahead, take exception.

13 MR. BACKUS: I do take exception to that. And in
14 view of your suggestion that if he appears again, he made need
15 counsel, this suggests to me --

16 JUDGE SMITH: I didn't say that. I said I want to
17 remind him that he is entitled to counsel.

18 MR. BACKUS: Well, I assume we will have access to
19 your comments --

20 JUDGE SMITH: Yes.

21 MR. BACKUS: -- and at some point, Mr. Flynn will
22 apprise him of the things you've said.

23 I just feel that the things you have said might have
24 a tendency to intimidate him as a witness. I think that the
25 things you've said raise such a concern in my mind about the

1 fact that you may have already determined how to judge his
2 testimony that think the Board should consider letting another
3 Board or perhaps a special hearing officer hear his testimony.

4 I have read his testimony very carefully many times.
5 I did not find it to raise any issues as I read it of questions
6 of candor. Now, there may be what I thought were minor
7 differences of recollection about whether there was a formal
8 vote or a concurrence or a consensus at the July 30th RAC, but
9 I would say, Your Honor, that Mr. Thomas' key testimony which
10 at one time was described as a gossamer web and triple hearsay,
11 has in major part turned out to be verified.

12 That there was a meeting on January 19th. That high
13 officials of both agencies were there. So I think credibility
14 is not at this point appropriate by the Board.

15 JUDGE SMITH: Mr. Backus, there's a problem that you
16 have. You're not privy to the entire discussion. You're
17 making in essence a motion that we recuse ourselves from this
18 particular issue, I guess. Normally, such motions should be in
19 writing supported by affidavits. We'll accept the oral motion
20 here if you want to make it, and deny it.

21 We have only made those observations as to witness
22 credibility which judicial officers are called upon routinely
23 to make and to take into account and act upon. But you can
24 renew your motion formally after you get the transcript, it's
25 always your right. And in that case, we'll expect you to make

1 it in writing supported by the necessary affidavit.

2 MR. BACKUS: Second point -- I appreciate that, Your
3 Honor. The second point I'd like to make is that you've had
4 both Mr. Turk and Mr. Flynn attempt to get you in advance to
5 narrow the scope of the testimony that we might elicit from the
6 witnesses that you said are to appear. In our opinion, if the
7 witnesses are going to appear without discovery, we should have
8 the same latitude on interrogating them as we would on
9 discovery. That is that we should be entitled to find if the
10 testimony would lead to discoverable evidence not that it be
11 admissible in itself.

12 The third thing I would say is that we would urge
13 that the Board direct not a representative of Mr. Stello, but
14 that Mr. Stello himself should appear in view of the
15 circumstances of this case. It would seem to us to be
16 consistent with directing Mr. Peterson to appear who is the
17 Associate Director for State and Local Programs of Support that
18 run the REP or Radiological Emergency Planning project at FEMA
19 that is equivalent to him, I would think, at NRC would be
20 Mr. Stello who we know he met with.

21 I think that from SAPL's point of view, having
22 Mr. Stello direct a representative to say what he may have said
23 at that meeting would be not sufficient.

24 JUDGE SMITH: Mr. Backus, I'm confused about how long
25 you've been on this conference call.

1 MR. BACKUS: Pardon me?

2 JUDGE SMITH: How long have you been on this
3 conference call?

4 MR. BACKUS: About five minutes after 3:00.
5 The last thing is that we --

6 JUDGE SMITH: I beg your pardon. Hang on a minute,
7 Mr. Backus.

8 Did somebody just make a remark?

9 MR. TURK: Your Honor, I simply noted the current
10 time is 4:00 o'clock.

11 JUDGE SMITH: Yes. I wasn't aware that you got on.
12 Nobody reported you present.

13 MR. BACKUS: I think the operator did.

14 JUDGE SMITH: Well, in any event, you're making these
15 points now because you have to leave, is that it?

16 MR. BACKUS: Yes, I do.

17 JUDGE SMITH: All right. Well, --

18 MR. BACKUS: The last point is that I don't think you
19 have addressed is that we had asked in part of our Motion for
20 Subpoena for all documents that would pertain to communicatio
21 or memoranda associated with that January 19th meeting to be
22 furnished in advance. And that request would encompass anybody
23 who was in attendance and memorialized that meeting in any way.

24 JUDGE SMITH: All right. Well, we want to take up in
25 a more deliberate fashion these witnesses one at a time. I was

1 only trying to outline what the Board's requirements were, and
2 we were going to listen to arguments from the parties as to
3 additional requirements, okay?

4 MR. BACKUS: All right. Well, I will delegate my
5 further participation to the other intervenors and return to my
6 hearing in the courthouse.

7 JUDGE SMITH: All right. Let me repeat what
8 Mr. Backus stated.

9 He stated that since we are having Peterson come,
10 therefore we have to have Stello come and that's their right.
11 That we should not overlook the fact that the subpoena request
12 required documents. And we have not addressed that yet.

13 And anybody else have anything else?

14 MR. TRAFICONTE: Yes, Your Honor. A few points. The
15 first being recusal at least as to further testimony by Thomas.

16 JUDGE SMITH: Yes. I repeated that one already.

17 MR. TRAFICONTE: And the second point was that in
18 light of the fact that we don't have any prehearing discovery
19 that you shouldn't accept Mr. Turk and Mr. Flynn's efforts to
20 restrict the scope and we should have full range of questioning
21 of these witnesses.

22 JUDGE SMITH: That's a ruling that we will make in
23 the context of the witnesses and the circumstances. We're not
24 going to rule now that the same almost unlimited right to
25 inquire on discovery will apply in a hearing.

1 On the other hand, we obviously are going to take
2 into account that there has been no discovery, or inadequate
3 discovery or not as much as is traditional, and we will try to
4 balance the needs of all of the parties. But we're not going
5 to grant the motion in the blanket form in which it's made.

6 And you hear our ruling on we're not recusing
7 ourselves.

8 MR. FLYNN: Your Honor, this is Joseph Flynn. In
9 response to the point that Mr. Backus made about needing freer
10 rein in the hearing room because they haven't had discovery of
11 these particular witnesses, I would just like to point out that
12 the FEMA witnesses are the only ones that the intervenors have
13 chosen to depose.

14 JUDGE SMITH: Okay. That's very good.

15 Mr. Turk, had you completed your comments?

16 MR. TURK: Not quite, Your Honor. And I'd also like
17 to address something Mr. Backus had said.

18 Turning first to Mr. Backus' comments, he indicated
19 that he sees a need to have Mr. Stello appear. I think that
20 that's something which is unsupported at this time. If, after
21 the Staff does designate a witness to appear to testify about
22 the January meeting, if there are questions which cannot be
23 answered by that person with facts known to him, then there may
24 be grounds to request that some other individual be designated
25 beyond that first one. And we can leave it at that point to

1 decide, one, that if anyone is necessary beyond the initial
2 witness who may appear, and second, who that additional person
3 should be.

4 I don't see any sort of an equivalence standard or
5 reciprocity that simply because Mr. Peterson may appear,
6 assuming he does, that therefore Mr. Stello should have to
7 appear as well. I don't see any logic to that.

8 JUDGE SMITH: I don't understand the logic, either.
9 We designated Peterson because he's acknowledged by everybody
10 involved as being the one who made the decision.

11 MR. TRAFICONTE: Your Honor, just a point of
12 clarification on the appointment by the Staff of a witness to
13 the January 19 meeting. I have assumed, although the Board
14 hasn't said it, that the Staff is to name someone who was in
15 attendance at that meeting?

16 JUDGE SMITH: Yes. But not limited to that.

17 MR. TRAFICONTE: No, no. But at least someone who
18 was there.

19 JUDGE SMITH: Absolutely, yes. I understand that
20 Dr. Bores was present, and we wanted somebody in addition to
21 him.

22 MR. TRAFICONTE: Yes, okay.

23 MR. TURK: Your Honor, for your information, Dr.
24 Bores was not there. Also Mr. Thomas indicated that he
25 believed I was there. I was not there.

1 But it's my understanding that when we do attempt to
2 designate a witness in compliance with the Board's order, it
3 will be somebody who can speak to what happened at that
4 meeting. And who will have been in attendance.

5 JUDGE SMITH: And the context of the meeting.

6 MR. TURK: Yes.

7 JUDGE SMITH: All right. Go ahead, Mr. Turk.

8 MR. TURK: The last thing I wanted to address is the
9 question as to whether the Staff or FEMA is trying to limit the
10 scope of questioning. I'm not trying to limit in any
11 unreasonable way the scope of the questioning. I note for
12 instance if Dr. Bores is on the stand, he will know quite more
13 than simply what happened at the RAC. He will have been
14 involved in discussions at NRC about proposed testimony that we
15 would be putting on, had we put on a case, and other matters
16 which I don't think bear on the issue raised by intervenors
17 here, and that is, what happened to FEMA's testimony, what was
18 the basis for the shift in testimony and what was it that FEMA
19 said initially and what are they saying now.

20 And for instance, if we're going to start getting
21 into discovery on the stand of what the NPC staff believes to
22 be an adequate protective measure for the beach population,
23 then I'd like to have an opportunity to submit a formal case.

24 JUDGE SMITH: To present a formal case?

25 MR. TURK: That's right.

1 JUDGE SMITH: Well, you'll remember that we did ask
2 the NRC staff in addition to our minimum requirements, to
3 affirmatively come forward and present a case on their view of
4 what happened from the beginning of the first the evolution of
5 FEMA's first testimony through it's change until what happened
6 at the end.

7 MR. TURK: But that's a different matter than the
8 Staff's view of what's an adequate protective measure for the
9 beach population. And I'm not about to start preparing a
10 substantive case.

11 The Staff has already taken the position that we're
12 not going to enter a separate --

13 JUDGE SMITH: We haven't asked for a case on the
14 merits of that.

15 MR. TURK: Right. And my point is if that's the kind
16 of questioning we get into on the stand, I'm going to be
17 objecting to the question and asking that that line of
18 questioning be cut off.

19 JUDGE SMITH: Well, I can see it could be a
20 collateral issue related to the evolution of the --

21 MR. TURK: I understand that.

22 JUDGE SMITH: -- and I don't know how you can cut it
23 off entirely, but we are not -- you have not sought to submit
24 an affirmative case, and I believe that our authority to ask
25 you to submit one is somewhat limited judicially. The staff

1 has usually agreed to do it, but I doubt if you're required to.
2 In any event, we're not asking for it.

3 We are asking, and that is a request, that the Staff
4 present its view of the evolution of FEMA's position
5 affirmatively without us striking the right chords and striking
6 the right witnesses doing it, okay?

7 MR. TURK: I'll see if we can accomplish that. There
8 may be many things that we don't know, but we can at least give
9 you our perspective on things.

10 JUDGE SMITH: All right.

11 Now who wants to be heard, next?

12 MR. OLESKEY: I'd like to make one point, Judge, if I
13 may, Steve Oleskey.

14 JUDGE SMITH: Yes.

15 MR. OLESKEY: I think this argument concerning the
16 jurisdiction over FEMA highlights an issue that's been lurking
17 in the case all fall and winter. It's one I started to address
18 in the hearing we had in connection with discovery and I think
19 that the Board may not have fully apprehended my thinking. For
20 that I have only myself obviously to hold responsible.

21 I think it has to go, it goes really to this question
22 of the relationship between FEMA and the NRC and their
23 memorandum of understanding and what the relationship between
24 these two agencies has been and now is in this hearing. As I
25 have understood it, and we discussed it briefly last week in

1 New Hampshire, ordinarily FEMA would be proffered essentially
2 as an expert witness by the NRC to give testimony in accord
3 with its acknowledged expertise in hearings like this. And it
4 was apparently contemplated through at least June or June of
5 1987 that that would be the case.

6 And in that connection, Mr. Thomas, who I regard as
7 reliable in the respects I've heard him testify, described I
8 think both in Board proceedings and certainly discovery,
9 Mr. Turk, in serving his --

10 JUDGE SMITH: Just a moment. Whose interjecting
11 here?

12 MS. WEISS: I'm sorry. That's me. It won't happen
13 again. I was just trying to get my secretary's attention.

14 JUDGE SMITH: Oh.

15 MS. WEISS: And I'm afraid to put you all on hold.
16 I'm afraid I'll disappear.

17 MR. OLESKEY: Should I continue, Judge, or hold?

18 JUDGE SMITH: Go ahead, Mr. Oleskey.

19 MR. OLESKEY: Mr. Thomas described Mr. Turk as
20 playing the role of co-counsel to him in the preparation of
21 FEMA's case as I understood it up through the end of May at
22 least of 1987, when FEMA then filed that position that the
23 Board is aware of dated June 4th of last year.

24 Then it appears to some extent that outside the
25 context of the RAC, that there had been close communications

1 between Mr. Turk and FEMA during the summer of '87. However,
2 it's my impression from everything I've learned about the scope
3 of the conduct of FEMA in the NRC in the fall, especially the
4 winter and spring of '87-'88, that Mr. Turk had moved back into
5 some kind of position equivalent to that of counsel for FEMA.

6 So it seems to me that the issue that's lurking under
7 all these discussions about whose witness FEMA is and whether
8 Mr. Turk was forthcoming, as forthcoming as the Board may feel
9 he should have been, is that Mr. Turk has had for about a year
10 with respect to these proceedings a filial conflict of interest
11 that began the moment it became clear that FEMA, although it
12 would apparently still be proffered in some sense as an expert
13 witness in the hearings, might no longer be presenting
14 testimony which was in effect a response of the NRC.

15 I think that put Mr. Turk in a very difficult
16 position from that point in June of '87 to date over his
17 responsibilities may have been from June 4th. I have a very
18 great concern that he be allowed to proceed now as counsel for
19 the NRC when he's privy to so much of that which we're about to
20 inquire into in New Hampshire from first hand knowledge gained
21 through his role in counseling FEMA and also in connection with
22 the role which he and the NRC had in preparing and counseling
23 FEMA.

24 I think that's fine filial conflict that's now been
25 built into the case and I think it works at a very basic level

1 to the disadvantage of the intervenors. To cite an example,
2 Mr. Turk's comment, which I think you may have referred to
3 earlier having made in January of '88 in substance, I'm aware
4 of facts which aren't on the record which will be brought out
5 in due course. I believe those facts are likely to have become
6 known to him because of his role in this special relationship.
7 And I think that highlights this conflict.

8 I am saying it now I hope more clearly than I tried
9 to say it in the discovery hearing about six weeks ago, because
10 I think it may illuminate part of what we're all grappling with
11 when we talk about the Board's jurisdiction and whose witness
12 FEMA is.

13 JUDGE SMITH: Well, assuming what you say is correct,
14 and I have reservations, what standing do you have to raise it?

15 MR. OLESKEY: Well, Mr. Turk is going to go ahead and
16 present witnesses and cross examine a party in an effort to
17 make points adverse to my client. I therefore think I have the
18 standing of a party to object to his continued presence under
19 those circumstances.

20 JUDGE SMITH: Well, are you making an oral motion
21 that we disqualify Mr. Turk?

22 MR. OLESKEY: I am bringing this to the Board's
23 attention, inviting you to take it into consideration as we
24 proceed with this hearing and think about next week. If the
25 Board, having the advantage of this discussion and whatever

1 else that you may wish to do, doesn't wish to proceed then I
2 will decide at that time whether I should make a motion.

3 But as I've always understood it, once the suggestion
4 of a conflict is raised, it leaves it at that moment with the
5 tribunal as to whether or not it wishes to take action. So if
6 the Board's comfortable with my putting it on that basis at
7 this time, I'm comfortable with leaving it there.

8 JUDGE SMITH: Mr. Turk, do you want to be heard on
9 this?

10 MR. TURK: At some point, I would, Your Honor. I
11 don't hear a motion yet.

12 MR. OLESKEY: And I also do want to say that of
13 course I understand that Mr. Turk would want to be heard.
14 Excuse me for failing to mention it.

15 MR. TURK: Well, Mr. Oleskey, I understood that you
16 would invite my response.

17 MR. OLESKEY: Proceed, sir.

18 MR. TURK: Just by way of a brief response, Your
19 Honor, and if I see a formal motion filed, I'll prepare a more
20 detailed and elaborate response.

21 The sole basis for Mr. Oleskey's comments are
22 comments by Mr. Thomas that he perceived that I had been acting
23 as co-counsel. And I didn't say co-counsel for whom. And that
24 didn't appear in the deposition, simply the reference to co-
25 counsel. There's also a record that Mr. Thomas was advised by

1 FEMA counsel. The NRC Staff did not represent him or FEMA in
2 the proceedings. That was made clear to Mr. Thomas a long time
3 ago.

4 Now, granted there have been communications between
5 FEMA and NRC as clearly is contemplated by the memorandum of
6 understanding. That communication has taken place between
7 technical members of NRC and FEMA and has taken place between
8 the legal members of NRC and FEMA. And indeed in the past
9 there have been conversations between NRC counsel and FEMA
10 staff, and between FEMA counsel and NRC staff.

11 That doesn't establish an attorney client
12 relationship nor does it give rise to a conflict of interest.
13 There are two separate governmental agencies, each of which has
14 its own purpose, its own statutory responsibility, and its own
15 counsel. And there's no identity of interest which counsel
16 would be representing.

17 I think if an analogy is to be drawn, it would be an
18 analogy of two defendants in a proceeding represented by their
19 own attorneys communicating about matters which they have joint
20 knowledge of. And I don't think that's a conflict of interest
21 if they do that with knowledge that they're not represented by
22 the other attorney for the other agency.

23 Now, perhaps the choice of the word, defendant, is
24 ill advised. Maybe I should have said plaintiffs, but its the
25 same sort of situation.

1 I don't feel there's been a conflict of interest. I
2 would also note that somewhere in the record, I believe in
3 Mr. Thomas' deposition, there is an indication that after the
4 early part of June, 1987, when it became clear to us, to me,
5 personally, and to others at NRC, that FEMA was taking the
6 position which it took, that we pulled away from it.

7 JUDGE SMITH: You declined, as I understand, to
8 review their testimony?

9 MR. TURK: I declined personally to review a draft of
10 Mr. Thomas' testimony on the beach population issue. And the
11 reason for that was I perceived that I would possibly be in a
12 situation where I would have to cross examine him, and I
13 certainly didn't want to be foreclosed from doing that.

14 And after that point, there has been no communication
15 between myself and Mr. Thomas other than instances which he may
16 have initiated about the substance of his beach testimony.

17 There is one reference in Mr. Thomas' deposition, by
18 the way, of a meeting between him and me in January. And he
19 described it as somewhat of a lengthy encounter, or in fact, a
20 lengthy meeting. In fact, what happened was I dropped off a
21 hearing transcript of Mr. Flynn. Mr. Thomas happened to be in
22 the hallway and stopped me to ask me some questions. Now, if
23 he wants to initiate questioning even after he's been advised
24 by FEMA counsel that I don't represent him or his agency, I
25 certainly can't stop him.

1 MS. WEISS: And I would state, Your Honor, that
2 that's a perfect example of the disability that the intervenors
3 are laboring under here. That Mr. Turk transforms himself back
4 and forth frequently between acting as a witness and testifying
5 in the context of making remarks on motions and making
6 objections, he testifies to the content of conversations that
7 he had with the witnesses in this case, and then the next day,
8 will go on to question them.

9 And it's a dual role. I think it's a conflict of
10 interest in his part, and I think it's clearly been operating
11 to our prejudice. And I've had concerns about it too for
12 several months.

13 MR. OLESKEY: Let me just make a couple of responses,
14 Judge Smith, if I may, in Boston.

15 First of all, perhaps apparently Mr. Turk and my
16 recollections differ on what Mr. Thomas said. But I believe on
17 more than one occasion, he identified Mr. Turk as in substance
18 co-counsel and he said for me, but from the context, I thought
19 it was clear that he meant for Thomas and FEMA, not simply for
20 Thomas personally.

21 And I think when we come to it if we do that either
22 new testimony on that point or the deposition testimony will
23 bear that out.

24 Secondly, with respect to the suggestion of the fact
25 of staff communication doesn't create a conflict, I don't think

1 anybody would differ with that, but that's not the issue. And
2 I tried to make that clear in my initial remarks. Because the
3 NRC under the memorandum proffers FEMA as its witness, as I
4 said last week, I think it's very much the same as any expert
5 who Mr. Dignan or myself or any other party might choose to
6 prepare and offer in a case, except that it happens to be
7 another agency.

8 And the importance of that is that because of that,
9 because the NRC presents the witness, which I think ultimately
10 with respect to the testimony that's apparently going to be
11 given on the March 14th testimony is again the case, whatever
12 may have been the fact regarding the September of last year,
13 Mr. Turk's in a position of someone whose agency and
14 potentially he has counseled and guided that testimony and
15 knows why strategic decisions were made to say some things and
16 not others.

17 And yet now he's going to have the opportunity in New
18 Hampshire to ask questions of FEMA apparently in an effort to
19 discredit the process that FEMA formerly followed in preparing
20 the testimony of September with the objective of strengthening
21 the testimony that FEMA's going to give, if it does, dated
22 March 14th. Those are things I don't think he could have done
23 unless he and his agency had that special relationship, and the
24 key for him is that he's counsel, not simply an agency staffer.

25 I have a recollection as well that it came out in the

1 depositions in February and March that the March 14th testimony
2 actually went over to the NRC for review before it was
3 presented and filed with this Board. Which would mean, even if
4 Mr. Turk didn't get a look at it, that responsible people in
5 his agency did.

6 JUDGE SMITH: Well, now, were you going to disqualify
7 the NRC from the proceeding as an institution?

8 MR. OLESKEY: No. I can't disqualify the NRC but I
9 can ask you to disqualify a counsel who enjoyed I think both
10 last spring and again at some point this late fall or winter, a
11 position substantially that of co-counsel to FEMA, and thereby
12 enjoyed a decided unfair advantage over the rest of us.

13 JUDGE SMITH: Okay. Now, this is as I understand it
14 a soft motion that the Board on its own sua sponte rule that
15 Mr. Turk is disqualified.

16 The basic argument that you have, the most convincing
17 argument that you have with respect to Mr. Turk is that the
18 relationship between the NRC and FEMA and the NRC Staff and the
19 Board and the parties is inherently in conflict. And there may
20 be an argument to that. The memorandum of understanding may
21 not, in some instances, be consistent with NRC's staff's
22 responsibility in hearings.

23 However, as you readily observed, any institutional
24 conflict of interest that there may be in the NRC Staff in this
25 case is beyond our ability to remedy. With respect to Mr. Turk

1 personally. It seems to me from what we've observed about the
2 case without regard to what Mr. Turk has to say, we've observed
3 from the case that FEMA knew that Mr. Turk for one, and the NRC
4 Staff working on the matter and that is Dr. Bores and
5 Mr. Lazarus, were fast putting distance between themselves and
6 FEMA as soon as they understood that there might be a conflict.
7 So they entered into it with a problem of institutional dilemma
8 and we see from our own observation that at least one instance
9 of Mr. Turk putting distance so he would not be in this
10 situation, and then above all, we take his representation to
11 that effect.

12 Anything after that, I think you have an
13 institutional part, and we will not impute to Mr. Turk any
14 institutional conflict of interest. If we were to do that, we
15 would have to impute that to the entire Office of General
16 Counsel, and that just is not practical.

17 So as your request goes to the Board to on its own
18 initiative disqualify Mr. Turk is denied. You'll have to make
19 your motion formally.

20 MR. OLESKEY: All right, Judge.

21 JUDGE SMITH: Next point?

22 MR. TURK: Your Honor, I want to note two things, if
23 I may. The question as to whether there's a conflict of
24 interest is really one that if it's going to be raised, should
25 be raised by FEMA. At some point, if they feel that their

1 witnesses should not be examined by me or by attorneys with my
2 agency, there the ones who have an interest to protect.

3 I don't see that the intervenors have standing to
4 complain about a conflict of interest between my agency and
5 FEMA, or between me personally and FEMA.

6 MR. OLESKEY: I happen to disagree with that. Since
7 FEMA's their expert witness and not a party, they have no
8 standing to raise that objection even were they so minded,
9 which it appears from all the evidence that they are not.

10 JUDGE SMITH: Look, you can't have it both ways. If
11 they're expert witnesses, then they're can't be any conflict
12 between Turk and the expert witnesses. If they're parties or
13 quasi parties, it's only there where you might have an
14 argument.

15 MR. OLESKEY: Well, I disagree to this extent, Judge.
16 I don't think that anybody can proffer an expert and then
17 attack them. And that's what I think the NRC has intended to
18 do and still intends to do.

19 JUDGE SMITH: But that's not conflict. That's
20 another matter. But however, we've ruled.

21 MR. TURK: Your Honor, with respect, whenever a
22 lawyer is confronted with a situation where his witness
23 presents facts which are inconsistent with his understanding of
24 the facts, he doesn't have to stand there and accept that
25 surprise. He can go after him.

1 MR. OLESKEY: Only when it's your own witness, you
2 have to withdraw him or make a disclosure.

3 JUDGE SMITH: All right. Well --

4 MR. TURK: I think it's hypothetical in any event,
5 but I'd make arguments against that, Your Honor.

6 JUDGE SMITH: These are mutually exclusive positions
7 you've taken, but in any event, we are not on this Tuesday
8 afternoon, going to send Mr. Turk packing based upon what
9 you've argued. You'll have to make your motion on your own
10 behalf. And we would be interested in standing, although we
11 understand your argument, Mr. Oleskey.

12 MR. OLESKEY: Yes, Your Honor. Thank you.

13 MR. TURK: Your Honor, I wanted to clarify one other
14 point. I had indicated that I refused to see a draft of FEMA's
15 testimony last June. That's correct.

16 I should also point out and I want you and
17 intervenors to understand that FEMA also offered up their
18 testimony in January and March of this year, and we did see it
19 in advance, both technical members of NRC and attorneys here in
20 the office, including myself.

21 And I would note that our comments in January were
22 rejected. And the comments in March were very minor and I
23 believe accepted. Those are not legal comments, particularly
24 they were comments as to the way in which the testimony was
25 presented as something for the Board to consider.

1 MS. WEISS: May I make just one comment,
2 Mr. Chairman, and not to belabor this point. But I would just
3 like to say that it is not a hypothetical situation when
4 Mr. Turk takes every opportunity to undermine the credibility
5 of Mr. Thomas, and who does so based on assertions that he has
6 personal knowledge which would suggest that these statements
7 aren't true and we can't test his assertions of his personal
8 knowledge.

9 I mean, it seems to me that's the nub from my point
10 of view of what's objectionable here. It's we're essentially
11 hearing testimony from Mr. Turk and he does it on every
12 opportunity that he gets to subtly and not so subtly undermine
13 Mr. Thomas. And we can't get Mr. Turk on the stand to tell us
14 what he's basing those on.

15 JUDGE SMITH: Again, I don't want to prolong this
16 argument. We have other business to take care of this
17 afternoon.

18 Again, we believe that whatever conflict might exist
19 in Mr. Turk is one that is inherent in the NRC and not peculiar
20 to himself. And we decline to take action. You'll have to
21 file your motions.

22 Go on to the next item. Were you done, Mr. Turk.

23 MR. TURK: I would respond in one sentence to Ms.
24 Weiss, if I may, Your Honor.

25 JUDGE SMITH: Not on disqualification. It's 4:30 and

1 we still have a lot of work to be done.

2 MR. TURK: All right, Your Honor. We are not taking
3 into account what Ms. Weiss said. If she renews it in a
4 motion, you can address it then.

5 MR. TURK: All right.

6 JUDGE SMITH: Go ahead, Mr. Turk.

7 MR. TURK: I have nothing further, Your Honor.

8 JUDGE SMITH: All right. Who would like to be heard
9 now?

10 I don't see that any particular order lends itself
11 here.

12 Mr. Dignan, are you still there?

13 MR. DIGNAN: Yes, Your Honor.

14 JUDGE SMITH: Do you have anything that you wish to
15 contribute to the discussion today?

16 MR. DIGNAN: Not really, Your Honor.

17 I was going to ask you one question. If I heard you
18 correctly on the order of witnesses, is it the Board's
19 intention that these witnesses appear and what will commence is
20 a Board interrogation of the witnesses, or are you assigning to
21 particular lawyers the filing of the opening shots, or what?

22 JUDGE SMITH: If no questions were asked by the
23 parties, the Board would have some questions. But the way
24 things are unfolding and the way it looks now that that will be
25 not necessary. I think that the record will be developed

1 through the adversarial process.

2 MR. DIGNAN: Well, okay. I guess I would imagine my
3 fellow brothers and sisters of the bar who are involved in this
4 thing would want to know. I mean, you've given us a list of
5 some if I am correct, five, at least six witnesses who will
6 appear. They will be sworn, and I guess in the case of each
7 witness, it would be helpful at least to know who gets called
8 on first to ask a question, or --

9 JUDGE SMITH: See, we'll have to take it up as a
10 functional matter. It would get rather complicated as we look
11 as to whether the witness is adverse to the party or not.

12 Now, we're starting out with Bores and Lazarus. We
13 would expect, Mr. Dignan, that you would not have the full
14 range of traditional cross examination with them because of the
15 functional nature of their testimony.

16 Mr. Thomas would be different.

17 Peterson and McLaughlin, you may be limited to more
18 of a direct, then. I don't know.

19 MR. DIGNAN: I guess my question is much simpler than
20 that. I'm not seeking rulings as to whose the witnesses are
21 because they're probably nobody's witnesses. But what I'm
22 just getting at is this. That there will come a time up there
23 when witness X will be called to the stand in order. And I'm
24 just asking the question of what happens then?

25 If some attorney is then to start the ball rolling,

1 it seems to me we ought to understand who. I don't care
2 whether he's cross examining an adverse witness or he's taking
3 the witness in direct, or what. That's a problem to be
4 resolved at the time the witness comes on.

5 JUDGE SMITH: I would expect the NRC staff to sponsor
6 Bores and Lazarus. If they decline to do that, the Board will
7 simply direct them to their memoranda and ask them to testify
8 about it. But I would expect the NRC staff to sponsor those
9 witnesses.

10 MR. DIGNAN: Okay.

11 JUDGE SMITH: With respect to Mr. Thomas, I don't
12 know what FEMA intends to do. But if they intend to sponsor
13 him as a witness or say he's simply there as a Board witness
14 without a sponsorship, then we would turn Mr. Thomas in the
15 first instance over to the intervenors to complete their as-on-
16 discovery inquiry, having already required that his notes be
17 produced, and then to the other parties adverse to the
18 intervenors to address.

19 Then we come to NRC witnesses, and I would expect the
20 NRC staff to sponsor them and turn them over to the intervenors
21 for cross examination with the applicant examining as their
22 interest might be affected.

23 Peterson and McLaughlin, I don't know about that.
24 That's a pretty tough one. I would expect FEMA to sponsor
25 their testimony and that intervenors would be adverse in cross,

1 and the applicant probably more in a posture of direct. But
2 we'll have to play that one as it unfolds.

3 And so on down the line for the FEMA witnesses.
4 That's how I would envision it.

5 MR. TURK: Your Honor --

6 JUDGE SMITH: Is that helpful?

7 MR. TURK: Your Honor, when you indicate that you
8 would expect the Staff or FEMA to sponsor various witnesses,
9 I assume you're not asking for prefiled written testimony;
10 simply introduce the witness in the usual way and make them
11 available for examination?

12 JUDGE SMITH: Yes, and protect them. Whatever.
13 You're not required to file prefiled testimony. It might be
14 helpful if you wish.

15 MR. TURK: I don't think we'll have the time.

16 JUDGE SMITH: Don't forget, we've asked you to come
17 forward with an affirmative case. You won't have the time,
18 perhaps, for Bores and Lazarus. I think that they could adopt,
19 if it's your desire, their memoranda to you.

20 MR. TURK: I think that's what I will do.

21 JUDGE SMITH: That is the purpose for which we think
22 that they should be called as witnesses, is to defend the
23 information in there, if they can.

24 Okay, who wants to be heard next?

25 MR. OLESKEY: I think I would, Judge, Steve Oleskey.

1 With respect to the remaining question of who else
2 would be examined, if what the Board is saying is that the
3 Board will hear from all of us when we've completed these six
4 people without foreclosing the opportunity to request and have
5 ordered the appearance of other people, I think we're content
6 with that.

7 JUDGE SMITH: Well --

8 MR. OLESKEY: But we certainly --

9 JUDGE SMITH: -- we don't foreclose that, no.

10 MR. OLESKEY: -- we certainly want it known that we
11 do want Mr. Krimm.

12 JUDGE SMITH: Okay.

13 MR. OLESKEY: As to anyone else, let's see what the
14 witnesses who testify have to say. Obviously we named, in
15 Mr. Backus's motion, a number of people who we thought could
16 have testimony that would be important.

17 With respect to the issue of the documents I think
18 Mr. Backus raised, we have an outstanding request jointly in
19 asking for the memoranda and planning documents relevant to the
20 January 19, 1988, meeting between the two agencies, which, I
21 reiterate for all of us, we would obviously find most useful in
22 advance of the commencement of hearings next week.

23 JUDGE SMITH: That's the agenda? Mr. Oleskey, I --

24 MR. OLESKEY: Yes, Your Honor, the agenda.

25 JUDGE SMITH: And talking points.

1 MR. OLESKEY: Talking points, and any memoranda
2 between the agencies relative to the setting up of the meeting
3 or to any determinations reached at the meeting.

4 JUDGE SMITH: There's no privilege I -- we're not
5 upholding any privilege. We've made the determination that we
6 do not have to resolve, in view of the arguments made now, the
7 executive privilege issue. We made a determination that the
8 needs of the hearing outweigh the executive privilege, if in
9 fact it exists.

10 The memoranda between the agencies as to that meeting
11 certainly should be produced, as well as the talking points and
12 the agenda.

13 MR. FLYNN: Your Honor, there are only two documents
14 which have not been produced that fall in that category, and
15 those are the two you just identified. They're two one-page
16 documents.

17 JUDGE SMITH: All right, well, they should be
18 produced, and Mr. Thomas's notes.

19 MR. FLYNN: Well, I talked to him about that earlier
20 today, and I told him that I wanted him to send to you, Judge
21 Smith, the notes in question, and he said he would take that
22 into advisement. Those are what we identified as a desk file.
23 They're his personal notes, they're not under FEMA's control,
24 they're not used by anyone else in FEMA.

25 MR. DIGNAN: Your Honor, could we take that one up?

1 The Applicant had a request in, and was refused a
2 number of notes of Mr. Thomas on this same theory. I confess
3 to not understanding the theory.

4 If somebody uses a set of notes in their official
5 capacity as a desk file or a diary, I don't that some closure
6 comes over it that agency doesn't have to produce it. If
7 Mr. Thomas, as I understand his testimony, and I'm perfectly
8 prepared to be corrected by anyone if I'm wrong, these are a
9 set of notes he keeps, he calls it a log. He keeps it on his
10 desk and utilizes it in his capacity as an employee of FEMA.

11 To all of a sudden make these the personal things
12 that can only be produced if Mr. Thomas feels like it is a
13 doctrine that I must admit is foreign to me.

14 JUDGE SMITH: Well, I think those ought to be
15 producible under the Freedom of Information Act alone, let
16 alone --

17 MR. DIGNAN: Precisely.

18 JUDGE SMITH: -- as discovery in a civil proceeding.

19 MR. DIGNAN: I would appreciate it if FEMA would be
20 advised that those, the Thomas notes in all their entirety -- I
21 mean, it was a whole bunch of these logs in the deposition room
22 -- be copied and produced.

23 JUDGE SMITH: Well, there's one thing I want to
24 consider, however, and that is if Mr. Thomas has personal items
25 intermixed in his notes, if he wants to submit the notes to the

1 Board first with the personal items underlined for us to
2 excise, we would do that. I mean, you know, if this were his
3 desk notes and his log, I don't know if he has any personal
4 notes or not, but --

5 MR. DIGNAN: Your Honor, it goes without saying I
6 have no problem with the redaction of a personal note that he
7 has a dinner engagement with an old college friend or anything
8 like that. There's no attempt to get that. Mr. Flynn can
9 redact that with no problems, but there's some theory that
10 because he keeps these in handwriting on his desk that they
11 aren't a FEMA record; they are.

12 MR. TRAFICONTE: Well, Your Honor -- John Traficonte
13 in Boston -- the only concern I have about the discussion we're
14 having on Mr. Thomas's notes, and we're also seeking those
15 notes, so don't take this the wrong way, but from what
16 Mr. Flynn has said, I'm concerned that the Board would rule now
17 in the absence of any attorney representing Mr. Thomas's views,
18 which, as I understand where we all stand right now, no one is
19 right now representing Mr. Thomas.

20 MR. DIGNAN: I agree with that, Mr. Traficonte. I
21 think that's a point well taken, and I'm not asking that
22 Mr. Thomas's notes be coughed up without his having an
23 opportunity to consult with personal counsel if he feels he
24 needs to.

25 MR. TRAFICONTE: He may be wrong. My point is he may

1 be wrong, but at least he's entitled to have someone represent
2 his views.

3 JUDGE SMITH: I think you're right.

4 MR. DIGNAN: I think you're right, Mr. Traficonte. I
5 don't disagree with that.

6 MR. TURK: John, just don't send him to me.

7 MR. OLESKEY: Judge, this is Steve Oleskey. I --

8 JUDGE SMITH: What'd you say, Mr. Turk?

9 MR. OLESKEY: -- and Mr. Traficonte will carry on.
10 Apologize.

11 JUDGE SMITH: All right, Mr. Oleskey's leaving, I
12 understand.

13 MR. OLESKEY: Yes, Your Honor.

14 JUDGE SMITH: All right.

15 Mr. Turk, you made a statement about what, don't send
16 the notes to you?

17 MR. TURK: Oh, no, Your Honor, it was in jest.

18 JUDGE SMITH: Oh, okay.

19 MR. DIGNAN: He didn't want the client sent to him,
20 Your Honor.

21 MS. WEISS: I don't think we got a worry there.

22 MR. FLYNN: That's perhaps another point that I need
23 to have clarified. I did have a discussion this morning with
24 Mr. Thomas on the subject of whether he might want to consult
25 private counsel, and that was essentially unresolved. And I

1 think the transcript of today's conference call will
2 undoubtedly guide him in that decision.

3 But I think there's some confusion, or there might be
4 some confusion, as to the extent to which he might need
5 counsel. And the reason I bring that up, in reflecting on the
6 testimony that the Board has identified as raising questions,
7 namely, the voir dire back in October and November.

8 It occurs to me that Board did consider those voir
9 dire examinations at the time in the context of the suggestion
10 that was reputedly made by Mr. Dignan as -- about their
11 reliability. And the Board concluded then that the record
12 established no such thing.

13 I'm having trouble understanding how to put the two
14 pieces together.

15 JUDGE SMITH: All right. Well, here's -- certainly
16 our observation was relevant, and I haven't read, I have not
17 read, our remarks on that. But if you recall, we declined to
18 censure Mr. Dignan or to put him under any restraint with
19 respect to what he should do. But once the suggestion was made
20 that Mr. Thomas had made statements which, in somebody's view,
21 should be brought to the attention of the United States
22 Attorney, we felt it obliged to review that testimony to see if
23 the integrity of our own process was in issue. And we went back
24 and read it.

25 And as i recall, we noted that Mr. Dignan had a

1 frustrating time getting the information from Mr. Thomas, and
2 we made some remark concerning Mr. Thomas's conservatism or
3 reticence or something, but that we saw no basis to proceed
4 further. We saw no need to take that up at that time as an
5 issue.

6 Now, I've gone back and I've read everything
7 Mr. Thomas has had to say about the issue, given the testimony
8 as it stands on the record as it exists now. I don't know if
9 we would be motivated to remind him that he does have the right
10 to bring counsel.

11 But looking at what might be the testimony of Dr.
12 Bores and Lazarus, and as we emphasize, that we have not heard
13 them on this, and it is not evidence, it is not in the record,
14 and may not be our view after we hear from them. And therefore
15 we're telling Mr. Thomas that he's invited to bring counsel.

16 Furthermore, I might say that having read again
17 Mr. Thomas's testimony, and understanding a little bit about
18 the issues that were involved there, even without Bores and
19 Lazarus we do have problems of candor. Now whether anything
20 else is involved, that's something else. But we still have
21 problems of candor with Mr. Thomas's testimony standing alone
22 without Bores and Lazarus.

23 It's not for us to outline why Mr. Thomas may need
24 counsel. I want to point out, however, that there is more than
25 just the suggestion that was attached to Mr. Dignan's remark;

1 that there is a civil penalty procedure in the NRC regulations
2 and statutes which -- attendant to people who provide, as the
3 words go, false material information.

4 So let's go back to the problem here. Mr. Thomas
5 wishes to -- Mr. Thomas is, incidentally, would you convey to
6 him that he is under the Board's direction to preserve those
7 notes, Mr. Flynn?

8 MR. FLYNN: Yes, Your Honor.

9 JUDGE SMITH: And we will, before we order them
10 produced, we will order them produced now, but give Mr. Thomas
11 an opportunity to consult counsel before he produces them.

12 Is that satisfactory?

13 MR. FLYNN: Yes, Your Honor.

14 JUDGE SMITH: If Mr. Thomas would like to have a
15 subpoena or other evidence of compulsory process, we'll be
16 happy to oblige.

17 MR. FLYNN: Yes, I think that's helpful.

18 JUDGE SMITH: All right.

19 Now we have the problem, do we need subpoenas to
20 produce the people we've designated. Do we need them or not?

21 If you'd like to have them, we'll issue them.

22 Can you accept them for them, Mr. Flynn, if you want
23 them?

24 MR. FLYNN: Yes, I can accept them, Your Honor. I
25 don't believe they'll be necessary; if --

1 JUDGE SMITH: Well, if --

2 MR. FLYNN: -- advised otherwise, I will get back to
3 you immediately.

4 JUDGE SMITH: All right.

5 And you, Mr. Turk, do you need anything from us?

6 MR. TURK: No, Your Honor.

7 JUDGE SMITH: All right. We're assuming that
8 Mr. Thomas will make a voluntary appearance unless we're
9 informed otherwise.

10 Mr. Flynn?

11 MR. FLYNN: Well, I don't know of that, Your Honor.

12 JUDGE SMITH: But today that's our understanding,
13 unless you tell us otherwise.

14 MR. FLYNN: Very well.

15 MR. TRAFICONTE: Your Honor, might I just come back a
16 moment to documents, and just for clarification -- it's John
17 Traficonte in Boston -- did Mr. Flynn state that the only
18 documents that we have requested that have not been produced
19 fall into the category of an agenda for the January 19 meeting
20 and perhaps a list of talking items? Is that what I heard him
21 say?

22 MR. FLYNN: Yes, John, that is what I said, and
23 that's consistent with our responses to your requests for
24 production that were inherent in the notice of depositions.

25 MS. WEISS: So it's your representation that these

1 are the only two documents responsive to those requests that
2 you haven't already made available?

3 MR. FLYNN: Other than Mr. Thomas's notes.

4 MR. TRAFICONTE: Right, okay.

5 MR. FLYNN: Yes, that's my representation.

6 MR. TRAFICONTE: Well, just so everyone's clear, we
7 understand our requests to catch other notes drafted by other
8 participants, for example. So then I take your representation
9 to be that no other participant at that meeting has notes,
10 which obviously is possible. I just want to make sure everyone
11 understands it.

12 MR. TURK: John, let me note that I will inquire of
13 the NRC attendants, whether they have notes, and I will produce
14 them if they do.

15 MR. TRAFICONTE: All right.

16 MR. FLYNN: My recollection on that point is not
17 clear. I'll have to go back and check.

18 MR. TRAFICONTE: Okay. I -- it was brought to mind
19 by the subject of Mr. Thomas's notes, and of course we intended
20 to catch these equivalent type of notes from all participants.

21 MR. FLYNN: I will check on that.

22 JUDGE SMITH: I -- we on our own -- well, as I
23 understand that not foreclosing the need for further witnesses,
24 everyone's happy with the slate that we've given, and that you
25 choose Krimm over Vickers, which we agree.

1 MR. TRAFICONTE: Yes. Yes, Your Honor.

2 JUDGE SMITH: All right.

3 MS. WEISS: Since we're on that subject, I haven't
4 thought about that tradeoff until -- I mean, I agree that Krimm
5 would be preferable to Vickers, but it's my recollection of the
6 depositions that Mr. Wingo played perhaps a greater role than
7 Mr. Krimm. I think that Wingo is Krimm's -- works for Krimm in
8 headquarters. And my recollection of the depositions was that
9 Wingo was the person who informed Thomas that there was a
10 problem with the position that he'd taken, whether it could be
11 defended technically.

12 And I believe I also recall that Wingo was the first
13 person who informed him of that, and whenever there was any
14 discussion over whether Thomas's position was the best
15 technical position, that Mr. Wingo frequently figured in those.

16 And so I know my purpose is not to quarrel with it,
17 but just to alert the Board that it's my feeling that Wingo is
18 probably a fairly key person.

19 JUDGE SMITH: Well, Ms. Weiss, that perhaps might be
20 the case. I'm looking at the application for subpoenas,
21 however, and that aspect of Mr. Wingo's role was not set out
22 there. So we didn't have an opportunity to address that point.

23 I'm looking at Page 9, and it says that he attended a
24 January 5, '88, meeting in which Mr. McLaughlin stated that the
25 testimony would have to be changed. And that was quoting

1 McLaughlin, apparently. What was needed was the best reasonable
2 dose savings considering the nature of the site.

3 So we only had Wingo down here as a potentially
4 cumulative witness.

5 MS. WEISS: Yes, I understand that. But, and of
6 course, I'm really working off my recollection of what I looked
7 through when I did the motion for directed certification. But
8 it is my feeling that Wingo had a substantial role in the
9 debates over the development of the so-called technical
10 position, moving off of one, moving onto another, to the extent
11 that the so-called technical position is defensible.

12 JUDGE SMITH: How can we handle this? How can we
13 entertain --

14 MS. WEISS: He could come on as a panel with Krimm,
15 the way you had the McLaughlin and Peterson together.

16 MR. TRAFICONTE: Well, I didn't understand, Your
17 Honor, that you were having McLaughlin and Peterson together.
18 I hadn't understood that any of these individuals were going to
19 appear in panel form.

20 JUDGE SMITH: That was not our intent.

21 MS. WEISS: Okay, I'm sorry, I misunderstood.

22 MR. FLYNN: That would be our preference, however.

23 JUDGE SMITH: Well, in fact in this instance we may
24 even entertain a motion for separation of witnesses. We don't
25 know. I don't know.

1 MR. TURK: Your Honor, I don't know if you intended
2 it, but I assume that Lazarus and Bores would appear together.

3 JUDGE SMITH: Yes, that was our intention, but we
4 hadn't really thought about the problem particularly. They
5 seem to be rather parallel; they were at the same meeting.

6 MR. TURK: Yes. Bores has more in his memo. He lays
7 out the history of the evolution of the position, whereas
8 Lazarus merely recounts what happened at the meeting of July.
9 Bores does that as well, but Bores does go into greater
10 history.

11 JUDGE SMITH: Generally in NRC proceedings, a
12 separation of witnesses is disfavored, and it would have to be
13 remarkably strong circumstances to justify it, but we don't
14 rule it out of hand, on a particular showing.

15 MS. WEISS: Well, they have not been sitting in on
16 each other's depositions, and we made that decision fairly
17 early on, that we wanted to take each person at a time. And to
18 the extent that this really is, to a large degree, discovery, I
19 think that rule's probably the better one.

20 JUDGE SMITH: Well, we'd take it into account in
21 arguments. That's a relevant point, Ms. Weiss.

22 MR. FLYNN: Speaking of discovery, I would like to
23 point out that Mr. Cumming was deposed over two days. At the
24 end of his deposition I made a large point of asking all the
25 intervenors if they had additional questions, and they hadn't.

1 If he had been asked, he would have testified about
2 the January 19th meeting. There's been some suggestion in
3 today's record that there was a decision made not to disclose
4 that, and we want to put that to rest.

5 We will even, right now, agree to reopen
6 Mr. Cumming's deposition before the hearings in Concord so that
7 the Intervenors may inquire of him about that meeting.

8 JUDGE SMITH: Well, Mr. Flynn, you bring to mind an
9 important point, and that is FEMA is not foreclosed from
10 addressing the problems that we've raised in their own way, by
11 a production of additional witnesses, or whatever you may wish
12 to do.

13 MR. FLYNN: But that's something that could
14 productively be explored outside of the context of this
15 conference call, and I will take it on myself to do that.

16 JUDGE SMITH: Okay.

17 So we will defer for now the Wingo, subject to you
18 renewing it, Ms. Weiss.

19 And I think that concludes all the business we have
20 this afternoon -- well, wait a minute.

21 MR. TRAFICONTE: Just, Your Honor, if we could have a
22 schedule for what the Board intends for next week, and then how
23 this actually would evolve. That would be tremendously helpful
24 for this office.

25 JUDGE SMITH: Well, before you joined, I believe we'd

1 finish with the panel that was testifying last week, and then
2 with that other witness, Eckert. And then, see, and this
3 problem comes up quite a bit, that we're asked what we -- what
4 our plans for the schedule is, and we always throw it back to
5 the parties.

6 MR. TRAFICONTE: Well, no, I appreciate that. I
7 meant a schedule for the FEMA testimony that we've just been
8 discussing for the last hour. Is that --

9 JUDGE SMITH: Were you present when we gave the
10 sequence?

11 MR. TRAFICONTE: Well, I was, but I - are we talking
12 about a third week that's as yet unscheduled, that --

13 JUDGE SMITH: I don't know how we can avoid a third
14 week.

15 MR. TRAFICONTE: Well, are we imagining at the end of
16 this coming week we would have Bores and Lazarus, and then
17 whoever follows? Is that going to be at the end of this coming
18 week?

19 JUDGE SMITH: Well, see, we don't know. We don't
20 know how much time you're going to consume by the panel that's
21 already testifying.

22 The first order of business after -- yes, it will be
23 at the end of this week.

24 MR. TRAFICONTE: I see.

25 JUDGE SMITH: Yes, that's correct. Or the middle, or

1 whenever, but --

2 MR. TRAFICONTE: Whenever. The point is do we
3 immediately enter the sequence of witnesses that we're --

4 JUDGE SMITH: Yes.

5 MR. TRAFICONTE: -- discussing?

6 JUDGE SMITH: Right.

7 MS. WEISS: Could we inquire of the other parties how
8 long we can expect the cross-examination to be on the Mass. AG
9 witnesses?

10 MR. TURK: I have a two-page cross-examination plan,
11 Ellyn. Usually I have only one.

12 MS. WEISS: So that means what, an hour?

13 MR. TURK: Double my usual time; make it two to
14 three. Maybe more, I -- you know, I don't claim to be the most
15 skilled examiner.

16 MS. WEISS: Well, I don't have the gong, so --

17 MR. FLYNN: I have no plans to cross-examine the
18 Mass. AG's witnesses.

19 JUDGE SMITH: Mr. Lewald will hold the key to it, I -
20 - go ahead.

21 MR. DIGNAN: This is Tom Dignan. Mr. Lewald is --
22 he's out of the office today. I'd just as soon not be held to
23 this, but my understanding last time I talked to him was he
24 would be through with the panel by three hours at the most.

25 MS. WEISS: Well, that means we don't have to -- we

1 won't be seeing anybody --

2 MR. DIGNAN: Well, I say don't hold me to that. I
3 don't have him here, but I -- this was a conversation a while
4 ago, and it was before Renn, and I don't know how much of the
5 Renn cross-examination did away with -- cut into that time.

6 MS. WEISS: Well, it sounds reasonable to imagine
7 that Bores and Lazarus won't get on until Tuesday. That seems
8 like a reasonable --

9 JUDGE SMITH: Yes, I think that -- you can count on
10 that. Yes, if Tuesday, but more likely Wednesday.

11 MR. TRAFICONTE: Yes.

12 JUDGE SMITH: All right.

13 MR. TURK: Your Honor, there's one other matter I'd
14 like to raise. Mr. Oleskey, I believe, has left.

15 MR. TRAFICONTE: Yes, he has, Sherwin.

16 MR. TURK: That Your Honor may recall that last
17 December when the Staff agreed to produce documents to the
18 Mass. AG, we asked for some reciprocity. At that time the
19 Board did grant us some discovery against Mass. AG, and we were
20 given a packet of documents concerning communications between
21 Mass. AG -- I'm sorry, between the Commonwealth and FEMA, among
22 other things.

23 At that time Mr. Oleskey withheld under a claim of
24 attorney work product notes of communications between his
25 office and Mr. Thomas's, and possibly others; but I believe

1 with Mr. Thomas entirely or mostly.

2 I'd like to pursue my request for those documents,
3 and I'm quite willing to have them go to the Board first for in
4 camera examination to see if the claim of attorney work product
5 can be sustained.

6 MR. TRAFICONTE: Well, I think --

7 JUDGE SMITH: My memory was that wasn't reciprocity.
8 All these requests had to stand on their own merits, but I do
9 recall something along that line.

10 Mr. Traficonte?

11 MR. TRAFICONTE: Well, I personally had reviewed
12 those documents, and I would be certainly prepared to argue
13 again -- I believe we -- Mr. Oleskey argued this once -- but
14 I'd be more than willing to argue again on why they are classic
15 work product. They are the result of investigations done by
16 attorneys or those working for attorneys, seeking information
17 from parties or expert -- however you want to characterize
18 FEMA, seeking information about the position FEMA had taken in
19 this proceeding.

20 They are work product. I don't think there's any
21 dispute on that. I think the problem is, Mr. Turk, I haven't
22 heard why the work product privilege that attaches to these
23 documents need be overcome in this situation.

24 MR. DIGNAN: Your Honor, this is Tom Dignan. May I
25 offer one observation?

1 I'm looking at the letter that was sent to Mr. Turk,
2 and the way it was phrased was these documents include two sets
3 of notes made by counsel and a Massachusetts Attorney General
4 paralegal in the course of trial preparation in this case.
5 They are withheld as work product and reflect oral statements
6 made by Ed Thomas of FEMA to us in the course of interviews
7 with him.

8 And they go on to some other documents they're
9 withholding that don't involve Mr. Thomas.

10 We naturally believe our mental processes in
11 evaluating these oral communications, as discussed inter alia
12 in Upjohn vs. United States...

13 The question of whether the work product privilege
14 must fall is almost parallel, I suggest, to whether the
15 executive privilege falls. The issue before the house when
16 Mr. Thomas is to take the stand, it seems to me, is going to be
17 the credibility of Mr. Thomas. And it would seem to me that
18 while redaction may well be in order on a pure attorney's
19 impression, any oral statements he made to an official of the
20 Commonwealth of Massachusetts about these events is highly
21 relevant, and in this setting I think the work product
22 privilege should fall.

23 It is no different than a witness statement at the --
24 given to an attorney in an accident case, and the usual rule
25 is that if you can't show that you can get the information

1 you can't get the information yourself, the privilege holds.
2 However -- against trial preparation material, things of that
3 nature.

4 However, here when you're going at the question of
5 credibility of a witness, the most important thing there is
6 inconsistent statements, and I suggest the privilege, assuming
7 it exists, between Mr. Thomas and the Commonwealth, should
8 fall. It's definitely not an attorney-client privilege,
9 obviously, and it's simply an attorney work product privilege,
10 and I don't understand the request to have been, and certainly
11 to the extent I joined it, for any mental impressions of
12 attorneys. And if anything has to be redacted, it can be, but
13 Mr. Thomas's statements on these interviews, I think, are
14 relevant.

15 And they're relevant for another purpose in that they
16 will disclose just how many interviews and how closely
17 Mr. Thomas has been working with the Commonwealth of
18 Massachusetts.

19 MR. TRAFICONTE: Well, I don't appreciate the meaning
20 behind working with, Your Honor, but if I could respond to the
21 substantive argument that Mr. Dignan just made -- can you hold
22 one second? We're just getting a buzzing on our phone.

23 JUDGE SMITH: You certainly are.

24 MR. TRAFICONTE: If I could respond to the
25 substantive argument that Mr. Dignan just made, analogizing it

1 to a witness interview in an accident case is not a bad
2 analogy, and if the witness were available, as Mr. Thomas
3 certainly is, and he'll be there and you can ask any questions
4 of him, as we will, that you want to, the witness is not
5 unavailable and you can't make the showing that you need our
6 work product documents.

7 If I understand the thrust of Mr. Dignan's argument,
8 then anything that Mr. Thomas has ever said to anyone
9 theoretically should be discoverable because it runs to his
10 credibility. And that's far too broad a brush here, it seems
11 to me.

12 He'll be on the stand. Any questions that we put to
13 him Mr. Dignan or Mr. Turk can put to him.

14 JUDGE SMITH: That's not the point. The traditional
15 rule is pretty much as Mr. Dignan stated it, that it's the
16 mental impressions of counsel that is to be protected by the
17 work product privilege. There's no privilege, Mr. Thomas did
18 not -- has no privilege of his own, absolutely none. His
19 credibility's certainly going to be in issue.

20 It seems to me that at least a redacted version
21 should be -- I mean, we'll look at them and agree that mental
22 impressions that Massachusetts AG may have incorporated in
23 those notes should be eliminated, but it seems to me that they
24 should be produced. They're not available through any other
25 source.

1 MR. TRAFICONTE: That's my point, Your Honor. They
2 are -- the answers to questions provided to us by Mr. Thomas
3 are available directly from Mr. Thomas as he sits on the
4 witness stand.

5 JUDGE SMITH: Assuming he gives the same answers.

6 MR. TURK: Yes, and, Your Honor, there's another
7 problem. I tried to get at some of that in my deposition
8 cross-examination of Mr. Thomas. Now, I was limited to about
9 20 or 25 minutes, so when I started trying to get into
10 communications he's had with the Mass. AG's office, I found a
11 round of objections from Ms. Weiss and others, so I had to cut
12 off that line of questioning.

13 MS. WEISS: That's not true. You asked --

14 MR. TURK: -- that's true.

15 MS. WEISS: You asked him how many times he'd met
16 with people, and he answered you. And that's all on the
17 record, and presumably he'll answer you again.

18 MR. TURK: I don't want to get into a deposition
19 transcript, but in any event --

20 MS. WEISS: You're the one who brought it up.

21 MR. TRAFICONTE: You just cited it, Sherwin. If you
22 don't want to get into it, don't cite it.

23 MS. WEISS: Those were your first questions and he
24 answered you.

25 MR. TURK: The notes that Mass. AG will have of any

1 meetings between themselves or any communications between
2 themselves and Mr. Thomas can give me a lot more information
3 than I'm likely to get in cross-examining Mr. Thomas for the
4 first time on the stand.

5 MS. WEISS: Well, that's a different -- now, that's a
6 different thing. It's not cross-examining him for the first
7 time; you had him at the depositions.

8 I'm not arguing about these notes, I don't know
9 what's in them, but I just want that when you make
10 representation about what happened at the deposition that you
11 make an accurate one.

12 MR. TURK: I will be accurate.

13 JUDGE SMITH: All right, never mind.

14 It certainly seems to me that if the parties
15 examining Mr. Thomas possess the notes of his testimony -- I
16 mean, his interviews with the Mass. AG, it's going to enhance
17 the quality of Mr. Thomas's testimony. The problem that I see
18 with it is to what extent are the mental impressions of the
19 legal counsel in there. We can look at that.

20 We also have the problem of how accurate are those
21 notes, and that always can be addressed, put to Mr. Thomas on
22 cross-examination, if necessary.

23 I'd hate to have somebody depend upon notes I made;
24 I'm a very poor notetaker. But that's a problem; that's a
25 problem of reliability. That doesn't foreclose producing them,

1 though.

2 I think they should be produced, Mr. Traficonte.

3 MR. TRAFICONTE: Well, if that's the Board's desire,
4 we will produce them to the Board.

5 JUDGE SMITH: With the mental impressions
6 highlighted, you know, so that we can see what you believe to
7 be mental impressions.

8 MR. TRAFICONTE: Yes.

9 JUDGE SMITH: Yes, they should be produced.
10 Anything further this evening?

11 MR. TURK: Your Honor, Sherwin Turk.

12 I'm looking at the deposition transcript of
13 Mr. Thomas, and I owe an apology to Ms. Weiss. Her objection
14 came in when I was asking about discussions within FEMA Region
15 1, not when I was asking about communications with Intervenors.

16 So I owe her that apology, and I make that.

17 JUDGE SMITH: Okay. Anything further?

18 Nothing further this evening?

19 Does anybody anticipate now a need for another
20 conference this week?

21 MR. TRAFICONTE: No, Your Honor, but again I want to
22 come back, I'm sorry I harp on the schedule, but did the Board
23 indicate when the third week or the next week after the coming
24 one would be?

25 JUDGE SMITH: No, we -- yes, we did, in that it's not

1 going to be after June 25th, or June 27th, when FEMA would have
2 it.

3 MR. TRAFICONTE: Right. It would follow immediately
4 upon that with a one-week break, as normal, or would --

5 JUDGE SMITH: Well --

6 MR. TRAFICONTE: Sure.

7 JUDGE SMITH: -- I think what we'd better do is
8 between now and then look at the calendar and try to be perhaps
9 a little more versatile this time. But as soon as possible
10 after the next week. Perhaps the week of the 23rd, or perhaps
11 a few days of that week, or whatever. Or the days following
12 Memorial Day holiday.

13 MS. WEISS: If you're looking at that, I just -- we
14 have just had the oral argument in the appeal to the NRC rule
15 change scheduled in the First Circuit on June the 8th, and I'm
16 involved in that, and I know that there are other people in
17 this case that'll be. I will be making oral argument in that --

18 MR. TRAFICONTE: I'm sorry, what day was that on,
19 June the 8th?

20 MS. WEISS: June the 8th.

21 JUDGE SMITH: If we can -- I think we should plan on
22 having all or parts of the week of the 23rd and the week of the
23 31st available to clean up this matter.

24 Anything further?

25 MR. DIGNAN: Yes, Your Honor, one other thing, and I

1 don't ask for any ruling now, but we've been talking about this
2 coming testimony as in part discovery, which I fully
3 understand. However, I do assume that the rules of evidence
4 that will apply will not be the discovery rules, but rather
5 will be the usual rules of material, competent, not outlandish
6 hearsay, and so forth.

7 As the Board is aware, one of the difficulties I had
8 with the whole deposition procedure was some third- and fourth-
9 hand hearsay going out to other quarters as though it was
10 firsthand statements. It is my understanding that even though
11 the scope of examination will be broader than the Board would
12 normally allow, that the usual rules of evidence will be in
13 effect, as would be in any other hearing.

14 JUDGE SMITH: We -- yes. As a matter of fact, to
15 call it combination testimony and discovery is somewhat of a
16 misnomer. We have no authority to receive or to depend upon
17 anything except reliable, probative, and substantial evidence.
18 And we should better have called it testimony with the
19 understanding that there has been no discovery, with the
20 recognition that there has been no discovery.

21 MS. WEISS: Your Honor, I must say that was not my
22 understanding of the ruling, and let me -- I -- it's my
23 expectation that you're going to deal with this on a case-by-
24 case basis. But let me just remark that had we been limited to
25 that kind of a standard, we would never have developed the

1 information that we now have.

2 JUDGE SMITH: Well, you have a very sharp
3 understanding of that standard. Maybe you could explain it to
4 me.

5 MS. WEISS: Well, what Mr. Dignan was suggesting was
6 that, for example, testimony that somebody was informed about
7 what happened at a meeting at which they were not present would
8 be objectionable on the grounds that that might not be
9 sufficiently reliable to meet the admissibility test under the
10 rules of admissible evidence, but that would clearly be
11 permissible discovery. And, you know, there's a big difference
12 when the goal is searching for admissible evidence.

13 And, you know, had we been limited to the tightest
14 standard on discovery, we would never have developed the
15 information we now have about that January meeting. So we, you
16 know, it was my understanding that this would be depositions
17 presided over by the Board.

18 JUDGE SMITH: No. No, no. It's not -- that was one
19 of our -- this -- the evidence adduced at the forthcoming
20 hearings will be available for proposed findings, but we will
21 allow a much greater reach in view of the fact that it must
22 also incorporate somewhat the purposes of discovery.

23 There's no way that we can relax the rule that
24 evidence be reliable, probative, and substantial.

25 MS. WEISS: Well, that's a case that, you know, it's

1 not discovery.

2 MR. TURK: Your Honor, I would note in response to
3 Ms. Weiss that they've asked for witnesses with firsthand
4 knowledge, and that's what they're getting. So I don't see
5 that they're going to be in a position where they'd want to
6 bring out all the hearsay. They've had the hearsay from
7 Mr. Thomas, and now they're being given the people with direct
8 knowledge --

9 MS. WEISS: Well, I believe that'll be true, but we
10 don't know for sure. I mean, we've gotten a little peek under
11 the blanket, and we don't know for sure whether this is the
12 full extent of, you know, what's going on.

13 MR. TURK: I mean, so if a witness can't give you an
14 answer based on personal knowledge, you can ask them who has
15 the knowledge and go after that person.

16 MS. WEISS: Fine.

17 JUDGE SMITH: Well, let's say that we will do what
18 due process requires, as we understand the requirement.

19 Anything further?

20 Nothing further this evening?

21 All right. Then we're adjourned.

22 (Whereupon, at 5:14 p.m., the hearing in the above-
23 entitled matter was concluded.)

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CERTIFICATE

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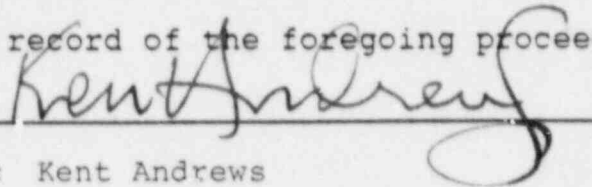
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:
Name: PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.,
(SEABROOK STATION, UNITS 1 AND 2)

Docket Number: 50-443-OL, 50-444-OL

Place: Bethesda, Maryland

Date: May 10, 1988

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken stenographically by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

/s/ 

(Signature typed): Kent Andrews

Official Reporter

Heritage Reporting Corporation