

# **Official Transcript of Proceedings**

## **NUCLEAR REGULATORY COMMISSION**

Title: Stakeholder Meeting on a Rulemaking Plan to  
Reduce the Scope of Part 26 Regarding  
Random Drug and Alcohol Testing  
(SECY-00-0022)

Docket Number: (not applicable)

Location: Rockville, Maryland

Date: Thursday, March 22, 2001

Work Order No.: NRC-119

Pages 538-601

**NEAL R. GROSS AND CO., INC.**  
**Court Reporters and Transcribers**  
**1323 Rhode Island Avenue, N.W.**  
**Washington, D.C. 20005**

**(202) 234-4433**

1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION  
3 + + + + +  
4 STAKEHOLDER MEETING ON A RULEMAKING PLAN  
5 TO REDUCE THE SCOPE OF PART 26  
6 REGARDING RANDOM DRUG AND ALCOHOL TESTING  
7 SECY-00-0022

8 + + + + +  
9 THURSDAY,  
10 MARCH 22, 2001

11 + + + + +  
12 ROCKVILLE, MARYLAND  
13 + + + + +

14 The Public Meeting was held at 9:00 a.m. in the  
15 Auditorium of the Nuclear Regulatory Commission, Two  
16 White Flint North, 11545 Rockville Pike, Mr. Garmon  
17 West of the Office of Nuclear Reactor Regulation,  
18 moderating.

19 PRESENT:

20 GARMON WEST	NRR
21 RICHARD ROSANO	NRR
22 GARY MIZUNO, ESQ.	OGC
23 CHUCK MULLINS, ESQ.	OGC
24 NANCY DURBIN	MDD
25 EDWARD JOHNNEMANN	NMSS

26  
27 ALSO PRESENT:

28 RICH ENKEBOLL  
29 LORI HAYES  
30 SUE TECHAU  
31 ROBERT SOUTHWORTH  
32 MIKE ROYAL  
33 SHERI ACKERT  
34 MIKE BURRELL  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433



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

(9:06 a.m.)

MODERATOR WEST: Good morning to everyone. Good to see you again. We're shifting gears and going on to yet another topic, but I'm sure it's going to be a lively one as well.

The purpose of this meeting is to have an advance look, if you will, by stakeholders, even before the proposed rule is out. We're not quite there yet. Just to give you a quick overview of what the topic is, we have a proposed amendment before the Commission to reduce the scope of random drug testing for 10 CFR Part 26.

And in a nutshell, what this would mean would be that currently we define it under the program with respect to the protected area. And under this proposed amendment, we would propose that individuals that would be covered for random testing, only random testing, wouldn't affect pre-access or for cause testing. We would define it with respect to the vital area. So that's the main part of it.

And along with that, we would, where it isn't the case now, we would exclude those individuals that have to report under emergency conditions to the TSC and the EOF, the Technical Support Center and the Emergency Operating Facility. And we can get into some of the details a little bit later.

So with that sort of as an overview in mind, whatever comments we get today, we'll treat them as if they are, and they will in fact be public comments, along with the other public comments that we'll receive on the proposed rule once that's issued.

While I'm thinking of it, I might mention the status of the proposed rulemaking effort. Currently, we're slated to have the proposed rule before the Commission in July. However, I might add, we have asked for an extension of that particular date. So we'll have to wait and see what management decides on whether we'll actually get the extension or not. That just gives you some sense of the timing of all this.

What I'm going to do, I'm going to give a rather general overview and then I'll allow -- if Dick wants to make any specific comments, he can certainly do that. And I'd also ask Chuck or Gary, in turn, to fill in with any specifics they may want to offer.

But this particular rulemaking effort goes back some years, and the beginning of it was an IBEW Union request that was around February of 1992. And

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 subsequent to that, there was a court denial of the  
2 IBEW Union in the time frame of June of 1992. And  
3 eventually, as sort of an overview here, our  
4 Solicitor's Office made a recommendation in this  
5 particular area, and that was still in the time frame  
6 of 1992, July of that year.

7 And, ultimately, the staff received a  
8 staff requirements memorandum from the Commission  
9 around August of 1992. And then in December of 1993,  
10 IBEW, the Union, submitted yet another exemption  
11 request in December of 1993. And around 1994, the  
12 staff put together a Commission paper, SECY-94-016,  
13 essentially pulling together the various issues on  
14 this topic for the Commission. And towards the middle  
15 of that year, there was a Federal Register Notice, and  
16 in effect what it did it proposed various options.  
17 One of them was the option that I mentioned, namely,  
18 to define random testing with respect to the vital  
19 area as opposed to the protected area. And then there  
20 were three or four other options. Dick might want to  
21 mention some of those, and we can get into those  
22 details a little bit later.

23 And then to sort of bring us up to date,  
24 most recently, the Commission approved SECY-00-0022,  
25 and that's the document that's out on the handout  
26 table that I'm sure most of you do in fact have a copy  
27 of. And that particular document, the rulemaking  
28 plan, recommended the particular option that I've  
29 mentioned already and along with a couple of other  
30 things that the staff hadn't actually recommended,  
31 like a risk analysis. We eventually got a staff  
32 requirements memorandum back, essentially telling us  
33 to move forward with the rulemaking.

34 So that is sort of a thumbnail sketch of  
35 where we are. I have specific topics that I would  
36 have us to perhaps focus on and get some feedback from  
37 you on with respect to the proposed rule.

38 I'd only add one caveat, however. When  
39 rulemaking is either before the Commission or about to  
40 go before the Commission, it puts the staff in  
41 somewhat of an awkward position in that you're dealing  
42 with the issue of pre-decisional material. So if I  
43 seem sort of tentative sometimes on certain responses,  
44 that's essentially it. The way I tend to try to deal  
45 with that is to try to frame whatever I'm going to say  
46 or whatever I'm going to answer in terms of what is  
47 publicly available, and that would be bounded by the  
48 rulemaking plan. So most of my responses will be  
49 relative to that.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1                   So we don't have a whole lot of time,  
2 although we'll have whatever time we need, but we're  
3 slated to devote from nine to 10:30. If it takes a  
4 little bit longer than that, that's fine. So let's  
5 get started. Did you want to make any -- excuse me,  
6 Chuck?

7                   MR. MULLINS: Let me give you a little bit  
8 of a brief rundown. I argued the case in the 9th  
9 Circuit in 1992. To give you a little more  
10 information, the Union came with an exemption request.  
11 Under 26.6, any person can request an exemption; it  
12 doesn't have to be a licensee. So the Union requested  
13 an exemption for several different categories of  
14 workers. They requested an exemption for reactor  
15 operators, maintenance workers, warehouse workers, and  
16 clerical and support workers.

17                  Now, you have to understand at Diablo  
18 Canyon, which is where the request came from, the  
19 administration building is inside the protected area.  
20 In most facilities, the administration building is  
21 outside the protected area. And so you've got very  
22 few people who are clerical or janitorial or cafeteria  
23 workers or whatever who have unescorted access to the  
24 protected area.

25                  The Union then later withdrew the request  
26 for reactor operators. The Commission denied the  
27 request, and the Union challenged that denial in  
28 Court. The Court -- and I did not put a legal cite to  
29 the decision, but I can get it for you at some point  
30 if you want it -- the Court said -- and the decision  
31 is published, by the way, in the Federal Second Report  
32 -- the Court said that they upheld the testing for  
33 maintenance workers, because they clearly perform  
34 duties.

35                  If you look at the Supreme Court decision  
36 in Skinner, which was the main decision on this issue,  
37 it talked about the duties of people who were subject  
38 to random testing. They said the warehouse workers  
39 performed duties that if other people didn't do their  
40 jobs correct, bad parts, the wrong parts could slip  
41 into the facility. But they said the clerical  
42 workers, people who did not have any particular duties  
43 which involved the plant -- and on the record before  
44 them they couldn't tell the duties of the various  
45 people involved -- but they said if the duties did not  
46 involve sensitive work -- and I'm paraphrasing here;  
47 you can read the decision for yourself -- but the  
48 Court gave a clear indication that they would  
49 overrule, they would throw out that part of the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 Commission's program when they got the case in the  
2 appropriate posture.

3 The Solicitor, as Garmon said, recommended  
4 it to the Commission. The Commission reviewed the  
5 issue, and the Commission directed the staff to make  
6 a review, and that was at some point what the onus was  
7 in 1994.

8 The Union came in with another exemption  
9 request, which has been on hold pending completion of  
10 the review. The review went on for a couple of years.  
11 It got put on the back burner. Then there was a case  
12 in the Supreme Court from Georgia. The name of the  
13 case is Chandler v. Miller. And OGC suggested that  
14 the Commission hold up the review pending the decision  
15 of that case. Chandler v. Miller sort of capped a  
16 change in trends in the courts. If you look back in  
17 the late '80s and early '90s, courts were pretty  
18 liberal, to use a word, in allowing testing programs.  
19 They pretty much approved just about anything that  
20 went. Starting in the mid-'90s, the courts seemed to  
21 change track and to look more closely at testing  
22 programs. And in Chandler v. Miller, the Supreme  
23 Court seemed to raise the bar for how we reviewed  
24 testing programs. In other words, raise the standards  
25 that the testing programs had to meet.

26 Garmon mentioned the case that came out  
27 yesterday. While it doesn't particularly apply to our  
28 situation, it does reinforce the trend that courts are  
29 looking much more closely and giving much stricter  
30 scrutiny to these types of programs.

31 Briefly, what was going on in South  
32 Carolina was that you had a health clinic run by the  
33 state for giving post-maternal care to mothers.  
34 Apparently, as a -- and, again, I've only been through  
35 the decision once; we'll have it hopefully outside  
36 here by the end of the meeting -- as a condition of  
37 attending the clinic, they had to give a urine sample.  
38 Apparently -- and, again, this is not clear -- but  
39 unbeknownst, at least, to some of them, the results of  
40 that test were given to the police. The police would  
41 then come in and arrest some of the mothers.

42 The Supreme Court, in a six to three  
43 decision, said that's unconstitutional, at least if  
44 it's not a voluntary situation. And they sent it back  
45 for more consideration of whether or not it was a  
46 truly voluntary agreement. Again, I don't think that  
47 the direct ruling has direct implications for our  
48 situation, but it does illustrate a trend for the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 courts giving stricter scrutiny to these types of  
2 programs.

3 Without disclosing or without revealing or  
4 waiving any attorney/client privileges, we have  
5 essentially told both the Commission and the staff  
6 that while we think we have -- if the current testing  
7 program were challenged again on a good record, that  
8 while we think we have good arguments to make, we  
9 don't have significantly different arguments to make  
10 than what we made before, and that we think that  
11 there's a significant chance that we might lose that  
12 situation, or lose that case. And that was  
13 essentially the advice we gave before and essentially  
14 the advice that we've given now.

15 And so that has resulted in the staff  
16 going back and looking at this program and apparently  
17 trying to focus it more closely on the job, the duties  
18 that are involved in the case. And I'll let Mr.  
19 Rosano take it from here.

20 MR. ROSANO: Actually, that's a good lead-  
21 in to my comments. That sets the legal basis. And  
22 just as Chuck and members of the legal community in  
23 the NRC have to be concerned with the legal bases for  
24 our regulations, we have to be concerned with the  
25 propriety of our regulations. We can't -- we talk in  
26 terms of burden and safety and things like that, and  
27 everybody knows we can't establish a burden that  
28 doesn't have the proper nexus of safety, but there's  
29 a certain propriety issue that we have to be involved  
30 with too.

31 Let me begin by saying that I recognize  
32 from the public comments received on the first  
33 issuance of this proposal a few years ago, that the  
34 public comments are not overwhelmingly in support of  
35 changing the scope of random testing, that by and  
36 large, the comments recommended maintenance of the  
37 current scope of random testing. I accept that, but,  
38 again, I want us all to step back from it and look at  
39 the propriety of the regulations and what we have to  
40 concern ourselves with.

41 Probably the safest way for us to protect  
42 the infrastructure of the United States or especially  
43 the nuclear plants would be to randomly test everybody  
44 in the country. But, clearly, that's not appropriate  
45 and clearly not warranted from a safety perspective.

46 An alternative to that might be to  
47 randomly test everyone who lives within a 100 miles  
48 from the plant. That would also probably result in  
49 quite a bit of resistance from the local community,

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 not to mention the sheriff who might would have to  
2 arrest all the people that we'd accidentally pick up  
3 in this sting operation.

4 Another option is to randomly test  
5 everybody who steps on-site at the plant, comes in  
6 through the protected area barrier. We start getting  
7 a little closer to the reason for our regulations, and  
8 it's a little easier to understand, but we still have  
9 to make a connection to safety.

10 The connection to safety in randomly  
11 testing, again, not for cause, but randomly testing  
12 everyone who sets foot on the site, is a little closer  
13 but it's still not as tight as we'd like. And we're  
14 bound by the same principles in regulation as the  
15 licensees are. We should only establish principles  
16 where we can clearly justify them on the basis of  
17 safety. And it became more difficult to justify  
18 randomly testing everyone who set foot inside the  
19 protected area barrier on the assumption that their  
20 unfitness for duty or their use of illegal drugs might  
21 cause them to have a safety impact. So we considered  
22 a variety of other ways to define it.

23 So we considered, for example, the type of  
24 duties, whether they're safety-related duties or not.  
25 There were some problems with that, because a person's  
26 duties shift often, and over short or long periods may  
27 change so that that individual may be working on  
28 safety-related equipment for the first half of the  
29 year and not the second half of the year. Also the  
30 definition of "safety-related" has bedeviled us and  
31 the industry for years. And so that didn't seem like  
32 it was going to work.

33 We considered, instead of the term  
34 "safety-related," to just take certain categories of  
35 employees. But taking a category of employee didn't  
36 say anything about where that person might end up in  
37 the plant at any given time. So defining it by job  
38 classification also gave us some problems.

39 What we leaned on was the venerable  
40 tradition in the NRC of designating as vital pieces of  
41 equipment that are considered vital to safety or to  
42 safe shutdown of the plant. And if we have this  
43 tradition of calling those pieces of equipment vital,  
44 it means that they have, in some way, some  
45 significance greater than the pieces of equipment  
46 outside the vital area.

47 And so if we were trying to find the  
48 clearest connection to safety, it appeared that one  
49 option would be to say proximity to vital equipment

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 was more safety related than your job classification  
2 or whether or not your duties today involve safety-  
3 related duties. So, again, we're going back to  
4 principles again.

5 And so rather than randomly testing  
6 everyone in the country or everyone within 100 miles  
7 of the site or necessarily testing everyone simply  
8 because they happen to work at the plant, one logic  
9 was to find a more reasonable safety basis by testing  
10 only those people whose duties brought them into  
11 proximity of vital equipment.

12 It's a principle. The principle is that  
13 we don't want to infringe on individuals' privacy  
14 rights without just cause. In our case, the only just  
15 cause has to be safety. And so we are looking for a  
16 way to make sense of that and to make sense on a  
17 safety basis, which is, again, as a foundation that's  
18 how we arrived at this particular point in defining it  
19 in terms of vital areas.

20 MODERATOR WEST: Thank you. Yes, sir?

21 MR. ENKEBOLL: Rich Enkeboll with NEI. I  
22 quote from the staff requirement memorandum on the  
23 SECY. "The staff should seek detailed comments on the  
24 matter, and as the rulemaking proceeds, undertake a  
25 careful analysis of the balance of public and private  
26 interests." That's just what you said.

27 "In particular, the staff should carefully  
28 assess the risks associated with unescorted access to  
29 protected areas if the scope of random drug testing is  
30 changed in light of the fact that some equipment of  
31 safety significance may be found in the protected  
32 areas outside the vital areas."

33 As you know, 7355 is under review, and in  
34 that process, we understand that there's a  
35 consideration to shift from a vital area concept,  
36 which is more operational, to a target set concept.  
37 We submit that you ought to wait for that rulemaking  
38 to come to fruition which will give you good insights  
39 as to whether there can be any shift in this issue.

40 I would also suggest that the industry  
41 feels that having someone next to them that has not  
42 gone through the wickets that they have, that there  
43 are two groups. One group has got to be under random  
44 testing, and another group doesn't. This will create  
45 a large friction that you don't need. There is some  
46 flavor that it will be less expensive to not test some  
47 people.

48 The problem is you will then probably have  
49 to institute some way of keeping track of these two

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 groups, so that the untested group can find no way  
2 into an area that could be a problem. You have to  
3 probably worry about tailgating. You're going to have  
4 to spend probably several times more money trying to  
5 keep track of this separate group from a safeguard  
6 standpoint than you would otherwise.

7 MR. ROSANO: Can I address these, Rich?

8 MR. ENKEBOLL: Yes. Go ahead.

9 MR. ROSANO: Let me handle the second  
10 group first, what I'll call the practicality issues.  
11 First of all, there is a suggestion that it will be  
12 less expensive to test fewer people on a per capita  
13 basis. And in fact that may not always be true. I  
14 realize there are system issues involved and process  
15 issues that may cost more money. But I would,  
16 however, say that we are dealing with issues of  
17 privacy, constitutional issues of privacy. It is  
18 probably easier to remove everyone's constitutional  
19 rights to privacy. It would probably be much easier  
20 in society to do that. I don't think that we're  
21 looking for an easy solution. We're simply looking  
22 for the right solution.

23 Let me handle the other practicality issue  
24 about the individual who might tailgate into vital  
25 areas. If the vital area concept is used, it would  
26 not suggest that everyone needs to be randomly tested  
27 who violates the procedures at the plant and gets into  
28 areas that they're not supposed to be in. The  
29 population of those to be randomly tested would be the  
30 population of those who are authorized access to the  
31 vital areas.

32 There's another issue involved together in  
33 the licensees being able to adequately monitor the  
34 access to the vital areas and ensure that the wrong  
35 people don't get in there. That's just a separate  
36 issue of access.

37 As for the first question, I think I can  
38 answer that fairly easily, and it's a good point that  
39 you raise about the notion that vital areas might, in  
40 the reevaluation of 7355, become something else. And  
41 without getting too much into the Rep 73 effort, I  
42 will say that one of the concepts that has survived is  
43 the notion of double barriers. Just as now we have a  
44 PA and a VA barrier, in the new rule we will have a PA  
45 and we'll have some other barrier that will be  
46 redefined hopefully more appropriately to our  
47 circumstances. But that double barrier concept would  
48 still be the defining factor in in this rule. And  
49 although vital areas may become something else, there

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 will still be a double barrier. And that second  
2 barrier would then be the defining perimeter for the  
3 testing population.

4 MR. MULLINS: One other point I want to  
5 point out: Remember when you look at Part 26, what  
6 does Part 26 -- what is it designed to prevent?

7 MR. ENKEBOLL: Reliability and  
8 trustworthiness.

9 MR. MULLINS: It's designed to prevent  
10 impairment.

11 MR. ENKEBOLL: Reliability and  
12 trustworthiness, not impairment.

13 MR. MULLINS: Unless I've read something  
14 wrong --

15 MR. ENKEBOLL: Reliability and  
16 trustworthiness.

17 MR. MULLINS: May I finish now? Thank  
18 you. The primary area is impairment, and that's the  
19 first thing that I got asked in court. It's the last  
20 thing I got asked in court. And if we have to go in  
21 and defend it again, it will still be the first thing  
22 I get asked in court. We're talking about impairment,  
23 I believe, unless -- at Part 73 in the pre-employment  
24 testing is more designed for the trustworthiness  
25 aspect. In fact, it was interesting, I was reading  
26 the comments that NEI submitted to OMB where NEI  
27 seemed to say that it was the pre-employment testing  
28 that was the really sine qua non of the prevention  
29 aspect, and the random testing seemed to be -- it was  
30 clearly a much lower priority, unless the --

31 MR. ENKEBOLL: That is not the way it was  
32 intended to read.

33 MR. MULLINS: Well, that's the way it  
34 read.

35 MR. MIZUNO: Well, I guess that just fits  
36 into what I said yesterday about why do we have a  
37 suitable inquiry. And we pointed out that the -- why  
38 ask someone about their past use of illegal drugs or  
39 their past terminations, and would they self-disclose?  
40 And I indicated that part of the reason for doing that  
41 is to see whether they're going to be acting in a  
42 truthful manner. I mean you recall that discussion  
43 that I had. I think this goes back. And I do recall  
44 that some of the comments that we received on testing  
45 refer to the fact that the suitable inquiry in and of  
46 itself was more of a test for the trustworthiness.

47 MR. ENKEBOLL: One other point I wanted to  
48 make was that in this proposed rule there is some  
49 statements about making it voluntary, and we would

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 suggest that there's no such thing as voluntary in  
2 this business, because if it's not by regulation, it's  
3 going to be very difficult for a site to pick one.  
4 They're going to be stuck with whatever the rule says.

5 MR. MULLINS: Look, I keep hearing that  
6 from people. I had some comment from, I believe,  
7 Winston Strom on that a couple weeks ago. You know,  
8 I watch TV around here, and every other day I can see  
9 an ad by some company which says, "We test our  
10 workers, because we don't want people to -- because  
11 you, the public, doesn't want drug-impaired people in  
12 your home." If private companies -- if the Roto-  
13 Rooter can require their employees to undergo drug  
14 testing, if the furniture store down here can require  
15 their employees to undergo drug testing, I don't  
16 understand why you can't inquire unless, of course,  
17 you are a state. I believe TVA would have a problem.  
18 If you're a state employee --

19 MODERATOR WEST: There are about three  
20 states that would have that problem.

21 MR. MULLINS: But most of the rest of you  
22 can require your workers to undergo testing.

23 MR. MIZUNO: Chuck's right. It changes  
24 the basis for the testing from a regulatory basis to  
25 an employment basis. Employers can make employment  
26 decisions within the limits of the state regulations  
27 that allow them, as an employer, to test. We're  
28 simply removing, effectively, the regulatory shield  
29 that employers have used to justify the testing in the  
30 past.

31 MR. ENKEBOLL: One of the problems that  
32 creates is the licensee must then negotiate with his  
33 unions and pay them to do this. And I don't think we  
34 should be put in that position.

35 MR. MIZUNO: If the licensees must  
36 negotiation a better position within the context of  
37 the right decision regarding privacy rights, then I'm  
38 all for it.

39 MR. ENKEBOLL: I yield.

40 MODERATOR WEST: Thank you for your  
41 comments.

42 MS. HAYES: This is Lori Hayes from  
43 Progress Energy. Has the NRC looked at or done some  
44 sort of analysis that we've been using 7356 and Part  
45 26 as a basis that we have insider protection based  
46 through those two programs. And when some of that  
47 with relation to Part 26 is removed, what effect will  
48 that have on the insider and our level to protect

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 against the facility, as we've claimed that we've been  
2 able to with those programs in place?

3 MODERATOR WEST: This is not a specific  
4 answer to the aspect of your question in terms of the  
5 insider, but generally speaking, what was previously  
6 mentioned as far as the staff requirements memorandum,  
7 the aspect in terms of a risk analysis, we are in fact  
8 obliged to do a risk analysis. And that will speak to  
9 --

10 MS. HAYES: So that's ongoing?

11 MODERATOR WEST: Yes. And that will be a  
12 part of the proposed rule.

13 MR. ROSANO: Also, I think that this is  
14 important that we should remember the 7356 is a pre-  
15 employment issue. It's about background -- it's  
16 access authorization, some access controls. And pre-  
17 employment screening for drugs will still be part of  
18 the rule. This only handles random testing which is  
19 post-employment, and that's not what's covered by 7356  
20 anyway.

21 MS. TECHAU: Sue Techau, Excelon. I'm  
22 going to be reiterating and talking about a couple of  
23 the samples that were just cited, but it goes along  
24 with the whole philosophy of my statement.

25 10 CFR 7355 talks about a design basis  
26 threat and what we have to do to defend against  
27 somebody who would try to attack a nuclear station.  
28 Within the design basis threat, we have to consider an  
29 insider threat, and that's what we're talking about,  
30 how we protect against it. We use 10 CFR 7356 to  
31 determine whether a person is trustworthy and reliable  
32 and 10 CFR Part 26. Now, within those rules, it also  
33 talks about for somebody to -- it doesn't designate  
34 between protected area and vital area. Once you're  
35 trustworthy, you're trustworthy.

36 And then it also talks about for somebody  
37 to continue to maintain their unescorted access, they  
38 have to be, one, in a CBOP, Continued Behavior  
39 Observation Program, and, number two, in a random  
40 testing program. So those are already in those rules  
41 that they have to be to continue unescorted access,  
42 that they have to have both those two elements.

43 And I believe that it would create an  
44 administration burden by us trying to have to evaluate  
45 whether or not a person gets upgraded to a vital  
46 access level or removed. Because our security control  
47 room areas are in the vital areas, and the actual  
48 control rooms are in vital areas. Maintenance people  
49 that go in to clean those areas get upgraded on a

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 daily basis. Are we going to be putting in the pool,  
2 taking them out, putting them in, taking them out?  
3 That's an administrative burden that we're all going  
4 to be affected by.

5 The security organizations and the  
6 utilities in the industry have based their design  
7 basis threat from guidance from the Regulatory  
8 Effectiveness Review and the Operational Safeguards  
9 Readiness Evaluations. And we use target sets to  
10 defend against a design basis threat. There are  
11 target sets within the protected area, not the vital  
12 area. And how are we going to protect against an  
13 insider that only has access to a protected area to be  
14 able to defend that, that that person continues to  
15 maintain their trustworthiness and reliability?

16 There was a rule change back in 1997. It  
17 was Federal Regulation -- Federal Register, Volume 62,  
18 Number 231, Section Number 4. It talks about  
19 maintenance of access levels, that we only have to go  
20 down to one access level. We don't have to break them  
21 up and have to administratively -- because I think  
22 there was a comment earlier that we could  
23 administratively break them down, separate the  
24 different one based on the more vital equipment that  
25 we're trying to protect against. And that rule  
26 applied to 7355-D7IA.

27 And under the Statements of Consideration,  
28 it also talks about separate access lists that we had  
29 -- and this is what the whole thing was all about --  
30 that we didn't have to keep them. And it said that  
31 there was no value added by keeping separate lists.

32 Now I know that the NRC is currently  
33 working with the industry to redo 7355. And within  
34 that effort, they're trying to reduce vital areas and  
35 eliminate those and say, "Let's defend against target  
36 sets." That's the industry's stand, and that's what  
37 they want to do.

38 MR. ROSANO: That may be the industry  
39 stand, but I don't want the public here to confuse  
40 that with the NRC's stand, okay?

41 MS. TECHAU: That's what the industry is  
42 working towards, because it was the guidance that was  
43 provided by RER and OSRE to defend against design  
44 basis threats. And it's not all areas that are within  
45 a vital area. There are some within a protected area.  
46 One in particular is the CSTs, or the condensate  
47 storage tanks. They're outside our vital areas;  
48 they're within our protected areas.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 And another statement is that Diablo  
2 Canyon may have their administrative building outside  
3 the protected area, but I can think of one of our 11  
4 that have it outside. Everyone else is inside our  
5 protected area.

6 MODERATOR WEST: I'm sorry, what was that  
7 last point? Everything else, what was that?

8 MS. TECHAU: All of the administrative  
9 buildings are within our protected areas, except for  
10 one.

11 MR. MULLINS: Question: I know that  
12 there's at least one plant that has the turbin  
13 building outside the protected area. Do you find a  
14 significant threat there?

15 MS. TECHAU: What utility is that?

16 MR. MULLINS: It's in Michigan, I believe.  
17 I know that there is one. Because there was a  
18 discussion of that back in about '95 to '96, and it  
19 was at that point that there was -- the question was  
20 raised in this ongoing discussion, and that there was  
21 --

22 MR. ROSANO: All right. Who out there is  
23 ready to come clean? Who's got their turbine outside?  
24 (Laughter.)

25 I got some inspectors in the back of the  
26 room. We'll send them out.

27 MS. TECHAU: I'm not aware of -- I don't  
28 have that knowledge to respond to that question.

29 MR. MULLINS: I know that one point back  
30 in the early '90s, when this was going on, there was  
31 a move -- there was discussion of eliminating the  
32 vital areas designation all together, and we said,  
33 "Gee, if you do that, then the current rule clearly  
34 would pass muster." The problem is, of course, that  
35 that's not been done. And as long as you've got a  
36 two-level area where you've got people whose normal  
37 duties have no conceivable relationship to the  
38 operation of the plant, people like secretaries,  
39 janitors, cooks, cafeteria workers, it's  
40 counterintuitive, especially trying to explain that --  
41 it's kind of hard to explain that to a group of  
42 federal judges that, "Gee, these people can bring down  
43 the plant."

44 The other thing is you're talking about  
45 the insider threat. I am apparently not cleared for  
46 that kind of information, but I was told a couple of  
47 years ago by Bill Olmsteade, who was a Deputy General  
48 Counsel at the time and who handled, in fact, did the  
49 litigation on the security issues at Diablo Canyon

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 back in the '80s, that under the insider threat, as he  
2 understood it, you could not have one person in the  
3 protected area bring down the plant.

4 Now, as I said, I'm not familiar with the  
5 insider threat. I asked him if he could explain that  
6 to me, and he said, no, if he explained it to me, he'd  
7 have to shoot me.

8 MR. ROSANO: He might have wanted to  
9 anyway, Chuck.

10 MR. MULLINS: He might have wanted to  
11 anyway.

12 MS. TECHAU: But the insider could assess  
13 somebody else.

14 MR. MULLINS: But in other words, at some  
15 point, I wouldn't need to see that addressed.

16 MS. TECHAU: Yes, it's definitely a  
17 concern.

18 MR. ROSANO: Yes. You've raised a lot of  
19 good points. And, actually, I won't presume to be  
20 able to answer all of them, not because I lack the  
21 knowledge but perhaps I lack the memory. I couldn't  
22 remember all the things you brought up. But let me  
23 try to address some of them sort of in scope.

24 First of all, we admit that there are some  
25 problems with the concept of vital areas. And in fact  
26 I think that the RER and OSRE programs have helped us  
27 better understand that there are problems with  
28 conceptualizing things, such as vital areas, that  
29 there's equipment outside the vital areas that's  
30 important. Similarly, there's equipment inside some  
31 of the vital areas that may not be as important,  
32 because there are redundancies available.

33 And then, to lead to the next point, that  
34 there are a variety of vital areas in a lot of plants,  
35 several different vital areas, and we have tackled  
36 that problem that the Fed Reg Notice has generally  
37 called the insider rule that you referred to, and that  
38 was to provide greater flexibility for the licensees  
39 and less burden by allowing them to do some things,  
40 such as have universal vital area access.

41 That's actually what it meant, and I'm not  
42 sure, you understood it -- I'm not sure that I  
43 understood it from your comment, though. What the  
44 insider rule said was that you could -- the licensees  
45 could establish protected area access and vital area  
46 access and that someone granted access to a single  
47 vital area could be generalized to all vital areas.  
48 But it's still holds true that someone who has access

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 to vital equipment then would be in this population of  
2 those tested.

3 Let me address another point, and then  
4 I'll get away from the microphone. You mentioned, for  
5 example, even some of your admin buildings are in the  
6 PA. Well, that's precisely the point. What we're  
7 trying to do is get away from the notion that  
8 everybody who works inside the protected area has some  
9 impact on safety and should be tested, because a lot  
10 of people in the admin building just simply don't need  
11 to be tested, and we're trying to respect their right  
12 to privacy and not drive them down to the urinalysis  
13 lab every couple of months just because it's the easy  
14 thing to do.

15 MS. TECHAU: Well, then how are we going  
16 to be able to maintain Part 26 and 7356 that require  
17 someone to have unescorted access to be in a random  
18 pool and under a Continual Behavior Observation  
19 Program?

20 MR. ROSANO: I don't think that's what it  
21 requires --

22 MS. TECHAU: Yes, it does.

23 MR. ROSANO: -- but I'd be willing to read  
24 it again. I'd be willing to say that that's not in  
25 fact how it's implemented.

26 MS. TECHAU: NUREG 1385 talks about that.

27 MR. ROSANO: I absolutely know the NUREGs;  
28 in fact, I helped write most of them. I will look  
29 into that. I'm trying my best to get you an answer  
30 right now, but I'll look for that.

31 MS. TECHAU: Okay.

32 MR. MULLINS: You mentioned the problem  
33 with people in protected areas. That's what we argued  
34 in the courts. We said, and I think the copy -- I  
35 don't know if I've got a copy of the brief left or  
36 not. If I can find one, you can leave me your  
37 address; I'll send you one.

38 MS. TECHAU: Well, wasn't Diablo Canyon  
39 basing part of their case that their admin building  
40 was outside of the protected area?

41 MR. MULLINS: No. In Diablo Canyon, the  
42 admin building is inside.

43 MS. TECHAU: Okay. Then I misunderstood  
44 the comment.

45 MR. MULLINS: Yes. That's the issue. In  
46 other words, what we argued in our brief, we went in  
47 the brief -- we gave several examples. I think down  
48 in Vogel there was a situation where somebody backed  
49 a truck into a lightpost. Lori, remember that?

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 MS. HAYES: It was Vogel.

2 MR. MULLINS: It was Vogel. There were  
3 several situations where you had accidents in a  
4 protected area which have, quote, "stressed" the  
5 safety systems, and that's what we argued to the  
6 court. But what we found ourselves doing was sort of  
7 we had to construct, for lack of a better term, a Rude  
8 Goldberg type of effect. This happens, then this  
9 happens, this happens, and in all three of the steps,  
10 or four of the steps, the safety system don't work.

11 Now, on one hand, what we are doing is we  
12 are going into court and saying, "Gee, the sky can  
13 fall and the sky will fall." On the other hand, we're  
14 trying to tell the public, "Nuclear power is safe,  
15 efficient, no problem. You don't have to worry."  
16 Now, I don't know about you, but I see something of a  
17 disconnect there.

18 First of all, it's kind of hard to explain  
19 to a court that when you put all of this effort and  
20 money into constructing this plant with all of these  
21 backup systems that are going to work and they're  
22 wonderful to work and they will work, trust us,  
23 there's no problem here, and then on the other hand  
24 saying, "Yes, but we can't invade your constitutional  
25 privacy, because we're afraid they won't work." Think  
26 about that. That's what I have to argue. Remember,  
27 I'm the one who's got to stand up and defend it.

28 MS. TECHAU: We want to make sure that it  
29 continues to be safe, so that's why we want to  
30 continue with the random testing.

31 MR. MULLINS: So do I.

32 MODERATOR WEST: I want to ask for  
33 clarification -- excuse me, go ahead.

34 MS. TECHAU: And something else I'd like  
35 to mention is that the clerical and the administrative  
36 people do work on safety-related procedures. And  
37 there are people that would approve those procedures  
38 all the way up to the top that would not have vital  
39 area access. So now you've got people that are  
40 working in a vital area on procedures that could be  
41 altered, generated to cause something.

42 MR. MULLINS: You have that now. You've  
43 got people in headquarters downtown who are outside  
44 the protected area. You have people typing computer  
45 codes. For example, at Diablo Canyon, PG&E has people  
46 in downtown San Francisco who prepare computer codes  
47 or who have other duties. I suspect if I go down, for  
48 example, to North Carolina, Carolina Power and Light,  
49 I can go down to Raleigh and find people who have a

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 significant amount of access to the computer codes, to  
2 various other procedures, who are not subject to Part  
3 26. Lori, am I right on that?

4 MS. HAYES: That is true.

5 MR. MIZUNO: In fact, I believe that that  
6 -- the fact that the Fitness for Duty rules do not  
7 cover those kinds of employees also poses a  
8 significant -- well, in my view, it raises a concern  
9 about the validity of the rule as we currently  
10 structured it. And, certainly, if we get into the  
11 concept here of trying to narrow the scope down and  
12 doing it on the basis of the functional --

13 MR. ROSANO: Access.

14 MR. MIZUNO: -- access or the functional  
15 nature of the employee's job, we are going to  
16 immediately get into the subject of functionality as  
17 applied to people who are off-site and whether they  
18 should also be tested. So I think that as you  
19 consider your comments -- and as you submit your  
20 comments -- and please provide us information that  
21 tells us about the practical nature of the impacts  
22 based upon whatever proposal that comes out. I think  
23 that that's something that we really need to know.

24 Also consider, however, that your comments  
25 will -- if they do raise issues, we will have to  
26 address them, and we have to have a consistent story  
27 with respect to how we deal with the issues. We  
28 cannot say, for example, "Here is an important set of  
29 people who need to be tested" and say, "Here's a set  
30 of people in a different location who perform  
31 essentially the same -- have the same kind of  
32 potential impacts upon radiological health and safety  
33 and we aren't testing them." We need to have some  
34 kind of basis for -- if we are going to have a  
35 distinguishing -- you know, in terms of the way we're  
36 going to test them, then we're going to also have to  
37 be able to distinguish why it is that one population  
38 is different from the other.

39 MODERATOR WEST: Would you like to  
40 continue with your comments, and then we'll take a  
41 comment to the left.

42 MS. TECHAU: Okay, just one more  
43 statement. I just wanted to stress that it's going to  
44 cause an administrative burden to be moving people  
45 within and out of our pools based on their access to  
46 vital areas and not -- could be on a one-day basis  
47 that could lead to potential violations. They're  
48 unnecessary violations that we would incur.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 MODERATOR WEST: Okay. Thank you for your  
2 comments. Please.

3 MR. SOUTHWORTH: Bob Southworth from PPL.  
4 On one hand you're making a statement here that one  
5 individual could not cause the plant, as you quote,  
6 come down. I don't think the plant coming down is the  
7 issue. It's a risk to the public, whether the plant  
8 comes down or there's a radiological release,  
9 whatever. And you're saying that one person couldn't  
10 do that, so why test the people in the control room?  
11 That one person can't do anything. What about the  
12 cafeteria work who's on drugs or something like that  
13 and puts some of the drugs in food or something,  
14 contaminates everybody on site?

15 Anybody on the site that's inside a  
16 protected area has a higher risk of impacting the  
17 safety. I'm not saying test everybody in the  
18 neighborhood or anybody outside this protected area,  
19 but once you're inside a protected area you have a  
20 higher risk of affecting the safety of the plant.

21 MR. MULLINS: How about the people  
22 downtown?

23 MR. SOUTHWORTH: Well, my opinion is,  
24 anybody that could have any effect on how the plant  
25 operates should be tested. I would test everybody in  
26 our company that could have any influence of what goes  
27 on at the plant.

28 MR. MULLINS: Why don't you do it now  
29 voluntarily?

30 MR. SOUTHWORTH: Well, I can't make them  
31 do it.

32 MR. MULLINS: Oh, okay.

33 MR. SOUTHWORTH: I'm down at the bottom.  
34 I'm at the bottom.

35 (Laughter.)

36 But, anyway, another issue is access to  
37 safeguards information. Is that an issue here?  
38 There's so many issues that come up here with once you  
39 start separating who is going to be tested and who's  
40 not, as she stated here, there's a burden here that I  
41 don't even know how we'd manage it. Every  
42 individual's got to be looked at. Every single job,  
43 everything they do is going to have to be looked at,  
44 and we're going to have to defend why we did or why we  
45 didn't test an individual. And God forbid if there's  
46 somebody we didn't test and something does happen with  
47 that information, we'll be under microscope as to why  
48 we didn't test that person.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 MR. ROSANO: Access to safeguards  
2 information is not determined by PA access. So to  
3 answer that issue, a lot of people have access to  
4 safeguards information outside the site, and a lot of  
5 people inside don't. That's purely job related. And  
6 in fact, as I mentioned earlier, job relationship and  
7 job duties is one possible alternative to VA access.  
8 But, anyway, to answer that point, that's really not  
9 decided on the basis of PA access.

10 MR. SOUTHWORTH: There's just other issues  
11 that could be brought into this. Once you start  
12 separating these few people -- and, to me, if you were  
13 an individual -- say you have two clerks working side  
14 by side. That clerk happens to have to go to the  
15 control room once a month to do something. That  
16 person's got to be in the random pool. I don't have  
17 to be. I can go do whatever I want, because I know  
18 nobody's going to come test me.

19 MR. ROSANO: Let me try to address that.  
20 Let us not forget that testing for cause is still  
21 going to be a part of the program, and you can't do  
22 anything you want. Behavior observation would still  
23 be required of all employees inside the site, and a  
24 supervisor who witnesses an employee acting in an  
25 abhorrent manner can still request a test. It's just  
26 the unauthorized and unsuspecting activity, the  
27 individual who has no cause to be suspected. That  
28 would be removed.

29 MR. SOUTHWORTH: I understand what you're  
30 saying there, but I also know from personal experience  
31 numerous times that an individual has observed this  
32 abhorrent behavior, this unusual behavior, but because  
33 he's my buddy, I'm not turning him in. Let somebody  
34 else figure it out. That happened -- can anybody here  
35 -- I'm sure they've all experienced what I have. "I  
36 thought I smelled alcohol on his breath when he came  
37 in this morning, but, oh, I didn't want to turn him  
38 in. It's not my job. I'm a union worker. I can't  
39 turn him on." So then --

40 MR. ROSANO: I agree with you. We've had  
41 cases before us just like that. But we have to make  
42 sure that we have the right fix for the right problem.  
43 If the problem is that people are not, especially  
44 supervisors, reporting issues that they believe are  
45 credible, then we've got to fix that problem, not just  
46 test everybody that we come across in order to make  
47 sure we don't miss anybody.

48 MR. SOUTHWORTH: This is just a tool. The  
49 randomness of the testing is just one of our tools we

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 use to catch these things that get through, like the  
2 example I just gave. And it looks to me like -- I  
3 know you tried to defend our position in court, but I  
4 don't think -- maybe you need somebody else to help  
5 defend it, not just -- I don't know.

6 (Laughter.)

7 Maybe somebody in the industry can help  
8 you.

9 MR. MULLINS: That's all right. My boss  
10 doesn't think I do a good job sometimes either.

11 (Laughter.)

12 MR. SOUTHWORTH: I'm not saying that. I  
13 do know, depending on who the opposition is who is  
14 against you, who is defending the other position,  
15 sometimes you need help. That's why some people get  
16 out of their arrests, and some people don't get out of  
17 things. There's maybe other points that somebody  
18 could bring up in defense of what we're expressing  
19 here.

20 MR. MIZUNO: As I said, I think it's  
21 important that you identify in your public comments,  
22 submitted when the proposed rule gets out, on the  
23 practical -- and be very precise -- on the practical  
24 implementation issues and difficulties that you are  
25 going to have in implementing whatever it is that the  
26 Commission may decide to propose in the proposed rule.  
27 Because those things are going to be the basis that we  
28 are going to rely upon in ultimately deciding what  
29 direction we're going to take in the final rule, which  
30 -- or if there is any rule at all, whether the  
31 Commission may ultimately decide that there's no other  
32 practical approach other than what we have now.

33 And so, therefore, I can't emphasize that  
34 you people are in the know. You are directly there.  
35 You are going to know how your systems work, what the  
36 practicalities are. You need to come and provide that  
37 information to us, because that's going to be the  
38 basis for decisionmaking by the NRC and ultimately  
39 what we are going to use as a basis for defense of our  
40 ultimate decision.

41 MR. MULLINS: I would point out that the  
42 brief, whenever we filed it, we coordinated it with  
43 the company, with PG&E, and they seemed to like what  
44 we argued. And as I said, we're not that incompetent.

45 MR. SOUTHWORTH: I'm not saying that at  
46 all. You know what I'm saying. I'm just saying that  
47 sometimes there's other points, and it only takes one  
48 other position to come up that may word it  
49 differently. It's all in how you word everything.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 And maybe somebody else might help. It's just a  
2 suggestion, okay?

3 The other thing is, I just want to get  
4 this clear in my where we're hinging this whole thing  
5 on. We're hinging this statement on what is vital and  
6 what is not vital; is that correct?

7 MODERATOR WEST: Correct.

8 MR. SOUTHWORTH: Okay. And that's been  
9 brought up several times here about that's in flux  
10 right now as far as what is going to be, in the near  
11 future, vital or important to the safety operation of  
12 the plant. So it seems to me that there could be,  
13 like somebody was saying, I know that there are  
14 transformers outside of the vital areas that are  
15 sitting out -- you can walk right up to them -- that  
16 are considered safety-related items. You could walk  
17 right up to the thing and throw the switch. How  
18 you're going to manage that, I don't know. I heard  
19 somebody say something about additional barrier or  
20 something. But, right now, vital areas -- there are  
21 certain descriptions in how a vital area has to be  
22 protected. If you have a transformer sitting out in  
23 the middle of a field, I'm not sure how you're going  
24 to meet that criteria.

25 MODERATOR WEST: Thank you for your  
26 comment; appreciate it. Take a comment over here.

27 MR. ROYAL: Mike Royal, Conservation  
28 Energy. In the sake of brevity, I'll just have a  
29 couple of things I want to say. I think that the  
30 testing of those people that have access to the vital  
31 areas, the protected area, that have access to our  
32 plant proper, needs to continue. I think it dovetails  
33 nicely with the minimization of the insider threat  
34 issues.

35 I respect the comments, Gary, that you and  
36 Chuck have made, carefully couched as they are, about  
37 the global issues that present themselves here. And  
38 I'm happy to hear that you are very cognizant of those  
39 global issues. And I would ask that because you are  
40 so cognizant of those, that we really not go forward  
41 with this, because you do understand the global  
42 issues. I might ask that you consider that the  
43 application of the Fitness for Duty rule point itself  
44 to those who could gain proximity to or have impact on  
45 vital equipment. Now, that's a little more global  
46 definition.

47 And, Chuck, I understand how difficult it  
48 is dealing with the courts with the law enforcement  
49 background that I have myself, but certainly while

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 it's hard to explain, it's necessary to provide that  
2 explanation in sufficient detail that the court can  
3 make a good decision. So I'd ask that you entertain  
4 that concept.

5 MODERATOR WEST: Thank you for your  
6 comment. Please.

7 MS. ACKERT: Sheri Ackert from Argenti. I  
8 understand your position, and I guess all along I've  
9 always been told or informed that working in a nuclear  
10 plant is a privilege, it's not a right. You don't  
11 have to have unescorted access. You may move down on  
12 the road if you choose not to sign the consent form to  
13 have the background investigation elements and  
14 everything completed.

15 An individual, when they sign --  
16 voluntarily sign that consent form, waive many of  
17 their personal privacy rights right at the very  
18 beginning anyways. So my question being if in fact we  
19 do concede that individuals who have non-safety-  
20 sensitive positions do not have to be in the random  
21 pool, what would be the next step? That if they're  
22 saying safety-sensitive, they don't need to be pre-  
23 accessed, they don't need to have a background?  
24 That's just a thought. I just was wondering about  
25 your comment on that.

26 MODERATOR WEST: Can I -- I think -- just  
27 a quick response. I think part of even the notion of  
28 being able to entertain disallowing random testing for  
29 that group is couched with the fact that you would in  
30 fact still have pre-access and you would in fact still  
31 have full cause testing.

32 MS. ACKERT: I understand. My thought  
33 being if in fact the IBEW does go forward with this  
34 and then basically win that fight, will they go for  
35 the next step of saying, "Well, gee, if that's the  
36 case, if they're safety sensitive, we don't need to  
37 have the other tests done either." And that was just  
38 my thought.

39 MODERATOR WEST: I understand your point.  
40 Thank you.

41 MR. ROSANO: I think the comment about  
42 employment being a privilege and not a right is an  
43 important, and it's one that we talk about often. But  
44 it also clearly captures this issue in terms of  
45 employment versus regulation. Because it's a  
46 privilege not a right, it casts it in terms of the  
47 rules that employer would have an opportunity to set  
48 for that area.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 Regulatory rules, if you'll excuse the  
2 redundancy, as opposed to employment rules, have to  
3 set a different standards. The regulations have to be  
4 based on something different. They have to be based  
5 on safety.

6 And I would like to take this moment also  
7 to add that this is not an easy subject. It's not one  
8 that is well understood, clearly understood or even  
9 with any great harmony. But that's the principle  
10 behind it, the issue of trying not to write  
11 regulations that require more than those that are  
12 necessary for safety. And if there's an alternative  
13 way to find that, that's what we ought to search for.

14 MS. ACKERT: Thank you.

15 MR. MULLINS: One, I would point out that  
16 we argued that in the court, that in the published  
17 part of our argument that it's not a right.

18 MR. MIZUNO: That was a loser.

19 MR. MULLINS: Yes. It was a loser.

20 MR. MIZUNO: But you can't waive away your  
21 rights.

22 MR. MULLINS: I invite you to read the  
23 court's opinion. In fact, the court issued an  
24 opinion. The majority opinion was written by a fairly  
25 liberal judge who wrote a fairly moderate opinion.  
26 Then there was a screaming opinion denouncing the NRC  
27 written by the Republican judge on the panel. Like I  
28 said, we raised all of those issues.

29 MR. MIZUNO: From the constitutional  
30 standpoint, okay, I have not yet seen a Supreme Court  
31 opinion that says that an individual may waive their  
32 constitutional rights vis-a-vis the government. I  
33 mean if that were the case, I mean there would be  
34 nothing to prevent any regulatory agency from, or  
35 indeed the government, from saying -- from requiring  
36 a -- I mean given the pervasiveness of government  
37 action throughout our lives, to require you to waive  
38 your rights to just about everything as soon as you  
39 end up dealing with the government. I mean I've never  
40 seen anyone that suggested that.

41 I mean that's why we say that our  
42 regulatory requirements must be focused with a nexus  
43 on radiological health and safety, and that's what  
44 we're trying to do. You, as a private employer, can  
45 impose whatever requirements you want to do, but it's  
46 going to be within the context of the  
47 employer/employee relationship, and you deal with that  
48 within that context.

49 MS. ACKERT: Okay. Thank you.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 MODERATOR WEST: Thank you. Please.

2 MR. BOISMENU: Brett Boismenu, Namo Point  
3 Nuclear, Fitness for Duty. My comment on  
4 functionality of the job task. We have our  
5 engineering group or badging personnel who would be  
6 issuing and changing the vital area access. They  
7 don't need vital area access. Is there a concern  
8 there that you would not have people to base on the  
9 integrity of the program or the trustworthiness or  
10 reliability? Is there a concern there for some  
11 subversion of testing?

12 As we spoke yesterday, and for the past  
13 two days, there seems to be a huge emphasis now on  
14 subversion of testing. To allow somebody to go back  
15 and forth between vital and protected area, does that  
16 create in itself a chance for subversion of testing,  
17 for people to say, "I may be an engineer working on  
18 design bases, but I'm not going to get myself into a  
19 random selection process."

20 MR. ROSANO: Let me ask a question of you,  
21 sir, and some others who'd like to chime in. This  
22 list of vital area -- now we're talking about the  
23 authorized access list for vital areas. We're not  
24 talking about daily duties, whether you go into a  
25 vital area today or not. Does your list of authorized  
26 access to vital areas, does it change as often as what  
27 you've been telling me today. Does it change daily  
28 and hourly? No. I hear some yes's, some noes.

29 My point is that my experience has been  
30 that the list is fairly static, with some migration  
31 due to changing duties, but that it doesn't change  
32 that often. You said --

33 PARTICIPANT: Sometimes they change every  
34 day because we do have requests for a change in  
35 purpose.

36 MR. ROSANO: And they need it the next  
37 day, but then it's removed again the day after? Okay.

38 I would hazard to say, with all due  
39 respect, though, that that's an unusual circumstance.  
40 I still believe that most of the vital area access  
41 lists are relatively static.

42 MODERATOR WEST: Would it make a  
43 difference during an outage?

44 MR. ROSANO: Yes, yes.

45 MR. BOISMENU: I'm not aware of it.  
46 That's why I touch base with our access folks. From  
47 a fitness for duty standpoint, as long as they do the  
48 drug test, they can bop between areas, and that's in  
49 access control. So I wouldn't be able to answer that,

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 but I did touch base with them, and they said, people  
2 may get vital area access for one day or one job, and  
3 then jump themselves out be taken out. So I guess  
4 what Sue was saying earlier, it comes down to the  
5 administrative burden.

6 MS. TECHAU: Sue Techau with Excelon.  
7 We've been beeped so much by the NRC inspectors that  
8 we need to maintain those vital areas. And if they  
9 don't need access or they don't have a need to that  
10 vital area, they shouldn't have it. And so that's why  
11 we're doing this daily thing.

12 MODERATOR WEST: Thank you for your  
13 comment. Please.

14 MS. HAYES: As part of the -- this is Lori  
15 Hayes, Progress Energy -- as part of the risk analysis  
16 with respect to the insider, is someone looking from  
17 a more technical or medical standpoint, and this might  
18 be a question for Nancy -- the effects that it might  
19 have on deterrent -- since you're not going to be in  
20 a random program, although you may not have safety-  
21 related duties, the deterrence effect is gone, so is  
22 someone looking at that to see that would actually  
23 increase more positive tests due to the fact that  
24 there is a deterrent level? Or is the NRC basing it  
25 on that we really don't care if there's more positive  
26 tests there, because they're not working on safety-  
27 related equipment?

28 MODERATOR WEST: I can't be too specific  
29 on the risk analysis, namely because I haven't  
30 received it yet, but I guess the only -- I don't  
31 really have anything to add. I think your insights  
32 are good, though; certainly, the kinds of things that  
33 we should, perhaps, have in mind. I can't really say  
34 that it gets down to that level of detail. It's not  
35 to say that it shouldn't. So I appreciate your  
36 thoughts on that.

37 MR. ROSANO: Let me respond. I don't  
38 think it's true that NRC doesn't care if there are  
39 more positive tests. Or extrapolating from that, I  
40 don't think it's true the NRC doesn't care there's  
41 more drug use, say, on the site. And excuse me for  
42 referring just to drugs; I know alcohol is part of it.

43 But it would be true to say that the NRC,  
44 in its regulatory capacity, may feel constrained to  
45 being concerned only with the drug tests or drug use  
46 related to, let's just for the moment say, vital  
47 areas, because that's what we're talking about. It's  
48 not that we don't care. It's just that we do have

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 some limits on what we're authorized to be concerned  
2 with.

3 MR. JOHNNEMANN: In addition to alcohol,  
4 Part 26 also mentions fatigue. And one of the  
5 questions that we've recommended that the staff put in  
6 the proposed rulemaking points out that licensees  
7 frequently require a lot of overtime work. How does  
8 the risk from fatigue accidents compare with the risk  
9 of accidents from impaired workers as well?

10 MS. TECHAU: Sue Techau, Excelon. I just  
11 wanted to quote 10 CFR 26.2A states that "The  
12 provisions of the Fitness for Duty Program must apply  
13 to all persons granted unescorted access to protected  
14 areas." And then also in NUREG 1385-7.1, it talks  
15 about contractor and vendors specifically for  
16 infrequent access and whether or not we can transfer  
17 them or accept their programs. And within the content  
18 of that, it says that in order for us to be able to do  
19 that, they have to be in a Fitness for Duty Program  
20 and under a CBOP.

21 And then under 7.2, it talks about other  
22 licensees accepting other people's programs. So we're  
23 getting into the transferring of people from one  
24 utility to another. We're going to have to start  
25 working on the burden of whether or not they were in  
26 a random testing pool, what type of access they had.  
27 It's just going to create all of these other  
28 administrative burdens.

29 MR. ROSANO: I don't have the document in  
30 front of me as you do, and I agree that the people  
31 have to be in CBOP, but does it -- and I'm sorry that  
32 I was --

33 MS. TECHAU: Do you want me to read it?

34 MR. ROSANO: Well, I don't -- my  
35 recollection is that it not require that they be in a  
36 random testing program but that they be in a chemical  
37 testing program for drugs. We're not talking about  
38 people being removed from the chemical testing  
39 program, because there's still for cause testing,  
40 there's still pre-employment.

41 MS. TECHAU: Random is part of the  
42 program. It's part of the --

43 MR. ROSANO: I know random -- but I don't  
44 know if you get my distinction. What I'm saying is  
45 that -- and I appreciate the need to be able to  
46 transfer employees and that there be some consistency  
47 among licensees and their programs in order to do  
48 that. And that the two key parts of the program is  
49 CBOP and a chemical testing program. But the chemical

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 testing program is made up of three parts. One is  
2 pre-employment, one is random, and one's for cause.

3 MS. TECHAU: You keep on using the term  
4 "pre-employment." It's not pre-employment.

5 MR. ROSANO: It's pre-access.

6 MS. TECHAU: Thank you.

7 MR. ROSANO: You're right. Okay, so pre-  
8 access and random and for cause. My point is that I  
9 believe that the expectation is that those two key  
10 elements will be part of every program, CBOP and a  
11 chemical testing program, not just that the random  
12 testing program be a part of it. So if we transform  
13 the chemical testing program such that now random  
14 testing only applies to a certain category of workers,  
15 all employees would still have to be a member of the  
16 chemical testing -- or be part of the chemical testing  
17 program. The program has simply been redefined. So  
18 I don't think that that violates that.

19 MS. TECHAU: Does that mean they're going  
20 to rewrite Part 26 again?

21 MR. MIZUNO: Yes. The bottom line is yes.  
22 Clearly, there are going to have to be some conforming  
23 changes to assure that -- yes, there's going to be a  
24 rewrite of Part 26.

25 (Laughter.)

26 MS. TECHAU: And then also people are  
27 granted unescorted access to maybe just protected  
28 areas that have a history of substance abuse and need  
29 a medical determination of fitness, and based on that  
30 they're going to be put in a follow-up program, and  
31 they are going to be subject to random testing. And  
32 then we're going to have to differentiate between all  
33 of that. I mean it just goes on and on and on.

34 MR. ROSANO: Protecting privacy rights is  
35 a very difficult thing.

36 MS. TECHAU: Yes.

37 MODERATOR WEST: Thank you again for your  
38 comment. Please.

39 MR. MORIARTY: Good morning. John  
40 Moriarty from Vermont Yankee. I'd like to wear three  
41 hats today. I am Security Manager there. I'm also a  
42 resident of the town in which the plant is located.  
43 And I'm also a School Board Director. So I'll kind of  
44 wear each of those hats.

45 My first comment as manager is to echo the  
46 comments that have been made about the system  
47 structures and components that lie outside the vital  
48 areas in the protected area, that were they  
49 compromised would certainly challenge those systems

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 that are in the vital ares. So not going into too  
2 much detail, that line begins right at the fence,  
3 right before you get your badge.

4 The other thing is this seems to be  
5 premised on that somehow vital area access controls  
6 are going to keep somebody physically out of a vital  
7 area if they don't have access. Vital area access  
8 controls are premised today in most plants more on the  
9 trust and reliability we place on people, not to  
10 piggyback in behind somebody. I think the public  
11 might get the wrong idea that somehow if you don't  
12 have access into a vital area, there's no way you can  
13 get in there. I'll say it again: We trust and rely  
14 on people past all the screening requirements that  
15 when we tell them to stay out of an area that the  
16 won't go in there.

17 The other issue I'd like to point out is  
18 that the access rule -- that this would, I believe,  
19 open the door to eroding the access rule, if you  
20 create a double standard or a lesser standard for a  
21 certain population of people.

22 MODERATOR WEST: Could you clarify that.

23 MR. MORIARTY: Well, quite simply, if  
24 you're going to create within the protected area a  
25 two-tiered system of trust and reliability so that if  
26 you have a certain job you don't have to meet a  
27 certain standard, the logic would say, and it would be  
28 hard to argue, that in the access authorization  
29 requirements, well, why then must I go through the  
30 same access requirements that the senior control room  
31 operator has to meet if I am one of these clerical  
32 maintenance types?

33 Right now, regardless of what your job is,  
34 whether you are the service master person or you're  
35 the shift supervisor, you meet the same level of  
36 trustworthiness and reliability before you get to come  
37 in through the gate. If we start now with saying,  
38 well, yes to this one, no to that one, it is just a  
39 matter of time before that will be the next step that  
40 the union or somebody else will say, "Gee, if this  
41 makes sense, why am I being held to this other  
42 standard."

43 The other part of this is the logic for  
44 this accommodation, kind of, I find interesting.  
45 Instead of taking Moses to the mountain, we're taking  
46 the mountain away in order to relax this rule to make  
47 this accommodation for this small population of  
48 people. Issues were made about -- or points were made  
49 about the privacy expectations that we give up. This

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 is just one small one. There are some -- every day,  
2 we give up our constitutional rights to search and  
3 seizure without probable cause just to get into the  
4 plant. So, for me, the privacy issue really doesn't  
5 hold a lot of merit, because we're already giving up  
6 an enormous amount of them anyway.

7 I'd like to speak to random testing as a  
8 form of behavior observation. It's probably one of  
9 our best forms of behavior observation, because when  
10 somebody's behavior comes into question, the question  
11 that often gets asked is, "Well when was the last time  
12 they had a random? Was it positive, negative or have  
13 they have ever tested positive?" It also speaks to  
14 the issue back to trust worthiness and reliability.

15 By the way, I would love to have an access  
16 rule that was made up of the elements of the Fitness  
17 for Duty rule in one rule. I mean one thing we  
18 learned yesterday and throughout this is that they are  
19 oftentimes out of step with one another. Qualifying  
20 as being fit for duty is an element of obtaining  
21 access. Why it isn't in one master rule that's  
22 consistent is just an observation. I would like to  
23 see that.

24 The issue, if I haven't already made it,  
25 about random drug and alcohol screening as an  
26 indication of trustworthiness and reliability. If  
27 you're screening for illegal substances, that  
28 certainly speaks to the use and abuse of an illegal  
29 substance as unlawful behavior as somebody that you  
30 would want or not want in certain places or certainly  
31 not inside the protected area of a nuclear plant. I  
32 think the protected area would be less protected if  
33 this went through. As the manager, I'm speaking for  
34 keeping the status quo.

35 Now as a resident of the town and School  
36 Board Director, I direct your attention to page 3 in  
37 your bullet where it says, "The public confidence  
38 issue may be raised regarding relaxation of random  
39 drug testing requirements against a background of  
40 congressional focus on reducing drug usage." Well, if  
41 it hasn't been changed already, I'd like to change  
42 that today to tell you that public confidence will be  
43 eroded if you do relax this rule. And I speak as a  
44 resident and a School Board Director.

45 Our elementary school is literally across  
46 the street from the plant, and I know the folks in  
47 town don't want to hear that you're relaxing any of  
48 these rules to make an accommodation whose logic just

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 seems to be coming at it from the wrong end. Thank  
2 you.

3 MODERATOR WEST: Thank you. Please.

4 MS. MATULA: Lisa Matula, STP Nuclear  
5 Operating Company. This may have been answered  
6 already, but is this voluntary, this new rule that you  
7 have to only do that testing?

8 MR. ROSANO: It is currently structured so  
9 that from a regulatory perspective that would be all  
10 that would be required, but that utilities, just like  
11 other employers, could choose --

12 MS. MATULA: Just like 10 CFR 26, we could  
13 have it more restrictive if we so desire.

14 MR. ROSANO: That's right.

15 MS. MATULA: Because, currently, we test  
16 everybody inside or outside. We have a drug-free work  
17 environment. Okay. So that is not going to force us  
18 into this.

19 MR. ROSANO: It will not.

20 MS. MATULA: Okay. Thank you.

21 MODERATOR WEST: That's an important  
22 point. Thank you. Please.

23 MR. BUSH: Loren Bush, currently self-  
24 retired.

25 (Laughter.)

26 I seem to recall -- I think Chuck made a  
27 point that the courts tend to change, and they're  
28 going in a certain direction now. But I would like to  
29 point out, to emphasize that point, that when the  
30 current Fitness for Duty rule was being developed back  
31 in the mid-'80s, there were a couple of court cases  
32 that took a look at discriminatory practices and  
33 random testing. And I know that the court in  
34 California is quite liberal, and my recollection was  
35 that these cases were in the South where they're  
36 usually a little more conservative. I don't think  
37 they were from Texas where they fry you before they  
38 test you.

39 (Laughter.)

40 But at any rate, the point was that the  
41 courts said that these companies had decided that  
42 certain portions of the company employees would not be  
43 tested. And the others that were being tested said,  
44 "How come I'm being tested and these others aren't?"  
45 And the court said, "That's discriminatory. If you're  
46 going to test, you've got to test everybody."

47 And in one case in particular, it was  
48 management who decided they didn't need to be tested,  
49 because they weren't driving the trucks or something

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 of that nature. Management had no impact on public  
2 safety, and they had exempted themselves from testing.  
3 And the court said, "No, no. Management has to be  
4 tested also."

5 So the fundamental point I'm trying to  
6 make is that courts at one time said it would be a  
7 discriminatory practice to say that secretaries or  
8 people doing some kind of functions don't have to be  
9 tested but everybody else does, okay? Thank you.

10 MR. MULLINS: I'm not familiar with the  
11 case, Loren, you're talking about. I have read the  
12 Supreme Court cases which, of course, cover the whole  
13 country. And the case that came out yesterday, of  
14 course, was from South Carolina, which the Supreme  
15 Court overturned.

16 MODERATOR WEST: I have a few quick items  
17 just to offer for your consideration. But before I do  
18 that, could we have a show of hands of those that  
19 would be in favor of the proposed rule?

20 (Laughter.)

21 MR. ROSANO: I had talked to Garmon about  
22 that. And because we -- this is our opportunity to  
23 learn from you; hopefully you from us. We can share  
24 information. And I thought it might be interesting  
25 that if the rule were to go forward today, how many  
26 utilities there in the audience today would feel that  
27 it was a good idea to support?

28 MODERATOR WEST: One point that I'm not  
29 crystal clear on. I know there's been some discussion  
30 of target set areas. Would this proposal make a  
31 difference if it was couched in terms of our target  
32 set areas, rather than vital areas?

33 Are there any particular options that we  
34 haven't considered? What I'm really saying is that  
35 we've essentially considered at this point the notion  
36 of the vital area as opposed to the protected area  
37 against the status quo. But are there other options  
38 that we haven't considered that might be worth  
39 entertaining?

40 MR. BURRELL: Garmon, the only option that  
41 I'd ask you to entertain, certainly based on the  
42 comments by Gary and Chuck about significant changes  
43 in the rule that would be required to implement this  
44 beyond what just appears here, is that you withdraw  
45 the current change and incorporate this along with the  
46 significant number of comments that we've wrote over  
47 the past couple of days and make certain that whatever  
48 moves forward is exactly what's needed, both to meet  
49 regulatory expectation as well as utility need to

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 protect the public health and safety so that we get  
2 published what really works, what meets the intent, as  
3 opposed to doing this a couple of times. Let's spend  
4 the time to get it right the first time instead of  
5 doing it over.

6 MODERATOR WEST: Okay. Thank you for your  
7 comment.

8 (Applause.)

9 MR. MULLINS: Should we worry about the  
10 constitutional questions while we're at it?

11 MR. BURRELL: Say again?

12 MR. MULLINS: Should we worry about the  
13 constitutional questions while we're at it?

14 MR. BURRELL: Absolutely.

15 MODERATOR WEST: I don't have any  
16 additional items. Unless there's something either  
17 someone at the table would like to add or someone from  
18 the floor, I'd like to thank you yet again for all  
19 your thoughts and your input and look forward to your  
20 formal comments as well on the proposed rule. Thank  
21 you.

22 (Whereupon, at 10:27 a.m., the Public Meeting  
23 was concluded.)  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701