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UNITED STATES NUCLEAR REGULATORY COMMISSION

UNITED STATES NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, et al.,

(SEABROOK STATION, UNITS 1 AND 2)

) Docket Nos.
) 50-443-OL
) 50-444-OL
) OFF-SITE EMERGENCY
) PLANNING

STATUS CONFERENCE

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Wednesday,
November 2, 1988

Room 458
4350 East West Highway
Bethesda, Maryland

The above-entitled matter came on for hearing,
pursuant to notice, at 2:04 p.m.

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

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

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

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APPEARANCES:

For the Applicant:

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For the Commonwealth of Massachusetts:

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P R O C E E D I N G S

2:04 p.m.

JUDGE SMITH: We're on the record now. This conference was requested by Mr. Traficonte and we're taking advantage of it to try to have a general discovery conference. Mr. Traficonte has agreed to take the responsibility of representing in general, I understand, the intervenors' position on these various issues, but not in particular of course. Mr. Traficonte?

MR. TRAFICONTE: Thank you, your Honor, and thank you for scheduling this as promptly as you have. I have requested this to handle three motions that Mass A.G. has either filed on its own behalf, on its own behalf, or with other joint intervenors. They are the Motion for an Extension of the Discovery Period, and separate motions to extend the time in which to file responses to the NRC's draft first set of discovery requests, as well as an extension of time to respond to the Applicant's dual set of requests, interrogatories running from contentions 1 through 63.

In addition, the other matter that I know that Mr. Flynn and I would like to have addressed, is a discovery dispute that's arisen around a document request that Mass AG has served on FEMA, and its relationship to the deposition presently scheduled of Mr. Donovan of FEMA for November 9th.

1 JUDGE SMITH: Well we have all of those pleadings
2 before us, although I cannot say that we have mastered them
3 all but they're here and we're prepared to begin discussing
4 them.

5 The first one I have here is the joint
6 intervenor's motion of October 25th. I guess that is pretty
7 much subsumed by your follow-up motion on the next day,
8 isn't it?

9 MR. TRAFICONTE: I would like to proceed and part
10 of it is just the difficulty of the foreign format. But I
11 would offer this objection. I have my say to say, and I'd
12 like to say it and then I will treat each of the motions
13 separately. Most of what I have to say really runs to the
14 three motions to extend time.

15 I would like to just be able to put my position on
16 the record, and then follow to the extent necessary, after
17 others have stated their say. Obviously we're having some
18 problem in not being able to be in person on this, but I
19 don't know how else we could proceed.

20 I would -- I'd like to present our case, if you
21 will, on the three motions at the outset, reserving until
22 later in the conference call stating our position on the
23 FEMA discovery.

24 JUDGE SMITH: All right go ahead, Mr. Traficonte.

25 MR. TRAFICONTE: All right.

1 MR. DIGNAN: Your Honor this kind of thing --
2 before we start, why are we getting the case, quote unquote,
3 presented for the first time instead of in the motion?
4 There was a motion made and the answer followed. Now if he
5 wishes and the Board wishes to grant him a rebuttal to my
6 answer, that's one thing.

7 But I don't understand this practice that we file
8 a motion, get a look at the opposition's views, I guess, and
9 then we present the real motion on a real argument.

10 MR. TRAFICONTE: Well, there's no --

11 JUDGE SMITH: All right, Mr. Dignan, the Board --
12 to the extent that we've reviewed the general subject matter
13 of discovery scheduling, we're reminded that this is a
14 perennial problem that boards have, and that is we don't
15 know very much about the dispute that we're called upon to
16 decide. We don't really know a lot about it.

17 Ropes and Gray's, the applicant's response to
18 these motions, is pretty much as I understand it to the
19 effect well look, we agreed upon November 15th. You have
20 misstated the Board's ruling. Let's stick to November 15th
21 and you ought to know what your case is about anyway, and
22 that's about all we got from your papers, and there has not
23 been any real explanation to the Board as to what the actual
24 discovery needs are.

25 MR. DIGNAN: Well, there's more to my response

1 than that, I hope your Honor.

2 JUDGE SMITH: Well, that's kind of my memory.

3 MR. DIGNAN: An argument from the State Attorney
4 General's office that they haven't got enough manpower.

5 JUDGE SMITH: Well, I remember that too, right.

6 MR. DIGNAN: Which is the only reason you were
7 given for granting the motion and the motion to file. The
8 only one.

9 MR. TRAFICONTE: Well already I take it my
10 suggestion about me going first has been set aside.

11 (laughter)

12 JUDGE SMITH: Go ahead Mr. Traficonte.

13 MR. TRAFICONTE: I -- if I could get -- I'm not
14 getting in to make new arguments. Actually what I intended
15 to do was simply hit the high point, and set the context, to
16 try to make the context clearer so that the Board can
17 decide, you know, however it is going to decide.

18 JUDGE SMITH: Well, Mr. Dignan --

19 MR. TRAFICONTE: If you're prepared to decide on
20 the basis of the pleadings, you know, we can live with that.
21 I do think it would be helpful to discuss the situation that
22 has prompted the filing of these motions.

23 JUDGE SMITH: All right. Mr. Dignan, if you want
24 us to rule on the pleadings, we will consider that, but
25 again the Board just does not know enough about the

1 discovery needs and discovery problems that the parties have
2 to really make a ruling other than what might be just an
3 arbitrary ruling, give some time or not give time.

4 We hope that this would be, this conference would
5 be in the nature of perhaps negotiations and Board
6 assistance in working these problems out. Let me begin -- I
7 might save you some trouble, Mr. Traficonte.

8 I don't think that the Massachusetts Attorney
9 General's handling of what the Board's rulings were on the
10 close of discovery was as careful as it should have been. I
11 don't think that there is any real dispute that the Board
12 had indicated its intention that discovery would close on
13 November 15th.

14 I think that the session that Ms. Sneider relied
15 upon in the transcript clearly indicated that we were
16 talking about the possibility of having the discovery on an
17 exercise closing and Mr. Dignan clarified then that he was
18 talking about a discovery request being out.

19 But our memorandum and order, if anybody
20 understands the clear language there, said discovery would
21 close on November 15th and I'd appreciate it if you might
22 convey to Ms. Sneider our request that she be very careful
23 in observing the Board's time in chasing these things down
24 like that.

25 MR. TRAFICONTE: Well, I will do that, your Honor,

1 and I will for the record state that I have reviewed -- I
2 reviewed this motion before it was filed, but I will convey
3 your sentiments to her.

4 JUDGE SMITH: Well, I would like for you to go
5 back and look at these papers and see if you can really
6 stand by them, you know.

7 MR. TRAFICANTE: That I did not do. I personally
8 did not do.

9 JUDGE SMITH: Well, I don't think that you would
10 support the argument if you really analyze those papers.

11 MR. TRAFICANTE: Right. I did not go back and
12 read the transcript, but I certainly read the pleading, but
13 I will convey that to Ms. Sneider.

14 Let me begin, and I think I can be very brief. I
15 hope I can be. The primary reason why we are at this
16 juncture and seeking additional time, the primary reason has
17 to do with what we had labeled defensive discovery, running
18 to the State, running to the Commonwealth, from both the
19 applicants and the staff, having to do with resources and
20 procedures and plans that the Commonwealth has generated
21 with regard to both radiological and non-radiological
22 emergencies within the Seabrook Emergency Zone as well as
23 outside that Zone, both in the past and currently.

24 The short answer to our problem is that in order
25 to respond adequately to the discovery that we have

1 received, it has required us to contact -- to date it has
2 required us to contact eight agencies that in the normal
3 course the AG's office does not represent and certainly has
4 not been representing in this proceeding.

5 We had to contact the agencies. We had to alert
6 them to the scope of the discovery. We've had to direct
7 their attention to their documents. We are now in the last
8 two weeks seeking from the Executive Branch of the
9 Commonwealth, we are seeking and I think we have now
10 achieved the appointment on a temporary basis of two
11 individuals who are not lawyers who would be helping the
12 AG's office coordinate the various agency discovery
13 response.

14 This has simply been an undertaking that the Mass
15 AG's office was not aware of the scope and the time and the
16 resources that were going to be necessary of this in a way
17 that really does service to this case, and on that point I
18 would just for the record want to indicate that our view is
19 that these materials are relevant.

20 We are not -- we have not objected on the grounds
21 that these materials are not relevant, although we have
22 sought, both in negotiation with the applicants and the
23 staff, we have sought some limitations on scope,
24 limitations, for example, in terms of the time frame for
25 document search, limitations in part on the location of

1 resources.

2 For example, we don't believe that resources on
3 the border of New York are necessarily relevant. But
4 generally and I don't think there's going to be much dispute
5 on this point, generally the position of the Mass AG's
6 office is that the discovery that we have can be understood
7 generally under the heading of ad hoc State response, what
8 we would do or could do in the event of an emergency, in
9 light of our resources and pre-existing procedures.

10 Under that general heading, we had not said that
11 this material is not relevant. In fact, we think it is
12 relevant, and we think that a careful reading of the new
13 rule that we're all living with would indicate that the
14 determination of the adequacy of a utility plan calls upon
15 the NRC to review the adequacy of that plan in combination
16 with the expected State and local governmental response, and
17 we believe to do that, and I don't think that really there's
18 much dispute about this, to do that requires a review, of
19 some fashion, of the very materials that we are gathering in
20 light of the discovery that's served on us.

21 Now the second point I would make is beyond the
22 scope of what's involved here. The second point I would
23 make -- I would call careful attention to the dates on
24 which, or starting with which, this discovery was served on
25 us, and just briefly would like to mention that the -- what

1 we believe is the key discovery that has caused the delay or
2 for reasons, the key discovery that's causing us to seek
3 extensions of time, involves the applicant's first set of
4 discovery that was served on us on September 23rd -- strike
5 that -- on August 31st, to which we began gathering
6 materials already in September, and then by September 23rd,
7 I personally had already contacted I believe four or five
8 agencies and made contacts with officials of those agencies
9 and began the discovery process.

10 Following upon the applicant's first set of
11 discovery, was a second set served on October 14th, just
12 about ten days ago or two weeks ago, and that second set
13 which we have not responded to as yet is a document request
14 which again gets into this general heading of seeking after
15 the ad hoc capabilities of the State, and is going to
16 require quite a bit of time in order to adequately respond
17 to it.

18 JUDGE SMITH: Excuse me. May I interrupt you?

19 MR. TRAFICANTE: Yes.

20 JUDGE SMITH: I was under the impression that the
21 second set followed on the first set, and was better -- was
22 addressed or was better specified to collections.

23 MR. TRAFICANTE: Let me clarify -- we're clear,
24 because there is some ambiguity when I use the phrase second
25 set and first set. The applicants served on us a first set

1 of interrogatories on August 31st, and we did object to some
2 of those questions, but we began the process, upon receipt
3 of that request, we began the process and to be
4 overtechnical it was in response to the request number 4 in
5 the applicant's first set of interrogatories, and the
6 process of contacting agencies --

7 JUDGE SMITH: Would you characterize that?

8 MR. TRAFICANTE: Sure. I have it in front of me.
9 The fourth request in the very first set of document
10 requests put to us asked us to identify and produce all
11 documents generated after January 1, 1980, that reflect or
12 refer to any emergency planning (other than that engaged in
13 by applicant) drafted or contemplated for the Massachusetts
14 ETZ, and then it goes on to indicate the planning documents
15 that they're seeking for this eight-year period is both
16 radiological and non-radiological.

17 We objected in part, in terms of scope, but we did
18 begin the process of contacting agencies and having them
19 begin searching through their records for a response. That
20 document is what I labeled -- that request comes out of the
21 first request for documents.

22 Now when I a minute ago referred to the
23 applicant's second request, I am not talking about the dual
24 set of interrogatories that proceed contention by contention
25 asking us to set forth those facts and that evidence that we

1 have in support of those contentions. I'm not talking about
2 that dual set.

3 Instead, I am talking about another document,
4 filed on October 14th, and it's headed Applicant's Second
5 Request for Production of Documents, and it's fairly brief
6 in pages. But there are three requests for production in
7 this second request that themselves require, of course, that
8 we transmit these downstream to the agencies that we are now
9 representing for the purposes of this proceeding, and they
10 began of course gathering and collecting the documents that
11 are caught by the separate request.

12 Now that's just, for the sake of completeness,
13 that is as we see it, is on the applicant's side of the
14 ledger. Now on the staff side of the ledger, we have, I
15 believe, a more extensive set of discovery. The first set
16 was filed on September 6th and the second -- strike that --
17 the third set was filed on October 6th, and I'm not going to
18 belabor the point by reading any portion of either of those
19 requests. In our pleading we already set forth in a
20 footnote a sample.

21 But I don't think there's any dispute that the
22 scope here, even after it's been limited by negotiation with
23 the staff, the scope of the task that we are presented with,
24 in terms of fair and complete response, is quite enormous,
25 and we're engaged in it. We are engaged in it.

1 I bring all this up because although the discovery
2 period may have opened or may have been open since August,
3 the fact of the matter is that it is not really until mid-
4 September, and then with regard to the staff's material,
5 late September and into October, that the requests are put
6 to us that have prompted our, if you will, marshaling the
7 agencies and contact people with those agencies to proceed
8 with the document gathering.

9 Now a third point I would make, beyond the scope
10 and the timing, is simply to reinforce the responsibility
11 that we have, the AG has. We cannot simply gather these
12 documents and turn them over in a wholesale fashion to the
13 other side. Our view of this process is that of course we
14 must review these documents.

15 We want to review them to make sure they're
16 responsive. We want to review them for attorney-client
17 material. We want to review them for any other documents
18 that we would want to claim privilege on, and the problem --
19 now we're just talking physical resource problems. The
20 process of document gathering from eight agencies that are
21 located in different physical locations, the gathering of
22 these documents and the review of these documents by an
23 attorney who is familiar enough with the case to make
24 judgments, intelligent judgments about them, is not an easy
25 matter.

1 It's a task that back in August when we last sat
2 down together and tried to work out a discovery schedule,
3 it's a task that was not on any of our minds. It certainly
4 was not on mine. I don't believe it was on anyone else's.
5 And the scope of that task, in terms of it drawing resources
6 away from our capacity to conduct both our offensive
7 discovery as well as the other matters that as we all know
8 have been proceeding apace, including the exercise and now
9 the applicant's summary disposition motion on the legal
10 issues.

11 The loss of resources to the defensive discovery
12 has simply put us in a situation where we need additional
13 time to complete a process that we hoped very much to
14 complete by November 15th.

15 Now I just -- I want to conclude that thought, if
16 you will, the points that have led us to this juncture. I
17 want to conclude that simply with a little perspective on
18 what's involved. We are here engaged in a fairly massive
19 litigation. When it's taken the term and it's gotten itself
20 very heavily involved in the state resources, state
21 procedures, state personnel, etcetera, we're talking about a
22 lot of material and if we step back for a moment and get
23 some perspective on it, we're really right now looking at --
24 we've been at this for probably six to seven weeks.

25 Six to seven weeks is not a long time for

1 conducting in an efficient way the kind of inquiry that
2 we're making here, that I believe is legally relevant to the
3 issues at hand. So I would say that, you know, seen from a
4 distance this is -- the kind of extension that we're seeking
5 is not unreasonable.

6 But I'm almost done, so please everybody be
7 patient. I want to just make some very quick points in
8 response to the applicant's argument that this is a matter
9 of the Mass AG simply hiring more people. We have. We are.
10 We are going to hire more lawyers. We have a lawyer who is
11 going to be beginning on November 14th. We're hiring that
12 lawyer for the very reasons that the applicant has indicated
13 that we should.

14 We agree. But lawyers are not walking down the
15 street in such a way that you can reach out, haul them in by
16 the neck and say here you are. You're now working on the
17 Seabrook case. There's a time frame for the notification
18 and the evaluation and the interviewing, and we are hiring.
19 We may well be hiring another lawyer, two lawyers fairly
20 shortly. So we're responding even on that very practical
21 scale.

22 Secondly, we have as I mentioned, we have ten days
23 ago, two weeks ago, we have contacted officials in the
24 executive branch. We have called their attention. The
25 problem of the scope of this discovery, and our particular

1 problem of course, which is we don't represent these
2 agencies in the normal course, and we have sought to have
3 and are going to have two individuals appointed on a
4 temporary basis to work full-time helping the Mass AG's
5 office coordinate the discovery and response on the part of
6 these eight agencies. This is something that we believe we
7 need, and again I think it's responsive to some of the
8 concerns that Mr. Dignan has raised.

9 The last point, and I want to just reinforce this.
10 We have hired a lawyer who is on staff here who has been
11 doing nothing other than this since approximately mid-
12 September. Now she's been doing it under my guidance, and
13 with my help, so I would not say that it's only been one
14 lawyer. It's been perhaps a lawyer and a third or a lawyer
15 and maybe a half, although I reviewed the last three months
16 and personally I think that I can't perhaps say it's been a
17 full half of my time, but it's certainly been a substantial
18 part of my time, as I know Mr. Turk can testify to. I have
19 been involved in some portion of my time in the discovery,
20 as has Ms. Sneider in part.

21 All of this is the context, in addition to what
22 I've already mentioned, which is the exercise aspect of the
23 case has proceeded apace and as well we have -- we have done
24 our damndest, if you'll excuse it. We've done our damndest
25 to get the discovery out that we can get out, to get the

1 depositions that we believe we need scheduled, and as the
2 applicant and I guess all the parties know, the result has
3 been that over the next two weeks we have depositions
4 scheduled practically on a daily basis.

5 So, we want the time. We absolutely have to have
6 it if we're going to do an adequate job. We think an
7 adequate job is nothing less than what the regulations call
8 for, and on that basis and as I said at the outset I'd like
9 to reserve my comments on the separate issue of the FEMA
10 discovery, which in a way may come back to be relevant to
11 this whole matter of the extension. But I would like to
12 reserve, just for the sake of clarity, my comments on that.

13 Those are the reasons that we are seeking this
14 time, and we think some relief should be granted. Thank
15 you.

16 JUDGE SMITH: Mr. Dignan?

17 MR. DIGNAN: Your Honor, it was a longer and more
18 detailed version, but it comes down to the Attorney General
19 of this Commonwealth filed a whole bunch of contentions.
20 Our interrogatories average out, as we see it, to slightly
21 under two interrogatories per contention or basis.

22 This is a big tough fight, but there are big,
23 tough stakes out there also. The Board will recall that at
24 the pre-hearing conference in your usual gentle way,
25 Mr. Chairman, you were kind enough to refer to me as

1 exhibiting frustration, perhaps improperly on a courtroom
2 and certainly not directed at the Board, but nevertheless
3 frustration.

4 You will recall how strongly I felt that this
5 discovery deadline should be imposed, and we should get this
6 case moving. I am delighted to hear that I don't have to
7 argue further that this preposterous idea that the 15th was
8 some date by which we should stop asking questions, not have
9 it in, and I want the deadline enforced.

10 I see no excuse for -- whatever the excuse is when
11 the intervenor is an underfunded volunteer group, if the
12 Attorney General of the Commonwealth of Massachusetts has
13 elected, as I said in my pleading, to make Seabrook a cause
14 celebre for his office, and that's okay, that's his
15 privilege, but he's got to pick the freight up, and to say
16 that now he's going to start hiring the legal staff he needs
17 is no excuse.

18 I'm sorry, I cannot agree to an extension of this
19 deadline, and I think the deadline should be enforced.

20 JUDGE SMITH: How do we enforce it, Mr. Dignan?

21 MR. DIGNAN: What you do is enforce it by saying
22 on the 15th discovery -- keep in mind. If you extend this
23 deadline, you also put us in the position where if we file
24 summary disposition motions, the answer will be you can't
25 grant summary disposition under the rules because discovery

1 is still open and we need more discovery before we can
2 answer.

3 So there's no question that this is going to be
4 real delay down the line.

5 JUDGE SMITH: I don't question that.

6 MR. DIGNAN: All right. The way to enforce it is
7 you put the deadline down and do the best they can to answer
8 it, and they take the penalties to the extent they don't
9 answer it.

10 JUDGE SMITH: All right now, is that satisfactory
11 to you?

12 MR. DIGNAN: Yes.

13 JUDGE SMITH: Now some of this discovery is
14 necessary, I understand it, for your affirmative case-in-
15 chief.

16 MR. DIGNAN: The discovery -- no, not all of it is
17 necessary for a proper case-in-chief.

18 JUDGE SMITH: Now, let's talk about dividing it
19 up.

20 MR. DIGNAN: If you have an answer as of the 15th,
21 I intend to use that through every benefit I have which is -
22 - includes summary disposition. If they haven't got the --
23 I'm not going to allow them to keep this evidence hidden,
24 and then use it on me later. I'm going to ask you to
25 enforce the rules of discovery in the normal way, which is

1 if they didn't produce it in discovery, they don't get to
2 use it in the trial.

3 JUDGE SMITH: Now that's no problem. That's no
4 problem. That is type of -- we can set a discovery deadline
5 which we think is possible, and impose sanctions if they
6 don't meet it. There's a larger area of sanctions that we
7 could select. I have other ideas on how we might approach
8 that.

9 But your problem as I see is you have also, and I
10 can't point to any particular interrogatory or document
11 request, but you and Mr. Turk have requested documents that
12 will support your case-in-chief, and if you don't have them
13 and the Attorney General doesn't produce them, that doesn't
14 help you any.

15 MR. DIGNAN: Your Honor? Your Honor, no. I'm not
16 concerned with that. I don't need documents to support my
17 case-in-chief. A lot of this discovery is to back them into
18 a position so I can use it on cross-examination.

19 JUDGE SMITH: Okay. Now some of the discovery,
20 some of the discovery asked for, as I understand it, what
21 other type of emergency planning documents are there? What
22 resources are there, that type of thing.

23 MR. DIGNAN: Right.

24 JUDGE SMITH: And that is what you need for your
25 case. That is not what Mr. Traficonte needs for his case.

1 MR. DIGNAN: Well, what I need to know for legal
2 purposes is to do they exist and what are they if they do,
3 and if the answer is he doesn't produce them, he can't use
4 them at trial.

5 JUDGE SMITH: No, he doesn't want to use any
6 document that shows that they have a nice radiological
7 emergency plan sitting on the shelf up there. He doesn't
8 want any, does he?

9 MR. DIGNAN: Well, if the record's unclear on
10 that, no.

11 JUDGE SMITH: But you do. You would like to have
12 that document?

13 MR. DIGNAN: I can prove the existence of their
14 plan without all these documents.

15 JUDGE SMITH: Is this true?

16 MR. DIGNAN: Your Honor, I guess the answer --

17 JUDGE SMITH: Well now, if this is true,
18 Mr. Dignan, maybe we can do something.

19 MR. DIGNAN: But the answer is simple here from
20 the applicant's point of view, provided that it's understand
21 that the full range of sanctions will be available, I want
22 the discovery cut off, and if that means that I'm going to
23 be in a fight later when he tries to use something that he
24 didn't produce, I expect to be backed up on it.

25 But I don't know of any other way to do this.

1 I've talked with my client. They understand. But you see
2 the problem is if the State is allowed to simply sit there
3 and say well, we can't do it so you've got to extend time,
4 that's just terribly costly to us, and I would rather have
5 the discovery enforced. I think with nights and weekends
6 and everything through the 15th they probably can produce
7 most of this stuff anyway.

8 JUDGE SMITH: I would really like to pin down the
9 point that I'm making, and then we'll come back to resources
10 and best effort on their part and all that.

11 I want pin down exactly what your position is with
12 respect to information that they have that you want on
13 discovery, pertaining to your case-in-chief, your burden of
14 proof.

15 MR. DIGNAN: Very simply, that they should take
16 whatever it takes to get it out by the 15th. To the extent
17 they fail to do it, they're going to pay an expense for it.

18 JUDGE SMITH: Well, you're not answering my
19 question.

20 MR. DIGNAN: Well, your Honor, I'm really trying
21 to address it. I take it your question basically is don't I
22 understand that I could lose by your enforcing the deadline?

23 JUDGE SMITH: Yes, what is --

24 MR. DIGNAN: I can only lose in my judgment, and
25 my judgment may be wrong, if the Board's intent is to having

1 put on the deadline then not enforcing it. But my
2 understanding from the Board is that the Board is perfectly
3 willing to put on a deadline and enforce it with the full
4 range of sanctions including such sanctions as are necessary
5 at trial, and with that understanding, I still insist on my
6 position, fully aware that there may be some document out
7 there that doesn't get produced that it may turn out might
8 have helped me later.

9 MR. TRAFICONTE: Your Honor, could I just
10 interject one very brief point, and it's picking up on
11 something that Mr. Dignan said, and maybe he misunderstood
12 or maybe he's hearing what I've said so far in his own very
13 distinctive way.

14 We are not, and I want to emphasize that word, we
15 are not and have not been sitting on our hands with regard
16 to the discovery that the staff and the applicants have hit
17 us with, and you know, on that point we are not in a
18 position, and this is not the perspective of Shoreham or
19 anything else, where we have stonewalled in any regard, and
20 are now at the close of the period saying well, you know,
21 maybe you do have a right to the stuff and now give us
22 additional time to go out and begin to get it.

23 That is not what has happened, and if need be I
24 would invite, but I can't imagine a more wasteful exercise
25 where that's concerned -- I would invite a hearing on the

1 issue, if need be, of what process and what steps we've
2 taken and when we've taken them and who's taken them and
3 what we've been doing since the discovery was served on us.

4 I just want to make that absolutely clear. We are
5 not in our present circumstance because of inaction by this
6 office until a very recent date. We responded when we got
7 the discovery. We assigned an attorney full time. We
8 contacted the agencies. Our view is that the discovery and
9 the request is so broad and so inclusive that it's simply a
10 time-consuming process to gather the relevant materials.

11 JUDGE SMITH: Okay, I'm going to want to talk
12 about that yet. I want to talk about it, but not yet, okay?

13 MR. TRAFICANTE: All right.

14 JUDGE SMITH: I still want to make sure that all
15 the parties understand the point that the applicant, at
16 least, as a discovery in party, is willing to take whatever
17 discovery can be produced by the deadline that either exists
18 now or reset, and depend upon the sanctions that the Board
19 might impose in the event that new evidence is presented by
20 the Attorney General and the intervenor later on. Now
21 before we move on --

22 MR. DIGNAN: And any sanctions that might be
23 imposed if for some reason we can satisfy the Board that the
24 attempt to produce by the deadline was not as good faith and
25 expeditious as it should have been.

1 JUDGE SMITH: Right. However, our problem now is
2 really prospectively --

3 MR. DIGNAN: Your Honor --

4 JUDGE SMITH: And I want to hear from Mr. Turk.

5 MR. TURK: I have one question about this latter
6 point before I go into my own presentation of our position.
7 As I understand normal rules, if the Massachusetts Attorney
8 General during trial or his pre-trial testimony, seeks to
9 put on a case which he has not disclosed in discovery, by
10 the time discovery has closed, that case should be precluded
11 from being presented.

12 JUDGE SMITH: Yes, Mr. Turk. I haven't reached
13 that point yet.

14 MR. TURK: Right.

15 JUDGE SMITH: I mean I'm aware of that. There's
16 many ways that we can sanction that. That is one of them.
17 That's one of them. Another way is to make them at the last
18 day of discovery come forward with a complete absolute trial
19 brief by which they are bound early, to pin down their
20 position, not only by the presentation of evidence in their
21 possession, but by presentation of position depending upon
22 that evidence. That is one of the -- not sanctions, but one
23 of the remedies that we might consider.

24 MR. TURK: Yes.

25 JUDGE SMITH: But in the meantime, is it your

1 position that you're willing to live with any discovery
2 deadline that is imposed and when the Commonwealth of
3 Massachusetts has made its best, strong effort to produce
4 evidence which may use in your case-in-chief, are you
5 willing to live with that situation?

6 MR. TURK: The case of the staff?

7 JUDGE SMITH: Yes. Now see you've asked a lot of
8 questions, what could you do, what would you do, what might
9 you do, could not do with all these things, and that seems
10 to me to go not to the Attorney General's case-in-chief, but
11 to the preparation of the adversary parties' case.

12 MR. DIGNAN: Well, your Honor --

13 MR. TURK: Well, in our case your Honor the staff
14 probably would not be putting on witnesses as to what the
15 State actually would do. But again, we would use that
16 evidence to impeach or to use in cross-examination or other
17 purposes.

18 JUDGE SMITH: Is that the general purpose of your
19 many, many discovery interrogatories?

20 MR. TURK: As a general matter, yes.

21 JUDGE SMITH: All right. Then cannot we possible
22 satisfy this problem by requiring the Attorney General on a
23 date to be discussed to come out with a complete statement
24 of their case together with the evidence upon which they
25 rely.

1 MR. TURK: And a production of that evidence.

2 JUDGE SMITH: And a production of the evidence.

3 MR. TURK: Yes. Your Honor, I'd like to address
4 the motions for extension also before you reach a final your
5 final ruling on --

6 JUDGE SMITH: Well, we're not. I just wanted to
7 establish that point that the only discovery matters that we
8 have to worry about now are as Mr. Traficonte called, it
9 anticipatory or defensive and not needed to construct your
10 case-in-chief. That simplifies our problem I think
11 somewhat, and I think we've established that, haven't we
12 gentlemen?

13 MR. DIGNAN: Well, I missed -- the answer is yes
14 from the applicant's point of view, your Honor.

15 JUDGE SMITH: Well, Mr. Traficonte, if you didn't
16 understand it, let me restate.

17 MR. TRAFICONTE: Yes please.

18 JUDGE SMITH: I just wanted to establish that
19 we've arrived at the point in this conference now where the
20 discovering parties, the NRC staff and the applicant, that
21 is, are -- have satisfied their needs for any case-in-chief
22 that they may put on.

23 MR. REIS: Your Honor, this is Edward Reis of the
24 staff. There's another point in what they could do and in
25 answering those questions. It must be presumed under the

1 Commission's rules, as we read it, that we can then use the
2 presumption that they could carry out the utility plan if it
3 is an adequate plan.

4 If they're not going to complete, what the
5 resources they have are, if they presume that they have the
6 resources with which to carry out that plan.

7 JUDGE SMITH: Well, I don't know that I agree with
8 you there, Mr. Reis.

9 MR. TRAFICONTE: Can I just respond to this point,
10 that point, your Honor. I didn't know Mr. Reis was on the
11 line, but I appreciate the point. I am trying to make it
12 clear that we are trying to answer this discovery, and I'll
13 again invite, if this is an issue in anyone's mind, I invite
14 inquiry in what procedures we're adopted to discover and
15 determine answers to these questions.

16 JUDGE SMITH: Well, Mr. Traficonte, I want to take
17 these issues one at a time.

18 MR. TRAFICONTE: Well all right. But I --

19 JUDGE SMITH: And I promise you we will return to
20 the point of recesses and good reasonable discovery and
21 everything else. But I do want to establish, to take the
22 discovery we're arguing about.

23 MR. TRAFICONTE: Well that's fine. But I hear a
24 lot of talk about sanctions on them because they've not been
25 doing anything.

1 JUDGE SMITH: Well we can talk about sanctions in
2 the abstract, as a means to determine that if as the staff
3 and applicant say that they're only concerned about meeting
4 your case.

5 MR. TRAFICONTE: Yes.

6 JUDGE SMITH: Then maybe sanctions would be, if
7 required, would be a remedy and we need not beat to death
8 any further discovery if they're satisfied that they know
9 your case, which I didn't read the discovery request to say
10 that, to mean that. I thought they were still trying to
11 come up with evidence that there is, there are plans and
12 mechanisms and resources which the Commonwealth would bring
13 to play in an emergency as a part of the applicant's case-
14 in-chief. I thought that was a major thrust of discovery
15 yet.

16 MR. TRAFICONTE: I think that just is very careful
17 reading the discovery on its face, if that's the point of
18 that discovery.

19 JUDGE SMITH: But it's up to Mr. Dignan to say
20 that he's going to forsake that objective and he's
21 satisfied.

22 MR. TRAFICONTE: But everytime he says he'll
23 forsake it, he says as long as you sanction us and not
24 permit us to put any of it into evidence if we haven't been
25 able to get it to them by the 15th of November.

1 JUDGE SMITH: If -- that's right.

2 MR. TRAFICONTE: Well, I'd take that position too
3 if I were Mr. Dignan.

4 JUDGE SMITH: Well now let's take an example of an
5 item of evidence that might be sought, and I haven't read
6 the discovery request well enough to know if it's a good
7 example or not.

8 But let's say that they're asking for some type of
9 statement that a particular agency has some of their
10 resources, and some of the procedures and whatever, that
11 they would be brought to play in a radiological emergency.

12 I would have thought that that information is
13 being sought, at least in part by the applicant, to support
14 their burden of proving that the presumption should apply.
15 Now you want to quarrel with me about burden of proving a
16 presumption should apply, but for the purpose of evidence, I
17 would have thought that would have been a part of your case-
18 in-chief.

19 I can also see that it is something that is going
20 to meet the Attorney General's claim later on that they had
21 no resources and they had no procedures. But in the
22 meantime that's a question of -- that's why I think that you
23 may need this information.

24 See, you say sanctions will do the job. But how
25 does sanctions do the job when the answer is a negative, a

1 void of information? If the Attorney General comes up with
2 a case that says we don't have anything except the potential
3 for ad hoc, how do you meet that without the evidence you're
4 seeking? How can a sanction do that? How can we prevent
5 them from putting on a case to reflect that there is a void
6 of resources to respond, and a void of preparation and
7 planning to respond? Mr. Dignan?

8 MR. DIGNAN: Well, your Honor --

9 JUDGE SMITH: Do you understand that point?

10 MR. DIGNAN: I want you to know that I'm not sure
11 that the kind of question you're referring to has really
12 been asked, but more importantly an honest negative doesn't
13 worry me. I'm assuming the Attorney General's evidence,
14 when it's put on, will be honest and if the honest answer is
15 that an agency doesn't have something, assuming that's
16 relevant, I'll get the same answer at trial.

17 The void answers aren't what worries me. What
18 worries me is the pro answers, and the other thing that's
19 worrying --

20 JUDGE SMITH: Give me an example of the pro
21 answer.

22 MR. DIGNAN: It's this. It is one thing for them
23 to claim they need a lot of time to pull some documents
24 together, and I understand I may not get a document that I
25 can't use. But there's no excuse for not answering the

1 interrogatories. That doesn't require them to search a lot
2 of files or anything like that.

3 JUDGE SMITH: You want to talk about -- you want
4 to talk about the reasonableness of the discovery deadline
5 before the Board is satisfied that it knows what the real
6 discovery dispute is. Mr. Reis raised the point if you're
7 satisfied, Mr. Dignan, I want to tell you the Board is not
8 satisfied.

9 MR. TURK: Your Honor, this is Sherwin Turk.

10 MR. DIGNAN: Not satisfied as to what, your Honor?

11 JUDGE SMITH: You persist, as all of you have,
12 coming back to the point is is the discovery period
13 reasonable. Have they put in enough resources in coming up
14 with the information? I'm telling you that the Board sits
15 here right now not satisfied that it understands the
16 consequences of the Attorney General not coming forward with
17 what you're requesting.

18 MR. TURK: Your Honor, if I can address that very
19 briefly. This Sherwin Turk.

20 MR. DIGNAN: Well, your Honor -- oh, I'm sorry.

21 MR. TURK: We have already received some discovery
22 response from the Massachusetts AG office, which does list
23 some of the resources they have at their disposal. Now in
24 addition, they've indicated to us that they have a large
25 quantity of documents gathered already for production to us,

1 and I'm hoping that that documentation will demonstrate to
2 some extent the resources of the State.

3 I don't feel especially foreclosed at this point.
4 I mean I feel there's information either in my possession
5 now or promised to me and already gathered by Mass AG which
6 demonstrates a substantial number of resources available to
7 them.

8 MR. TRAFICONTE: Well, could I just respond to
9 that. Why did --

10 MR. TURK: And I'm -- I am not suggesting that
11 those documents not be produced to me. I'm not giving up
12 the right to receive documents which have already been
13 gathered for production.

14 MR. TRAFICONTE: Well, or are being gathered,
15 right Mr. Turk?

16 MR. TURK: And which -- yes, and which will
17 continue to be gathered up until whatever the cutoff date
18 for discovery ends up being.

19 MR. TRAFICONTE: Well that's your end. I think
20 that puts it in a nutshell. I think that puts it in a
21 nutshell. What we're talking about is the time necessary to
22 complete the discovery that we are engaged in gathering
23 after negotiation on scope, etcetera. We are in the process
24 of doing what essentially the parties, at least with regard
25 to the staff and the Mass AG, have agreed is relevant.

1 What I'm basically trying to convey is the time
2 needed to complete a task that is before us, and I guess I
3 just missed the notion that -- what I don't hear in any of
4 my runners here is the notion that this is in itself a time-
5 consuming process and we're trying to do it.

6 JUDGE SMITH: Gentlemen, the Board is going to
7 have its way on this. We wish first to resolve the issue of
8 the need for discovery before we address the problem of the
9 time and the resources devoted to discovery. We insist upon
10 having our way.

11 MR. DIGNAN: Your Honor, I think one of the --

12 JUDGE SMITH: Do you understand? Does everyone
13 understand that?

14 MR. TRAFICONTE: Right. At least --

15 MR. DIGNAN: I agree your Honor.

16 JUDGE SMITH: Do the people appreciate the turn of
17 irritation?

18 MR. TRAFICONTE: I agree your Honor.

19 MR. DIGNAN: Yes, your Honor. The point is this.
20 I guess where I'm having difficulty is this. The staff, it
21 is true, as near as I figure out has asked these kind of
22 resource questions you're talking about. I think ours,
23 though, is not.

24 Most of our questions -- now I can't say there
25 isn't one in there that isn't resource-directed. But if you

1 review our filing of October 14th, the little one, it's
2 basically you say this in your basis. What's your basis for
3 it?

4 It's not a request for resources from the State,
5 it's you tell us why you're saying this. Those kind of
6 questions, and the documents that are asked for are the
7 documents that they claim back up the assertion that, for
8 example, our -- let's do something.

9 I've made -- let me get an example of the kind of
10 question. It says -- as the July contention 31, we ask
11 please describe in detail all the specific purposes for
12 which intervenors assert that ORO "Emergency field
13 personnel" need a "lateral network of communications
14 directly linking" them to each other, and identify all
15 "emergency field personnel" whom intervenors assert have
16 that need. Please also state all the facts underlying your
17 answer.

18 Now these are the kind of questions that we're
19 talking about here. They aren't what are your resources.
20 They are you have filed your bill of complaint, Mr.
21 Plaintiff. Now what do you mean by it? And that's why I'm
22 having difficulty talking, answering the way or directing
23 myself to the concern of the Board because these kind of
24 questions I don't view as stuff I need for my affirmative
25 case.

1 What I need them for is as the block for them
2 introducing stuff I don't know about.

3 MR. TRAFICONTE: Okay. Can I follow up, your
4 Honor, on the same point, which has to do with what is the
5 need and who's need is it for this discovery. Mr. Dignan
6 has chosen an interrogatory from one of the dual sets of
7 interrogatories that we had discussed earlier, and I want to
8 reiterate that the argument that I had made has very little
9 do with with the dual set, but instead has to do with other
10 requests, and I would like to read two requests from the
11 Applicant's Second Request for Production of Documents that
12 served on us October 14th, exactly 30 days before the close
13 of discovery.

14 MR. DIGNAN: This is documents, not
15 interrogatories.

16 MR. TRAFICONTE: Yes, documents.

17 MR. DIGNAN: I understand that.

18 MR. TRAFICONTE: Okay. Now I'm going to read the
19 second and third requests. The second request reads any and
20 all documents reflecting or commenting on draft and/or final
21 policies of the Department of Public Safety, the
22 Massachusetts Civil Defense Agency, and/or the Department of
23 Public Health regarding emergency planning and/or
24 radiological emergency response planning. That's number 2.

25 Request number 3. Any and all documents

1 reflecting or commenting on emergency plans, policies,
2 guidance or implementing procedures developed by any state
3 agency, department, commission or authority, and I repeat,
4 there's no time limitation, no agency limitation, no space
5 limitation, no kind of emergency limitation.

6 Those two requests in and of themselves involve an
7 enormous amount of document gathering, document review,
8 consultation with agencies and we received those two
9 requests on October 17th, some 13 or 14 days ago.

10 Now again, I don't think -- I am very surprised
11 and quite frustrated, frankly, to hear Mr. Turk and
12 Mr. Dignan say that this is something that they need for
13 purposes of cross-examination. That's not what I read these
14 to be. These are extremely burdensome and broad requests
15 that if they have anything to do with this case, it seems to
16 me they must have to do with what the state resources are
17 and what state procedures exist that would make up the ad
18 hoc response or make up, if you will, the bulk of this
19 response. That's what I thought this was about.

20 JUDGE SMITH: That's what I did too.

21 MR. TRAFICANTE: Well, and that's why I lead
22 emphasizing the relevance of this material and trying to get
23 people to pay attention to how much, how difficult it is to
24 complete the search.

25 I hear Mr. Turk and Mr. Dignan saying that this is

1 essential. Well, if it's essential it's essential that's
2 basically -- been on which we've been expending an enormous
3 amount of time and energy.

4 MR. TURK: I wasn't here, speaking for myself, I'd
5 say that's a side shell. I want to --

6 MR. TRAFICANTE: But more importantly, not to void
7 Mr. Traficante, but the fact is that's exactly what I want
8 those for, is cross-examination. You have to go back on
9 this case. The theory of the Commonwealth of Massachusetts
10 as first expounded when they decided not to cooperate, is
11 that it's "impossible to design a plan that'll take care of
12 Seabrook," first because I intend to hit him with documents
13 I know exist, in which there were favorable comments on the
14 early plan and that it was feasible.

15 And that's cross-examination material. I don't
16 need it for my direct case. I need it to hold in check
17 Massachusetts experts.

18 JUDGE SMITH: Now what kind of sanction would you
19 ask us to impose?

20 MR. DIGNAN: For what?

21 JUDGE SMITH: In the event that -- in the event
22 that they put on these experts. You do not have these
23 documents, you never got them, because discovery closed and
24 the panel is there and you don't have the documents. What
25 are you going to do?

1 MR. DIGNAN: If I don't have the documents, and
2 the sanction would be to not take the experts' testimony.

3 JUDGE SMITH: How do you know the documents exist?
4 How can we impose such a sanction?

5 MR. DIGNAN: That's my problem, to demonstrate it
6 to you.

7 JUDGE SMITH: And you're confident you can do
8 that?

9 MR. DIGNAN: If he hasn't produced them.

10 JUDGE SMITH: Okay.

11 MR. DIGNAN: I'm never confident I can do
12 anything, your Honor, but you've asked me as to what my
13 position is for resolving this discovery request, and that
14 is my position.

15 JUDGE SMITH: Mr. Turk?

16 MR. TURK: Your Honor, let me come back, first of
17 all, to the question of whether there's been a good faith.

18 JUDGE SMITH: Now let's begin hearing about that
19 now, and unless anybody wants to add anything more about the
20 purposes of the discovery dispute, I mean the discovery that
21 is in dispute.

22 MR. TURK: Well, just for the record --

23 JUDGE SMITH: Wait a minute, just a moment. Wait
24 a minute. Wait a minute. We're still on here. We're going
25 to break here.

1 (Off the record.)

2 JUDGE SMITH: We're back on the record. Mr. Turk?

3 MR. TURK: Yes, your Honor.

4 MR. TRAFICONTE: Hello? I'm sorry. I was off for
5 a minute.

6 JUDGE SMITH: Well, so were we. We were -- you
7 didn't miss any -- where were we when you left? I told Mr.
8 Turk if you wanted to go on to the subject matter now of
9 good faith effort or to comply with discovery request, we
10 are now prepared to leave the issue of the purpose of the
11 discovery that is in dispute. Did you catch that,
12 Mr. Traficonte?

13 MR. TRAFICONTE: I did, your Honor. Thank you.

14 JUDGE SMITH: Okay, Mr. Turk?

15 MR. TURK: Your Honor, just if I can make myself
16 clear on the purpose of the staff's discovery. We have no
17 present intention of calling witnesses in order to make out
18 a case-in-chief. We would use the documents we requested
19 for cross-examination, both for impeachment and to make
20 a case through cross-examination of any witnesses put
21 forward by the Mass AG.

22 JUDGE SMITH: All right.

23 MR. TURK: Now, if I can, let me come back to the
24 question of whether Mass AG has made a demonstrated good
25 faith attempt to comply with our discovery requests and

1 those of the applicant.

2 Your Honor, in my past history I've been involved
3 in anti-trust litigation, and as I know you're familiar with
4 anti-trust. Generally, you often get into large document
5 requests, and typically what is done in those kinds of
6 situations is not only what the lawyers for the party
7 responding to discovery such as Mass AG, not only would
8 those lawyers gather documents, but they would also set up a
9 room where other lawyers for other parties could come and
10 examine documents, and they might in fact permit files to be
11 searched in the first instance by the requesting parties,
12 subject to a rule on privilege. That's one approach that
13 was not used here.

14 Something else that was not done here by Mass AG
15 was utilizing the efforts of lawyers employed by these eight
16 different agencies to respond to discovery. Although we've
17 heard about Mr. Traficante's personal involvement and that
18 of one other person in his office in making this production,
19 we have not heard anything about the attorney capabilities
20 of the eight agencies who are directly responding to the
21 discovery.

22 I don't see any reason why attorneys employed by
23 those agencies could not have been enlisted in this effort,
24 and certainly they would be the ones to be able to screen
25 for privilege without having Albert or Mr. Traficante

1 involved in that effort.

2 Also let me address the time with which the
3 response commenced. Mr. Traficonte has acknowledged to us
4 that our initial set of interrogatories were lost somewhere
5 in his office for approximately ten days before he found
6 them and started to develop his response. That's not a
7 fault of ours or the applicants. That's some kind of an
8 error in his office for which we should not be held
9 accountable.

10 Also there's no indication why Mr. Traficonte
11 could not have enlisted a broad-scale effort within his own
12 office to respond to discovery. I don't know the resources
13 of the Massachusetts Attorney General's office, but it does
14 represent the sovereign State of Massachusetts. They do
15 have many lawyers employed, and they could have drafted some
16 people to come over and help with the effort. They have not
17 done that.

18 JUDGE SMITH: Taking the, Mr. Dignan and Mr. Turk
19 at their words that they are now seeking documents to be
20 used solely as cross-examination, not for the purpose of
21 preparing their own direct testimony, and not for the
22 purpose of preparing their own case-in-chief, which I think
23 has been covered quite a bit.

24 MR. TURK: Except, your Honor, through cross-
25 examination.

1 JUDGE SMITH: Except through cross-examination.
2 How -- would either of you be prejudiced if we granted an
3 extension of time to respond to that discovery, but at the
4 same time required the parties to proceed with the next
5 phase, and that is since you don't need this discovery to
6 prepare your case-in-chief or your written testimony, we'll
7 just proceed without interval and give the Attorney General
8 the extra time it needs to contact the eight agencies. How
9 would that work?

10 MR. DIGNAN: Do I understand, your Honor, then
11 that the extension would only be for them to respond to the
12 document request outstanding against them, and that what it
13 would not have the effect of doing is precluding us from
14 filing summary disposition motions?

15 JUDGE SMITH: I didn't really plug the summary
16 disposition motion in there.

17 MR. DIGNAN: Well that's my major concern. If the
18 discovery -- in other words, let me give you the other side
19 of this discovery. We've been asked somewhere between 150
20 and 200 questions, one of which incidentally was a question
21 that said give us your position on every contention, and
22 we've answered them, and we've had no motions to compel.

23 We have objected, but we think the objections were
24 pretty reasonable and we can only assume the AG does too
25 because we've not been hit back with the motion to compel on

1 anything, and we've given them our positions. The only
2 reservation we made is the reservation that you essentially
3 make under rules that, you know, if you learn later that a
4 fact you stated was wrong, you can amend the answer and I'm
5 sure there will be a certain amount of that because there's
6 massive answers and we'll find some mistakes.

7 But we basically answered all the interrogatories.
8 Now unless there's a general extension of discovery, come
9 November 15th we're in a position to start after the summary
10 disposition route, and not be faced with a response under
11 the rules that says we haven't completed our discovery and
12 therefore we can't answer your motion for summary
13 disposition, and that is my main concern.

14 If all the AG wants here, but I have a feeling
15 since he wanted a general extension of discovery that's not
16 all he wants, is from now until December whatever, to
17 complete producing documents to me, I've got no problem with
18 that.

19 JUDGE SMITH: All right. That's, I think, is
20 where we're going.

21 MR. TURK: But there's one other part of that,
22 your Honor. The pending motions from Mass AG seek to extend
23 not only the time for their response to applicant and staff
24 discovery, they also look for an extension of time in which
25 to make their own discovery requests.

1 JUDGE SMITH: Yes, we haven't talked about that
2 yet. We haven't come to that yet.

3 MR. TURK: I would certainly oppose that as
4 unsupported by anything in the past occurrence in this
5 proceeding.

6 JUDGE SMITH: Do you see where we're going?

7 MR. TURK: Well, yes. I imagine I do. As
8 we said in our briefs, as I would -- I think I made
9 it quite clear to the court in the first instance we
10 need more time to gather the documents and do the defensive
11 discovery with regard to document requests, interrogatories,
12 and providing answers to the interrogatories that go
13 contention by contention.

14 That's why we filed the two separate motions in
15 addition to the motion for the extension of the discovery
16 period. Of course, there's an independent aspect there.
17 Sure, we need more time to complete, as I've said, to
18 complete the defensive part. We also seek an extension of
19 the time in which to do our own offensive discovery. That's
20 part of the relief that we're seeking.

21 But the short of it is that in the event that this
22 is somehow divided up and we have more time to respond to
23 the defensive discovery, I would still request some period
24 of time that motions for summary judgment are deferred until
25 we at least can clear the decks of our defensive discovery

1 and can pay -- focus in on responding to the, at that time
2 it would be responding to the summary disposition material.

3 JUDGE SMITH: Why are they serial considerations
4 and why do you have to clear the decks on your defensive
5 discovery duties before you complete your offensive
6 discovery program?

7 MR. TRAFICONTE: The office is going -- we're
8 obviously going to do the best we can under any agenda
9 that's been set. We are not going to be able to respond to
10 the discovery that's been put upon us by November 15th, and
11 that's just a fact. It's a fact of nature.

12 JUDGE SMITH: Okay, but that doesn't meet my --

13 MR. TRAFICONTE: Well again, as I'm indicating,
14 we're seeking an extension of the entire discovery period
15 because part of our resources have been diverted and we
16 would like to do some follow-up offense discovery.

17 If that is not permitted, if you do not grant us
18 that relief, we would at least seek some period of time
19 before we would have to respond to summary disposition
20 materials, or at least until perhaps they're filed. It
21 doesn't matter to us whether it's some time in which to
22 respond to them or some time before they can be filed,
23 either way.

24 So that we would still be engaged in completing
25 the defensive discovery. That's still going to take

1 resources. We're still now, between now and November 15th,
2 we're basically -- or in fact we've extended it until
3 November 17th -- we essentially have a deposition scheduled
4 practically every day.

5 The notion that on December 18th or December --
6 strike that -- on November 18th or November 16th Mr. Dignan
7 intends to hit us with summary disposition motions on
8 however number of contentions that he thinks such motions
9 might have merit, that doesn't solve -- in a sense it
10 doesn't resolve our difficulties at all, because we would
11 still in that same time period be trying to answer the
12 defensive discovery, and the energy and the resources that
13 it is taking.

14 We would have just completed a kind of madcap
15 discovery period of two weeks, you know, that we're into
16 right now, and immediately get hit with summary disposition
17 materials that we simply, at that point, be back before you
18 seeking additional time to digest the material we've already
19 received from the applicant, get up to the Seabrook station
20 where we have to go to see the documents that they're going
21 to produce.

22 The problem would still be with us, and it would
23 still be part of the problem of the scope of the discovery
24 that's been flaying from both sides.

25 JUDGE SMITH: As I understand it, an important

1 part of the delay in the Attorney General's response on
2 defensive discovery is that there are some eight agencies
3 involved. They've already been contacted and those agencies
4 are not at work, coming up with the documents. Is that
5 correct?

6 MR. TRAFICONTE: Yes.

7 JUDGE SMITH: And answering interrogatories. Is
8 that correct?

9 MR. TRAFICONTE: Yes.

10 JUDGE SMITH: All right. Now that process is
11 already under way?

12 MR. TRAFICONTE: Yes.

13 JUDGE SMITH: Presumably those agencies are not
14 going to be involved in the offensive discovery by the
15 Massachusetts Attorney General?

16 MR. TRAFICONTE: But all are not, for the most
17 part, involved in our offensive discovery.

18 JUDGE SMITH: So I think you're double-
19 counting --

20 MR. TRAFICONTE: No, because attorneys from this
21 office, however, have been involved in the defensive
22 discovery. Maybe I'm talking --

23 MR. TURK: But you're not adding in Mr. Fierce,
24 who apparently is conducting your offensive discovery
25 through deposition.

1 MR. TRAFICONTE: Mr. Fierce at this juncture is
2 conducting the offensive discovery, is exclusively involved
3 in offensive discovery.

4 MR. TURK: Right. That's separate and apart from
5 yours and Ms. Talbott's participation in the defensive
6 discovery.

7 MR. TRAFICONTE: We have not been sitting on your
8 hands, your Honor, with regard to offensive discovery. We
9 have sent out -- but I don't know I'm happy with the point
10 of reinforcing this is, but we have done discovery. We're
11 doing it now. We have depositions scheduled.

12 JUDGE SMITH: I see them as being on different
13 tracks.

14 MR. TRAFICONTE: They may be.

15 JUDGE SMITH: I mean different resources.

16 MR. TRAFICONTE: They may in part involve
17 different lawyers and different resources.

18 JUDGE SMITH: Well then let's don't bootstrap the
19 defensive discovery onto the offensive or the vice-versa.
20 Don't bootstrap the offensive discovery onto the defensive
21 discovery.

22 MR. TRAFICONTE: Well --

23 JUDGE SMITH: All right, they do seem to be
24 separate considerations, don't they?

25 MR. TRAFICONTE: In part they are.

1 JUDGE SMITH: But in part you presumably have to
2 at least supervise all aspects?

3 MR. TRAFICONTE: Well, that's also part of it.
4 And not only that, but the other aspect of it is that
5 Mr. Dignan is no doubt -- the bottom line for Mr. Dignan,
6 from what I have heard, is the date on which he can hit us
7 with summary disposition pleadings.

8 And I could see it from his point of view, and
9 that's not easy to but I can. He'd like to do that. Now
10 our point is the major aspect of seeking an extension of the
11 discovery period, the major focus of that, setting aside the
12 defensive problem and if we get some relief on the time in
13 which to answer the defensive problem, the major focus of
14 our concern is not additional offensive discovery. That is
15 not our concern.

16 Our primary concern is simply to have some period
17 of time in which to digest and review and come to comprehend
18 what it is we've learned through the offensive discovery
19 that we in fact will complete on or near November 15th. So
20 the point of --

21 JUDGE SMITH: Now wait a minute. You see, you
22 think that you will complete --

23 MR. TRAFICONTE: I'm making myself -- I don't know
24 if that's clear, but what I'm saying is that the purpose of
25 seeking the extension of the entire discovery period was

1 twofold.

2 JUDGE SMITH: Well, I wish you wouldn't loop them
3 together, though. I think we can give you some relief if
4 you won't -- if you would be more specific as to the
5 particular program where you need the relief.

6 MR. TRAFICONTE: Well, I can be very specific. I
7 can be very specific. We need relief in terms of some
8 additional time in which to respond to the defensive
9 discovery that has been served upon us.

10 We need perhaps just an extra week or a few days
11 to complete offensive discovery that we would contemplate
12 doing. Or if not --

13 JUDGE SMITH: Let me ask you this.

14 MR. TRAFICONTE: Well, let me finish because
15 there's a third wing here to the point, and third point is
16 that the reason why we sought an extension for the whole
17 ball of wax is that we're terribly concerned that we be
18 given some time to digest what it is that we're just still
19 gathering in the way of offensive discovery by the office,
20 so that we can then prepare answers not only to -- I mean
21 the interrogatories that the applicant has hit us on is
22 basically contention by contention, state your case.

23 JUDGE SMITH: State your case with respect to what
24 you're learning on offensive discovery?

25 MR. TRAFICONTE: Well, I mean, that would be part

1 of an answer.

2 JUDGE SMITH: What do you say to that, Mr. Dignan?

3 MR. TRAFICONTE: Mr. Dignan is going to be hard-
4 pressed to answer that since he's answered one of our
5 questions as to what his position is --

6 MR. DIGNAN: It's an easy one to answer, your
7 Honor. What those interrogatories do is ask the complainant
8 what do you mean by paragraph 3. Now it's never been my
9 understanding that you have to complete your discovery
10 before you answer an interrogatory back there.

11 If they learn something later in discovery that
12 they want to use, they use it and assuming I object they get
13 overruled on the grounds they didn't have it beforehand.
14 These are tie-down interrogatories, and we had already
15 answered a set without completing our discovery, and that
16 just does -- that's a non-starter.

17 MR. TRAFICONTE: It's not a non-starter. I was
18 about to say that Mr. Dignan responded to one of our similar
19 requests by stating that he would have to see what we say to
20 his discovery before he could answer it. He couldn't --

21 MR. DIGNAN: That on only two interrogatories, and
22 those were two where the Board had assigned the burden of
23 proof to the Attorney General.

24 MR. TRAFICONTE: These are very classic
25 situations, your Honor, of having, you know, both sides say

1 to the other what are you relying on, what are you relying
2 on, as offensive discovery is proceeding. The basic bottom
3 line is that the parties need -- at least this party -- I
4 mean the Mass AG needs to digest what is learned in order to
5 formulate answers with regard to the contentions.

6 JUDGE SMITH: How much time do you need for
7 offensive discovery?

8 MR. TRAFICONTE: Well, you know we --

9 MR. DIGNAN: Your Honor, could we before they
10 answer that, what offensive discovery is left? They've
11 asked interrogatories, we've answered them. They've asked
12 for document requests, we're going to produce that on --
13 tomorrow, which is the date, and there's another set of
14 interrogatories which we'll be answering -- we answered
15 yesterday in the mail, and that's it.

16 It's my understanding I'll be seeing no more
17 interrogatories or document requests because the time to
18 have done that and still complete by the 15th is gone. I
19 understand the only offensive discovery left are these
20 depositions which are scheduled, and I have not squawked and
21 probably will not squawk, but they scheduled two of them for
22 after the 15th.

23 I don't understand there's any more offensive
24 discovery to be coming at us under the prior ruling of the
25 Board.

1 MR. TRAFICONTE: Well, I can't quibble with that,
2 your Honor. Obviously under the prior ruling of the Board,
3 today's the 2nd of November. We can't squeeze 14 days in
4 before the 15th, so we would be hard-pressed to get answers
5 to any interrogatories. We have scheduled two depositions
6 after --

7 JUDGE SMITH: Well, before you go to the
8 depositions, do you -- you do not have any additional
9 offensive interrogatories or document requests in the works.
10 Is that correct?

11 MR. TRAFICONTE: No, the answer is that that is
12 not correct.

13 JUDGE SMITH: What do you have?

14 MR. TRAFICONTE: We have one set of
15 interrogatories that we have been working on and obviously
16 dependent upon what the Board's ruling is, we would not --
17 we haven't served them today obviously, because they
18 wouldn't have to be answered under the present ruling.

19 We have one set of interrogatories. We have a
20 follow-up set of document requests that reflect the
21 applicant's answers to our previous interrogatories, and we
22 have those two depositions presently scheduled for the 16th
23 and 17th, that Mr. Dignan appears not to have that much
24 difficulty with.

25 And we would be able to get the discovery out, the

1 one set of interrogatories and the request, we would be able
2 to get out hopefully this Friday. That was our intent.

3 JUDGE SMITH: And that would require how much an
4 extension for offensive discovery?

5 MR. TRAFICONTE: That would require, you know, if
6 we hand-delivered it, I guess, it would require an extension
7 from the 15th of November until the 18th of November, in
8 order to provide them the adequate and requisite answer.
9 But --

10 JUDGE SMITH: Now you have these presently
11 prepared?

12 MR. TRAFICONTE: We are presently working on them.
13 They're not ready to file today, no.

14 MR. DIGNAN: Your Honor, you know, cut back my
15 frustration level. The Board had an order out there that at
16 least I thought was pretty clear. Discovery over by the
17 15th. Now they on their own have decided to schedule things
18 up so that the discovery won't be ready to go until Friday,
19 relying on a further extension. Now I just don't think this
20 conduct should be countenanced.

21 MR. TRAFICONTE: We're not relying on it. I don't
22 understand that point. If the Board does not grant us
23 relief, the discovery is not going to go out. What could be
24 clearer?

25 MR. DIGNAN: Well, I for one urge that the relief

1 not be granted. We have answered a pile of interrogatories.
2 We've got a pile of documents ready to go. We've done our
3 part over here. Where we are is ready to start moving
4 forward on summary disposition motions.

5 JUDGE SMITH: When's the last date by which those
6 document requests, that document request and interrogatory
7 could have been submitted to meet our earlier schedule?

8 MR. TRAFICONTE: Probably yesterday.

9 JUDGE SMITH: Yesterday.

10 MR. DIGNAN: That's on interrogatories, and the
11 document request would be some three weeks ago.

12 MR. TRAFICONTE: That's true. There's a
13 difference if it's interrogatories or document requests. I
14 would just want to note that. I don't want to press too
15 hard on this. I would just want to note that part of this
16 document request I've described follows upon the answers to
17 the interrogatories that we received about a week ago, so --

18 JUDGE SMITH: Well, what I propose -- I'm not
19 ordering it. I propose for discussion that with respect to
20 the interrogatories, if you've got them prepared, send them
21 out. If we think that they're of a nature that you should
22 have had them out earlier, maybe we won't allow them. We'll
23 intercede and void them.

24 If they're the nature that are important to the
25 case, really were follow-up in discovery, could not probably

1 have done much earlier, I don't think it's any big deal,
2 three days. Document requests -- you've got another problem
3 there. That's three weeks and you can't have a self-
4 fulfilling extension of time. That's a bigger problem.

5 MR. TRAFICONTE: I appreciate that. That's what I
6 need to come back to, the original focus of the motion.
7 That is why we sought an extension of the entire period. I
8 mean I'm not being honest if I don't say that we could use
9 additional time for offensive discovery. That is clear.

10 And just so the record's clear, you know, it is
11 not since we last addressed this issue, that the Mass AG's
12 office has been doing -- it's not that we haven't been busy,
13 and I don't think there's any point in going in any detail
14 on that point, but we certainly have been generating and
15 abiding by all other procedural and substantive
16 requirements, and we have done a fair amount of work since
17 August on other matters in that. But we appreciate we live
18 by deadline.

19 JUDGE SMITH: Mr. Traficonte, what is the nature
20 of your interrogatories? Are they position type
21 interrogatories?

22 MR. TRAFICONTE: Well, for the major part they are
23 specific information-oriented interrogatories, and I don't
24 think Mr. Dignan's going to quarrel with that. We certainly
25 did ask a general one that asked him for his position on

1 each contention.

2 But for the most part, the interrogatories are
3 contention by contention. We seek specific pieces of
4 information as to, for example, the training of various
5 staff and the schedule of that training and the testing of
6 that staff. We basically --

7 JUDGE SMITH: That strikes me as being the type of
8 information that should have been asked early on.

9 MR. TRAFICONTE: In part, your Honor, I can't
10 quibble with that.

11 JUDGE SMITH: So it's not really follow-on.

12 MR. TRAFICONTE: Well what --

13 JUDGE SMITH: It's just you're getting around to
14 it late. It's not a second round. You're getting around to
15 it late. Is that it?

16 MR. TRAFICONTE: The part that is second round is
17 the part that is a document, the very brief document request
18 that picks up on the documents identified applicant's
19 answers to earlier sets of interrogatories of ours.

20 JUDGE SMITH: But I'm talking about the
21 interrogatories you're sending now.

22 MR. TRAFICONTE: They are the ones that we have
23 worked out over the last three days and that we just --
24 given permission that we would send out. I would not
25 contest the description of them as information that we could

1 have sought earlier, right.

2 JUDGE SMITH: All right. We're going to take a
3 break.

4 (Off the record.)

5 JUDGE SMITH: We're back on the record. Go ahead,
6 Mr. Traficonte. Is anybody there?

7 MR. TRAFICONTE: Yes. I m listening, your Honor.
8 The major point and I want to come back to just wrap up the
9 grounds for seeking an extension of the entire period. As I
10 stated in part it was because we needed some substantial
11 time to finish the defensive discovery. We seek obviously
12 whatever time that is reasonable to finish up our offensive.

13 But the major point is that we wanted to highlight
14 the difficulty in any schedule that would permit the
15 applicant to file on the day after the 15th of November
16 summary disposition materials when our response to those
17 materials would involve a review and compilation and
18 digestion, really, of the information that we would only be
19 receiving answers to perhaps on that previous day. So it
20 would --

21 JUDGE SMITH: Well, wouldn't your relief then be
22 to --

23 MR. TRAFICONTE: Not if on date certain on which
24 summary disposition -- yes, yes. There could a separate
25 form of relief running to that third point. I don't

1 disagree with that at all.

2 JUDGE SMITH: What did you think I was saying?

3 MR. TRAFICONTE: I thought you were going to say
4 that the relief sought could be three different days,
5 running to three different things. When we would finish our
6 defensive, when we would have available to finish our
7 offensive, and when the applicant would be free to file his
8 summary disposition materials.

9 JUDGE SMITH: Well, that's not what I had in mind,
10 but assuming you're right on the three points, let's go to
11 the summary disposition. Rather than us making a blanket
12 ruling as to your problems of responding to summary
13 disposition, wouldn't it be better depending upon the nature
14 of the motion for summary disposition, to seek relief,
15 particular relief?

16 MR. TRAFICONTE: Would it be better?

17 JUDGE SMITH: Yes.

18 MR. TRAFICONTE: It would be another alternative.

19 JUDGE SMITH: Better designed to satisfy
20 everyone's needs.

21 MR. DIGNAN: Your Honor?

22 JUDGE SMITH: Yes.

23 MR. DIGNAN: Let me offer him a deal. Here's the
24 deal --

25 MR. TRAFICONTE: I've got my hand on my wallet,

1 your Honor. I've got my hand on my wallet.

2 (Laughter)

3 MR. DIGNAN: Until December 15th to complete
4 answering the questions we've given them and to give us the
5 documents, and I will file no summary disposition motions
6 before December 1. That's an offer.

7 JUDGE SMITH: Say that again, Mr. Dignan, would
8 you please?

9 MR. DIGNAN: All discovery against us is over.
10 That is to say, other than the depositions that are
11 presently scheduled, and the fact that we've got some
12 responses due this week that we know about. In other words,
13 no further interrogatories against us. No further document
14 requests against us. No further depositions beyond those
15 already noticed and set up.

16 Number 2 is I won't file any summary disposition
17 motions until December 1 or later, and number 3 is he can
18 have until December 15th to get us those documents and I
19 don't care, the answers to our interrogatories also.

20 JUDGE SMITH: The defensive ones you mean?

21 MR. DIGNAN: Yes, the defensive ones. The ones
22 we've got out against him.

23 JUDGE SMITH: Yes, right.

24 MR. DIGNAN: Now I don't know whether Mr. Turk
25 would agree with that from the staff point of view, but I'm

1 willing to offer that from the applicant's point of view.

2 MS. CHAN: Your Honor, the staff agrees.

3 MR. TURK: That was not Mr. Turk, but I certainly
4 don't challenge Ms. Chan. She has a nicer speaking voice.

5 MR. DIGNAN: Well, your Honor, if we're --

6 MR. TURK: Your Honor, I would presume that the
7 December 15th date offered by Mr. Dignan in response to
8 interrogatories and production of documents would apply also
9 to the staff's discovery requests which are outstanding.

10 JUDGE SMITH: I think we're hung up over the
11 summary disposition and offensive discovery.

12 MR. TRAFICONTE: Now if I could -- it sounds like
13 we're negotiating and horse trading a little bit, so let me
14 just --

15 MR. DIGNAN: No, no, no. That's my offer.

16 MR. TRAFICONTE: Okay. Well then let me make
17 mine.

18 MR. DIGNAN: And if you don't take it I'm going
19 back to my original position.

20 MR. TRAFICONTE: All right, well let me make my --
21 I recall that we sought an extension of the entire period
22 until January 15th, and through this process I've learned
23 that perhaps the solution is a tripartite one, and I guess I
24 would propose that the offensive discovery period, that we
25 be permitted by -- we be permitted November 7th, until

1 November 7th, which is next Monday, to file Mr. Dignan
2 can --

3 MR. DIGNAN: No, your Honor I will not agree to
4 any further discovery against us. The Board may order it--

5 JUDGE SMITH: See him through.

6 MR. TRAFICONTE: Well, I just -- I mean apparently
7 the offer will not be accepted by Mr. Dignan. But let me
8 just make it anyway, which is that we be given for offensive
9 discovery purposes November 7th to filing of follow-up
10 documents requests and a brief set of interrogatories, that
11 we be given until -- I'm looking at my calendar, but I would
12 chose December 19th to complete the defensive discovery that
13 is outstanding, and that Mr. Dignan would hold his filing on
14 summary disposition until December 19th.

15 JUDGE SMITH: What is it, Mr. Dignan. Now you
16 agree to defer summary disposition to December 1st. What is
17 it that you're giving?

18 MR. DIGNAN: Well, because he says he doesn't want
19 me to come in on summary disposition on November 15th or
20 16th if that was the cutoff date, and I was saying if he
21 wants to be assured of that, I'll give him the 15 days.

22 JUDGE SMITH: But you've given him no additional
23 offensive discovery. You haven't given him anything.

24 MR. DIGNAN: Your Honor, I'm not going to agree to
25 give him any more. The discovery should have been done by

1 the 15th.

2 JUDGE SMITH: I'm trying to understand what you're
3 giving him now.

4 MR. DIGNAN: I said what I want for getting what
5 I'm getting, which is to agree to extensions of the
6 defensive discovery deadline, agreeing not to file summary
7 dispositions, but what I want back for it is discovery is
8 over. That's the deal I'm offering him, against us, which
9 is 1D under this deadline.

10 JUDGE SMITH: Yes, but I would like it if anybody
11 could explain to me how anybody, how you are giving away
12 anything or how Mr. Traficonte is advantaged by your
13 agreement not to --

14 MR. DIGNAN: Hold to the original discovery
15 deadline. I can file my summary disposition motions
16 November 16th. I can demand that his discovery be in on
17 November 15th, the best he can do, and I still hold my right
18 not to answer any further discovery.

19 MR. TRAFICONTE: If I could clarify it, your
20 Honor. The present circumstance is about as black as it
21 could get, and Mr. Dignan's offer would make it a slightly
22 brighter shade of black.

23 MR. DIGNAN: It might be blacker shade of gray.

24 JUDGE SMITH: Well, Mr. Dignan if we were to grant
25 Mr. Traficonte a total of, as he's requesting -- well, he's

1 requested a total of seven days' extension for offensive
2 interrogatories, if we were to grant him say three of those
3 days, four of those days, how would you be affected in your
4 summary disposition?

5 MR. DIGNAN: Because, your Honor -- well, if it's
6 going to be only the interrogatories, the answer is first of
7 all he's already admitted to you that the interrogatory part
8 of his case could have been asked a long time ago.

9 JUDGE SMITH: The document request -- the
10 interrogatory.

11 MR. DIGNAN: The interrogatories he's admitted are
12 not interrogatories that couldn't have been asked already.
13 It's the document request that's follow-up. The document
14 request takes a 30-day period in. The interrogatories also,
15 if you allow them, take in at least a 14-day period and I
16 don't know what they are or how long it's going to take or
17 whether I'll need an extension and during all that time the
18 easy answer to any summary disposition request is I haven't
19 completed my discovery yet.

20 JUDGE SMITH: Okay now, the Board inclination,
21 Mr. Traficante, was to give you some relief on offensive
22 discovery on interrogatories, none on documents, and with
23 that in mind, what do you say about Mr. Dignan's offer?

24 MR. TRAFICANTE: (pause) The basic problem I have
25 with it, your Honor, is the fact of the matter is that as

1 long as -- I'm sorry -- as long as we would be attempting to
2 complete the defensive discovery on what date that would be
3 and I take it his offer was December 15th, we would simply
4 want to have the summary disposition materials come in, you
5 know, on that day or after that day.

6 That's just a resource, you know, point that we
7 would -- that just -- I haven't given you all the detail,
8 but that would just be an essential part of any kind of
9 coherent capacity we have to respond. We would --

10 MR. DIGNAN: All right, I'll offer you another
11 deal. December 15th to complete your defensive discovery
12 and I won't file any summary dispositions before that date.

13 MR. TRAFICANTE: Well that fell far from what I
14 said. I said December 19th, and I did that primarily
15 because I was calculating the response time and trying to
16 push it at least through the Christmas vacation so that, you
17 know, that we wouldn't immediately be seeking more than 20
18 days just because of the Christmas holiday. That was my
19 only calculation for moving your offer of the 15th to the
20 19th.

21 MR. DIGNAN: Listen John. Get everybody back from
22 the key states, put them to work and you'll be able to make
23 up.

24 MR. TRAFICANTE: I wonder There will be no
25 longer any key states as we all know.

1 (Laughter)

2 MR. DIGNAN: Your Honor, that's a private
3 Mr. Dignan's joke.

4 MR. TRAFICONTE: Well, the joke's on everybody.

5 JUDGE SMITH: There is a problem of getting the
6 necessary affidavits I would assume and so forth.

7 MR. TRAFICONTE: No, Christmas. That's what we're
8 imagining. Obviously the material that we would be then
9 preparing would be issue-oriented in major part. and it
10 would require coordination and we'd very likely be back
11 asking for an additional week to ten days to complete our
12 response. So --

13 JUDGE SMITH: Do I understand you to be saying
14 then, Mr. Traficone, that you would accept Mr. Dignan's
15 offer of settlement if the date were the 19th? That is, no
16 more offensive discovery?

17 MR. TRAFICONTE: No more offensive discovery at
18 all, and December 19, we're given until December 19th to
19 complete defensive discovery and summary disposition would
20 come in after that date.

21 JUDGE SMITH: On that date.

22 MR. TRAFICONTE: On that date. Well, I'm inclined
23 to agree to it if there's a point and perhaps there is a
24 point in light of discussing the 20-day rule on response,
25 because I'm now looking at my calendar and I'm realizing

1 that the Christmas situation is perhaps a little bit more
2 serious than I thought. If Mr. Dignan would serve us on the
3 19th --

4 MR. TURK: Well, why can't you just handle that at
5 the time?

6 JUDGE SMITH: Yes, why don't you take -- take the
7 offer, Mr. Traficonte, if you can use it, because I don't
8 want to give a blanket ruling in advance that you need extra
9 time for summary disposition responses.

10 MR. TRAFICONTE: All right, okay.

11 JUDGE SMITH: If you need it, seek it but justify
12 it.

13 MR. TRAFICONTE: Okay.

14 JUDGE SMITH: In the context of the particular
15 summary disposition motion.

16 MR. TRAFICONTE: You'll have some of them but not
17 all of them. That's fine.

18 JUDGE SMITH: Okay.

19 MR. TRAFICONTE: That's fine.

20 JUDGE SMITH: I think we've agreed then, haven't
21 we?

22 MR. DIGNAN: I haven't agreed to the 19th.

23 JUDGE SMITH: You haven't?

24 MR. DIGNAN: I guess I will.

25 JUDGE SMITH: I'm going to nudge you that way.

1 MR. DIGNAN: The tone of irritation reached me.

2 JUDGE SMITH: It's not that any more. It's nudge.

3 MR. TRAFICONTE: If not, the next word's going to
4 be so ordered.

5 JUDGE SMITH: It was nudge, not push. Is that
6 agreed now? You can agree reluctantly if that satisfies
7 your client's --

8 MR. DIGNAN: Yes. I understand that the order
9 then is the discovery is over against us, except for that
10 which we're now going to answer and the depositions?

11 JUDGE SMITH: Yes.

12 MR. DIGNAN: That defensive discovery will be
13 completed by the 19th, that is their responses, and that I
14 will not file any summary disposition motions before the
15 19th.

16 JUDGE SMITH: That's correct.

17 MR. TRAFICONTE: Yes, that's correct.

18 MR. DIGNAN: This does not put off the track, as I
19 understand it, the one summary disposition motion that has
20 been filed and which Mr. Traficonte is due to respond
21 shortly?

22 JUDGE SMITH: No. That's separate.

23 MR. TRAFICONTE: That is separate, yes.

24 MR. DIGNAN: I'm agreeable to that, your Honor.

25 JUDGE SMITH: Okay, let's let the record show

1 Mr. Dignan that you agreed reluctantly under duress and
2 screaming, or whatever you --

3 MR. DIGNAN: That doesn't help, your Honor,
4 because I've still got to go see the Board of Directors
5 tomorrow.

6 JUDGE SMITH: Okay. And you too, Mr. Traficonte.
7 Mr. Turk or Ms. Chan?

8 MR. TURK: Your Honor, we have no objection to
9 that.

10 JUDGE SMITH: All right.

11 MR. TURK: Presuming, of course, that it applies
12 also to the staff.

13 JUDGE SMITH: Yes.

14 MR. TURK: No more offensive discovery against the
15 staff and responses to ours are to be in no later than
16 December 19th to existing requests.

17 JUDGE SMITH: Okay.

18 MR. TURK: And hopefully we even get some things
19 sooner.

20 MR. TRAFICONTE: Oh yes, that's right. This is
21 the date by which we would have to complete, but we
22 obviously could get it out to you in -- before that, and we
23 would make documents available to you certainly well before
24 that.

25 JUDGE SMITH: And that does assume, Mr.

1 Traficonte, that you do your best.

2 MR. TRAFICONTE: Yes, your Honor.

3 MR. TURK: Your Honor, I have one single thing I'd
4 like to note, and that is we have not yet decided whether or
5 not, on behalf of the staff, we're going to seek any
6 deposition discovery against Mass AG, and I assume that the
7 time for that still continues to run until the 15th of
8 November.

9 MR. TRAFICONTE: Well, maybe we'll address that
10 point, because I understand most of today's discussion to
11 mean that the 15th represents the close of discovery.

12 JUDGE SMITH: That's right.

13 MR. DIGNAN: Well, if a notice came out on the
14 3rd, you take the deposition on the 10th.

15 MR. TRAFICONTE: Well, fine. I just -- as long as
16 Mr. Turk is clear on that.

17 MR. TURK: I understand that.

18 JUDGE SMITH: Okay, now.

19 MR. TURK: Unless of course Mr. Traficonte's
20 willing to give us until the 19th of December to take the
21 depositions.

22 MR. TRAFICONTE: I don't think so.

23 MR. TURK: Do it by any time?

24 MR. TRAFICONTE: Not from this assistant attorney
25 general.

1 JUDGE SMITH: All right, what did you just decide
2 about your depositions?

3 MR. TURK: Well, your Honor, we have not decided
4 if we're going to take any, but if we do, we will take the
5 depositions before November 15th.

6 JUDGE SMITH: All right, or notice them or take
7 them?

8 MR. TURK: Well, we'll definitely notice them
9 before the 15th, and the question is what's the return date
10 on it?

11 JUDGE SMITH: Yes. All right.

12 MR. TURK: And I guess I'm asking Mr. Traficonte
13 if he would agree to some extension of the 15th or the date
14 to take the depositions?

15 MR. TRAFICONTE: (laughter)

16 MR. TURK: Part of this request is necessitated--

17 MR. TRAFICONTE: I'm totally enjoying the fact
18 that you're requesting time from me.

19 MR. TURK: Well, part of the reason that I'm
20 requesting that is because we have -- we're still waiting to
21 get the documents. We're waiting to have them gathered.
22 We're still waiting for a completion on interrogatory
23 answers, and normally the depositions will not be held until
24 we get completed responses to the documents and
25 interrogatory discovery.

1 So we're at a disadvantage in going forward with
2 depositions without the ammunition in our hands to get a
3 meaningful deposition.

4 JUDGE SMITH: I don't think anybody should be
5 expected to agree or disagree on a blanket basis. You're
6 not asking for any relief, are you?

7 MR. TURK: No.

8 JUDGE SMITH: All right. Let's move on then to
9 the next item. Does everyone agree?

10 MR. TRAFICONTE: Your Honor, the next item that I
11 have is the FEMA material.

12 JUDGE SMITH: Yes.

13 MR. TRAFICONTE: And maybe the decision we've come
14 to or the agreement we've reached is perhaps might resolve
15 this, at least in part.

16 MR. FLYNN: I would suggest that I be allowed to
17 go forward, since it's in my motion --

18 MR. DIGNAN: Just so nobody misunderstands, I do
19 not believe the agreement resolves the FEMA thing from the
20 applicant's point of view.

21 MR. TRAFICONTE: Well, let me just make a point.
22 The agreement that we've already -- that I have just made
23 with regard to no final discovery out of this office
24 obviously does not have to do with FEMA. Is that --

25 MR. DIGNAN: I agree you haven't agreed to that.

1 MR. TRAFICONTE: Okay, all right.

2 MR. FLYNN: I was hoping you had, but --

3 MR. TRAFICONTE: No, no. I'm sorry if that was
4 unclear. We just hadn't turned to the FEMA thing. I
5 thought we were talking about discovery from us on the
6 applicants and staff.

7 JUDGE SMITH: All right. Yes, that was my
8 understanding.

9 MR. TRAFICONTE: Okay.

10 MR. FLYNN: All right.

11 JUDGE SMITH: Mr. Flynn.

12 MR. DIGNAN: Your Honor, would it be possible to
13 have a two minute recess.

14 JUDGE SMITH: Sure, delighted.

15 MR. DIGNAN: One minute recess, or frankly just
16 long enough to get down to a men's room?

17 JUDGE SMITH: Good idea, whatever room.

18 (Whereupon, a short recess was taken.)

19 JUDGE SMITH: All right, we're on the record. Mr.
20 Flynn?

21 MR. FLYNN: Yes, your Honor. I would like to
22 address my motion and as has been suggested earlier, the
23 previous discussion has not disposed of all the issues in my
24 motion. I would like to begin by reporting that
25 Mr. Traficone and I have had a discussion and some of the

1 issues have been resolved.

2 I'm more concerned with scope objections than I am
3 on the relief from the deadline imposed.

4 JUDGE SMITH: Would you speak up please?

5 MR. FLYNN: Yes, I'm sorry. Mr. Traficonte and I
6 have already figured out that if the -- my motion is granted
7 on much of the scope objections that I have raised, then the
8 amount of material which I have to produce is greatly
9 reduced, and there are many things which I am prepared to
10 produce right now, or I shouldn't say many. It's actually
11 fairly small in volume, but I'll get into that in a moment.

12 You have agreed that the deposition will take
13 place on the 9th and that I will produce those documents
14 which are available which I have not objected to or which
15 the Board indicates my objection is not well-founded. Now,
16 having -- and we will produce those documents either by
17 Friday of this week or Monday of next week so that has them
18 in time for the deposition.

19 Now having said that, here's the question of my
20 scope objection to be decided by the Board or worked out by
21 the Commission or the Board. And I think it is an
22 objection. The request that I found to be most flagrant had
23 to do with a request for information about the selection of
24 Richard Donovan as our chairman, SPMC.

25 Now I've already indicated to Mr. Traficonte, he

1 certainly is entitled to know what Mr. Donovan's
2 qualifications are, and I've already in prior conversations
3 offered to give him Mr. Donovan's resume. To get into any
4 internal discussion within FEMA about why he might be a
5 better chairman than anyone else, a comparison of Mr.
6 Donovan's qualifications with anyone else's qualifications,
7 or anything in that line strikes me as an unnecessary and
8 inappropriate invasion of the internal workings of FEMA.

9 It is not necessary for Mr. Traficonte's case to
10 be able to compare Donovan's qualifications with anyone
11 else's qualifications to be able to make an argument that
12 Mr. Donovan is not as expert as we ought to be or entitled
13 to as great weight as he'd like to see it. That is a
14 discrete question. It really has nothing to do with the
15 comparison of his qualifications to anyone else's
16 qualifications, or the process that FEMA went through in
17 selecting him to handle this task.

18 Now there's a similar objection to the
19 deliberations or the comments or the documents that were
20 before FEMA. To be very concrete about it, FEMA hasn't
21 change its regulations in the recent past, at least not as
22 they relate to a logical emergency response program has
23 changed its guidance that goes 654 FEMA/Rep 1.

24 JUDGE SMITH: Just a minute. Mr. Flynn, you need
25 to keep your voice as high -- in the volume as much as you

1 can?

2 MR. FLYNN: Yes, your Honor.

3 JUDGE SMITH: You're trailing off at the end of
4 your thoughts.

5 MR. FLYNN: Yes, the thought that I was expressing
6 a moment ago had to do with what guidance FEMA had altered
7 in the recent past, and the one document which all the
8 parties are aware of is Supplement 1 to Reg 0654/FEMA Rep 1,
9 R-E-P, and that guidance is an implementation of the NRC's
10 change in its regulations.

11 Very straightforward, it simply translates into
12 practical application the changes in the NRC regulations,
13 and I submit that it serves no purpose to inquire into the
14 reasons for the change. First of all, they're perfectly
15 plain from the document itself, but I also submit that to
16 inquire into the thought process, the deliberation that went
17 into decided those changes really amounts to a challenge to
18 the NRC rule, which the rules of procedure that this Board
19 is operating under don't permit.

20 And I further would argue that that request is
21 symptomatic or symbolic of the tenor of all of the requests,
22 and that is to make FEMA's process the focus of the hearing
23 rather than the adequacy of the SPMC, the Seabrook plans for
24 Massachusetts communities.

25 It certainly is a legitimate issue, an appropriate

1 issue for SAG's office to explore and discover what FEMA's
2 position is, how did it arrive at its position. But to go
3 into how FEMA's policy is established and policy issues have
4 not be raised in the contentions, have not been raised in
5 the discovery, is inappropriate.

6 And then my objections also --

7 JUDGE SMITH: Then you're saying that the request
8 with respect to Supplement 1 is irrelevant?

9 MR. FLYNN: Yes.

10 JUDGE SMITH: There are no contentions which would
11 as to which that would relate?

12 MR. FLYNN: Yes. That is my position.

13 JUDGE SMITH: Well, I'm surprised.

14 MR. FLYNN: The issue --

15 JUDGE SMITH: I don't have that document before
16 me, but I'm surprised that that is the case, given the
17 number and extraordinary reach of the contentions.

18 MR. FLYNN: I don't want to be understand to say
19 that it doesn't apply. What I'm saying is that the validity
20 of the document is not an issue.

21 JUDGE SMITH: Well, were the contentions in any
22 way be judged by the document?

23 MR. FLYNN: Well, they would. FEMA's evaluation
24 of the plan depends heavily on that document. In fact,
25 almost entirely. The evaluation process that we went

1 through was to compare a plan, page by page and line by
2 line, against the elements, the planning standards and the
3 elements of that document, Supplement 1 to new Reg 0654 FEMA
4 Rep 1.

5 But I'm saying that to inquire into how did it get
6 to be written in the way that it is challenges our
7 policymaking, our thought process. It goes to the validity
8 of the guidance. I don't think that's appropriate. I don't
9 think that's an issue that is before the Board.

10 The other major objection that I had went to the
11 deliberative process privilege. We argued this before
12 during the New Hampshire Radiological Emergency Response
13 Plan phase of the hearings, and my recollection is that it
14 was resolved not by order of the Board but by a strong
15 suggestion of the Board that resulted in agreement among the
16 parties, matters that were sought to be discovered or
17 inquired into at trial were permitted.

18 But it is FEMA's policy to assert the deliberative
19 process privilege, and that we have a concern. We have seen
20 negative results from the weakening of our position by
21 disclosing details of the deliberations, both within FEMA
22 and within the RACs, the regional assistance committee. We
23 are now seeing that the discussion within the RAC is
24 stunted. It's not as candid as it should be.

25 We are seeing in fact the chilling effect that the

1 deliberative process privilege is designed to prevent, and
2 therefore we are continuing to assert deliberative process
3 privilege and that forms the basis of my objection for many
4 of the documents that have been requested, specifically
5 communications to and from the regional assistance
6 committee, comments from the members of the regional
7 assistance committee on the plan that FEMA reviewed, and
8 communications from other agencies not specifically on the
9 draft plan reviews but on the subject of the plan.

10 And closely related to that is another broad
11 category of discovery requests which goes to contact with
12 other government agencies and other governments, such as the
13 State of New Hampshire, the Governor of New Hampshire, and
14 there's also a request for documentation of contacts with
15 the White House.

16 Now I'm not representing that there are such
17 documents or that there were such contacts, but the request
18 itself is objectionable. It may go to deliberative process
19 but whether or not those contacts formed a part of the
20 decisions that were made and the evaluation of the plan,
21 they are objectionable for another reason, and that is that
22 they go directly to the so-called corrupt process or the so-
23 called undue influence theory that was litigated at length
24 in the prior hearing.

25 Those are my terms. I'm not representing that

1 anyone else has adopted those terms as identifying their
2 theories. And as a way of referring the Board to a portion
3 of the litigation that consumed enormous amounts of time and
4 in my view, at least, and I expressed this at the time, were
5 quite irrelevant. There's nothing in the record of this
6 phase of the hearing to date which suggests that it would be
7 appropriate to go into those questions all over again.

8 It strikes me as simply a fishing expedition to
9 try to discover whether there were any such contacts which
10 might be complained of, which might be con. rued outside of
11 the normal process or arm-twisting or whatever the
12 intervenors want to make of it, and a case hasn't been made
13 that that's something that is already in the case or ought
14 to be in the case.

15 The last objection that I want to raise at this
16 time, subject to rebuttal to what Mr. Traficonte will have
17 to say is that he has asked for telephone logs, travel
18 records, and basically an account of Mr. Donovan's time, and
19 I again submit that that does not go to the question which
20 is before the Board, or which is the proper subject of
21 discovery, namely FEMA's position and the substantiation of
22 FEMA's position. That is again an unnecessary and undue
23 invasion of our internal processes.

24 JUDGE SMITH: Mr. Traficonte?

25 MR. FLYNN: That concludes my remarks at this

1 time.

2 JUDGE SMITH: Mr. Traficonte?

3 MR. TRAFICONTE: Yes, thank you your Honor. I
4 don't think the disagreement here is as broad as I initially
5 did when I first read through Mr. Flynn's filing. Let's
6 start with the corrupt process undue influence theory, which
7 is, I think, a fairly apt way of putting some of the focus
8 on FEMA that did devour quite a bit of time in New
9 Hampshire.

10 The purpose of the document request that I had
11 faxed to him on October 19th in fact did not have that as
12 its primary focus. I'm not even sure it was a secondary
13 focus. There is no question that there is a portion of one
14 of the 11 requests that seek any communications between the
15 Governor of New Hampshire and FEMA regarding the SPMC, and
16 there's a similar request with regard to the White House.

17 Those two separate, separable requests conceivably
18 could be seen as -- or even more inconceivably -- could be
19 seen as a pursuit of the corrupt influence theory. The last
20 of it frankly is my effort to seek what Mr. Flynn has
21 already, it seems to me, indicated on the record is
22 permissible discovery, which is how did FEMA arrive at its
23 position.

24 That's to say, it is permissible for an intervenor
25 to -- or for a licensee or an applicant for that matter, if

1 FEMA were on the other side -- to seek to challenge the FEMA
2 position on the adequacy of a plan by trying to * of the
3 issue of what weight should be given to it. Now in part
4 that's a function of what appears in the FEMA review on its
5 face, but it also necessarily must include some
6 investigation, some permissible investigation into how FEMA
7 as a matter of a process evolved its position.

8 And it is not -- we do not move forward in this
9 regard on some theory that that process was corrupt. But
10 instead we're seeking to determine what it was, simply what
11 the process was. So for example, I have learned -- at least
12 I think I've learned from Mr. Flynn -- that this process,
13 FEMA's review of the SPMC is in fact or was in fact
14 different from the normal process that it used with regard
15 to, or it has used in the past, with regard to a State plan
16 generated by the State or local government.

17 JUDGE SMITH: Well, isn't that necessarily the
18 case with the Sup 1 and the --

19 MR. TRAFICANTE: Well, let me just be a little bit
20 more precise. Different not simply with regard to the
21 criteria document, against which it measures the adequacy,
22 but different with regard the staffing of FEMA, of its
23 personnel, different with regard to the use of the RAC and
24 filtering of the input by the RAC into the FEMA review.

25 I believe that what we have in this instance is

1 really a one-person production here. I think that
2 Mr. Donovan, for whatever reason, is really the sole author
3 of the FEMA position, and that the RAC is a very, very
4 secondary, had very, very secondary input if any input into
5 the actual formation of the relevant judgments of adequacy.

6 And again, I have had no discovery on them so you
7 have to take some of this as simply the sense that I have
8 gotten from conversations with Mr. Flynn. I'm not sure
9 Mr. Flynn disagrees with me, that I have a right to inquire
10 of Mr. Donovan and through document requests, into the
11 nature of the process that FEMA used.

12 I think the problem here is where is the line to
13 be drawn, and part of my hesitation -- I don't know, and I
14 answered my own question by saying I don't know. And it
15 seems to me part of the problem for the Board is that Mr.
16 Flynn has gotten a document request which I hope the Board
17 has an opportunity to look at, and he's run the flag up and
18 said basically that he's not going to give up any of it.

19 And we just think that that can't be right, that
20 some of this is clearly well within the scope of permissible
21 discovery on FEMA, and some of it perhaps crosses that line
22 on some theory that is not going to something more, which we
23 don't yet know, but for present purposes, crosses the line
24 into impermissible discovery.

25 That's fine. We can live with that, but we

1 haven't heard Mr. Flynn say anything that would justify
2 essentially providing Mr. Donovan for a deposition and
3 handing us his resume and handing us the final report and
4 then saying well, he's ready to be, you know, make your
5 inquiry. That's all the discovery of us you're going to
6 get.

7 That's just not in line with existing practice in
8 NRC emergency planning cases, where discovery on FEMA was
9 had by intervenors and for that matter by applicants. Now,
10 and I'll just be brief on that point, we don't all need to
11 be reminded of the scope of the discovery permitted the
12 applicants. In fact it included a voir dire of Mr. Tannis.
13 We don't need to be reminded of the scope of the discovery
14 permitted the applicants on FEMA, initially, in an answer
15 proceeding, and you know we're really asking for, you know,
16 equal time.

17 I mean obviously in this instance FEMA has found
18 the utility plan adequate. You want to inquire how. We all
19 know that FEMA took the position in April of 1987, took the
20 public position that utility planning is not going to be
21 inadequate under its view of the regulations. It's
22 obviously changed its mind. We want to make some inquiry as
23 to the basis that it has for arriving at the conclusion that
24 this plan is adequate.

25 So I think what we have here is a line drawing

1 exercise, and I just can't imagine the line can be drawn
2 where Mr. Flynn would have it, which would give us
3 Mr. Donovan in the flesh and his resume, and the FEMA report
4 as we received it on October 21st and nothing more. And
5 maybe it's a matter of going through this in a more request
6 by request basis, but I just -- I think that many of this
7 are just unobjectionable on their face.

8 MR. FLYNN: May I respond, your Honor?

9 JUDGE SMITH: Mr. Flynn.

10 MR. TRAFICANTE: May I make one further point,
11 your Honor, before Mr. Flynn responds, because it might be
12 connected to this. We intend, we intend and I think
13 hopefully by tomorrow to serve interrogatories on FEMA, and
14 I say that because much of the discussion we've had here
15 this afternoon concerning the schedule I purposely left FEMA
16 out of the picture and we understand that technically that
17 would not able -- that would not be in before the deadline
18 of the 15th, but we didn't even get the report until I think
19 October 17th or October 18th, and we've reviewed it and have
20 some follow-up interrogatories.

21 So another aspect of the concern we have is that
22 we be permitted some reasonable time here to complete the
23 discovery, to whatever extent the Board views it as
24 permissible discovery.

25 JUDGE SMITH: Mr. Flynn.

1 MR. FLYNN: Yes. On that last point your Honor,
2 let me just point out that we complied with the schedule
3 which we announced at the pre-hearing conference. It
4 shouldn't have come as any surprise that the report arrived
5 when it did.

6 MR. TRAFICONTE: I'm going to tell you what is a
7 surprise. I'm just indicating that we didn't get it until
8 the 18th of October.

9 JUDGE SMITH: This is the easy part. Let's talk
10 about the hard part.

11 MR. TRAFICONTE: All right.

12 MR. FLYNN: Very good. I don't agree with
13 Mr. Traficone's characterization that what I have told him
14 about the process that we went through is different from any
15 other process that we've ever used, different from what he's
16 used to.

17 But I'm saying for the record that I don't accept
18 that characterization. I think there is a way to draw the
19 line which meets my needs and allows him what is
20 permissible. Yes, I agree that it is appropriate for him to
21 inquire who did FEMA talk to, when, what was the process,
22 where did you go, what did you look at in order to evaluate
23 the SPMC.

24 That is not the same as saying what did those RAC
25 members tell you in the RAC meeting? What comments did they

1 submit to you in writing? That process doesn't apply to
2 non-governmental bodies. It is a public policy argument.
3 It's an application of public policy, and there's abundant
4 case law, much of which I cited in my brief, what that
5 policy is.

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1 My point here is that that can be observed and
2 still give Mr. Traficonte the discovery that he is looking
3 for out of process.

4 I would also like to point out the wide-ranging
5 discovery I just referred to a few moments ago --

6 JUDGE SMITH: Excuse me, Mr. Flynn. Are you using
7 a speaker phone?

8 MR. FLYNN: No, Your Honor, I'm not.

9 JUDGE SMITH: There is something causing your
10 voice to cut out as if there's an electronic mute there. It
11 must be you; you'll have to keep your voice up because we're
12 missing a part of almost every sentence.

13 JUDGE HARBOUR: The beginning of a sentence after
14 pauses.

15 MR. FLYNN: After which?

16 JUDGE HARBOUR: Pauses.

17 JUDGE SMITH: Pauses.

18 MR. FLYNN: Oh, I went on then to talk about the
19 voir dire in the New Hampshire hearings, the wide ranging
20 discovery connected with those hearings, and went on to
21 start to point out that that was very different from the
22 situation that we are faced with here. The Board expressed
23 repeated concern about not understanding what FEMA's
24 position was.

25 In this case, our position has already been

1 disclosed through this report which has been served on all
2 the parties. Our position will be consistent. It is not
3 hard to fathom. The evaluation of the plan represents a
4 very straightforward comparison of the plan against pending
5 standards of NUREG 654.

6 There can be challenges as indeed there will be to
7 our judgment, but that is not the same situation as having
8 unclear positions before the Board. The inquiry here
9 should be what is FEMA's position, what or when they hope to
10 complete its evaluation of the plan, what is the basis for
11 its judgment.

12 I submit that all of that is proper discovery and
13 is in issue. But beyond that is the caveat that the
14 deliberative process privilege applies. I submit that the
15 rest of what the Attorney General's office has requested is
16 really off on a different subject.

17 JUDGE SMITH: Certainly it's not a different
18 subject, Mr. Flynn. It's, this is the same argument I heard
19 you make up in New Hampshire that it's not relevant. Well,
20 it is relevant. It's not a different subject; it is the
21 same subject. The question is being all of that, should it
22 be protected by the deliberative process privilege, or is it
23 protected. That's the question.

24 MR. FLYNN: Well, it certainly is an issue before
25 you right now, yes.

1 MR. TURK: Your Honor, can I speak for the Staff?

2 JUDGE SMITH: Yes, we'd be pleased to hear from
3 you.

4 MR. TURK: I would support Mr. Flynn's request for
5 the maintenance of the deliberative process privilege.
6 First, I'd like to note that again, in this stage of the
7 proceeding, it seems as if Mass A.G. wants to try to make a
8 case in which FEMA is the focus of attention, rather than
9 the adequacy of the plan.

10 And that really is the central issue, that is,
11 whether the SPMC is adequate. It's established precedent
12 when it comes to Staff reviews and FERs that the focus of a
13 hearing really should be on whether or not an FSAR or
14 application is adequate and the focus should not be on
15 whether the staff review or evaluation was performed
16 adequately.

17 There's a slight difference here in which
18 Massachusetts is faced with having to try to overcome the
19 burden of rebutting -- excuse me, that didn't come out quite
20 clearly.

21 Massachusetts has the burden of having to rebut
22 the presumption that FEMA's finding is correct. That does
23 not mean that they should be allowed to overcome the privilege
24 as to RAC deliberations. I would have no objection if they
25 inquire as to whether or not the RAC supported the views

1 expressed by Mr. Donovan.

2 And only if there is an indication that there was
3 disagreement or that the view of Mr. Donovan and FEMA was
4 not supported by the RAC, would they then come to you and
5 say, we need more discovery for one or another reasons. Or
6 you should permit a broader inquiry as to exactly what the
7 RAC member said.

8 But I don't feel that they should be able to
9 overcome that privilege right now at the outset.

10 And there's something else that should be
11 mentioned in contrast to what happened in the New Hampshire
12 hearings. As the Board may recall, back then there was a --
13 well, two things happened, essentially.

14 One, there was a statement in testimony filed by
15 FEMA that implied that the RAC supported the view of FEMA
16 and there was some indication in the possession of other
17 persons that that was not correct, that there was a chance
18 there to impeach or to try to overcome that statement by
19 FEMA, that there was some basis to try to make that attempt
20 to overcome it. So far, we have nothing like that here in
21 the review of the SPMC.

22 And secondly, in the New Hampshire case, there was
23 a question as to the credibility of the witness, the
24 particular witness who was then appearing on behalf of FEMA.
25 And that's not an issue here. So whatever grounds may have

1 existed in the New Hampshire phase for overcoming the
2 privilege simply has not been demonstrated to have occurred
3 at this time.

4 JUDGE SMITH: Under your approach, Mr. Turk, it
5 never could become an issue because the parties would never
6 find out about it.

7 I think --

8 MR. TURK: Under my approach, they'd be able to
9 ask, as Mr. Flynn suggested, what was the process by which
10 FEMA reached its decision, did they consult the RAC, did
11 they have meetings, did the PAC provide their views, did
12 FEMA consider those views. And I would go so far as to
13 permit the final question, that is, were those views
14 consistent with the views of FEMA.

15 JUDGE SMITH: But you would not have them inquire
16 into the reasoning employed by the individual RAC members?

17 MR. TURK: No.

18 JUDGE SMITH: You wouldn't do that?

19 MR. TURK: No. Absent any suggestion that the
20 FEMA witness is not telling the truth, or that there's a
21 reason to doubt the truthfulness of his testimony, I
22 wouldn't allow it to go further.

23 JUDGE SMITH: Well, that's what discovery's for:
24 to test the truthfulness of potential witnesses.

25 MR. TURK: There's a balancing, Your Honor. There

1 is a privilege to be protected. And you have to balance the
2 need for maintaining that privilege against the need of a
3 party in litigation.

4 JUDGE SMITH: Yes, that's correct. But we haven't
5 come to that; you're not making that argument, yet.

6 MR. TURK: I am making that argument. I'm saying
7 there's been no demonstration of any need to overcome the
8 privilege, and therefore the privilege should be allowed to
9 stand.

10 MR. TRAFICANTE: Well, if I could just address
11 that very point. I understand from Mr. Flynn that Mr.
12 Donovan is going to be the sole FEMA witness. I also
13 understand that Mr. Donovan has had whatever contacts FEMA
14 has had with the RAC, they have been by and through Mr.
15 Donovan.

16 If I follow the thrust of Mr. Turk's ingenious
17 argument, I'm supposed to ask Mr. Donovan if Mr. Donovan is
18 telling the truth when Mr. Donovan tells us what the RAC has
19 told him. I just, the circularity just dictates that
20 something's wrong and that I should be able to have some,
21 you know, limited though it may be and I'm certainly not
22 holding up that it should be an unlimited, you know, go in
23 there and get everything that they possibly have in the way
24 of communications, but we should be permitted some inquiry
25 as to what went into the process and what forms the basis of

1 Mr. Donovan's judgments on the adequacy of the plan.

2 MR. TURK: Well, Your Honor, they have that
3 already. They have the report which talks about the
4 different matters that were considered and why the plan is
5 considered adequate. And in depositions, they can challenge
6 Mr. Donovan and ask him, for instance, did you consider the
7 location of the personnel who'll be relied upon for one or
8 another function.

9 JUDGE SMITH: Let me make some factual inquiries
10 here. The posture here is a little bit different. The last
11 time, we pointed out to Mr. Flynn and Mr. Thomas that
12 FEMA's going to come to the hearing depending upon the value
13 to be obtained from the RAC advice, then they're going to
14 have to permit some inquiry into the soundness of that
15 advice. And that is pretty much what Mr. Flynn decided,
16 that maybe they would allow some inquiry into it. And then
17 there were other considerations.

18 But it seems to me that we have a situation here
19 which is somewhat similar to -- I thought maybe Mr. Flynn
20 would have cited it but I don't see it -- it's Sears v. NLRB
21 (National Labor Relations Board) in which you have the case
22 of the NLRB general counsel -- if not general counsel,
23 another legal officer; general counsel, I believe -- who in
24 the first instance makes a determination whether there's an
25 unfair labor practice. If he decides that there is none,

1 then that ends the matter, and that becomes the decision of
2 the NLRB as to which the deliberative process would apply.

3 If he decides that there is an unfair labor
4 practice, he brings his case and must prove it factually.
5 And in that event, the deliberative process privilege would
6 stand and there would be no benefit or need to set it aside
7 because the case would have to stand or fall on its legal
8 and factual merits.

9 In this instance, FEMA's going to bring Mr Donovan
10 to the hearing, and their decision is whatever it is. And
11 typically traditionally it would fit the deliberative
12 process privilege; that they have arrived at a policy
13 position as an Agency, and they're ready to defend it on its
14 discoverable factual merits.

15 Now, where things get complicated is where FEMA
16 says, hey, we've got a neat little RAC here that supports
17 us. If that's given any weight at all, then the validity of
18 the RAC advice has to be probed. The underlying difficulty
19 we have here is that the concept of a FEMA rebuttable
20 presumption in NRC rules is by and large unworkable. I
21 mean, not unworkable, but it becomes by and large irrelevant
22 as we get into any of these cases.

23 I'm inclined to think that the RAC advice is
24 important to FEMA and the deliberative process should be
25 preserved. But then again, I'm inclined to think also that

1 the RAC should be forgotten in this proceeding, because
2 they're not going to be there to testify. Their rationale
3 is not going to be probed. The value of their advice cannot
4 be tested.

5 It is of no value to us. It is no value to the
6 evidentiary record. It is no value to the Courts on appeal.
7 It is no value to anybody if it cannot be tested and probed.

8 Now, I think just exactly as we said a year ago,
9 just about a year ago -- more than a year ago -- I said to
10 Mr. Flynn, if you're going to come in with your FEMA
11 rebuttable presumption and you're going to come in with your
12 RAC, it's not going to get you anyplace unless you can
13 defend it. And nothing has changed.

14 MR. FLYNN: Your Honor, I detect a question in
15 there about what is our posture in this phase of the hearing
16 with respect to the RAC. And it's different than it was in
17 the last phase. I'm happy to share with everybody on this
18 conference call what I told Mr. Traficonte the other day.

19 And that is, what Mr. Donovan did was, as the plan
20 was submitted to him, he did field verification of
21 everything that he was capable of verifying. He drafted the
22 RAC report which is a different process than some of the
23 other RAC chairmen, although not all of them. He submitted
24 the draft review of the SPMC to the RAC, asked for comments.

25 The volume of comments was somewhat briefer than

1 it would be had he waited for them to do the drafting. They
2 met a couple of times around the draft and the end product
3 was the result.

4 I'd be happy to represent --

5 JUDGE SMITH: And that's the end result you're
6 going to present in the hearing?

7 MR. FLYNN: Yes.

8 JUDGE SMITH: Then how can you have the
9 deliberative process you're going to depend upon. Or are
10 you going to in any way point to RAC and ask us to give its
11 counseling to Mr. Donovan any weight in this proceeding?

12 MR. FLYNN: No, and that's my point, Your Honor.
13 It happens that we followed that process. That is what our
14 regulations call for us to do. But that doesn't, but we are
15 not asking the Board to give our opinion greater weight
16 because we consulted the RAC, not at all.

17 Mr. Donovan is, I'm satisfied as counsel for FEMA
18 that Mr. Donovan is the best witness we can put forward, and
19 he's perfectly capable of defending FEMA's conclusions on
20 the strength of his own qualifications and the work that he
21 did.

22 JUDGE SMITH: So your position this time is 180
23 degrees different. The last time I asked you if you were
24 going to depend upon the RAC review, you said, yeah. And
25 then I said, well you better, if you're going to, you have

1 to allow it to be probed. This time the RAC is out of it.

2 Is that correct?

3 MR. FLYNN: Well, I'm not -- it's not 180 degrees
4 difference, and I had to assign a number. But what I'm
5 saying is we did consider the RAC views. It means something
6 to FEMA that the RAC agrees with us, but I'm not asking the
7 Board to attach any weight to that.

8 JUDGE SMITH: Well, yes. You don't even, as far
9 as I can see, you don't even want us to know about it,
10 right? There's no reason for us to even know it.

11 MR. FLYNN: Go into that, yes.

12 JUDGE SMITH: Right. And that would be your
13 litigative position in the case?

14 MR. FLYNN: Yes.

15 MR. TRAFICONTE: Well, Your Honor, I'd just like
16 to -- well, I have a couple of follow-up points on this
17 development.

18 MR. TURK: John, if you would, could you hold and
19 let me --

20 MR. TRAFICONTE: Sure.

21 MR. TURK: -- add to what Joe said and then maybe
22 you could respond to both of us.

23 MR. TRAFICONTE: Sure.

24 MR. TURK: Your Honor, as was disclosed in the New
25 Hampshire litigation, the RAC is advisory to FEMA. FEMA can

1 take their advice or disregard their advice, or do whatever
2 they want with it. So I don't see any problem in Mr. Flynn
3 saying to you that FEMA is relying on the views and on the
4 testimony of Mr. Donovan. Not that they disregarded the RAC
5 or didn't go through the process of RAC consultation, but
6 Erin is proceeding to present FEMA's views and that's what
7 they're going to do.

8 MR. TRAFICONTE: Well, that makes Mr. Turk's
9 comment tries to do away with Mr. Flynn's comment. It's
10 either different or it isn't. It sounds to me like FEMA's
11 taking the position that this time we really are getting a
12 different kind of process. We've got a one person. Mr.
13 Donovan has come in, he's come in from Washington. He's
14 been assigned this task and he's conducted his review. And
15 the FEMA report is really just his report.

16 MR. TURK: Mr. Flynn did not say that. Mr. Flynn
17 indicated that he did draft the report and sent it to the
18 RAC to collect their comments.

19 MR. TRAFICONTE: But Mr. Flynn also said that the
20 advise of the RAC is of no legal significance whatsoever.

21 MR. TURK: He said that in the New Hampshire
22 proceeding, as well.

23 JUDGE SMITH: No, he didn't. That's not my
24 memory.

25 MR. TURK: I remember an argument, Your Honor. In

1 fact, Mr. Thomas was the one who espoused it chiefly. And I
2 believe FEMA --

3 JUDGE SMITH: We have already had offered in this
4 case and received into evidence, Mr. Thomas' testimony.

5 MR. TURK: That's right, which has specifically
6 referenced the RAC.

7 JUDGE SMITH: Yes, right.

8 MR. TURK: That's the way they phrased it last
9 time. They're not phrasing it that way in their testimony.
10 Well, I haven't seen their testimony, but I presume based on
11 what was just said, that the testimony will come in and say
12 that the RAC told us and that's what we're doing.

13 JUDGE SMITH: Well, I think that we can perhaps
14 agree that Mr. Flynn was somewhat vague -- and I don't want
15 to use the word, evasive, but he was not as responsive as
16 other attorneys I've seen, when the Board pressed him on the
17 role of the RAC in the proceeding. They seem to try to have
18 the best of both worlds.

19 MR. FLYNN: Your Honor, I will accept that
20 characterization. But I would like to point out in my own
21 defense that it took me some time to understand where it's
22 concern was.

23 JUDGE SMITH: Yes. And if they did not have a
24 meeting of the minds, then there was a problem. But I
25 understood the situation to be that the only reason we would

1 inquire into the underlying process of the RAC was because
2 it was part and parcel of FEMA's position. And otherwise,
3 as we said at that time, we recognized the very important
4 value of the deliberative process privilege.

5 And it is important in that you have an obligation
6 to weigh it. If you want to preserve the deliberative
7 process privilege and the value of that advice, then you
8 can't take advantage of it in litigation. And that's we
9 were and now I think you're coming around to where,
10 practically speaking, you should have been to begin with.

11 MR. FLYNN: Well, it also happens that the --
12 well, there were two things that are different: one is the
13 process is somewhat different. That's --

14 JUDGE SMITH: Wait a minute. Wait.

15 That's Mr. Flynn.

16 All right, go ahead, Mr. Flynn.

17 MR. FLYNN: Yes. What I started to say that I'd
18 like to point out there are two things which are different
19 this time.

20 One is that the RAC Chairman drafted the report
21 and is the principal author of the report, of the plan.
22 That's one difference.

23 And the other is that evidence which we intend to
24 present, the testimony which we intend to present doesn't
25 depend for its effectiveness or its weight on what RAC said.

1 They're offering Mr. Donovan as the spokes person for FEMA
2 as the person who developed the position and is the one most
3 able to explain it.

4 JUDGE SMITH: All right. We're going to ... the
5 Board's --

6 MR. TURK: Mr. Flynn, you have to confirm one
7 thing. Mr. Donovan did consult with the RAC.

8 MR. FLYNN: Yes, I've said that several times.

9 MR. TURK: Yes.

10 MR. FLYNN: That's essential. I mean, we did that
11 because we always do that. But that's not part of the case
12 that we're presenting.

13 MR. TURK: Yes. I at least understand that, Your
14 Honor. I don't know if Mr. Traficonte does.

15 MR. TRAFICONTE: I was just sitting here in my own
16 mind, forming a proposed finding of fact, Your Honor. Which
17 was that, based on discovery, we would urge that the Board
18 disregard or give no weight to the FEMA position. Because
19 contrary to its normal deliberative and collegial process of
20 getting the expertise of upwards of I think it's eight or
21 nine other Federal agencies, each with separate expertise,
22 when it came to a utility plan for Seabrook, they decided to
23 bring in one of their own members. appoint him RAC chairman,
24 and he basically did the whole thing himself.

25 And they, for their part, would just as soon not

1 have us inquire in any way as to what input he received from
2 those agencies who are supposed to be more expert than FEMA
3 on various parts of planning.

4 JUDGE SMITH: Is Mr. Donovan --

5 MR. TRAFICONTE: This is the problem I hear.

6 JUDGE SMITH: Is Mr. Donovan Mr. Thomas' successor
7 as the Chief of the Radiological and Natural Hazards
8 Division?

9 MR. FLYNN: No. He is detailed to Region One.
10 His home is in the State of Washington. In fact, he lives
11 there if he hasn't moved to the East Coast. He has other
12 duties in the State of Washington, but he's detailed to
13 FEMA's Region I office for the matters pertaining to
14 Seabrook.

15 MR. TURK: He is also, Your Honor, the RAC
16 Chairman of FEMA Region 10 which is located in the State of
17 Washington.

18 MR. FLYNN: That's correct.

19 MR. TURK: His normal responsibilities are to
20 Chair the RAC and to review plans.

21 JUDGE SMITH: Is he, he's representing the views
22 of the Federal Emergency Management Agency in this
23 proceeding?

24 MR. FLYNN: Yes.

25 JUDGE SMITH: Regardless of what his position is

1 with respect to the RAC?

2 MR. FLYNN: Yes.

3 JUDGE SMITH: He could have been perhaps not the
4 Chairman of RAC, and still have been selected for that, just
5 as Mr. Keller was?

6 MR. FLYNN: Yes.

7 JUDGE SMITH: Is that correct?

8 MR. TURK: Well, -- Your Honor, this is Sherwin
9 Turk. I won't attempt to speak for Joe Flynn but there's a
10 difference. Mr. Donovan's normal duties include the review
11 of off-site emergency plans and presenting the technical
12 positions on behalf of FEMA with respect to those plans.

13 Mr. Keller, by contrast, was an outside consultant
14 employed by a DOE laboratory.

15 JUDGE SMITH: But nevertheless, he had no
16 responsibility with respect to RAC but he came there and he
17 presented the technical position of FEMA as to which the
18 parties urge that the Board find to be not rebutted under
19 Section 47(a)(2).

20 MR. FLYNN: There may be a misunderstanding here.
21 It is not irrelevant that he was RAC Chairman. He, that's
22 the position to which he was assigned, to which he was given
23 --

24 JUDGE SMITH: You mean Donovan? Donovan?

25 MR. FLYNN: To Donovan.

1 JUDGE SMITH: It's not relevant or it is relevant?

2 MR. FLYNN: Well, --

3 MR. TURK: He said it was relevant.

4 MR. FLYNN: -- it's relevant in the sense that
5 that is the vehicle by which he got involved in the review
6 of this plan.

7 MR. TRAFICONTE: That isn't just a contingent
8 fact, is it, Mr. Flynn? That's what I can't understand.
9 I'm sharing the --

10 MR. FLYNN: Well, it's confusing because we've got
11 three different people trying to interpret this three
12 different ways, I think. All I am saying is that the Board
13 shou'dn't give Mr. Donovan's testimony any greater weight
14 than he deserves because of the persuasiveness of his
15 testimony because he happens to have consulted the RAC, or
16 because he happened to have been the RAC Chairman.

17 JUDGE SMITH: And you're saying that this presence
18 there as a witness does not depend upon him being a RAC
19 Chairman. Now, they're related but it doesn't depend upon
20 it.

21 MR. FLYNN: I think that's what I'm saying. Part
22 of the reason he was chosen as our witness was he, more than
23 any other person, has been involved with the review of that
24 plan.

25 JUDGE SMITH: Well, I think we have a Sears v.

1 NLRB situation here.

2 MR. TRAFICONTE: Your Honor, I did not hear that
3 sentence. Could you repeat that?

4 JUDGE SMITH: Well, I'm alluding to the case, I
5 haven't seen it cited lately but it's a case, when FEMA
6 arrives at its final position and is willing to defend it in
7 the hearing on the factual merits, on the logical merits,
8 the advice it receives from its advisors should be
9 privileged.

10 Now, if FEMA receives factual information from
11 RAC, factual information from its advisors as to which it
12 puts into its testimony and conclusions, that's another
13 matter. But if it's simply a matter of advice, helping FEMA
14 understand the situation, and then FEMA in turn defends its
15 position on the factual and logical merits, you have a Sears
16 v. NLRB situation. Which, if I'm not mistaken is, and I
17 don't have a cite for you, but I think it was decided on the
18 same day that Gruman v. Renegotiation Board was decided in
19 1975. And you can probably find it right next to there in
20 the U.S. Reports.

21 Aren't you all familiar with this case?

22 MR. TRAFICONTE: I have to admit, Your Honor, that
23 I'm not. But I think I get the thrust of it as you've
24 described it. Factual input cannot be concealed or not
25 disclosed under some theory of deliberative process.

1 JUDGE SMITH: Factual, and that's not my point.
2 However, what you're saying is true. Factual input cannot
3 be hid under the deliberative process.

4 MR. TRAFICONTE: Right, right.

5 JUDGE SMITH: Pure advice to the FEMA official who
6 then must defend his position with or without that advice,
7 with or without it, who then must defend his position based
8 upon the factual and logical merits is entitled to that
9 privilege, to protect the availability of that advice.

10 MR. FLYNN: I will represent that that is the
11 situation that we have. We are not coming to the hearing or
12 to the deposition with actual information which we gleaned
13 from the other RAC members. It was the advice of the type
14 that you suggested as the alternative.

15 JUDGE SMITH: As a matter of fact, it is important
16 that the advice available to the FEMA officials, be it bad
17 advice, good advice, any kind of advice, and it can be
18 consistent with or inconsistent with its final position, and
19 still must be protected.

20 MR. FLYNN: Your Honor, I would agree with that,
21 but I'd like one clarification. When Mr. Traficonte
22 indicated that factual inputs cannot be hidden, with which
23 Your Honor agreed --

24 JUDGE SMITH: That's right.

25 MR. FLYNN: -- I have no trouble with that as long

1 as we understand that when RAC members give advice, it's
2 based upon the facts and considers the facts that is known
3 to --

4 JUDGE SMITH: That's different.

5 MR. FLYNN: Right, but in other words, the advice
6 may say, look at these particular facts of which you are
7 already aware, and here's my view of how that affects your
8 decision.

9 JUDGE SMITH: Yes, here we're talking about --

10 MR. FLYNN: You can't withhold that whole thing if
11 the facts are already present, that's just a restatement of
12 facts in promulgation of the advice.

13 JUDGE SMITH: Remember the Costel case, you know,
14 the Costel -- well, you ought to. It's up there in New
15 Hampshire, the Costel v. EPA case where he got his advice
16 off the record with new factual info. What I'm saying is,
17 if the RAC gave advice which advice was predicated upon the
18 facts made known in this case, and made known and made
19 available in this case, the nature of that advice is to be
20 protected.

21 If Mr. Donovan is going to come to the hearing
22 with factual input, say from the meteorologist there, you
23 know, new meteorological information or whatever, then the
24 fact that it is an advisory group does not protect it. It
25 is a legitimate source of discovery.

1 It is advice and not any factual input which is
2 protected.

3 JUDGE SMITH: Now, you have as you say, a dog, in
4 this fight, Mr. Dignan. We want to hear from you, too.

5 MR. DIGNAN: I'm not sure that I can add much
6 except to say that I agree the request is too broad. I
7 wanted to be clear on one thing.

8 As I understand it, if Mr. Flynn loses all the way
9 here -- I'm not saying he should or will -- all he's asking
10 for is to the 18th to produce documents?

11 JUDGE SMITH: No, no. He wants a ruling on
12 several items here and the time, we didn't even get to the
13 time.

14 MR. DIGNAN: No, my point is what he wants, the
15 most he wants is the 18th, and since I have said I won't
16 file any disposition motions until the 19th or later, at that
17 point I really ceased to have a dog in the fight.

18 JUDGE SMITH: Okay.

19 MR. DIGNAN: I agree entirely with the position
20 that Mr. Flynn is taking in terms of the breadth of this
21 business and the relevancy of such things as the White House
22 and that sort of thing. But I don't want to bore you by
23 repeating it.

24 JUDGE SMITH: All right. Now, as to the RAC, our
25 ruling is this.

1 That based upon your representation that Mr.
2 Donovan's testimony representing FEMA will stand or fall on
3 its own factual merits and its own logic, without regard to
4 the RAC advice, we will rule that the RAC advice is covered
5 by the deliberative process privilege.

6 With respect to communications from Governor
7 Sunnunu and the White House, it may not have been your
8 intention, Mr. Traficonte, but had you not explained that,
9 we would have thought that perhaps there was the corrupt
10 process underlying that. And we're not going to support
11 discovery under that theory.

12 As it turned out, FEMA's final position in the
13 earlier phase through Mr. Keller is the, just as the Board
14 predicted from the first day of this hearing, is the input
15 from FEMA that we found to be valuable. We anticipate that
16 Mr. Donovan's testimony will have to stand or fall upon his
17 logic, the factual predicates for it, and his legatory
18 analysis.

19 I think that the last hearing demonstrated that
20 FEMA's findings do have to stand upon their own merits if
21 they're going to be of any value in a contested proceeding,
22 as this one is.

23 Now, what do we have left?

24 MR. TRAFICONTE: Well, Your Honor, quite a bit.
25 As I said at the outset, I think that certainly we wanted

1 RAC input documents. But if you just pass your way through
2 the request, and there's still other material that I
3 continue to believe that is not protected by deliberative
4 process.

5 JUDGE SMITH: Okay, right. We're coming to Supp
6 1, now. And I don't know how to handle that one. I mean,
7 that's --

8 MR. TRAFICONTE: It seems to me it would be part
9 of regulatory analysis that you were just outlining.

10 JUDGE SMITH: Well, the difficulty with NUREG 0654
11 and FEMA 1 are no more than staff guidance as to which the
12 Board is not bound, but has become the universal study by
13 which emergency plans are judged, even the parties, there's
14 not even much dispute in this because even interveners site
15 the standards of 0654, and the Commission has repeatedly
16 referred to NUREG 0654 as a basis in their adjudications for
17 arriving at various conclusions.

18 So NUREG 0654 has almost achieved the status, or
19 at least the persuasive value of a regulation. Now, Supp 1,
20 I don't know about that. That's different. I mean, Supp 1
21 is the product, as far as I can see, of some NRC Staff
22 members and some FEMA Staff members, and nothing more,
23 absolutely not one thing more. It is just their view.

24 If FEMA has used Supp 1 as a criteria and a
25 standard for its evaluation, if they don't want anybody to

1 go behind Supp 1, well, then that might put a limit on the
2 value that can be given to FEMA's evaluation. If they're
3 going to depend upon it, I think that the analysis
4 underlying it should be provided.

5 I don't know. To us, as it stands right now, it's
6 just another paper, another piece of paper.

7 MR. TURK: Your Honor, this is Sherwin Turk.

8 I don't agree with that. From what I understand
9 about this discovery from the Mass A.G.'s office, what it
10 looks to do is to get at the background of NUREG 0654, Supp.
11 1. That's simply not an issue. If the Board is correct,
12 and I think they definitely are, that NUREG 0654 is a
13 guidance document and indeed Supp 1 is a guidance document,
14 the Mass A.G.'s approach should be to try to show that there
15 are some other means of compliance with NRC regulations
16 apart from NUREG 0654, Supp 1.

17 It simply doesn't matter why Supp 1 was drafted.
18 The issue is how do you satisfy the regulations. Supp 1
19 provides you a guidance as to one method of compliance. The
20 Mass A.G. may decide they want to show some other means.

21 JUDGE SMITH: All right. Well, let me say this.
22 The Supp 1, say it's equivalent to a regulatory guide.

23 MR. TURK: And it is, Your Honor.

24 JUDGE SMITH: All right, with respect to the
25 applicants, the NRC Staff and FEMA could not be heard to say

1 that if they meet the requirements of Supp 1, they do not
2 comply with the regulations.

3 MR. TURK: I'm sorry?

4 JUDGE SMITH: With respect to the license
5 applicant or the license holder, and when NRC puts out a
6 regulatory guide or a guidance document, they will be pretty
7 well stuck with that guidance viz a viz the license holder
8 or the license applicant.

9 MR. FLYNN: Yes, Your Honor, that is our position.

10 JUDGE SMITH: Right.

11 MR. TURK: I'm not sure I understand it, Your
12 Honor.

13 JUDGE SMITH: Well, not with respect to a third
14 party, in my view. Who is giving this guidance? Who is the
15 guider, who is the guide on this, on Supp 1? Who? What's
16 his name?

17 MR. FLYNN: I would like to address that. I want
18 to be sure that you understand the evolution of Supp 1.
19 When the NRC changed the rule, that is, 50.47C.1, the
20 provision for utility sponsored plans, the problem became
21 how you apply NUREG 0354 to a utility sponsored plan. There
22 are things in NUREG 0654 that obviously pertain to State and
23 local governments and those governments only.

24 The evolution of Supp 1 was in adaptation of NUREG
25 0654 so that those references or those requirements that

1 could not be made to apply to utilities were removed. And
2 that's what it was, it was an adaptation.

3 MR. TURK: If I can clarify that a little bit,
4 Your Honor?

5 As I recall, it was FEMA's request that there be
6 an additional guidance document developed beyond 0654 which
7 deletes statements such as "state and local government are
8 responsible to do something" and instead made specific
9 reference that those requirements are to be subsumed by
10 utilities. It really was a sort of a typographical
11 correction of 0654 to specifically reference utilities.

12 JUDGE SMITH: We understand where it came from.

13 MR. TURK: But in fact, it is a guidance document
14 and if an applicant demonstrates that it complies with 0654,
15 Supp 1, then in my view, that's good enough to satisfy the
16 regulations.

17 JUDGE SMITH: Well, that is with respect to the
18 NRC Staff, but not with respect to an intervenor.

19 MR. TURK: Well, the intervenor's option at that
20 point is to say, wait a minute, the regulations state
21 something different from -- or, I'm sorry, the regulations
22 specify something which cannot be fulfilled except in some
23 other matter.

24 JUDGE SMITH: Well, do you believe an intervenor
25 is bound by the Staff's interpretation of the regulation

1 through a guidance document? Where's their hearing?

2 MR. TURK: As I recall the use of guidance
3 documents in our proceeding, the guidance document
4 establishes one means to comply with the regulations.

5 JUDGE SMITH: With respect to --

6 MR. TURK: And only to comply with it, it's one
7 means.

8 JUDGE SMITH: Oh, yes, what you say is correct,
9 Mr. Turk, but only with respect to the Staff and the license
10 holder.

11 MR. TURK: And with respect to the Commission,
12 itself.

13 JUDGE SMITH: No.

14 MR. TURK: The argument that applicant
15 demonstrates that it complies with our guidance documents.
16 And the Commission has a basis to say, that's enough under
17 our regulations.

18 MR. FLYNN: I understand your point to be, Your
19 Honor, that the interveners are free to argue that the
20 standard should be something else or the interpretation of
21 the regulation should be something other than what is
22 announced in the guide, in the regulatory guide.

23 JUDGE SMITH: That's what I believe.

24 MR. FLYNN: We would accept that as a correct
25 statement of the law.

1 JUDGE SMITH: They are free to argue that even
2 though you comply with Supp 1, you do not comply with the
3 regulation.

4 MR. FLYNN: Yes. That is a legitimate argument.

5 JUDGE SMITH: And I think it is a correct one,
6 valid one. But that doesn't handle the whole problem as,
7 again, what are we going to do with Supp 1 at the hearing?

8 We've always accepted NUREG 0654, largely because
9 of its inherent logic and because of its long tradition and
10 because of the Commission's express blessing of it. I don't
11 see where that is on Supp 1. That's the problem. And I
12 don't know how important it is.

13 We can read the regulation as well as the authors
14 of Supp 1. That's different. Supp 1 tends to be a
15 regulation interpretation while NUREG 0654 is the basis for
16 the regulation in a large respect.

17 MR. TURK: Your Honor, as I recall Supp 1, and I
18 don't have it in front of me; I'm out of the office at this
19 time, that it really does nothing more than simply makes the
20 specific mention of utilities. And really it doesn't add
21 any kind of a requirement or any kind of a guidance beyond
22 specifically referring to utilities in lieu of the prior
23 reference to state and local governments.

24 JUDGE SMITH: Exactly, Mr. Turk. And I view Supp
25 1, as far as the NRC is concerned, as saying, you, the NRC

1 staff, the NRC Staff. Farmers say to a licensee that if you
2 comply with Supp 1, we will deem you as having complied with
3 the respective regulation. It says, we will, you, as the
4 Staff, not the NRC Commissioners in an adjudicatory sense.
5 It is not a regulation. That you do not bind interveners
6 with that or foreclose yourself from contending otherwise in
7 any adjudication.

8 MR. TRAFICONTE: Your Honor, could we go off the
9 record for just about 30 seconds?

10 JUDGE SMITH: Yes. You mean you want to talk to
11 us off the record.

12 MR. TRAFICONTE: Well, I'd like to talk to the
13 whole group of us off the record.

14 JUDGE SMITH: All right, off the record.

15 (Discussion held off the record.)

16 JUDGE SMITH: (Back on the record.)

17 We've already ruled on the RAC. We're not going
18 to give you Mr. Donovan's telephone logs. I don't see that
19 that's going to lead to anything at all that's going to help
20 you, considering our ruling on the RAC. We're not going to
21 support a corrupt process through discovery.

22 We will not arrive at any conclusion on the
23 regulatory significance of Supp 1, other than my general
24 discussion of it, except we will rule that we don't need
25 Supp 1 in a contested proceeding with interveners to the

1 extent, as I read it, and I'll go back and read it again, it
2 is simply an interpretation of a regulation as to which
3 we're bound to interpret ourselves. So therefore, any
4 discovery into the background of it is not likely to lead to
5 evidence that you can use.

6 And I'm going to read Supp 1 again and see if
7 that's correct. That's different from the basic document
8 which has a lot of technical bases in it. So that will be
9 our ruling. We won't require production of the underlying
10 rationale of Supp 1 at this time.

11 We'll return to it after we look at it.

12 And I think that pretty well takes care of the
13 dispute.

14 MR. FLYNN: There was the question about documents
15 relating to the selection of Mr. Donovan?

16 JUDGE SMITH: That's out.

17 MR. FLYNN: Okay.

18 Now, what's the time scale?

19 MR. FLYNN: There's no problem. We can comply
20 with the remaining discovery requests in time for the
21 deposition on the 9th.

22 MR. TRAFICANTE: Now, let's see if I understand
23 the scope of the ruling.

24 Mr. Flynn, are you interpreting the ruling to be
25 that you'll be satisfying this request if you give me the

1 resume of Mr. Donovan and --

2 MR. FLYNN: No, we -- John, I told you the other
3 day, we'll give you the resume plus the records of our
4 correspondence with New Hampshire. There may be some other
5 things, too. I'll have to go through and look at what we
6 have. But you'll get that much at least.

7 JUDGE SMITH: All right. Now, I think we've come
8 far enough that if you can't resolve it on what we've ruled,
9 you can ask for an off-the-record telephone conference
10 tomorrow with just the two of you, which we can set up
11 immediately.

12 Would that be all right?

13 MR. TRAFICONTE: That's fine.

14 JUDGE SMITH: Then Mr. Traficonte can go on, okay?
15 Anything further this evening?

16 MR. TURK: Your Honor, just to note one thing for
17 the record. There is a pending motion for summary
18 disposition filed by the applicants which Mr. Traficonte has
19 asked for an extension of until, response until November
20 7th, and the Staff had asked for November 21, two weeks
21 after the Mass A.G.'s response.

22 JUDGE SMITH: Okay. Now, Mr. Traficonte, before
23 you leave, when I gave Mr. Turk that extension on the
24 telephone, I pointed out that if he supports the Applicant's
25 Motion for Summary Disposition, you get another round if he

1 raises any new -- if he supports it, you get another round.

2 MR. TURK: To the extent to which I raise new
3 arguments not covered by the applicant.

4 JUDGE SMITH: Yes. And if you don't raise new
5 arguments, why're you going to do it?

6 MR. TURK: I'd like to think my writing carries
7 some persuasion in this, Your Honor.

8 JUDGE SMITH: Well, then, there you go, you see.
9 The better you are, the more Mr. Traficonte gets another
10 shot at it. But you read the rule, just that we're
11 cognizant of it.

12 Anything further?

13 All right, we're adjourned. Thank you very much.

14 (Whereupon, at 5:00 p.m., the hearing in this
15 matter was concluded.)

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CERTIFICATE

This is to certify that the attached proceedings before the
United States Nuclear Regulatory Commission in the matter of:

Name:

Docket Number: 50-443-OL OFF SITE
50-444-OL EMERGENCY PLANNING

Place: Bethesda, Maryland

Date: November 2, 1988

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

ISI K. C. Sekander
(Signature typed): K. C. SEKANDER

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