

ORIGINAL

UNITED STATES NUCLEAR REGULATORY COMMISSION

In the Matter of:)
PUBLIC SERVICE COMPANY OF) Docket Nos. 50-443-OL
NEW HAMPSHIRE, et al.) 50-444-OL
(SEABROOK STATION, UNITS 1 AND 2)) Offsite emergency planning

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

3 In the Matter of:)
4) Docket Nos. 50-443-OL
PUBLIC SERVICE COMPANY OF) 50-444-OL
5 NEW HAMPSHIRE, et al.)
6 (SEABROOK STATION, UNITS 1 AND 2)) Offsite emergency planning

7
8 Tuesday
April 5, 1988
9 West Tower, Room 428
10 4350 East-West Highway
Bethesda, Maryland

11 The telephone conference convened, pursuant to
12 notice, at 10:08 a.m.

13 BEFORE: HON. IVAN W. SMITH, CHAIRMAN
14 HON. GUSTAVE LINENBERGER, JR., MEMBER
HON. JERRY HARBOUR, MEMBER
Atomic Safety and Licensing Board
15 U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

16 APPEARANCES:

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22 (No appearance)

23 For the NRC Staff:

24 SHERWIN E. TURK, ESQ.
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Washington, D.C. 20555

1 JUDGE SMITH: On the record. Let us begin with
2 reviewing Mr. Oleskey's telephone call last night.
3 Mr. Oleskey called inquiring if a telephone conference could be
4 set up because of a claim of privilege asserted
5 by -- oh, Mr. Flynn, you are present, are you not?

6 MR. FLYNN: Yes, Your Honor.

7 JUDGE SMITH: Asserted by Mr. Flynn. And I said that
8 is a good idea, because we wanted to have a telephone
9 conference to discuss the considerations of the telephone
10 conference of April 1st. And that is the deliberative process
11 or executive privilege problems that still remain. Let us
12 begin with Mr. Oleskey repeating what he told me last night.

13 MR. OLESKEY: I told you in substance, Judge, that
14 during the deposition of Mr. Thomas that I asked a question
15 which led Mr. Thomas to testify that there was a meeting
16 between FEMA and the NRC on the 19th of January of this year
17 involving various high officials at FEMA, as he understood it,
18 and various officials of the NRC including Victor Stello.

19 And he testified that a report of that meeting had
20 been given to George Watson, one of the counsel to
21 FEMA -- I am sorry, that George Watson, one of FEMA's counsel
22 had been present, and had reported on the meeting to Joe Flynn,
23 who had reported to Thomas.

24 And he said that the report given to him was that
25 FEMA had negotiated away a negative finding at the meeting with

1 Stello. But the meeting had gone from 1:00 until 6:30, and
2 that Stello had indicated that the NRC would engage in total
3 war with FEMA if FEMA did not change its testimony in the beach
4 population.

5 He further said that Grant Peterson, identified as
6 the Deputy Director of FEMA for state and local programs, had
7 agreed to make changes; changes in the FEMA position, it
8 appears, from the context of his testimony.

9 JUDGE SMITH: What is it that you would like to have?

10 MR. OLESKEY: He then testified that he had notes, I
11 believe, one page, two sides, which contained additional
12 details on the information that he got from Joe Flynn in that
13 meeting, plus related information that he got from Bill Cumming
14 the next day and Joe Flynn on the 21st, two days later.

15 I asked for the notes prefatory to further inquiry as
16 to the entire substance of that meeting and any later reports
17 on what appeared from his testimony to have been continuing
18 negotiations between the two agencies that week over the nature
19 and scope of FEMA's testimony, ultimately the testimony filed
20 on March 14th.

21 Mr. Flynn then indicated in substance that he was not
22 going to produce the notes or allow further inquiry as to the
23 scope of the meeting of the 19th, or the communication from
24 Cumming on the 20th or his own further conversation on the
25 21st, because of attorney-client privilege. And I think that

1 Mr. Flynn perhaps should speak further to that point himself.

2 MR. FLYNN: Yes, Your Honor. The basic issue in my
3 mind is the scope of discovery. I have been very cautious in
4 making objections. And until yesterday with one exception, I
5 have not instructed the witness not to answer questions, and I
6 have not refused to produce documents.

7 But where the line of questioning was going was
8 directly into communications with other agencies. That is
9 obvious from the testimony that Mr. Oleskey referred to. And
10 the issue of attorney-client privilege is secondary, although I
11 insist that it is important.

12 I had in mind when I made the objection and refused
13 to produce the document the conversation that we had on
14 April 1st, the conference call. And I had understood you to
15 say, although it was not by way of a ruling, that the discovery
16 should be focused, that the deposition should concentrate on
17 whether FEMA had legal, technical, and policy reasons for the
18 position that it adopted.

19 And I also understood you to say that calls from the
20 White House, as an example, were not within your concept of a
21 properly focused discovery effort. That, I submit, is the
22 issue here.

23 JUDGE SMITH: Well, my comment about calls from the
24 White House and other potential influences upon Mr. Peterson's
25 action in approving FEMA's current position assumed that

1 Mr. Peterson would be saying that he acted solely upon the
2 advise of his staff, and ignored other influences.

3 The premise of our discussion was that Mr. Peterson
4 approved a position set out in the testimony based upon advice
5 that he received from his staff and the reasons set out in the
6 testimony and for no other reason. If in fact there were other
7 reasons underlying the policy decision, other influences
8 underlying the policy decision, that might be another matter.

9 MR. FLYNN: Mr. Thomas was not at the meeting. We
10 are talking about double or triple hearsay.

11 JUDGE SMITH: Well, all right. That is another
12 problem, yes, I admit. But let us see if we can resolve now
13 the executive privilege consideration with respect to this
14 information.

15 MR. FLYNN: Did you wish further argument on the
16 executive privilege?

17 JUDGE SMITH: Is it FEMA's position today, I mean
18 position with respect to this conference, that FEMA's position
19 was not influenced by any statement by Mr. Stello?

20 MR. FLYNN: I have not discussed that directly with
21 Mr. Peterson. I would have to say that I believe that would be
22 his position. But obviously, other people would draw other
23 inferences from the testimony which was elicited yesterday.

24 JUDGE SMITH: So I do not believe that we are able to
25 decide this issue now on executive privilege grounds. You

1 could move on to your other grounds, attorney-client. You
2 first raised it as to scope.

3 MR. FLYNN: Yes.

4 JUDGE SMITH: I do not think that we can resolve it
5 as to scope, if by scope you are referring to our discussion as
6 to the bounds of the executive privilege. I do not think that
7 scope as to relevancy is going to resolve the problem. But we
8 have not discussed triple hearsay, reliability, and
9 attorney-client.

10 MR. FLYNN: Well, I think that the hearsay aspects
11 are obvious, and do not need to be belabored. Let me talk
12 about attorney-client. The conversations that I had objected
13 to were principally in the context of witness preparation.
14 Some of them were in the context of developing the testimony.
15 In any case, they are conversations between me as counsel for
16 FEMA and in this particular case with Mr. Thomas, who at the
17 time was a witness.

18 JUDGE SMITH: Mr. Thomas was recording the advice
19 that you gave him?

20 MR. FLYNN: Well, yes. Although I am not admitting
21 the correctness of the report.

22 JUDGE SMITH: The accuracy of the report.

23 MR. FLYNN: Right.

24 JUDGE SMITH: Okay. Now who is the client?

25 MR. FLYNN: The client is FEMA. It is not

1 Mr. Thomas, and it is not Mr. Peterson, nor any other witness.
2 It is FEMA. Now if the privilege is to be waived by the client
3 as opposed to the attorney, it would have to be done by someone
4 with the management authority to do that, and not the witness.

5 JUDGE SMITH: Mr. Thomas does not have that
6 authority?

7 MR. FLYNN: That is my point, yes.

8 JUDGE SMITH: All right. Hang on a moment. The
9 Board wants to consult.

10 (The Board confers.)

11 JUDGE SMITH: Back on the record. The Board would
12 like to have clarification.

13 The notes that Mr. Thomas was testifying from were
14 notes of his conversation with Mr. Flynn as to which Mr. Flynn
15 states are privileged by attorney-client privilege, because Mr.
16 Flynn was discussing with Mr. Thomas testimony and giving him
17 legal advice, is that correct?

18 MR. FLYNN: Well, I do not know that I was
19 necessarily giving him legal advice. My representation was
20 that it was in the context of either preparing the witness to
21 testify or developing testimony.

22 JUDGE SMITH: So it could also have elements of work
23 product?

24 MR. FLYNN: Yes.

25 MR. OLESKEY: I would like to be heard on this at

1 some point, Your Honor.

2 JUDGE SMITH: Mr. Oleskey.

3 MR. OLESKEY: Is this a good time?

4 JUDGE SMITH: Yes.

5 MR. OLESKEY: Just briefly with respect to hearsay, I
6 do not think that is an operative objection here. Because
7 generally in depositions, any knowledge or information which a
8 witness has which has come to his attention which may lead to
9 admissible evidence is admissible in deposition.

10 With respect to attorney-client privilege, first of
11 all, Mr. Thomas has been allowed to testify freely for two and
12 a half days with respect to all kinds conversation with
13 Mr. Cumming and Mr. Flynn, including a good portion but
14 apparently not all of the conversation which has been objected
15 to.

16 It is a waiver in my view. And the only person who
17 could have asserted privilege on behalf of the client agency is
18 Mr. Flynn by letting Mr. Thomas testify in that fashion as long
19 and freely as he did including this subject. It is clearly a
20 waiver.

21 Secondly, in any event, a report of an interagency
22 meeting which is essentially what we have here is hardly the
kind of advice, let alone confidential advice, which the
privilege is designed to address. So I do not think that the
privilege exists in any case, because he was not being given

1 advice or counsel, but he was being told about a meeting.

2 Even if there is, it was waived by the repeated
3 inquiries that were unchallenged into all kinds of
4 communications back and forth between counsel.

5 Thirdly, not as importantly, with respect to the
6 portion of the testimony that has been objected to that is Mr.
7 Cumming's, the communication of the 20th, Mr. Flynn expressly
8 waived on the record on the second day of Mr. Thomas's
9 deposition any communications with Cumming, as I understood it,
10 including specifically any communications between the Witness
11 Thomas and Cumming.

12 So what we are saying is that the only way to
13 establish whether or not this was an entirely irregular
14 governmental process is to find out from Mr. Thomas, the
15 witness that we have, what he knows about the regularity or
16 irregularity of that process.

17 He has now given us evidence which is substantiated
18 by people who were at the meeting including both McLaughlin and
19 Peterson, whose deposition requests that the Board is aware are
20 pending, that might well lead to admissible evidence, because
21 it would show that the Commission, FEMA, the authority was
22 influenced by factors extraneous to ordinary governmental
23 deliberations.

24 I think that we should be allowed to make a full
25 record now from Thomas at whatever level of hearsay it might

1 otherwise be in order to have sufficient grounds to persuade
2 the Board or anyone else that we are entitled to follow up on
3 these seemingly very important matters with Peterson and
4 McLaughlin when it comes time for their depositions.

5 JUDGE SMITH: Now would you review again your
6 statement about the conversation between Thomas and Cumming?

7 MR. OLESKEY: Well, he was not allowed to testify to
8 the conversation with Cumming on the 20th.

9 JUDGE SMITH: He was not?

10 MR. OLESKEY: No. Only to state that there had been
11 such a conversation, apparently as a follow-up to his previous
12 day's conversation with Attorney Flynn. Then he was allowed to
13 identify a similar conversation with Attorney Flynn on the
14 21st, two days after the initial conversation, which as we
15 understood it, appeared to be a follow-up to the previous
16 conversation with Attorney Flynn.

17 JUDGE SMITH: Where has Mr. Flynn waived, on behalf
18 of his agency, where has he waived the privilege?

19 MR. OLESKEY: Well, he certainly waived it by letting
20 the Witness Thomas discuss a good deal of the substance of the
21 meeting of the 19th, the one at which McLaughlin and Peterson
22 were present together with Stello and other officials from the
23 NRC, and to point out that at that meeting that it was reported
24 to him that FEMA had negotiated away this negative finding with
25 respect to its position on Seabrook, and that Stello had

1 indicated that if this did not happen that the NRC would engage
2 in total war with FEMA.

3 So two very important statements were made about what
4 happened at the meeting. I want to explore anything else that
5 was said at the meeting, which might arguably benefit FEMA as
6 much as the Intervenors, since it will be a complete record as
7 reported to this witness. And then find out what additional
8 information was reported to the witness from Cumming on the
9 20th of January and Attorney Flynn on the 21st, which it
10 appears from the context of the examination related to ongoing
11 discussions between the two agencies about the scope of FEMA's
12 testimony.

13 (Continued on next page.)

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1 MR. FLYNN: May I respond, Your Honor?

2 JUDGE SMITH: Yes, Mr. Flynn.

3 MR. OLESKEY: Briefly, the other thing, the Thomas
4 report about the meeting of the 19th, which seems to us very
5 important, is that, quote, and I am reading from the
6 transcript, "Grant Peterson had held up very well, but had
7 agreed to make changes."

8 JUDGE SMITH: Who said that?

9 MR. OLESKEY: That's Thomas testifying to what he was
10 told Peterson had said or done at the meeting of the 19th. And
11 this was all reported, according to Thomas, to Attorney Flynn
12 by George Watson, who was one of those attending the meeting
13 for FEMA.

14 JUDGE SMITH: And your point is that that has gone so
15 far that whatever privilege there was has now been waived?

16 MR. OLESKEY: Correct.

17 Also, I feel more broadly that you can't pick and
18 choose your spots with respect to attorney/client privilege.
19 You either invoke it as an agency with respect to a particular
20 witness and you are consistent, or you don't invoke it and the
21 witness testifies freely. But you can't decide merely because
22 a particularly sensitive or potentially embarrassing matter is
23 reached that then selectively you are going to invoke it.

24 MR. FLYNN: May I respond, Your Honor?

25 JUDGE SMITH: Mr. Flynn.

1 MR. FLYNN: If the position that Mr. Oleskey has just
2 advocated is tantamount to saying if I allow any question
3 whatsoever about a communication that I had with the client, or
4 witness for FEMA, then I waive this forever under all
5 circumstances, and I submit that is simply not the law.

6 JUDGE SMITH: Did you know that Mr. Thomas was
7 bringing those notes to the deposition?

8 MR. FLYNN: No, Your Honor.

9 JUDGE SMITH: Did you know that he even had such
10 notes?

11 MR. FLYNN: Well, I wasn't surprised, but I did not
12 know that in advance. And I know from working with Mr. Thomas
13 that he customarily keeps notes.

14 MR. OLESKEY: Mr. Thomas has been testifying
15 throughout with large piles of notes from various sources in
16 front of him, and has used them frequently to refresh his
17 recollection.

18 MR. FLYNN: There are other points that I would like
19 to make, Your Honor.

20 JUDGE SMITH: Mr. Flynn.

21 MR. FLYNN: Yes. In our -- it seems to me that it's
22 difficult to focus the argument that we are making now without
23 the decision on the matters that were raised in our conference
24 call on Friday, on April 1st.

25 One of the things that you indicated that you were

1 giving consideration to at that time was a Board-supervised
2 deposition of Grant Peterson. And it seems to me it makes a
3 difference in how we would decide to approach the pending
4 issue, or even argue the pending issue if we knew what your
5 decision on that was going to be.

6 Mr. Oleskey is arguing that he needs more information
7 about what Mr. Thomas says was reported to him by me, which he
8 says was reported to me by Watson, which is the report of what
9 someone else said at the meeting. I am not necessarily
10 advocating that we go ahead with the deposition of Mr.
11 Peterson.

12 My point is it makes a difference in how we perceive
13 the need to proceed with Mr. Thomas.

14 MR. OLESKEY: I don't entirely agree with that for
15 this reason, Your Honor.

16 I think we are entitled to know now what the report
17 of the meeting was from one agency official to another back on
18 the 19th of January, two months almost before the testimony was
19 filed since FEMA takes the position that its mind was
20 completely opened, according to the testimony that has been
21 given in the various depositions in the last two weeks, until
22 March 4th. And Mr. Peterson might have a different view or
23 recollection, even an initial view given all that happened
24 since the 19th of January, that would be very different than
25 whatever Mr. Flynn or Mr. Watson recollected when the events

1 were fresh and reported on to Mr. Thomas.

2 So I think it is important to get that slice of
3 recollection contemporaneous in time with the meeting, not
4 simply to be dependent upon what somebody else said later as a
5 check on what's reported.

6 MR. FLYNN: Your Honor, I have a fundamental concern
7 here. The nature of this hearing is undergoing some real
8 change. The hearing is no longer about will the beach
9 population on Seabrook and Hampton Beaches be adequately
10 protected. It is no longer about does FEMA's position have a
11 legal, technical or policy basis.

12 The issue is about secret meetings between NRC and
13 FEMA.

14 And I submit the choice is squarely before you is, is
15 that the direction that these hearings ought to go. If that
16 subject is opened up, that will be the central focus of the
17 hearing.

18 MR. OLESKEY: Your Honor, we, the Intervenors have
19 been crystal clear from the time the depositions were noted,
20 and in fact advance of the notices when we discussed the
21 hypothetical of FEMA potentially dramatically changing its
22 position.

23 And our view has been consistent that if that
24 happened, we would want to explore the substance of the new
25 positions to understand technically and legally what underlay

1 it, and the process under which the original decision of June
2 and September of '87 was reached and the circumstances under
3 which this agency, using Mr. Flynn's former metaphor, arrested
4 the liner in mid-course and caused it to do a 180 degree turn.

5 We haven't wavered from that, and throughout these
6 depositions of these four FEMA witnesses there have been
7 questions that clearly pursued both lines, and both lines, I
8 have no doubt, will be very much be the focus of the hearings
9 when they resume in May.

10 JUDGE SMITH: All right, let's see if we can take 11
11 these items one at a time and discuss them and see if we come
12 out with any logical end to it.

13 With respect to the meetings, if there were, assuming
14 there were meetings between the NRC and FEMA on the 19th, the
15 fact that there are two different agencies involved does not in
16 any way take away the right to assert executive privilege.

17 The agencies are bound together in this endeavor by
18 the Presidential order giving FEMA responsibilities together
19 with NRC.

20 Furthermore, the memorandum of understanding entered
21 into by NRC -- although it was the executive director it was, I
22 understand, with the approval of the Commission -- binds the
23 two agencies together as virtually as a single entity. It even
24 makes provisions for FEMA assisting NRC, or producing evidence
25 for hearings for them working out between counsel for NRC and

1 counsel for FEMA responsibilities. It creates, in effect, for,
2 at least for the purposes of executive privilege sufficient
3 privity, that we would regard the meetings between NRC and FEMA
4 as being within the decisionmaking group entitled to
5 consideration for executive privilege.

6 Now, of course, we always have the problem of does
7 the need outweigh the privilege, and we will come to that
8 later.

9 So then we have apparently FEMA's lawyer in the
10 meeting, and as a consequence -- I am accepting Mr. Oleskey's
11 hypothesis, or representation as the basis for the ruling. I
12 understand Mr. Flynn does not agree that it's accurate, but
13 let's just take it for discussion purposes.

14 So Mr. Flynn, as I understand it, was in the
15 meeting --

16 MR. FLYNN: No, excuse me, Your Honor.

17 JUDGE SMITH: No, I'm sorry, he wasn't.

18 MR. FLYNN: That was not the testimony.

19 JUDGE SMITH: It was --

20 MR. FLYNN: What was alleged or what was testified to
21 was that I passed on to Mr. Thomas reports from Mr. Watson.

22 JUDGE SMITH: Mr. Watson, yes.

23 Mr. Watson was in the meeting as an attorney
24 apparently to see what FEMA's position would be and execute it
25 before this Board. I would regard his role and his efforts as

1 being within the work product, attorney work product privilege,
2 and him conveying that to you, also counsel for FEMA, and
3 conveying that to a witness, I would regard that as all being
4 within the work product privilege.

5 Further, it is also within the deliberative executive
6 privilege. So I would regard that as privileged information.

7 The waiver, I agree with Mr. Flynn that you don't
8 waive for all purposes, all times, your privilege. However,
9 there is an argument, I guess it's a factual argument, that you
10 can't pick and choose.

11 It seems to me that even accepting Mr. Oleskey's
12 position here you have a discrete -- excuse me a moment -- you
13 have a discrete set of facts here that he wishes to assert his
14 privilege. I don't see that it's a waiver, but it's not clear
15 to us how far Mr. Thomas got into that January 19th meeting. I
16 don't know. I don't think that he had.

17 Could you tell me about that?

18 MR. OLESKEY: I would be happy to read you the
19 approximately one page that bears on it from the transcript,
20 Your Honor.

21 Shall I do that?

22 JUDGE SMITH: All right.

23 MR. OLESKEY: It starts at Volume 3, Page 50. I am
24 picking up for -- well, I will pick up in the middle of the
25 page with Thomas's testimony.

1 "Generally I can't give you much about what went on
2 because I was excluded from the meetings that were held with
3 the NRC and the meetings that were held internally with FEMA to
4 discuss the beach population. But I was told on the 19th by
5 Attorney Flynn --"

6 The witness asks, "Shall I go forward?"

7 Mr. Flynn: "Yes."

8 Witness continues: "That George Watson had called.
9 George had been at a meeting with a large meeting with the NRC.
10 I understand that Vic Stello, and I believe Attorney Turk were
11 at this meeting along with Grant Peterson and Dave McLaughlin
12 and Dick Krimm and his staff. And the report that was given
13 to me was that we negotiated away a negative finding at a
14 meeting with Stello.

15 "I was then told additional information about that
16 meeting which had, according to my information, taken place
17 from 1:00 until 6:30 p.m. on the 19th, to the effect that
18 Stello had indicated that the NRC", the transcript said
19 "wouldn't" but I believe the testimony was "would engage in
20 total war with FEMA if we didn't change our testimony in the
21 beach population. Grant Peterson had held up very well, but
22 had agreed to make changes.

23 "Later that week on the 21st, Attorney Flynn had a
24 conversation with me just as I was leaving."

25 Then there was an interjection by Mr. Dignan, and a

1 question by Mr. Flynn, "What was the pending question?"

2 That led to some colloquy, some unrelated testimony,
3 earlier testimony, and then to this on Page 354.

4 "Were you aware of the meetings during the week of
5 the 19th of January before they took place? Were you aware
6 they were going to happen?"

7 Answer: "I was aware that there were meetings and
8 that's why I was in Washington."

9 And then he goes on to say that, "I don't believe I
10 was aware there was going to be a meeting with the NRC that
11 week, but I was aware there were going to be policy level
12 discussions that way. That's why I was in Washington."

13 Then skipping to the bottom of the page, "What was
14 your understanding about any reason why your agency and the NRC
15 would be meeting that week?"

16 Answer: "To discuss the beach population at
17 Seabrook."

18 And then some other testimony. Ultimately several
19 pages later I made a request for the notes, and that's the
20 point at which Joe Flynn asserted attorney/client privilege.

21 We then had a colloquy in which I asked if he would
22 assert the privilege with respect to recollection of the
23 witness, further about what the notes said, and also about the
24 two later communications that the witness had identified having
25 been made by Bill Cumming and by Attorney Flynn on the 20th and

1 21st. And Joe Flynn said that he would similarly take that
2 position with respect to those communications.

3 And my recollection would be that would be pretty
4 much the end of it.

5 MR. FLYNN: I would just like to point out a couple
6 of things.

7 First, when the original question was asked that
8 elicited the testimony which Mr. Oleskey first read, I did not
9 know what the answer would be. I did assert the objection
10 which we are talking about today the next time a question was
11 asked which directly related to that subject matter.

12 JUDGE SMITH: So your representation is that you
13 asserted the privilege as soon as you became aware of the need
14 to.

15 MR. FLYNN: That is my representation, Your Honor.

16 MR. OLESKEY: I think that in a direct sense the
17 transcript supports my interpretation which is that Joe decided
18 he had better let the witness testify to a good many things
19 about communication between himself and the witness, or other
20 FEMA lawyers and officials and Thomas.

21 But when he heard what this was decided to pull back,
22 and I just don't think he is entitled to do that even if it's
23 otherwise privileged.

24 And with respect to work product which we are
25 discussing, Your Honor, I just don't see how a lawyer's factual

1 report of what happened at a meeting fits in the category of
2 his work product.

3 JUDGE SMITH: Well, he's addressing the potential
4 witness as I understand it, and reviewing the position of the
5 agency to prepare testimony in this very varying.

6 Is that correct, Mr. Flynn?

7 MR. FLYNN: Yes, that is my position.

8 MR. OLESKEY: I don't think that's a very strong
9 privilege where arguably if you had Peterson, McLaughlin or any
10 other person who was at the meeting here today giving a
11 contemporaneous recollection, I don't think they would be able
12 to invoke work product or attorney client obviously. And I
13 don't think under these circumstances that even the agency
14 would be able to invoke executive or deliberative process here,
15 because as I understand it that rests fundamentally on a
16 presumption of regularity in the administrative process, but
17 that it falls away when you present actual facts which show a
18 realistic danger of partiality, or taint, or undue influence,
19 and that's clearly what we are saying happened here even though
20 it may not be a convention undue --

21 JUDGE SMITH: I can't listen.

22 MR. OLESKEY: Excuse me?

23 JUDGE SMITH: Go ahead, proceed.

24 MR. OLESKEY: Even though it may not be convention
25 undue influence saying outsiders acting on agency, in the

1 context of the relationship of these two agencies and the
2 history that the Board is aware of, there are differences of
3 opinion since approximately last February of '87 over
4 sheltering at Seabrook.

5 JUDGE SMITH: All right, Mr. Oleskey, you are dumping
6 too much on us. I can only handle it one point at a time.

7 MR. OLESKEY: Excuse me, Judge, I will see what Mr.
8 Dignan says.

9 JUDGE SMITH: All right. The Board is going to
10 confer for a moment off the record.

11 (Board confer.)

12 JUDGE SMITH: We are back on the record, ladies and
13 gentlemen.

14 Still trying to take this one point at a time, we
15 believe that the privilege was properly asserted. It was a
16 discrete change in the testimony, and, of course, the portion
17 that he has already testified about is no longer privileged.
18 But the part that he hasn't testified about and the notes that
19 pertain to the balance of his testimony are -- we will
20 recognize the work product privilege.

21 And it's not only the work product privilege, but the
22 executive privilege follows it through.

23 The question is, should the executive privilege be
24 preserved. And it is exactly the type of executive privilege
25 that is intended by the cases that I have read on the matter.

1 Here are two agencies charged with an important health and
2 safety consideration, and they are having, assuming that Mr.
3 Thomas is correct, they are having a very, very candid
4 discussion, nobody is holding back on advice to the other, and
5 it is the type of advice that is sought to be preserved by the
6 executive privilege.

7 People apparently had strong opinions, and strong
8 opinions are protected. Strong advice is the very type of
9 advice that is anticipated by the executive privilege. If
10 every bit of advice a decisionmaker receives was bland and
11 uncontroversial, or correct on the face of it, patently
12 correct, there would be no need for the executive privilege.

13 So we think that the executive privilege should apply
14 if there was in fact a meeting between the NRC and FEMA.

15 However, that's not the end of it.

16 We have been led to understand that Mr. Peterson made
17 his decision based upon, one, the facts and the position set
18 out in the March testimony, and the supplemental testimony of
19 January 25th. If Mr. Thomas is correct in what he has already
20 stated, there may be some question as to whether Mr. Peterson
21 would be believed if he said there was no other influence in
22 arriving at that decision.

23 But the problem is we go too far down the road
24 speculating on what Mr. Peterson might say or what he might not
25 say.

1 But it seems to me that the Intervenor's have come up
2 with some reason to attach the representation that Mr. Peterson
3 made his policy decision based solely upon the advice of his
4 staff and the information contained in the testimony.

5 But what do we do with that? That is the question:
6 What do we do with that in this case?

7 And as I sit here right now, I don't know. Let's
8 review why we are in this debate today, and it is, as I stated
9 on April 1st, we would not be talking about this for five
10 minutes, or one minute if it were not for the rebuttable
11 presumption.

12 The Board, at the time when the rebuttal presumption
13 was favoring the Intervenor's, the Board made it clear that we
14 were not going to be very much impressed by rebuttal
15 presumptions. We will be impressed by the rationale and the
16 technical basis of FEMA's witnesses.

17 The policy basis is something that we are required by
18 regulation to recognize, but we also recognize that the
19 rebuttable presumption tends to weaken and even vanish when it
20 is brought into question.

21 Now that the advantage goes to the Applicant we feel
22 pretty much the same way, exactly the same way. The law, the
23 Commission's regulations, the facts of this case require this
24 Board to look at the testimony of FEMA and give it the
25 appropriate weight.

1 The policy aspects of the position simply are not
2 that important to us. We can tell you right now we do not feel
3 a great need to have, in addition to the legal and technical
4 basis, to have a statement of policy from Mr. Peterson, or any
5 other official of FEMA.

6 We wonder even if the rebuttable presumption has any
7 place in a contested hearing.

8 On the other hand, we recognize that the rebuttable
9 presumption is an evidentiary consideration granted by the
10 regulation as to which a party is entitled, and we don't want
11 to sweep it out without full consideration.

12 All of this goes to whether there is a need to set
13 aside the executive privilege for the use in this case. Our
14 feeling as we sit here now is that we don't see that strong
15 need to -- it may very well be that the deliberative process
16 privilege led to -- I mean the deliberative process, or the
17 executive process in this case led to a policy which we will
18 ignore, but the executive privilege is intended not for the
19 present case but for the future cases. It is to prevent in the
20 future advisers to decisionmakers being chilled in their
21 willingness to give candid, free advice.

22 So we see a strong need to protect the executive
23 privilege in this area. And unless we see a very, very strong
24 need overriding that for the evidence in this case, we are
25 going to protect it.

1 So where you are, I don't know. FEMA is not --
2 number one, FEMA is not a party to this proceeding, has no
3 burden of proof. Institutionally I would imagine that FEMA
4 does not care whether the Board gives them a rebuttal
5 presumption as to their position.

6 There is another matter, too, and that is the
7 memorandum of understanding as to which this Board feels bound,
8 makes it clear that FEMA is not a party to the proceeding and
9 should not be subject to the same discovery requirements that a
10 party would be.

11 We would regard in that respect, then, FEMA as having
12 a certain amount of immunity only from a normal discovery which
13 would be set aside only if FEMA is coming pounding in here
14 strongly asserting the rebuttable presumption of its policy,
15 which we don't see.

16 So where we are coming out is that the more we hear
17 the less likely we are to look at anything FEMA is doing in
18 this case other than the legal and the technical bases as
19 having an influence.

20 Now what does that do to the Interveners who are
21 pounding on this?

22 The most that you can expect, the most that you can
23 hope to win in your discovery dispute is to diminish the
24 executive privilege -- I mean the rebuttable presumption which
25 FEMA's position is entitled to. And that's why we say that

1 your discovery needs are not that great because we don't give
2 that much weight to the rebuttable presumption.

3 Mr. Dignan has a right to that if he is otherwise
4 entitled to it, and we -- I guess we understand from his
5 comment on Friday the he does not want that rebuttable
6 presumption swept aside.

7 Well, we are inclined to sweep it aside because we
8 have a situation here which we already know about, which we
9 already know about on the evidentiary record and from the
10 discovery proceedings and which our greatest focus is going to
11 be on the technical bases for it, for FEMA's position, and the
12 legal analysis. And it is a position that we took from the
13 very first day of this hearing that we will be impressed by the
14 quality of the rationale and the quality of the technical
15 basis, and not much impressed in a contested hearing where we
16 have the responsibility of the policy rebuttable presumption.

17 Now that is where we come out right now, and we will
18 hear from whoever wants to be heard from.

19 First, I might say to the Intervenor, would you
20 address the point that I am making that if we do not believe
21 that the policy aspects are important to us, and that the
22 rebuttable presumption is important to us, what do you have to
23 gain by destroying it?

24 MR. OLESKEY: Well, I would say. Your Honor, in part
25 that the kind of evidence that the discussion this morning is

1 focused on can't fall on the credibility and good faith of
2 the -- potentially of the technical and legal bases that are
3 offered in support of the position, the technical and legal
4 bases which you said the Board considers to be principally the
5 things at issue.

6 JUDGE SMITH: All right, now, you have deposed the
7 technical witnesses.

8 MR. OLESKEY: Right.

9 JUDGE SMITH: And you are prepared to cross-examine
10 them as to their credibility, their candor, their integrity,
11 the whole basis of their technical position.

12 MR. OLESKEY: But they are only the people who carry
13 the ball. They are not the people who set up the plays. They
14 are not the quarterbacks.

15 JUDGE SMITH: Let's assume just for the purpose of
16 arguing that FEMA's decisionmakers have decided to change their
17 position for inappropriate reasons, for corrupt reasons, for
18 the purpose of argument. But we have witnesses who are not
19 party to any such inappropriate decisionmaking, whose testimony
20 is worthy of belief as much as if they had been third-party
21 witnesses.

22 You have had an opportunity to depose those people
23 and discovery their bases, and you will have an opportunity to
24 cross-examine them.

25 Are the Intervenors -- I think your argument about

1 the credibility of the technical witnesses is a good one. But
2 the Intervenor is taking the position that they are entitled
3 to inquire into the policy bases, and that is a two-edged
4 sword.

5 If you argue the importance of that, then you must
6 necessarily be arguing that the rebuttable presumption is an
7 important consideration to us in the hearing.

8 MS. WEISS: Rebuttable presumption is in the rules,
9 Your Honor, and I don't know whether it can be waived by the
10 parties. Certainly haven't been waived by the parties.

11 And I would just like to make one further point if I
12 may. And that is that if Mr. Oleskey said there is a
13 presumption of regularity that attaches to the activities of
14 both of these agencies as a matter of federal administrative
15 law, all the way up through the appeals, the judicial review of
16 these cases, and they will receive deference in accordance with
17 a degree to which there have been irregularity, and if we can
18 demonstrate on this record that there is evidence to believe
19 that the agencies have not moved in a deliberative fashion with
20 regularity but they have either colluded or have been subject
21 to pressure, that is clearly relevant to the degree of
22 deference that they ought to get, not only from you on the
23 rebuttable presumption, but also in court.

24 JUDGE SMITH: So you are going to argue then, Ms.
25 Weiss, that we should give deference then to FEMA's position

1 because it is FEMA's position.

2 MS. WEISS: I am not going to argue that. I expect
3 that there is a rebuttable presumption in your rule.

4 JUDGE SMITH: That's right.

5 MS. WEISS: I don't think that you necessarily have
6 certainly the pre-emptive authority to waive it.

7 JUDGE SMITH: Well, no, we have the authority. The
8 rebuttable presumption is an evidentiary rule, and we have the
9 authority and the responsibility to decide evidentiary matters.

10 MS. WEISS: That's right, on the evidence.

11 JUDGE SMITH: Right.

12 MS. WEISS: But we have to have an opportunity to
13 present some of that evidence and to make a case. And I don't
14 think it can be waived pre-emptively as essentially a mechanism
15 for avoiding have to put that evidence on the record.

16 We believe it's our right to put that evidence on the
17 record, Your Honor.

18 JUDGE SMITH: So you're assuming that rebuttable
19 presumption, which is operating against you right now, as your
20 right so you can shoot it down.

21 MS. WEISS: Yes.

22 JUDGE SMITH: Okay. That's creative.

23 MS. WEISS: Well --

24 (Laughter.)

25 JUDGE SMITH: Anybody else want to be heard on this

1 point?

2 MR. BACKUS: Yes, I have got one thing, Judge Smith.
3 This is Bob Backus.

4 You premised much of this discussion by saying that
5 the executive privilege was designed to protect the free flow
6 of advice.

7 JUDGE SMITH: In the future.

8 MR. BACKUS: Yes. And I would just say that I think
9 that -- well, I think on the basis of what we now have what we
10 are talking about is not advice, not legal advice on the
11 attorneys here, but simply using the attorneys as a vehicle of
12 communication between the agencies. And I would just ask you
13 to consider that that's not something that needs to be
14 protected.

15 JUDGE SMITH: Well --

16 MR. BACKUS: I don't think that we are trying to
17 discover deliberative process within the agency; just further
18 discovery as to exactly what was communicated as a result of
19 this interagency meeting.

20 JUDGE SMITH: No, I think that the work product and
21 the deliberative process are intertwined inseparably in this
22 case. I mean we are talking about a decisionmaking, apparently
23 a meeting in which the cognizant agencies are trying to arrive
24 at a decision that is theirs to make under the law, and the
25 executive privilege follows the communication through Watson,

1 through Flynn to Thomas if it exists, and we found that it does
2 exist. The work product is just another aspect of it.

3 MR. BACKUS: One other point I would like to make,
4 Judge Smith. This is Attorney Backus again.

5 On the second day of the Thomas deposition Flynn and
6 Cumming engaged in an extensive discussion at the very opening
7 in which they made it very clear that they were waiving any
8 privilege for any communication to Mr. Cumming even before he
9 withdrew his appearance and was designated as a witness on
10 January 25th. They went through and got every party to agree
11 that they were not going to assert any privilege.

12 Now part of what we are seeking to discover here,
13 according to Mr. Thomas, is communications that came through
14 Mr. Cumming, and Mr. Flynn is even trying to maintain the
15 privileges to Mr. Cumming. And as to that I think it's been an
16 explicit undeniable waiver, and I can refer to the transcript
17 pages of the Thomas deposition where this was discussed before
18 Mr. Thomas actually began testifying on the second day.

19 JUDGE SMITH: I am having trouble plugging Mr.
20 Cumming into this --

21 MR. BACKUS: The testimony of Mr. Thomas, Judge
22 Smith, was that he had notes of conversations after the meeting
23 on the 19th. And I believe he said that some of them came from
24 things he heard from Mr. Flynn, who of course was and is now
25 counsel of record, and some of them came from Mr. Cumming, who

1 had acted as counsel but had withdrew and became a witness as
2 of January 25th.

3 And what I am saying is that Mr. Cumming and Mr.
4 Flynn explicitly waived any privilege in regard to
5 communications made to Mr. Cumming.

6 JUDGE SMITH: At any time?

7 MR. BACKUS: Any time.

8 JUDGE SMITH: Ever.

9 MR. BACKUS: Up to the time of the deposition; that's
10 what they said.

11 JUDGE SMITH: Is that true, Mr. Flynn?

12 MR. FLYNN: Your Honor, it's true in a very limited
13 sense. Let me explain what I mean by that.

14 Mr. Cumming came into the deposition room on the
15 morning of the second day of Mr. Thomas's deposition and he
16 said, in effect, I need to know if any of the parties wish to
17 assert any claim of confidentiality or privilege as to
18 communications made to me, that is to Mr. Cumming.

19 And he said, if I do not hear from any of the
20 parties, and especially if I don't hear that they have gone to
21 the Board and submitted the contents of those communications to
22 the Board in camera, I will assume that no party, or no witness
23 wishes to assert a claim of privilege as to those
24 communications; that is, communications between Mr. Cumming.

25 And when he was deposed, he again commented that he

1 had not heard from any party or any witness that such a claim
2 of privilege was asserted.

3 What we are talking about here is not within the
4 ambit of that. What we are talking about now is communications
5 from Mr. Cumming, and that's different.

6 JUDGE SMITH: Yes, well, what -- I understand that.

7 What did Mr. Cumming have in mind? What witness,
8 what parties would be covered by that?

9 MR. FLYNN: Well, I believe he had in mind
10 conversations that he had with Mr. Turk. In fact --

11 JUDGE SMITH: Oh, I see, all right.

12 MR. FLYNN: And he also may have had in mind
13 conversations with Mr. Thomas.

14 But, again, the focus of it was communications to Mr.
15 Cumming and not necessarily communications from him.

16 MS. WEISS: Judge, Mr. Cumming insisted that Ed
17 Thomas state on the record, as every other counsel was asked
18 to, that he, Thomas, didn't assert any privilege with respect
19 to any communication involving Cumming. And Thomas did that on
20 the record after counsel had been asked to do so.

21 I don't understand now this selective interpretation
22 of this, or this limiting interpretation that Joe is putting on
23 what Cumming said.

24 Cumming came in to Thomas's deposition on day one,
25 asked to be heard out of course, said that since he was going

1 to be a witness and since Thomas was going to be a witness
2 before anyone, to clear the decks right then, and make it clear
3 that no privilege with respect to communications involving him
4 was being asserted period.

5 MS. WEISS: And one certainly can't claim a privilege
6 as to half the conversation. You can't say that you can
7 testify as to what I told you, but not as to what the response
8 was.

9 MR. BACKUS: And lastly, Your Honor -- this is Backus
10 again -- Cumming, of course, testified for two days about
11 conversations he had before he was designated a witness.

12 How he can now be protected against testifying
13 against certain other things that he said is beyond me.

14 MR. FLYNN: Your Honor, this goes back to the part of
15 our conversation earlier today, and that is if waiving
16 privilege in one context means that it's waived in all context,
17 and I believe you have already decided that matter.

18 MS. WEISS: I don't agree. I mean this is the
19 broadest possible pre-emptive general waiver. It was not a
20 failure to assert a privilege. It was a completely general
21 waiver.

22 MR. DIGNAN: Could I respectfully point out, Your
23 Honor -- this is Tom Dignan -- that the waiver that they are
24 talking about as I heard from Cumming is this.

25 Cumming wanted everyone else to waive. He was

1 waiving nothing. He asked everybody else to waive because he
2 said, I am going to be asked about conversations I had with
3 various people, and if you assert you have got some kind of a
4 privilege that I have to uphold for you, I want to know it
5 beforehand. And it wasn't a waiver of the privilege that
6 people went around waiving, people like me. I didn't know what
7 I was waiving, because I didn't think I had a privileged
8 conversation with Mr. Cumming anyway.

9 But the fact of the matter is there was no waiver by
10 FEMA in this action. FEMA sought a waiver from everybody
11 else -- FEMA in the form of Cumming -- that he could talk
12 freely and not be hit over the head that he had let go of
13 privileged information as far as they were concerned.

14 So I don't know how this can possibly be a waiver by FEMA.
15 It was a waiver by everybody but FEMA the way it went around
16 the room.

17 JUDGE SMITH: All right.

18 Well, the meeting of January 19th between officials
19 of FEMA and officials of NRC is privileged, the discussion is,
20 and it has not been waived, and we will regard that as a
21 traditional privilege. We see no need, no litigative needs yet
22 to set that privilege aside for the litigation.

23 It may come up. We don't want to go too far down the
24 road. The argument made that it may affect the credibility of
25 the witnesses, we don't know about that. That's premature for

1 us to rule on that.

2 We don't see -- I didn't read Mr. Keller's testimony,
3 or Dr. Hock's testimony as being infused with policy
4 considerations, but you will have an opportunity to cross-
5 examine those people before the Board and let us make a
6 judgment as to what their candor is and what their credibility
7 is, if they really believe what they are saying or if they are
8 saying it because they were threatened, or coerced into it,
9 that's your -- your chance will come up. That's what we are
10 paid to decide.

11 Your difficulty is that I do think the Intervenors
12 have made a threshold showing that we could not simply just
13 take an affidavit from Mr. Peterson that his policy was
14 predicated solely upon the history as set out by Mr. Cumming in
15 the testimony and the advice of his staff at a meeting where
16 they arrived at it. I think that they have raised enough
17 outside, extraneous information to be allowed to -- if Mr.
18 Peterson is going to have any input at all -- to not be
19 required to rest upon an affidavit. So there is where you are.

20 (Continued on next page.)

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1 MS. WEISS: Your Honor?

2 JUDGE SMITH: Ms. Weiss?

3 MS. WEISS: Will we be precluded, assuming there is
4 some reason to provide deposition for Matthew to Peterson about
5 what happened at the meeting of the NRC on the week of January
6 19th?

7 JUDGE SMITH: Where we are right now, as far as I see
8 it, well, we didn't get to the supplemental testimony yet -- I
9 want to talk about that in a moment -- but we have witnesses
10 that are coming to the hearing, and they're going to testify,
11 and we're going to make our decision based on upon what they
12 said and the cross-examination of those witnesses. And we
13 don't see, at this time, any rebuttable presumption in favor of
14 FEMA's position. We will look at it as to the quality of their
15 analysis and the -- the quality of their analysis. As we would
16 any other witness. There's nothing magic. There is no special
17 weight because of the fact that there are FEMA witnesses
18 attendant to that panel.

19 To go to your other point, Ms. Weiss, it has not been
20 the custom of this board to give any special weight to staff
21 witnesses. They stand or fall upon their own credibility
22 unless the issue, itself, is the staff's position.

23 MS. WEISS: The reason why I asked the question, Your
24 Honor, is that, frankly, I am not interested in having Mr.
25 Peterson if all that I am allowed to ask him is for him to

1 elaborate on his official version of reality and if I'm not
2 allowed to ask him about other facts which might cast a
3 different light, which might offer an alternative view as to
4 what was actually going on at FEMA.

5 It's no good whatsoever to me to provide a forum for
6 somebody to review what I know is going to be a one-sided
7 version of facts, since I know I can't ask questions about
8 other facts that I know.

9 JUDGE SMITH: Well, Ms. Weiss, when I look at the
10 equities of the situation before us, that the most you can --
11 putting aside witness credibility -- the most that you can hope
12 for in your discovery efforts is to shoot down that rebuttable
13 presumption and the board deciding now that, in the absence of
14 something further which has been offered to us, there is no
15 rebuttable presumption, then you have need for the information
16 you're seeking.

17 MS. WEISS: If he's supporting his ruling,
18 eventually, then, evidence of improper conduct, of corruption
19 or collusion between the two agencies is going to be ruled out
20 as though this points forward. Then that, you know, from
21 my --

22 JUDGE SMITH: Put it in a different context.

23 MS. WEISS: Well, I don't want to hear Mr. Peterson
24 then, speaking clearly, just for myself. I don't care to be a
25 part of making a one-sided record.

1 JUDGE SMITH: All right. That's fine, but if you
2 assert that corruption or irregularity in the process is an
3 issue in this case, explain it.

4 MS. WEISS: Well, I think that we have, Your Honor.
5 I think we have evidence that there were meetings at which FEMA
6 was told that if had it changed its position or there would be
7 total war, that FEMA's position was, quote-unquote, negotiated
8 away. FEMA's evidence would like to portray what happened as a
9 deliberate, evolving process, and we have got enough to present
10 an alternative view.

11 JUDGE SMITH: All right, well, where does it take
12 you?

13 MS. WEISS: Well, I think you cannot consider these
14 issues purely as a matter of -- that you cannot ignore that if
15 these witnesses are giving only the official version of the
16 facts and there were other things that went on, that you would
17 have to have that in your mind when you weigh whether what they
18 would say on other issues was true or false, or if it's weighed
19 as I first weighed it.

20 JUDGE SMITH: Ms. Weiss, there's no way that you can
21 revive that I can see in the facts of this case, rebuttal for
22 presumption attendant to the FEMA's first panel and the first
23 position. Absent that, unless you can show irregularity in the
24 process, as having some evidentiary relevance to the issues
25 before us, I don't know what we can do for you.

1 MS. WEISS: I think what we are attempting to do is
2 show that there was irregularity in the process and that that
3 bears on the weight which you can give the FEMA evidence --

4 JUDGE SMITH: Right.

5 MS. WEISS: -- and the NRC evidence, that it can't be
6 disregarded. Certainly, it can't be disregarded in the
7 preemptive fashion that we have to field out, to develop, what
8 the paint was, what direction it took, whether substantive
9 positions were fabricated after the fact in order to justify
10 pre-determined conclusions rather than going the other way
11 around, that you gather the facts first and then reach the
12 conclusion. That would have to bear on the weight that you
13 gave NRC's position and FEMA's position, and that you can't say
14 that we are precluded from developing that evidence at this
15 stage.

16 JUDGE SMITH: Well, Ms. Weiss, what I -- the point I
17 was making is we are not giving weight to positions.

18 MS. WEISS: But I'm not talking about the rebuttable
19 presumption, but you're going to be weighing evidence.

20 JUDGE SMITH: Right.

21 MS. WEISS: But weighing evidence that FEMA presents
22 and evidence that we present.

23 JUDGE SMITH: And you attack the credibility of those
24 witnesses with all of the energy that you can muster. And
25 you've had depositions, opportunities to do that. And if you

1 can demonstrate that those witnesses are not worthy of belief
2 or that less weight should be given to them, that's fine. But
3 that does not give you any reason to invade the deliberative
4 process.

5 MS. WEISS: Please, Mr. Chairman. You're stopping us
6 at the threshold right now. Right now we have evidence that
7 suggests that a conclusion was reached and did paint it to the
8 agency and that a basis was fabricated thereafter in order to
9 give it a plausible, some plausibility, a plausible basis. And
10 we have evidence that suggests that, and you're stopping us at
11 the threshold from developing it. If we could develop it, I
12 don't see how it could help but bear on the question of how
13 much weight you're giving this evidence.

14 JUDGE SMITH: The evidence or the witnesses?

15 MS. WEISS: Don't see any substance.

16 JUDGE SMITH: The evidence that comes from the
17 witnesses?

18 MR. FLYNN: Your Honor, I would like to suggest that
19 if this hearing were to go forward without any testimony from
20 FEMA, then you would actually focus on the technical issues.
21 And if that information came from the applicant's witness, for
22 example, you would have a very simple issue, and that is, is
23 the position correct, is it well supported, or isn't it.

24 I think your analysis is correct that that is and
25 should be the focus of the hearing.

1 MR. OLESKEY: Judge, this is Steve Oleskey. Let me
2 just make one other brief observation.

3 It seems to me that FEMA and the NRC are now pretty
4 much in the position in terms of the hearing originally
5 contemplated by the Memorandum of Understanding, that is, in
6 substance, FEMA is appearing as an expert witness on behalf of
7 the NRC. And what the evidence, if it's accurate, that comes
8 out of the meetings of the 19th of January, says is that the
9 NRC got together with FEMA and directed its conclusion that
10 week, before the supplemental filing by FEMA on the 25th of
11 January, before the New Hampshire filing that was supposed to
12 be the key to FEMA's position on February 11th and well before,
13 obviously, FEMA's actual position was formulated between
14 approximately the 4th of March and the 14th.

15 So, if that's the context, if FEMA's back as a
16 witness for the NRC, presenting their evidence, I think that
17 half of that testimony, that I think we would be in a position
18 to bring in if we are allowed to complete the depositions in
19 the fashion we contemplate, that the decision was made in the
20 middle of January and dictated by the NRC and that FEMA's not
21 operating in the context also contemplated, as I view it, by
22 the Memorandum of Understanding as a kind of expert agency and
23 holding itself aside, in a sense, even more an expert witness
24 to formulate independent questions of judgment on these
25 important issues.

1 I think that's relevant, to be brought into the case
2 when we attack these witnesses. It's true that we may not be
3 able to do it entirely through these witnesses. We may have to
4 ask you to bring in other witnesses. I acknowledge that.

5 JUDGE SMITH: Well, your arguments really do not take
6 into account the importance of the deliberative process. We
7 value that very highly, and you have not made a case showing
8 that it is needed in the context, yet, of this case.

9 Now, you're going to have an opportunity to cross
10 examine these people and demonstrate either that they are not
11 to be believed or more evidence is needed. I don't know. But
12 I might also say that I do not see, I do not see, the sinister
13 implications that Ms. Weiss does and the interviewers do in the
14 meeting between the NRC and FEMA. They, obviously, had
15 difference of opinion.

16 MR. TURK: Your Honor, this is Sherwin Turk. I've
17 held myself back from this discussion until now.

18 JUDGE SMITH: Well, you weren't going to succeed in
19 that because we are going to search you out. Mr. Turk, in just
20 a moment.

21 MR. TURK: I'd like to make one comment if I can.
22 It's a gossamer web. I recall reading that in some poetry. I
23 think that's exactly what we have here. The Interveners are
24 trying to use third-hand hearsay, from a witness who was not
25 present at a meeting, to try to allege that there was some sort

1 of improper comment made by Mr. Stello to FEMA. The Intervenor
2 are very far from having any direct evidence or any credible
3 evidence on that.

4 Mr. Thomas, himself, has indicated that his superior
5 was called to Washington in December. The complaints about Mr.
6 Thomas's position on the Beach testimony. Mr. Thomas has
7 indicated that in the fall of 1987, FEMA was moving away from
8 the position which she had originally espoused. The fabric
9 which these Intervenor are attempting to weave here with, have
10 you believe, that in mid-January of 1988, the NRC exerted
11 pressure on FEMA in an attempt to get it to change its view.
12 It's simply not true. There are a lot of inaccuracies in Mr.
13 Thomas's testimony. If Mr. Thomas is brought as a witness
14 before the board, perhaps some of those inaccuracies will come
15 out, but I don't think that the corrective privilege should
16 fall on third-hand hearsay, particularly from a witness whom
17 this board has already had occasion to examine and has already
18 had occasion to view his credibility.

19 JUDGE SMITH: All right, Mr. Turk. Let me ask you
20 one other thing, Mr. Turk. You are asserting privilege on the
21 meeting of January 19th on behalf of your clients?

22 MR. TURK: No, I am not.

23 JUDGE SMITH: You are not?

24 MR. TURK: I made a statement to Mr. Cumming when I
25 was asked whether I am waiving privilege. I said that I was

1 not aware if that privilege had been asserted, and until I
2 become aware that any such privilege is asserted I can only
3 discuss waiver. Now, in fact, I have not discussed with my
4 client whether they wish to assert the privilege.

5 JUDGE SMITH: That's on the meeting of January 19th?

6 MR. TURK: That's right. I have not asked my client
7 whether they wish to assert privilege after that meeting. So I
8 can't tell you whether you or not we would want to assert that
9 privilege or waive any such privilege.

10 JUDGE SMITH: That is, indeed, a gossamer web. Well,
11 our ruling so far as what it is, we have not seen extraneous
12 information of such a degree to inquire into those meetings as
13 it relates to the testimony offered by FEMA in its March
14 version. We will wait and see what happens when you cross
15 examine them or what else you come up with, but we have not,
16 even taking Mr. Thomas' version of it, which we agree that we
17 had problems with, but even taking his version of it, I do not
18 see a statement that might arise in a conference of that nature
19 as being sufficient to destroy the Executive Privilege.

20 I mean it is the nature, it is the very nature, of
21 Executive Privilege to allow people to sit around and speak in
22 strong terms and not have it come out later on to defeat them.
23 It's the future chilling effect that we're concerned about.
24 Not the present one in this case because what is said is
25 already said.

1 Now, we do have, we want to move on to the testimony.
2 The testimony incorporates by reference the testimony of
3 January 25th, which included Mr. McLaughlin. The testimony
4 does not show that it's severable as seems to be by a three
5 member panel. If that testimony, if that attachment to your
6 March testimony is offered at the hearing, the board would
7 entertain a motion to strike the testimony of January 25th
8 because of the inability of the parties to cross examine Mr.
9 McLaughlin on it, either in form of depositions or by his
10 presence at the hearing. I don't know what to tell you to do.
11 We hate to tell -- we don't like to tell FEMA, or anybody, how
12 to clean up their act because we're saying, if we do that, that
13 if they do certain things then they have met our standards, and
14 it's not for us to decide.

15 We're just telling you in advance that the way you've
16 presented it now, we would be very sympathetic to a motion to
17 strike the January 25th attachment, supplemental testimony
18 attached to your March testimony.

19 MR. FLYNN: I appreciate that advice, Your Honor.

20 MR. TURK: Your Honor, for the record, let me note
21 that I was interviewed by the press about this purported
22 statement by Mr. Stello. And I indicated that I was not aware
23 that any such statement had been made. And I'm informed that
24 the Public Affairs of NRC is also talking to Mr. Stello and has
25 provided a statement to the press categorically denying that

1 that kind of a statement was made.

2 MR. OLESKEY: You know, this gets to an issue that
3 concerns all of us, Judge, since we're here and that is the
4 dual capacity that Mr. Turk has from time to time as both
5 counsel and witness. And I think I speak for Intervenors when
6 I say that we're very uncomfortable with the way he moves back
7 and forth, or appears to move back and forth, on occasion
8 between attorney status and quasi-party or fact witness status.

9 I want to put him on notice before the board that we
10 may seek to deal with that in front of the board later in these
11 hearings.

12 JUDGE SMITH: All right, now. How did the press find
13 out about the statement attributed to Stello by Thomas?

14 MR. OLESKEY: The press, I think, is aware from
15 earlier discussions, has been covering these depositions
16 throughout.

17 JUDGE SMITH: They have not been covering the
18 depositions. They've been interviewing people who leave the
19 depositions.

20 MR. DIGNAN: That's correct, Your Honor. And they
21 got no interviews of the Applicant.

22 JUDGE SMITH: Now, Mr. Oleskey, you're telling me
23 that somebody's free to read that deposition, ascribe a
24 statement to Mr. Stello, and I expect the NRC staff to remain
25 silent about it.

1 MR. OLESKEY: I don't think Mr. Turk has the right in
2 the hearing to play a dual role. That's my only point, Your
3 Honor.

4 JUDGE SMITH: Well, you can't pick and choose a
5 narrow aspect of that point and expect to succeed. You live by
6 publicity, you'll die by it. I don't like having our hearings
7 turn into a circus.

8 MR. OLESKEY: Well, as far as I'm concerned, the
9 depositions aren't a circus and the hearings haven't been a
10 circus, at least not as far as any entertainer has influenced
11 or affected them.

12 MR. TURK: Your Honor, I'd like to note, just so the
13 board is aware of how the depositions have been conducted, that
14 members of the press have been present sitting outside the
15 deposition room, during the deposition of Mr. Thomas.

16 JUDGE SMITH: I know.

17 (Continued on next page.)
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1 MR. TURK: Speaking of Oak, Thomas, or Keller.

2 MS. WEISS: That seems to be true, they were out.
3 they've been out there the whole time.

4 MR. TURK: We've had, they were never -- too far.
5 But Your Honor, I normally don't speak to the press myself.
6 Yes, and they were followed to the bathroom by a press camera.
7 That led my client to speak with the press.

8 MR. DIGNAN: Your Honor, let's get it clear on the
9 record the way the game should be played, at least the context.
10 The first day of the depositions I showed up, I was sure there
11 would be press coverage, and I wasn't surprised. It was
12 channel 5, with its cameras and everybody else in town.

13 I brought with me a press spokesman from the --, on
14 the theory because I do make it a rule simply not to talk to
15 the press but you have to have somebody there to give our
16 version of the facts.

17 I went out and met with Mr. Oleskey. Mr. Oleskey
18 said he did not want my press representative to be in there
19 unless I would agree to just let the press in the deposition
20 room. I said to him at that point, well Mr. Oleskey I don't
21 need my press representative, if as and when you'll agree with
22 me you're not going to talk to the press.

23 Mr. Oleskey took the position that he always talks to
24 the press, and he thinks that's appropriate. That's fine, and
25 that's his business. But what's really going on here is we ask

1 a nice sensational third or fourth degree hearsay question, get
2 a crack about Vic Stello, and then there is immediately a press
3 conference. Indeed it will reflect in the record, we had to
4 wait, to start a deposition because Mr. Backus was holding a
5 press conference outside.

6 Now, I mean that's alright, I'm a great believer in
7 the First Amendment. But to jump on Shirlen [ph] Turk, for
8 doing what he just did there is beyond the pale. Shirlen Turk
9 is in the same position I'm in. He's got one hand tied behind
10 his back by his own views of what the press are, and these
11 people have been going out and giving the press exactly what
12 they want the press to hear out of the entire deposition.

13 JUDGE SMITH: Mr. Dignan, I'm going to put an end to
14 it. We are not concerned about the press. If Mr. Oleskey
15 wishes to make a motion with respect to Mr. Turk he can do it.
16 We will look into the circumstances, though.

17 We do not have the authority nor the desire to
18 control the parties' communication with the press. But I'm
19 just not sympathetic to Mr. Oleskey's position that he reveals
20 information in a deposition and then expects no reaction. It's
21 all part of it, Mr. Oleskey.

22 Let's move on. Anything further?

23 (Continued on next page.)
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1 JUDGE SMITH: Is there anything further by any
2 party?

3 MR. OLESKEY: I guess not, Your Honor.

4 JUDGE SMITH: Is there any --

5 MR. BACKUS: What -- wanted to know, is the Board
6 ready to tell us what is going to happen with the request for
7 further deposition in any sense. We have a list of other
8 parties that we wanted to depose.

9 I must say I would associate myself with Attorney
10 Weiss, that if Mr. Peterson is going to be limited to only
11 testifying to the official FEMA position without opportunity to
12 explore the background of how that was obtained, I would not be
13 interested in his testimony.

14 JUDGE SMITH: It's entirely up to Mr. Flynn, whether
15 he wishes to offer Mr. Peterson as a witness. We are not
16 telling Mr. Flynn that if he makes Mr. Peterson available in
17 depositions or if he makes him available as a witness, or if he
18 files an affidavit, what the result will be.

19 Other than to say that we're not in the mood to
20 accept an affidavit based upon the fact that we know that he
21 attended a meeting with NRC, if the affidavit states what I
22 thought it would state on our conference on April 1st.

23 We're not going to tell you people how to run your
24 case. We're just deciding now that we see no need to invade
25 the executive privilege because the only need that we can

1 imagine at this time, or the only need that we can identify at
2 this time is as it relates to the rebuttable presumption.

3 We do not find a set of facts before us where FEMA is
4 entitled to rebuttable presumption. The remaining problem is
5 how do these meetings and how does the actions of the policy
6 makers, decision makers, impact upon the credibility of the
7 fact witnesses offered in the testimony in March. We don't
8 know. We don't know how that's going to work.

9 We'll wait and see how you cross-examine them. You
10 had an opportunity to depose them and presumably you know now
11 what the basis of their testimony is. That summarizes our
12 ruling.

13 MS. WEISS: We had just one other outstanding
14 problem, Your Honor, that I think is what Mr. Backus was
15 raising, which is we have outstanding depositions notices for a
16 variety of other witnesses and whom I felt at least I would
17 like to have a ruling on those.

18 JUDGE SMITH: What are those witnesses?

19 MS. WEISS: Mr. Wingo, Mr. Krimm, Mr. Vickers, oh,
20 Mr. Krimm isn't on there. Mr. Wingo, Mr. Vickers, Mr.
21 McLaughlin, Mr. Peterson, anybody else? And Mr. Becton,
22 General Becton.

23 JUDGE SMITH: I don't even know who those people are.
24 They've been identified to us as policy-level people and they
25 would be covered by our ruling that we will not allow them to

1 be interviewed, be deposed, based upon their deliberative
2 process, in arriving at the FEMA position.

3 MS. WEISS: And I take it then that you've just made
4 a ruling denying the remainder of the deposition requests
5 including Mr. McLaughlin and Mr. Peterson?

6 JUDGE SMITH: If I understand the purpose, as I
7 stated, was that these are policy makers at FEMA and the
8 purpose of your examining them is to probe the deliberative
9 process at arriving at that policy.

10 MS. WEISS: Well, the purpose of McLaughlin is the
11 fact witness, that he be in addition to a policy maker, and we
12 wish to depose him because he's attached, you see, as --
13 attached to that testimony.

14 JUDGE SMITH: And we stated that we won't accept that
15 testimony unless they make him available for deposition or the
16 testimony is withdrawn or reformulated or something, but we
17 don't want to tell FEMA how to clean up their testimony.

18 It's up to them. They're going to offer it. We're
19 just telling them now that the very thing that you, your point
20 is well made.

21 MS. WEISS: Well, let me just finish. There's a
22 flow, Your Honor.

23 There's a flow between that January 25th testimony
24 and the March 14th testimony, which presumably shows the
25 evolution of the FEMA position and the evolution of the FEMA

1 policy. And I think we're entitled to ask Mr. McLaughlin about
2 how FEMA moved from one to the other.

3 MR. FLYNN: Your Honor, I think this misses the point
4 of our testimony. As I stated several times, what we are
5 offering is a technical and policy/legal explanation of the
6 position that we've taken.

7 I heard the advice that you gave earlier, that if we
8 don't submit Mr. McLaughlin to deposition you will not look
9 kindly on an effort to introduce that testimony. I think on
10 balance our preference would be to withdraw the testimony.

11 JUDGE SMITH: Yes, well, I might also point out to
12 you that the policy aspects of FEMA's presentation before this
13 Board are not acceptable.

14 I mean, unless you make your policy makers more
15 available, or there is better explanation of the policy. Now
16 we don't see much policy, but we see some policy in that
17 testimony. I think that's about the best advice we can give
18 you.

19 MR. FLYNN: I understand your point, Your Honor. And
20 at this point what I am prepared to say is that we are
21 certainly not interested in submitting any of our management-
22 level people to inquiry into the meeting of January 19th or any
23 other discussions as to which the deliberative process
24 privilege might apply.

25 Now I'm leaving the door open a little bit. We may

1 decide that we should allow a deposition of perhaps Mr.
2 Peterson on the subject of what the policy considerations were,
3 but I am not promising that we will do that at this point.

4 I'll negotiate that with the Intervenors after I have
5 had a chance to consult with Mr. Peterson.

6 JUDGE SMITH: All right, anything further? All
7 right. That's the end of our conference, and thank you for
8 joining us.

9 (Whereupon, at 11:44 a.m., the telephone conference
10 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: Public Service Company of New Hampshire, et al.
(Seabrook Station, Units 1 and 2)

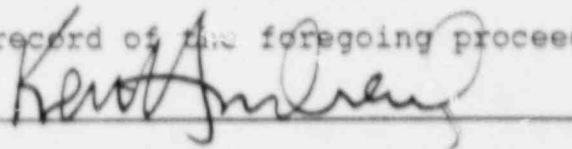
Docket Number: 50-443-OL; 50-444-OL

Place: Bethesda, Maryland

Date: April 5, 1988

were held as herein appears, and that this is the original
transcript thereof for the file of the United States Nuclear
Regulatory Commission taken ^{electronically} ~~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
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/s/



(Signature typed): Kent Andrews

Official Reporter

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