

ORIGINAL

UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: 50-289 OLA-1
50-289 OLA-2

GPU NUCLEAR CORPORATION, et al.

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

LOCATION: BETHESDA, MARYLAND

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:
GPU NUCLEAR CORPORATION, et al. : Docket Nos. 50-289-OLA1
(Three Mile Island Nuclear : 50-289-OLA-2
Station, Unit No. 1) : (Steam Generator Plugging
Criteria)
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Fifth Floor Hearing Room
Nuclear Regulatory Commission
4350 East West Highway
Bethesda, Maryland

Wednesday, May 7, 1986

The conference convened, pursuant to notice,
at 10:30 a.m.

BEFORE:

SHELDON J. WOLFE, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

FREDERICK J. SHON
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

OSCAR H. PARIS
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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APPEARANCES:

On Behalf of the GPU Nuclear:

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WILBERT WASHINGTON, II, ESQ.
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On Behalf of Three Mile Island Alert:

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On Behalf of the Commonwealth of Pennsylvania:

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On Behalf of the Nuclear Regulatory Commission:

MARY E. WAGNER, ESQ.
MITZI A. YOUNG, ESQ.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

* * * * *

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

2 JUDGE WOLFE: Good morning.

3 This conference is being held in the case of GPU
4 Nuclear Corporation, et al., Three Mile Island Nuclear
5 Station No. 1, Docket No. 50-289-OLA1 and 50-289-OLA2. This
6 case relates to the licensee's applications to amend the
7 steam generator tube technical specifications.

8 In a conference telephone call on May 2, 1986 the
9 Board scheduled this conference to assist it in ruling upon
10 Three Mile Island Alert's motion of April 11, 1986 which
11 requested a six month's extension of time from May 12 to
12 November 12, 1986 within which to complete discovery.

13 More particularly in the conference call, the
14 Board advised that the staff's response of April 30th to
15 TMIA's motion notified the Board of certain matters which
16 required discussion.

17 To my left is, as you know, Administrative Judge
18 Frederick Shon, Nuclear Engineer Member of this Board, and
19 to my right is Administrative Judge Oscar Paris,
20 Environmental Scientist Member, and I am Administrative
21 Judge Sheldon Wolfe, Legal Member and Chairman of the Board.

22 Beginning to my left here would counsel and/or
23 representatives of the parties identify themselves for the
24 record.

25 MS. WAGNER: My name is Mary Wagner. To my left

1 is Mitzi Young, my co-counsel, and we are representing the
2 NRC Staff. To my right is John Stolz, Director of PWR
3 Project Directorate No. 6 in NRR.

4 MR. CHURCHILL: Good morning. My name is Bruce
5 Churchill of Shaw, Pittman, Potts and Trowbridge,
6 representing the licensee. To my far right is Wilbert
7 Washington, and to my immediate right is Alan Wasserman,
8 both of the same law firm.

9 MR. AU: Good morning. My name is Thomas Au. I
10 am counsel for the Commonwealth of Pennsylvania.

11 MS. BRADFORD: My name is Louise Bradford. I will
12 be representing Three Mile Island Alert.

13 JUDGE WOLFE: All right.

14 Mr. Au phoned me a few minutes ago in my office
15 and advised that he had something that he wanted to
16 distribute or whatever.

17 Mr. Au.

18 MR. AU: Yes. In last Friday's, May 2nd telephone
19 call I was at somewhat of a loss over what was occurring and
20 why we were having this conference.

21 I discovered later after the call in talking with
22 Mr. Churchill and Ms. Wager that the NRC Staff had filed a
23 response to TMIA's motion for an extension of time and found
24 that we had not received a copy of that response because we
25 were inadvertently omitted from the service list.

1 So Ms. Wagner promptly telecopied a response to me
2 on Friday afternoon. As a result of that, the Commonwealth
3 has mailed a response to TMIA's motion for an extension of
4 time yesterday in which we supported their request for an
5 extension of time.

6 I have distributed copies of that response to
7 counsel here this morning, and I have extra copies for the
8 Board, if the Board so wishes.

9 JUDGE WOLFE: Any objections?

10 Ms. Wagner?

11 MS. WAGNER: No objections.

12 JUDGE WOLFE: Mr. Churchill?

13 MR. CHURCHILL: No objections.

14 JUDGE WOLFE: Ms. Bradford?

15 MS. BRADFORD: No objections.

16 JUDGE WOLFE: I would only add, Mr. Au, that your
17 response is out of time. Your time begins to run as of the
18 time that the movant files its motion. You had 15 days, and
19 that expired on April 28th.

20 MR. AU: That is correct. The information that
21 prompted us to file a response is the information mainly
22 contained in the NRC Staff's response, which we did not
23 receive until May 2nd.

24 JUDGE WOLFE: Well, all I am pointing out is that
25 you are filing out of time, and I don't know that what you

1 are saying evidences good cause for not having filed within
2 the 10-day and 5-day period, 15 all together.

3 After this, please timely submit your
4 submissions. All right?

5 MR. AU: Yes, sir.

6 JUDGE WOLFE: We will allow the filing of the,
7 what do you call it, a response, Mr. Au, to TMIA's motion?
8 Is that what it is?

9 MR. AU: Yes.

10 JUDGE WOLFE: All right. We will admit it. Could
11 you hand copies up to the Board, please?

12 (Counsel Au complied with the Board's request.)

13 And I might add, Mr. Au, to the extent that really
14 your response here is directed to that which the Staff said
15 in its response of April 30, that while we appreciate having
16 this in writing, we set aside this morning and perhaps this
17 afternoon just to discuss that which was presented in the
18 April 30th response of the staff.

19 So you would have been permitted anyway to have
20 commented on that during the course of this conference.

21 MR. AU: Yes. Since I was on the tailend of the
22 conference call I didn't realize the full scope of this
23 conference.

24 JUDGE WOLFE: All right.

25 Ms. Bradford, has TMIA since the special

1 prehearing conference on March 27th, 1986 initiated any
2 discovery at all in this case?

3 MS. BRADFORD: To not my knowledge, Judge Wolfe.

4 JUDGE WOLFE: And Ms. Doroshow is not here today
5 or will not be here?

6 MS. BRADFORD: She will not be participating any
7 further. I believe she intends to file a notice of
8 withdrawal today.

9 JUDGE WOLFE: I see. And you will take over as
10 the representative of TMIA? I think your name was mentioned
11 in the earlier filings in this case. Are you now the lead
12 representative for TMIA?

13 MS. BRADFORD: Yes. I might point out that my
14 name was mentioned only in as far as Ms. Doroshow
15 resubmitted filings that she had filed earlier, and I have
16 not up until the current time been involved in this phase of
17 the steam tube hearing.

18 In fact, last night I received the documents that
19 had been filed in this proceeding so far for the first
20 time.

21 So in answer to your question as to whether TMIA
22 has been involved in any of the discovery process, I am not
23 really sure, although I think there possibly is an
24 indication that they might have started some information
25 discovery process. I am not quite clear as to that.

1 JUDGE WOLFE: Well I will ask the staff. Ms.
2 Wagner?

3 MS. WAGNER: To ask whether TMIA has filed
4 discovery?

5 JUDGE WOLFE: Yes.

6 MS. WAGNER: No, they have not.

7 JUDGE WOLFE: Mr. Churchill, do you confirm?

8 MR. CHURCHILL: TMIA has filed no discovery.

9 There were some discussions about an informal arrangement
10 for TMIA's response to licensee's interrogatories. We did
11 work out an arrangement, but TMIA later decided not to go
12 through with that arrangement and instead I thing filed the
13 motion indicating the notice of withdrawal from the
14 proceeding if the six- month had not been granted.

15 So as far as I know, the status of discovery is no
16 discovery activities by TMIA toward the licensee. An
17 outstanding set of interrogatories have been filed on TMIA,
18 and they were due to be answered on April 18. The motion
19 for an extension, or in the alternative, a withdrawal I
20 guess kind of mooted a practical expectation of getting
21 interrogatory responses on the 18th.

22 JUDGE WOLFE: Clarify this, Ms. Bradford. Have
23 you or have you not notified the Board that you are the
24 representative of TMIA? I don't know that you have?

25 MS. BRADFORD: I have not. I believe Ms. Doroshow

1 filed, or as part of the motion for an extension has
2 mentioned my name. There has been no formal ---

3 JUDGE WOLFE: Well, I think you should tend to
4 that, but in the meantime we will proceed on the basis that
5 you are lead representative.

6 Now what will be your participation in this case
7 from here on, Ms. Bradford?

8 MS. BRADFORD: Well, at the present time I am
9 involved in another hearing which is currently ongoing. The
10 hearing is set for June 23rd. We are right now in discovery
11 on that hearing, and I expect that findings would be due
12 sometime at the end of August.

13 JUDGE WOLFE: So that means, I take it, that you
14 would not be able to, or would you be able to participate to
15 any extent in this case?

16 MS. BRADFORD: Excuse me, I misspoke. I think at
17 the end of July, given that things go well, findings would
18 be due. We haven't discussed a schedule for reply findings,
19 but if the Board were to okay an August 15th date for the
20 beginning of discovery in the steam tube case, then at which
21 time I would be relatively free of the other proceeding.

22 JUDGE WOLFE: I see. So your six-months'
23 extension of time request is still in place then, and you
24 would need at least six months before discovery could be
25 completed?

1 MS. BRADFORD: That is correct.

2 JUDGE WOLFE: During the course of the special
3 prehearing conference when Ms. Doroshow said that she didn't
4 know who her replacement would be from TMIA, we assumed that
5 she had a choice of more than one representative. Is it a
6 fact that you are the only representative or member of TMIA
7 that could replace Ms. Doroshow?

8 MS. BRADFORD: Judge Wolfe, the request came to me
9 shortly before Ms. Doroshow submitted the motion asking me
10 if I would be willing to accept the representation for TMIA
11 in this proceeding. And I indicated to TMIA at that time
12 that I would be, but if I did it would have to be delayed
13 and that they should ---

14 JUDGE WOLFE: That it would have to be delayed did
15 you say?

16 MS. BRADFORD: Yes. --- and that they should look
17 for another representative. They later got back in touch
18 with me and said that they would be submitting my name. So
19 I assumed that they had not found another representative.

20 I must say that I have been a little busy and have
21 not really discussed just how far their search extended.

22 JUDGE WOLFE: Well, the Board is interested in
23 your response to this question, and I hope you are prepared
24 enough in the case to respond to it. You do know that there
25 is a technical specification change request, 148. Are you

1 aware of that?

2 MS. BRADFORD: Yes, I am.

3 MR. CHURCHILL: And what that involves?

4 MS. BRADFORD: Yes.

5 JUDGE WOLFE: And you are also aware of technical
6 specification change request 153?

7 MS. BRADFORD: Yes, I am.

8 JUDGE WOLFE: And that amendment seeks in
9 substance a 50 percent throughwall standard; is that
10 correct?

11 MS. BRADFORD: Yes.

12 JUDGE WOLFE: Now directing your attention to 153,
13 does TMIA contend that 153 presents a significant hazardous
14 consideration?

15 MS. BRADFORD: TMIA contends that it is uncertain
16 that there are uncertainties regarding the eddy current
17 testing and continuation of possible degradation of the
18 tubes. And inasmuch as that uncertainty exists, then there
19 is a significant safety risk involved with the 50 percent.

20 JUDGE WOLFE: Well, I notice in TMIA's motion for
21 a six-months' extension of time that you indicate, among
22 other things, that granting TMIA's motion would not
23 prejudice the licensee. But I take it since you are
24 uncertain about whether or not there is a significant
25 hazardous consideration with respect to change request 153,

1 the Board is wondering why at least as to 153 why you would
2 set over a hearing on that for six months at least or more
3 and a resolution of 153 if you are indeed concerned about
4 there being a significant hazardous consideration?

5 MS. BRADFORD: Well, I can't speak for what was in
6 Ms. Doroshow's mind when she wrote this motion. But it
7 seems to me that the no significant hazards consideration
8 has already been granted regardless of TMIA's position.

9 JUDGE WOLFE: Yes, I am aware of that, but all
10 that I am saying is if TMIA is concerned, it would seem to
11 me that you would want to expedite that resolution because
12 the amendment is now effective.

13 MS. BRADFORD: That is certainly correct, Judge
14 Wolfe. The fact is that we are not able, if I am going to
15 represent TMIA, to expedite that process.

16 JUDGE WOLFE: We note that in the staff's and the
17 licensee's responses to the TMIA motion for extension of
18 time that both parties have set forward the scheduled
19 refueling outage from December to November of 1986.

20 Mr. Churchill, is that new scheduled refueling
21 outage definitive or not?

22 MR. CHURCHILL: It is my understanding, Your
23 Honor, that it is fairly certain at this time. The actual
24 date of the outage depends on a number of things, the most
25 significant of which is the performance of the plant and the

1 extent to which the fuel is being used up.

2 As you are aware, since TMI Unit 1 has been
3 restarted, it has had an excellent availability and capacity
4 factor and has been running virtually trouble free. And on
5 that basis the company fully expects that it would have to
6 come down for the next refueling shutdown on the scheduled
7 date of November 3.

8 Now obviously something could happen I suppose
9 that would cause a lesser consumption of fuel between now
10 and then, but that is not expected.

11 JUDGE WOLFE: Following that up, I understand that
12 there was an eddy current testing outage in March, is that
13 correct, and could you advise how many days there were of
14 that outage, if you know? And if you know, would this
15 affect the estimated date for refueling outage in November?

16 MR. CHURCHILL: The outage has been completed and
17 the plant has resumed power.

18 JUDGE WOLFE: And your estimate of November now
19 for the refueling outage takes that into account?

20 MR. CHURCHILL: Yes, the fact that the plant has
21 resumed power. I can find out the duration that that outage
22 did take place, if you will give me one moment.

23 JUDGE WOLFE: All right.

24 (Pause.)

25 MR. CHURCHILL: Five weeks.

1 JUDGE WOLFE: Do you have anything to add, Ms.
2 Wagner, in light of that? Do you have any comment?

3 MS. WAGNER: No.

4 JUDGE WOLFE: Do you accept?

5 MS. WAGNER: We accept the November estimate time
6 for the next outage.

7 JUDGE WOLFE: All right. We have read pages 3 and
8 4 of the staff's response to TMIA's motion for extension of
9 time, and the staff's response is dated April 30th. Among
10 other things, the staff stated, one, that at staff's request
11 in a letter of February 19, 1986 the licensee agreed that at
12 the next refueling outage, now scheduled for November, the
13 licensee would remove a number of tubes and would conduct
14 tests to determine whether the initial corrosion had been
15 arrested and to determine whether the eddy current testing
16 techniques were accurate.

17 The staff also indicated or stated in its response
18 that it estimates that these actions to be taken by the
19 licensee would be completed by the end of December 1986.

20 Secondly, the staff also stated that prior to the
21 outage in November of '86 that it planned to issue an SER
22 concerning TSCR-148 which would contain certain assumptions
23 as to what the test results would ultimately show.

24 In the response the staff also advised that its
25 SER would be issued by July 31, 1986.

1 And, third, it advised that in a supplement to the
2 SER the staff would present its final evaluation of the test
3 data.

4 Also in the response the staff estimated that the
5 supplement to the SER would issue in late January of '87.

6 I will put the question to you, Mr. Churchill.
7 Prior to the special prehearing conference on March 27,
8 prior to that time, and for that matter of fact or during
9 special prehearing conference why didn't you notify the
10 Board as to these matters?

11 MR. CHURCHILL: You are referring to the pulled
12 tubes or the fact that ---

13 JUDGE WOLFE: I am referring to that which I just
14 read off from the staff's response. Let's target in. For
15 example, in in the letter of February 19, 1986, and the
16 Board has not seen that letter, and for that matter, we
17 haven't seen the staff's request leading to that letter, but
18 directing your attention to your letter of February 19,
19 1986, why wasn't that brought to the attention of the Board
20 before the prehearing conference or during the prehearing
21 conference?

22 MR. CHURCHILL: As to the actual existence of the
23 letter on February 19, I may or may not have known about it,
24 but I don't remember whether I knew about it. I certainly
25 didn't focus on it.

1 The reason for that situation is as follows. The
2 licensee has submitted its application with all of the
3 supporting documentation and has always taken the position
4 and felt that that alone was more than sufficient to
5 justifying issuance of the amendment.

6 I did not realize that the staff would require the
7 pulling of tubes as part of the issuance of the amendment.
8 As I say, maybe I did know of the letter on February 17th.
9 I didn't have it with me, and I certainly didn't think of
10 it. I did not think that that was a prerequisite toward
11 issuance of this particular amendment.

12 JUDGE WOLFE: What do you think now?

13 MR. CHURCHILL: Pardon me?

14 JUDGE WOLFE: What do you think now?

15 MR. CHURCHILL: Now I think that the staff, based
16 on this, and I don't know whether I can really speculate as
17 to what is in the staff's minds, but based on this and
18 presumably as a result of the very favorable eddy current
19 inspection that just took place, is that the staff is ready
20 to take a position on this as of July 31st, and that to the
21 extent that they would look at pulled tubes, and I think I
22 am told that they plan to pull about three tubes, would
23 merely be confirmatory in that one would not expect to find
24 anything in that analysis that would upset the staff's
25 determination.

1 Now of course, if it did, then that would have to
2 be taken into consideration by everyone. I know that the
3 licensee never expected there to be anything that would
4 impact on this shown from the analysis of the tubes, and
5 when you asked me what I think about what the staff says,
6 based on what they said, I know believe that the staff
7 doesn't believe that there will be.

8 I read from this response that the staff does want
9 to look at the results of the inspection of those pulled
10 tubes before it makes its final decision, but I would assume
11 that because they are willing to issue the SER on the 31st
12 that the staff also feels fairly confident that they would
13 not expect to find anything untoward in those results.

14 JUDGE WOLFE: Who wrote that letter of February
15 19th, 1986?

16 MS. WAGNER: Judge Wolfe, I have got extra copies
17 of the February 19th letter which I brought with me.

18 JUDGE WOLFE: Please, yes. And do you also have a
19 copy of your -- whatever it was, your request?

20 MS. WAGNER: Our request was not in writing. So I
21 don't have a copy of any request that initiated the February
22 19th letter.

23 We did make an oral request at a meeting with the
24 licensee, and I believe that is in a transcript of the
25 meeting. It was a January meeting I believe. I don't have

1 the exact date, but I think it was early this year.

2 I would like to distribute the February 19th
3 letter to the Board members. I have already given a copy to
4 Ms. Bradford and Mr. Au.

5 I also have a May 2nd, 1986 letter that the staff
6 has just send to GPU which sets forth some of the analysis
7 that should be included in the test run on the pulled
8 tubes. This is a letter that went out May 2nd. It has not
9 been distributed internally or to the parties as yet. So I
10 again gave copies to the parties this morning.

11 (The documents referred to were distributed by
12 Counsel Wagner to the Board.)

13 MS. WAGNER: And if I may say one more thing on
14 the subject of the May 2nd letter, I note that the service
15 list is not entirely accurate. It does not include all of
16 the Board members in the steam generator proceeding, and I
17 have spoke with the staff about updating their service list
18 to include the Board members and to delete a number of
19 people who really don't belong on the list. That will be
20 attended to.

21 JUDGE WOLFE: Well, do you recall or not having
22 seen this letter of February 19th, 1986 signed by Mr. R. F.
23 Wilson addressed to Mr. Stolz?

24 MR. CHURCHILL: Your Honor, the letter looks
25 familiar. I don't remember when I first saw it, but I will

1 have to assume that since we are on the distribution list --
2 well, we routinely get correspondence that is distributed.
3 Whether we routinely get correspondence that is distributed
4 out of Mr. Wilson's office, and I notice he signed it, I
5 can't remember.

6 I have seen this letter before, Your Honor, but I
7 don't remember when I have seen it.

8 JUDGE WOLFE: Can you speak for Mr. Wasserman, Mr.
9 Churchill?

10 MR. CHURCHILL: He has never seen it.

11 JUDGE WOLFE: Can you speak for Mr. Washington?

12 MR. CHURCHILL: He has not seen it.

13 JUDGE WOLFE: I take it this passed by you and
14 that you attached no significance to it whatsoever prior to
15 the prehearing conference or during the course of the
16 prehearing conference?

17 MR. CHURCHILL: Your Honor, I don't know whether I
18 can say that I placed no significance on this. I do know
19 that in any of these proceedings there are times during the
20 course of the operation of the plant or later when
21 additional information is looked for and obtained.

22 I was certainly not under the impression that this
23 was information that was necessary for the granting of this
24 amendment, particularly at the prehearing conference when we
25 ---

1 JUDGE WOLFE: Well, it would have something to do,
2 however, with scheduling, would it not, or at least in the
3 Board's thinking as to scheduling, for example, discovery?

4 MR. CHURCHILL: Yes, sir, it certainly would. If
5 this was something that were significant and that was
6 necessary for the granting of this amendment, yes, it would
7 impact on scheduling.

8 I certainly didn't think it would be, and I
9 assumed the staff didn't either. And I had no idea that I
10 knew something about something like this that the Board --
11 well, the staff obviously would have, they have had this,
12 didn't know about.

13 Based on the way the prehearing conference
14 progressed, I assumed that we were all proceeding on a
15 schedule, a very expedited schedule, which would have led to
16 an early determination, or at least a hearing on this well
17 before any schedule, months before any schedule for pulling
18 tubes. So I guess that is probably the reason why it didn't
19 enter my mind as a piece of information that was necessary
20 for a determination of this amendment request.

21 In talking with the company since seeing the
22 staff's response, the position is the same. They do not
23 really believe that this could have any impact.

24 If anything, it could have a positive confirmatory
25 effect on it but, as I said before, if it did, certainly it

1 wouldn't be ignored, and any results that might impact on a
2 determination by the staff or this board would have to
3 immediately be brought to the attention of both of those
4 bodies.

5 JUDGE WOLFE: And I take it then that the self
6 same response would apply to the other two sequences that I
7 spoke of when I read from the staff's response of April
8 30th?

9 MR. CHURCHILL: I had better make sure I know
10 exactly what you mean before I reply.

11 JUDGE WOLFE: Well, I am speaking now that the
12 issuance of the SER, which they anticipate now will be in
13 July, the end of July of this year, and that the
14 confirmatory testing and the supplement would not be issued
15 until late January of '87.

16 MR. CHURCHILL: Well, before I read the response,
17 I had no idea what the staff's schedule was for an SER.

18 JUDGE WOLFE: Aside from a schedule now. Really,
19 I am not interested in dates. All that I am saying is you
20 didn't bring these two other matters to our attention
21 either, regardless of dates.

22 MR. CHURCHILL: I am sorry.

23 JUDGE WOLFE: You were aware, I take it, prior to
24 the special prehearing conference that an SER would be
25 issued by the staff and a supplement to the SER would be

1 issued.

2 MR. CHURCHILL: Oh, no, I was not aware of the
3 supplement. I knew an SER would have to be issued. It is
4 issued I think with every amendment. I had no idea that
5 there would have to be a supplement based on the analysis of
6 the pulled tubes. I wasn't even thinking of those pulled
7 tubes. I didn't realize that that was a consideration.

8 (Board conferring.)

9 JUDGE WOLFE: Well I must say, Mr. Churchill, that
10 absent such information or absent knowing, for example,
11 about the February 19 letter, we were unaware of this
12 information, and absent such information the Board just
13 considered that to our mind that perhaps tests had already
14 been conducted and/or that the staff and the licensee would
15 rely just on expert testimony absent any tests.

16 We thought at that time that the case was ripe for
17 hearing, that everything was fixed, that all facts were in
18 place and in that void we proceeded to schedule discovery.

19 Turning to you, Ms. Wagner, I will ask the same
20 question of you. Why prior to the special prehearing
21 conference or during the special prehearing conference, why
22 didn't you bring these three facts to the attention of the
23 Board? You must have understood that the Board was unaware
24 of these matters or what?

25 MS. WAGNER: Well, regarding the February 19th

1 letter, to take that first, while I hadn't seen the letter,
2 I was aware that the staff's final position on the issuance
3 of the amendment would have to await these test results. We
4 had asked for three tubes to be pulled and tested, and
5 licensee had agreed to that.

6 However, we view these tests as confirmatory in
7 nature. We will be prepared, once our SER is issued, to
8 proceeding to hearing ---

9 JUDGE WOLFE: Based on certain assumptions.

10 MS. WAGNER: Based on certain assumptions, right,
11 that we have a high level of confidence in. So we don't
12 think that the fact that these test results will not have
13 been analyzed by the staff until the end of January has to
14 impede the progress of the hearing at all.

15 JUDGE WOLFE: What about the Board's decision,
16 what sort of decision could we render if we proceeded on the
17 present schedule and have a hearing -- well, we really
18 hadn't thought about that, but if we have a hearing in mid-
19 summer or late-summer and what sort of decision could we
20 render? It would necessarily, I would think, could not have
21 any immediate effect because we would still be waiting for
22 the confirmatory analysis by the staff in its supplement to
23 the SER which now is not scheduled until the end of 1987.

24 MS. WAGNER: The beginning of 1987 is what I had
25 intended to say.

1 JUDGE PARIS: At the end of January.

2 MS. WAGNER: The end of January 1987.

3 JUDGE WOLFE: At the end of January '87, right.

4 MS. WAGNER: Well, we would anticipate that we
5 could proceed to hearing and we could have a decision by the
6 Board. There would have to be a condition that the test
7 results are found by the staff to be confirmatory of their
8 assumptions, and when that condition is satisfied, then the
9 staff upon satisfying itself otherwise with regard to the
10 amendment request could proceed to issue the amendment.

11 It is true that the staff does not intend to act
12 on the amendment until it does have this confirmatory data.
13 But we believe we can proceed to hearing and have a decision
14 in advance of that confirmatory data being received, and we
15 think this would save significant amount of time.

16 Just glancing over the Commonwealth's response to
17 TMIA's motion today, I notice they say that, you know, once
18 we get the confirmatory data, this would only result in
19 maybe a day or two of additional hearing, and why don't we
20 do it all at once.

21 Well if we wait until February to do it, we have
22 got to have the whole hearing, we have got to have time for
23 proposed findings and maybe reply findings, and then we have
24 got to await the Board's decision, and this is taking us at
25 least, I would say, to the end of March at the earliest

1 before we could have a decision I would think.

2 On the other hand, if we proceed in the summer or
3 fall or whenever to hearing, we can submit the findings and
4 have a decision, and the only remaining outstanding item
5 will be the confirmatory data and the staff's analysis of
6 it.

7 So that is why we didn't raise anything about this
8 February 19th letter at the hearing discussing scheduling.

9 As to the SER being issued around July 31st, on or
10 before July 31st, that was not mentioned because, frankly,
11 the date for the issuance of the SER was really not
12 determined until last week in responding to TMIA's pleading.

13 JUDGE WOLFE: Regardless of the date, all I am
14 interested in why this wasn't brought up to the Board about
15 the SER, that such an SER was in the works.

16 MS. WAGNER: I had assumed that everyone was aware
17 that an SER would issue on this amendment request. An SER
18 has been in the works on this request since we received the
19 request I believe in November. We have had staff people
20 working on analyzing ---

21 JUDGE WOLFE: That is the one that is now dated
22 April 18th; is that right? That is on 153 though, isn't it?

23 MS. WAGNER: Oh, that SER is out. On 153 it is
24 out. I am talking about 148.

25 JUDGE WOLFE: All right.

1 MS. WAGNER: We proceeded I believe promptly to
2 analyze the data that we had received from the licensee on
3 TSCR 148 upon receipt of that application. We have got to
4 assess the adequacy and completeness of the information and,
5 frankly, the time required to satisfactorily analyze that
6 information is taking us -- the time required is longer than
7 we had anticipated initially.

8 As we proceed in our analysis and as we are
9 getting closer to reaching our conclusions, we are also
10 realizing that certain additional work is necessary. We are
11 contemplating hiring an outside consultant on the issue of
12 fracture mechanics, and I believe that process is in the
13 works now.

14 So the exact timing of the issuance of the SER was
15 not really certain. I guess I had proceeded at the hearing
16 on the assumption that everyone knew that an SER would be
17 forthcoming.

18 JUDGE PARIS: Well, if you were not certain at the
19 prehearing conference when the SER would be issued, but you
20 have given us a date now, yet the staff is contemplating
21 hiring a consultant to help with the analysis, are you
22 really sure when it will be issued?

23 MS. WAGNER: Well that is the same question we
24 pursued with the staff before we put that date in our
25 pleading, because we have every intention of holding to that

1 July 31st date.

2 I don't expect, based on discussions with the
3 staff, that the SER would be issued significantly before
4 July 31st, but we do believe we can hold to that date. That
5 July 31st date does taken into consideration the fact that
6 we will be hiring an outside consultant. We have factored
7 that into the date.

8 JUDGE WOLFE: But before the special prehearing
9 conference, or at the special prehearing conference, while
10 you perhaps didn't know the date that it would issue, you
11 were aware that it would issue after the cut-off date for
12 discovery of May 12th, 1986?

13 MS. WAGNER: We were not certain as to when it
14 might issue. There was a possibility at that time that it
15 might not even issue until January of '87. But we did not
16 view that again, the issuance of the SER, at that time to
17 necessarily impact the hearing.

18 We had anticipated and we had checked with staff,
19 and we had thought at that time that we would be able to
20 prepare and submit testimony in advance of the issuance of
21 an SER.

22 JUDGE WOLFE: All right. Let me ask you this. At
23 the time of the special prehearing conference if you didn't
24 know exactly when the SER was going to be issued, wouldn't
25 in any event TMIA, after the issuance of the SER, have been

1 entitled to initiate discovery, if any, and subject to the
2 restrictions in our rules, couldn't they have proceeded with
3 additional discovery in light of the assumptions you now say
4 would be contained in the SER, because really up until that
5 time, I take it, TMIA would not know of your position based
6 on certain assumptions?

7 MS. WAGNER: I think with respect to the three
8 issues before the Board, and of course the SER is a lot
9 broader than that, but I think TMIA might be entitled to
10 some discovery.

11 JUDGE WOLFE: All right.

12 MS. WAGNER: However, if we are proceeding to
13 hearing, TMIA would have our testimony, which we had
14 expected to be to reflect the information that would be
15 contained in our SER whenever it was available. Our
16 testimony would be based on the assumptions.

17 JUDGE WOLFE: However, parties are entitled to
18 discovery prior to testimony, aren't they?

19 MS. WAGNER: That is correct. The SER would not
20 have been a surprise to them if they had conducted discovery
21 and, even failing that, in seeing our testimony that we were
22 prepared to proceed with at that time.

23 Now, as I say, it turns out that the analysis that
24 we want to do is taking a little longer than we had
25 anticipated. So I think that does to some extent impact on

1 the scheduling.

2 JUDGE WOLFE: And further, if TMIA meets the late
3 filing criteria, once having seen or been furnished with the
4 SER, wouldn't it be entitled to propose contentions, new
5 contentions, additional contentions based upon what is
6 reflected in the SER?

7 MS. WAGNER: Assuming that they meet the criteria,
8 as you said, I believe that is correct, but there is a
9 fairly heavy burden on TMIA at that point.

10 JUDGE WOLFE: I don't know whether this would
11 happen, but for example, since the staff's testimony and
12 since the SER would be based upon certain assumptions as to
13 what the test results would show, at least the initial test
14 results, if the staff's confirmatory analysis in January of
15 1987, as reflected in the supplement to the SER, varies from
16 its earlier assumptions, but nevertheless supports the
17 amendment, is not TMIA entitled to discovery, if any, and
18 subject to the restrictions of our rules and practice, could
19 it not and is it not entitled to propose additional
20 contentions?

21 MS. WAGNER: Well, if I understood your question,
22 it was whether at that point they would be entitled to
23 discovery, and I think ---

24 JUDGE WOLFE: Well, not only discovery, but
25 couldn't they also propose contentions if TMIA meets the

1 late filing criteria?

2 MS. WAGNER: That is right. Assuming again they
3 meet the criteria, I believe they would be able to come in
4 with contentions. I don't believe they would be entitled to
5 discovery in order to frame those contentions, and I wasn't
6 sure whether that was part of the question.

7 JUDGE WOLFE: Yes. Well, there are restrictions
8 in our rules on that, but certainly as to contentions they
9 would be entitled to file if they meet the late filing
10 criteria.

11 MS. WAGNER: That is correct.

12 (Board conferring.)

13 JUDGE SHON: Ms. Wagner, I am a little disturbed
14 at the position you seem to be taking with regard to the
15 timing involved in the issuance of the SER and matters of
16 discovery.

17 As I am sure everyone knows, the staff enjoys a
18 certain privilege of position in regard to discovery in that
19 they are really not by the rules required to answer certain
20 discovery questions.

21 It is my understanding that the reason for that
22 provision in the rules is that it is assumed that the
23 staff's position will be made so clear as to be
24 unmistakable, and that any opposing party will therefore
25 know what they have to defend against, the primary purpose

1 of discovery.

2 But if we were going to conduct discovery in the
3 spring, and the SER wasn't going to get there until late
4 summer, it seems as if that whole business collapses. The
5 fact that the intervenor, for example, might see your
6 testimony when it is ready to be given wouldn't tell them
7 much at all about what they had to prepare for or what they
8 had to meet with their testimony, and would not that
9 frustrate the basic purposes of discovery?

10 MS. WAGNER: Well, I don't believe, Judge Shon,
11 and I didn't mean to imply that we wouldn't cooperate with
12 discovery requests. I am aware of the rule and the
13 privileged position, but as you are probably also aware, we
14 don't always go by that rule. We cooperate whenever
15 possible, and I think this is one instance where we would
16 make very attempt to fully inform TMIA of our position in
17 response to discovery requests before the testimony is
18 filed.

19 JUDGE SHON: I see. What you are saying is that
20 you would cooperate anyway.

21 MS. WAGNER: That is correct. We have done that
22 in other cases where we have no obligation to, but I think
23 here certainly is an instance where we would cooperate. And
24 that is one reason why we have no problem with a three-month
25 extension of time in the discovery schedule. That would

1 enable TMIA to see our SER and frame discovery questions
2 based on that written position.

3 JUDGE PARIS: Ms. Wagner, can you tell me under
4 the Commission's policy with respect to Board notification
5 whose responsibility in the staff it is to determine whether
6 a particular piece of information is followed to the Board?

7 MS. WAGNER: That responsibility lies with NRR.

8 JUDGE PARIS: Thank you.

9 (Board conferring.)

10 JUDGE SHON: Ms. Wagner, there are two matters
11 that very much trouble me in the way that this case has
12 proceeded in scheduling and when we has a Board got to know
13 certain things.

14 The first was why were we not under Board
15 notification procedures forwarded the February 19th letter,
16 and the second was, why were we not given under Board
17 notification procedures copies of TMIA's comments on the
18 proposed finding of no significant hazards? I understand
19 those comments were filed on March 27th regarding technical
20 specification change request No. 153.

21 It seems to me that both of these matters, the
22 February 19th commitment to remove tubes, and the TMIA's
23 comments on change request No. 153 were matters that bear
24 directly on both the scheduling and even on the matters at
25 issue in this case, and I am quite concerned that we weren't

1 given them.

2 MS. WAGNER: May I consult with the staff person I
3 brought with me?

4 JUDGE SHON: Sure.

5 (Pause.)

6 MS. WAGNER: Judge Shon, on the February 19th
7 letter, or more broadly speaking, on the issue of tests
8 being done, my co-counsel, Ms. Young, recalls that at the
9 prehearing conference on March 27th we did in a general
10 manner mention the fact that there would be some tests that
11 would be done on some pulled tubes. This was mentioned in
12 the context of taking a position on the contentions.

13 I don't have a transcript reference.

14 JUDGE SHON: Does the standard procedure that
15 pertains to Board notification, that is notifying Boards of
16 important developments, cover the matter that if you refer
17 to it generally in a prehearing conference that it is all
18 taken care of?

19 MS. WAGNER: I was just pointing out that it was
20 mentioned, but in terms of standards for Board notification,
21 we don't think that this meets the standards for Board
22 notification. It has to be relevant and material to an
23 issue in the case, and given our view of the case and given
24 our view that this is confirmatory data only, we don't
25 believe this rises to the level of a Board notification.

1 JUDGE PARIS: Ms. Wagner, you say in the response
2 to TMIA's motion for an extension on page 4 in talking about
3 the test data that such data will also bear directly on
4 TMIA's Contentions 1, 2 and 5, which relates to that there
5 is continued or new corrosion and that eddy current testing
6 is inaccurate with respect to such corrosion.

7 It sounds like to me what you just said is
8 inconsistent with that.

9 MS. WAGNER: No. I think it bears on Contentions
10 1, 2 and 5. I don't think it is material information that
11 prevents us from going to hearing in advance of receipt of
12 the data.

13 JUDGE WOLFE: Despite your earlier responses to my
14 questions with respect to TMIA's entitlement to discovery
15 and the possible filing of proposed new contentions?

16 MS. WAGNER: That is correct.

17 JUDGE WOLFE: This is not relevant and material
18 and important certainly insofar as the Board's scheduling is
19 concerned?

20 MS. WAGNER: We don't believe it to be. We
21 believe that the issues will be resolved in the hearing
22 which can take place prior to the receipt of this data, and
23 TMIA would have a heavy burden to come in with additional
24 contentions.

25 JUDGE WOLFE: I don't care about the heavy

1 burden. What I am talking about now is whether, assuming
2 that they meet that heavy burden, wouldn't this have alerted
3 you that these matters were material, relevant and important
4 to scheduling?

5 MS. WAGNER: I just have to restate our position
6 that we view this as confirmatory only and it was not viewed
7 as something that rise to the level of a Board notification.

8 JUDGE PARIS: Even though it bears directly on
9 TMIA's contentions?

10 MS. WAGNER: The results of the tests we
11 acknowledge bears directly in terms of our final position,
12 but as you know, we are prepared to go ahead based on the
13 assumptions that the tests will show what we have every
14 expectation of them showing.

15 JUDGE SHON: I think the thought that the result of
16 the tests bear directly on the contentions in the case, but
17 the fact that the tests were going to be performed and
18 possibly performed next January is completely irrelevant to
19 the case's scheduling is a bit more than seems reasonable to
20 me, but I will accept that that is how you felt, that you
21 simultaneously adopted these two positions, the data bear
22 directly on the issues in the case, but the fact that we are
23 going to get the data has nothing whatever to do with the
24 case and is irrelevant and immaterial.

25 MS. WAGNER: Well, no. I don't mean to say that

1 it has nothing to do with the case, but we don't think that
2 it rises to the level of a Board notification.

3 I know that over the years there has been a
4 tendency of the staff to forward all sorts of pieces of
5 information to Boards going well beyond what the standards
6 for Board notifications are. And I think recently there has
7 been a directive to try to narrow the papers that are sent
8 to the Board to stay within the standards, and we didn't
9 think this met the standards.

10 JUDGE SHON: Fine. I would like to then have you
11 address the matter of TMIA's comments on the no significant
12 hazards determination in tech spec change 153.

13 MS. WAGNER: Yes. Those comments which,
14 incidentally, are dated the same date as our prehearing
15 conference, were addressed in the safety evaluation on TSCR
16 153 by the staff.

17 JUDGE SHON: That is correct, but there is a great
18 deal of difference in reading the staff's treatment of this
19 staff's paraphrase of the comments and seeing what the
20 comments actually were, or in my view there is, but perhaps
21 not in the staff's view.

22 MS. WAGNER: I have not had a chance this morning
23 to go back and see whether their comments on no significant
24 hazards with regard to 153 really have any direct bearing on
25 the contentions in this case. I haven't had the chance to

1 that just now. But certainly the no significant hazards
2 consideration is a determination made by the staff.

3 Again, comments of the sort received by TMIA are
4 not generally forwarded to the Licensing Boards. That is my
5 understanding.

6 JUDGE SHON: One last question. This letter of May
7 2nd that you have now given us concerning the laboratory
8 analysis of TMI-1 OTSG tubes, would that have been supplied
9 to us at any time under the Board notification provisions?

10 MS. WAGNER: Let me consult with the
11 representative from NRR, please.

12 (Pause.)

13 Judge Shon, the answer is probably not.

14 The May 2nd letter reflects the additional
15 information that we are requesting from the licensee, and
16 our position on that May 2nd letter, which I have provided
17 you because of the interest sparked by the mention of the
18 February 19th letter ---

19 JUDGE WOLFE: So this initially was not served on
20 the Board. We weren't on a mailing list for the May 2nd
21 letter.

22 MS. WAGNER: Well, I believe, Judge Wolfe, you may
23 be on it. Now the service list is a list prepared by NRR,
24 and they distribute these in accordance with their own
25 procedures. I hadn't seen the letter before yesterday

1 afternoon, and I believe that NRR was going to say, hey,
2 this is a letter that counsel for the staff should
3 distribute as a Board notification or should distribute to
4 the parties.

5 JUDGE PARIS: Judging from the service of Board
6 notifications by NRR in other cases that are ongoing right
7 now, I get the impression that the performance of NRR in
8 providing Board notifications in this proceeding is
9 profoundly different.

10 (Pause.)

11 MS. WAGNER: I believe that it is NRR's policy not
12 to issue Board notifications before the issuance of an SER.
13 I have followed that policy in the past. I have been
14 informed by NRR in other cases that that is their policy.

15 Also, it is policy not to serve Board
16 notifications generally before 30 days before the scheduled
17 hearing.

18 So I am not familiar with the cases you are
19 talking about, but there may be differences in those areas.

20 JUDGE PARIS: I believe there are.

21 (Pause.)

22 MS. WAGNER: I am further informed that Board
23 notifications are generally issued following the SER because
24 the SER is presumed to be the staff's position, and if
25 something that comes up that significantly differs with what

1 was said in the SER or affects something there or is new
2 information that would affect something that has been
3 testified to, then it would be appropriate to make a Board
4 notification.

5 (Board conferring.)

6 JUDGE WOLFE: Yes, Ms. Wagner.

7 MS. WAGNER: Judge Wolfe, I would like to point
8 out that I have asked the staff to amend their service list
9 that had accompanied the May 2nd, 1986 letter to include all
10 the Board members. Judge Wolfe and Judge Shon are on, and I
11 have asked that Judge Paris be put on the list.

12 Then you would receive copies of information like
13 this, but it would not be under a Board notification
14 procedure according to our policy.

15 I would also like to point I believe TMIA's
16 representative is on the service list for receipt of this
17 letter.

18 JUDGE WOLFE: Any additional comments in light of
19 the querying of and the responses by Ms. Wagner?

20 Mr. Churchill.

21 MR. CHURCHILL: It is not so much a comment, but
22 while we are on the subject of Board notifications, I have
23 to confess probably a certain laxity in focusing on just
24 what of the correspondence that goes back and forth between
25 the staff actually comes before the Board.

1 To the extent that we didn't advise you of
2 something that perhaps we should have, I apologize, and I
3 apologize on behalf of myself personally and on behalf of
4 the licensee.

5 But I would like to clarify or perhaps ask you a
6 question about to what extent do you get the
7 correspondence? We do write letters back and forth as the
8 attorneys for the clients in these licensing cases. I am
9 not so tuned into a particular requirements as I try to be
10 tuned into keeping the Board informed of what I think is
11 germane and aware.

12 And, frankly, it must have just gone over my head
13 or passed me or something, or maybe I assumed the Board knew
14 about this or maybe I didn't know about it at the time or
15 something. I don't know what it was.

16 JUDGE WOLFE: Well, now you know ---

17 MR. CHURCHILL: Well, now I know, and I am
18 wondering ---

19 JUDGE WOLFE: It is not particularly in being
20 served with the letter of February 19th, but being told
21 about it.

22 I have appeared before a lot of courts as a lawyer
23 and you have to get yourself in tune with the judge. You
24 have to know or have a feel for what the board or court is
25 interested in and what is going to affect its ultimate

1 rulings, and you just can't hold back purposefully nor can
2 you do it negligently. You have to put everything before a
3 court or a board so that it is in a position to rule.

4 And this simply was not before the Board at the
5 time or before the special prehearing conference. I am
6 concerned about not being served with a copy, but even more
7 so, I am concerned that we just weren't alerted to it at the
8 special prehearing conference or at any time before.

9 Anything more, Mr. Churchill?

10 MR. CHURCHILL: No, not on this subject, Your
11 Honor.

12 JUDGE SHON: Mr. Churchill, I am sure you are
13 aware of the McGuire doctrine.

14 MR. CHURCHILL: I am sorry?

15 JUDGE SHON: I am sure you are aware of the
16 McGuire doctrine.

17 MR. CHURCHILL: Yes, sir.

18 JUDGE SHON: And it does require a licensee or any
19 party to supply matters that might be important. I will
20 admit that one could perhaps examine this particular letter
21 and decide it was not such a matter, but that is the kind of
22 thing that we would like to have you keep in mind.

23 MR. CHURCHILL: Yes, sir, and we will try to do
24 that in the future. We just did not focus on this as a
25 piece of information.

1 This was information that might be coming later,
2 and in the context of our thinking that it wasn't really a
3 part or necessary to this, I think I just didn't realize or
4 focus that perhaps you would have been interested in it or
5 even that you didn't know about it. I probably just skipped
6 a step and maybe assumed you knew about it, but I certainly
7 wasn't thinking of it as germane to this.

8 Now I can see the Board's concern, and that is why
9 I have said what I just said before. That is why I was
10 asking, and I have been listening with interest to what the
11 staff is saying about what the Board does get, because there
12 is correspondence back and forth, and apparently the Board
13 does get it routinely, and particularly ---

14 JUDGE WOLFE: We are not interested in routine
15 interchanges between the staff and the licensee. What we
16 are interested in are those matters that properly should be
17 before us. We are not interested in a blizzard of
18 correspondence that speaks of well, we will meet next week
19 and discuss such and such, or that -- well, whatever.

20 But matters of importance, matters that are
21 important to those matters that are pending before a Board,
22 I think counsel for the licensee and the staff, it is
23 incumbent on them to make certain that the Board is apprised
24 of that sort of correspondence.

25 MR. CHURCHILL: Yes, sir. We appreciate your

1 concern, and we will try to be more diligent in this matter
2 in the future.

3 JUDGE WOLFE: Ms. Bradford, do you have anything
4 that you wish to say?

5 MS. BRADFORD: I would just like to make one
6 comment, Judge Wolfe.

7 JUDGE WOLFE: Yes.

8 MS. BRADFORD: When TMIA asked me if I would take
9 on this responsibility, and I suggested the six-month delay,
10 that was solely in recognition of the fact that I was
11 working in another area. In fact, I was not aware until I
12 saw the staff's response here that the results of the tests
13 would not be available until much later after the hearing.

14 I just wanted to make that observation that in
15 suggesting this six-month time frame it was considering the
16 time when I would be actually free to take up these
17 responsibilities, and I had not considered other information
18 that might be necessary for TMIA to put together its case.

19 JUDGE WOLFE: Well, in light of what you heard
20 today, do you have any reflective comments to make?

21 MS. BRADFORD: Well, I certainly think it is going
22 to be certainly extremely difficult for TMIA to confront the
23 staff's final position if that position is not made
24 available until the beginning of next year.

25 In fact, as I am looking here at the May 2nd

1 document, the staff has said that the analysis is important
2 to the staff's consideration of permanent changes. Although
3 Ms. Wagner has indicated that the assumptions that will be
4 made in SER, or has made a representation here today that
5 they expect them to be confirmed, this May 2nd document does
6 at least raise some question as to whether that will be so.

7 JUDGE WOLFE: I haven't read the May 2nd letter
8 thoroughly. What are you referring to?

9 MS. BRADFORD: Well, I am looking at language here
10 with regard to the importance of the test results to
11 permanent changes in the repair criteria, and that is the
12 first paragraph. Then it goes on to state exactly what
13 testing should be done.

14 However, that first statement there is that in
15 fact this would be important.

16 In addition, on the second page in the last
17 paragraph the staff continues that it would be significant
18 to their understanding of the implications of the phenomena
19 on the structural margins involved.

20 What I am saying is that I am sure that we would
21 need some of this information before we could put forth or
22 at least plan the strategy of TMIA's case. Or, in fact, if
23 we planned our trial strategy based on the assumptions in
24 the SER, as the Board has already pointed out, they might

25

1 very well change with the results of this testing.

2 I am not sure in the exchange between the Board
3 and the staff whether the test data would be available to
4 TMIA as well as the staff's confirmatory statement or its
5 statement as a result of those tests. It wasn't clear to me
6 whether that would be a part of discovery or an informal
7 discovery process. I am not sure.

8 MS. WAGNER: The staff's SER would be made
9 available to TMIA. I would also expect that the licensee's
10 results, which would be available before the staff's SER,
11 would also be made available to TMIA.

12 Correct me if I am wrong, Mr. Churchill, but I
13 would expect that your results of the tests would also be
14 made available to TMIA?

15 MR. CHURCHILL: Yes.

16 MS. WAGNER: So you would have some time even
17 before the issuance of our SER to consult whatever experts
18 you might wish to. There would be an SER supplement, you
19 understand, that would come out.

20 MS. BRADFORD: Right. It is the supplement that I
21 am interested in myself.

22 MS. WAGNER: And that would be made available to
23 TMIA. But even before that, as Mr. Churchill just
24 confirmed, you would have the results of GPU's own analysis
25 of the test results.

1 MS. BRADFORD: But under the current schedule, the
2 hearing would be completed by that time.

3 MS. WAGNER: That would be the way we would intend
4 to proceed. Well, I guess there may not be a current
5 schedule for the hearing. I am not quite sure. But the
6 staff would anticipate that the hearing could be concluded
7 before those results are out.

8 I would like to address, if I might, your comments
9 concerning the May 2nd letter and the statements we make in
10 that letter. Those statements are addressed to the staff's
11 consideration of the entire amendment request and not
12 necessarily the particular contentions that have been
13 admitted in this proceeding.

14 There are only three issues really that have been
15 admitted, and it is the staff's position, as we stated in
16 response to your motion for an extension of time, that we
17 are prepared to present our position on those three issues
18 in advance of receipt of this information with the caveat
19 that the tests will confirm the assumptions that we are
20 making. And we have every expectation that that will be the
21 case.

22 MS. BRADFORD: Judge Wolfe, it is that information
23 that I need some clarification on. If in fact there is a
24 supplemental SER, it was with regards to the supporting data
25 for that supplemental SER whether that would be

1 automatically available to TMIA and from the licensee also.

2 The discussion here today about discovery and what
3 discovery would be available to TMIA, should TMIA decide to
4 request further hearings based on the supplemental SER, and
5 my question goes to would the supportive data for the
6 supplemental SER, would that be made available at the time
7 the supplemental SER was issued, or would we have to rely on
8 meeting the burden and entering into a discovery process?

9 I hope I have made myself clear.

10 JUDGE SHON: Ms. Bradford, as I understand it,
11 your question is fundamentally this. Would the hearing as
12 it is presently constructed with presently admitted
13 contentions guarantee that come January of '87, regardless
14 of what the posture of the case might be at the time, you
15 would have access to the original data, possibly
16 metellographic examinations and such, that would be involved
17 in the tests made on these pulled tubes; is that that?

18 MS. BRADFORD: That is right.

19 JUDGE SHON: In other words, you are trying to
20 assure yourself that no one would raise the defense that,
21 oh, that is not relevant because the case is already closed
22 or because it doesn't bear upon a contention that is still
23 at issue or anything like that. You would really be able
24
25

1 to get at the data regardless of the posture of the case at
2 that time; is that it?

3 MS. BRADFORD: Exactly, and without having to
4 meet, what I understood from the staff to be a heavy burden
5 in ---

6 JUDGE SHON: Without having to meet either the
7 rather worrisome burden for reopening the case or for the
8 introduction of late-filed contentions; is that your worry?

9 MS. BRADFORD: Exactly.

10 MR. CHURCHILL: May I comment on the point, Judge
11 Wolfe?

12 JUDGE WOLFE: Certainly.

13 MR. CHURCHILL: We keep referring to tests that
14 are to be conducted at the end of the year as if it is a
15 type of required information necessary to come to a decision
16 on this, and that is because the staff has said before they
17 come to their final determination to issue the amendment
18 they want to see and they want to actually look at some
19 tubes and see what is there.

20 Now we have taken the position, and I have always
21 taken the position that everything that the licensee has
22 submitted is adequate to support our burden to show that
23 there is not an undue risk to health and safety to the
24 public because of the change request, the tech spec change
25 that we have been requesting.

1 The staff has stated that they will be in a
2 position to issue an SER. We do not know where they are
3 going to come out and we don't know what their determination
4 is. Obviously, if they decide they don't like it, the SER
5 would say it and that would be a new ball game.

6 But assuming, and we believe that is a reasonable
7 assumption, that the staff will agree that based on the
8 information the licensee has submitted, there is adequate
9 assurance that the health and safety of the public will be
10 protected, we believe that that information will be
11 sufficient for the Board to make a similar determination.

12 The licensee does not believe that it is necessary
13 to pull the tubes and look at it for confirmation of the
14 type of activity that is going on or eddy current
15 verification or anything. We have done that already, and
16 there is data in our files and that is before the NRC that
17 the licensee does not believe these tests are necessary.

18 But, nevertheless, we have crossed that. The
19 staff wants to see it and we will provide it. But we
20 believe the case can be made without it and that there can
21 be a finding made by this Board.

22 But, in addition, the Board does not have to under
23 the scenario that I understand is being proposed by the NRC,
24 does not even really have to make a final
25

1 determination then, and final in the sense that the Board
2 can say, as Boards do a lot, based on what we have before
3 us, it looks okay.

4 We do know that there will be some confirmatory
5 information coming down the pike later. It isn't the fact
6 that there is some information now. It is that something
7 will be looked at later beyond what the Board and the
8 parties are looking at.

9 If what we have before the Board, placed before
10 the Board, Your Honor, is sufficient to make the
11 determination, then I believe we should be able to go ahead
12 with the hearing, and I believe the staff feels that that is
13 a reasonable possibility. I believe that is what the staff
14 means when it says that by the end of July it can have an
15 SER.

16 I am not saying that that is what the staff says
17 it is going to find. I am saying I believe that they think
18 it is a reasonable probability that that could be the result
19 at that time.

20 Therefore, we could go to hearing. The record
21 could be closed and an initial decision could be issued.
22 The Board is free to condition the initial decision subject
23 to verification or examination by the staff of the results
24 and that they don't show anything inconsistent with the
25 evidence that was presented.

1 This is reasonable because that is strictly
2 confirmatory information. The staff hasn't said that they
3 need that to perform their analysis to show that what we
4 have asked for is reasonable or unreasonable or safe or
5 unsafe.

6 Therefore, Your Honor, I would strongly urge that
7 we proceed on a hearing which would enable an initial
8 decision in time for the licensee if the staff determines
9 that 148 can be issued in time for the Board to make its
10 determination and the licensee to implement change request
11 148 during the next outage.

12 This is all as a precursor to my comments on Ms.
13 Bradford's statement that once the new information, if
14 any -- well, I don't mean if any. It is going to say
15 something presumably confirmatory. Once the analysis is
16 available, does she have to sustain the burden or reopening
17 the hearing and filing a new contention and so on, and a
18 logical extension of what I have said is yes, of course, she
19 would.

20 We have held a hearing based on evidence and
21 information before us presented by the staff and by the
22 licensee which will have been shown to be adequate to
23 sustain the licensee's burden. If new information comes
24 along, and I don't see the distinction between our knowing
25 that there will be some later and our not knowing that

1 there will be some later, new information could come along
2 at any time from any source, and we are always subject to
3 that, but if new information should come along that warrants
4 a reopening of the record, TMIA is free to file a motion to
5 reopen the record.

6 TMIA will have to sustain the burden of such a
7 motion to reopen, and that motion would be filed before
8 either this Board or the Appeal Board, depending on which
9 body still had or acquired jurisdiction at the time new
10 information warranting opening the record should appear.

11 So I would like to try to, if I can, de-emphasize
12 the fact that this information that we are expecting in
13 January is something that is necessary for anybody to make a
14 determination on this. It really could only be negative.
15 It is expected to be confirmatory. That is all. It is not
16 something that the staff has said we have got to see that so
17 we know what is going to happen in there.

18 We have a reasonable basis for believing what is
19 going in there. There is lots of evidence, there is lots of
20 data and there is lots of information and we have provided
21 that.

22 The only conceivable thing that could upset the
23 apple cart is if the staff looked at that analysis and said
24 something here is inconsistent with what the licensee said
25

1 before or what we said before or what was placed into
2 evidence.

3 Therefore, there is no reason either to wait for
4 confirmatory information or to suggest that once information
5 does come that proceedings could be automatically opened up,
6 discovery could be started and new contentions could be
7 added without the intervenor sustaining its burden.

8 JUDGE PARIS: Mr. Churchill, I would just like to
9 observe that in that May 2nd letter the two tests that the
10 staff refers in number on the first page, the first one is
11 aimed at determining the accuracy of the eddy current
12 technique, and the second one is to provide additional
13 confirmation regarding the cessation of the corrosive
14 mechanism.

15 It doesn't sound to me like the staff is as
16 absolutely convinced that there may not be some question as
17 you are.

18 MR. CHURCHILL: Well, I have only seen this letter
19 today, too, but the licensee is convinced, and how convinced
20 the staff is or not, I can't say. But presumably thoughts
21 on that will be forthcoming as we get the staff's SER which
22 I believe would be their official position on it at that
23 point.

24 JUDGE PARIS: You did not see the letter until
25

1 today?

2 MR. CHURCHILL: No. It was handed to us today.

3 JUDGE PARIS: Ms. Wagner, would you put him on the
4 service list also.

5 (Laughter.)

6 MR. CHURCHILL: Mine doesn't have a date -- oh,
7 yes, it does.

8 MS. WAGNER: May 2nd.

9 MR. CHURCHILL: It is May 2nd.

10 MS. WAGNER: It is dated May 2nd, and I have been
11 told that distribution had not, as of yesterday, had not
12 been completed, but the letter did go out, as far as I know,
13 on May 2nd to the licensee.

14 MR. CHURCHILL: But since I have the opportunity,
15 having had the question directed at me, yes, I believe the
16 staff is firmly convinced that there is no problem.

JUDGE WOLFE: Well, the Board is being requested
17 to rule in a vacuum, and we don't like a vacuum. We will
18 just have to proceed as we go here. We can't rule without
19 there being some substance in the record.

20
21 You will just have to make your case as we
22 proceed. We simply haven't ruled yet obviously on your
23 motion for extension of time. But if you have to move to
24 reopen, why you will have to move to reopen. That is a
25 legal fact and a legal procedure.

1 I am interested, Ms. Wagner, in your statement at
2 page 4 of the staff's response, when you say at the bottom
3 of page 4, the second to the last line, "The staff testimony
4 on Contentions 1, 2 and 5, based on an SER containing
5 certain assumptions as to what the test results will show,
6 could be presented prior to analysis of the test results."

7 When you speak there of test results, you are
8 speaking there of the licensee's test results that won't be
9 forthcoming until the end of December.

10 Am I correct?

11 MS. WAGNER: That is correct.

12 JUDGE WOLFE: So that the SER will be based on the
13 staff's assumptions as to what those tests in December will
14 indicate.

15 I have a hard time in light of what I am sort of
16 aware of from representations made by Ms. Bradford and by
17 her citations to various meetings between the staff and the
18 licensee, which may or may not have been attended by Ms.
19 Bradford, that the staff is very much concerned, and if not
20 concerned, and maybe that is a bad word, but they are most
21 interested obviously in assuring the health and safety to
22 the public if the amendment 148 is granted.

23 Am I right there? You are very concerned about
24 that?

25

1 MS. WAGNER: (Nodding affirmatively.)

2 JUDGE WOLFE: But at the same time in these
3 meetings you have indicated that you have some problems,
4 that the staff has some problems with the granting up to 70
5 percent throughwall, isn't that correct? And if that is so,
6 how can you make certain assumptions prior to seeing the
7 test results?

8 There seems to be a conflict there in the staff's
9 position, or maybe I don't understand the staff's position.

10 MS. WAGNER: You are correct that there have been
11 statements by certain staff members expressing reservations
12 about going to a 70 percent throughwall limit.

13 However, it may be the staff's ultimate position
14 that a 70 percent throughwall is not justified.

15 But regardless of what position we take,
16 assumptions as to whether corrosion is continue, for
17 example, can be made, even given concerns about the ultimate
18 limit you take.

19 JUDGE WOLFE: How can you make assumptions as to
20 that absent tests being completed in November of '86?

21 MS. WAGNER: That is right, because, as you may
22 recall, TMIA raised the issue of corrosion, continued
23 corrosion or new corrosion before, and the staff has taken a
24 position on that, and we believe that these tests in that
25 area will confirm the position that we have taken on the

1 record and affidavits that we have filed I believe before
2 the Appeal Board to the effect that corrosion has not
3 reinitiated.

4 So there are certain assumptions that can be made
5 regardless of whatever percentage the staff should
6 ultimately find is the percentage that it would approve for
7 the amendment, the percentage throughwall.

8 JUDGE WOLFE: Well, what have been these problems
9 that the staff has had during the course of conferences with
10 the licensee? If you are not concerned, say, about the
11 continuation of past corrosion and you are not concerned
12 about, apparently I guess, not about the correctness or
13 accuracy of eddy current testing, what is the staff's
14 problem, and how can you separate those from certain
15 assumptions that you are going to make?

16 MS. WAGNER: Let me confer for a minute with our
17 staff expert.

18 JUDGE WOLFE: Yes, please do.

19 MS. WAGNER: Thank you.

20 (Pause.)

21 As I understand the concerns that have been
22 expressed by some members of the staff, they are primarily
23 in the area of fracture mechanics and fracture mechanics
24 analysis that is relied on by the licensee in support of its
25 request to go to 70 percent throughwall.

1 The concerns are not in the areas for which
2 assumptions can be made and will be made. The concerns held
3 by certain staff members should be resolved at the time that
4 the SER is issued.

5 Does that help?

6 I have Mr. Stolz here from NRR who can answer more
7 detailed questions if necessary, but there is not as yet, as
8 I am sure you know, a final resolution of those concerns.

9 JUDGE SHON: Ms. Wager, I am afraid you have
10 confused me either further. You tell me that the staff's
11 only real concerns are in the field of fracture mechanics,
12 but in your own document, your answer to TMIA's proposal for
13 a continuance, you said that the data will bear directly on
14 TMIA's Contentions 1, 2 and 5. None of those really bear
15 directly on fracture mechanics.

16 They have to do primarily with these other things,
17 the morphology of the defects, the rate of crack growth and
18 the accuracy of eddy current testing. I'll admit the two
19 have to work together, but those seem to be exactly the
20 things addressed first in your letter of May 2nd, the
21 paragraphs numbered one and two, the things that are at
22 issue here, and they seem to be exactly the things that the
23 staff hasn't made up its mind about.

24 MR. STOLZ: Judge Shon, this is John Stolz, and I
25

1 would like to hopefully clarify the issues.

2 With respect to the assumptions of no further
3 internal corrosion due to intergranular attack and the
4 assumptions made regarding eddy current accuracy, these we
5 think will be verified by the tests that will be presented
6 in December.

7 My understanding right now is that the staff has a
8 fairly clear position on this, and it has been previously
9 expressed that they have seen no further sign of additional
10 corrosion beyond the intergranular attack that was
11 previously identified prior to the kinetic expansion work.

12 The long-term tests that were provided in the
13 previous proceeding for that hearing have confirmed for the
14 staff's understanding that there was no further internal
15 corrosion.

16 They are interested in these tests to in turn
17 further validate that assumption. Notwithstanding that, the
18 staff has not reached a conclusion yet with respect to the
19 analysis that supports the 70 percent throughwall criteria
20 being proposed by the licensee, even given that there is no
21 further corrosion, and even given that the 10 percent
22 accuracy is maintained via the eddy current.

23 So it is quite possible when the staff evaluates
24 this that they may find that the 70 percent throughwall is
25 not supportable based on its own analysis, and they may

1 come to a somewhat more conservative conclusion or position
2 with respect to what is a more appropriate criteria to use
3 instead of the 70 percent. I don't have that answer yet,
4 and this is something we are working on.

5 I am afraid I don't even have a consensus with the
6 staff at this time on this subject. As was mentioned
7 earlier, we are planning to get consulting help in this
8 area. We have consultants also for the eddy current testing
9 accuracy, but I think the primary concern right now is with
10 respect to the analysis of the fracture mechanics that the
11 licensee is proposing to use to justify the 70 percent
12 throughwall criteria.

13 JUDGE WOLFE: Fracture mechanics, Ms. Wager, that
14 is not raised in TMIA's contentions?

15 MS. WAGNER: That is correct. That is a concern
16 that is independent of the issues in this case, and that is
17 why we can go to hearing in the near future.

18 JUDGE SHON: What you seem to be telling us is
19 that TMIA has raised certain concerns that you yourself have
20 concerns that you regard as more important even and
21 unresolved that are not a part of those concerns.

22 It seems to me that you seem to be saying to the
23 question that Judge Wolfe raised, which is how can you
24 simultaneously say we want confirmatory data and we are
25 willing to testify, the answer is you are sure enough to be

1 willing to testify, but you also want the confirmatory data
2 later simply because even with belt and suspenders you can't
3 be sure.

4 MS. WAGNER: That's right. That is exactly
5 correct, and what we are also saying when we say it is
6 conceivable that our position might change if the results
7 don't bear us out is in the realm of anything is possible.

8 We are ready to proceed to hearing, but we
9 recognize that anything is possible, and we would notify the
10 Board and the parties if the confirmatory data doesn't bear
11 out the assumptions that we feel confident in making.

12 (Board conferring.)

13 MR. AU: May I make a comment?

14 JUDGE WOLFE: Yes.

15 MR. AU: What I am hearing is I guess slightly
16 different from what I read in the staff's response to TMIA's
17 motion at page 3 where it is talking about the tests to be
18 conducted in November and December. It says "These tests
19 are a necessary prerequisite to a final staff position on
20 licensee's amendment request TSCP 148."

21 MS. WAGNER: May I address that?

22 MR. AU: Yes.

23 MS. WAGNER: I don't think they are inconsistent.
24 We are ready to present our testimony on the three
25 contentions that are in this case. We are not ready to

1 proceed and act on the amendment request until we see the
2 results of those tests and we have analyzed the results of
3 those tests.

4 MR. AU: Does the testimony that you are prepared
5 to present represent a final position on the contentions?

6 MS. WAGNER: It would present a position based on
7 certain assumptions which we expect to be confirmed in
8 February. We don't expect our position to change.

9 JUDGE SHON: Ms. Wager, I guess this whole latter
10 colloquy has grazed a question in my mind particularly
11 concerning your May 2nd letter here, the one you gave us
12 this morning, where it seems clear to me that the thing the
13 staff really wants done is the metallographic
14 characterization to determine the accuracy of the eddy
15 current testing and the metallographic examination to
16 determine degradation morphology, if you want to put it
17 briefly, and then says it may also be desirable to perform
18 burst strength tests.

19 Oddly enough, the burst strength tests seem to me
20 to be the things that would bear directly on the accuracy of
21 the fracture mechanics analysis. Why, if that is the big
22 hang-up and the other two are only minor, are you asking for
23 the other two directly and saying that is something that
24 might be desirable but we don't know. That seems
25 inconsistent to me.

1 MS. WAGNER: The chief purpose of the letter was
2 to be able to get the confirmatory data that we are seeking
3 to confirm the assumptions that we are making and the basis
4 on which we are proceeding to do our SER and present our
5 testimony in this proceeding.

6 The information on the burst strength tests is not
7 necessary to the assumptions that we have said we are
8 making, nor is it necessary to the staff's review of
9 licensee's fracture mechanics analysis.

10 JUDGE WOLFE: This was written only by virtue of
11 the litigation in this case, this letter, and that is why
12 you gave sort of a throw away mention to the burst strength
13 test; is that what you are saying?

14 JUDGE PARIS: Would the burst strength test
15 confirm or not confirm the results of the structural
16 mechanics analysis?

17 MS. WAGNER: I think I should let the author of
18 the letter speak to that.

19 MR. STOLZ: We are not sure that the burst
20 strength tests would affect the fracture mechanics analysis
21 or not. I think the reviewers who requested this
22 information naturally like to have as much as they can get,
23 but we consider that the burst strength tests are not a
24 requirement to support the staff's review of the fracture
25 mechanics analysis provided by the licensee.

1 If the licensee came back, for example, and said I
2 can't provide you the burst strength tests for whatever
3 reason, we would not have a problem with that position.

4 JUDGE SHON: You would rely on your consultants'
5 analysis?

6 MR. STOLZ: That is correct.

7 JUDGE PARIS: But if they were performed, would
8 they or would they not serve as confirmation of the fracture
9 mechanics analysis?

10 MR. STOLZ: I am not clear what relationship these
11 burst strength tests have with the fracture mechanics
12 analyses. I am not qualified to make that statement.

13 JUDGE PARIS: Thank you.

14 JUDGE SHON: In connection with these two documents
15 that we obtained this morning, I note something about them
16 that seems mildly discrepant and it may not be of any great
17 importance.

18 Concerning the tests which are going to be done
19 during the refueling outage or on the tubes that are taken
20 out of the steam generators at that time, GPU Nuclear in its
21 letter of February 19th says in the second line of the only
22 paragraph in the letter, starting there, that "The tests are
23 in conjunction with the revised repair limits proposed in
24 technical specification change request No. 153 for an
25 interim period."

1 Now that strikes me as odd because as I understand
2 the posture of the whole thing, that change request would
3 have actually expired by the time these tests are
4 performed. It is for an interim period before the tests.

5 The May 2nd letter responding to the letter of
6 February 19th says "The laboratory analysis is important to
7 the staff's consideration of permanent changes in the repair
8 criteria for the OTSG."

9 Now the permanent change is surely change request
10 No. 148. Why did GPU Nuclear say the tests bear upon 153
11 and you, Mr. Stolz, say we need it for 148, and why did they
12 seem to think the tests bore on something that you have
13 already made up your mind about?

14 JUDGE WOLFE: I think that should be addressed
15 possibly to Mr. Churchill.

16 JUDGE SHON: Possibly. It seems to involve both
17 ends of the spectrum, and I am not sure who really should
18 answer it.

19 MS. WAGNER: We have an answer, but I think
20 probably it should come after Mr. Churchill's response.

21 MR. CHURCHILL: I assume you have asked the staff
22 this question and I don't have to respond; is that where we
23 left it?

24 (Laughter.)

25 JUDGE PARIS: It was referred to you, Mr.

1 Churchill.

2 (Laughter.)

3 MR. CHURCHILL: I don't have an answer. Mr.
4 Wilson, who wrote the letter, is not here. It wasn't
5 written by anybody in this room. I could speculate that he
6 might have just written the wrong number. None of us know
7 why we would have thought that this would have been in
8 conjunction with 153. Perhaps it was an error.

9 JUDGE SHON: It isn't just the number. He says No.
10 153 for an interim period. It was not my understanding that
11 148 was for an interim period in particular. 153 the staff
12 approved for an interim.

13 The staff said they might have an answer, but felt
14 that it would be more appropriate for you to answer. So we
15 could let them try I suppose.

16 MR. CHURCHILL: Well I hope I helped.

17 (Laughter.)

18 MS. WAGNER: Our understanding of why this refers
19 to TSCR 153 is that there has been some suggestion of
20 submitting a request for a permanent 50 percent throughwall
21 limitation, and if that were the case, we would like to see
22 the same assumptions that we want for 148 apply here and we
23 would like to see the test results in connection with any
24 such permanent change.

25 JUDGE SHON: But of course that still doesn't say

1 why GPU Nuclear seemed to think it bore on the interim
2 period request.

3 MS. WAGNER: I believe Mr. Stolz can explain that.

4 MR. STOLZ: You will recall that during March
5 there was a five-week shutdown during which there was a
6 steam generator eddy current test scheduled program
7 following the restart.

8 The licensee was concerned that if he experienced
9 degradation in tubes in the free span greater than 40
10 percent in this so-called random sample area where you have
11 to take a three percent sample of the tubes to determine the
12 degradation, that he would have to expand his sample size to
13 the next sample size required in the tech specs. That was
14 the reason for the 50 percent request.

15 He requested consideration for an interim period
16 through the end of December to provide him an interim 50
17 percent defect criteria for the tubes in the free span,
18 these tubes being in the three percent sample size.

19 The staff evaluated that request and granted it
20 via the amendment 153. But, as you know, that is a fairly
21 restrictive amendment and only applies to the internal
22 corrosion, for one thing, and of course it has a limited
23 span. It ends at the time of the next refueling.

24 So that was the motivation for the amendment 153.

25 JUDGE SHON: I think we understood that. I am

1 still not clear on why GPU Nuclear mentioned that as being
2 confirmed by tests in January of next year after it expired.

3 MR. STOLZ: Well, assuming that again they would
4 like to await the outcome of the proceeding involving the 70
5 percent criteria, and let's assume for one reason or another
6 that that was not granted, they might want to consider a
7 fall-back position saying well, why don't you consider
8 granting us a permanent amendment for the 50 percent
9 criterion, which would be comparable to the interim one, and
10 we just granted 153.

11 But that would be a fall-back assuming that people
12 found some serious problems with their proposal as before
13 this Board on the 70 percent. That proposal, I suggest, has
14 not been formally tendered to the staff, that is the 50
15 percent permanent one, and I think that is what was possibly
16 alluded to in this letter.

17 JUDGE WOLFE: Anything more, Mr. Au?

18 MR. AU: No.

19 JUDGE WOLFE: I think we will recess for lunch
20 until a quarter of two. In the meantime, the Board will be
21 conferring. I don't know that we will be in a position to
22 rule today. We want to mull over what we have heard so
23 far. But my suggestion is, and it is always a suggestion to
24 the parties, that they get together. No one knows, none
25

1 of the parties, knows how the Board is going to rule.

2 We may deny TMIA's motion for a six-months
3 extension of time, we may allow it or grant it in part going
4 along with staff's recommendation that we extend the time
5 for three months, or we may grant TMIA's motion.

6 So my suggestion is that, if possible, during the
7 lunch hour you people get together and see if you can't work
8 something out on this scheduling.

9 Since you don't know how the Board is going to
10 rule, and we haven't made up our mind, and we will probably
11 not make up our mind today and have to issue a memorandum
12 and order on that, my suggestion is that you try to iron
13 this out between yourselves, taking into account that you
14 don't know how the Board is going to rule, and that the
15 better part of discretion is to settle this between
16 yourselves.

17 I have nothing more to say.

18 We will recess then until a quarter of two.

19 (Whereupon, at 12:50 p.m., the conference
20 recessed, to reconvene at 1:45 p.m., the same day.)
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1 AFTERNOON SESSION

2 (2:15 p.m.)

3 JUDGE WOLFE: All right, any report? Does someone
4 wish to speak on the results of the afternoon negotiations
5 between the representatives and counsel?

6 MR. CHURCHILL: We have talked among ourselves,
7 but we began the discussion with a basic dilemma that almost
8 seems insoluble, and let me try to explain what the
9 situation is.

10 Based on the schedule of activities for the outage
11 as we know them today, the licensee would need a decision on
12 change request 148 by January 15 in order to implement that
13 change at this forthcoming outage.

14 JUDGE WOLFE: That date again was?

15 MR. CHURCHILL: January 15. And that looks to us
16 like the latest date. We realize that some of these dates
17 we can't plan exactly, but that is the best information we
18 have now.

19 JUDGE PARIS: Well, the staff says that their
20 analysis will not be done until the end of January. You
21 can't begin until that is done, can you? If the staff says
22 that they will not give final approval of the proposed
23 amendment until they complete their analysis, and their
24 analysis is not done until the end of January, as they now
25 say, how can GPU expect to start implementing the change

1 prior to that date?

2 MR. CHURCHILL: We can't do it prior to that date,
3 and I didn't mean to imply that. I just hadn't realized,
4 until you reminded me, that that is the date for the
5 staff's.

6 JUDGE WOLFE: And I don't even know whether that
7 is a definitive time. The staff's response said that their
8 SER supplement could be presented in late January '87, and I
9 don't know whether that is definitive or not. Was it
10 intended to be definitive?

11 MS. WAGNER: Well, I have made a number of
12 inquiries to the staff about this firmness of that date, and
13 they feel fairly certain that they stick by that date if
14 they get the results four weeks before it. They are
15 thinking in terms of a four-week turnaround for their own
16 analysis and evaluation of licensee's data.

17 JUDGE WOLFE: Well, do you need more time to
18 discuss this now having that late January date?

19 MR. CHURCHILL: No, I don't think so because that
20 would drive our schedule. I mean we can't do anything until
21 the staff is ready. I think, unless it was possible to get
22 results to the staff earlier than that, but I doubt that it
23 would be. It takes some time to look at the tubes and
24 select the three tubes. The pulling of the tubes is very
25 complex. They have to be sent out to a laboratory to

1 be analyzed.

2 I think that what this means is the schedule I am
3 talking about that we needed it by can't be made. So
4 obviously we would have to change our schedule.

5 MS. WAGNER: By two weeks or thereabouts?

6 MR. CHURCHILL: I guess, yes. I don't think that
7 affects, and that is why I say I don't think we need more
8 time, I don't think that affects what I was going to say.

9 MS. WAGNER: Could I just inject one thing here.
10 I don't we have ever said or informed the Board what the
11 estimated start-up time after the November outage is, and
12 that might play a part in these discussions.

13 MR. CHURCHILL: Oh, okay. I am looking at a
14 schedule that I just received from the company yesterday,
15 and the current outage is scheduled to begin November 3 and
16 end March 13. That is about four months and 10 days.

17 What I was told when asked, and I haven't done
18 this analysis myself, is given that and given the time it
19 takes to do your eddy current testing, repairs and so on,
20 when do we need a decision, and I was told January 15. It
21 doesn't look like we are going to have a decision by January
22 15.

23 So whether that means that we can't come up on
24 March 13 or there is some way to not begin until later and
25 still make March 13, I can't tell you at this point. I

1 don't know.

2 Could I take a moment on this?

3 JUDGE WOLFE: Go ahead.

4 (Pause.)

5 MR. CHURCHILL: I don't have much more light to
6 shed on it. It looks like we need to have approval by
7 January 15 or possibly have to forego using that, but we
8 obviously aren't going to accept that. Maybe we have to go
9 back to square one and figure out some way to get
10 information to the staff earlier if possible. I don't know
11 if that is possible. But right now the January 15 looks
12 like the drop-dead date.

13 On the other hand ---

14 JUDGE PARIS: So if you didn't have it by January
15 15, what would you have to do, assuming that is the drop-
16 dead date?

17 MR. CHURCHILL: Well, what I am told if we didn't
18 have it by January 15, what we would do would be plug by
19 whatever the existing criteria were as opposed to the
20 criteria requested in the change request.

21 JUDGE PARIS: So you would have to start plugging
22 right away?

23 MR. CHURCHILL: Yes.

24 (Board conferring.)

25 JUDGE SHON: There is something a little obscure

1 here in that as I understand it, what I will call the 50
2 percent plugging criterion was only a temporary thing that
3 was due to expire at the next refueling outage; is that
4 correct?

5 MR. CHURCHILL: Yes, sir.

6 JUDGE SHON: So that if you were caught without
7 change request 148 okayed during this winter shutdown, you
8 would have to plug according to the 40 percent criterion,
9 unless you got an extension or something?

10 MR. CHURCHILL: That is right. I mean if it
11 looked like we weren't going to do it, I don't know what the
12 company would do. But one logical proposal would be to file
13 for an extension.

14 Another I suppose would be to say -- well I guess
15 there wouldn't be any other that I can think of, unless we
16 wanted to go with the 40 percent.

17 It happens, as a matter of fact, that the results
18 of the March eddy current inspections, which we will keep
19 the Board apprised of when the report is due, were very,
20 very good. One could almost say that we wouldn't have been
21 severely prejudiced if we hadn't have had a 50 percent limit
22 when we did that, but that is just because we happened to
23 have astonishing good eddy current results.

24 Those results, I am sure, and I am thinking out
25 loud as I go along here, but I am sure those results would

1 be strong support for an extension of the 153 50 percent
2 limit. Certainly that would be taken into consideration by
3 the staff in developing their SER for 148.

4 We obviously are going to have to remain flexible
5 to try to figure out how to deal with this scheduling
6 problem, and I can't tell the Board we have to make a
7 schedule that gets an initial decision by January 15 if the
8 staff will not have had time to analyze the data and issue
9 an amendment until the end of the month.

10 So that means either we are going to have to get
11 information earlier to the staff or somehow rely on -- I
12 don't know. Maybe there is a way the staff could do it
13 earlier.

14 JUDGE PARIS: But if those tests were so good in
15 March and you have confidence in them, why do you need to go
16 to 70 percent? Maybe I am going to the merits of it, but ---

17
18 MR. CHURCHILL: This question has a strangely
19 familiar ring.

20 (Laughter.)

21 JUDGE PARIS: I'll go back and read your previous
22 answer.

23 (Laughter.)

24 MR. CHURCHILL: Well, I'm not sure that would be
25 much help.

1 (Laughter.)

2 I think that what we should do, Your Honor,
3 because I can't shed any more light on this, is we are paced
4 by the staff's ability to review what we have gotten. So I
5 think we will have to assume for purposes of this discussion
6 a January 30 drop-dead date and hope that somehow things can
7 be worked around so that works, because otherwise this would
8 be a totally academic discussion. If we couldn't meet it,
9 then we might as well relax and we will have a lot of time
10 for the hearing.

11 If you back up from January 30th, and it is not
12 that much different from January 15, the other day date that
13 we have to work within is the SER issuance. We can't do
14 anything before that. That paces us.

15 I had worked out a schedule assuming that we could
16 file our motions for summary disposition as soon as we got
17 the SER on July 31st. If we file motions for summary
18 disposition then or say a few days later on August 4, we
19 could have reached with a lot of luck and some expeditious
20 scheduling, we could have reached a January 15 initial
21 decision.

22 I don't want to make any presumptuous presumptions
23 about any time that it would take the Board to act on it,
24 but it would be on various decisions along the way. But it
25 would be possible, and I think in some cases it would

1 require asking the Board to issue decisions sooner than
2 might be optimum and sooner than Boards usually would be
3 able to do it. So we would have to walk through that to see
4 if it would work.

5 But I think that, assuming a January 31st SER and
6 summary disposition motions filed about then, we could have
7 made a January 15 initial decision.

8 If there is a two-week change, that would only
9 change by about two weeks. In fact, I would still propose
10 filing motions for summary disposition on August 4 because
11 it would give us two extra weeks to help make a January 30
12 initial decision.

13 The problem is, and this is the dilemma that we
14 faced when we were talking together, is that in order to
15 file a motion for summary disposition at the beginning of
16 August, discovery would have to be completed at that point.
17 To complete discovery at the beginning of August, it would
18 have to start no later than mid-June, and it is assuming the
19 Board's 45 days for completion of discovery period that it
20 established at the prehearing conference.

21 A 45-day discovery period, if you are diligent,
22 allows you to just barely squeak in two rounds of
23 interrogatories. You can take a couple of days at the
24 beginning to file the round. When the answers come in, you
25 will have several days to develop follow-up interrogatories

1 and file them. It assumes using a certain amount of hand
2 delivery and timely responses.

3 How relevant is all this or how real is all this
4 because June 15, the start of discovery, is inconsistent
5 with TMIA's ability to start discovery not until I think you
6 mentioned August 15.

7 I don't want to misrepresent anything you said,
8 but I think what you told me was that there is absolutely no
9 way you could begin on June 15, and that August 15 was the
10 bottom line, or earliest possible date you could start, and
11 even then you couldn't be sure you would be able to keep up
12 with that because you don't know for sure what the
13 scheduling is going to be at the other case. Is that
14 correct?

15 MS. BRADFORD: (Nodding affirmatively.)

16 MR. CHURCHILL: I don't know how to reach a
17 compromise on that, because if you split the different, we
18 lose our chance to have the change request acted on in time
19 for this outage. That is the dilemma, and that is a very
20 long way of telling that I am sorry we have no progress to
21 report.

22 JUDGE WOLFE: Well, assuming there are no motions
23 for summary disposition to be filed, supposing that is the
24 case or would be the case, I had understood at least that,
25 and maybe I am wrong, Ms. Wagner, but I thought during the

1 special prehearing conference and certainly on the question
2 of collateral estoppel you were indicating that collateral
3 estoppel could not be raised as a defense and ruled upon
4 favorably to the movant if there were changed circumstances.

5 In any event, that pertains to collateral
6 estoppel, and you indicated that perhaps TMIA had raised
7 changed circumstances. This being so and projecting that on
8 into the realm of motions for summary disposition, and I am
9 just sounding you out on this, do you think that the case,
10 all three contentions can be resolved on motions for summary
11 disposition?

12 I am not holding you to it, and it certainly won't
13 be binding on you, but I am just getting your expression.

14 (Pause.)

15 MS. WAGNER: Judge Wolfe, I have thought about
16 that question. I had anticipated that you might ask about
17 that. The staff is not far enough along in its analysis of
18 this amendment request, and particularly as it regards these
19 contentions, to be able to answer that yes or no at this
20 time.

21 Of course, the question is whether there is a
22 material factual issue, and we just are not in a position to
23 say at this point whether we would either be filing for
24 summary disposition or could support licensee's motions.

25

1 I would expect to be able to tell you that after
2 the issuance of our SER, or give you some observations
3 anyway.

4 JUDGE WOLFE: I am just throwing that out. All
5 parties have the right to proceed to summary disposition
6 procedures. If the parties waive that right or indicate
7 that they would not be filing motions for summary
8 disposition, I don't know how that would help or impede the
9 progress toward ultimate resolution in this case.

10 Any suggestion on that?

11 MR. CHURCHILL: Yes. The suggestion was made to
12 me during the discussions that if the licensee was willing
13 to waive summary disposition motions it could solve a
14 scheduling problem. We do not wish to waive summary
15 disposition. It is not only our right, but it is also
16 strongly encouraged by the Commission regulations and
17 policies.

18 If we were to waive summary disposition, it would
19 be essentially saying -- well, you have read our arguments
20 about why we don't believe that the strained resources of an
21 intervenor who asked for a hearing is the basis for their
22 not to comply with an expeditious hearing and reasonably
23 expeditious hearing schedule and to discharge their
24 obligations.

25 We don't believe that we should be required to

1 waive our right to summary disposition just so a party who
2 is otherwise obligated to go ahead would then be able to.
3 The equities aren't there. We clearly have that right just
4 as TMIA has an obligation to proceed forward.

5 We also think that the way these particular
6 contentions are framed, they are all of them broad, and
7 summary disposition is probably necessary to help get them
8 down into a litigable form.

9 We would hope that even if we couldn't win totally
10 on summary disposition, which we would hope to do of course,
11 at least many issues could be eliminated and it could be
12 pared down so that we had more concrete issues to work with
13 or, as I said before, possibly it would avoid having to hold
14 a hearing altogether.

15 We did consider, Your Honor, very carefully the
16 question of whether we should wave that. In fact, I have
17 been talking that question over with the licensee for some
18 time now, and it is the client's wishes, and it is my
19 judgment as well that it would not be in our best interest
20 to waive the right to motion for summary disposition.

21 JUDGE WOLFE: Well I gave the parties time for
22 negotiation and apparently it is fruitless. I appreciate
23 the efforts of the parties to attempt to negotiate a
24 schedule that would serve the interests of everyone.
25 Obviously this now is not possible.

1 Therefore, the Board will just have to mull over
2 this, give consideration and issue an order and the chips
3 will fall where they may.

4 That is about all that can be said at this point.

5 Unless there is some expression or any other
6 comments by anyone, the conference is concluded.

7 Yes.

8 MR. CHURCHILL: Just one point, Your Honor. We do
9 outstanding a series of interrogatories to the intervenor.
10 Obviously, we wouldn't expect it to be reasonable that we
11 would expect an answer to those because we don't even know
12 at this point whether they are in the proceeding or what the
13 schedule is.

14 But I just want to say for the record that
15 whatever we do with that, and if it should be necessary to
16 take further actions on it, we are not waiving any right.
17 We are just waiting to see -- I guess we will wait until
18 the Board's decision before we do anything further on
19 discovery.

20 MS. WAGNER: Judge Wolfe, getting back to some
21 questions you asked this morning regarding whether the Board
22 could issue a decision and whether that decision could
23 include certain conditions or whatever, I just wanted to
24 bring to the Board's attention a decision that I think
25 supports our position in terms of delegation to the staff,

1 and that is Commonwealth Edison Company, Zion Station Units
2 1 and 2, LBP-7335, 6AEC-861, affirmed in relevant part, ALAB
3 226 8AEC-381, 1974.

4 JUDGE WOLFE: 381?

5 MS. WAGNER: 381. That is a situation involving
6 some QA questions and where the Board delegated confirmatory
7 authority to the staff to make sure that the QA issues which
8 the Board found would be addressed in the action that was
9 going to take place indeed was addressed.

10 JUDGE SHON: Ms. Wagner, that is a 1973 case.

11 MS. WAGNER: At the Licensing Board level it is a
12 '73 case.

13 JUDGE SHON: Would you care to comment on a much
14 more recent case in which the Court of Appeals remanded to
15 the Commission the question of allowing the staff and FEMA
16 to decide whether or not a satisfactory performance had been
17 turned in in an emergency planning exercise?

18 A Board had, as I understand the case, essentially
19 done that, and the Court of Appeals said that no, the
20 Commission could not proceed in that manner in treating an
21 emergency planning exercise as a simple inspection matter
22 that the Board could delegate or that the Commission could
23 delegate to its staff.

24 It had to permit a hearing, a substantive hearing
25 on the matter of how well the exercise would come off. Do

1 you recall the case? I can't give you a citation.

2 MS. WAGNER: I generally recall the case, but I am
3 not -- give me a minute, please. I don't think I am
4 prepared to ---

5 JUDGE SHON: You see, it seems to me that it might
6 have cut in the other direction and that it is a later case.

7 (Pause.)

8 MS. WAGNER: I would have to review the particular
9 factual situation of that case, which I do recall generally,
10 in order to comment on it in relation to the Zion case. But
11 I don't think that it undercuts Zion, which I think is still
12 good, in terms of what can be delegated to the staff.

13 I would be willing to submit something in writing,
14 if that is the Board's wish.

15 (Board conferring.)

16 JUDGE WOLFE: All right. All parties are invited
17 to brief the Board on the two cases mentioned, both on Zion
18 and ---

19 JUDGE SHON: Well, I think I would like you to
20 brief us on the exact limits as they now stand with at least
21 the emergency planning thing tested as far as the Court of
22 Appeals that exists on a Board's power to delegate to the
23 staff some sort of ultimate determination of this

24
25

1 kind as to whether the applicant has complied with what went
2 on in the hearing or what was guaranteed in the hearing. I
3 would just like to know what you are thinking.

4 MS. WAGNER: I would be happy to do that.

5 (Board conferring.)

6 JUDGE SHON: I am awfully sorry that my memory is
7 failing me at the moment, and I don't have a law library or
8 anything popping out right now, but I am sure you know what
9 case it is.

10 Mr. Churchill, you certainly do, do you not?

11 MR. CHURCHILL: You bet.

12 (Laughter.)

13 JUDGE PARIS: Can you give us a citation?

14 MR. CHURCHILL: Yes, I'll get it from my ---

15 JUDGE SHON: Or at least the name of the plant
16 involved. Do you know?

17 MR. CHURCHILL: It is the Union of Concerned
18 Scientists case that changed everything around such that
19 there is a possibility of hearings on the actual exercise
20 itself. It has led to an almost impossible timing and
21 schedule situation as a result.

22 JUDGE SHON: That is right. The style was UCS
23 versus NRC at the Appeal Court level.

24 MR. CHURCHILL: Do you have a time for which you
25 wish to receive briefs on this this question?

1 JUDGE WOLFE: Let's see, today is Wednesday.
2 Could we get it this afternoon?

3 (Laughter.)

4 I would say we would like to have in hand the
5 parties' briefs on this by no later than Wednesday of next
6 week. That gives you seven days, or less than seven days,
7 but we want that in hand. So it should be hand delivered by
8 those people in town or express mailed to us, but we will
9 have your briefs by close of business next Wednesday.

10 Now so that we can understand, and I don't know
11 whether the issue is full framed, but let's see if I can
12 word it so that we can proceed on a common basis.

13 The issue as framed is whether a Board may issue
14 an initial decision resolving various matters, but deciding
15 therein that as to certain other matters the staff is
16 delegated to make its analysis and determination.

17 Does that frame the issue?

18 JUDGE SHON: And I think also we would like the
19 Zion case Ms. Wager cited compared with the UCS versus NRC
20 and the effect of one on the other, whether they are just
21 totally irrelevant to one another, have no connection to one
22 another or whether there is some connection between these
23 cases.

24 MR. AU: Is there a different address for sending
25 express mail to the Board?

1 JUDGE SHON: I think express mail would have to be
2 addressed to 4350 East West Highway because I believe ---

3 MR. AU: Because otherwise it would go downtown to
4 the Commission.

5 JUDGE SHON: Yes, that is right, and it would take
6 another day to get here probably through the Commission's
7 mail.

8 JUDGE WOLFE: I think that gives you some
9 framework of the issue, and obviously you can draw down from
10 what is actually involved in the instant case as to that
11 which would be delegated in the Board's decision to the
12 staff to analyze and confirm and advise as to what its
13 conclusions are.

14 MS. WAGNER: Judge Wolfe, am I correct that it
15 must be in the Board's hands on Wednesday the 14th, but it
16 may be mailed to the other parties that day? It does not
17 have to be in everybody's hands on the 14th?

18 JUDGE WOLFE: It is simultaneous briefing. It is
19 just for the Board to have that in a timely way so that we
20 in turn can issue our ruling on TMIA's motion for extension
21 of time. So it is just to the Board.

22 Anything further?

23 All right, the conference is concluded.

24 (Whereupon, at 2:50 p.m., the conference
25 concluded.)

* * * * *