

ORIGINAL

UNITED STATES NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of:)

EVIDENTIARY HEARING)

PUBLIC SERVICE COMPANY OF)

NEW HAMPSHIRE, et al)

(SEABROOK STATION, UNITS 1 AND 2))

) DOCKET: 50-443-OL
) 50-444-OL
) OFFSITE EMERGENCY
) PLANNING

Pages: 11781 through 12025

Place: Concord, New Hampshire

Date: May 19, 1988

TR. 01

8/1

HERITAGE REPORTING CORPORATION

Official Reporters

1226 L Street, N.W., Suite 600

Washington, D.C. 20005

(202) 628-4888

8805260327 880519
PDR ADOCK 05000443
T PDR

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

Tax50Tt1

3 In the Matter of:)
 4)
 5 PUBLIC SERVICE COMPANY OF) Docket Nos.
 NEW HAMPSHIRE, et al.,) 50-443-OL
 6) 50-444-OL
 (SEABROOK STATION, UNITS 1 AND 2) OFF-SITE EMERGENCY
 7) PLANNING
 8 EVIDENTIARY HEARING)

9
 10 Thursday,
 May 19, 1988

11 Room 210
 12 Legislative Office Building
 Concord, New Hampshire

13 The above-entitled matter came on for hearing,
 14 pursuant to notice, at 9:06 a.m.

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

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

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

22
 23
 24
 25

1 APPEARANCES:

2 For the Applicant:

3 THOMAS G. DIGNAN, JR. ESQ.
4 KATHRYN A. SELLECK, ESQ.
5 GEORGE LEWALD, ESQ.
6 Ropes & Gray
7 225 Franklin Street
8 Boston, Massachusetts 02110

9 For the NRC Staff:

10 SHERWIN E. TURK, ESQ.
11 Office of General Counsel
12 U. S. Nuclear Regulatory Commission
13 Washington, D.C. 20555

14 For the Federal Emergency Management Agency:

15 H. JOSEPH FLYNN, ESQ.
16 Federal Emergency Management Agency
17 500 C Street, S.W.
18 Washington, D.C. 20472

19 For the State of New Hampshire:

20 GEOFFREY M. HUNTINGTON, ESQ.
21 State of New Hampshire
22 25 Capitol Street
23 Concord, New Hampshire 03301

24 For the Commonwealth of Massachusetts:

25 CAROL SNEIDER, ASST. ATTY. GEN.
STEPHEN OLESKEY, ESQ.
Commonwealth of Massachusetts
One Ashburton Place, 19th Floor
Boston, Massachusetts 02108

For the New England Coalition against Nuclear
Pollution:

ELLYN R. WEISS, ESQ.
Harmon & Weiss
2001 S Street, N.W.
Washington, D.C. 20009

1 APPEARANCES: (Continued)

2 For the Seacoast Anti-Pollution League:

3 ROBERT BACKUS, ESQ.
4 Backus, Meyer & Solomon
5 116 Lowell Street
6 Manchester, New Hampshire 03105

7 JANE DOUGHTY, DIRECTOR
8 Seacoast Anti-Pollution League
9 5 Market Street
10 Portsmouth, New Hampshire 03801

11 For the Town of Hampton:

12 MATTHEW T. BROCK, ESQ.
13 Shaines & McEachern
14 25 Maplewood Avenue
15 P.O. Box 360
16 Portsmouth, New Hampshire 03801

17 For the Town of Kensington:

18 SANDRA FOWLER MITCHELL, EMERGENCY PLANNING DIR.
19 Town Hall
20 Kensington, New Hampshire

21 For the Towns of Hampton Falls and North
22 Hampton and South Hampton:

23 ROBERT A. BACKUS, ESQ.
24 Backus, Meyer & Solomon
25 116 Lowell Street
Manchester, New Hampshire 03105

For the Town of Amesbury:

(No Appearances)

21

22

23

24

25

I N D E X

1		
2	<u>WITNESSES</u>	<u>DIRECT CROSS REDIRECT RECROSS EXAM</u>
3	<u>Panel:</u>	
4	ROBERT BORES	
5	WILLIAM LAZARUS	
6	by Mr. Turk	11862
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

I N D E X (Continued)

	<u>EXHIBITS:</u>	<u>IDENT</u>	<u>REC 'D</u>	<u>REJ</u>	<u>DESCRIPTION</u>
1					
2					
3	<u>NRC Staff:</u>				
4	No. 4	11832	11970	11832	1 page, memo, Schumacher to Turk, 15 Oct. '87
5					
6	No. 5	11838	11841		Multipage, memo, Bores to Thomas, 18 February '87
7					
8	No. 6	11894	11894		Multipage, memo, Bores to Thomas, 4 June '87
9					
10					
11					
12					
13					
14					
15					
16					
17					
18					
19					
20					
21					
22					
23					
24					
25					

P R O C E E D I N G S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDGE SMITH: Good morning.

Is there any preliminary business?

MR. BACKUS: Yes, Your Honor.

I would like to, if I could, return to the issue of the motion that we filed yesterday, to say that we are as of today going to recharacterize that motion as one directed to the discretion of the Board. And I would like to address that if I could.

JUDGE SMITH: You mean it's going to -- you remove from it the quality that it is mandatory for us to grant it if the law and facts require it?

MR. BACKUS: Well, perhaps I'd better make the statement that I wanted to make. And if there are questions that arise, I'll try and answer them.

At this time I would like to revisit the characterization of the renewed motion for recusal in view of yesterday afternoon's discussion of the matter. There are two clear procedural concerns that prompt this recharacterization.

First, there is the concern that if the adverse parties insist on a right to normal response times, and even briefing as Mr. Dignan has suggested he may, the motion may be mooted merely by the passage of time for those responses, although we submit it was promptly filed.

We have in mind that the Board has unequivocally

1 stated that whatever else happens these hearings are going to
2 go forward on a schedule the Board has outlined. This is a
3 concern the Board itself raised yesterday afternoon.

4 The second procedural problem, if this motion is
5 characterized as a matter of law, is that there is apparently
6 then a need for automatic referral to a higher tribunal, the
7 Appeal Board, when that Board has now twice indicated its
8 disinclination to entertain interlocutory appeals in this
9 proceeding; once in regard to the attempted interlocutory
10 appeal by directed certification on the Sholley-Beyea ruling;
11 and more recently on the Intervenors' motion for directed
12 certification on discovery from FEMA.

13 JUDGE SMITH: And isn't it also true three separate
14 disqualification motions with respect to Judge Hoyt?

15 JUDGE HARBOUR: Two of which were the subject of
16 formal decisions, and if I recall correctly, the third one was
17 dismissed for timeliness grounds.

18 JUDGE SMITH: Go on with your statement.

19 MR. BACKUS: As a result of these two procedural
20 problems, the Intervenors have decided to present the joint
21 recusal motion as one seeking recusal not as a matter of law
22 but as a matter entrusted in the first instance to the exercise
23 of this Board's reasonable discretion. This means we are not
24 presenting the motion in such a way as to compel immediate
25 review of the Board's decision on the motion.

1 Let me just add that there have been numerous
2 accusations that motions such as this one are filed for the
3 purpose of delay, and we specifically disavow that. We would
4 note it was the Intervenors who asked for the FEMA witnesses to
5 be brought here, the senior management witnesses, at a earlier
6 time than FEMA itself wanted.

7 However, in so stating, we are not in any way
8 indicating that we think the motion is not meritorious. We
9 affirm our belief that it is indeed meritorious in our
10 judgment, and in order to move this proceeding along and to
11 have a chance to have the Board have full consideration of this
12 motion, we would respectfully request leave to make our
13 arguments in support of the motion at this time before we go
14 forward with the substantive testimony from Dr. Bores and Mr.
15 Lazarus since the motion, we believe, would impact on whether
16 the Board should sit on that testimony as well as that of Mr.
17 Thomas when he appears.

18 And if I can do that, I would now like to make a
19 brief argument --

20 JUDGE SMITH: All right, let me pause for a moment,
21 interrupt you for a moment if this is a good place.

22 You have accurately captured what the Board's -- what
23 I said last night; that the way things are going the matter
24 would be mooted if we don't take arguments, act upon it, and
25 under no event would we delay the hearing while this is

1 pending.

2 However, working here away from the office without
3 any books or anything is somewhat of a handicap. However,
4 since then I have recalled that it is incumbent upon the
5 judicial officer to whom a motion for recusal is addressed to
6 rule on it immediately before the subject matter comes up.

7 So, if in the first instance we determine that the
8 motion is not frivolous, we will rule on it on the merits. And
9 if the law requires, we would recuse ourselves. That does not,
10 however, take care of the problem about the Appeal Board. I
11 don't know what to tell you about that.

12 So I do want to assure you that if you want us to
13 consider it on the legal merits, that we will do it. We would
14 have -- my plan would be to issue a decision, written decision
15 Monday.

16 MR. BACKUS: I would -- all right, Your Honor.

17 As I say, we have chosen to recharacterize the motion
18 as one committed in the first instance to the reasonable
19 exercise of discretion on this Board, not as we requested
20 it --

21 JUDGE SMITH: Well, do you want to consult -- I mean
22 I just -- do you understand what I'm saying; that the Board is
23 readdressing its statement that the matter will be mooted in
24 the normal course of events, and that we will allow it to be
25 mooted because the fact is, if the motion is made in the

1 correct form, we will not allow it to be mooted before we
2 address it?

3 MR. BACKUS: Okay, I understand.

4 Just a second.

5 JUDGE SMITH: I think that that is the requirement of
6 law on that.

7 Does anybody have the Rules of Practice?

8 MR. TURK: Yes, Your Honor.

9 JUDGE SMITH: Do you have them? Could I borrow --
10 (Counsel confer.)

11 MR. BACKUS: Your Honor, we understand the point
12 you're making. We still think we have a practical problem
13 given the necessary, as I understand it, involvement of the
14 Appeal Board if we do not revise our characterization of the
15 motion. And in light of that, we are, as you inquired
16 yesterday, contrary to what our statements were yesterday, we
17 are now arguing this motion on the basis that it's entrusted to
18 the reasonable exercise of this Board's discretion and not
19 asking that it be treated as a matter requiring appeal,
20 interlocutory appeal.

21 JUDGE SMITH: Now, are you gentlemen prepared to
22 argue it?

23 Mr. Dignan.

24 MR. DIGMAN: Yes, Your Honor. I do wish to reply,
25 however, to a statement that was made.

1 I, at least, have made no allegations, and I have
2 heard none from any other counsel that the motion was made for
3 delay. I may believe it was made for other extraneous reasons,
4 but I have not alleged delay.

5 When it comes to my attention that the press had it
6 before you did or I did, I do start thinking there were other
7 reasons.

8 MR. BACKUS: The press, as far as I know, did not
9 have it before the parties and the Board. I made every effort
10 to see that that was not the case. But this does, I suggest,
11 not present anything the Board needs to deal with and I would
12 like, if I may, to go forward and say what I want to say in
13 support of the motion at this time.

14 We do so because, as I mentioned, we believe the
15 arguments should be made now before the Board undertakes to
16 consider the substantive testimony of the NRC witnesses.

17 First, let me just turn basically to the factual
18 basis for the motion very briefly, and then discuss how I think
19 the law should be applied to those facts.

20 The factual basis for the motion, we believe, is set
21 forth in the motion itself and need not be much further
22 elaborated at this point. I would add that we believe that the
23 facts here are indeed unique. I know of no other case, whether
24 NRC or federal civil trial proceeding in which a factfinder has
25 chosen to characterize the witness's testimony as this Board

1 did on the telephone conference on May 10th as raising "large
2 concerns about forthrightness and candor" on the basis of prior
3 sworn statements of that witness when in fact those statements
4 were not accurately recorded and/or reported by the factfinder.

5 This is at least the case when an accurate version of
6 that testimony was, as in this matter, available through the
7 fact that we have daily verbatim transcript.

8 Now since the Board made those statements on May
9 10th, it has already acknowledged at Pages 11241 and -42 of the
10 May 16th Monday transcript that its characterization of Mr.
11 Thomas's testimony in January 13th of this year was in fact
12 incorrect.

13 The Board has gone further, and now says its
14 statements concerning Mr. Thomas were not intended as a
15 "warning", and that its comments about his right to counsel
16 were intended to afford him a right to confront by cross-
17 examination the NRC witnesses. This was on Tuesday, May 17th,
18 at Page 11359 of the transcript.

19 The Board has further said its statements about
20 counsel "was not made as a pejorative judgment on Mr. Thomas."
21 That was at the same place in the transcript over to Page
22 11360.

23 Now we submit that these statements that the Board's
24 judgments on Mr. Thomas's testimony were neither a warning nor
25 pejorative cannot be squared with the Board's initial May 10th

1 assertion that it had suggested counsel because "there is a
2 civil penalty procedure in the NRC regulations and statutes
3 which attendant to people who provide, as the words go, false
4 material information." That was on the May 10th transcript at
5 Page 11204.

6 So we suggest the Board's own statements here in this
7 record on Monday and Tuesday of this week reflect a recognition
8 that the Board's May 10th characterization of Mr. Thomas was
9 inappropriate and perhaps even, as we contend, unjustified.

10 With this in mind, now let me turn to the case law,
11 and I want to discuss two cases -- the Houston Light & Power
12 case at 15 NRC 1363, and the TMI Restart case at 21 NRC 566.

13 First, let me note for the record that although we
14 are going to treat this in light of these cases since they are
15 binding on this Board, that we do not agree that they set forth
16 a correct legal standard for recusal. Rather, we believe the
17 correct legal standard is set forth in 28 USC Section 455(a)
18 for federal judges and magistrates, and that that section,
19 properly interpreted, requires recusal where there is an
20 objective basis for believing a factfinder or tribunal has
21 engaged in conduct which gives the appearance of personal bias
22 or prejudgment on factual issues whether or not arising
23 extrajudicially or as a part of judicial conduct.

24 We believe this standard should be the one applied,
25 but we recognize, of course, as we must, the Commission has

1 applied a different standard in the Houston case, and we would
2 therefore turn to that case.

3 In Houston, the Commission adopted a narrower
4 standard when it claimed prejudgment would only rarely be a
5 basis for disqualification unless it was extrajudicial. As to
6 this, we have two positions.

7 First, we believe the prejudgment in this case does
8 arise out of matters that should properly be characterized as
9 extrajudicial.

10 And, second, we say that even if this view is not
11 accepted, that this is indeed within the words of the Houston
12 case, an extreme case quite beyond the facts in Houston or the
13 Metropolitan Edison TMI Restart case.

14 First, we claim the prejudgment is indeed
15 extrajudicial. Our basis for so stating is the Board's
16 comments on Mr. Thomas's testimony as contrasted with the
17 apparent recollection of the July 30th RAC meeting on the part
18 of Mr. Bores and Mr. Lazarus as reflected in their memoranda
19 prepared at the request of NRC trial counsel in mid-October
20 1987, after Mr. Thomas had testified.

21 These memoranda were furnished to the Board for the
22 first time, so far as I know, with Mr. Dignan's subpoena
23 request for those witnesses dated January 6, 1988. Those
24 memoranda were not, at the time the Board saw them, a part of
25 the evidentiary record in this proceeding. Yet the Board

1 apparently formed adverse opinions related to Mr. Thomas's
2 testimony, at least in part because of them, and as I said, at
3 a time when they were not part of the evidentiary record nor
4 supported by sworn testimony by witnesses.

5 Thus, we claim that insofar as the Board relied on
6 those memoranda to make the comments it did about Mr. Thomas's
7 sworn testimony, it should be considered to have acted in an
8 extrajudicial capacity.

9 However, even if this argument is not accepted, we
10 say that Houston Lighting standard has been met in this case.
11 That case states that in order to overcome the general rule
12 that prejudgment in order to disqualify must be extrajudicial,
13 there must be a "extreme case".

14 As an example, the Commission said it must be more
15 than extra-record conduct such as "stares, glares and scowls".
16 We believe this is indeed such a case, and as previously
17 discussed, a unique one. In this case we have, I think, clear
18 prejudgment and it is not based on or supported by the record
19 as our motion points out.

20 Two things make this a unique case:

21 The first is, the Board made its statements about Mr.
22 Thomas on the basis of misstating Mr. Thomas's testimony, which
23 as I previously mentioned, was not a matter which had to be
24 guessed at. It was available through verbatim transcript.

25 Secondly, the Board had had Mr. Thomas under oath

1 twice, on October 7th and November 4th, and yet went on the
2 record on December 1st having said it had read his testimony
3 more than once, and it found no reason whatever to doubt his
4 integrity.

5 Because of these things, I think that the statements
6 made on May 10th, when Mr. Thomas had testified one additional
7 time, make this a unique case, and indeed, we believe, an
8 extreme case.

9 Now I'll turn to the Metropolitan Edison case, the
10 TMI case, TMI Restart case. In that case, I find this.

11 It is enough that the statements will be understood
12 to reflect Judge Smith's opinion based on the record, and his
13 conduct of the proceeding rather than on sources outside the
14 proceeding.

15 The distinction with that case, I submit again, is
16 the phrased "based on the record". Here the statements made
17 concerning Mr. Thomas, we believe, were not based upon, and
18 indeed were contradicted by the record.

19 So these are the reasons why we believe that this
20 case, although there is so far as I know no case exactly on
21 point, is a unique case and one which rises to the level of an
22 extreme case which justifies the filing and the granting of the
23 motion for recusal.

24 Lastly, since we have come back to characterizing
25 this as a motion directed toward the Board, reasonable

1 exercise of discretion, we would advert again to the statements
2 the Board itself has made about the need to maintain public
3 confidence in the proceedings of this Board. We certainly
4 agree that that is a very important matter. And given the
5 record references that we have made to May 10th, May 16th and
6 May 17th that the statements that the Board has made, we
7 believes that public confidence in this proceeding will be
8 furthered by the Board exercising its discretion to grant the
9 motion.

E46

10 (Continued on next page.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

47

1 JUDGE SMITH: Mr. Backus, the Board has still
2 remained somewhat uncertain as to the exact reach of your
3 motion. We think it's clear you're not asking us to step out
4 of the proceeding.

5 MR. BACKUS: That's correct.

6 JUDGE SMITH: But you're asking us not to judge Mr.
7 Thomas' -- continue to judge Mr. Thomas' credibility.

8 MR. BACKUS: That's correct.

9 JUDGE SMITH: But you ask for other relief and that
10 is where we don't know where the precise cutoff point is. I
11 mean, should we stop now and not listen to Bores and --

12 MR. BACKUS: Well, we've now said this is a matter
13 entrusted in the first instance of the discretion of the Board.
14 I believe an appropriate exercise of that discretion would be
15 to take not only Mr. Thomas, but those who the Board has chosen
16 to characterize as having significant differences with Mr.
17 Thomas and their recollection of this RAC meeting on July 30th,
18 which are the witnesses before you, and also step aside in
19 viewing their testimony so that a fact finder could view all
20 the testimony pertaining to what this Board has characterized
21 as an important issue.

22 JUDGE SMITH: How about Cumming?

23 MR. BACKUS: I would have to say, we would think that
24 that would probably apply to Cumming as well. I would say,
25 probably we would not urge you to step aside for Hock and

1 Keller.

2 But those who are dealing with the evolution of the
3 FEMA position and how it switched insofar as it pertains to the
4 credibility of Mr. Thomas or those who are in disagreement with
5 him or have been, I think that that's the reach that we are
6 asking the Board to consider recusal.

7 JUDGE SMITH: Okay.

8 Mr. Dignan?

9 MR. DIGNAN: May I inquire if anyone wishes to be
10 heard further in support of Mr. Backus before I begin?

11 JUDGE SMITH: You're representing all of the movants?

12 MR. OLESKEY: Yes, he is, Your Honor.

13 MR. FLYNN: Mr. Dignan, I don't know that what I'm
14 about to say is strictly in support of Mr. Backus' motion, but
15 it's more in support than against it, so I suppose I should be
16 heard before you.

17 Your Honor, I am not prepared at this time to argue
18 the law. I am simply not familiar and have not had an adequate
19 opportunity to research the law, so I will not address that.

20 I do wish to say that, having read the motion for
21 recusal it appears to me that the factual analysis in the
22 written motion is an accurate one.

23 MR. BACKUS: Did you say accurate -- accurate?

24 MR. FLYNN: Accurate.

25 MR. BACKUS: Thank you.

1 MR. FLYNN: The other point that I wish to bring up,
2 and bearing in mind that the motion is addressed to the
3 discretion of the Board, and I do not wish my comments to be
4 taken as compelling a certain result; I leave it to the Board
5 to decide the weight to be given to this. But I do wish to
6 comment that it appears from the transcript of May 10th that
7 the Board may have prejudged or at least challenged the
8 veracity of Mr. Cumming who is not -- who has not yet appeared
9 in this -- as a live witness in this proceeding.

10 The reason I say that is because the Board referred
11 to a statement from his prefiled testimony in which he said he
12 wished to account as accurately as possible the events leading
13 to the change in position, and the Board questioned that
14 statement at some length.

15 JUDGE SMITH: Would you restate that last point, I
16 think I missed it.

17 MR. FLYNN: The point -- I'm talking about the
18 appearance of having prejudged Mr. Cumming's credibility.

19 JUDGE SMITH: Oh, Mr. Cumming's.

20 MR. FLYNN: Mr. Cumming, right. And what I'm
21 referring to specifically is the question raised by the Board
22 about the completeness or the accuracy of his chronology which
23 appears in the prefiled testimony.

24 JUDGE SMITH: Right, I understand. When you said
25 Cumming I heard Thomas, and I just -- I don't know.

1 Who will be heard next? Mr. Dignan, Mr. Turk,
2 what's your pleasure?

3 MR. DIGNAN: I guess it would be me, tradition is the
4 staff speaks last, Your Honor.

5 Your Honor, I begin with noting the somewhat
6 absurdity of the motion. I don't know how, if you grant it, we
7 go from there. Apparently, another Board listens to certain
8 witnesses that presumably are going to give testimony as
9 integral to any initial decision that may come down.

10 I don't know if the thought is that the present
11 members of the Board will write an initial decision and ship it
12 to the other Board for an appendix. I really don't know what
13 you're going to do if you grant the motion as it's before you.

14 I've never heard of a partial recusal. You generally
15 shoot to kill, when you shoot the king, and there's no way that
16 I know you can go forward with two Boards deciding exactly the
17 same case and different parts of it. This isn't a question --
18 first of all, there's no ultimate issue as to the credibility
19 of Mr. Thomas, if that's what they're talking about. You know,
20 it might be a nice exercise to have a Board sit down and decide
21 whether Mr. Thomas is credible or not. But that doesn't --
22 nothing turns in an NRC case ultimately on that. It is the
23 entire evidence.

24 I don't know what you do if you grant this motion and
25 have one Board -- you continue with everything else and one

1 Board sit and take a bunch of witnesses in front of them; and
2 then what do you do with it? I don't know, I confess.

3 In any event, I would like to argue this case on the
4 basis of a standard of disqualification out of the cases.
5 That's what I came here prepared to do, and I think it
6 obviously is just as good an argument on the standard of the
7 cases as if it's directed to the discretion of the Board
8 somehow.

9 I would like to start by quoting the standard of
10 disqualification that I believe is the prevailing one in the
11 Commission. I am quoting, at this point, from ALAB-777 in the
12 Lilco case. I regret no jump cites, Your Honor, I'm working
13 with LEXIS versions of these cases.

14 I will just read the quote: "It is well settled that
15 an administrative trier of fact is subject to disqualification
16 if he has a direct personal substantial pecuniary interest in
17 the result. If he has a personal bias against the participant.
18 If he has served in a prosecutive or investigative role with
19 regard to the same facts as are in issue. If he has prejudged
20 factual, as distinguished from legal or policy issues, or if
21 he's engaged in conduct which gives the appearance of personal
22 bias or prejudgment of factual issues.

23 This same language also appears in ALAB-759, a case
24 involving Seabrook.

25 Now, I don't read in this motion any allegation that

1 the Board has a pecuniary interest in the result, nor an
2 allegation of personal bias towards a participant, a party, nor
3 an allegation of a former prosecutive or investigative role of
4 any member of this Board. That's what we're down to as an
5 alleged prejudgment of a factual matter, which I will deal with
6 in a minute.

7 However, to make the standard complete it should be
8 noted that in ALAB-749, another public service company Seabrook
9 disqualification case, there's a large number of them in the
10 books it -- there is what I would say, perhaps, an additional
11 gloss on the standard to be considered.

12 We reiterate two points which we made in our earlier
13 opinion in this case. First, a party requesting
14 disqualification or recusal may attempt to establish by
15 reference to a Judge's overall conduct that a pervasive climate
16 of prejudice exists in which a fair hearing cannot be obtained
17 by the party complaining.

18 Second, the complaining party may attempt to
19 demonstrate a pattern of bias toward a class of participants of
20 which it is a member.

21 Now, I don't understand that to be being alleged here
22 either. Therefore, we're basically faced, as I said, with an
23 allegation of prejudgment on the candor of Mr. Thomas.

24 Now, they have a factual problem, because when the
25 Board recited its concern at transcript pages 11146 and 11147

1 the Board stated the following: "So we really have some
2 serious concerns about Mr. Thomas's perception of what happened
3 in the RAC, and we, today, based upon the evidentiary record so
4 far have very large concerns about Mr. Thomas' forthrightness
5 and candor on this subject. We leave unresolved further doubts
6 about that matter until we've been able to hear from Dr. Bores
7 and Mr. Lazarus on the subjects. So we have no fixed opinion
8 on that point."

9 In short, I thought the Board's statement with
10 respect to the candor question, made very clear that the Board
11 had not prejudged the matter. It is true there were two more
12 references to forthrightness and candor. However, one of those
13 which immediately followed was simply the Board's explanation
14 of why to date it had been unwilling to give the far-ranging
15 discovery that had been requested and it is no more than a
16 recitation of a proper reason for a decision.

17 And the other was in response to FEMA's counsel
18 bringing up the fact that the Board had earlier indicated that
19 they had no question -- no reason to question Mr. Thomas'
20 integrity. And what the Board made clear, as I read that
21 portion of the transcript, that they had revisited that matter,
22 reread it, and having reread it persisted in the view that they
23 had questions about candor and forthrightness even absent their
24 knowledge of the Bores and Lazarus memos.

25 So that's the record on what the Board has said. The

Heritage Reporting Corporation

(202) 628-4888

1 record itself, frankly, flatly rejects the concept that there
2 has been any prejudgment by this Board.

3 Now, the fundamental rule in NRC practice laid down
4 in the Houston case is that the alleged ground for
5 disqualification must stem from an extrajudicial source, in
6 most cases, except in extraordinary cases. Here, there simply
7 is no extrajudicial source alleged.

8 Indeed, all we have here at the most for the
9 Intervenors is the Board's giving a preliminary assessment by
10 the Board of Mr. Thomas' penchant for veracity; and that is
11 simply no basis for disqualifications. And I say that on the
12 basis of quotes I'm about to read.

13 The first is from the Houston Light and Power case,
14 CLI-82-9: "Indeed, the Commission has expressly adopted this
15 role, holding that, quote, 'preliminary assessments made on the
16 record during the course of an adjudicatory proceeding based
17 solely on application of the decisionmaker's judgment to
18 material properly before him in the proceeding do not compel
19 disqualification as a matter of law."

20 That is the most that has occurred here, is that the
21 Board taking note of material properly before it, including
22 that motion which was properly before it, has made a
23 preliminary assessment. That is the most one can say has been
24 done in this record, and that is perfectly proper and not
25 grounds for disqualification.

1 This same language is quoted by the Appeal Board in
2 ALAB-748, another of the Seabrook disqualification cases, and
3 the Appeal Board went on to say: "The Commission nonetheless
4 suggested that there may be an exception to this general rule
5 where judicial conduct as demonstrates pervasive bias and
6 prejudice. To constitute such pervasive bias and prejudice,
7 however, a Judge's conduct must be more than, quote, 'stares,
8 glares, and scowls or occasional outbursts toward counsel
9 during a long trial."

10 Now, there can't be any stares or glares in a phone
11 conference, and I don't remember any growls, and I don't see
12 any basis for recusing any member of this Board for any conduct
13 towards counsel. That the case has been tried with a certain
14 degree of high tension, no one can doubt, but we're all big
15 people here and I haven't heard anything come out of anybody's
16 mouth, including my own and my opponents', that somebody should
17 really go home and cry about. It's a tough case; yes, it is,
18 but you can't make any case for having gone over the line of
19 the general rule that the Commission has recited.

20 JUDGE SMITH: They're not making that argument. I
21 didn't hear that anyway.

22 MR. DIGNAN: Now, finally, when one is all through
23 reading the motion the basis is that the argument for
24 prejudgment is based on the allegation that the Board has made
25 this prejudgment on a misreading of the record by the Board.

1 Now, in fact, I don't think the Board has misread
2 the record. But assuming that were the case, the TMI case,
3 which Mr. Backus quoted -- which cited in part, I believe it is
4 Footnote 6, makes clear that an argument that says that a
5 preliminary assessment or judgment by the Board which is being
6 complained of as showing bias is a preliminary assessment for a
7 judgment formed on the basis of the Board misunderstanding the
8 record, is not grounds for the disqualification.

9 If the Board persists in the assessment that is based
10 on a misreading of the record, the Board may ultimately be
11 reversed in its ultimate decision for that error.

12 But the fact that the Board had -- if you had misread
13 the record in forming this, as I read the TMI case, that cannot
14 effect a disqualification. The remedy for any misreading by a
15 Board, and a holding base on that misreading, is the ultimate
16 appeal of the decision and a reversal of the Board's decision
17 on a substantive basis.

18 In short, I'm led to the conclusion that this recusal
19 motion is wholly without merit. It is without basis in fact,
20 and it has no support in the law.

21 JUDGE SMITH: Mr. Turk?

22 MR. TURK: Your Honor, I'm not prepared to argue the
23 law, I don't have the cases with me. I do concur, however, in
24 Mr. Dignan's reliance upon the cases he cited, the Houston
25 Power case, Seabrook decisions by the Appeal Board. And I

1 agree with Mr. Dignan that there's no basis in law for this
2 Board to accept the motion and to recuse itself.

3 I would go further, in my mind it's a frivolous
4 motion, and I'm going to tell you why. That's going to be the
5 thrust of my comments today.

6 There is a history in this proceeding, as I see it,
7 where if the Intervenors do not like the way the case is going,
8 there's an attack on counsel, there's an attack on a Licensing
9 Board member. That may not be the initial intent, but I see
10 that happened repeatedly.

11 I also see a repeated practice of going to the press,
12 if they don't like the way things are turning out.

13 Now, I don't think there's anything improper in a
14 sitting Judge evaluating the testimony of witnesses who have
15 come before him, including Mr. Thomas, and in the course of
16 hearing that testimony forming a mental impression as to
17 whether or not the witness is credible.

18 Everyone of us does the same thing. All of us in
19 this room are listening to witnesses and evaluating their
20 credibility and determining whether or not we feel we accept
21 the testimony as stated.

22 Mr. McEachern had an observation which may be
23 interpreted along the same lines. Back on October 7th when Mr.
24 Thomas first appeared in this proceeding, Mr. McEachern stated
25 at transcript page 3149 in a question to Mr. Thomas, quote: "I

1 couldn't help but notice that your answers in this proceeding
2 are perhaps the most deliberative answers that I have ever
3 heard from a witness," close quote. And he went on to inquire
4 if Mr. Thomas was afraid of his career being affected based
5 upon the answers.

6 I think the observation by Mr. McEachern indicated to
7 him that he heard a pattern of answering which was different
8 from what he normally heard from witnesses.

9 I'm not going to suggest that Mr. McEachern has the
10 same view of Mr. Thomas' testimony as anyone else in this room,
11 but I think it's clear that we all go ahead and form
12 impressions of a witness' testimony as he's giving it.

13 I also share a concern raised by Mr. Dignan, and that
14 is, I don't see how Mr. Thomas' testimony can be evaluated by
15 anyone other than the Judge who sat and heard the testimony and
16 watched and observed the demeanor of the witness as the
17 testimony was being given.

18 Mr. Thomas has already appeared before this Licensing
19 Board, I see no cure to resolving the issue as to which
20 testimony is more believable other than to have the same Judge
21 hear all the testimony on the issue.

22 (Continued on next page.)
23
24
25

1 JUDGE SMITH: Do you have a response?

2 MR. BACKUS: If I could be indulged, Your Honor, yes,
3 I do, very briefly.

4 First, I'd just like to say that, as Your Honor
5 already pointed out, that this is not in any way an accusation
6 that the Board has been discourteous in any way to counsel in
7 the proceeding. I will say right on the record for all of us I
8 think the Board has been courteous; the Board has permitted us
9 access to the record when we wanted it; and we are appreciative
10 of that. We think the Board's conduct to counsel is not a
11 matter of criticism, and we make not criticism. This is not
12 that case.

13 With regard to Mr. Dignan's concern about --

14 JUDGE SMITH: This is, in essence, just a prejudgment
15 case.

16 MR. BACKUS: That's right.

17 JUDGE SMITH: All right.

18 MR. BACKUS: That's all we're saying in this motion.
19 As for Mr. Turk's --

20 JUDGE SMITH: And not only prejudgment, but
21 prejudgment based upon error.

22 MR. BACKUS: That's right.

23 JUDGE SMITH: Okay.

24 MR. BACKUS: That's our position.

25 And we recognize, as Mr. Dignan says, that handling

1 this problem by the motion presents practical difficulties. I
2 don't think they are insuperable. I think we can meet them if
3 the Board decides that our motion, as now presented, warrants
4 the action that we're seeking. I think that we can solve that,
5 and I don't want to spend a lot of time addressing that.

6 Mr. Dignan suggests that the transcript of the
7 telephone conference on May 10th can be read to suggest that
8 the Board had not made the prejudgment that we are claiming the
9 Board did make. He referred to Page 11146 of the transcript,
10 of which the last sentence says, "We leave unresolved further
11 doubts about that matter," that matter being Mr. Thomas's
12 candor and forthrightness, "until we have been able to hear from
13 Dr. Bores and Mr. Lazarus on the subject."

14 I would just emphasize the word "further". I think
15 the Board was clearly saying at that point that on the basis of
16 what it had at that time, it was harboring those doubts.

17 JUDGE SMITH: That's right.

18 MR. BACKUS: And I would say that it was further on
19 in the transcript, at Page 11204, where the Board made the
20 reference to Mr. Thomas needing to consider his right to
21 counsel in light of NRC statutes and regulations concerning
22 civil penalties for those that provide material false
23 information.

24 The only other thing I'd say is that Mr. Turk, I
25 think, has not addressed the motion we made. He has cast

1 accusations at our motives. And I will only say, Mr. Turk, I
2 don't appreciate that. We made this motion in good faith. We
3 verified that to the Board. I'm sorry you don't care to accept
4 that.

5 JUDGE SMITH: All right. We will take it under
6 advisement. We will probably rule today.

7 You were going to -- Mr. Oleskey, you were going to
8 come up with a -- you were going to look at your cross-
9 examination to see if you could carve out a most narrow
10 possible area for sequestration. You don't have to give it to
11 us now because it hasn't come up yet, but I hope that you have
12 done that.

13 MR. OLESKEY: I have that in mind.

14 JUDGE SMITH: Okay.

15 (Board confer.)

16 JUDGE SMITH: We're late enough in the morning that
17 since your motion encompasses even listening to these
18 witnesses, we'll just take an early morning break and consider
19 the arguments and come back with our ruling.

20 MR. FLYNN: Your Honor.

21 JUDGE SMITH: Mr. Flynn.

22 MR. DIGNAN: Your Honor, could I clean up one other
23 matter, Your Honor?

24 I had indicated to the Board yesterday that I, in the
25 event sequestration was ordered with respect to the NRC

1 witnesses, that I would be bringing a motion for a
2 sequestration order on Mr. Thomas.

3 And I just wanted to advise the Board that on what I
4 like to think of as mature reflection -- well, I did have a
5 pretty good argument, I think -- I will not press the motion.
6 The reason is very simple.

7 JUDGE SMITH: You're going to waste it?

8 (Laughter.)

9 MR. DIGNAN: Yes, even though I got it put together.
10 It was kind of a fun one. You know, you don't usually in a NRC
11 case get to talk about rights of confrontation and that sort of
12 thing. But my point is simply this.

13 I will not be pressing it. It is my view that as a
14 practical matter, as a practical matter, even if I could
15 persuade the Board, I don't know how in this setting that that
16 relief could be policed.

17 It's my understanding, from what we've been told by
18 the Attorney General, that there will be likely resistance to
19 the subpoena. It's going to go for time. And to ask you to
20 give me that relief, even assuming I could persuade you to do
21 so, I don't think as a practical matter in a free nation with a
22 free press it could really be policed. And, therefore, it will
23 not be made.

24 MR. TURK: I have one other preliminary matter, Your
25 Honor.

1 Mr. Oleskey has provided us with a copy of notes of a
2 meeting which apparently Mass. AG had with Mr. Thomas. It
3 appears to be on November 4th. And there are several
4 instances, in fact, a complete page in which the notes were
5 taken in shorthand by Mr. Oleskey's paralegal. And I'd like to
6 request that we have the translation of the shorthand provided
7 to us by Mr. Oleskey.

8 MR. OLESKEY: I'm not going to translate notes that
9 never should have been produced and to which production I
10 objected in the first place.

11 He's got them. He can get his own shorthand
12 translator.

13 MR. TURK: I should note --

14 MR. OLESKEY: And I'm not going to interpret them,
15 which is another request he's made of my staff, but not to me.

16 MR. TURK: I should note also that one of the
17 attorneys with the Mass. AG's office explained to me that even
18 the person who took the notes, the paralegal employed with the
19 Mass. AG's office, had some trouble translating them for the
20 Mass. AG.

21 I think shorthand, in general, is not simply a matter
22 of mechanical reproduction. There are personal idiosyncrasies
23 involved.

24 JUDGE SMITH: Well, yes. Shorthand becomes unique to
25 the person. I would say that you refused to do it. I don't

1 know if we want to enforce it or not in face of your refusal,
2 but you have not provided the information.

3 MR. OLESKEY: I provided it in the form in which it
4 was taken.

5 JUDGE SMITH: I recognize that you objected to it in
6 the first instance, but you didn't prevail on that.

7 MR. OLESKEY: It's never been translated by me or Ms.
8 Keough or anybody, and I --

9 JUDGE SMITH: Oh, it hasn't.

10 MR. OLESKEY: No.

11 JUDGE SMITH: It has not.

12 MR. OLESKEY: It has not. I didn't propose to do it
13 now or ever, in fact.

14 JUDGE SMITH: That might have some bearing on it.

15 MR. TURK: Your Honor, there's a difference of
16 opinion here. Mr. Oleskey may not have written down a
17 translation of it, but he was at the same meeting. He's aware
18 of what the meeting contents were, so he may not need a
19 translation.

20 I was not invited to that meeting, and I do need a
21 translation.

22 MR. OLESKEY: I think my position is pretty
23 reasonable, and would ask the Board to understand that.

24 JUDGE SMITH: Let's take our break. I don't want
25 to -- enough's enough. You know, it's just as a practical

1 matter. We're not resolving -- because it is not resolvable
2 with a fine, bright line just exactly where your right to
3 inquire stops. It just isn't practicable to go into this.
4 It's not worth it. You're going to have plenty of information
5 as to what Mr. Thomas told the Massachusetts Attorney General.
6 So it's just a benefit, a cost-benefit consideration.

7 Twenty minutes.

E48

8 (Whereupon, a recess was taken.)

T49

9 JUDGE SMITH: In announcing our decision not to
10 recuse ourselves from consideration of the issue involving the
11 evolution of FEMA's change of position, we want to review very
12 briefly the history of why we're here discussing this matter.

13 First, I think everybody recognizes that we don't
14 know Mr. Thomas other than seeing him here on the witness stand
15 actually, and walking around the hearing room. We certainly
16 have no personal bias against him.

17 Further, we point out that this is in the context of
18 prejudgment of a witness, and we're aware this is not an
19 allegation of bias against a party. But we have no personal
20 bias against Mr. Thomas, none whatever; just no reason to have
21 any, and we don't in fact.

22 We watched him, listened to him for two days on the
23 witness stand, and we formed judgments, both as humans do and
24 particularly as we try to do in the discharge of our
25 responsibilities as judicial officers.

1 At the end of two days we, on our own motion,
2 announced that we would have to return to Mr. Thomas's
3 testimony and read it, and we did read it carefully. And as is
4 pointed out, we stated we find no reason -- looking at the
5 entire exchange, we find no reason whatever to question Mr.
6 Thomas's integrity.

7 We went on to say, however -- and thank you, Mr.
8 Backus, for providing this quote to me -- "We don't want to
9 comment further on the total effect of the testimony because it
10 is still an open matter and there will be further examination
11 of Mr. Thomas's testimony."

12 As we stated earlier this week, that it is not an
13 unusual phenomenon for boards to have difficulty with
14 witnesses' perceptions, memories, and even candor, and not have
15 it rise to the level of questioning integrity, particularly
16 when integrity is being looked at in the context of was there
17 perjury.

18 At the end of the third day of testimony, the Board
19 continued to develop its own impressions of Mr. Thomas's candor
20 and forthrightness, and we added a new dimension, and that is,
21 we were concerned about his perception. It was pointed out by
22 Mr. Backus that I recalled the matter as saying that Mr. Thomas
23 saw no difference between his position and that of Dr. Bores
24 and Lazarus when in fact he stated he saw no significant
25 difference.

1 You're right, you know; that's correct. It is, I
2 believe, not controlling, but we'll come back to that.

3 The matter arose the next time sequentially,
4 chronologically, in the context of a request by Intervenors to
5 authorize a very, very large discovery effort based upon what
6 Mr. Thomas -- what was told to us and, in fairness, read to us
7 from his deposition, that Mr. Thomas stated in his deposition,
8 based in turn upon what he learned through several links in a
9 chain of communication about, for example, the January 19th
10 meeting.

11 We were not willing, as we stated, to authorize such
12 a broad ranging, potentially disruptive discovery effort based
13 upon those grounds, and part of those grounds was our
14 perception of Mr. Thomas's forthrightness.

15 Then a related but different component arose when the
16 Board itself decided that a full and trustworthy record in this
17 case required the attendance of Bores and Lazarus. We read the
18 Bores and Lazarus memorandum. It was not in evidence --
19 correct. We read it. The Bores and Lazarus memorandum however
20 was also referred to by both Mr. Thomas, he alluded to it, and
21 others.

22 But in any event, as Mr. Dignan points out, the Bores
23 and Lazarus memorandum was properly before us. We were not out
24 on an investigation of our own. It was properly before us, and
25 it was a matter that we believed -- as a matter of fact, it was

1 a pending motion, it was a still pending motion. It's a matter
2 which we believed had to be aired in the public record.

3 We read it. As stated, we recognized that it was not
4 in evidence, and we could not make a judgment as to its
5 accuracy. And to this very moment, we have not.

6 Nevertheless, it is evidence that we looked down the
7 road to see coming, and we believed that if it should turn out
8 that that evidence was competent, and material and convincing,
9 that it would raise further questions about Mr. Thomas, and
10 that Mr. Thomas -- and you'll just simply have to take our word
11 for it, there's nothing much you can do about it -- is that our
12 concern at that time shifted to fairness to Mr. Thomas. It was
13 not an accusation. It was informed concern as to what it might
14 mean to him if evidence is adduced contradicting his testimony.

15 At the beginning of this week when the Intervenors
16 raised the issue again saying, but you have misstated the
17 transcript; you have misstated what Mr. Thomas testified to;
18 and you have not only prejudged, but you have prejudged on a
19 false basis what Mr. Thomas testified to, and we will
20 demonstrate that.

21 And our response at that time was do it. You will be
22 doing a great service to the Board if you would demonstrate to
23 us that we are incorrect. And in fact as we sit here right
24 now, we're not devoid of human feeling here. We hope that that
25 may be the result.

1 But this goes to the final point as to the legal
2 merits of the motion appealing to our discretion, and that is,
3 when we err on the record on judicially observed matters, the
4 solution, the standard recognized traditional solution is not
5 to recuse, but to reverse on appeal.

6 You've pointed out to us, at least arguable
7 differences between our perceptions and what you believe the
8 record to be. And if it turns out after the entire record is
9 developed that we are wrong, you will have a full record upon
10 which to mount your appeal, but let's go farther than that.

11 As I indicated at the very beginning, that we could
12 have said nothing. We could have just allowed the matter to
13 pass, gone back to our offices, reflected on our views about
14 Mr. Thomas's credibility, correctly as the law anticipates,
15 constructed a decision with those views in mind instead of
16 allowing you to seek your relief on appeal if in fact you ever
17 can, I mean as a practical matter, we don't wait that long. We
18 bring it right back to you, this is what our worries are, this
19 is what our concerns are, here is your chance to address them.

20 I honestly don't know how we could treat you any more
21 fairer by telling you we had formed those judgments. We can't
22 help it. They exist in our minds. They are there. They may
23 be wrong, but we're telling you those judgments about his
24 candor and forthrightness did exist. The three of us had them,
25 and we felt it, perhaps not our duty, but at least fairness to

1 come out early and report it and give the parties an
2 opportunity to address it.

3 We're not under any obligation to do that. And you
4 will find it, indeed, as you pointed out, a rare -- you are not
5 prejudiced by it. To the contrary, 180 degrees the opposite.
6 You were informed that as judicial officers we formed, as we're
7 required to do, impressions, and we revealed them early so that
8 in the event that we're wrong that error can be corrected
9 timely.

10 Then there is one final aspect. This is not
11 controlling but it's an observation. We do not see a practical
12 solution to it, to granting your motion. We could appoint a
13 special master under the rules, but then it doesn't help
14 because the Atomic Safety and Licensing Board appointed under
15 the Atomic Energy Act has the unrelieved responsibility of
16 making the decision upon the evidentiary record. Even though a
17 special master may be assigned the responsibility of developing
18 a part of the record, we have to still make the final
19 determination as to is the evidence reliable, probative, and
20 substantive. And we would have to review de novo a special
21 master's report to us if we were to go that route.

22 As to another Licensing Board, well, we have no
23 authority to appoint another Licensing Board. That's more than
24 just a quibble, because we could recommend it to the chairman
25 of the panel and he may or may not accept it. But even that

1 would not give you a clean cut issue between two boards. We
2 think that the margins would be feathered, would be blurred.

3 I suppose there would be some possibility that the
4 issue of the FEMA rebuttable presumption could be carved out,
5 but not really because the rebuttable presumption as we've
6 discussed before, and has been pointed out to us by learned
7 counsel, is merely a framework for the assessing of evidence,
8 and how would we have somebody else's determination as to the
9 rebuttable presumption and then blend it in with our
10 determination is that presumption rebutted. We just don't know
11 how that would work.

12 So as a practical matter, even if we were so
13 inclined, we just don't know how we could carve it out. I
14 think that the motion would have to be to recuse the Board
15 before it would make sense, and there is no basis to do that.

16 All right, that's our ruling.

17 MR. BACKUS: Can I just make a very brief response?

18 JUDGE SMITH: I would prefer you not to.

19 MR. BACKUS: Well, I just wanted to know --

20 JUDGE SMITH: I just don't want to -- you had an
21 opportunity to make your arguments.

22 MR. BACKUS: I'm not going to make any further
23 argument. I just wanted to observe.

24 I've heard the Chairman say that at some point there
25 became a concern about fairness to Mr. Thomas and airing these

1 concerns early. I just think it's unfortunate that the effect
2 is that Mr. Thomas, who was testifying voluntarily, is now
3 being subpoenaed, and if he appears at all will only be under
4 subpoena, and the indication is he may move to quash the
5 subpoena.

6 JUDGE SMITH: Do you wish to enforce your subpoena?

7 MR. BACKUS: Yes, certainly we do. But the effect of
8 all of this has been to take a witness who was appearing
9 voluntarily, and of course we disagree with the Board's
10 characterization of the testimony.

11 JUDGE SMITH: Well, look, Mr. Backus, you are raising
12 an argument that you can't win, because when I assert to you
13 that what exists in my mind and in my colleagues' mind on the
14 Board that we are driven by fairness to Mr. Thomas by telling
15 him that, and inviting him to the hearing, there's nothing you
16 can do about that. You're not going to convince us that we're
17 wrong in what we think. You're not going to convince us that
18 we are lying to you, Mr. Backus.

19 MR. BACKUS: I'm not going to comment on the things
20 you have said about your motives at all.

21 JUDGE SMITH: All right, that's fine.

22 Now, let's talk about the consequences, and this is
23 coming from the very person who engineered a letter to the
24 Board to discipline Mr. Dignan in the first instance. I lay it
25 all back to you if Mr. Thomas is injured in this, and we will

1 do our very best to give Mr. Thomas his day in court here.

2 MR. BACKUS: All right.

3 JUDGE SMITH: Proceed.

4 MR. TURK: Your Honor, the Staff is going to ask Dr.
5 Bores and Mr. Lazarus to retake the stand and continue the
6 direct examination of yesterday.

E49

7 (Continued on next page.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1/50

1 Whereupon,

2 ROBERT BORES

3 WILLIAM LAZARUS

4 having been previously duly sworn, resumed the witness stand
5 herein, and was examined and further testified as follows:

6 DIRECT EXAMINATION

7 BY MR. TURK:

8 Q Gentlemen, I'd like to continue for a moment with
9 respect to the two exhibits that were introduced yesterday.

10 Dr. Bores, I note on Staff Exhibit No. 2, which is
11 your memo to me of October 15, 1987, that there's a reference
12 in the cover memo to an enclosure 3.

13 MR. TURK: I'd like to note to the Board that
14 that enclosure is not attached to the Staff Exhibit, it was
15 withheld under production of discovery because we were certain
16 that it was the final testimony submitted to the Markey
17 subcommittee; so it is not part of this enclosure and has not
18 been produced.

19 JUDGE SMITH: It has never been produced until this
20 moment?

21 MR. TURK: It has not been produced and we don't
22 intend to produce it.

23 JUDGE SMITH: Could you tell me again what has
24 not -- you do not intend to produce?

25 MR. TURK: All right. There had been an enclosure 3

1 to Dr. Bores memo.

2 JUDGE SMITH: Right.

3 MR. TURK: And that was a set of draft testimony for
4 production to the --

5 JUDGE SMITH: Oh.

6 MR. TURK: -- to Congressman Markey's subcommittee.

7 JUDGE SMITH: I got it. All right.

8 MR. TURK: That's excluded from this document that we
9 all have in front of us and had not been produced in discovery
10 and is not being produced today.

11 JUDGE SMITH: All right.

12 BY MR. TURK:

13 Q And, Dr. Bores, let me just ask you, is it correct
14 that there was such an enclosure 3 to your memo to me?

15 A (Bores) That is correct.

16 Q And it is deleted from this exhibit?

17 A (Bores) It is.

18 Q Now, also, Dr. Bores, in your cover memo to me on
19 Staff Exhibit No. 2 there's a sentence that indicates, quote:
20 "Mr. John Schumacher also attended those meetings and may be
21 able to provide his recollections on them some time later,"
22 close quote.

23 And I note, ask you to confirm that there is no part
24 of this document, Staff Exhibit No. 2, that consists of Mr.
25 Schumacher's memo; is that correct?

1 A (Bores) That is correct.

2 Q Did you ever have occasion to see a memorandum
3 prepared by Mr. Schumacher with respect to the July RAC
4 meeting?

5 A (Bores) I have seen it.

6 Q And I have placed in front of you a one page
7 memorandum addressed to Sherwin Turk from John A. Schumacher,
8 dated October 15, 1987. Do you have that document in front of
9 you?

10 A (Bores) I do.

11 Q And can you identify this for us?

12 A (Bores) This is the memoranda from John Schumacher
13 to Sherwin Turk, dated --

14 Q Have you seen --

15 A (Bores) -- October 15, 1987.

16 Q Have you seen this document before?

17 A (Bores) Yes, I have.

18 MR. TURK: Your Honor, I recognize that Dr. Bores is
19 not the author of this document. I am going to offer it into
20 evidence at this time as Staff Exhibit No. 4.

21 MR. FLYNN: I object as an obvious hearsay problem.
22 Mr. Schumacher is not available, in fact, he's not even any
23 longer an employee of NRC. And I take it it's being offered
24 for the truth of the contents.

25 MR. OLESKEY: I have the same objection, Your Honor.

1 I do think that it may be competent for impeachment later and
2 will probably offer it myself for that limited purpose. But as
3 a general unrestricted offer now as it appears it is made, I
4 object for the grounds stated by Mr. Flynn.

5 MR. TURK: Let me do a little exploration before I
6 make the offer then, Your Honor.

7 BY MR. TURK:

8 Q Could you first describe for us your understanding of
9 the genesis of this document, either one of the witnesses?

10 A (Bores) Okay. Which document are you talking about?

11 Q The Schumacher memo?

12 A (Bores) Okay. The genesis of the document was
13 initiated by a phone call from Mr. Turk to me requesting that I
14 and the other NRC attendees at the July 30th RAC meeting detail
15 our separate recollections of that meeting in a memo back to
16 Mr. Turk.

17 I relayed this message to Mr. Lazarus, and Mr.
18 Lazarus in turn relayed the message to Mr. Schumacher who
19 worked for him.

20 Q And at that time was Mr. Schumacher still employed by
21 the NRC?

22 A (Lazarus) I don't believe Mr. Schumacher was
23 employed at the NRC. It was around the first of October 1987
24 that he had resigned and gone into his own business. So, at
25 the time that he drafted this he was no longer an employee of

1 the NRC.

2 Q Mr. Lazarus, did he draft it at your request?

3 A (Lazarus) Yes, he did.

4 Q And did he then provide you with a copy of it?

5 A (Lazarus) Yes, he did.

6 Q And this is the document that he provided to you?

7 A (Lazarus) Yes, it is.

8 MR. TURK: Your Honor, I am going to offer this into
9 evidence. I think it has been properly identified. Granted
10 the author is not here to be cross-examined on it. It does
11 have the earmarks of an official government document in the
12 sense that Mr. Schumacher identifies himself by name and by
13 position. He prepared it at the request of his former
14 supervisor. It has been recognized to be the document which
15 Mr. Schumacher provided, and I think it can be admitted into
16 evidence as an authentic document and under an exception to the
17 hearsay rule.

18 MR. OLESKEY: Mr. Turk might have had a vestigial
19 argument if he hadn't made the rest of his examination. We've
20 now discovered that it isn't a business record of the NRC.
21 It's facially inaccurate because it states it's from a person
22 who identifies himself as a Senior Emergency Preparedness
23 Specialist for Region 1, who by the testimony just given, no
24 longer had that position, although it was apparently thought
25 proper to convey that he did have --

1 JUDGE SMITH: Wait a minute, if you want to get into
2 the discussion of the accuracy, the merits of it, then it
3 better go in as evidence.

4 MR. OLESKEY: I'm just commenting that the memo on
5 its face describes to me as being a current government
6 official, which this preliminary testimony has just disclosed,
7 he no longer was.

8 It's not a business record. It certainly is hearsay.
9 And I'll say again that I'm going to use it for impeachment,
10 but I'm going to object again and even on stronger grounds in
11 view of this further examination that it not go in on offer in
12 chief.

13 MR. FLYNN: I have an additional argument to make. I
14 don't challenge the authenticity of it, I submit that the
15 authentication is not the issue. The issue is whether it is --
16 whether it qualifies under the business records exception to
17 the hearsay rule; and I submit that it doesn't.

18 There hasn't been any showing that it is part of the
19 regular activities of the Nuclear Regulatory Commission to
20 document disagreements within RAC discussions.

21 JUDGE SMITH: This document fits within the
22 traditional exception to the business rule in that it is a
23 document that is prepared in anticipation of the litigation
24 that we're having right now. And for that reason it cannot
25 come in under the ordinary course of business rule.

1 MR. TURK: Your Honor, I had offered --

2 JUDGE SMITH: So, it's rejected.

3 MR. TURK: All right. I don't recall if I had
4 identified it with a number.

5 JUDGE SMITH: 4.

6 MR. OLESKEY: So it's going to be Staff 4 for
7 identification, Judge?

8 JUDGE SMITH: Yes.

9 (The document referred to
10 was marked for
11 identification as NRC
12 Staff Exhibit 4, and was
13 rejected.)

14 BY MR. TURK:

15 Q Dr. Bores, I'd like to ask you to begin to tell us,
16 based upon your recollection, of the earlier -- earliest
17 considerations you recall of the Seabrook Beach issues as that
18 matter was considered by the RAC or the RAC Chairman, Mr.
19 Thomas?

20 A (Bores) Well, I guess I might refer to the first
21 enclosure to my memo. And in terms of my own consideration the
22 beaches were certainly evident to me well before I got into the
23 emergency preparedness aspect for Seabrook because I was
24 involved in the environmental inspections of the Seabrook
25 consideration. So they certainly were evident to me.

1 Certainly, the initial plans submitted by the State
2 of New Hampshire even for technical review dealt with the beach
3 issues. And I, as a RAC member, certainly Mr. Thomas as the
4 RAC Chairman, knew that, you know, we needed to consider the
5 beach issue and perhaps the, you know, the particular care to
6 it. So that was always the general sense.

7 The RAC in general, also, had the beach issue in mind
8 as we went through the various plans from the earliest times.

9 Q When you say, the earliest times, can you give us the
10 general time frame?

11 A (Bores) I believe I mentioned yesterday that I
12 believe the first submittal by the State of New Hampshire for
13 technical review was about the 1982 time frame.

14 MR. OLESKEY: 1982?

15 THE WITNESS: (Bores) Approximately.

16 BY MR. TURK:

17 Q And in the course of those earlier conversations,
18 starting from approximately 1982, do you recall any expressions
19 by Mr. Thomas as to the nature of his concerns for the beach
20 population?

21 MR. OLESKEY: Could I ask, Judge, for a clarification
22 and continuity, that there be some precision with respect to a
23 date, a place, a time, a context, as we go along, since we
24 don't have prefiled testimony and we're dealing with a
25 considerable period of time.

1 MR. TURK: Certainly to the extent that the witness
2 is able to remember specific instances, I've asked him to
3 recall those in particular. I'd also like to have his general
4 sense of the development of this issue.

5 JUDGE SMITH: Do you understand?

6 THE WITNESS: (Bores) I understand that. I guess --
7 well, let me just ask Mr. Turk to restart or restate what you
8 asked me.

9 MR. TURK: All right.

10 BY MR. TURK:

11 Q In the discussions prior to the writing of Attachment
12 1 to your memo, that is Mr. Thomas' December 31, 1985 memo, in
13 the days before that and in the years before that, do you
14 recall any expressions of concern by Mr. Thomas as to the
15 nature -- as to the Seabrook Beach populations, and what -- and
16 if so, what concerns do you recall being expressed?

17 A (Bores) I do recall such concerns. The concerns,
18 basically, I think are many of those that were expressed, I
19 think, last several weeks here, that there was in the
20 summertime potentially a large population, the evacuation time
21 estimates, even the first studies indicated that there was a
22 long time to evacuate beaches, even though those numbers have
23 been modified over the years. You know, in general, hasn't
24 changed that situation; in some instances may have aggravated
25 the situation.

1 So, if you had a fast release that people may not be
2 able to get off the beaches.

3 So I think part of what Mr. Thomas was looking at
4 were not only means of getting people off the beaches, but, you
5 know, could we say anything about what is the likelihood of an
6 accident of some sort that could cause health hazards, let's
7 say, for the population on the beach.

8 Q Now, when you say that he had concerns, whether we
9 could say anything about the health hazards, et cetera, could
10 you elaborate on that, please? Who was he asking or did he
11 indicate --

12 A (Bores) He had expressed it to me. He had expressed
13 it to the RAC in general. I think he was looking for help here
14 to allay -- something relative to reducing the risk in
15 reviewing these plans. It's just something we can say about
16 probabilities of accidents, type of the plant. Can we say that
17 we will not have a release, you know, for two hours, because of
18 plant systems, containment or whatever. In addition to looking
19 at the plans, and in addition to looking at special precautions
20 for the beach.

21 We had -- I had, and I think other NRC staff members
22 who had been involved or in dealing with the RAC or in fact
23 with meeting with Mr. Thomas and FEMA on other matters had,
24 from time to time, been asked to comment on this, and in fact,
25 discussed in some detail some of the accident sequences as

1 detailed in WASH-1400 to try and provide some perspective on,
2 at least, the literature relative to some of these accident
3 sequences.

4 Q And I take it the first documentary request that was
5 made by Mr. Thomas along these lines is represented in his memo
6 of December 31, 1985?

7 A (Bores) That is correct.

8 Q And also, this memorandum which is Attachment 1 to
9 your memo, did you receive a copy of that from Mr. Thomas?

10 A (Bores) Yes, I did. Let me see, I'm not sure if it
11 was mailed directly to me at that time. It was sent out to the
12 Regional Assistance Committee. I had gotten several copies, I
13 know. I may have gotten it internally because it was mailed to
14 someone else who was currently a member of the RAC. I may have
15 gotten copies directly; I know I got at least one additional
16 copy because I did not have one at a particular RAC meeting or
17 a meeting subsequent to that, and I was furnished another one.

18 Q On December 31st, 1985 or a few days after that, who
19 was the NRC RAC member for Seabrook?

20 A (Bores) Bill?

21 A (Lazarus) December 31st, 1985 I don't recall. It
22 was either John Schumacher or myself at that time. No, I'm
23 sorry, John Schumacher wasn't even in the section. At the time
24 it was myself, I'm sorry.

25 Q All right. Now, did the NRC ever provide a response

1 to the December 31st, 1985 memo?

2 A (Bores) Yes, they did.

3 Q And when was that?

4 A (Bores) That -- the response was provided in a
5 memoranda from me to Mr. Thomas, and that was dated February --
6 hold on a second. February 18th, 1987.

7 Q And at that time were you the NRC RAC member for
8 Seabrook?

9 A (Bores) Yes, I was.

10 (Pause.)

et/50

11 (Continued on next page.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1/51

1 BY MR. TURK:

2 Q Dr. Bores, I believe I've placed in front of you a
3 copy of a letter, could you please identify that?

4 A (Bores) The letter that you placed in front of me is
5 a letter from me to Mr. Thomas, dated February 18th, 1987, and
6 it refers to Mr. Thomas' memo of December 31st, 1985 relative
7 to the beach population in the Seabrook area.

8 Q And is this in fact the response which you provided
9 to Mr. Thomas' memo of December 31st, 1985?

10 A (Bores) It is.

11 MR. TURK: Your Honor, at this time I'd like to offer
12 -- first identify and then offer Staff Exhibit No. 5.

13 (The document referred to was
14 marked for identification as
15 NRC Staff Exhibit 5.)

16 MS. WEISS: I ask if this is on the same basis as the
17 other attachments to the memo, that is, not for the truth of
18 the matters, but simply for purposes of establishing historical
19 records.

20 MR. TURK: Well, we certainly got -- I'm going to
21 make my offer for all purposes. If you seek to limit it, I'll
22 hear argument on it.

23 MS. WEISS: Well, I'm going to object to it. I think
24 it should be allowed in on the same basis that the other
25 attachments are. In fact, it is one of the enclosures to the

1 memo. It is the -- so it has already been allowed in on that
2 limited basis. You're just providing the remainder of the
3 pages that aren't provided in the copies you gave us yesterday.

4 MR. TURK: Your Honor, the document that I've
5 identified as Staff Exhibit No. 5 is referred to in Dr. Bores'
6 memo to me of October 15th; and two pages of this Staff Exhibit
7 No. 5 appears in attachment to Staff Exhibit No. 2 which is the
8 Bores October 15th memo. The other two pages were admitted for
9 historical purposes.

10 I am offering this --

11 JUDGE SMITH: Historical purposes for that exhibit?

12 MR. TURK: Yes.

13 JUDGE SMITH: Okay. And --

14 MR. DIGNAN: May I point out that the document, as I
15 understand it, was offered by Dr. Bores and has been identified
16 as such.

17 JUDGE SMITH: I don't understand --

18 MR. DIGNAN: Well, I don't understand --

19 JUDGE SMITH: -- didn't he write this?

20 MR. DIGNAN: -- he just putting this in for the truth
21 of the matter as contained. The witness is there, he
22 identified that he wrote it.

23 MS. WEISS: Well --

24 JUDGE SMITH: This is his document and here he is.

25 MS. WEISS: Well, Your Honor, there are a large

1 number of assertions made in this document with regard to the
2 nature of the Seabrook containment, and the probability of
3 accidents, and the consequences of accidents. You know, we're
4 not going to accept those for the truth of them.

5 JUDGE SMITH: Well, you're arguing relevance.
6 Overruled. This witness is here, he's offering a document that
7 he wrote.

8 MR. TURK: Your Honor, I will note one thing, in
9 response to Ms. Weiss, I don't -- as I indicated in a telephone
10 conference call prior to our coming to hearing this week, I do
11 not believe it's appropriate for us to begin to explore the
12 bases for statements made by Dr. Bores as to the reliability of
13 containment.

14 JUDGE SMITH: So you're not offering it, then, for
15 general purposes.

16 MS. WEISS: You can't have it both ways.

17 MR. TURK: I'll take an agreement of counsel that we
18 will not be exploring --

19 MS. WEISS: No, sir.

20 MR. TURK: -- substantive bases. If you --

21 JUDGE SMITH: Well, I can tell you, we are making an
22 extraordinary intercession in this case to develop the
23 evolution of FEMA's position, and not to litigate extraneous
24 matters, and we won't have it.

25 MS. WEISS: Well, then it is --

1 MR. TURK: Your Honor, I'll establish --

2 MR. DIGNAN: Your Honor, do I understand the offer to
3 simply be for the purposes of demonstrating what information
4 was conveyed by this witness to Mr. Thomas, isn't that what the
5 thrust of the offer is.

6 MR. TURK: Yes.

7 MR. DIGNAN: If taken for that purpose, it seems to
8 me, satisfies everybody's problems.

9 JUDGE SMITH: See, the argument truly is one of
10 relevance, and not of --

11 MR. DIGNAN: That's correct.

12 JUDGE SMITH: -- of anything else, simply relevance.

13 MR. TURK: Your Honor, I do concur, the purpose of
14 this offer is to indicate what the NRC staff response was. I
15 will not offer it for the truth of the contents other than to
16 prove that these things were in fact the statements made in the
17 letter from NRC to FEMA.

18 JUDGE SMITH: All right.

19 MS. WEISS: On that basis I would have no objection.

20 JUDGE SMITH: Staff Exhibit 5 is received.

21 (The document referred to having
22 been previously marked for
23 identification as NRC Staff
24 Exhibit 5, was received in
25 evidence.)

1 BY MR. TURK:

2 Q Now, Dr. Bores, to whom did you show this letter
3 before you issued it to Mr. Thomas?

4 MR. OLESKEY: Just one clarification, I have attached
5 to -- physically attached to what we just marked as 5, a number
6 of other documents. Maybe I shouldn't, but I have a letter --
7 the Perry-Christenbury letter.

8 JUDGE SMITH: The entire letter --

9 MR. OLESKEY: And the Dignan memo, is that all to be
10 part of this offer?

11 MR. DIGNAN: That's got to be for the truth of the
12 matter.

13 (Laughter)

14 MR. OLESKEY: Time for you to sign then.

15 MR. FLYNN: Have you just become a witness.

16 MR. TURK: I thank Mr. Oleskey for pointing that out.
17 In case any of the parties or Board ever seeks to find those
18 documents, they are attached here, and the offer is for the
19 same purpose as to those documents. This is -- as I understand
20 it, this is the paper, the cover letter with the enclosure and
21 the two attachments which was provided by Dr. Bores to Mr.
22 Thomas.

23 MR. OLESKEY: The cover memo doesn't say that, so
24 would you establish that and clarify that, please.

25

1 BY MR. TURK:

2 Q Dr. Bores, at page 10 of the first enclosure to this
3 document, I'd ask you to turn to the bottom of that page, and
4 could you tell us -- read what appears in the last two lines of
5 that page?

6 A (Bores) The last two lines read: "Attachment letter
7 from Christenbury to Perry, dated June 18th, 1986."

8 Q And then immediately following that page there is a
9 letter addressed to Spence Perry, Acting General Counsel of
10 FEMA, dated June 18, 1986, signed by Edward S. Christenbury,
11 that's a nine page letter; do you see that?

12 A (Bores) Yes, I do.

13 Q And is that in fact the attachment which was provided
14 with your letter to Mr. Thomas?

15 A (Bores) It is.

16 Q And then immediately following the last page of that
17 document, the Christenbury letter, there's a five page
18 document, no author shown, labeled "Memorandum," is it your
19 understanding that this was also a part of the document you
20 transmitted to Mr. Thomas?

21 A (Bores) It was.

22 MR. TURK: All right.

23 MR. OLESKEY: Thank you, Mr. Turk.

24 JUDGE SMITH: Well, this was the unsigned memorandum
25 attached to the Christenbury letter?

1 THE WITNESS: (Bores) That is correct.

2 JUDGE SMITH: Which in turn was attached to your
3 memo.

4 BY MR. TURK:

5 Q Now, Dr. Bores, could you tell us, to whom you showed
6 this letter before you issued it to Mr. Thomas?

7 A (Bores) Yes. The memo -- letter -- the letter
8 response to Mr. Thomas and the enclosure was developed in my
9 capacity as a RAC member. And in the past the RAC input from
10 each of the individual RAC members had been considered to be
11 withholdable from the -- under the Freedom of Information Act
12 as being predecisional to RAC. In other words, this was held
13 up, I believe, at Shoreham. As a matter of fact, I believe
14 there was an appeal on it.

15 So, I was trying to be quite careful as to who had
16 gotten copies of this. This was my input to RAC. It was
17 developed laying out a bases; it was not developed as a staff
18 paper or a FEMA paper or a RAC paper per se.

19 So, when I developed the paper, since it was rather
20 lengthy, covered a number of subjects, I did want to get some
21 peer review. So I gave a copy, draft copy to Mr. Lazarus,
22 Mr. -- Dr. Bellamy who is Mr. Lazarus' supervisor. I gave a
23 copy to Tim Martin who is my supervisor along with Dr.
24 Bellamy's. I gave a copy to our Regional Counsel. And I gave
25 a copy to Dr. Murley who was our Regional Administrator.

1 I asked them for their comments on the paper. I
2 collected all the documents after, you know, with their
3 comments; and from that I generated this document that you see
4 before you, which I did not, again, recirculate. And that way
5 I had hoped to maintain the integrity of the FOIA relative to
6 RAC.

7 I did receive a request from Mr. Thomas to see a copy
8 of the paper, not for concurrence, but rather to see if they
9 had any, quote, "Major heartburn" with it. I provided him a
10 copy of it. He had two minor wording changes that we
11 discussed. I'm not sure if I accepted both of them; I accepted
12 at least one of them, it had to do with the wording I had
13 relative to the unwinterized accommodations on the beach.

14 And with those revisions I generated this document,
15 which I then sent out on February 18th, 1987.

16 Q Prior to --

17 MR. DIGNAN: Your Honor, before Mr. Turk proceeds,
18 Ms. Selleck has reminded me, the record may not be clear on the
19 status of Staff 5. If you recall Your Honor at one point
20 admitted it for all purposes, there then seemed to be a general
21 consensus that it should be limited to the purpose of
22 demonstrating what, in fact, was transmitted to Mr. Thomas from
23 Dr. Bores. And I'm not at all clear that Your Honor, as a
24 matter of record, confirmed that restriction on the admission;
25 and I was wondering if you wanted to do so, so that it's clear

1 in the record.

2 JUDGE SMITH: Yes, certainly -- certainly, it was Mr.
3 Turk's prerogative to limit the reach of the exhibit, and we
4 endorse it.

5 BY MR. TURK:

6 Q Dr. Bores, was your letter to Mr. Thomas of February
7 '87 shown to anyone in NRC headquarters prior to its issuance?

8 A (Bores) It was not.

9 Q Was it shown to anyone in NRC Office of General
10 Counsel headquarters before its issuance?

11 A (Bores) It was not.

12 Q Was it discussed with anyone in headquarters either
13 in technical staff or OGC prior to its issuance?

14 A (Bores) I -- excuse me, I discussed some of the
15 contents and the approach I was taking. However, no part of it
16 was ever transmitted, and this goes to the NRR side of the
17 house rather than to OGC. So, as far as discussing it with
18 legal staff, no.

19 So, content and format, in general, were discussed.

20 Q And did you receive any sort of a concurrence on the
21 paper from NRC headquarters?

22 A (Bores) No.

23 JUDGE HARBOUR: Was that no?

24 THE WITNESS: (Bores) No.

25

1 BY MR. TURK:

2 Q And would you characterize this document as
3 representing the views of the NRC staff?

4 A (Bores) I would not.

5 Q How would you characterize it?

6 A (Bores) I'd characterize it as representing my views
7 on the situation to RAC. The document was formulated to
8 provide a working document, if you will, a straw man approach
9 to resolving what appeared to be a situation going nowhere
10 relative to the beach population.

11 So the paper was generated to, essentially, gather
12 all the facts that we had discussed as RAC members, comments
13 that we had, items still needing resolution relative to the
14 beach population protection issues, and other facts or other
15 things that might be considered by the RAC at a later time in
16 resolving the issues.

17 Q Did you ever indicate to Mr. Thomas --

18 MR. OLESKEY: Just a moment, Your Honor.

19 Can we have that read back, that was a long answer.
20 To me it's very important and I want to make -- I know I didn't
21 get most of it in fact.

22 JUDGE SMITH: Would you read it back, please.

23 MR. OLESKEY: Thank you.

24 (Whereupon, the Court Reporter played back the last
25 answer.)

et/51

152

1 BY MR. TURK:

2 Q Did you ever have a conversation with Mr. Thomas as
3 to the nature of this document being your views rather than the
4 views of the NRC Staff?

5 A (Bores) Yes, I did.

6 Q Can you tell us about that, and also give me an
7 approximate time frame?

8 A (Bores) I discussed this with Mr. Thomas I would
9 estimate in January of 1987. I discussed essentially the
10 approach I planned to take in responding to his memo. I had
11 indicated to him that I was not planning to circulate it for
12 NRC Staff review at this point. Again, bearing in mind the
13 freedom of information type aspects of the RAC input effort.

14 I also indicated to him that since it did not have
15 NRC Staff concurrence, that it certainly was NRC Staff
16 prerogative, if they wished, to reject that view, and he
17 understood that, I believe.

18 Q Now, Dr. Bores, after your transmission of this
19 document, can you recall the next events which took place with
20 respect to consideration of the beach issue for Seabrook within
21 the RAC?

22 A (Bores) The next step that occurred, I believe, was
23 shortly after the submission of the letter to Mr. Thomas.
24 There was a letter from Mr. Thomas to the RAC circulating
25 several other responses from other RAC agencies to the RAC.

1 along with this document asking for comments relative to the
2 responses from the RAC committee members that had been
3 received, and indicating that there would be a RAC meeting, I
4 believe, in the near future.

5 To get exactly where this came about, I believe there
6 is a memoranda in here and the exact wording is there, but this
7 is my general recollection as to what the steps were.

8 Q And did a meeting of the RAC in fact take place?

9 A (Bores) A meeting of the RAC did in fact take place,
10 and that took place on April 15th of 1987.

11 Q And did you attend that meeting, Dr. Bores?

12 A (Bores) I did attend that meeting, and Mr. Lazarus
13 also attended that meeting, I believe.

14 Q Is that your recollection as well, Mr. Lazarus?

15 A (Lazarus) Yes, I attended that meeting.

16 Q Dr. Bores, could you please describe what took place
17 in that RAC meeting of April 15th with respect to --

18 MR. OLESKEY: For what it's worth, consistent with
19 the sequestration I asked yesterday, this being one of the
20 meetings I want to cross-examine on extensively, it seems to me
21 the value that the sequestration may have will be pretty well
22 gone if Dr. Bores now testified with Mr. Lazarus sitting beside
23 him.

24 JUDGE SMITH: We had already addressed that. This is
25 his direct. He could very well have reviewed it with him

1 beforehand. It's his opportunity to -- in fact, it's
2 beneficial for him to have an opportunity to have a complete
3 record at this point. It in no way diminishes your right to
4 cross-examine and test separately their memories.

5 BY MR. TURK:

6 Q Dr. Bores, there's a question pending that's asking
7 you to please describe your recollection of events as they took
8 place in the April 15, 1987, RAC meeting with respect to the
9 Seabrook beach issues.

10 A (Bores) After the preliminary issues on the agenda
11 had been taken care of, and there usually are several, we got
12 to what we view to be the central issue, and that was
13 formulation of the RAC position relative to the beach issues,
14 if we could resolve it at that time.

15 Mr. Thomas, in introducing the matter, did furnish
16 the letter which I had sent him dated February 18, 1987, and
17 indicated that it was his understanding that the position that
18 I had taken in my paper was that the New Hampshire plans were
19 generally adequate with the exception of the Seabrook beach
20 population. And that with the added features such as the
21 strong containment in the systems there, that I was now saying
22 that that plan was now adequate for the beaches as well.

23 I corrected him at that point, and I indicated to him
24 that that is not at all what I was saying with my position
25 paper. That in fact in review of where RAC had left the items

1 relative to the planning, that in fact it appeared that all of
2 the items were adequately addressed; that in fact for the
3 Seabrook beach situation the plans were adequate as they were;
4 and in addition, the Seabrook beach -- I'm sorry, the
5 containment features were an additional feature which dealt
6 with reduced probability. But the plans were adequate as they
7 stood without consideration of the containment issues.

8 JUDGE SMITH: Are you saying containment features?
9 Is that what --

10 THE WITNESS: (Bores) Containment and plant features
11 as well.

12 JUDGE SMITH: I just couldn't get the word
13 "features", but that's what it was.

14 THE WITNESS: (Bores) Okay. Yes.

15 BY MR. TURK:

16 Q When you refer to the plans, I take it you're
17 referring to the New Hampshire Emergency plan as it then
18 existed?

19 A (Bores) That is correct.

20 When I did reiterate this, the general consensus was,
21 okay, that's the statement you have made, and this is the way
22 we went on to deliberate going through the paper featuring I
23 guess most of the consideration of RAC at that point, not
24 really focusing too much on the individual element-by-element-
25 type approach for the J-9 elements and subelements and where

1 they were left, nor really very much on the containment aspects
2 either.

3 It seemed the focus of the RAC at that point was
4 basically on the distance to the beaches and the
5 meteorological-type considerations. There were two members of
6 NOAA there at this particular meeting. That's National Oceanic
7 and Atmospheric Administration. And they were there, I think,
8 primarily to look at, you know, what I had said relative to
9 meteorology, and there was quite a bit of discussion on that
10 aspect.

11 As a result of it, there was a sentence that I had
12 agreed to put in which would indicate that there was the
13 possibility of recirculation, but also -- that is,
14 recirculation of material back over the beaches, but that they
15 also indicated that if such recirculation did occur, that there
16 would be, you know, tremendous dilution by such wind
17 recirculation.

18 So the outcome of that particular discussion was a
19 minor change in the meteorological situation.

20 The other area that consumed a bit of time was
21 relative to a portion of the paper where I did compare the
22 statements I believe made in the Brookhaven studies relative to
23 the risk. There was a statement in the paper that indicated
24 that from the Brookhaven analysis it appeared that the risk at
25 two miles from the Seabrook Station was essentially equivalent

1 to the risk at a plant let's say considered in NUREG-0396 at 10
2 miles.

3 Now the fact that the risk at two miles at this
4 station was equivalent to the risk at 10 miles there, words to
5 that effect, provided a problem in comprehension. So I agreed
6 to rework that and put a definition in there relative to what
7 risk meant, essentially the inverse of safety, and then
8 apparently with using those words, it became much more
9 understandable. So that relative safety, if you would, at two
10 miles at this plant is the same as that at 10 miles at a 396
11 plant.

12 But those were essentially the areas that we had
13 covered in this meeting, and everyone came away agreeing that
14 in fact the issues apparently for the beach population were
15 resolved, at least to the extent that they were resolved for
16 the entire EPZ generically.

17 Let's see if there is anything else I want to add on
18 that.

19 Q Do you recall --

20 A (Bores) Excuse me.

21 Q Go ahead.

22 A (Bores) I guess I was sort of surprised when I asked
23 Mr. Thomas how he was going to handle the then resolution
24 aspect, whether it was just going to be a change to the spread
25 sheet. And he had indicated that in fact he was simply going

1 to adapt the working paper that I had developed. I had not
2 expected that.

3 Q Did you say adapt or adopt?

4 THE WITNESS: (Bores) I probably said adapt, and I
5 probably should have said adopt.

6 JUDGE SMITH: Well.

7 BY MR. TURK:

8 Q Which is correct?

9 Which did he indicate he was going to do?

10 A (Bores) I really can't tell you. I mean, I don't
11 know.

12 Okay, that's my word.

13 Q But essentially, as I understand what you're saying,
14 he had indicated to you that he was going to go with your
15 paper --

16 A (Bores) That is correct.

17 Q -- expressing the RAC view.

18 A (Bores) That is correct; as modified by these slight
19 modifications.

20 And Mr. Rospenda, who was at the meeting, was tasked
21 with providing modified spread sheets to take care of the
22 wording on these elements, and I was to provide to Mr. Rospenda
23 some wording changes as I had agreed to at the RAC meeting.

24 Q Do you recall if in the course of the April 15th
25 meeting there was any discussion of the phrase "reasonable

1 assurance", or as to whether or not reasonable assurance had
2 been provided for the beach populations?

3 A (Bores) I cannot specifically recall whether
4 reasonable assurance was expressed per se. I think the general
5 sense of the RAC was that we had reasonable assurance because
6 in fact everybody seemed satisfied that in fact we had resolved
7 these issues.

8 Q Mr. Lazarus, I'd like to ask you one brief point
9 about the April 15th meeting.

10 Do you recall any discussion at that meeting in which
11 Mr. Thomas indicated his initial understand of what Dr. Bores's
12 paper meant?

13 A (Lazarus) I don't recall any specific comments. I
14 recall that there was a sense that he accepted that as a
15 reasonable position to take. And the meeting was a fairly
16 harmonious meeting. It seemed to be the first time that
17 everyone was coming together on agreement.

18 Q My question was getting at something a little bit
19 different.

20 I was asking whether you recall anything along the
21 line that Dr. Bores testified to as to Mr. Thomas's opening
22 discussion stating what his understanding of what Dr. Bores's
23 paper meant?

24 A (Lazarus) No, I can't recall any specific comments.

25 Q All right. Subsequent to the April 15th meeting, can

1 you describe the next events that took place?

2 You indicated you were going to be making some
3 changes. Did you go ahead and write up some changes to your
4 paper?

5 A (Bores) I did, and those changes are provided in the
6 attachments to my October 15th memoranda to you. What I
7 provided in Attachment 10 was in fact modifications proposed by
8 Mr. Rospenda, the Argonne contractor, to Mr. Thomas. And then
9 in Attachment 11, my markup, again some additional markups, I
10 believe, of -- let me take a look at those attachments.

11 Q I don't --

12 A (Bores) Attachment 10 is the letter dated April 17th
13 from Mr. Rospenda to Mr. Thomas containing the proposed
14 revisions. And if we go to his Enclosure 1, without the
15 scratched out portion, that was his proposed revision. What
16 you see written --

17 Q Let me stop you right there, so we're sure to
18 understand it. It's a rather lengthy attachment.

19 A (Bores) Yes, it is.

20 Q The first portion of the attachment, as I see it, is
21 a one-page letter dated April 17th, from Mr. Rospenda to Mr.
22 Thomas.

23 A (Bores) It is.

24 Q The page following that is Enclosure 1.

25 A (Bores) Mm-hmm.

1 JUDGE SMITH: Could we make that -- would the parties
2 object if we marked on that Rospenda Enclosure 1, because that
3 sort of gets us off into that direction?

4 Of course, it's already bound in the transcript.

5 MR. TURK: Yes, Your Honor.

6 JUDGE SMITH: But that's what it is, isn't it?

7 THE WITNESS: (Bores) Yes, it is.

8 MR. TURK: All right. I'm going to count those pages
9 so we have a clear identification here.

10 I count eight pages to what's labeled as Enclosure 1,
11 Mr. Rospenda's April 17th memo.

12 Is that agreeable with --

13 JUDGE SMITH: What is the eighth page that you count?

14 MR. TURK: The eighth page is immediately following
15 the April 17th letter.

16 JUDGE SMITH: And what would be the eighth page that
17 you count? The Rospenda letter to Thomas?

18 MR. TURK: No.

19 MR. DIGNAN: He's counting the title page that says
20 Enclosure 1, Your Honor.

21 MR. TURK: That's right, Your Honor. I'm starting my
22 count with the page that bears only the cloud with the words
23 "Enclosure 1" inside of it. Cloud, C-L-O-U-D.

24 So the last page of that is a spread sheet which at
25 the top right-hand corner indicates Page 17 of a number which

1 is obliterated on my copy.

2 JUDGE SMITH: Thirty, it looks like.

3 MR. TURK: Something like that.

4 BY MR. TURK:

5 Q And this is the set of changes which Mr. Rospenda
6 made following the April 15th meeting with respect to the
7 spread sheets on the beach issue?

8 A (Bores) That is correct. Minus on the handwritten
9 sheet, which is the second page of the enclosure as indicated
10 by Mr. Turk, there are some handwritten in a clearly different
11 handwriting than Mr. Rospenda's. Those are my handwritten
12 comments on his handwriting which slightly modified the sense
13 of the comment for the -- for the spread sheets.

14 And the reason for that modification was that I
15 pointed out to Mr. Rospenda and to FEMA that we had been
16 discussing at the April 15th meeting the Seabrook beach aspects
17 only, and there were several items that still awaited either
18 information or something else for closure for the EPZ in
19 general.

20 And since the spread sheets are designed for the plan
21 as a whole, the entire EPZ rather than for a specific area as
22 the beach, we could not close them in that fashion.

23 Q Let me see if I understand that a little bit more.

24 On the second page of the enclosure to Mr. Rospenda's
25 April 17th letter, the bulk of the writing appears in a larger

1 printed hand, and then there are some smaller handwriting,
2 which I believe you're identifying as yours, the smaller
3 handwriting.

4 A (Bores) That's right. The poorer, smaller writing
5 is mine.

6 Q And I assume that the crossouts are also yours?

7 A (Bores) That is correct.

8 Q Now, do I understand the sense of what you're saying
9 to us to be that Mr. Rospenda had written this up to say that
10 the spread sheet should be marked as adequate?

11 A (Bores) That is correct.

12 Q And you were correcting that to say that, no, you
13 still had open items; you could not yet find adequacy?

14 A (Bores) For the EPZ in general, or at least they
15 were open.

16 JUDGE LINENBERGER: Excuse me, Mr. Turk, but at this
17 point it would help my following this discussion if I could get
18 Dr. Bores to explain a little bit more the functional purpose
19 and significance of the term "spread sheets" that you have been
20 using.

21 THE WITNESS: (Bores) Okay. It's a good point.

22 For illustrative purposes, let's go to Page 4 of that
23 enclosure.

24 The way we had been working, particularly in Region 1
25 of RAC, is that each of the RAC comments or recommendations in

1 accord with the various NUREG elements or subelements, for
2 example, J-9, we had a previously existing RAC comment on that
3 element, or a bunch of comments.

4 And so this was our mechanism of tracking comments
5 through various plan revisions through other input, or other
6 things which we may want to modify this. So in fact we'd have
7 a tracking system.

8 We go through a plan and identify a number of
9 deficiencies, or concerns, or areas in which we need more
10 information to resolve an issue, or in fact we may have a
11 recommendation that we wish to convey back to the state for
12 their consideration or action. We would note it there.

13 But then this provides a means of tracking through to
14 see if in fact resolution was required, that we got a response;
15 that response was indeed adequate or inadequate, or still
16 pending. So that is what I'm referring to by the spread sheet.

17 So for each element starting, you know, from A-1-A
18 all the way through the final one, we had something which --

19 JUDGE LINENBERGER: Thank you, sir.

20 BY MR. TURK:

21 Q Let me turn for a moment two pages into that same
22 document which on my set of sheets is labeled Page 64 of one
23 something.

24 Do you see that?

25 A (Bores) Yes.

1 Q Next to the element J-9 in the next to the last
2 right-hand column, I see that the letter "I" has been crossed
3 off, and the letter "A" inserted.

4 Is that your marking?

5 A (Bores) It is not.

6 Q Whose marking was that?

7 A (Bores) This was Mr. Rospenda's coming back from the
8 RAC meeting with his understanding of what we had done.

9 Q And the same, I take it, would be true on the
10 subsequent pages where we see -- it's marked 86 of 139 -- a
11 question mark has been crossed off and a letter "A" put there.

12 A (Bores) That's correct.

13 Q That again is Mr. Rospenda's marking?

14 A (Bores) Yes.

15 Q Which indicated his understanding that the matter had
16 been resolved as adequate already for the whole EPZ?

17 A (Bores) Yes.

18 Q I'm sorry.

19 A (Bores) I was just going to elaborate. We see, you
20 know, also it says "insert" there. And for those to whom it
21 hasn't been obvious, that's where this second page of the
22 enclosure was meant to follow in each of those where it says
23 "insert". That is the insert that was proposed in the spread
24 sheet at those areas.

25 Q All right. So with respect to the markings on that

1 page, Page 86 of 139, in the second to the farthest right-hand
2 column, I see a question mark has been crossed off and the
3 letter "A" inserted.

4 A (Bores) Yes.

5 Q That's Mr. Rospenda's writing; is that correct?

6 A (Bores) That's correct.

7 Q And this is a place next to the NUREG-0654 element

8 J-10-M.

9 A (Bores) That is correct.

E52

10 (Continued on next page.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1/53

1 Q And going to the last page, the eighth page of this
2 same enclosure, which I identified earlier as marked page 17 of
3 something. Again, the question mark has been replaced by an
4 "A," is that Mr. Rospenda's writing?

5 A (Bores) It is.

6 Q And that's next to the NUREG element J-9?

7 A (Bores) Yes.

8 Q All right.

9 And your comment --

10 A (Bores) This J-9 is different than the first J-9
11 because this is for the EPZ communities.

12 Q All right. Maybe you can explain that a little bit?

13 A (Bores) Okay. Where a number of spread sheets --
14 there was a spread sheet for the State plan; there is a spread
15 sheet -- one spread sheet in general for the EPZ risk community
16 plans, which they didn't answer, there was a separate spread
17 sheet for the host community plans.

18 And in fact, they got more complicated because there
19 were some supplements to Rev. 1 of the plan which seemed to
20 spurn additional spread sheets. For example, the portion of
21 the plan that came in with the compensating actions.

22 And so there were a number of these spread sheets.
23 So, in looking through a given NUREG element you had to be sure
24 of which plan or set of plans you were dealing with. But the
25 same comment, this enclosure, held here.

1 Q And just so it's all clear to us, in the same
2 enclosure I notice, for instance, that the third spread sheet,
3 labeled page 64 of something, bears the title "RAC Review of
4 the State of New Hampshire, Radiological Emergency Response
5 Plan for Seabrook." And on that page Mr. Rospenda had crossed
6 off the "I," inserted an "A" next to element J-9?

7 A (Bores) That's correct.

8 Q The next page page 86 is also labeled at the top,
9 "RAC Review of State of New Hampshire, RERP for Seabrook,"
10 where Mr. Rospenda had crossed off the question mark and put in
11 an "A" next to element J-10-M; is that correct?

12 A (Bores) That's correct.

13 JUDGE HARBOUR: Was that a yes?

14 THE WITNESS: (Bores) Yes.

15 BY MR. TURK:

16 Q And then on the last page of this enclosure, which
17 has been labeled page 17 of 3 something, the label at the top
18 says, "RAC Review of the Municipal EPZ Communities, RERP for
19 Seabrook." And it is on that page that Mr. Rospenda has marked
20 out the question mark and inserted an "A" next to element J-9;
21 is that correct?

22 A (Bores) That is correct.

23 Q All right.

24 Now, I -- in the same attachment to your October 15th
25 memorandum to me, Staff Exhibit No. 2, Attachment 10 continues

1 with another letter from Mr. Rospenda to Mr. Thomas; do you see
2 that?

3 A (Bores) Yes.

4 Q And that's dated April 22, 1987. Now, am I -- could
5 you describe what this letter represents?

6 A (Bores) This letter represents a modified response
7 from Mr. Rospenda to Mr. Thomas, taking into account the
8 changes I had suggested on the spread sheets being put in, in a
9 clearer, shall I say, marked-up form than my hand scratching
10 over the original one.

11 And in fact, you're going to have the same problem
12 here relative to numbering pages in the enclosure, but if we
13 look at -- following what says, section one, following the
14 handwritten section in there, page 64 of 134 of that particular
15 enclosure.

16 Q Let me stop you to identify that.

17 MR. OLESKEY: Your voice is dropping, Dr. Bores.

18 THE WITNESS: (Bores) I'm sorry, I've got somewhat
19 of a throat problem.

20 MR. TURK: Mr. Oleskey, let me see if I can help
21 identify this document a little better.

22 MR. OLESKEY: Do you have water up there?

23 THE WITNESS: (Bores) I do have some. It's just
24 that I had a cold all week.

25 MR. TURK: If Mr. Oleskey is finished I'll continue.

1 MR. OLESKEY: I just wanted to make sure that he
2 could be heard and he's comfortable, counsel.

3 THE WITNESS: (Bores) I appreciate that.

4 BY MR. TURK:

5 Q Counting the pages that follow the Rospenda letter of
6 April 22, I see the fifth page, subsequent to the April 22
7 letter is marked on the right hand upper corner of page 64 of
8 134, and do you have that page in front of you?

9 A (Bores) Yes, I do.

10 Q And on that page I see that in the second to the
11 right hand column the letter "I" has been crossed off, next to
12 that a letter "A" has been inserted and crossed off, and then
13 there's a letter "I" in brackets, again, with an arrow marking
14 that it should be put into that column. And is it your
15 understanding that this reflects the comments you had made as
16 to those spread sheets which we discussed a few minutes ago?

17 A (Bores) Yes, it is.

18 Q And the same thing on the next page which is labeled
19 page 86 of 139?

20 A (Bores) Yes.

21 Q We see the question mark has been crossed off, the
22 letter "A" has been inserted and then crossed, and then a
23 question mark has been reinserted; again, that -- it's your
24 understanding that represents your comments to Mr. Rospenda?

25 A (Bores) Yes.

1 Q And I won't belabor this, but I see there are
2 numerous pages following, as part of this attachment, if you
3 can look at those briefly and tell us whether it's your
4 understanding that these subsequent pages which make up the
5 balance of Attachment 10 also represent Mr. Rospenda's
6 accounting of the changes you had suggested?

7 A (Bores) That is correct.

8 Q All right. Now, subsequent to these two letters, did
9 you have occasion to provide any further comments to Mr. Thomas
10 in writing with respect to the Seabrook Beach issues?

11 A (Bores) Well, following my discussions with Mr.
12 Rospenda, and in fact, FEMA Region 1 in providing my comments
13 to Mr. Rospenda for incorporation, I followed up with my
14 promise at the RAC meeting to provide some wording changes
15 relative to the sentence on risk; and that is provided in my
16 letter to Mr. Thomas on April 24th of 1987 which is included as
17 Attachment 11.

18 Q And that's a one page document?

19 A (Bores) That is a one page document; yes.

20 MR. OLESKEY: Let me ask for clarification. I'm a
21 little lost in these various enclosures leading up to the point
22 where the witness now is. Just before Attachment 11 there's
23 another document labeled "Enclosure 2," which is not the
24 Enclosure 2 sequence we've been discussing until now, what is a
25 letter from Bores to Thomas dated February 18th. Could that be

1 put in context of this recitation?

2 MR. TURK: I think that's a good idea.

3 THE WITNESS: (Bores) This particular Enclosure 2
4 was Mr. Rospenda's Enclosure 2 to his letter --

5 BY MR. TURK:

6 Q April 22nd?

7 A (Bores) -- of April 22nd

8 JUDGE SMITH: Mine looks like he miscounted then,
9 didn't he?

10 THE WITNESS: (Bores) Well, we may have -- let's
11 see. I'm not sure, perhaps in the copying that was provided
12 for the Board, this Enclosure 2 was -- the first Enclosure 2
13 perhaps is out of place in my copy.

14 JUDGE SMITH: No, I misspoke.

15 MR. TURK: Let me see if I can correct the confusion.

16 BY MR. TURK:

17 Q It does appear to me that the page which immediately
18 follows the April 27th -- 22nd letter from Mr. Rospenda is out
19 of place. And it reappears as the last page, I believe, the
20 subsequent page -- the last two pages to the April 22nd letter?

21 A (Bores) I think that's correct. In a reduced form,
22 it appears again, the same cover page I think was in some --

23 MS. WEISS: You're going to identify those again.

24 MR. TURK: Let --

25 MR. OLESKEY: I'm going to make what I hope is a

1 practical suggestion, we seem to be near lunch, when we get
2 there I would suggest that this be reassembled in the form that
3 the witness originally sent it or that it came to him, and that
4 we use what we before -- to before as global numbers, so that
5 this -- so that the record, which I think is going to be really
6 quite confusing, at least hereafter would be less confused by
7 reference to global numbers in this major piece.

8 MR. TURK: It's a good suggestion, Your Honor. We
9 have a practical problem in that the document has already been
10 bound into the transcript of yesterday's session as it appears
11 today.

12 MR. OLESKEY: So it will get bound in today in the
13 right order with global numbers and help us all.

14 JUDGE SMITH: It's going to be -- also, it is an
15 exhibit. Binding it in is not a substitute for providing the
16 three copies as an exhibit; that's just a convenience. And I
17 think it would be helpful to the Board, too, if we can do that.

18 MR. TURK: All right. I'll --

19 JUDGE SMITH: Because there's no other reason, even
20 if you master it the citation in proposed findings and findings
21 will be --

22 MR. TURK: Awful.

23 Your Honor, the Reporter informs me that the edition
24 to the copy that was bound in yesterday, the three exhibits
25 which I provided have been shipped to Bethesda already.

1 JUDGE SMITH: Well, that's -- we can take care of
2 that. We can have a substitution. If you think there's merit
3 to it. I do, at least, we can call it Staff Exhibit 2-A, if we
4 want to.

5 MR. TURK: Fine.

6 JUDGE SMITH: Or Staff Exhibit 2 Revised.

7 MR. TURK: I'll have it globally numbered and
8 recopied and distributed this -- probably tomorrow morning,
9 I'll have to have the copying done later today.

10 JUDGE SMITH: How are you going to do that?

11 MR. TURK: I'll have to write a check out to a
12 reproduction center.

13 JUDGE SMITH: Oh, you have the resources to do that?

14 MR. TURK: I hope I get it repaid.

15 Let me indicate, however, I am not going to alter the
16 document in any way other than to insert global page numbers,
17 and I mention that in particular because of this problem with
18 the, apparently, erroneous duplicate reproduction of the first
19 page following the April 22nd cover letter. That I will leave
20 in the document and assign a global page to it and we can all
21 understand that that's the way the document appeared initially
22 when it was put into evidence.

23 MR. OLESKEY: I'm not sure I'm with you still,
24 counsel. My inquiry that started this had to do with the
25 second document labeled "Enclosure 2," which appears to be

1 another copy of the February 18 letter from Dr. Bores, which is
2 followed by a page 8, which I think is from his Bores 1 memo,
3 both of which precede Attachment 11.

4 MR. TURK: That's right.

5 MR. OLESKEY: Those are supposed to be in that
6 sequence?

7 MR. TURK: Dr. Bores can help us with that.

8 THE WITNESS: (Pores) What Mr. Rospenda provided was
9 the cover page and this modified page of my February 18th
10 letter as Enclosure 2.

11 MR. TURK: I think --

12 THE WITNESS: (Bores) So, I think that first
13 Enclosure 2 in copies that we have received was just a cover
14 page of that memoranda; my letter is the one that should not
15 have been there.

16 MR. OLESKEY: If I could just ask one more question.

17 MR. TURK: To me it appears to be an error in the
18 reproduction process.

19 BY MR. TURK:

20 Q Does that sound to you to be something that sounds
21 possible?

22 JUDGE SMITH: That's what it is, you can see the --
23 it's identical, the handwritten part is identical.

24 MR. OLESKEY: Just one more clarification. This page
25 8 which is the last page before Attachment 11.

1 THE WITNESS: (Bores) Yes.

2 MR. OLESKEY: Could you explain again what that
3 represents in this sequence?

4 THE WITNESS: (Bores) Okay. This page 8 is a page
5 coming back from Mr. Rospenda to Mr. Thomas with the wording
6 changes that we had agreed to at the April 15th RAC meeting.

7 So, and he put them in handwritten form so that the
8 changes would be evident.

9 MR. OLESKEY: So it relates back to what we call
10 Bores 1, your first document? It's that --

11 THE WITNESS: (Bores) Bores 1 as modified.

12 MR. OLESKEY: Right. Thank you.

13 BY MR. TURK:

14 Q In fact, it's Mr. Rospenda's markup of this
15 particular page in Bores 1?

16 A (Bores) That is correct. I think, the only reason
17 for including the cover page of my transmittal memoranda was to
18 identify where the document came from or the page came from.

19 Q All right. Let's come back now for a minute, we
20 already discussed briefly Attachment 11, which is the one page
21 document from you to Mr. Thomas. And just to summarize, I
22 understand that you've indicated these are the changes you
23 provided to Mr. Thomas consistent with your commitment in the
24 April 15th meeting?

25 A (Bores) That is correct. And as you can see, I also

1 provided it to Mr. Rospenda.

2 Q Now, could you explain to us the reasons why you
3 indicated in your markup of Mr. Rospenda's write up, and that
4 is Attachment 10, why did you indicate that the plans could not
5 yet be found to be adequate?

6 A (Bores) The reason for indicating that the plans for
7 these particular elements were not yet adequate was that we had
8 not focused on the EPZ in general; we only were looking at the
9 Seabrook Beach issues at our RAC meeting, and we still had some
10 outstanding information requests.

11 Q And what were those?

12 A (Bores) Well, for that we would need to go to the
13 spread sheets to take a look at the individual items that were
14 requested.

15 Q As I understand it, then, those items which are left
16 open applied generically to the entire EPZ?

17 A (Bores) That is correct.

18 Q And they were not unique to the beach population?

19 A (Bores) That is correct.

20 Q For instance, if there was a personnel item left
21 open, that would be something of a general applicability
22 throughout the EPZ?

23 A (Bores) That is correct. I envisioned the April
24 15th RAC meeting as essentially resolving the issue that, as of
25 that point we had no issues at the beaches that were unique,

1 that needed to be considered separately then from the rest of
2 the EPZ areas. But if we had deficiencies open in the EPZ
3 generically, they may in fact also apply, in some instances, to
4 the beaches.

5 So, from that aspect, simply by looking at the beach
6 issues we could not close the issue when we're dealing with,
7 for example, the State plan. I hope that's clear.

8 Q Yes. As long as I understand that the reason you
9 couldn't close it is because of these generic considerations
10 which applied to all areas of the EPZ including the beach?

11 A (Bores) That is correct.

12 MR. TURK: Your Honor, I note it's 10 to 12:00, is
13 this a good stopping point?

14 JUDGE SMITH: All right, it will be a good time;
15 return at 1:00.

16 MR. TURK: Judge Linenberger has a question, I think.

17 JUDGE SMITH: Do you have any estimate of how much
18 longer you're going to be in your direct?

19 MR. TURK: It's probably going to be about an hour
20 and a half, two hours, the way things are going, Your Honor.

21 JUDGE SMITH: Okay. We may want to talk about next
22 week's schedule again.

23 MR. TURK: All right.

24 MR. DIGNAN: Your Honor, has the Board made any
25 preliminary, at least decision, as to how long a day we're

1 going to go tomorrow, I'd just like to know for planning
2 purposes.

3 JUDGE SMITH: 4 o'clock.

4 MR. DIGNAN: 4 o'clock.

5 JUDGE SMITH: No later than 4:00, preferably a little
6 bit earlier. Well, we usually arrive at a consensus on
7 adjudicating matters, we don't easily arrive at a consensus on
8 how much margin for airplane time there should be.

9 MR. FLYNN: I have two matters which seems
10 appropriate to bring up at this point. The point at which we
11 broke is just before getting to Attachment 12 and there was a
12 request made yesterday that I tried to obtain a legible copy of
13 that attachment, which it was a transmission by telefax machine
14 from Robert Rospenda to Elaine Chan.

15 I have attempted to do so. I've passed the request
16 on to my headquarters who now have to try to reach Robert
17 Rospenda. However, there is a significant problem in doing
18 that in that there is a major problem with the telephone system
19 in Chicago, and it's difficult to reach him by telephone. We
20 are working on that; I will provide the copies as soon as they
21 are made available to me, but it's not an easy process

22 The other thing I wish to report is that I have
23 obtained a commitment from Mr. Peterson, Mr. McLoughlin and Mr.
24 Krimm, they will be here on Wednesday through Friday of next
25 week for testimony.

1 JUDGE SMITH: Okay. Break for lunch.

2 (Whereupon, at 11:52 a.m. the hearing was recessed to

3 reconvene at 1:00 p.m. this same day, Thursday, May 19, 1988,

et/53

4 at the same place.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

AFTERNOON SESSION

(1:04 p.m.)

1
2
3 Whereupon,

4 ROBERT BORES

5 WILLIAM LAZARUS

6 having been previously duly sworn, were recalled as witnesses
7 herein, and were examined and testified further as follows:

8 JUDGE SMITH: During the lunch break, Mr. Backus was
9 kind enough to bring to our attention that members of the
10 public and the audience were having confusion, or were having
11 difficulty following the testimony because of the use of
12 initialisms. And I think it would be very helpful if maybe a
13 few of them were explained.

14 FEMA stands for Federal Emergency Management Agency
15 which together with the Nuclear Regulatory Commission has
16 responsibility for emergency planning and commercial nuclear
17 reactors.

18 The word RAC has been used, which is initialism for
19 Regional Assistance Committee, which is a committee made up of
20 various agencies of the United States Government, which advises
21 FEMA on the adequacy of emergency plans.

22 OGC refers to the Office of General Counsel, and in
23 this instance the Office of General Counsel of the Nuclear
24 Regulatory Commission which is referred to.

25 We welcome inquires from people. If there is

1 difficulty understanding the testimony because of these
2 initialisms, raise your hand or bring it to the attention of
3 one of the parties because if you go to the trouble coming
4 here, we want you to understand what you're hearing.

5 Proceed.

6 MR. TURK: Thank you, Your Honor.

7 Let me start first by offering a report on the
8 reproduction of NRC Staff Exhibit No. 2. I have made global
9 numbering on each of those pages and I've taken it over to the
10 photocopying center. They will be ready this evening, so I can
11 distribute those the first thing tomorrow morning.

12 Also, I have spoken with Mr. Lazarus, and he would
13 like to make a correction to his testimony at this time based
14 on something which transpired earlier today in direct
15 examination.

16 DIRECT EXAMINATION (Continued)

17 BY MR. TURK:

18 Q Mr. Lazarus, would you please inform the Board and
19 the parties what transpired over the lunch hour?

20 A (Lazarus) Yes. In order to clarify Mr. Schumacher's
21 separation date from the NRC, I called the NRC regional
22 personnel office, and confirmed that his separate date was
23 October 23, 1987.

24 Q And just to be clear, that's after the date of his
25 October 15th memo.

1 A (Lazarus) Yes, that was the following week.

2 JUDGE SMITH: That, however, did not play a role in
3 the Board's decision not to receive it into evidence.

4 MR. TURK: I understand, Your Honor. I'm merely
5 clarifying for purposes of having a good record.

6 BY MR. TURK:

7 Q Dr. Bores, where we left off before luncheon was with
8 the letters in April making revisions to the spread sheets and
9 otherwise reflecting the discussions of the April 15th RAC
10 meeting.

11 Can you, also in that same vein, identify for us the
12 document which appears as Attachment 12 to Staff Exhibit 2?

13 MR. TURK: And since I do have a copy of this
14 document with global numbers, from now on I'll begin referring
15 to the numbers, both with the global number and the page
16 reference.

17 BY MR. TURK:

18 Q I'm looking now at Attachment 12 which appears to be
19 a telecopy of some sort. It's global Page 43.

20 Do you see Attachment 12 to your paper?

21 A (Bores) Yes, I do.

22 Q Can you identify it for us what that document is?

23 A (Bores) This document is a telefax from Robert
24 Rospenda of Argonne National Laboratory, to Elaine Chan of the
25 Nuclear Regulatory Commission. It's dated May 7.

1 Q Had you seen this document prior to its transmission
2 by Mr. Rospenda to Elaine Chan on May 7th?

3 A (Bores) I had not.

4 Q You had not.

5 A (Bores) I had not.

6 Q At various places in this telecopy I notice that
7 there are some handwritten insertions or revisions. Are those
8 your markup?

9 A (Bores) No, they are not.

10 Q Do you have any opinion as to whose markups they are?

11 A (Bores) My assumption is that they are Mr.
12 Rospenda's or someone at the Argonne staff.

13 Q Have you had an opportunity to go through that
14 document and form any opinions as to whether it correctly
15 reflects the RAC's view of matters pertaining to the beach
16 population?

17 MS. WEISS: Excuse me. Does it correctly reflect
18 what? I didn't hear.

19 BY MR. TURK:

20 Q Whether it correctly reflects your understanding of
21 how the RAC has treated the beach population issues for
22 Seabrook as of the April meeting.

23 MR. OLESKEY: Well, if we're going to be -- if it's
24 going to be that question, I would like the witness to be as
25 specific as possible when he refers to the RAC, because there

1 were a number of people at the April 15th meeting as I
2 understand his testimony, and it may not be entirely accurate
3 to talk about a "RAC view".

4 MR. TURK: Maybe I can withdraw the question and ask
5 something a little bit different, and I'll make it a simple
6 question, and perhaps Mr. Oleskey wishes to explore more on
7 cross-examination.

8 BY MR. TURK:

9 Q In the course of your looking at that document, did
10 you have occasion to determine whether or not it correctly
11 reflected your understanding of what happened at the RAC?

12 A (Bores) It does not in all cases.

13 Q In particular I'd like to direct your attention to
14 what I have as global Page 47. It's the fifth page in,
15 including the cover page. It's a document which at the upper
16 right-hand corner reads No. 177-PO-5, which I assume is Page 5.
17 This is again on global 47 for purposes of cross-examination
18 later.

19 And do you have that page?

20 A (Bores) I do.

21 Q And do you note in the bottom, there's a bottom
22 paragraph on that page which begins with the words "With the
23 use of early precautionary protective actions such as beach
24 closing and evacuation are not the sole means for protection of
25 the beach population."

1 Do you see that paragraph which begins with that
2 sentence?

3 A (Bores) Yes, I do.

4 Q Do you have an opinion as to whether this paragraph
5 accurately reflects your understanding of how the RAC addressed
6 the beach population issues in April?

7 A (Bores) That is not my understanding of how the RAC
8 addressed the beach containment issues.

9 This particular paragraph in fact indicates that
10 reliance on that containment system is necessary for the
11 protection of the beach population. That is, the special or
12 unusually strong containment system as it's worded here.

13 That is not my understanding as to what the RAC had
14 agreed to at the April 15th meeting. At the April 15th meeting
15 the New Hampshire RERP as it stood had indicated that there was
16 reasonable assurance for protection of the beach population.
17 The containment features were in addition to.

18 Q And that's again your understand of what the RAC did?

19 A (Bores) That is correct.

20 Q Now, after the April RAC meeting, did there come a
21 time when discussions commenced between yourself and NRC
22 headquarters concerning your position as expressed in your
23 February 18th memorandum -- February 18th letter to Ed Thomas?

24 A (Bores) Yes.

25 Q Could you describe for us those discussions, and

1 approximately when did they begin, and identify the persons
2 involved in those discussions, and the types of comments which
3 were made?

4 A (Bores) The discussions probably occurred around the
5 first part of May is the best of my recollection. And they
6 were initiated basically by the people in the Emergency
7 Preparedness Branch -- I believe that's the correct title -- of
8 the Division of Nuclear Reactor Regulation.

9 Q And that's in Washington?

10 A (Bores) In Washington, D.C.

11 The individuals involved were primarily Mr. Kantor,
12 that's K-A-N-T-O-R, and Mr. Matthews. And their discussions
13 based primarily on a need, or a desire at least, to see what I
14 had provided to RAC, because they were in the process of
15 developing responses to contentions, and they would like at
16 least to follow the same line of reasoning, if in fact they
17 agreed with it, in responding to the contentions. And since
18 they had not been privy to what I had provided to the RAC, they
19 were seeking to get a copy of the paper.

20 At that time I still had reservations about providing
21 the paper, which I still viewed as the RAC member input to the
22 FEMA RAC decision process as proprietary under the Freedom of
23 Information Act, and still had concerns at that point about
24 even providing them copies.

25 But I did provide an information copy to the Office

1 of General Counsel for that particular purpose.

2 Q And, incidentally, I understood you to say that
3 headquarters was in the process of responding to contentions.

4 Could it have been -- are you sure that it was
5 contentions, or could it have been some other legal pleading?
6 Are you certain on that?

7 A (Bores) I'm not certain on it. It was my
8 understanding that it was contentions, but it could have been
9 something else.

10 Q What sort of reaction did you receive from
11 headquarters with respect to your paper?

12 A (Bores) Well, I guess I got some mixed views. I
13 guess they were generally pleased with the format I had
14 utilized in summarizing the beach issues. I got some negative
15 response, particularly relative to the containment features and
16 the paragraph that discussed probabilities of risks and risk
17 reductions specific to the Seabrook site.

18 Q And could you give us a little more information about
19 those negative comments?

20 A (Bores) Well, in particular, if we go back to I
21 believe it's our Exhibit No. 5.

22 Q That's the February letter from you to Ed Thomas?

23 A (Bores) That is correct.

24 And we go to Page 7 of Enclosure 1, which discusses
25 the plant features and considerations. The first three

1 paragraphs there relate to either probability analyses or the
2 site-specific, plant-specific features themselves.

3 In addition, in my conclusion section on Page 10, I
4 had several bullet items that I had indicated that I had
5 utilized in reaching my conclusion. Near the bottom of the
6 list, the last three, or starting at the fourth bullet from the
7 bottom and then going on to the third and second bullets from
8 the bottom, also related to the containment features, site-
9 specific features.

10 Q Those are the three bullets which read, "Containment
11 at Seabrook is very strong," et cetera. "Containment bypass is
12 unlikely to cause severe off-site problems." And the third
13 one, "Site-specific studies for Seabrook indicate risks," et
14 cetera.

15 A (Bores) That's correct.

16 Q Those are the three bullets you're referring to?

17 A (Bores) Yes. Yes, it is.

18 Q All right.

19 A (Bores) So these areas of the paper caused some
20 problems with the headquarters staff, including OGC staff. And
21 we had a number of discussions. I had proposed a number of
22 modifications. I guess my inclination at the time was to hang
23 on to some of them, and I guess I was asked, is it necessary
24 for the paper -- that's one of the first questions I was asked
25 as a matter of fact.

1 Q Who asked you that?

2 A (Bores) I believe it was asked by NRR, probably Dr.
3 Congel -- I'm sorry, NRR is Nuclear Reactor Regulation. It's a
4 division of NRC -- Dr. Congel and his staff, and by the Office
5 of General Counsel, Mr. Turk expressed some concern about the
6 use of this area.

7 Q Were you ever asked whether you believe the plans are
8 adequate without regard to these containment and plant-specific
9 features?

10 A (Bores) Yes.

11 Q And what answer did you give?

12 A (Bores) I gave them a definite yes.

13 Q All right.

14 A (Bores) So, with that, the question was, why is the
15 site-specific materials included, or is it necessary to include
16 the site-specific materials.

17 The answer is no.

18 Q No, it's not necessary?

19 A (Bores) It is not necessary. It was provided, I
20 guess, as a point of information speaking to risk, risk
21 reduction probabilities, which would indicate a less severe
22 probability, if you will, for a serious accident for people on
23 the beaches at Seabrook.

24 In considering all of these items, the recommendation
25 of the staff was that I do withdraw these areas since it wasn't

1 necessary for my position.

2 Q In the course of those discussions, was there any
3 discussion as to the use of probabilities as a part of your
4 paper as being appropriate or inappropriate?

5 A (Bores) Yes, there was.

6 Q Could you tell us a little bit about that?

7 A (Bores) The discussion basically centered on the
8 fact that for emergency preparedness we're not judging a site
9 based on probabilities of accidents, nor really on risks, but
10 in fact based on the finding in the plans themselves which
11 would ensure reasonable level of protection.

12 Q And I assume in that regard those discussions were
13 consistent with your understanding of NUREG-0654?

14 MR. OLESKEY: Could we have a little less leading,
15 Your Honor?

16 MR. TURK: I'll withdraw and rephrase.

17 BY MR. TURK:

18 Q Are you familiar with NUREG-0654?

19 A (Bores) Yes, I am.

20 Q And what is your understanding of NUREG-0654's
21 treatment of probabilities of accident occurrence?

22 A (Bores) Probabilities are not directly included in
23 NUREG-0654. The planning bases themselves take into account a
24 spectrum of accidents which were included, not necessarily
25 based on probabilities, but in fact ranges of severity in the

1 plans were needed to be designed around a given bases provided
2 in the NUREG.

3 Q Is it fair to say that for emergency planning
4 purposes you must make a certain assumption as to the
5 probability of an accident?

6 A (Bores) If you're going to be considering the type
7 of accident, then for that particular accident you're assuming
8 essentially the probability is 1. That is, the accident
9 happens, how do you cope with that particular accident in that
10 particular situation. So that is where we go with an emergency
11 preparedness use of that.

12 Q And was that concept raised at all in your
13 discussions with NRC headquarters, the assumption of the
14 probability of 1?

15 A (Bores) Yes, it was.

16 JUDGE SMITH: Well, would you stop a minute?

17 (Board confer.)

18 (Continued on next page.)

E54

19
20
21
22
23
24
25

155

1 JUDGE SMITH: Mr. Turk, we understand the reason for
2 your questioning now, and there has to be some contextual basis
3 for how the NRC arrived at its position and evolution here.
4 But we also believe you are getting very, very close to what
5 you said you were not going to do, and that is, address the
6 position on the merits.

7 MR. TURK: Yes, Your Honor.

8 JUDGE SMITH: And, of course, the parties will be
9 allowed to follow you wherever you go.

10 MR. TURK: Your Honor, I'm not seeking to --

11 JUDGE SMITH: It's a --

12 MR. TURK: I'm not seeking to do more than simply
13 elucidate the nature of the discussions had between Dr. Bores
14 and the NRC staff headquarters.

15 To the extent any of this testimony should be found
16 to relate to the merits, it's certainly not my intention. It's
17 simply to elucidate and draw from the witness's recollection of
18 discussions.

19 BY MR. TURK:

20 Q Dr. Bores, looking at your October 15th memo to me,
21 Staff Exhibit No. 2, I see a summary on global Page 4. It's
22 the fourth page in. There's a paragraph at the top numbered 6.

23 And as I understand it, this paragraph further
24 describes the nature of discussions held between you and the
25 NRC staff headquarters; am I correct?

1 A (Bores) That's correct.

2 Q Well, after these discussions had commenced, did you
3 have occasion to discuss the matter with Mr. Thomas?

4 A (Bores) Yes. I believe since we had several
5 opportunities to discuss where we were going on a number of
6 occasions relative to other aspects of the Seabrook site, on
7 one of those -- at least one of those occasions I informed him
8 that NRC staff at headquarters was looking at this, and in fact
9 were recommending that I withdraw certain paragraphs from my
10 February 18th document.

11 Q And did you identify the paragraphs to Mr. Thomas?

12 A (Bores) I did not identify specifically as I did
13 here just a few minutes ago, but in general as to the content.

14 Q In other words, you indicated that these were the --

15 A (Bores) Yes.

16 Q -- discussions of containment and risk?

17 A (Bores) That's correct.

18 Q And plant-specific features?

19 A (Bores) That's correct.

20 Q What was his reaction?

21 A (Bores) He was not very pleased with it. His words
22 essentially indicated that if the NRC withdrew these
23 paragraphs, FEMA would no longer support a finding of
24 reasonable assurance.

25 Q What happened next?

1 A (Bores) What happened next was that I redrafted the
2 position paper that I had written on, or sent out in February,
3 and deleted the paragraphs that we had just been speaking about
4 along with the bullet items.

5 I provided a cover memo on that particular letter
6 which explained, in part, the rationale for my removing those
7 particular pages, or particular sections.

8 Q And what was the date of this paper, this revised
9 position paper?

10 A (Bores) It was June 4, 1987.

11 MR. TURK: May we go off the record?

12 JUDGE SMITH: Okay. Off the record.

13 (Discussion off the record.)

14 JUDGE SMITH: We're on the record.

15 JUDGE HARBOUR: Mr. Turk, before you go on to this, I
16 just had one question to clarify something here.

17 Dr. Bores, where is the corresponding paragraph, or
18 the paragraph that corresponds to the three bullets that you
19 were talking about?

20 Is that in your February 18th --

21 THE WITNESS: (Bores) It's on Page 10 of my February
22 18th letter. It's in the conclusion section.

23 JUDGE HARBOUR: Those are the three bullets. And
24 then where is the paragraph?

25 THE WITNESS: (Bores) Oh, the paragraphs that were

1 withdrawn?

2 JUDGE HARBOUR: Yes.

3 THE WITNESS: (Bores) Okay, I'm sorry. I
4 misunderstood.

5 That is on Page 7, the first three paragraphs.

6 JUDGE HARBOUR: Thank you.

7 THE WITNESS: (Bores) Now there was some --

8 MR. TURK: Wait -- I'm sorry, go ahead. I didn't
9 understand you were directing yourself to Judge Harbour.

10 THE WITNESS: Okay.

11 BY MR. TURK:

12 Q Dr. Bores, I believe you were going to say something
13 further in response to Judge Harbor?

14 A (Bores) I was going to point out that in fact there
15 was some reorganization of the particular paragraph in the
16 submitted June 4th document.

17 Q Some reorganization of what had previously appeared
18 in --

19 A (Bores) Yes.

20 Q -- the February document?

21 A (Bores) Yes, previous paragraphs.

22 Q And were there also some other minor changes?

23 A (Bores) It also incorporated the changes relative to
24 the meteorology as had been discussed earlier here.

25 The changes relative to risk are now gone.

1 MR. TURK: All right, now, before we go any further,
2 Your Honor, I would like to offer for identification and then
3 offer into evidence Staff Exhibit No. 6. This is a document
4 dated June 4, 1987, to Edward A. Thomas. It's from Robert J.
5 Bores, and the signature on the cover memo is Thomas T. Martin
6 for Robert J. Bores.

7 BY MR. TURK:

8 Q And first I'd ask the witness to identify if this is
9 in fact the revised position paper which he transmitted to Mr.
10 Thomas.

11 A (Bores) It is.

12 MR. TURK: And let me note also, Your Honor, that
13 this document as we're introducing it today consists of a one-
14 page letter from Dr. Bores to Mr. Thomas, an enclosure which
15 immediately follows of nine pages. On the last line of that
16 ninth page of the enclosure, there is an indication that there
17 is an attachment, letter from Christenbury to Perry, dated June
18 18, 1986. That attachment follows the nine-page enclosure.
19 And then again we have, as the last item in this package, the
20 five-page undated memorandum which is Mr. Dignan's memorandum
21 with respect to the so-called three misconceptions.

22 MR. OLESKEY: It's attributed to Mr. Dignan.

23 MS. WEISS: Well, we can never have too many copies
24 of that.

25 MR. TURK: And at this time, Your Honor, I would like

1 to offer this document into evidence.

2 JUDGE SMITH: Any objections?

3 MR. OLESKEY: No.

4 MR. TURK: For purposes of --

5 JUDGE SMITH: Staff Exhibit 6 is received.

6 MR. DIGNAN: Wait a minute. Is that a general offer
7 or --

8 MR. TURK: No, same --

9 MR. DIGNAN: -- is it like the other one, offered for
10 the purpose of showing what was sent to Mr. Thomas?

11 MR. TURK: Same purpose, Your Honor. This is
12 historical. We're not going to be arguing the merits of the
13 positions expressed in either Bores 1 or Bores 2, which
14 incidentally are the February 18 and June 4, 1987 memos. We
15 are introducing these to show the evolution of the position
16 with respect to beach shelter.

17 JUDGE SMITH: All right. Staff Exhibit 6 is received
18 for the purposes stated.

19 (The document referred to was
20 marked for identification as
21 Staff Exhibit No. 6 and
22 received in evidence.)

23 BY MR. TURK:

24 Q And just so we're clear also, Dr. Bores, in your memo
25 to me, which is Staff Exhibit No. 2, dated October 15, 1987,

1 there is an Attachment No. 13; do you see that? This is at my
2 global Page 59.

3 A (Bores) Yes, I see it.

4 Q And as I understand Attachment 13 to Staff Exhibit 2,
5 it consists of the first page -- excuse me.

6 It consists of the cover memo from Martin on behalf
7 of you to Thomas dated June 4th, as well as the first page of
8 the enclosure that follows; is that correct?

9 A (Bores) That is correct.

10 Q And also while we're at it, on that second page that
11 I referred to, the first page of the enclosure, and this is
12 global 60, at the bottom there is a handwritten note.

13 Can you identify that for us?

14 A (Bores) That is a handwritten note that I put on
15 just indicating that since the documents were already
16 available, I didn't feel I needed to provide the full document,
17 just to identify it.

18 Q The attachment to your memo to me?

19 A (Bores) That's correct.

20 Q All right.

21 Just so the record is clear, I'll read that quote,
22 that sentence. It reads, "Complete copy not provided since
23 document is readily available." I believe that's "RJB".

24 And essentially, then, is this document, Staff
25 Exhibit No. 6 of June 4, 1987, substantially the same as the

1 February 18th document, Staff Exhibit 5, except as to the
2 changes which you have already described?

3 A (Bores) That is correct.

4 Q Does Staff Exhibit No. 6, the June 4th letter or
5 Bores 2, does it contain anything new that had not been offered
6 as a consideration in support of the adequacy of New
7 Hampshire's plans beyond what was contained in the February
8 18th memo?

9 A (Bores) Nothing new in words. There is a new aspect
10 of this in that this particular document did receive the
11 staffing through the region as well as through our headquarters
12 staff.

13 JUDGE SMITH: Received?

14 THE WITNESS: (Bores) Staff approval, or
15 concurrence.

16 BY MR. TURK:

17 Q It received concurrence at NRC headquarters?

18 A (Bores) That's correct.

19 Q And as indicated in the cover memo, this document,
20 the June 4, '87 letter, was transmitted to Mr. Thomas at FEMA;
21 is that correct?

22 A (Bores) That is correct.

23 Q Dr. Bores, are you familiar with the timing of the
24 issuance of this document with respect to the submission of
25 FEMA's position on contentions in June of 1987?

1 A (Bores) Did I know -- well, if you're asking did I
2 know that FEMA needed to submit, or was requested to submit
3 their response to contentions within the same sort of time
4 frame?

5 Q Yes.

6 A (Bores) The answer to that question is yes.

7 Q And are you aware of whether there were any meetings
8 between NRC headquarters and FEMA concerning the submission of
9 FEMA's position on beach shelter?

10 A (Bores) At that time I was not aware of any
11 meetings.

12 Q You didn't attend any?

13 A (Bores) I did not attend any. I was on annual leave
14 at that time.

15 Q Now, the next thing that happened -- well, maybe you
16 can tell us.

17 Do you recall the next thing to happen with respect
18 to the issuance of a FEMA position on beach shelter?

19 A (Bores) Yes. I got back from annual leave, and I
20 was hit with a call from a reporter asking me about the FEMA
21 position, which I had not seen.

22 Q You had not seen it?

23 A (Bores) No.

24 Q And did you have an opportunity then to find and look
25 at the FEMA position on contentions?

1 A (Bores) Not at that time.

2 Q Approximately when did you first have an opportunity
3 to review the FEMA positions?

4 And let me, just so the record is clear, indicate
5 it's my understanding the FEMA position was filed approximately
6 June 5, 1987, on or about that date.

7 MR. OLESKEY: That's a date that Mr. Flynn would know
8 best.

9 MR. TURK: Mr. Flynn --

10 JUDGE SMITH: These were the responses to
11 interrogatories that had been alluded to earlier?

12 MR. TURK: Yes. Your Honor, for clarification, FEMA
13 was required to identify its position with respect to
14 contentions. They did so in --

15 JUDGE SMITH: Oh, by the Board?

16 MR. TURK: By the Board. And they did so in the way
17 of providing a response to interrogatories with the position of
18 our contentions attached.

19 JUDGE SMITH: Yes.

20 MR. FLYNN: The document served a combined purpose.
21 There had been an appeal of the scheduling order, and the order
22 which came down from the Appeal Board required FEMA to provide
23 its position to the parties 30 days in advance of their
24 prefiled testimony.

25 The statement of position which accomplished that was

1 an attachment to answers to interrogatories propounded by the
2 Massachusetts Attorney General's office.

3 MR. OLESKEY: The clarifying question, though, was it
4 the 4th or the 5th? Do you know?

5 MR. FLYNN: My belief is that it was on June 4th.

6 MR. OLESKEY: Thank you.

7 MR. TURK: Your Honor, may I have just a moment?

8 (Pause.)

E55

9 (Continued on next page.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

T/56

1 BY MR. TURK:

2 Q Dr. Bores, approximately, when did you first have an
3 opportunity to read and review the FEMA position on
4 contentions?

5 A (Bores) My best estimate would be that I probably
6 got that opportunity around the 15th of June.

7 Q Do you recall what your reaction was when you had an
8 opportunity to review that position as it related to the beach
9 shelter contentions?

10 JUDGE SMITH: Well, whose reactions?

11 MR. TURK: Dr. Bores.

12 MR. OLESKEY: You mean what he did or said, Mr. Turk?

13 THE WITNESS: (Bores) I'll try to answer it. My
14 reaction, when I saw it, was that --

15 MR. OLESKEY: Well, I think that if he did something
16 that's probative. If he reacted or had a view, that's not
17 particularly probative.

18 MR. TURK: Oh, I strongly disagree, Mr. Oleskey.

19 JUDGE SMITH: It's not an objection, but, he can
20 answer it his way.

21 THE WITNESS: (Bores) In a way I guess I was
22 surprised that FEMA filed it, but not all that surprised
23 perhaps after the discussions I had had with Mr. Thomas in sort
24 of indicating to him what changes would likely come in the
25 redrafted enclosure.

1 The surprising -- well, the area that certainly did
2 change is that this was not the position that we had agreed on
3 at the April 15th RAC meeting.

4 BY MR. TURK:

5 Q Now, when you say it was not the position that,
6 quote, "We," close quote --

7 A (Bores) We the RAC.

8 Q -- did not agree --

9 A (Bores) We the RAC, and at that time I would include
10 FEMA, certainly.

11 Q I'd like to ask you to turn to a further attachment
12 to your October 15th memo, Staff Exhibit 2, and that is Staff
13 Exhibit -- I'm sorry, that is Attachment 14, and this begins on
14 global 61. That document is a September 11, 1987 filing by Mr.
15 Flynn for FEMA entitled "FEMA Prefiled Testimony." And
16 attached to it in comprising the last two pages of this
17 attachment, I have them as global pages 68 and 69, are pages
18 which bear the numbers on the upper right hand corner 38 and
19 39; do you recognize those two pages, in particular?

20 A (Bores) Yes.

21 MR. TURK: Am I confusing this, Your Honor?

22 JUDGE SMITH: I beg your pardon?

23 MR. TURK: Am I confusing this?

24 JUDGE SMITH: I don't think so.

25 THE WITNESS: (Bores) Yes, I recognize it.

1 JUDGE SMITH: And I have a low threshold, so it must
2 be all right.

3 (Laughter)

4 BY MR. TURK:

5 Q Can you tell us what these two pages are?

6 A (Bores) These two pages are essentially the FEMA
7 response to the Town -- the Revised Town of Hampton Contention
8 No. VIII to Revision 2 of the New Hampshire RERP for Seabrook,
9 SAPL Contention 16 and NECNP Contention, RERP-8.

10 Q Do you recall whether these two pages, without the
11 handwritten comments, constituted the FEMA position on beach
12 shelter contentions as filed by FEMA in June of 1987?

13 A (Bores) They're essentially the same.

14 MR. TURK: I just note, Dr. Bores may not have been
15 present at an earlier day in the proceeding. Mr. Flynn has
16 previously indicated that these pages which are attached to
17 FEMA prefiled testimony of September, in fact, were the pages
18 at which comprise part of their position on contentions back in
19 June.

20 BY MR. TURK:

21 Q Whose handwriting appears on these two pages or on
22 the second of them?

23 A (Bores) That's my handwriting.

24 Q Do you have an understanding of the thrust of this
25 position?

1 MR. OLESKEY: Objection. It's there for all of us to
2 read. I don't know what that question means or what it could
3 possibly produce that would be probative.

4 JUDGE SMITH: If it goes to -- certainly it's
5 relevant to -- overruled. It's relevant to the evolution of
6 the position and his observation of it.

7 MR. OLESKEY: What's relevant is what FEMA said. His
8 observations are worth no more than anybody else's.

9 JUDGE SMITH: Yes, they are when it tells how he
10 reacted and how -- what his role was, which is the issue.

11 MR. OLESKEY: No, the question was something like,
12 would you tell us what -- the thrust of what it says, which is,
13 in my judgment, a very different question, which is why I'm
14 objecting.

15 JUDGE SMITH: Oh, I see.

16 MR. TURK: Your Honor, let me --

17 JUDGE SMITH: If it were, how did you view it, that's
18 another matter.

19 MR. OLESKEY: This is something he's been going
20 through generally.

21 JUDGE SMITH: I see. I agree.

22 MR. OLESKEY: All right.

23 MR. TURK: Your Honor, I'm quite happy to have that
24 question reread, I'm certain that I asked Dr. Bores if he had
25 an understanding of the position.

1 MR. OLESKEY: Rather than reread it, why don't we
2 treat that as the question.

3 JUDGE SMITH: Well, that's all right --

4 MR. TURK: That is the question.

5 MR. OLESKEY: Yes.

6 MR. TURK: And I also note that Dr. Bores has
7 previously indicated that the FEMA position of June 1987 did
8 not express what Dr. Bores believed to have been the RAC
9 position of April. And I think it's fair to ask him --

10 JUDGE SMITH: No one is questioning that.
11 It's -- I think you misperceived the objection and the concern.

12 MR. TURK: No, I didn't, Your Honor, but I'm willing
13 to let things go.

14 THE WITNESS: (Bores) Okay. My perception as to
15 what FEMA's position is, is that they're going to find or
16 cannot find the protection for the Seabrook beaches adequate
17 because there are not adequate shelter for the summer beach
18 population. That's a short summary of it.

19 BY MR. TURK:

20 Q And had that been the position of the RAC in April?

21 A (Bores) No, it had not.

22 Q Also, I recall that when we first began this direct
23 examination you related to us that Mr. Thomas had a concern
24 over the risk to summer beachgoers in the Seabrook area; do you
25 recall that general line of testimony?

1 A (Bores) Yes.

2 Q How do you -- well, do you feel that this position on
3 contention as expressed by these two pages has any relationship
4 to that earlier concern expressed by Mr. Thomas?

5 MS. WEISS: Objection.

6 MR. OLESKEY: Objection.

7 MR. TURK: Leading? What's the objection?

8 MR. OLESKEY: My objection is it's calling for a
9 conclusion from the witness. It doesn't go to any issue that's
10 before the tribunal.

11 MS. WEISS: You're trying to argue the merits of
12 FEMA's position. That question is going to the merits.

13 MR. TURK: No, it is not.

14 JUDGE SMITH: Is it -- do you intend to follow on
15 here with, did he react -- I mean, did he act upon any such
16 impression.

17 MR. TURK: Pardon me, did he --

18 JUDGE SMITH: When you elicit the answer to the
19 question, then you intend to follow on, I guess, what did he
20 with that impression? How did that impression -- what did he
21 do about it?

22 MR. TURK: Your Honor, the staff's presentation of
23 its views of the evolution of FEMA's position will consist of
24 two parts. The first part is before the Board now, and that's
25 the input from the RAC member, other persons in the region,

1 their understanding of the initial FEMA position.

2 What will follow then will be, what happened or at
3 least how does the NRC interpret the evolution of that position
4 as the NRC staff understood it. And we are talking about the
5 staff's understanding of FEMA's position, because that's the
6 only thing we can tell you in terms of our understanding of the
7 evolution.

8 JUDGE SMITH: That's not my point. The point is, if
9 Dr. Bores developed an impression and that impression died
10 there at that point; then the objection has merit.

11 MR. TURK: I certainly will follow up.

12 MR. OLESKEY: Then I'll withdraw my objection.

13 BY MR. TURK:

14 Q Do you recall the question, Dr. Bores?

15 A (Bores) Yes.

16 Q All right.

17 A (Bores) The way I would characterize the response
18 here is that, the previous position -- let me relate it back to
19 the previous FEMA RAC position --

20 Q Of April?

21 A (Bores) Of April, and as was stated in the draft
22 contention from Argonne to Ed Thomas, included an aspect there
23 which dealt with the containment features. At that point,
24 since the inclusion of that, apparently, made this acceptable
25 to FEMA, when I withdrew those aspects which related to

1 probability and risk, the plan suddenly became inadequate.

2 In other words, the risk aspect of it suddenly made
3 this plan unacceptable.

4 Q And when you say, it made the plan inadequate or
5 unacceptable, you mean to FEMA?

6 A (Bores) To FEMA; that's correct.

7 Q I'd like to ask you to turn to one further attachment
8 in Staff Exhibit 2, and that is Attachment 15 which commences
9 at global page 70. Can you identify that document, please?

10 A (Bores) Yes. Excuse me. That's a letter from Mr.
11 Edward A. Thomas of Chief Natural and Technological Hazards
12 Division, FEMA Region 1, to Mr. Richard H. Strome, Director of
13 New Hampshire Civil Defense Agency. It's dated -- I'm sorry, I
14 don't see the date right now.

15 Q I'd note that my copy does not bear a date either.
16 There is a telefax date on the third page, upper left hand
17 corner which to me reads June 15, 1987. I don't guarantee that
18 date, but --

19 A (Bores) That's what it says.

20 Q -- do you agree with that?

21 A (Bores) June 15. June 19.

22 Q June 19th?

23 A (Bores) Yes.

24 MR. OLESKEY: June 19 on mine, too.

25 MR. TURK: Excuse me one second, I do have a better

1 copy here.

2 THE WITNESS: (Bores) 6-19-87.

3 MR. TURK: All right. Thank you, that helps. Yes,
4 it does look like June 19.

5 MR. DIGNAN: Your Honor, could we have a stipulation
6 of all counsel that the telefax that the witness is being
7 referred to, the original letter was actually dated June 11,
8 1987. I think Mr. Oleskey and I at least can agree on that.
9 He introduced it during the Thomas deposition. The actual date
10 of the communication is June 11th, 1987.

11 JUDGE SMITH: Is that stipulated to by the parties?

12 MR. OLESKEY: It is by me. I don't think we know
13 when it was sent, but that's certainly the date on it.

14 MR. DIGNAN: That's the date on the original.

15 JUDGE SMITH: All right, that would be a stipulation
16 then.

17 MR. TURK: Let me note an aside here, Your Honor, in
18 copies of the globally numbered, global page numbered version
19 which you don't have yet in front of you, it seems that I have
20 given the printer something that bears some bracketing on my
21 part. So the parties may wish to note, tomorrow when they get
22 that globally page numbered document that there is some
23 bracketing on global page 70 and 71, just the bracketing, just
24 the words which are my own, and not -- they do not
25 appear in Staff Exhibit 2.

1 BY MR. TURK:

2 Q Dr. Bores, I've asked you to turn to the third
3 paragraph of the first page of this Attachment 15?

4 A (Bores) I have it.

5 Q And that's the paragraph which reads: "The current
6 FEMA position is largely based upon the FEMA and Regional
7 Assistance Committee, RAC reviews which were previously
8 provided to you. A portion of the current FEMA position
9 dealing with the beach population is based on a thorough
10 analysis by FEMA and the RAC," close quote. The paragraph goes
11 on, but I'd like to address my comments to that particular
12 segment of the document.

13 In your opinion, does the FEMA position on the beach
14 shelter contentions, which we discussed a few minutes ago, in
15 your mind, does that reflect the position of the RAC as of
16 April or even June of 1987?

17 A (Bores) It could not reflect the position of the RAC
18 since the RAC had previously found the plans were adequate at
19 the April 15th meeting. We had not had a subsequent meeting on
20 this issue until July 30th. And to my knowledge, I don't
21 have -- let me back on that. I was not contacted, let's say,
22 relative to FEMA in terms of developing a separate position,
23 and to my knowledge none of the other RAC members had either.

24 Q Also, I'd ask you to turn to the second page of this
25 document, in the first full -- first paragraph on that page

1 which begins, "In addition," approximately nine lines down
2 there's a sentence which I'll read as follows, quote: "The
3 availability of shelter as an option in the more fast breaking
4 scenarios is considered to mitigate the need for some hard time
5 objective for evacuation. However, in this case the sheltering
6 option is also clouded or the absence of sheltering for what is
7 even in the more favorable estimates amongst several thousand
8 individuals in the absence of apparently effective shelter for
9 many others.

10 Thus, the information provided on evacuation and
11 sheltering compounded one another in a manner of individuals
12 that might be involved. I might add that these numbers
13 apparently hold, not simply for the worse case accident, but
14 for a number of lesser scenarios," close quote.

15 Do you see that statement?

16 A (Bores) Yes, I do.

17 Q Do you believe that that statement reflects the
18 position of the RAC as it had been expressed prior to the
19 issuance of this letter?

20 A (Bores) It does not.

21 Q And I notice on the right hand margin of that same
22 paragraph somebody has written in the word "No" with two
23 exclamation marks, whose writing is that?

24 A (Bores) That's mine. If I might add, I put that in
25 before it was enclosed as an attachment, and since I didn't

1 have a clean one that's the way it came in.

2 Q Did you make that note when you read this letter, the
3 first time you had seen it?

4 A (Bores) Yes.

5 Q That was your immediate response to reading that
6 paragraph?

7 A (Bores) Yes. If I might note here, at the April
8 15th RAC meeting very little was discussed relative to
9 sheltering, because sheltering, when we read the plan, was
10 simply not considered as a major option in the summer for the
11 beaches.

12 Q I'm sorry, I missed that last statement, could you
13 say it once more?

14 A (Bores) What I said was, at the April 15th RAC
15 meeting sheltering was not given a lot of consideration in
16 terms of reaching that agreement that the protection for the
17 beach population was adequate, because sheltering, as we
18 understood it, in the existing New Hampshire plan had been
19 indicated as not being very feasible for a large summertime
20 population on the beaches.

21 Q Why is that or what was expressed in that respect at
22 the RAC meeting?

23 A (Bores) I said very little was expressed at this
24 particular RAC meeting because it had been accepted generally
25 by the RAC members. We had gone through this on several

1 occasions relative to the beaches and the efficacy, if you
2 would, of sheltering versus evacuation for such populations.

3 Q What is the next event that occurred in the evolution
4 of the beach shelter position, to your recollection?

5 MR. TURK: Oh, before getting to that question, let
6 me note, Your Honor, that this same Attachment number 15
7 consists of three pages, my global page is 70, 71 and 72, and
8 continues on with an attachment which is numbered global 73 and
9 74. And let me direct a question to Dr. Bores about those
10 pages, if I may.

11 BY MR. TURK:

12 Q Dr. Bores, am I right that these two pages which are
13 attached -- okay.

14 JUDGE SMITH: Can we have --

15 MR. TURK: Attachment 15 consists of a three page
16 letter from Mr. Thomas to Mr. Strome.

17 JUDGE SMITH: Yes, I have that.

18 MR. TURK: With an attachment consisting of two
19 pages.

20 JUDGE SMITH: Oh, I see. All right. The attachment
21 has an attachment.

22 MR. TURK: Yes. And those latter two pages are
23 global pages 73 and 74. Let me just ask if Dr. Bores
24 recognizes those two pages.

25

1 BY MR. TURK:

2 Q They begin with, in the left hand corner, with the
3 words. "NECNP contention RERP-8?"

4 A (Bores) I see that.

5 Q What are these two pages?

6 A (Bores) These two pages, again, are FEMA response to
7 Revised Town of Hampton Contention VIII to Revision 2 of the
8 New Hampshire RERP for Seabrook, SAPL Contention 16 and NECNP
9 Contention, RERP-8.

10 Q And are these in fact the same two pages which we
11 discussed earlier being the FEMA position on beach shelter
12 contentions of June 4, 1987?

13 A (Bores) Yes.

14 MR. TURK: I think counsel can stipulate to that.

15 BY MR. TURK:

16 Q And also, on this same document I notice again some
17 handwriting, that's global page 74, that's the last page of
18 this attachment; can you tell us whose handwriting that is?

19 A (Bores) That's my handwriting.

20 Q And that's the handwriting which reads on the left
21 hand margin, quote: "What basis," question mark, "Not
22 considered by RAC or NH RERP," close quote. What's that
23 handwritten comment refer to, do you recall?

24 A (Bores) I just want to read the paragraph first.

25 Q Sure.

t/56

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

(Pause)

(Continued on next page.)

57
1 THE WITNESS: (Bores) Okay. It goes back to again
2 what I had just related before, I believe, that we did not
3 spend much time looking at sheltering because we did not
4 believe sheltering was a feasible or practical way to treat the
5 summer beach populations in most instance.

6 BY MR. TURK:

7 Q And when you say we, again you refer to the RAC?

8 A (Bores) I'm referring to the RAC.

9 In fact, I believe some of the earlier plans did have
10 a heavier reliance on sheltering, and that was later removed.
11 I think the RAC felt better about it.

12 Q When you refer to earlier plans, you mean the --

13 A (Bores) The draft, or the plans submitted for
14 technical review.

15 Q What time frame?

16 A (Bores) '82 to about '84, I believe they were, time
17 frame.

18 Q And those plans, you say, did include --

19 A (Bores) There was more of an indication there
20 relative to sheltering.

21 Q Had those earlier drafts of the New Hampshire plans
22 relied to some extent on sheltering the beach population?

23 A (Bores) They discussed it as though they would rely
24 more on it. There were no provisions for essentially
25 sheltering the beach population.

1 MS. WEISS: Can we have a point of clarification?
2 What plans are you talking about? What dates?

3 MR. TURK: Yes. Dr. Bores indicated that these are
4 the earlier drafts in the 1982 to 1984?

5 THE WITNESS: (Bores) These were plans submitted by
6 the State of New Hampshire to FEMA for technical review. They
7 were not submitted as part of a formal submission by the state.

8 BY MR. TURK:

9 Q And what's the time frame again?

10 A (Bores) The earlier one is probably 1982. The
11 second version, my guess is approximately 1984.

12 Q Did FEMA or the RAC ever provide technical assistance
13 comments?

14 A (Bores) Yes, we did.

15 Q With respect to those earlier versions?

16 A (Bores) Yes.

17 Q Do you recall what the comments were with respect to
18 the sheltering provisions?

19 A (Bores) I could relate a general sense, but I can't
20 give you the specific wording.

21 Q What was the general sense?

22 A (Bores) The general sense is either you have to come
23 forward with, you know, more solid provisions if you are going
24 to sheltering. Otherwise, you know, you can't really rely on
25 it at all. And if you're not going to rely on it at all, fine.

1 Then provide the justification or explain why you wouldn't use
2 it.

3 Q And that's in the 1982 to 1984 time frame?

4 A (Bores) Yes.

5 Q All right.

6 JUDGE SMITH: Did you establish when that notation
7 was put in the margin?

8 MR. TURK: Not yet.

9 BY MR. TURK:

10 Q Could you tell us when these handwritten notes were
11 placed on the last page of Attachment 15, global 74?

12 A (Bores) This was put on when I first saw the
13 memoranda, or the letter from Mr. Thomas.

14 Q They represent your immediate reaction to the --

15 A (Bores) Yes.

16 Q -- letter as you read it?

17 Would this in fact possibly have been your first
18 reading -- would these notes reflect in fact your first reading
19 of the FEMA position on the beach shelter contentions of June
20 1987?

21 A (Bores) I can't say it's the first reading, but it
22 certainly is one of the very early ones.

23 Q In approximately June of 1987.

24 A (Bores) Yes.

25 Q Did there come a time in the summer of 1987 that the

1 beach shelter issues were discussed by the RAC?

2 A (Bores) Yes.

3 Q Could you tell us -- was that in a meeting?

4 A (Bores) This was at a meeting, and the meeting was
5 on July 30, 1987.

6 Q July 30th?

7 A (Bores) Yes.

8 Q Did you attend that meeting?

9 A (Bores) I did.

10 Q And Mr. Lazarus, did you attend that meeting?

11 A (Lazarus) I did.

12 Q Dr. Bores, can you describe for us what transpired at
13 that meeting?

14 A (Bores) Well, there were a number of items that were
15 on the agenda. As a matter of fact, a large number of items
16 that were on the agenda. And perhaps it's easier to take a
17 look at some of the items that were on Attachment 17.

18 Q Could you -- all right, now that we're talking about
19 that let's for a minute take a look at Attachment 16 and then
20 Attachment 17 to NRC Staff Exhibit No. 2.

21 Can you identify those two documents?

22 A (Bores) Okay. Attachment 16 was sent to the RAC
23 providing a number of areas here for comments and work that
24 needed to be discussed with the RAC, and provided the meeting
25 date for the upcoming meeting. It included a preliminary -- on

1 the first page -- a preliminary agenda, if you will.

2 Q I'm sorry, on the first page?

3 A (Bores) On Attachment 16, I'm sorry. It provided a
4 preliminary agenda for that RAC meeting.

5 Q I note that in that same document, Attachment 16 to
6 Staff Exhibit 2, there is an indication that reads, "Please
7 plan on attending a RAC meeting here at 10 a.m. on July 30,
8 1987, to discuss the following", and it goes on to list three
9 items which include -- there's the bullet No. B which reads, "A
10 revised RAC position on the Seabrook beach memorandum as a
11 result of the change in NRC's position."

12 Now, is it fair to say that this is the document
13 which informed the RAC members that there would be a meeting to
14 discuss --

15 A (Bores) That is correct.

16 Q -- the beach population issues for Seabrook?

17 A (Bores) Yes.

18 Q All right. And it is from Mr. Thomas to the RAC; is
19 that correct?

20 A (Bores) That is correct.

21 Q All right. Now, can you identify Attachment 17?

22 A (Bores) Attachment 17 was the agenda provided at the
23 RAC meeting for discussion.

24 Q That's -- all right.

25 It was distributed at the meeting?

1 A (Bores) That is correct.

2 Q And I notice there are quite a few handwritten notes
3 on this page, Attachment 17.

4 Whose handwriting is that?

5 A (Bores) That's my handwriting.

6 This handwriting occurred during the course of the
7 meeting to jot down some things for future reference, or how
8 they were handled, or further action.

9 Q Were all the handwritten notes on this page written
10 at the RAC meeting on July 30th?

11 A (Bores) All of the handwritten comments were made at
12 the RAC meeting with the following exception.

13 On the lower right-hand corner there is a listing of
14 some agencies, but to the immediate left of that, it says,
15 "Positions noted by statements at the meeting," and then under
16 that the initials RJB. I put that on some time later.

17 Q Did you put that on when you were preparing the
18 document for transmission to me in October?

19 A (Bores) That's correct.

20 Q What about the statements immediately to the right of
21 this October entry, the ones which indicate a tabular list of
22 FEMA, RAC, DOE, EPA, HHS, and DOA, when were those handwritten
23 remarks and what is the right of them entered into the
24 document?

25 A (Bores) Those were put on during the RAC meeting.

1 Q What about the pluses and minuses and the question
2 marks in that same lower right-hand corner?

3 A (Bores) They were also entered at the time of the
4 RAC meeting.

5 MR. TURK: Your Honor, is this a good time to take a
6 break, or do you want to go further?

7 JUDGE SMITH: It's up to you.

8 MR. TURK: I'd appreciate five minutes.

9 JUDGE SMITH: All right. Let's take our break until
10 2:30.

11 (Whereupon, a recess was taken.)

12 (Continued on next page.)

E57

13
14
15
16
17
18
19
20
21
22
23
24
25

1/58

1 JUDGE SMITH: Are you ready, Mr. Turk?

2 MR. TURK: Yes, sir.

3 BY MR. TURK:

4 Q Gentlemen, we left off just before the break, we had
5 reached the July 30th, 1987 RAC meeting.

6 And, Dr. Bores, I'd like to ask you at this time to
7 describe for us, first of all, -- well, let me strike that.
8 Dr. Bores, Attachment 17 does provide a number of different
9 items for discussion at the July 30th RAC meeting, and I'd like
10 to ask you, first of all, to describe briefly the types of
11 issues that were discussed at the RAC meeting without focusing
12 yet on the beach issue?

13 A (Bores) The issues that were discussed or perhaps
14 not even in some instances issues per se, but status on various
15 items, upcoming work loads, things that had been worked on and
16 still needed additional work; and then trying to project ahead
17 where RAC needed to be or would be much more involved in terms
18 of the work load, for example, in roman number II, coming work
19 load.

20 So, these items had been gone through primarily to
21 update the RAC as to what would yet be coming for them to
22 handle.

23 Q And these matters included things other than
24 Seabrook?

25 A (Bores) They did include matters other than

1 Seabrook. For example, the FEMA 350 process for Vermont, New
2 Hampshire, Maine. They required annual letters of
3 certification from the states on the emergency plans. Status
4 of review, for example, on previous plans which had been
5 submitted to RAC for review and were in some status of
6 completion or going back for comment or information to the
7 states for additional information.

8 Q Approximately what time did the meeting commence?

9 A (Bores) The meeting began, as I recall, shortly
10 after 10 o'clock.

11 Q And approximately what time did it conclude?

12 A (Bores) My best recollection is that the meeting
13 concluded on the order of about 2:30 p.m.

14 Q Is that -- Mr. Lazarus, can you give us your opinion
15 of the starting and ending times of the meeting, approximately?

16 A (Lazarus) They coincided very closely. I know it
17 was shortly after 2:00 p.m., around 2:30 when it concluded.
18 And based on our flight time up there and arrival at the
19 office, it started some time after 10:00 a.m. in the morning.

20 Q At what point in the meeting -- I'm sorry.

21 JUDGE LINENBERGER: I'm sorry, Mr. Turk, but I should
22 like to ask for a clarification here. We're talking about this
23 Attachment 17 agenda and I'm just -- it's not clear in my mind
24 how this agenda document would typically come into existence.

25 Could you -- do you know an answer -- can you explain

1 that, Dr. Bores?

2 THE WITNESS: (Bores) Yes. FEMA prepared this, FEMA
3 Region 1 prepared this as an agenda for the convenience of the
4 RAC members when they got to the meeting.

5 JUDGE LINENBERGER: Thank you.

6 MR. TURK: Thank you.

7 THE WITNESS: (Bores) Talking points, if you will.

8 BY MR. TURK:

9 Q Dr. Bores, approximately what time did the discussion
10 of the Seabrook beach issues commence, if you recall?

11 A (Bores) My estimate would be that the commencement
12 of the Seabrook beach issues began approximately 11 o'clock.

13 Q And how long did they continue?

14 A (Bores) Well, we generally take a break somewhere
15 around the lunch period.

16 Can I have a second for conference on this?

17 Q Sure.

18 (Witnesses conferring)

19 THE WITNESS: (Lazarus) Mr. Bores just asked me if I
20 remember breaking for lunch, I don't recall whether we broke
21 for lunch or whether -- the exact time of the discussion on --
22 the issues on the beach population started.

23 THE WITNESS: (Bores) Reflecting back on it, I can't
24 remember taking a lunch break either, so we -- we have on some
25 of these occasions worked straight through. And I, at this

1 point, feel we did work straight through from 11:00 till
2 approximately 2:30 or thereabouts.

3 MR. TURK: I note that this is May, the meeting was
4 last July.

5 BY MR. TURK:

6 Q Did the discussion of the Seabrook beaches consume
7 the rest of the day's discussions until the meeting adjourned?

8 A (Bores) Yes, they did.

9 Q Dr. Bores, could you describe for us the or recount
10 for us, to the best of your recollection, the discussions at
11 this RAC meeting concerning the Seabrook beach issues?

12 A (Bores) When we got to the Seabrook beach issues Mr.
13 Thomas introduced the issues along with an explanation for the
14 filing that FEMA had made relative to the contentions that were
15 being litigated in this case, with the FEMA position that was
16 expressed in the response to those contentions.

17 He apologized to the RAC for not getting them
18 involved with the response, but indicated that there simply was
19 not time after my position paper had withdrawn the containment
20 risk aspects of it. So that FEMA had to go ahead and decide,
21 without benefit of the RAC, and thought it would be appropriate
22 to bring it now to the RAC attention and to, I guess, reach a
23 closure again on those issues.

24 Q Now, when you say, he indicated there was not enough
25 time after the withdrawal of your paper, could you elaborate on

1 that a little bit? There wasn't enough time between what event
2 and what event?

3 A (Bores) Okay. There wasn't enough time between the
4 time I sent the June 4th -- hold on a second, let me make sure
5 I get the dates right.

6 MS. WEISS: Does the question go to what Mr. Thomas
7 said?

8 MR. TURK: Yes.

9 MS. WEISS: You're asking what Thomas said.

10 THE WITNESS: (Bores) My June 4th letter to Mr.
11 Thomas, and the time which FEMA had to get their response in on
12 the contentions, to have a RAC meeting simply was not enough
13 time. So therefore, FEMA made a decision relative to the
14 position and filed the contentions.

15 BY MR. TURK:

16 Q All right.

17 Now, can you relate for us what next transpired in
18 the meeting, as you recall?

19 A (Bores) What next transpired was that, I again
20 reiterated the position that I had, that the paper that we had
21 before us, the June 4th letter and enclosure, was essentially
22 the same letter, the same plan that we were talking about;
23 nothing was added. And only those elements which related to
24 probability were withdrawn.

25 So we had the same issue before us as we did before.

1 And the conclusion before was that the plans were adequate; and
2 therefore, withdrawing the probability aspects of it didn't
3 change that finding. And therefore, we should still find that
4 the plans are adequate.

5 Q All right. Was there any discussion at the meeting
6 about those containment or plant specific features?

7 A (Bores) Yes. Mr. Thomas, certainly, indicated that
8 he had relied very heavily on the earlier letter of mine where
9 I had indicated that these features reduced the probability of
10 having that severe-type accident, saying in effect that, you
11 know, he wasn't really looking at the plan per se, but had read
12 that to mean that when you read the paper with the containment
13 thing that satisfied him.

14 Now, that I've withdrawn the containment portion,
15 that he could not and did not feel that the plans were
16 adequate.

17 In addition, you know, there were other comments by
18 various RAC members relative to containment issues. One of
19 them I cited in my memo to you, Mr. Lutz, for example.

20 Q I'm sorry, what's that reference?

21 A (Bores) This is page three of my memoranda to you, I
22 believe it's marked Staff Exhibit No. 2. It's page three of
23 the enclosure, I'm not sure -- I guess it's --

24 Q Global four, global page four. Is that the page with
25 paragraph number nine?

1 A (Bores) That is correct.

2 Q Is that the paragraph you're referring to?

3 A (Bores) Yes.

4 Q All right.

5 A (Bores) Mr. Lutz did allude to the fact that, in
6 fact, whether or not it was stated in the paper the containment
7 was there, and couldn't really be ignored in the back of your
8 mind.

9 I don't remember anything else by any of the other
10 RAC members specifically that related to the containment per
11 se, of the containment features per se other than the position
12 that I had related that in fact it wasn't necessary to come to
13 the finding of adequacy.

14 Q Did Mr. -- all right, strike that. Can you tell us
15 whether in the course of that meeting, the various RAC members
16 expressed their views with respect to the adequacy of the New
17 Hampshire plans as they pertained to the beach population?

18 A (Bores) Of all the RAC members there I think all of
19 them expressed -- there was a lot of discussion among the RAC
20 members. All of them, I think, made statements indicating the
21 adequacy of the plan with the exception of FEMA and the
22 representative from the Department of Energy. The Department
23 of Energy -- I'm sorry, the Department of Agriculture.

24 Q Who was the representative for the Department of
25 Agriculture?

1 A (Bores) That's Ms. Nevitt.

2 Q All right. And what did Ms. Nevitt say, if anything?
3 Did she express any comments that you recall?

4 A (Bores) I'm not aware of any comments that she made.

5 Q All right.

6 A (Bores) Nothing that I can recall.

7 Q Let me turn for a moment to Attachment 17, and on
8 this document we had previously discussed the listing of
9 different individuals in agencies, plus or minus signs. Can
10 you tell us what these entries on this paper represent and when
11 the entries were made in particular? This is the lower right
12 hand corner of Attachment 17, global page 76.

13 A (Bores) These entries were made during the course of
14 the discussion that afternoon. And they were made by me in the
15 course of that discussion relative to statements indicated by
16 individual RAC members as to their position relative to the
17 adequacy of the Seabrook beach issues as we saw them at that
18 time.

19 Q Let's look at the first one entered there which reads
20 FEMA, and then to the right of that there's an entry; could you
21 tell us what those entries are and what they mean?

22 A (Bores) Next to FEMA there is a negative.

23 Q A minus sign?

24 A (Bores) A minus sign. I guess there's a question
25 mark there as to whether or not that minus would change as a

1 result of the meeting. Negative meant that they did not feel
2 the plans, as they existed, based on the statements that they
3 had made, were adequate. Therefore, negative meant reasonable
4 assurance could not be found.

5 Q And this is based upon statements --

6 A (Bores) Statements made during the meeting, yes.

7 Q By whom?

8 A (Bores) By the FEMA representative, and at this
9 meeting the principal representative, the one who is
10 essentially espousing the position was Mr. Thomas.

11 Q All right. And essentially, have you already
12 captured for us Mr. Thomas' remarks with respect to adequacy of
13 the plans for beach populations?

14 A (Bores) That's correct.

15 Q Is there anything you wish to add to that in terms of
16 expressions of positions he made?

17 A (Bores) Mr. Thomas'?

18 Q Yes?

19 A (Bores) Well, Mr. --

20 Q Anything in particular that comes to mind?

21 A (Bores) Mr. Thomas at this point introduced the
22 subject of, I guess, sheltering again for the entire beach
23 population, which, as I had indicated earlier, was not a
24 subject of the April meetings. RAC had not been looking for
25 sheltering as a general protective action for the beach

1 population in April or in previous meetings on this.

2 Sheltering, since it was part of the FEMA response,
3 then became a source of continued discussion among the RAC
4 members in general.

5 Q Let me see if I understand you. Are you saying that
6 Mr. Thomas advocated the position whereby the RAC would find it
7 necessary that there be shelter for the beach populations? Or
8 if I've mischaracterized that, please let me know, I'm trying
9 to understand the gist of his comments?

10 A (Bores) I'm not sure that he had indicated that RAC
11 needed to find it necessary to have shelter, but in fact he
12 made it clear that it was, in his words, FEMA's position that
13 shelter was required for the peak summer populations on the
14 beach.

15 Q And did he indicate whether or not he felt such
16 shelter existed?

17 A (Bores) Relative to the existence of that shelter he
18 did not allude to the fact that he knew that such shelter did
19 or did not exist in quantities sufficient to take care of the
20 beach population. He was aware of the Stone & Webster study,
21 at least -- I guess the initial one was done.

22 It did not become a source from which we looked at
23 it, looked at the availability of shelters per se.

24 Q And did he provide reasons why he believed that
25 shelter should be required?

1 A (Bores) He felt -- again, he goes back to the one
2 type of scenario, the fast breaking accident, severe release
3 situation, summer weekend, mid-afternoon, the beach, you know,
4 jammed with people, and in fact, you have traffic jams and
5 people are out potentially exposed to the plume, so there are
6 levels of radiation for extended periods of time. And he felt
7 that in this situation sheltering needed to be available for
8 the peak summer population.

9 And without such provisions in the plan, the plans
10 were inadequate.

11 Q All right. Now, does that pretty much conclude your
12 statement about Mr. Thomas' position or is there anything else
13 that comes to mind that you haven't already mentioned?

14 A (Bores) It may come to mind as we're talking about
15 some of the others.

16 Q All right. The next entry underneath the entry for
17 FEMA on Attachment 17 reads, "RAC," and next to that "Paul
18 Lutz," L-U-T-Z?

19 A (Bores) Yes.

20 Q What -- could you describe that entry or am I making
21 a mistake in my understanding of that?

22 A (Bores) I'm not sure why I put RAC there, R-A-C.
23 Paul Lutz is the member from the Department of Energy.

et/58

24 (Continued on next page.)

25

59

1 Department of Transportation, I'm sorry. Just as
2 much trouble with my mouth today.

3 Q And next to Mr. Lutz's name appears something. What
4 is that?

5 A (Bores) That's a plus sign.

6 Q And that represents?

7 A (Bores) That represents statements that his position
8 supported a finding of adequacy for the beach population.

9 Q In other words, he made some statements which
10 indicated he supported a finding of adequacy?

11 A (Bores) That's correct.

12 Q Can you recall what Mr. Lutz said?

13 A (Bores) Mr. Lutz had discussed several times during
14 the course of the afternoon his belief that the plans that we
15 had looked at were perhaps the best plans that he had seen. He
16 had looked at the resources. He had looked at the beaches. He
17 felt with the precautionary measures that everything was there
18 that needed to be there, and in fact he said, you know, we have
19 done our job. The plans are adequate.

20 MR. TURK: As an aside, I'll note that one nice thing
21 about doing direct examination is you can take all the time you
22 need to complete your notes.

23 THE WITNESS: (Bores) That does not happen sometimes
24 at other meetings.

25

1 BY MR. TURK:

2 Q Do you recall anything else in particular stated by
3 Mr. Lutz?

4 We've already discussed his comment about
5 containment.

6 A (Bores) Yes. After Mr. Thomas had indicated what
7 the FEMA position was relative to sheltering for the beach
8 population, Mr. Lutz said, you have a problem, indicating that
9 FEMA has taken a position different than what RAC had. And
10 then he followed it with a statement that we have a problem,
11 and we need to get together and resolve it.

12 MS. WEISS: Your Honor, I'm going to move to strike.
13 Unless I have misunderstood, the witness has said Mr. Lutz
14 said, you have a problem.

15 JUDGE SMITH: Referring to something else.

16 MS. WEISS: Yes, indicating that RAC disagreed with
17 Mr. Thomas.

18 Now if Mr. Lutz said, you have a problem because you
19 disagree, Mr. Thomas, with the RAC, that's fine. But I think
20 his interpretation of that ought to be separated from what Mr.
21 Lutz said.

22 MR. TURK: Now let me -- Your Honor, let me see if I
23 can ask the witness, and I note that the comment does appear
24 before us also in Staff Exhibit 2, Paragraph 9, global Page 4.

25 MS. WEISS: The comment without the elaboration

1 appears.

2 MR. TURK: Let me see. Your Honor, if I might, I'll
3 ask Dr. Bores to clarify that.

4 BY MR. TURK:

5 Q Dr. Bores, do you recall if Mr. Lutz stated at the
6 meeting, with regard to his comments to Mr. Thomas, that "You
7 have a problem"?

8 Do you recall if he stated that the problem related
9 to FEMA taking a position different from the RAC?

10 A (Bores) It was in that context. Now, he did not
11 restate the problem per se, but this is what we were
12 discussing. It is in that context.

13 Q All right. Do you recall anything further about Mr.
14 Lutz?

15 A (Bores) Mr. Lutz had indicated that he had made a
16 number of trips up the beach areas over the course of the year
17 since he is a member of the Department of Transportation. And
18 he felt that the numbers of people on the beaches, as expressed
19 in some of the documents that RAC had before, were very high
20 compared to his actual observations at the times he was there.

21 Q All right. The next entry after Mr. Lutz reads, DOE.
22 Could you explain that entry to us?

23 It is again Attachment 17.

24 A (Bores) The Department of Energy member is Mr. Herb
25 Fish.

1 Q And there is something to the right of his name.

2 A (Bores) Okay.

3 Q What is that?

4 A (Bores) That's a plus sign.

5 Q And, again, does that represent something about the
6 statements he made?

7 A (Bores) Yes, it represents that he made statements
8 indicating that his position supported a continued finding of a
9 reasonable assurance, or at least that the beach population
10 could be adequately protected under the -- with the current
11 plan provisions.

12 Q Do you recall anything in particular beyond this with
13 respect to Mr. Fish's comments?

14 A (Bores) I would not care to contribute to any
15 specific statements to Mr. Fish at this time, because it's a
16 long time ago. But the statements that he had made were
17 generally supportive of statements that had been made, or
18 restatements of what others on the RAC had made indicating
19 their continued belief that the plans were adequate.

20 Q And the entry of a plus next to Mr. Fish's name, does
21 that indicate that during the course of the meeting it was
22 clear to you that Mr. Fish supported a finding of adequacy for
23 beach population?

24 A (Bores) That is correct.

25 Q All right, the next entry, could you read that one

1 for us? Again, Attachment 17.

2 A (Bores) The next entry says, EPA -- that's
3 Environmental Protection Agency -- Byron Keene who was the
4 representative, and there is a plus statement following that.
5 Again, indicating that his position as expressed at the meeting
6 indicated his support for the position that the beach
7 population would be adequately protected with the current
8 plans.

9 Q Do you recall anything in particular about his
10 comments?

11 A (Bores) Mr. Keene had discussed a number of areas.
12 One was a situation, I think raised by Mr. Thomas again,
13 talking about these people that Mr. Thomas says are going to be
14 trapped for hours and hours in the plume. Mr. Keene indicated
15 that he felt that it would be much better for people to stay in
16 line, to get out of the area than to try and go back or be
17 housed somewhere and perhaps be in a situation where the plume
18 might be over you much longer.

19 In that context, you know, we talked about the length
20 of time of plume might be over a given area, assuming it was
21 going to the beach population; time it might take even if you
22 are in a long line of cars waiting to get off, that the plume
23 may not stay overhead, if it is overhead at all very long; you
24 can traverse through the plume. These things considered, it
25 still would be preferable to get off of the beach rather than

1 to stay there.

2 Q And this is a representative from the Environmental
3 Protection Agency?

4 A (Bores) That is correct.

5 Q Do you recall anything further about Mr. Keene's
6 comments?

7 A (Bores) Yes, we also got into a discussion raised by
8 another RAC member relative to the EPA PAGs, and an
9 interpretation of the protective action guides. And he
10 provided clarification on what was meant by the protective
11 action guides; that they are --

12 Q Could you tell us what he stated in that regard?

13 A (Bores) Basically he related the use of the EPA PAGs
14 were to -- PAGs are protective action guides, and their use is
15 primarily to assist decisionmakers in determining whether to
16 take a particular type of protective action, or protective
17 action may not be necessary, but is sort of a trigger point,
18 rather than a point at which radiation is safe, unsafe, or in
19 fact a level at which the adequacy of plans can be judged
20 adequate or inadequate.

21 JUDGE LINENBERGER: Excuse me, Mr. Turk, but I should
22 like to inquire of Dr. Bores.

23 Your most recent statement involving PAGs, is this
24 your characterization of them, or do you represent that this is
25 a characterization of them discussed by Mr. Keene at the

1 meeting?

2 THE WITNESS: (Bores) It's a representation that Mr.
3 Keene had discussed this. It doesn't mean that Mr. Keene was
4 the only one who discussed this interpretation. I, for
5 example, share that interpretation.

6 BY MR. TURK:

7 Q But this was an interpretation offered expressly by
8 Mr. Keene?

9 A (Bores) Yes, it was.

10 Q Now let me see if I understand that, however, with
11 one question.

12 When you say that the PAGs were not a basis, or when
13 you relate that Mr. Keene indicated that PAGs are not a basis
14 upon which to find plan adequacy, what did he say in that
15 regard?

16 Do you recall anything further?

17 A (Bores) Perhaps I ought to put it in the context.
18 The issue was raised by Mr. Church, who is the member from
19 Health & Human Services, or FDA more specifically.

20 Q Now one clarification. FDA is Food and Drug
21 Administration?

22 A (Bores) That is correct.

23 Q And that's a part of Health & Human Services.

24 A (Bores) Health & Human Services, yes.

25 Q All right.

1 A (Bores) Mr. Church had raised, or made a comment
2 that indicated something to the effect that, you know, safety
3 is judged by whether or not doses could exceed the EPA
4 protective action guides.

5 And Mr. Keene then provided the clarification as to
6 what these protective action guides were, and how they were
7 used, and clearly were not to be utilized as a level by which
8 one would judge the adequacy of plans.

9 That is, if you have a plan designed so that for any
10 accident that you can imagine you can keep the exposures below
11 the level of the protective action guide, the plan is adequate.
12 And if you can't, it is not adequate. So he explained that
13 that was not the purpose of the protective action guides. It
14 was a guide for a decisionmaker, basically to make -- help him
15 determine at what level protective action should be taken.

16 Q Did he indicate anything along the line that really
17 because you could postulate an accident exceeding the PAGs,
18 that that either would or would not require a finding of plan
19 adequacy?

20 Did he say something along that line?

21 A (Bores) Okay.

22 MS. WEISS: Your Honor, this is mostly leading, and
23 it's also getting well into the merits of the issues of the
24 case, and I think beyond any reasonable discussion of the RAC
25 meeting.

1 MR. TURK: It is to a certain extent leading, Your
2 Honor. I recognize that. I'm seeking to elicit recollection
3 on this; actually clarification to make sure I understand the
4 gist of what Dr. Bores has already related.

5 THE WITNESS: (Bores) I don't know to whom you were
6 referring with your last question.

7 JUDGE SMITH: Well, there's an objection.

8 THE WITNESS: (Bores) Oh, I'm sorry.

9 MR. TURK: Let me see if I can rephrase it, Your
10 Honor.

11 JUDGE SMITH: Okay.

12 BY MR. TURK:

13 Q You were indicating that Mr. Keene was clarifying the
14 meaning and use of the PAGs, and you further were discussing
15 the relationship between the PAGs and emergency plan adequacy.

16 Let me see if I can ask you one more time to tell me
17 what he said in that regard.

18 A (Bores) He indicated that the protective action
19 guides could not be used to determine the adequacy of the
20 plans. That is, whether or not you could keep exposures below
21 the levels of the PAGs should not be used to judge the adequacy
22 of plans. That was not their intended purpose.

23 Q Did the RAC come to some sort of a common
24 understanding or agreement with Mr. Keene's position?

25 A (Bores) Yes.

1 Q They agreed with him?

2 A (Bores) Yes.

3 Q Do you recall anything further about Mr. Keene's
4 remarks at the meeting?

5 A (Bores) No specific statements.

6 Q All right. The next entry on Attachment 17 is for
7 HHS. Could you describe that entry for us?

8 A (Bores) Okay. That is Mr. Church, who was the
9 representative for Health & Human Services, Food and Drug
10 Administration.

11 And on my copy there's a mark there.

12 MR. TURK: Your Honor, I do observe that the entry
13 next to this person's name is somewhat illegible.

14 JUDGE SMITH: Mine looks negative.

15 MR. TURK: Don't reach that conclusion, Your Honor.
16 I do have the document which Dr. Bores transmitted to me before
17 all the additional photocopying was done.

18 May I have a moment?

19 (Pause.)

20 (Continued on next page.)

21

22

23

24

25

160

1 MR. TURK: Your Honor, I've placed in front of Dr.
2 Bores a copy of Attachment 17, which is -- and the document
3 that I've placed in front of him is the precise document as I
4 received it from Dr. Bores. It indicates in red ink the
5 comment which Dr. Bores previously indicated had been added on
6 to the document when he transmitted this paper to me; that is,
7 a line that reads, "Positions noted by statements at meeting,
8 RJB." And I think it provides a better copy, a more legible
9 copy of this same document, Attachment 17, than the parties and
10 Board have in front of them.

11 BY MR. TURK:

12 Q Dr. Bores, first, let me ask you if in fact this is
13 Attachment 17 to Staff Exhibit 2 as the attachment was
14 initially transmitted to me in October of 1987?

15 A (Bores) It is.

16 Q And are you able to read on that document what the
17 entry says next to HHS?

18 A (Bores) Yes, it --

19 MR. BACKUS: Your Honor, I just wish to inquire.

20 Isn't the original available? If there is some great
21 importance as to whether this is a plus or minus, can't we have
22 the original?

23 MR. TURK: I will ask Dr. Bores --

24 MR. BACKUS: Does he have it?

25 MR. TURK: He does not have it in New Hampshire.

1 I'll ask him to see if he can find it when he goes back home
2 over the weekend. This is the best available copy we have in
3 New Hampshire today.

4 BY MR. TURK:

5 Q Dr. Bores, are you able to indicate to us what that
6 entry is next to HHS?

7 A (Bores) It is a plus symbol.

8 Q And is that plus symbol the entry you made during the
9 RAC meeting of July 1987?

10 A (Bores) It is.

11 Q And what does that plus symbol represent?

12 A (Bores) The plus symbol represents my understanding
13 of his position based on statements that he had made relative
14 to the adequacy of the New Hampshire plans to protect the beach
15 population; the plus symbol indicating that he had made
16 positive statements of his position; that is, that the plans
17 were adequate.

18 JUDGE SMITH: Do you remember from your own memory
19 that that was positive, or are you just reading it from that
20 copy?

21 THE WITNESS: (Bores) No, it was positive.

22 JUDGE SMITH: From your own memory.

23 THE WITNESS: (Bores) That is correct.

24 BY MR. TURK:

25 Q Dr. Bores, can you relate to us what Mr. Church said

1 about the adequacy of the New Hampshire plan for the beach
2 population, if you recall?

3 A (Bores) I can't attribute any specific statements to
4 Mr. Church in that regard other than the general sense that
5 they were supportive of what other RAC members had said.

6 Like Mr. Fish's I had alluded to earlier, provided
7 more supportive statements than specific points that needed to
8 be considered or should be considered as an advocacy position.

9 Q You're saying, in other words, that Mr. Church
10 indicated support for other speakers' positions?

11 A (Bores) That is correct.

12 Q And when you refer to these other speakers, are you
13 including Mr. Thomas, or are you talking about the RAC members
14 other than Mr. Thomas?

15 A (Bores) I'm talking about RAC members other than Mr.
16 Thomas, and to statements of Mr. Lazarus.

17 Q I'm sorry?

18 A (Bores) And to statements of Mr. Lazarus.

19 Q What do you mean?

20 A (Bores) Well, Mr. Lazarus was not a RAC member.

21 Q In other words, Mr. Church indicated support for
22 statements made by Mr. Lazarus?

23 A (Bores) Yes.

24 Q What is the last entry in this Attachment 17?

25 A (Bores) The last entry says, DOA, or Department of

1 Agriculture, Dorothy Nevitt. And following her name is a
2 question mark.

3 Q What does that entry represent?

4 A (Bores) As I had indicated earlier, there was rarely
5 lively discussion among all of the members present with the
6 exception of Ms. Nevitt. She really didn't say much of
7 anything. And from her statements, therefore, I couldn't draw
8 any conclusion as to which -- which way she was leaning in this
9 regard.

10 Q So you entered a question mark as the meeting -- at
11 some time during the progression of that meeting; is that
12 correct?

13 A (Bores) That's correct.

14 MR. OLESKEY: What was that last? Sometime during
15 what? Could you repeat that? I missed it.

16 MR. TURK: Why don't we have it reread for you.

17 JUDGE SMITH: Well, it's a simple word. During the
18 progression of the meeting.

19 MR. TURK: Yes.

20 MR. OLESKEY: I just didn't get what it was during
21 the progression of the meeting, Judge.

22 JUDGE SMITH: He marked -- the question mark was
23 placed --

24 MR. OLESKEY: Ah, fine.

25 JUDGE SMITH: -- during the progression of the

1 meeting.

2 MR. OLESKEY: Thanks.

3 BY MR. TURK:

4 Q Mr. Lazarus, I'm going to ask you a series of similar
5 questions.

6 MR. DIGNAN: Your Honor, Mr. Turk, before you
7 proceed, if I may be permitted.

8 In my copy, at least, there is a mark at about the
9 1:00 o'clock direction from the minus question mark next to
10 FEMA. Is it just my copy that has that, or what is it?

11 MR. TURK: Could I see what --

12 JUDGE SMITH: I have it, too.

13 MR. TURK: Let me take out the original again, Your
14 Honor; at least the original in my possession as I received it.

15 JUDGE SMITH: Before you waste a lot of time, Dr.
16 Bores will say what it means.

17 MR. TURK: Let me show it to Dr. Bores.

18 JUDGE SMITH: He saw it. You just showed it to him.

19 MR. TURK: No.

20 THE WITNESS: (Bores) I wasn't sure if it was the
21 same copy.

22 JUDGE SMITH: Okay.

23 MR. TURK: Your Honor, we will attempt to locate the
24 original.

25 MR. DIGNAN: I guess all I wanted in the record was

1 an acknowledgement, if it be so, that that's not part of -- if
2 I can use the vernacular, the score sheet. In my copy it looks
3 like another minus, and I just wanted to be sure it wasn't part
4 of the score sheet. I've seen the original.

5 MR. OLESKEY: We'll take it.

6 MR. TURK: Let's ask Dr. Bores what he can tell us
7 about that.

8 THE WITNESS: (Bores) Okay. The first thing I
9 indicated that it had no meaning for me, what I saw there. But
10 when I look at the copy that I had transmitted to Mr. Turk, it
11 appears to be a circling of the entire grouping of markings
12 there; that is, including, you know, what I had marked for
13 FEMA, for Department of Transportation, DOE, EPA, HHS, and DOA.
14 Simply an enclosure looping.

15 BY MR. TURK:

16 Q Sort of a circle --

17 A (Bores) And what you see is --

18 Q A circle. This represents then the top edge of a
19 circle --

20 A (Bores) It's the top edge --

21 Q -- you drew around the pluses or minuses.

22 A (Bores) -- of the circle which copied on I guess
23 ours, but which the rest of the circle did not copy the rest of
24 that loop.

25 MR. TURK: Pardon me?

1 JUDGE SMITH: I didn't say anything.

2 BY MR. TURK:

3 Q Just for clarification, was there any other RAC
4 member present at that meeting, other than the ones listed
5 here? Of course, not including yourself, in addition to
6 yourself.

7 A (Bores) Department of Commerce was not present.
8 Department of Interior was not present. So, none other than
9 this.

10 Q So in fact, then, we should not in any way interpret
11 that mark which appears above the minus of FEMA to be a
12 negative vote for anyone else. It's really just the circling.

13 A (Bores) That's correct.

14 JUDGE SMITH: Well, you say vote. Having read the
15 reference to Mr. Lazarus's part in it, you mean vote --

16 MR. TURK: I didn't mean vote.

17 JUDGE SMITH: -- or interpretation of comments?

18 MR. TURK: Excuse me. If I said vote, I withdraw
19 that. I mean interpretation, of comments. We haven't gotten
20 there yet.

21 BY MR. TURK:

22 Q Mr. Lazarus, let me ask you if you recall any
23 particular statements made by any of these individuals at the
24 RAC meeting of July?

25 A (Lazarus) The only statement that I remember that I

1 can attribute to an individual is the statement by Paul Lutz,
2 because there was a flash of anger with the, you've got a
3 problem, and that stuck in my mind.

4 But I remember the general discussions that were
5 taking place on the other issues, but am unable to attribute
6 any particular quotes to any particular individuals.

7 Q Do you recall whether or not Mr. Thomas made any
8 specific remarks that come to mind?

9 A (Lazarus) Mr. Thomas's remarks during the meeting
10 were, you know, along -- as chairing the meeting, he made
11 several marks as far as that goes, as far as presenting the
12 FEMA position, their concerns with the protection of the beach
13 population, the NRC's removal of the site-specific information.

14 When it got to the point of people were really
15 voicing opinions, and it became apparent to me -- most of the
16 meeting I was sitting listening as I was not the RAC member; I
17 was not doing any presenting. Mr. Bores was doing most of the
18 speaking for the NRC. That I was just watching, watching the
19 positions develop.

20 Q Do you remember whether Mr. Thomas made any remarks
21 about his reliance on RAC members for any particular --

22 MR. OLESKEY: No, this really does go too far.

23 MR. TURK: I'll withdraw it.

24 MR. OLESKEY: Now, as I understood the rules, if a
25 witness indicates a complete absence of memory as to a

1 particular event under some circumstances, if you make the
2 preliminary -- ask the preliminary questions, and the court
3 makes the finding there's a total absence of memory, then the
4 interrogator on direct or on cross can suggest a possible
5 answer.

6 But here we have a witness who has some recollections
7 and says he recalls nothing else. I don't think it's
8 appropriate to suggest answers on direct of your own witness in
9 that circumstance, and I object.

10 MR. TURK: I'll withdraw the question.

11 BY MR. TURK:

12 Q Does anything further about Mr. Thomas's remarks come
13 to mind?

14 A (Lazarus) I did indicate that as he opened the
15 meeting that he indicated that he depended on the expertise of
16 the RAC, and that's in the memorandum that I submitted to you
17 dated October 15th; that he had no special technical expertise;
18 and that he depended on the expertise of the RAC members. And
19 that was how the discussion began.

20 Q And those were his remarks?

21 A (Lazarus) His specific, you know, quote?

22 Q Do you recall --

23 A (Lazarus) Yes, I recall. He had -- a specific quote
24 was that, all I know about nuclear power plants is that they're
25 big. I depend on the technical experts here for the technical

1 expertise.

2 Q Well, we've gone through your recollections of
3 specific statements.

4 What do you recall about the manner in which the
5 meeting wrapped up? And here let me ask Mr. Lazarus.

6 A (Lazarus) As Mr. Bores indicated, almost everyone on
7 the RAC voiced an opinion as to the adequacy of the New
8 Hampshire Radiological Emergency Response Plan after the site-
9 specific information had been removed.

10 Q And by site-specific information, you mean --

11 A (Lazarus) We're talking about the risk -- the
12 assessment of risk, the contain -- you know, the special
13 containment, and those sorts of aspects; anything that dealt
14 with the Seabrook specific design feature.

15 Q All right. And then what happened?

16 A (Lazarus) At approximately 2 p.m., after I had heard
17 almost everyone voicing their opinions, Mr. Thomas started
18 talking about, well, let's take this information and we'll get
19 something out to the RAC on a revised position.

20 And I indicated at that point that we have everyone
21 here. Why don't we try to resolve this while we have everyone
22 here. It's only 2:00 o'clock. Let's continue on with this
23 until we come to some resolution.

24 Q All right. And did you get a response to that
25 comment?

1 A (Lazarus) His response was that he'd been up late
2 and he was tired, and he thought it would be better and more
3 orderly to redraft the position and send it out to the RAC
4 members for review.

5 Q All right. Then what happened?

6 Oh, did he make any other statements in that regard?

7 A (Lazarus) I don't believe so, not --

8 Q All right, then what happened?

9 A (Lazarus) I was unwilling to leave the meeting with
10 the vague promise of sending a position out to the RAC that had
11 not been discussed or even outlined as to what that position
12 would be.

13 I asked him to at least take a vote of the members of
14 the RAC to find out where each one stood on the issue. He
15 declined to do that. At one point he indicated --

16 Q Did he indicate why?

17 A (Lazarus) He also indicated correctly that the NOAA
18 representatives that attended the previous meeting weren't
19 there, and he declined to take a vote on the issue.

20 Q Then what happened?

21 A (Lazarus) Then I -- based on his declining to take a
22 vote --

23 Q Just one minute.

24 JUDGE SMITH: NOAA representative is National Oceanic
25 and --

1 THE WITNESS: (Lazarus) I'm sorry. Yes, National
2 Oceanic Atmospheric Administration.

3 MR. TURK: Mr. Lazarus, I would just ask you to slow
4 down. I'm trying to write, and I want to make sure the record
5 is clear too.

6 THE WITNESS: (Lazarus) Sorry.

7 BY MR. TURK:

8 Q What happened after he declined to take a vote?

9 A (Lazarus) I stated that I would like to know for my
10 own information then clearly where each one stood on the issue.
11 He did not respond to that.

12 So then I stated a question to the RAC members, and
13 asked each one for their position.

14 Q Could you tell us about that? What did you ask?

15 A (Lazarus) The statement that I presented was that in
16 light of what you know about the New Hampshire Radiological
17 Emergency Response Plan as far as the early closure of the
18 beaches at the alert level, the protective actions being able
19 to be disseminated over a PA system on sirens, their knowledge
20 of the evacuation time estimates and people were unlikely to be
21 in the plumes for lengthy periods of time during evacuation,
22 and the fact that we had discussed just prior to this dose
23 reduction factors would be on the order to 10 percent,
24 whether --

25 Q Ten percent.

1 A (Lazarus) Ten percent dose reduction factor for
2 sheltering.

3 Q For sheltering.

4 A (Lazarus) Yes. Whether or not each one thought that
5 the New Hampshire RERP, Radiological Emergency Response Plan,
6 was adequate as it was written at that time.

7 And I raised my hand, and looked around at each one
8 of the persons at that table for a sign of whether or not they
9 agreed with that position.

10 Each person on the RAC that I looked at raised a
11 hand. It was not an eye or nay thing; it was a --

12 Q Did Mr. Thomas raise his hand?

13 A (Lazarus) No, he did not.

14 Q Do you recall anyone in particular raising their
15 hands?

16 A (Lazarus) I recall that each person I looked at
17 raising their hand. I recall especially Ms. Nevitt from the
18 Department of Agriculture, because she had said very little, if
19 anything, during the whole meeting. So I was sort of surprised
20 that she did signal her consent with the question as stated.

21 Q She raised her hand?

22 A (Lazarus) Yes.

23 Q Did all of the RAC members other than Mr. Thomas
24 raise their hands?

25 A (Lazarus) Yes, they did.

1 Q Dr. Bores, do you recall anything about this
2 incident?

3 A (Bores) Yes.

4 Q Where were you sitting at the time?

5 A (Bores) I was sitting directly on Bill's right, as I
6 am right now.

7 Q And you heard him ask the question?

8 A (Bores) Yes, I did.

9 Q Did you look around at the RAC members?

10 A (Bores) Yes, I did.

11 Q And what did you observe?

12 A (Bores) I observed the same thing as related by Mr.
13 Lazarus. That each of the members, other than the FEMA
14 representatives and the contractors, had signaled consent by
15 raising their hand.

16 Q By raising their hand?

17 A (Bores) That's correct.

18 Q What happened next?

19 A (Lazarus) At that point Mr. Thomas reiterated that
20 he would have the position redrafted by Mr. Rospenda, the
21 Argonne Laboratories contractor, and provide it to the RAC for
22 review. And the meeting adjourned within minutes of that
23 discussion.

24 Q Mr. Lazarus, did you have occasion to observe Mr.
25 Thomas's behavior while you were asking your question and

1 signaling with raising your own hand what you were asking the
2 RAC members to do? Did you observe Mr. Thomas?

3 A (Lazarus) Yes, I did.

4 Q What did you observe?

5 A (Lazarus) Stony silence mostly. He was obviously
6 not pleased based on my judgment of his body language.

7 Q What do you mean by that?

8 MR. OLESKEY: Move to strike. Move to strike the
9 conclusion.

10 JUDGE SMITH: Overruled.

11 THE WITNESS: (Lazarus) Would you repeat the
12 question, please?

13 BY MR. TURK:

14 Q When you say you observed his body language, what did
15 you observe?

16 A (Lazarus) That he was sitting stiffly and he was
17 staring at me, and he did not have a pleased expression on his
18 face. That's all I was trying to indicate.

19 Q Well, if he didn't have a pleased expression, did he
20 have any expression?

21 MS. WEISS: Oh, he said two times he stared at him in
22 stony silence. Is that enough?

23 MR. TURK: No.

24 MR. DIGNAN: Is that an objection?

25 MS. WEISS: It's an objection that the question has

1 been asked and answered twice.

2 JUDGE SMITH: I think that Mr. Lazarus has said all
3 he's going to -- what he has said on his own about Mr. Thomas's
4 appearance.

5 Sustained.

6 BY MR. TURK:

7 Q And did the RAC meeting then adjourn?

8 A (Lazarus) Yes, it did.

9 Q Do either of you recall whether Mr. Thomas made any
10 remarks concerning his interpretation of the phrase "reasonable
11 assurance" --

12 A (Lazarus) I do not recall.

13 Q -- during the course of the RAC meeting?

14 A (Lazarus) I do not recall that.

15 Q Dr. Bores?

16 A (Bores) I'm trying to recall whether it was this RAC
17 meeting or the succeeding one where he certainly did raise the
18 question of reasonable assurance.

19 Q You're not sure which meeting it transpired at?

20 A (Bores) No, not without checking back at my notes
21 and perhaps I can find it.

22 Q Well, I don't know if it matters as a matter of
23 function of time, so let me just ask you.

24 What do you recall about his comments in that regard?

25 JUDGE SMITH: At the meeting that he doesn't recall

1 that he made the comments.

2 MR. TURK: No, I understand Dr. Bores to have said
3 that he recalls Mr. Thomas making comments either at the July
4 RAC meeting or the subsequent RAC meeting. And now I'm saying
5 without regard --

6 JUDGE SMITH: All right.

7 MR. TURK: -- When the comment was made, what does
8 Dr. Bores recall about Thomas's comments.

9 THE WITNESS: (Bores) Mr. Thomas said that the FEMA
10 definition of reasonable assurance is not the same one that the
11 NRC maintains. That, in fact, FEMA's interpretation is
12 different. And what he had indicated at that particular
13 meeting was that reasonable assurance meant what the reasonable
14 person would find acceptable.

15 He had further indicated that the interpretation in
16 the FEMA, NRC Christenbury letter that was provided as an
17 attachment in response to the Dignan memo was not a proper
18 characterization of the FEMA position.

19 (Continued on next page.)

E60

20

21

22

23

24

25

t/61

1 BY MR. TURK:

2 Q And just for clarification, I'd ask you, is that
3 Christenbury letter the same one that's attached to your
4 letters to Mr. Thomas of February and June 1987?

5 A (Bores) That is the same one.

6 Q And, Dr. Bores, I'd also like to ask you to turn to
7 another attachment, to your October 15th, 1987 memo to me,
8 Staff Exhibit 2. And I'd ask you to look in particular, first,
9 at Attachment 4, global 11, can you identify that document?

10 A (Bores) Yes. This is a memoranda from Spence Perry
11 who was the Acting General Counsel for FEMA to Edward Thomas,
12 FEMA Region 1. It's dated June 25th, 1985, I believe it is.

13 Q Could it be 1986?

14 A (Bores) '86? Possible.

15 Q Should I show you the original?

16 A (Bores) Please. My copy is not very good.

17 JUDGE SMITH: Well, look at the stamp on the bottom
18 rather than taking time there. It's stamped.

19 THE WITNESS: (Bores) Yes. 1986.

20 BY MR. TURK:

21 Q And could you tell us when you received this or how
22 you received a copy of this document?

23 A (Bores) Well, the way I got a copy of this one was
24 that, Mr. Charles Berry of the Office of Public Safety of the
25 Commonwealth of Massachusetts had provided to FEMA a copy of

1 what is called the Berry Report on Pilgrim; and this was
2 subsequently distributed also at the NRC. And this memoranda
3 was attached to the previous memorandum on -- I'm sorry,
4 attached to the letter which is in my Enclosure 1 as Attachment
5 3, in that Berry document.

6 Q And I'd like --

7 JUDGE SMITH: Now, Mr. Turk, if I didn't know better
8 I would think that you're entering into an attack on the merits
9 of Mr. Thomas' interpretation, but I know better than that,
10 because you wouldn't do that.

11 MR. TURK: Let me turn from this document then, and
12 also ask you to turn to Attachment No. 3.

13 BY MR. TURK:

14 Q Could you identify that document?

15 A (Bores) Yes. That's a letter from Mr. Edward Thomas
16 to Mr. Boulay of the State Emergency Management Director,
17 Massachusetts Civil Defense Agency and Office of the Emergency
18 Preparedness. And it is dated July 9th, 1986.

19 Q And how did you happen to get a copy of this?

20 A (Bores) This was also attached to the Berry report.

21 Q Gentlemen, did you ever receive from Mr. Thomas or
22 from FEMA the revision of the RAC position on beach population
23 as he indicated he would send out at the close of the July RAC
24 meeting?

25 A (Lazarus) No, I did not.

1 A (Bore) No.

2 Q Are you aware whether something like that, these
3 revisions that Mr. Thomas promised had been sent out to the RAC
4 members?

5 A (Bores) They have not been sent out to date.

6 JUDGE SMITH: You say, to date, to this day?

7 THE WITNESS: (Bores) To this date we have not
8 received them.

9 JUDGE LINENBERGER: Question, sir. When you answered
10 that they have not been sent out, are you indicating that
11 answer based on your not having received them or do you have
12 independent knowledge that nothing has been prepared and
13 transmitted?

14 THE WITNESS: (Bores) Okay. Let me try and answer
15 it this way. On -- I forget what date it is specifically, but
16 in August of last year following this meeting, I was at a
17 meeting up here at the Office of Civil Defense with a number of
18 individuals, representatives of public service, the State of
19 New Hampshire, FEMA, and the FEMA contractor was there; and I
20 took the opportunity to ask the FEMA contractor if that
21 position was developed. And he had indicated that he had in
22 fact developed the position, had provided it to FEMA Region 1
23 the previous weekend or previous Friday, but it had not been
24 submitted.

25 I had checked several times subsequent to that with

1 FEMA Region 1 as to whether or not they were going to submit or
2 provide a revision to the document, and he had indicated that
3 they still hadn't had time or something along that way. But I
4 have not gotten a copy.

5 BY MR. TURK:

6 Q For information, Dr. Bores, who is the FEMA
7 contractor with whom you had this discussion in August?

8 A (Bores) This would be Mr. Rospenda of Argonne
9 National Laboratory.

10 Q And when you indicated that you checked several times
11 with FEMA Region 1 as to whether the document had been issued,
12 I forget your words, was issuing -- let me characterize it that
13 way -- who did you speak with in FEMA Region 1?

14 A (Bores) Either Mr. Dolan or Mr. Thomas.

15 Q And your recollection is that the response you
16 received on those occasions was that, they were too busy to get
17 it out right away or something -- what -- I'm sorry, I don't
18 want to mischaracterize, what did you say the response was?

19 A (Bores) That they had not had the time to get it
20 back, to get it out yet.

21 Q Dr. Bores, do you recall a time in October of 1987 in
22 which I placed a telephone call to you?

23 A (Bores) Yes.

24 Q And could you describe what you were requested to do
25 in that telephone -- were you requested to do something in that

1 telephone call?

2 A (Bores) Yes. I was requested to provide my -- a
3 history or a chronology of my involvement with the Seabrook
4 emergency preparedness situation, and in particular, you know,
5 the beach issues, and my recollections of the April 15th and
6 July 30th, 1987 RAC meetings.

7 I was also to notify or request Mr. Lazarus to
8 independently prepare his recollections of the two RAC meetings
9 that he had attended. And since my discussions with you, you
10 learned of Mr. Schumacher's attendance at the July 30th
11 meeting. You had requested that I try and obtain a similar
12 independent recollection from him.

13 Q And did you relay this request to Mr. Schumacher and
14 Mr. Lazarus?

15 A (Bores) I relayed it to Mr. Lazarus, and since Mr.
16 Lazarus was the supervisor of Mr. Schumacher, I assume Mr.
17 Lazarus relayed it to Mr. Schumacher.

18 Q And in fact, is the Staff Exhibit No. 2, cover memo
19 with the four page Enclosure 1, and that's global pages 1 to 5,
20 does that represent your response to my request, Dr. Bores?

21 A (Bores) Yes.

22 Q Was it prepared independently by you?

23 A (Bores) Yes, it was.

24 Q Was it prepared in consultation with any other
25 person?

1 A (Bores) No.

2 Q Mr. Lazarus, do you recall Dr. Bores asking you to
3 prepare an independent recollection of these matters?

4 A (Lazarus) Yes, I do.

5 Q And is Staff Exhibit No. 3, which is the October
6 15th, 1987 memo from you to me, does that represent your
7 response to that request?

8 A (Lazarus) Yes, it does.

9 Q Did you prepare it independently?

10 A (Lazarus) Yes, I did.

11 Q Did you prepare it with consultation with any other
12 person?

13 A (Lazarus) No, I did not.

14 Q And did you ask Mr. Schumacher to prepare an
15 independent accounting?

16 A (Lazarus) I did.

17 Q And did he provide you with one?

18 A (Lazarus) Yes, he did.

19 MR. TURK: Your Honor, I would like to reoffer at
20 this time the Schumacher memo, for no purpose other than to
21 show the -- a response received -- that a response was provided
22 by Mr. Schumacher.

23 JUDGE SMITH: That there was a response?

24 MR. TURK: Yes.

25 JUDGE SMITH: That there is -- the idea is that there

1 is no unheard of -- there's no person unheard from on this?

2 MR. TURK: Well, frankly, Your Honor, I believe that
3 given the fact that we've now established that Mr. Schumacher
4 was still employed by the NRC on the date that he wrote this
5 memo, I believe that it does constitute an exception to a
6 hearsay rule.

7 I understand your prior ruling to be that, because it
8 was prepared in the course of litigation it does not constitute
9 a normal business record.

10 If I may have just a moment.

11 As I recall, and I don't use my Federal Rules of
12 Evidence too often, there's a further exception to the hearsay
13 rules with respect to government documents. I could be wrong,
14 but let me see if I can take a minute to find the reference I'm
15 thinking of.

16 (Pause)

17 JUDGE SMITH: There's a whole series that pertain to
18 official records and that type of --

19 MR. TURK: It's exception number 8 to Rule 803,
20 stated in Rule 803 which is the listing of hearsay exceptions.
21 Let me read as follows: "Public records and reports. Records,
22 reports, statements or data compilations in any form of public
23 offices or agencies setting forth: (a) the activities of the
24 office or agency; or, (b) matters observed pursuant to duty
25 imposed by law as to which matters there was a duty to report

1 excluding, however, in criminal cases matters observed by
2 police officers and other law enforcement personnel; or, (c) in
3 civil actions and proceedings and against the government in
4 criminal cases factual findings resulting from an investigation
5 made pursuant to authority, granted by law, unless the sources
6 of information or other circumstances indicate lack of
7 trustworthiness," close quote.

8 Let me come back and emphasize item "B" which are,
9 quote: "Matters observed pursuant to duty imposed by law as to
10 which matters there was a duty to report," close quote.

11 JUDGE SMITH: If there had been a duty to report that
12 he would have reported it right after the meeting and not until
13 you needed it for the litigation. However, your other point, I
14 think, is -- has merit and that is, it cannot -- you offer that
15 for the purpose of showing that the missing person, Mr.
16 Schumacher, did in fact make a report.

17 MR. FLYNN: Your Honor, that is not at issue.

18 MR. TURK: Your Honor, I assume I can get it in for
19 that reason, but I would like a general offer.

20 JUDGE SMITH: Well, you can't have that.

21 MR. TURK: All right. I accept the ruling, Your
22 Honor.

23 JUDGE SMITH: But you don't want to offer it for any
24 other reason?

25 MR. TURK: Yes, I would. And I would offer it simply

1 for the purpose of showing the historical --

2 JUDGE SMITH: That he made a report.

3 MR. TURK: He made a report, this is the paper trail.

4 JUDGE SMITH: You see, I think it's important -- I
5 think it's appropriate to be in evidence, so it cannot be
6 argued -- there were three people there, what has happened to
7 the missing one.

8 MR. TURK: That's right.

9 JUDGE SMITH: But it's not for the purpose of what he
10 stated, but the fact, he did in fact make a report.

11 MR. TURK: Yes.

12 JUDGE SMITH: All right.

13 MR. FLYNN: Your Honor, may I address that briefly.
14 I submit that that is not in issue, and I would invite a
15 stipulation that Mr. Schumacher responded to the request to
16 report what he observed.

17 If that's the only question, I would submit it's
18 already been established by the testimony of these two
19 witnesses.

20 JUDGE SMITH: So you're saying is, that we don't have
21 the possible prejudicial effect of Mr. Schumacher's letter, we
22 can accomplish the same thing by other means.

23 MR. FLYNN: Yes. And the other concern that I have
24 is, is the scope of the hearing. It invites the whole entire
25 new line of examination that I see is unnecessary.

1 JUDGE SMITH: No, it doesn't.

2 Does anybody else want to be heard on this?

3 Does anybody have any objection to it being offered
4 for the --

5 MR. TURK: For the limited purpose.

6 MS. WEISS: No.

7 MR. OLESKEY: No.

8 JUDGE SMITH: You don't. Okay.

9 MR. TURK: We had previously --

10 JUDGE SMITH: But your objection is, it's not going
11 to be opened on the merits of it; it simply shows that John A.
12 Schumacher made a report.

13 MR. FLYNN: Well, I'll subside. I think it's
14 redundant. I think it's entirely cumulative. But if that's
15 all it's being offered for, it's harmless.

16 MR. OLESKEY: Just to remind the Board, I have said
17 twice that I intend to use it to impeach, for that limited
18 purpose.

19 JUDGE SMITH: Yes.

20 MR. TURK: For what purpose?

21 MR. OLESKEY: Impeachment, counsel.

22 JUDGE SMITH: So it's going to be offered, not for
23 the truth of the matter as asserted by the staff, but for the
24 fact that Mr. Schumacher did make a report. So that Staff
25 Exhibit 4 is received then, previously rejected is now

1 received.

2 (The document referred to having
3 been previously marked for
4 identification and rejected
5 as NRC Staff Exhibit 4, was
6 received in evidence.)

7 MR. TURK: And, Your Honor, I don't know if we had
8 closed the trail on this. Let me make sure we get
9 identification -- may we go off the record?

10 JUDGE SMITH: All right.

11 (Discussion off the record)

12 MR. TURK: Your Honor, I note that it's the
13 recollection of the group that this has -- this document, Staff
14 Exhibit 4, has been identified as the document prepared by Mr.
15 Schumacher at Mr. Lazarus' request.

16 JUDGE SMITH: All right.

17 BY MR. TURK:

18 Q Dr. Bores, do you recall any instances in the fall of
19 1987 at which you had occasion to speak to other persons
20 employed by or associated with FEMA concerning the Seabrook
21 beach position, which FEMA had taken?

22 A (Bores) In October of '87, late October '87 I was
23 participating in an emergency exercise at the Ginna site in New
24 York State.

25 Q How do you spell Ginna?

1 A (Bores) G-I-N-N-A. It was a New York State Ginna
2 ingestion pathway exercise.

3 Q And that's a nuclear powerplant?

4 A (Bores) That is correct.

5 Q All right.

6 A (Bores) At the exercise I was working in conjunction
7 with Mr. Roger Kowieski of FEMA Region 2.

8 MR. OLESKEY: I couldn't hear that because someone
9 slammed the table, would you give that name again.

10 MR. TURK: And spell it, please.

11 THE WITNESS: (Bores) Roger Kowieski.

12 MR. OLESKEY: I wouldn't have gotten it even if I
13 heard it.

14 BY MR. TURK:

15 Q How do you spell it?

16 A (Bores) It's K-O-W-I-E-S-K-I.

17 MR. DIGNAN: If Oleskey doesn't get it, who does.

18 (Laughter)

19 MR. OLESKEY: Because it's "I" and not "EY."

20 BY MR. TURK:

21 Q And this was approximately what time frame?

22 A (Bores) October, late October of last year.

23 Q All right.

24 A (Bores) I was working in conjunction with Mr.
25 Kowieski in the observation of a portion of this exercise, and

1 in the course of, I guess, nonexercise observation times the
2 casual discussion got on to the Seabrook topic. And Mr.
3 Kowieski related to me --

4 MR. OLESKEY: Just a minute, if there's going to be a
5 conversation come in by Kowieski that's going to be offered,
6 I'm going to object unless it's offered for some non-hearsay
7 reason or as an exception.

8 MR. TURK: Your Honor, Mr. Oleskey is seeking to
9 apply a very stringent application of the interpretation of the
10 hearsay rule, which as we all know does not strictly apply to
11 administrative proceeding where the testimony is reliable. And
12 I submit that there's no reason to exclude the following
13 conversation.

14 MR. OLESKEY: Well, we don't -- as you have often
15 said, Judge Smith, sometimes when counsel signal where they're
16 going with things we all get a grip on it that may be different
17 than our first assumptions. But where credibility is at issue,
18 and I have a reasonable surmise that this conversation may be
19 offered to affect either the credibility of FEMA or one of its
20 witnesses, Mr. Thomas, I'm certainly going to invoke a normal
21 and reasonable definition of hearsay unless I hear something
22 from Mr. Turk which persuades me that that caution is not
23 necessary in this instance. I haven't heard it yet.

24 MR. FLYNN: What concerns me is, I don't know what
25 the subject matter of the conversation is. If it follows the

1 line that was previously established in simply tracking the
2 evolution of the FEMA position, it may not be objectionable.
3 But I don't know that that's been established.

4 MR. TURK: Your Honor, the purpose of this
5 discussion, in fact the whole direct examination of Dr. Bores
6 and Mr. Lazarus has only been to show the NRC staff's awareness
7 of -- to the extent that we're aware of matters affecting the
8 evolution of FEMA's position.

9 I would offer this next piece of testimony --

10 MS. MITCHELL: Time to go --

11 JUDGE SMITH: What's that, fire?

12 MS. MITCHELL: Fire alarm!

13 SECURITY OFFICER: Clear the building.

14 (Whereupon, an unscheduled fire drill took place.)

15 (Continued on next page.)

16

17

18

19

20

21

22

23

24

25

t/62

1 JUDGE SMITH: Do you want to argue the objection
2 of --

3 MR. TURK: Before we argue the objection I'd like to
4 identify the -- have the witness identify who this person is
5 with whom he spoke, so it puts a little more information in
6 front of the Board.

7 THE WITNESS: (Bores) Roger Kowieski is an employee
8 of FEMA, Region 2 of New York City and he --

9 BY MR. TURK:

10 Q I'm sorry, of what?

11 A (Bores) Of FEMA, Region 2, his office is in New York
12 City. And they're responsible for New York and New Jersey and
13 I believe Puerto Rico in their region.

14 Q Do you know what his title is within FEMA, Region 2?

15 A (Bores) I'm not sure what his current title is in
16 FEMA, Region 2. Mr. Kowieski had been the RAC Chairman for
17 FEMA, Region 2 for a number of years and had provided extensive
18 testimony in the Shoreham and Indian Point cases.

19 MR. TURK: Your Honor, I take it at this time there's
20 an objection to a line of questions which I will ask if I can
21 maybe suggest a single question as to Dr. Bores' recollection
22 of statements made by this other individual, Mr. Kowieski, an
23 official of FEMA, in a conversation to which Mr. Bores -- to
24 which Dr. Bores was a party.

25 As I understand the objection it's hearsay.

1 JUDGE SMITH: Yes. Just flat-out ordinary day in
2 and out hearsay.

3 MR. FLYNN: I think there's another problem and that
4 is, that a necessary predicate hasn't been established and that
5 is, that Mr. Kowieski had any role in the development of the
6 FEMA position.

7 JUDGE SMITH: Well, of course, we don't have any idea
8 what Kowieski's testimony is being offered for. So you have us
9 on that.

10 MR. TURK: Not for the truth, Your Honor. I will
11 make this offer, just following question and answer simply for
12 the purpose of indicating the evolution of FEMA's position, not
13 as to whether or not the merits of FEMA's position at any time
14 are correct or not, but simply the evolution.

15 MS. WEISS: Well, perhaps Mr. Turk could explain how
16 somebody from Region 2 would have played a role in the
17 development of the FEMA's position on Seabrook?

18 JUDGE SMITH: Well, you just opened the door there,
19 didn't you.

20 MS. WEISS: Well, that's a necessary --

21 MR. TURK: I do not represent that Mr. Kowieski
22 played a role. I don't know if he did or did not.

23 MS. WEISS: Well, in that case I think --

24 MR. TURK: Dr. Bores may be able to answer that
25 question.

1 MS. WEISS: I think it's objectionable.

2 MR. OLESKEY: Well, you prepared Dr. Bores, how can
3 you be having him offer testimony that's on its face hearsay,
4 and represent to the Court you don't know what his answer is
5 going to be.

6 MR. TURK: Your Honor, I do know what Dr. Bores will
7 say about his conversation with Mr. Kowieski. The additional
8 question raised by Ms. Weiss I have not posed to the witness
9 until now.

10 MR. DIGNAN: I sometimes say, I guess I don't have a
11 dog in the fight, but as Mr. Oleskey said, I might have a horse
12 in the race. I'd like to be heard on this one.

13 As I understand that the reason we're convened here
14 in dealing with this subject is because the Board indicated
15 that it was very concerned about how the position of FEMA
16 developed, how it changed. There's been concern as to whether
17 prior testimony was forthright.

18 In short, it's a question of whether there is reason
19 for the Board to question FEMA and its position. Now, that
20 being the case and without getting into the ramifications of
21 whether FEMA is a separate party or the NRC is a separate party
22 from FEMA or whether FEMA is a party at all, normal court
23 parlance, since the main thrust of this inquiry, as I
24 understand it, is how did FEMA get to the position it did, I
25 say anything that he was told by a responsible FEMA official is

1 admissible as hearsay on the basis it's an admission of FEMA.

2 And FEMA is a party for that purpose, if this inquiry
3 is to have any meaning at all. And that's a well-recognized
4 exception to the hearsay rule.

5 JUDGE SMITH: It's a well-recognized exception, but
6 it doesn't take into account the subtleties of the situation we
7 have before us where we have the actual expressions,
8 statements, and events that are in dispute are being inquired
9 into.

10 Let me -- I would like to ask a few questions about
11 this. Was this conversation you had, was it a conversation
12 directly related to the Ginna exercise?

13 THE WITNESS: (Bores) Was it directly related to
14 Ginna?

15 JUDGE SMITH: Yes?

16 THE WITNESS: (Bores) No.

17 JUDGE SMITH: It was more conversational?

18 THE WITNESS: (Bores) It was conversational --

19 JUDGE SMITH: Like water cooler gossip, that type of
20 thing, about the problem that we had, that -- the problem that
21 was going on in Region 1?

22 THE WITNESS: (Bores) I wouldn't necessarily call it
23 water cooler gossip in that I had worked with Mr. Kowieski for
24 a number of years in a number of different plans, and I think,
25 you know, we had mutual respect for one another in terms of our

1 professional capabilities, in capacities.

2 MR. TURK: Maybe we could also clarify, Your Honor,
3 what was -- rather than ask an open-ended question to which
4 there may be an objection, let me put it in a leading form.

5 BY MR. TURK:

6 Q Did this conversation concern FEMA's testimony on the
7 Seabrook beach population issue?

8 A (Bores) That it did.

9 JUDGE SMITH: We would approach hearsay in this
10 situation that we started out that it's -- it is a flat-out
11 hearsay, and you say it's not going to be offered for the truth
12 of the statement, but I just -- you haven't made any other
13 offer that makes any sense.

14 I mean, you want what he said to be in the evidence
15 and to be considered.

16 MR. TURK: Let me offer -- let me indicate what my
17 offer is. Your Honor. Under the hearsay rule, a statement is
18 hearsay only if it is, quote: "Offered in evidence to prove
19 the truth of the matter asserted," close quote.

20 JUDGE SMITH: That's right.

21 MR. TURK: That's Rule 801(c). I am not going to
22 offer this next piece of testimony to prove that Mr. Kowieski's
23 statement represents a true statement of fact. Rather, with
24 respect to whether or not he was correct in his evaluation or
25 in his comments concerning the FEMA testimony.

1 Now, the offer is simply for the purpose to indicate
2 that there was an awareness within certain persons within FEMA,
3 of certain concerns or that certain persons in FEMA had
4 concerns about the position expressed in this proceeding by
5 FEMA.

6 JUDGE SMITH: That's what I thought.

7 MR. TURK: The existence of concern, not -- well,
8 I'll await a ruling.

9 MR. OLESKEY: You know, there may be a million
10 concerns running around inside FEMA and the NRC, and I'm sure
11 they're all very entertaining, but whether this guy Kowieski
12 who has no discernible relationship to the development of the
13 testimony between Washington FEMA headquarters and Region 1 has
14 any authorization to make any comment that binds his agency or
15 has any probative value is a very different question.

16 This could have been a water cooler conversation with
17 anybody in FEMA in the country and has equal merit.

18 JUDGE SMITH: You would approach a hearsay situation
19 involving a regulatory agency, as we are doing, as a hearsay
20 conversation -- a conversation by declarant, not present, who
21 is reporting a routine matter and saying this case, the guy
22 says, we just told them to go on stored feed up in Ginna, and
23 that might be something perfectly appropriate to report as a
24 hearsay. It has all the elements of trustworthiness.

25 But in this instance it was a conversation, not in

1 the ordinary course of the exercise, it was a conversation not
2 as a part of the duties of Mr. Kowieski. It was just -- as he
3 states it, as an ordinary garden variety hearsay statement.
4 And the closer it gets, the closer the statement gets to the
5 issue being litigated, the more objectionable it is, not as a
6 question of reliability so much, but as a question of
7 fairness --

8 MR. TURK: All right.

9 JUDGE SMITH: -- to the adversaries in not being able
10 to confront the declarant. Now, I know you're not offering it
11 for the truth of it, but at bottom you are offering it for the
12 truth of it.

13 MR. TURK: Certainly, I understand your ruling and I
14 withdraw the question, Your Honor.

15 BY MR. TURK:

16 Q Dr. Bores, in that same time frame, October 1987, did
17 you have occasion to talk to anyone else employed by or
18 affiliated with FEMA, and if so --

19 A (Bores) Well --

20 Q Go ahead.

21 A (Bores) Yes, I did. I talked to a couple of their
22 contractors who were involved in the exercise, the same
23 exercise.

24 Q Were any of those conversations concerning Seabrook
25 population issues?

1 A (Bores) Yes.

2 Q And can you state with whom such a conversation
3 occurred?

4 A (Bores) Mr. Keller.

5 Q Do you know his first name?

6 A (Bores) Joe. Joseph Keller.

7 MR. TURK: Your Honor, I submit that this next
8 inquiry relates to the testimony which the witness may be
9 expected to -- relates to a conversation in which a witness who
10 will appear in this proceeding was the out-of-court declarant.
11 And I'm not sure if I'm going to get the same ruling, but I am
12 going to ask Dr. Bores to relate to us the conversation he had
13 with Mr. Keller.

14 MR. OLESKEY: Well, you're certainly going to get the
15 same objection.

16 MR. TURK: Will I have the same ruling?

17 MR. OLESKEY: Well, he's going to get the witness on
18 a panel, if it's a relevant question he can put it to the
19 witness when he gets here.

20 JUDGE SMITH: Well, that's not the solution to it.
21 The solution is, since the witness will be available the
22 weakness of the hearsay is removed. We want both his version
23 of the conversation with Dr. Keller, and Dr. Keller's version
24 of it; and all of that confrontation aspects will be satisfied.

25 MR. OLESKEY: Well, except there's this problem.

1 Keller is not authorized to speak for FEMA, he's a contractor.

2 JUDGE SMITH: Well, you can establish that; that's
3 differen . That's an entire different matter.

4 MR. OLESKEY: Well, then, I want to Voir Dire the
5 witness before the question is asked to establish that, if it's
6 not on the record yet to your satisfaction.

7 MR. TURK: To establish what?

8 MR. DIGNAN: Your Honor, could I respectfully suggest
9 that there's no jury here. We're dealing with a Judge trial.
10 I guess we've all demonstrated we took Evidence 101. But the
11 easy solution to this, let him ask the question. Let him
12 answer it. And if you're not satisfied, you've heard something
13 trustworthy in violation of the hearsay rule, we can move to
14 strike it and out it goes. It's not a jury case. We're going
15 to waste an awful lot of time. As I say, we all demonstrate
16 our proficiency in the rules of evidence.

17 Now, we all did it. I mean, he probably got a better
18 course, I went to Michigan, he went to Harvard, but, you know,
19 we all went through it and it really is a waste of time,
20 because you can simply strike stuff if it's out of line once it
21 comes out.

22 I see no reason --

23 JUDGE SMITH: Does Michigan have a law school?

24 (Laughter)

25 JUDGE SMITH: I know. This is a little bit out of

1 the ordinary.

2 MR. DIGNAN: Don't think you offended me. I came to
3 the law firm Ropes and Gray and everybody assumed it was
4 Michigan State, you know. I mean, it's tough coming to Boston.

5 JUDGE SMITH: Well, you're right.

6 (Laughter)

7 JUDGE SMITH: I think we have -- we have a situation
8 pertaining here which is somewhat -- is quite a bit different
9 than the ordinary regulatory testimony. We want the answer.
10 Give us the answer.

11 MR. OLESKEY: You understand my objection, Judge?

12 JUDGE SMITH: Well --

13 MR. OLESKEY: It goes --

14 JUDGE SMITH: You didn't make it completely.

15 MR. OLESKEY: All right, let me complete it. It was
16 twofold: it was hearsay; and it was also that, under no
17 circumstances, as I understand the context of this dialogue at
18 the water cooler again in October with a contractor for FEMA,
19 can anything that the contractor said be used to impeach or
20 bind FEMA, and agency for which he works under contract, as we
21 know from the deposition that he's given in this proceeding.
22 He works for the Idaho National Laboratory which does contract
23 work for FEMA, and as such he'll be a witness here.

24 JUDGE SMITH: It's not being offered -- the
25 testimony, the evidence concerning the conversation between Mr.

1 Keller and the witness is not being offered as an admission by
2 FEMA, but simply as a statement of the facts that are being
3 litigated.

4 MR. OLESKEY: Well, once --

5 JUDGE SMITH: As any witness, he could have been one
6 of the farmers up there at Ginna.

7 MR. OLESKEY: I think that will be the next
8 conversation. But in any event, once it's in, it's in for all
9 purposes unless you limit it now.

10 JUDGE SMITH: Well, let's see what it is.

11 We'll take Mr. Dignan's advice on that. If it turns
12 out that it is so unreliable, it should be thrown out, we'll
13 just have to use discipline and throw it out and ignore it.

14 Would you answer, please?

15 BY MR. TURK:

16 Q Dr. Bores, would you relate to us the conversation
17 you had with Mr. Keller concerning the Seabrook beach
18 population position that FEMA had taken?

19 A (Bores) The conversation I had with Mr. Keller was
20 quite similar, I might say to the one with Mr. Kowieski --

21 MR. OLESKEY: Now, that's objectionable --

22 MR. TURK: I'll accept a motion to strike that.

23 JUDGE SMITH: Okay.

24 THE WITNESS: (Bores) The conversation related to
25 the Seabrook testimony as provided by FEMA, and its

1 relationship to the testimony provided by Mr. Keller and Mr.
2 Kowieski at the Licensing --

3 JUDGE SMITH: Now, wait a minute, you just better
4 leave Kowieski out of this.

5 THE WITNESS: (Bores) Well, both of them appeared on
6 a panel, Your Honor.

7 JUDGE SMITH: Oh.

8 BY MR. TURK:

9 Q And you're relating Keller's comments to you?

10 A (Bores) Yes.

11 Q All right. Let's only stick with what Keller has
12 told you in this October encounter.

13 A (Bores) Okay. These two witnesses -- these two
14 individuals appeared as witnesses in the Shoreham and Indian
15 Point emergency preparedness cases. And Mr. Keller related to
16 me the difficulty he had in -- with the current FEMA position
17 in that it contradicted positions that had been taken by FEMA
18 in those two proceedings.

19 MR. BACKUS: All right. I have a motion to strike
20 that on a basis that perhaps has not been addressed by Mr.
21 Oleskey. My understanding that the current rule change that
22 was adopted last December 3rd has said that you do not compare
23 any emergency plan to any other plan. I think that was the
24 gist of Mr. Turk's argument that underlay the decision the
25 Board made on the Sholly-Beyea testimony.

1 Now we're getting testimony about what FEMA
2 contractors say about being embarrassed because testimony given
3 at one panel from one plant, apparently, is not entirely
4 congruent with testimony in another plant. I think on the
5 basis of the Commission's position taken a rule change, that's
6 inadmissible.

7 MR. OLESKEY: I move to strike as well unless the
8 Board is prepared to have us litigate the circumstances under
9 which the evidence was given at Shoreham and whatever the other
10 proceeding was. This is really far afield unless you want to
11 open that door. I don't want to encourage you to do that.

12 (Board conferring)

13 MR. DIGNAN: Your Honor, can I be heard before you
14 make a final decision?

15 JUDGE SMITH: Yes.

16 MR. DIGNAN: You will recall that the witnesses whose
17 testimony -- the individual witness' testimony, which is much
18 of a focus of this hearing, was deliberately offered by FEMA as
19 a policy witness speaking for its agency, solely alone. That
20 was brought out ad nauseam, when they first sat in that witness
21 stand. No Tanzman, no Swiren or whoever the other people were,
22 Thomas alone would speak for FEMA, giving a FEMA position. I
23 consider it highly relevant, probative, and an admission
24 against FEMA, if the responsible witnesses who gave the FEMA
25 position in another proceeding say that the FEMA position given

1 in -- or at least originally to be given was inconsistent with
2 the one given in those proceedings.

3 I can think of nothing more relevant to this inquiry.

4 MR. OLESKEY: We know -- well, you don't know it yet,
5 but we know from Thomas' deposition how the position was
6 evolved as far as his testimony goes here. We don't know what
7 went into the position at Shoreham and the other plant, nor do
8 we know what it is.

9 MR. TURK: But we do know --

10 MR. OLESKEY: The only way to counter this evidence
11 for what it would be worth, if it came in, would be to put on
12 evidence of the development of the position there and what it
13 was, and show that it was wrong. It's -- you're opening the
14 barn door very wide.

15 MR. BACKUS: One other point, Your Honor, and that
16 goes back to the point that none of this is in the material
17 that we had in advance of these witnesses testifying. This is
18 really truly new evidence being elicited for the first time on
19 direct which we've had no opportunity to respond to.

20 MR. TURK: Your Honor, I would note one thing before
21 you confer and rule, I have in front of me two volumes of a
22 deposition of Mr. Joseph Keller taken at the instance of
23 Massachusetts. Mr. Keller, in his deposition, relates concerns
24 he had about FEMA's position over time. And I think that Dr.
25 Bores' testimony will corroborate the statements by Mr. Keller

1 in his deposition and the statements which we may expect to
2 come out during the hearing.

3 MS. WEISS: Because it was questioned during the
4 deposition doesn't mean that it's relevant and admissible at
5 this hearing.

6 MR. OLESKEY: Multiple proposition, counsel
7 (Board conferring)

8 (Continued on next page.)

e*/62

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

63

1 JUDGE SMITH: The objection will be sustained. I
2 mean the answer, I don't know what it is, but the conversation
3 with Keller -- your testimony. Dr. Bores's conversation with
4 Dr. Keller will be stricken, because although as you indicated
5 not all hearsay would be unreliable, in this instance it
6 purports to be not just a simple statement of fact as stated by
7 Dr. Keller, but something broader, an opinion; and an opinion
8 undefined as far as we know, and it is virtually impossible to
9 confront that opinion through this witness.

10 Furthermore, with all those infirmities in it, it is
11 not needed, because Dr. Keller himself will be here and the
12 same position can be put to him, and there would be an
13 opportunity to examine what he meant if in fact he said it.

14 So for that reason the objection is sustained.

15 MR. TURK: All right, Your Honor.

16 BY MR. TURK:

17 A Dr. Bores, over the fire alarm break that we had a
18 few minutes ago, did you -- did something come to mind that you
19 wished to add to your prior testimony here today?

20 A (Bores) At the close of the July 30th meeting, or
21 prior to the close, one of the reasons that Mr. Thomas
22 indicated that he felt he wanted to end the meeting there
23 rather than going on is because we were essentially at a
24 stalemate. He felt he did not -- he felt we needed more
25 information from somewhere in order to make a decision. And in

1 fact since NOAA wasn't there, he felt that we couldn't reach a
2 consensus.

3 In particular, he said that NOAA had raised
4 considerable concerns about the meteorological aspects in the
5 February paper that we had discussed at the April meeting.
6 And so without their presence there, he felt he needed to
7 adjourn.

8 Q To your knowledge, had the concerns expressed by NOAA
9 been resolved at the April meeting?

10 A (Bores) They had. They had been as indicated in the
11 attachments to my memorandum to you of October 15, 1987.

12 JUDGE SMITH: In that ruling, did I specifically
13 state that the answer is stricken?

14 MR. TURK: Yes.

15 BY MR. TURK:

16 Q Dr. Bores, has there been an -- has it ever -- strike
17 that.

18 After the writing of your October 15, 1987 memo to
19 me, was there ever an occasion in which you had a conversation
20 about that memorandum with Mr. Thomas?

21 A (Bores) Yes.

22 Q And when did that conversation take place?

23 A (Bores) This conversation was not that much of a
24 conversation. It was a short, very short discussions, comments
25 if you will, which occurred at the RAC meeting in January.

1 Q What was the approximate date of that RAC meeting in
2 January? Do you know?

3 A (Bores) I don't have the date in front of me.

4 Q Was it in the early part, or the later part?

5 A (Bores) The first part of January.

6 JUDGE SMITH: This is the same meeting that Dr. Bores
7 testified to on January 11th?

8 THE WITNESS: (Bores) That is correct.

9 JUDGE SMITH: And it is the same conversation that he
10 reported, I believe, at that time by Mr. Thomas about the
11 memorandum, or am I --

12 MR. TURK: About the RAC meeting.

13 JUDGE SMITH: About the memorandum. Well, it may
14 have been that Mr. Thomas testified, but Dr. Bores and Mr.
15 Thomas were sitting on the witness stand, and they were asked,
16 one of the two was asked about that memorandum --

17 MR. TURK: Yes.

18 JUDGE SMITH: -- in that conversation.

19 MR. TURK: Yes, that's correct, Your Honor.

20 BY MR. TURK:

21 Q And can you relate to us what transpired in this
22 conversation with Mr. Thomas?

23 A (Bores) Well, Mr. Thomas handed out my October 15th
24 memo to the RAC, had explained that he had just gotten it and
25 just read it. He was very upset about it, and essentially felt

1 that he was stabbed in the back by it.

2 He indicated that if the NRC perceives the
3 proceedings of the July meeting that differently, they should
4 have approached him or his counsel as opposed to releasing it
5 the way it was.

6 Q When you say if the NRC had perceived the July
7 meeting that differently, that different from what?

8 A (Bores) Than -- than he had.

9 MR. BACKUS: Excuse me. Is this the subject of prior
10 testimony in this proceeding, Mr. Turk? Is there a page --

11 JUDGE SMITH: That's what I stated. There was a
12 reference to that memorandum and that conversation, but this
13 testimony has never been adduced, to my memory.

14 MR. TURK: That's correct, Your Honor.

15 MR. BACKUS: I just wondered if there was a reference
16 to a date or a page in the transcript we should go where this
17 came up, if you know.

18 JUDGE SMITH: January 11.

19 MR. BACKUS: January 11th?

20 MR. TURK: Eleventh, 12th, and 13th.

21 Your Honor, that concludes the major portion of my
22 direct examination. There were a series of comments made in
23 testimony by Mr. Thomas earlier, on October 7 and November 4,
24 1987, in which Mr. Thomas attributed certain remarks to NRC
25 employees or officials.

1 I don't want to get into it now. I don't know that
2 there is any need for a presentation of rebuttal on that. That
3 certainly was not the purpose for bringing Dr. Bores and Mr.
4 Lazarus here. But I do note that at some point I may wish to
5 address those matters through testimony.

6 JUDGE SMITH: As rebuttal, you mean.

7 MR. TURK: Yes. However, -- well, I don't want to
8 digress, Your Honor. I don't feel a need to digress at this
9 time. I want to hold my -- I want to put a bookmark in place
10 so that if I need to come back to this at some point, I'll be
11 able to.

12 MS. WEISS: Your Honor, we prefer to get it all over
13 with now rather than to call these people back again, so we'll
14 know everything we have to meet when the next panel of
15 witnesses comes up.

16 MR. OLESKEY: We've already spent a day. We might as
17 well finish it.

18 JUDGE SMITH: Well, Mr. Turk, I'm not sure I
19 understand your position. You are deferring a judgment as to
20 whether you go into these matters depending upon some event
21 that is yet to happen. That's why I characterized it as
22 rebuttal, although that's not an easy label to put on it given
23 what we're doing here.

24 But if you now plan to offer that testimony, you
25 should do it now, I would think. I don't understand your

1 position really.

2 MR. TURK: All right, I'll proceed, Your Honor.

3 JUDGE SMITH: Well, or -- or correct my misimpression
4 or whatever, you know. But I agree with you. If you have
5 examination of this panel which may not be necessary, don't do
6 it.

7 MR. TURK: Your Honor, the next line of questions
8 would address comments made by Mr. Thomas during Mr. Dignan's
9 voir dire of him. In the course of Mr. Thomas's testimony, he
10 attributed various remarks to NRC employees and officials.

11 Now, I have really an ambivalence about whether I go
12 ahead on this. I'm not looking to throw dirt. I'm not looking
13 to get into fine points. I think we have already established a
14 good accounting of what transpired at the RAC meetings based
15 upon my understanding and belief of these witnesses who appear
16 here today.

17 The only residual concern I have is that at some
18 point I may find Intervenors' proposed findings of fact relying
19 upon that former voir dire.

20 Actually, I have a solution to this problem. As I
21 recall, the voir dire was not to be relied upon for proposed
22 findings of fact; is that correct?

23 JUDGE SMITH: No, that's not correct. It was in the
24 evidentiary record. But it would not be relied upon unless
25 the -- it would be somewhat on the order like this. You could

1 not cite direct testimony and propose findings when the
2 opportunity for cross for some reason was not -- you know, was
3 not afforded. But I could be wrong; I don't recall.

4 I specifically remember --

5 MR. DIGNAN: I have a memory, Your Honor, that you
6 indicated at one point in a bit of a firefight going, and you
7 said -- you did make a ruling close to it or not exactly, if
8 not exactly what Mr. Turk indicated, that the voir dire would
9 not be available.

10 My memory is dim but I've got both voir dires here.
11 If I can have a moment, I might be able to refresh the
12 situation if it's important to do so.

13 JUDGE SMITH: I remember one statement that what
14 started out to be a cross-examination on the relocation
15 centers, decontamination centers, turned out to be a cross-
16 examination or a voir dire.

17 MR. DIGNAN: That's correct.

18 JUDGE SMITH: Well, it would be helpful if that point
19 can be clarified. My memory is not reliable at all.

20 MR. FLYNN: May I make a suggestion, Your Honor?

21 It's near the end of the day, and I have another
22 matter in which I wish to take about five minutes. Since we
23 are near a natural breaking point, perhaps this will allow Mr.
24 Turk --

25 MR. TURK: I'd like to continue --

1 MR. DIGNAN: Your Honor --

2 MR. TURK: -- because I may release one witness for
3 him to go back to Washington -- to the regional office at this
4 time given the fact that we're going to lead into cross-
5 examination.

6 Actually, I'm not sure what's next. I don't know if
7 the Board is going to have questions that we ask before we get
8 to cross-examination. Presumably, that's possible. And if so,
9 I won't release my witnesses, or either one of them yet.

10 JUDGE SMITH: Did you plan to allow Mr. Lazarus to
11 leave and then come back?

12 MR. TURK: Well, my understanding of Mr. Oleskey is
13 that he has a substantial amount of cross-examination for Dr.
14 Bores.

15 MR. OLESKEY: True.

16 MR. TURK: And let me ask if Mr. Oleskey feels that
17 will consume all of tomorrow.

18 MR. OLESKEY: I'm sure it will.

19 MR. TURK: So as far as Mr. Oleskey is concerned,
20 there is no need for Mr. Lazarus to remain tonight or tomorrow
21 morning.

22 MR. OLESKEY: I'm going to get to Lazarus at a point.
23 I think ironically we're back to the position I was contending
24 for yesterday because of the sequestration, even if it's now a
25 voluntary one. So I'm in a poor position to contest it, and I

1 won't. As long as the man comes back next week.

2 MR. TURK: Well, there's another solution. If
3 there's just a little bit of cross-examination for Mr. Lazarus,
4 maybe we can finish that off tomorrow morning, let him return,
5 and never have to come back to Concord, and take Dr. Bores
6 second. I think that's preferable --

7 MR. OLESKEY: Since Bores has the most to say and has
8 said the most here, in fact, it's much more sensible for the
9 continuity and clarity of the record to do him, and to do clean
10 up, if you will, with Lazarus.

11 JUDGE SMITH: Well, that may be, but we have tried
12 very much to accommodate the witnesses. And that may be ideal,
13 but I think you -- can your needs be met in another sequence?

14 MR. OLESKEY: Sure.

15 MR. TURK: All right. Then I assume we'll have
16 cross-examination of Mr. Lazarus begin tomorrow, and then we'll
17 have Dr. Bores afterwards, presumably also starting tomorrow.

18 Does the Board wish to engage in Board questioning
19 before the witnesses are sequestered?

20 MR. OLESKEY: May I ask before that if Mr. Turk is
21 indicating that he's made a decision --

22 MR. TURK: No.

23 MR. OLESKEY: -- that he's concluded with direct or
24 not?

25 MR. TURK: No, I'm looking for the transcript cite

1 for the indication of --

2 MR. DIGNAN: That's why I was trying to help out.

3 In the first voir dire that I conducted of Mr.
4 Thomas, Your Honor, at Pages 3094 and 3095 of the record, and
5 this is the date of October 7, 1987, Your Honor and I engaged
6 in the following colloquy.

7 Judge Smith: "That's why I termed it somewhat as a
8 voir dire. Massachusetts Attorney General and other
9 intervenors, but Mass. AG, in particular, are concerned. They
10 weren't prepared to go into other issues than the substantive
11 issue today and the particular sheltering.

12 "However, the way I understand it, the cross-
13 examination on introductory aspects will not be available for
14 use to propose substantive findings as to any of the issues."

15 Mr. Dignan: "That certainly would be my view, Your
16 Honor."

17 Judge Smith: "Yes."

18 Mr. Dignan: "And I'm perfectly prepared to so
19 represent. If I have to come back and get something, I'll get
20 it later."

21 And so my understanding, at least of that first voir
22 dire, was that it would not be available for substantive
23 findings.

24 Now, having said that, I took at the time and I
25 assume Your Honor meant the word "substantive", and I meant

1 that to be substantive findings in the case.

2 MR. TURK: The answer to that --

3 MR. DIGNAN: I do not think it's not available to me
4 if for any reason I need, or have to propose a finding as to
5 credibility of a witness.

6 JUDGE SMITH: Well, that's the whole purpose of voir
7 dire.

8 MR. DIGNAN: Yes. It is available for that.

9 But substantive findings, as I understand it, it is
10 not available. Credibility findings, I assume it still would.

11 MR. TURK: Out of an interest in completing the
12 statement, Your Honor, Mr. Dignan certainly is correct that
13 your first comment about findings did reference substantive
14 findings.

15 After the colloquy that Mr. Dignan related, the very
16 next entry says:

17 Judge Smith: "If you have to come back and pick it
18 up at the time, you are free to do it. But this session this
19 afternoon would not be available for proposed findings."

20 But I certainly don't disagree with Mr. Dignan's
21 characterization that the thrust of this went to substantive
22 findings.

23 MR. OLESKEY: I would throw in one cautionary note
24 here.

25 If Mr. Thomas ever reappeared and we had held by

1 right, as we did, our cross on the so-called voir dire, it
2 would be my view that the testimony might not be available for
3 anyone for any basis.

4 MR. TURK: The Thomas testimony of October and
5 November on beach shelter.

6 MR. OLESKEY: Right.

7 MR. TURK: I have no objection to that.

8 MR. DIGNAN: No, no, no.

9 MR. OLESKEY: I'm not saying that, Mr. Turk. I'm
10 just forecasting --

11 MR. DIGNAN: No, my position --

12 MR. OLESKEY: -- a possible scenario.

13 MR. DIGNAN: -- the Board can overrule it if it is
14 not, anytime a witness goes under oath what he says is
15 available for credibility finding on that witness if it becomes
16 relevant.

17 MR. OLESKEY: Only --

18 JUDGE SMITH: Don't forget, we did allow cross-
19 examination on the voir dire for the purposes of voir dire,
20 whatever it was.

21 MR. OLESKEY: Yes, but the discussion that's set
22 forth here, I believe, was that we weren't prepared for that
23 issue to have arisen, that Mr. Flynn wasn't prepared, and had
24 told us he didn't think it was going to come up, and we wanted
25 to hold our voir dire - cross-examination until the subsequent

1 date.

2 JUDGE SMITH: Did it say that?

3 MR. OLESKEY: That's my recollection. I'm looking at
4 it now.

5 Apparently, you had said, "Would you have any
6 objections to doing what you would like to do this afternoon
7 next Monday? I mean Monday when we reconvene."

8 And then it goes on at great length, which I can't
9 summarize fast enough to respond to your question.

10 My recollection is it was left that we pick it up
11 later when he testified on sheltering, and do it all at once.

12 JUDGE SMITH: See, the issue might be, and I think
13 I'd have to read the whole thing, but the issue may be, truly
14 your voir dire was for the very purpose of bringing into
15 question Mr. Thomas's account of was there a -- without this
16 being a pejorative statement, but was there an opportunity for
17 full rehabilitation on the part of those who were advancing his
18 point of view.

E63

19 (Continued on next page.)

20

21

22

23

24

25

164 1 That's what I don't know. I don't recall.

2 MR. DIGNAN: The answer is Your Honor may have to
3 decide that, but I remind the Board -- I don't think this is
4 something anybody has to decide now, because no findings have
5 been proposed, no one knows if a credibility finding will be in
6 order or necessary.

7 But lest my silence be acquiescence of something, I
8 would remind the Board that if that is the approach that's
9 being taken, that I cannot use his prior statements under oath
10 because there was not an opportunity for rehabilitation, and no
11 pejorative intent, the reason there will be no opportunity is
12 one of two reason: Either he elects to resist a subpoena and
13 not come, or the Attorney General drops the subpoena, but there
14 is no bar to his sitting on that witness stand again.

15 JUDGE SMITH: But he's not a party.

16 MR. DIGNAN: That's true, but inferences can be drawn
17 by the refusal to come and testimony.

18 MR. OLESKEY: Not against the parties.

19 JUDGE SMITH: See, not against the party. He
20 can't --

21 MR. DIGNAN: No, against the witness.

22 JUDGE SMITH: Against the witness.

23 MR. DIGNAN: Yes.

24 JUDGE SMITH: All right.

25 MR. DIGNAN: And that's what a credibility finding

1 is; it's against the witness.

2 JUDGE SMITH: But I don't know how we're going to
3 have --

4 MR. DIGNAN: That's my --

5 JUDGE SMITH: Well, it's very complicated.

6 MR. DIGNAN: Your Honor, my point is it may never
7 come to pass if Mr. Thomas never testifies again for all I
8 know. I am just -- don't want my silence to indicate that if
9 it becomes relevant to have a finding made on his credibility,
10 that I can't use that voir dire material in proposing such a
11 finding.

12 MR. OLESKEY: Just so you'll know it later if we have
13 to deal with it, at 3099, Judge Smith, you said, after I said,
14 "We're willing to have Dignan go ahead as long as we can do it
15 later." You said, "Yes, you do agree, do you not, that they
16 must have an opportunity to address the points that you are
17 going to make this afternoon?"

18 Mr. Dignan: "I sure do, Your Honor. I think a lot
19 of people are looking for a hidden motive here."

20 You said, "Well."

21 Mr. Dignan: "Let me explain right out, if the
22 testimony is admitted if I don't cross it now, if I don't make
23 the move, I did, somebody could say later you passed your
24 opportunity."

25 And it goes on in that vein, so that's consistent

1 with my recollection.

2 MR. DIGNAN: That's right, and you have an
3 opportunity. All you have to do is enforce your subpoena.

4 MR. OLESKEY: Well, we'll enforce our subpoena.
5 We're only talking about the eventuality which may never come
6 to pass if there is a successful effort to resist this
7 subpoena. That's all.

8 MR. DIGNAN: And an inference can be drawn as to the
9 witness's credibility when he makes that successful attempt.

10 MR. OLESKEY: As you said, Judge Smith, that becomes
11 a fascinating issue, because if the witness isn't a party, then
12 that adverse inference as to the witness could only be useful
13 for someone who was attacking the position which the witness is
14 advocating, which would be as of October the position of the
15 intervenors.

16 MR. DIGNAN: That's right. Attack the position by
17 saying your witness isn't credible. It's an age old thing.

18 MR. OLESKEY: Yes, but --

19 JUDGE SMITH: See, the witness --

20 MR. OLESKEY: It's not that situation.

21 JUDGE SMITH: The witness is not a party. He has no
22 incentive or no duty to come forward with respect to --

23 MR. DIGNAN: Your Honor, I understand that.

24 JUDGE SMITH: Okay.

25 MR. DIGNAN: You cannot ask for an inference to be

1 drawn against a party. But a case is evidence. And one of the
2 fundamental rules -- for example, on the civil side of the
3 court, it has always been my understanding that the rules is,
4 if somebody puts a witness on and you start cross-examining
5 that witness, and all of a sudden the witness gets in trouble
6 and says, I take the Fifth, you can ask the civil court to draw
7 an adverse inference --

8 MR. OLESKEY: Against that witness.

9 MR. DIGNAN: -- from his taking of the Fifth, against
10 the witness.

11 JUDGE SMITH: You mean he has to sponsor that
12 witness.

13 MR. DIGNAN: No, against the witness. And by doing
14 so, you throw out his sponsor's evidence. That's my point.

15 JUDGE SMITH: All right. With respect to the quality
16 of the evidence --

17 MR. DIGNAN: Exactly.

18 JUDGE SMITH: -- presented by that witness All
19 right, I think we'll probably work it all out.

20 MR. OLESKEY: The sponsor's thrown -- the sponsor has
21 thrown out the evidence anyway.

22 MS. WEISS: It's already gone.

23 MR. OLESKEY: I suggest we return to Mr. Turk's
24 decision, so we'll know, and Mr. Flynn has a point, apparently,
25 that he'd like to make.

1 JUDGE SMITH: Okay. Thank you.

2 MR. OLESKEY: Off of this issue. Something fresh.

3 MR. TURK: I'm not sure I understand where we're at
4 on this.

5 MR. OLESKEY: I want to know if you are through with
6 direct.

7 MS. WEISS: Well, just tell us when you are done.

8 MR. DIGNAN: Evidence 201.

9 (Laughter.)

10 MR. DIGNAN: The advanced course.

11 MR. TURK: Your Honor, my question initially was will
12 the prior testimony of Mr. Thomas be available for use as
13 proposed findings. I understand now that it will not be,
14 except possibly for credibility.

15 I'm not interested in doing any further direct
16 examination, because that direct examination will not relate to
17 Mr. Thomas's credibility but rather, to the truth of the
18 matters as he related them in testimony before the Board.

19 So if I am correct in understanding that there will
20 be no substantive findings possible on Mr. Thomas's prior
21 testimony, I have no need to do any further direct.

22 JUDGE SMITH: I think everyone agrees that that is
23 the case, that was the case. That as far as the merits of the
24 issues before us --

25 MR. TURK: I would note if at some time --

1 JUDGE SMITH: That the so-called voir dire
2 testimony.

3 MR. TURK: Yes, both on the October 7th and November
4 4th dates.

5 I would note, though, that if at some time Mr. Thomas
6 does appear and makes -- either adopts his prior testimony of
7 his voir dire examination and any part material to my interests
8 here, or makes similar statements, I will at that time want to
9 conduct cross-examination. And I will then wish to bring a
10 rebuttal witness on those points.

11 JUDGE SMITH: All right.

12 Mr. Flynn.

13 MR. FLYNN: The matter that I wish to bring up is
14 marginally related to what we were just discussing, but it is
15 essentially a separate matter. And it has to do with the
16 factual question of whether there was a vote at the RAC meeting
17 in July or not.

18 Now, at this point I don't see that FEMA has a stake
19 in the resolution of that issue, but I want to raise this just
20 as a matter of fairness.

21 I have expressed concerns about the scope of the
22 hearing when the matter was first brought up in October or
23 November. I expressed -- I started an objection and expressed
24 concerns about the relevancy of whether there was a vote or
25 not. I made the argument that what was relevant was that the

1 views of the RAC members were expressed, and that they were
2 taken into account regardless of what the numbers were.

3 Nevertheless, the question of whether there was a
4 vote or not seems to have taken on a life of its own, and the
5 significance of it to this hearing seems to be it's the test as
6 to whether Mr. Thomas is credible or not.

7 Now, the information that I feel obligated to bring
8 to the attention of the Board is that in the end of November --

9 MR. TURK: I'd like to interject one thing if I may,
10 Your Honor.

11 MR. DIGNAN: Mr. Flynn is about to testify. And if
12 he wants to take an oath and get up there, he can testify.

13 MR. TURK: And I'm going to cross-examine.

14 MR. DIGNAN: Yes. Me, too.

15 MR. TURK: I want the Board to understand something.
16 Mr. Flynn advised me in November that he was going to the
17 Vermont Yankee site to interview RAC members. And I told him,
18 I want to come, too. This was in the evening.

19 He knew of my concern. We were in the hearing the
20 next day. He went up anyway that night. He left in the
21 morning without telling me that he was actually on his way, and
22 I had no opportunity to be present during any interviews he
23 conducted.

24 And if Mr. Flynn is going to testify here now about
25 his interviews with the RAC members, I'm going to want to

1 cross-examine him and be able to pursue him on the witness
2 stand.

3 MR. FLYNN: I don't need to get into what I was told.
4 The point is the information that I have would suggest that if
5 you wish to explore that issue of whether there was a vote or
6 not, then it would be important to hear from all of the RAC
7 members.

8 MR. TURK: And, Your Honor, I don't agree with that.
9 We have witnesses here. Mr. Thomas is a witness -- Mr. Thomas
10 is a witness with a different recollection of events. He is
11 able to testify. His credibility as well as the credibility of
12 the two witnesses here today is subject to examination.

13 MR. OLESKEY: What we have here is very simple. Mr.
14 Thomas has testified in January, I believe, and certainly in
15 his deposition, that he and Mr. Flynn had separately
16 interviewed the other RAC members, and none of them have a
17 recollection of any vote.

18 MR. TURK: That's not his testimony.

19 MR. OLESKEY: Well, that's my recollection of
20 counsel.

21 MR. TURK: He indicated he was satisfied with their
22 responses.

23 MR. DIGNAN: Why doesn't he bring in the rest of the
24 RAC?

25 MR. OLESKEY: I'm happy to have that done. What Mr.

1 Flynn was doing --

2 MR. DIGNAN: Get a subpoena for the rest of the RAC.

3 MR. OLESKEY: Mr. Dignan, may I complete my
4 statement, please?

5 I understood Mr. Flynn as an officer of the court to
6 be telling you that he has information based on work he did as
7 counsel to a party that supports Mr. Thomas's version, and
8 would substantially be at variance with the version the
9 witnesses are giving you.

10 What he's saying, and I agree, is if this is the
11 witness test --

12 MR. DIGNAN: But he doesn't agree with you.

13 MR. OLESKEY: Well, he'll state his position in a
14 moment.

15 MR. FLYNN: My comments --

16 MR. OLESKEY: I agree with the position. If this is
17 the witness test for whether Ed Thomas's candor and
18 forthrightness is to be accepted, or one of them as it seems to
19 have been, then either through examination of Flynn on the
20 subject, or by calling in the other RAC members, we're entitled
21 to have that information. I hoped it would come out sooner,
22 but I'm pleased that Mr. Flynn is dealing with it now.

23 MR. FLYNN: I've lost --

24 MR. TURK: Obviously, Your Honor, Massachusetts would
25 like the opportunity to extend the hearings, to bring in as

1 many people as possible, to search to follow down the smallest
2 detail of an item.

3 MS. WEISS: We'll take an affidavit.

4 MR. TURK: I don't see the necessity.

5 MS. WEISS: You're the one who wants to cross-
6 examine.

7 MR. FLYNN: I appreciate your helpfulness, but I've
8 lost control of the comments that I wish to make.

9 I made a point of not getting into the substance of
10 what I was told. I simply want to bring to the attention of
11 the Board that the matter is more complicated than it may have
12 appeared, and that you have a fundamental choice to either
13 minimize the importance of that particular issue of fact, or to
14 expand it. That was my point.

15 JUDGE SMITH: Would you summarize exactly -- are you
16 making a recommendation to the Board now?

17 MR. FLYNN: No, I simply -- not exactly. It's just
18 that I continue to insist that the matter really is not
19 relevant.

20 JUDGE SMITH: Well, now let's take that up.

21 FEMA sent testimony to this hearing in which the
22 person with the authority to represent -- to implement and
23 explain FEMA's policy came to the hearing, and said that FEMA's
24 position was reviewed by the RAC.

25 If these gentlemen are to be believed, the review by

1 RAC consisted of five or something to zero against FEMA's
2 position.

3 MR. TURK: Your Honor.

4 JUDGE SMITH: Now, if that is what was meant by
5 review, that was what was represented to us, it is a sense of
6 the word in the context that it was presented with which I am
7 not familiar. It is somewhat the way a dog might review a
8 tree, if that's the way the verb is being used.

9 I mean, that was a very, very sharp thing to have
10 said there, and that is what has caused our attention, so it is
11 relevant.

12 MR. FLYNN: Your Honor, may I respectfully
13 suggest --

14 JUDGE SMITH: I want to apologize for that remark.
15 It was not considered --

16 MR. FLYNN: No, I accept that. But the point that I
17 wish to make in response to that is FEMA never said, in the
18 person of Ed Thomas or anyone else, that the RAC agreed with
19 the position that we were taking.

20 What I said at --

21 JUDGE SMITH: He said that they reviewed it.

22 MR. TURK: He said there was a collegial process;
23 that RAC was a big part of it. That the position of FEMA was
24 based --

25 MR. FLYNN: Excuse me. May I --

1 MR. TURK: -- on the considered judgment of --

2 MR. FLYNN: May I have --

3 JUDGE SMITH: Whatever was said was said. We know
4 what it is, but we --

5 MR. FLYNN: May I have this conversation with Judge
6 Smith?

7 JUDGE SMITH: Yes, let Mr. Flynn proceed.

8 MR. FLYNN: Your Honor, I think we very frankly
9 acknowledge that there was a sharp difference of opinion within
10 the RAC. There was no attempt to hide that the position that
11 was developed under those circumstances where we had to react
12 to what we perceived as the change in position by the NRC.
13 Whether that was a fair reaction or not was something that
14 was -- that was put forward without RAC review at that time, in
15 June, and that there was -- and that when the matter came up
16 again at the next RAC meeting, which was in July, there was the
17 sharp difference of opinion that was developed in the voir
18 dire.

19 MR. TURK: With Mr. Thomas being on one side, and
20 everyone else on the other.

21 MR. FLYNN: Excuse me. I would like to be able to
22 finish.

23 MR. TURK: Excuse me.

24 JUDGE SMITH: Please let Mr. Flynn speak.

25 MR. FLYNN: And the focus got narrower and narrower,

1 and it came down to a question of not what views were
2 expressed, but was there a poll or a vote as a separate
3 question from who said what.

4 And if you compare Mr. Thomas's account of the
5 nonagreement, as he put it, with what Mr. Bores and Lazarus
6 have said about who espoused which position, I think you will
7 find a very close congruence.

8 Where the accounts differ is on whether there was a
9 vote at the end of the meeting. And I am saying that is a very
10 minute point, and it had nothing -- and for the purpose of
11 FEMA's determining what its position at that time should be, it
12 didn't matter. We had the views. We knew what the views were.
13 And for reasons which will be developed in our own testimony at
14 that time, we chose to take a different position.

15 JUDGE SMITH: Okay.

16 MR. FLYNN: Now what I'm saying is if, indeed, that
17 very minor, or that very narrow point assumes the importance
18 that everyone here is attaching to it, then there's more to it
19 than what you've heard so far. And I leave that with the
20 Board, and I'm not suggesting you do any particular thing at
21 all.

22 JUDGE SMITH: So if I understand your point, you're
23 not -- you're not disputing directly the testimony of Dr. Bores
24 and Mr. Lazarus that there was a formal vote taken.

25 MR. FLYNN: I am very pointedly not --

1 MR. TURK: Your Honor, that is not -- that is not the
2 testimony.

3 MS. WEISS: Let him answer.

4 MR. TURK: I want to be sure that Mr. Flynn is not
5 asked to agree to a statement that I don't consider to be the
6 witness's testimony.

7 MR. FLYNN: Your Honor, I believe you were talking to
8 me and I am talking to you.

9 MR. TURK: I apologize.

10 JUDGE SMITH: Well, yes, Mr. Flynn. I'm having also
11 difficulty in what they said they said is on the record. My
12 characterization of it, when they asked for a show of hands, I
13 would regard that as something more formal than the consensus,
14 soft consensus approach that was before. So if you don't like
15 formal, okay. I'm just trying to identify in context what they
16 said.

17 Do you dispute their account that a show of hands or
18 a specific demonstration of position was asked at the end of
19 that meeting? Or is it your position that it doesn't matter;
20 it's not that important?

21 (Continued on next page.)

E64

22
23
24
25

1/65

1 MR. FLYNN: Well, I would certainly say that it
2 doesn't matter. And I also have to remind everyone that I was
3 not at that meeting, I'm reporting what other people or I'm
4 reflecting what other people said to me. And my recollection
5 on that precise point, frankly, is vague with the passage of
6 time.

7 JUDGE SMITH: So you don't have any position on it?

8 MR. FLYNN: No. What I'm reflecting is, the memory
9 that I have that when I went and talked to them I came away
10 with the impression that -- well, that the events could be
11 interpreted in different ways, and as I've said, there was more
12 to it. I guess what I'm suggesting is that, if it really is
13 important to get to the bottom of that particular question,
14 then it's correspondingly important to talk to the other people
15 who were there.

16 MR. TURK: Your Honor, if I may make a note of
17 something. I don't contend that it's significant that there
18 was this show of hands. I think it's clear from the witnesses'
19 testimony that there was a clear expression of views by
20 everyone present except the lady from the Department of
21 Agriculture. It's the recollection of the witnesses, as I
22 understand it, that Ms. Nevitt did raise her hand during this
23 show of hands.

24 I think that's a minor point compared with the
25 indication of what the RAC position was, of all persons

1 indicating positions other than FEMA.

2 JUDGE SMITH: You mean, the mechanism of hand showing
3 or whatever?

4 MR. TURK: The mechanism itself -- I could have asked
5 the witnesses, in fact maybe it would help if we asked them how
6 long that whole process took. I did hear Mr. Lazarus say he
7 asked a question, he put up his hand indicating, you know,
8 showing -- asking for a show of hands; it was a question and an
9 answer. I don't think that is as significant as the fact that
10 the RAC during this long extended meeting expressed its views,
11 and those views were contrary to the views of Mr. Thomas.

12 MS. WEISS: If I may be heard, Your Honor. I really
13 think that that is a disingenuous remark considering all the
14 time you spent asking about the mechanics of this so-called
15 vote and three or four questions about what was Mr. Thomas'
16 expression on his face while this vote was being taken. You
17 certainly emphasized it, and I think your remarks are
18 disingenuous.

19 MR. TURK: Let me clarify that. I certainly accept
20 the truth of these witnesses' comments about that hand raising,
21 the show of hands process. I think it is relevant. My point
22 is that the most relevant thing is the expression of positions;
23 and this is really the icing on the cake.

24 I am prepared, however, to let anyone be subpoenaed,
25 if that's necessary, to get to the bottom of whether there was

1 a show of hands. I agree with Mr. Flynn, it's not the crucial
2 part of what happened at the RAC meeting.

3 As I understand it, it's a question and answer,
4 perhaps later on we can find out from the witnesses how long
5 the process of that show of hands took.

6 But I do know that I'm not convinced that when Mr.
7 Flynn went up to the Vermont Yankee meeting he asked the right
8 questions in order to probe and determine for sure what the
9 witnesses' recollections were. And I was excluded from that.
10 I wanted to be present. I had hoped that Mr. Flynn and I could
11 pursue the matter jointly, we were not able to. There was an
12 NRC person who sat in the room who had no familiarity with the
13 background, he was simply the person participating in the
14 Vermont Yankee exercise. He certainly is not a lawyer, and he
15 wasn't aware of the background that he couldn't probe, he
16 simply was present.

17 And I think the -- if we're going to get any
18 testimony from Mr. Flynn on this it's going to have to be
19 examinable. And I personally don't think it's necessary.

20 JUDGE SMITH: Gentlemen, going from July 30, 1987 at
21 the RAC meeting, as to which you've testified, until -- and
22 through the time you prepared your memo to Mr. Turk, did you
23 two consult about Mr. Lazarus' request to Mr. Thomas for a vote
24 and Mr. Lazarus' initiative on his own to ask for a
25 demonstration of opinion of the PAC members; did you consult?

1 THE WITNESS: (Lazarus) Yes, we did.

2 JUDGE SMITH: And what was the nature of your
3 consultation?

4 THE WITNESS: (Lazarus) That we agreed that that's
5 what transpired at the meeting, Your Honor.

6 JUDGE SMITH: Did you agree at any time to put that
7 information in a memo?

8 THE WITNESS: (Lazarus) We did not put it in a memo
9 until we were requested by Mr. Turk.

10 JUDGE SMITH: And after that time you did not -- when
11 you consulted did you have any agreement that that would be
12 your story, if called upon to restate it or did you just
13 compare memories?

14 THE WITNESS: (Lazarus) No, Your Honor, we did not
15 agree that that would be our story, if we were called upon to
16 compare it. At the time we really thought it was moot because
17 we were waiting for another draft of the FEMA position.

18 JUDGE SMITH: When did it first occur to you that it
19 was not moot?

20 THE WITNESS: (Lazarus) When we saw the copy of the
21 FEMA submitted position, I believe, in October. And we had
22 not, up to that time, received the promised revision to the
23 FEMA testimony.

24 JUDGE SMITH: When did you, after the RAC meeting on
25 July 30th, when did you talk about your shared memory of it,

1 approximately?

2 THE WITNESS: (Bores) We talked about it, I think,
3 when we left the meeting. We talked about it the next day. We
4 certainly informed our management. I believe I had talked to
5 Mr. Turk the evening I got back from that RAC meeting.

6 JUDGE SMITH: From that meeting.

7 THE WITNESS: (Bores) We had also talked to, you
8 know, our, you know, the staff at headquarters.

9 JUDGE SMITH: When?

10 THE WITNESS: (Bores) Very shortly after that
11 meeting.

12 JUDGE SMITH: And then did you have anymore
13 conversations between you two after those?

14 THE WITNESS: (Bores) Sure.

15 JUDGE SMITH: On that subject matter?

16 THE WITNESS: (Bores) Well, the meeting in general,
17 that's all.

18 JUDGE SMITH: But I mean on the events where Mr.
19 Thomas was asked to make a vote and failing that Mr. Lazarus
20 asked for an expression of --

21 THE WITNESS: (Bores) Yes.

22 THE WITNESS: (Lazarus) Yes, Your Honor.

23 JUDGE SMITH: Continue to tell us the occasions you
24 talked about it?

25 THE WITNESS: (Lazarus) I think that -- I don't know

1 specific dates. I know we talked about the meeting several
2 times, because in my mind, at least, it was a very special
3 extraordinary meeting. Things transpired at this RAC meeting
4 that I had not seen in my previous two years in the Emergency
5 Preparedness Section and my frequent attendance at RAC
6 meetings.

7 It stuck in my mind as being extraordinary to the
8 extent that we discussed it, and we, you know, immediately
9 briefed my management. And I included the briefing of the fact
10 that at the end of the meeting that I took a poll, because the
11 sense was that -- I indicated earlier, I sensed that Mr. Thomas
12 did not like my stepping in and doing that, to brief them and
13 let them know that there may be some repercussions on this.

14 JUDGE SMITH: When were you first informed that your
15 views of it were wanted for the purpose of coming to this
16 hearing? When were you first informed that you were -- that a
17 memorandum was requested? When did Mr. Turk first request you
18 to put it in writing?

19 THE WITNESS: (Bores) I don't have, excuse me. I
20 don't have the specific date, but it was very close to October
21 15th.

22 THE WITNESS: (Lazarus) We responded in a matter of
23 a day or two of his request by telephone to put it in writing.

24 MR. TURK: Your Honor, if I can offer something on
25 that. It's my recollection it was either the same day of Mr.

1 Thomas' testimony or within a day thereafter.

2 JUDGE SMITH: And from the time you got the request
3 from Mr. Turk, did you confer with each other? I think you
4 already testified on that, but would you just tell me again?

5 THE WITNESS: (Lazarus) No, Your Honor, I did not.

6 JUDGE SMITH: In that time you didn't?

7 THE WITNESS: (Lazarus) Yes, sir.

8 JUDGE SMITH: Is that your memory, Dr. Bores?

9 THE WITNESS: (Bores) I guess I don't know on which
10 part you're referring.

11 JUDGE SMITH: When Mr. Turk called, as you -- I'm
12 really covering what you previously said, so it's not a
13 different question. You testified that Mr. Turk called you and
14 asked you to prepare a memorandum of your memory of that
15 meeting and you told Mr. Lazarus of that request; and did you
16 consult after that as to what your memorandum would say?

17 THE WITNESS: (Bores) No. And I did not see his
18 memoranda -- memorandum, and he did not see mine until they
19 were completed, and I enclosed them in my -- with mine and a
20 cover letter to Mr. Turk.

21 JUDGE SMITH: Now, when you conveyed Mr. Turk's
22 request to Mr. Lazarus, did you discuss what your memorandum
23 might state at that time?

24 THE WITNESS: (Bores) No, I did not.

25 JUDGE SMITH: Did any other person at the NRC,

1 earlier, ask you to be preparing a memorandum?

2 THE WITNESS: (Bores) No.

3 THE WITNESS: (Lazarus) No, Your Honor.

4 JUDGE SMITH: I think we should adjourn for the
5 night.

6 MR. TURK: May I ask one followup question in light
7 of the Board's questions.

8 BY MR. TURK:

9 Q Gentlemen, I'd like each of you to reflect for a
10 moment and indicate to us whether it is your clear recollection
11 of events of the July meeting, as you sit here today, do you
12 clearly recollect this show of hands, and I'd ask each of you
13 to reflect on that and give us your clear personal
14 recollection?

15 MS. WEISS: So I guess this is important now?

16 THE WITNESS: (Lazarus) Yes, I recall it as I
17 testified.

18 BY MR. TURK:

19 Q Dr. Bores?

20 A (Bores) Yes.

21 MR. DIGNAN: Your Honor, before we adjourn there's
22 been some indication of letting Mr. Lazarus leave, and I guess
23 what I'd like to inquire as a matter of procedure, Mr. Turk has
24 inquired as to whether the Board is going to have questioning
25 before Mr. Oleskey begins to cross-examine. And then the next

1 thing is, if I have any questions I assume Mr. Oleskey would
2 want me to proceed him.

3 MR. OLESKEY: I should think so. I would want you to
4 get done with Lazarus, if that's what you're asking.

5 MR. DIGNAN: Yes, get done with both of them before
6 you proceed.

7 MR. OLESKEY: Actually, I'd like to -- I thought the
8 order was going to be I start out on cross and then we'd go --

9 MR. DIGNAN: That's fine with me. I'm not -- I'm
10 trying to avoid putting you in a position I often find myself
11 in. It would be ridiculous for me to say, I am not, and
12 indeed, His Honor has already indicated that my rights on cross
13 may really be in the nature of direct because of the position
14 I'm in, in this case.

15 What I'm asking you, essentially, do you want me to
16 do whatever examination I have of this panel before you cross
17 or do you want to do your cross and then let me --

18 MR. OLESKEY: How much are you going to have?

19 MR. DIGNAN: Very little.

20 MR. OLESKEY: Then let's get it done.

21 JUDGE SMITH: Well, not tonight anymore. So that
22 means that they will both come back in the morning.

23 MR. TURK: Yes, sir.

24 MR. DIGNAN: The problem is that I have very little,
25 at least one of the questions is for Mr. Lazarus. I hate to

1 make him stay over to answer one question.

2 MR. TURK: Well, as I understand it he's staying over
3 anyway, he'll be the first of the sequestered witnesses to
4 appear.

5 MR. DIGNAN: Oh, all right.

6 JUDGE SMITH: Now, we're going -- there's a chance
7 that we -- we're adjourned for the night.

8 (Whereupon, at 5:22 p.m. the hearing was adjourned to
9 reconvene tomorrow morning at 9:00 a.m., Friday, May 20, 1988,
10 at the same place.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

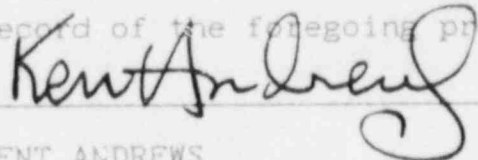
25

CERTIFICATE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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.
Docket Number: 50-443-OL, 50-444-OL
Place: CONCORD, NEW HAMPSHIRE
Date: May 19, 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 electronically by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the recording is a true and accurate record of the foregoing proceedings.

/s/ 

(Signature typed): KENT ANDREWS
Official Reporter
Heritage Reporting Corporation