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UNITED STATES OF AMERICA
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NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

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IN THE MATTER OF: :

DUKE ENERGY CORP., : Docket Nos.
50-413-OLA
(Catawba Nuclear Station : 50-414-OLA
1 & 2) ASLBP 03-815-03-OLA
:

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Thursday, December 4th, 2003

U.S. Federal Courthouse
Courtroom # 2
401 W. Trade St.
Charlotte, NC

The above-entitled matter came on for
hearing, pursuant to notice, at 8:30 a.m.

BEFORE:

THE HONORABLE ANN MARSHALL YOUNG, CHAIR
THE HONORABLE ANTHONY BARATTA
THE HONORABLE THOMAS ELLEMAN

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

8:35 a.m.

CHAIR YOUNG: Let's go on the record. I believe we were going to finish up on BREDL 6, if there was anything left on that one, and then go straight back to NIRS 1.

Does anyone have anything to add on BREDL 6, briefly?

(No response.)

CHAIR YOUNG: If not, then, Ms. Olson we will go to you.

MS. OLSON: I want to appreciate, very much, the attachments and other materials that were forwarded to me by NRC staff and Duke. I have to admit, as a resource issue, with no secretary, or clerk, or anything, I saw a response to the RAI on October 1st, that was about boroflex, but I failed to see that there was a second response with the same date on quality assurance.

And I am pleased to have reviewed those materials, and to know that Framatome is taking this position so completely seriously that they have changed the name of the individual in charge to the vice president for sustainable development and continuous improvement.

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1 And when it comes to MOX fuel experience
2 in the last decade, I certainly think there is room
3 for continuous improvement, and that quality assurance
4 is one of the key areas that the Nuclear Regulatory
5 Commission should be paying attention to, because of
6 its very poor track record in the world.

7 Now, I'm actually not going to go into
8 much more of a critique of the proposed quality
9 assurance program, in part, because I only got these
10 materials into my possession very recently, and I
11 understand that that is my problem.

12 However, in reviewing them I think it is
13 still worthwhile to focus on the first part of my
14 contention, which is the question of a publicly
15 benchmarked record of what the material going into
16 these lead test assemblies is, what its isotopic
17 composition is, what its previous history is.

18 I take to heart Duke's comment that the
19 question of whether this test has any relevance or any
20 ability to be used as a bounding set of data for batch
21 assemblies is for the next round.

22 However, that cuts to the question of
23 severability between doing four lead test assemblies,
24 and a very clearly stated intention, in this
25 application, that there will be a Duke application for

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1 batch irradiation.

2 If it is that question, I would love to
3 have Duke affirm that they never intend to put batch
4 assemblies into their four reactors in the Carolinas.
5 That is totally consistent with Nuclear Information
6 and Resource Services hope for the future, that this
7 does not happen.

8 If they want to assert that they are never
9 going to do batch irradiation, we will be glad to say
10 there is no relevance between lead test assemblies and
11 batch irradiation.

12 However, that is not what we are offered,
13 that is not what we are contending with. It is
14 certainly not what NRC is spending massive
15 organizational resources to deal with.

16 Given the fact that this is a program to
17 move towards irradiation of MOX fuel, what are the
18 things that we need to know from this test, in order
19 to know its relevance for future irradiation?

20 And one of the things that I think we all
21 need to know is, is there no gallium in this or very
22 low parts per billion acceptance criteria, because
23 they got it out, or is it very low parts per billion
24 because it was never there?

25 And while there may, indeed, be some

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1 gallium in low enriched uranium fuel, the papers that
2 I have submitted indicate that there may be an excess
3 of one percent gallium in the plutonium that is coming
4 out of a former nuclear weapon pit, the trigger, the
5 alloyed plutonium that was alloyed in order to make it
6 malleable so that it could be machined into a complex
7 shape is a different example than plutonium oxide
8 stored at Los Alamos that never made it into a
9 plutonium alloyed pit.

10 I am simply suggesting that at this
11 juncture there should be a record of what was the
12 plutonium that was used for this test.

13 CHAIR YOUNG: I am going to see if I can
14 understand something. Duke's reference to the
15 Framatome MOX fuel design report, are you saying that
16 that does not deal with the same type of plutonium?

17 MS. OLSON: I am saying, indeed, that
18 Framatome has no experience with weapons grade
19 plutonium, nobody has ever made fuel rods, for use in
20 the United States, out of weapons grade plutonium, or
21 use in Europe.

22 Apparently there may be one experience in
23 Russia that I have heard of. But this is a new phase
24 with zero experience in Framatome's history, with this
25 particular material.

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1 And what I am asserting here is that in
2 order for the data that comes out of these lead test
3 assemblies to be a reputable argument on the next
4 round, as to how it applies, or does not apply to the
5 fuel that may or may not come out of a new MOX fuel
6 factory in the United States, that would be irradiated
7 in batch quantities, what is going to be the
8 relationship between this experience of four
9 assemblies, and a license amendment to go to batch
10 quantities?

11 And, clearly, they are going to be relying
12 on data from this experience, why would they do the
13 experience if they weren't? So I'm asking that part
14 of the record of this process be a clear statement of
15 the history of the plutonium.

16 Because we are not talking about plutonium
17 that is reprocessed from reactor waste, here. We are
18 talking about plutonium that has been highly
19 processed, in some cases, to make a nuclear weapon.

20 And then the stated plan is to process it
21 again, it is like your grandmother's silver, they are
22 going to polish it, because they don't want to use the
23 word reprocessing, because it is such a flash point
24 word in the southeast.

25 I believe that is why it is called

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1 polishing now. But they are going to reprocess it.
2 And I'm not even saying that they can't do that well.
3 I'm just saying I want to know what they did, and that
4 depends on what the history of the plutonium going
5 into these tests was.

6 And that is not contained in any of the
7 proposals, in any of the quality assurance plans, and
8 it is stated that it is DOE's purview. Well, it may
9 well be, but it should be NRC's responsibility to
10 request that part of that purview be to disclose that
11 history.

12 And I'm not even suggesting that they
13 should have to use pit plutonium. I'm just saying I
14 want to know what it was, where did it come from, and
15 what is its process history.

16 Because we are going to be going into an
17 arena where plutonium is going to be coming from
18 multiple sources, and they have processes to deal with
19 them. However, in industrial scale they may or may
20 not hold up. And I want to know how this test applies
21 to that.

22 CHAIR YOUNG: On the certification of the
23 test fuel, does your argument that you just made apply
24 to that, as well?

25 MS. OLSON: Well, this is somewhat of a

1 gratuitous thing on my part. I just think they would
2 be smart to have an independent certification because
3 it sure would make it harder for anybody to challenge
4 them.

5 But if they don't want to have independent
6 certification, third party, well okay. I'm less
7 attached to that. It is the fundamental issue of
8 scientific inquiry, and can we say when we are
9 comparing apples to apples, and when we are comparing
10 oranges to oranges?

11 Well, if we have a black box is it an
12 apple? We don't know. Is it an orange? We don't
13 know. Because if we don't know what they made those
14 lead test assemblies out of we don't know what we are
15 comparing them to.

16 CHAIR YOUNG: Mr. Repka?

17 MR. REPKA: On this particular contention
18 I don't have a lot to add to what I believe is already
19 in the papers.

20 Just responding to a couple of the things
21 I heard this morning. First we did make an
22 overarching argument that to the extent this
23 contention is a challenge to the representativeness of
24 the lead assemblies, that is really an issue for a
25 subsequent batch assembly application, should that be

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1 filed.

2 And I think I heard Ms. Olson, at least,
3 sort of agreeing with that. To the extent that the
4 second part of the contention related to the gallium
5 content, a couple of points.

6 I think that the issue here, to the extent
7 that it is material and relevant to the lead assembly
8 application would have to be that the gallium content
9 is somehow inappropriate and creates a problem with
10 respect to the lead assemblies and their performance
11 at Catawba, I would characterize the contention, in
12 that regard, as more a question than a contention with
13 any basis.

14 In fact, as we pointed out in the papers,
15 the gallium content is controlled by specification, it
16 is controlled on the order of magnitude below what Ms.
17 Olson was concerned about, it is at the parts per
18 billion level.

19 Just in terms to perhaps enhance NIRS'
20 factual understanding, the material for the lead
21 assemblies is from pits, there is nothing hidden about
22 that fact. Those pits do have a prototypical gallium
23 content in the order of one percent, as she is
24 suggesting.

25 However, and in fact, when the

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1 specification says that the gallium content will be at
2 less than parts per billion, it is because the gallium
3 content has, to use her words, because we got it out.
4 That is, in fact, the case.

5 And I think that apart from just answering
6 that question, there is really no other basis, in this
7 aspect of the contention to suggest that there is a
8 genuine dispute with any support on any particular
9 issue.

10 With respect to the issue of whether those
11 lead assemblies are representative relative to the
12 gallium content of, ultimately, the batch assembly,
13 the batch use assemblies, again, that is a matter that
14 is being controlled by specification, by the fuel
15 specification.

16 And there is nothing in the contention
17 that would suggest that there is a problem with that
18 particular approach.

19 The last aspect of this contention was the
20 question of the certification of the test fuel and the
21 QA program. Certainly with respect to the QA program
22 I thought I heard this morning something that would
23 suggest that Ms. Olson is not interested in pursuing
24 that, now that she understands that Framatome will
25 manufacture the lead assemblies under 10CFR part 50

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1 appendix B QA program.

2 Certainly nothing in the contention
3 addresses the materials in the application, and in the
4 response to the request for additional information,
5 that would suggest a problem with that QA program.

6 With respect to the request for an
7 independent certification of the test fuel, again,
8 there is no basis for that relief that is presented.
9 It would be relief that would exceed NRC requirements
10 with respect to QA.

11 And in that regard ultimately there really
12 is nothing to litigate under this contention.

13 CHAIR YOUNG: Staff?

14 MS. UTTAL: The Staff really has not much
15 to add, Your Honor, except to say that weapons grade
16 plutonium has been used in the United States. I don't
17 know the exact time period, but Saxton test reactor
18 used what was, then, weapons grade plutonium. I don't
19 know for how long, either.

20 Other than that I don't believe that Ms.
21 Olson has raised any issues that should be admitted.
22 The Staff has, effectively, countered what she raised
23 to begin with, in our pleading. We have nothing else
24 to add.

25 CHAIR YOUNG: Ms. Olson?

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1 MS. OLSON: Thank you. I would like to
2 respond to what Mr. Repka said.

3 These issues were raised in our concerns
4 in our original petition to intervene. And I took to
5 heart the response that Duke made that these issues
6 reside with the next Duke application to put 40
7 percent MOX in the reactor core, not in this one.

8 However, I asked myself what would we need
9 in order to raise these issues at that time, that if
10 they were not put out on the table now, we wouldn't be
11 able to raise those issues. In other words, what is
12 the substrata that is required to be able to raise
13 these issues.

14 And I still go back to the fact that a
15 clear statement of what the material that is going
16 into this process is needed. And I appreciate Mr.
17 Repka's disclosure that they have used material from
18 pits, and that they are using a process that is
19 dealing with the gallium.

20 I appreciate that. I think, however, that
21 this transcript is not sufficient. And, at the very
22 least, NRC staff should issue an RAI that would
23 include this documentation into the formal application
24 for license amendment.

25 Because, as I say, if we are saying that

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1 these are issues that could, and possibly, should be
2 litigated in the next round, then we need to create a
3 basis for that. And I do not find the basis for that
4 in the materials that they have submitted.

5 So that is why I continue to raise the
6 issue of some kind of certification. I'm using that
7 word kind of loosely. To me a Duke response to an RAI
8 would probably amount to that. But simply a comment
9 from Mr. Repka in this transcript does not.

10 CHAIR YOUNG: Just one question. The fact
11 that the lead assemblies will be manufactured under a
12 QA program that, according to Duke I believe, must
13 meet the 10CFR50 Appendix B requirements, in addition
14 to that, assuming that they meet those requirements
15 which, if that is the requirement I think we need to
16 assume that that is how it is going to be done, or if
17 there are any challenges to that, that would be
18 something that would be brought up at that point.

19 But assuming that that is true I'm not
20 entirely clear on what further information would be of
21 concern.

22 MS. OLSON: Indeed. I am not going to
23 attack the regulations, that is out of bounds.
24 However, we are talking about an experiment here. Ms.
25 Uttal has mentioned a past experience at Saxton, which

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1 I'm glad to know about, was not aware of it.

2 However, she qualified her statement, and
3 said that I was weapons grade material at that time.
4 I think that is an important qualification. And I
5 think just plain knowing what the material is that is
6 being used, and its process history, should be part of
7 this record.

8 I'm trained as a scientist, it seems to me
9 a reasonable thing for NRC to be requiring of its
10 applicants. And so perhaps it will not rise to the
11 level of a contention admitted in this proceeding.

12 However, I think, it would be appropriate
13 relief for having brought the concern that staff might
14 consider that this is something that should be entered
15 into this process, because there are going to be
16 multiple sources of plutonium processed for MOX fuel
17 at the new fuel factory, if it is ever built.

18 And so knowing what the history of this
19 plutonium, and its process history, to me, validates
20 its applicability in terms of the question of how do
21 these lead test assemblies and the data generated from
22 this test relate to a future license application.

23 I'm not saying that there will be a viable
24 contention in the future. I'm just saying that we
25 can't know what we are talking about unless that piece

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1 of information is included as part of the data
2 generated, associated with this test.

3 This is not just a license amendment, it
4 is a test. It is a test which, by its very nature,
5 must be relevant to the future use, or it wouldn't be
6 done.

7 ADMINISTRATIVE JUDGE BARATTA: Are you
8 concerned about where it comes from, or about the
9 physical and chemical characteristics of it? That is
10 to say if the isotopic content, and say, particle size
11 and things like that were specified, or known, would
12 that be sufficient?

13 MS. OLSON: I would think that a full
14 documentation of all of those kinds of details would
15 be appropriate. I mean, if it is safe, you know, I
16 don't know where the safeguards boundaries lie. Make
17 it classified if you have to.

18 I mean, not classified but, you know,
19 limited access if it is the isotopic distribution that
20 somehow is questioned. But the whole matter of we
21 have plutonium coming from Rocky Flats that was,
22 basically, waste stream from making pits at various
23 stages of the alloying process.

24 We have pits of various ages, we have
25 plutonium that was residing at other locations, with

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1 various other histories. And I just think it is going
2 to be valuable, in the future, to know what this
3 particular plutonium was, and its process history, and
4 its meeting the acceptance criteria, that is good.

5 I wouldn't want NRC to approve a license
6 amendment for material that wasn't meeting the
7 acceptance criteria. Obviously you are not going to
8 do that. But there is this additional piece that I
9 think is vital.

10 And it should be in the record, other than
11 this transcript.

12 ADMINISTRATIVE JUDGE BARATTA: Mr. Repka,
13 do you know what, off-hand, what is in the spec for
14 the fuel fabrication, in terms of feed stock?

15 MR. REPKA: One moment, please.

16 (Pause.)

17 MR. REPKA: The process, the history of
18 the plutonium oxide will be a known factor, where it
19 comes from, and it will be something that is
20 documented.

21 In terms of the specifications, those
22 don't begin to apply until once it is polished. The
23 first specification is at the plutonium oxide powder
24 stage. And then at that point there are various
25 specifications related to gallium, as well as the

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1 inhomogeneities, and other things that we've
2 referenced in our written document.

3 ADMINISTRATIVE JUDGE BARATTA: Has that
4 specification actually been developed at this point?

5 MR. REPKA: Yes, it has. And the
6 specifications are summarized in the MOX fuel design
7 report referenced in our filing.

8 ADMINISTRATIVE JUDGE BARATTA: And they
9 specify isotopics and chemical composition?

10 MR. REPKA: Yes, impurities.

11 MS. UTTAL: Judge Baratta, the Staff tells
12 me that there is an RAI out regarding the MOX fuel
13 design report, asking for the fuel specification, and
14 the procedure that will be used to verify that the
15 material meets the specification.

16 But from the Staff's point of view, as
17 long as the material meets the specification at the
18 time it goes into the process, then it is okay. But
19 it has to meet the specification, they are just asking
20 for details on what the specification is.

21 ADMINISTRATIVE JUDGE BARATTA: Mr. Repka,
22 I assume that you will be requiring material
23 certification that can be then validated,
24 independently, if for any reason you wanted to do
25 that?

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1 In other words, you have material cert
2 sheets with the powder?

3 MR. REPKA: They will be tested to
4 validate that the specifications are met and those
5 will be documented.

6 Returning to the earlier question, I just
7 wanted to give a specific reference to the MOX fuel
8 design report. There is a discussion of the feed
9 material requirements in section 8.3.1.

10 To the extent there is an RAI from the
11 Staff looking for further detail Duke will, of course
12 respond to that RAI. But there is a particular
13 subsection here addressing the plutonium feed, as well
14 as the plutonium polishing, and the uranium feed.

15 CHAIR YOUNG: It occurs to me that
16 whatever happens with this contention, that given your
17 interest in the information, it sounds as though part
18 of your concern is just knowing.

19 And so I would encourage you to keep
20 abreast of these things. I don't know what enquiries
21 you have made to this date. But that, whatever
22 happens with this contention, that would seem to be,
23 to some extent, a separate issue of attempting to get
24 whatever information you need.

25 And then should problems develop, dealing

1 with those problems at that time, in whatever the
2 appropriate context might be.

3 MS. OLSON: Indeed. I appreciate your
4 encouragement. I think what I am seeking could be
5 very easily accomplished, because most of what I'm
6 seeking is there. But the process history of this
7 particular plutonium is not apparently going to be
8 part of this record, and I'm recommending that it be
9 made so.

10 And that Staff has the easy opportunity to
11 do that with a simple RAI. Because Mr. Repka has
12 already said that it was pit material. I just think
13 it should be on a piece of paper that somebody can
14 access a little more easily than a voluminous
15 transcript.

16 CHAIR YOUNG: Is there any further
17 clarification needed here before we move on from this
18 one? Just in terms of -- some clarification was just
19 provided. Is there anything further that can be
20 provided, at this point, before we move on to the next
21 contention?

22 MR. REPKA: There is nothing further I can
23 provide right now. But I certainly encourage Ms.
24 Olson if she has specific questions, to ask us.

25 ADMINISTRATIVE JUDGE ELLEMAN: Ms. Olson,

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1 I have two questions, please.

2 You raised a considerable number of points
3 in your contention, and you mentioned you received a
4 great deal of information from Duke, and from the
5 Staff.

6 Has that information removed any of your
7 concerns that you have raised in the contention? And
8 if so which ones can we drop?

9 MS. OLSON: Certainly reviewing the
10 materials assures me that there is a robust machine,
11 if you will, dedicated to the process of meeting the
12 regulations that are in place. And that is good, to
13 have that affirmed.

14 I figured it was there, but in the
15 materials that I had access to, at the time that I
16 wrote the contention, it was -- I probably should have
17 picked up the phone and said, where is it?

18 But, as I say, I heard there was an RAI,
19 I found an RAI of that response of that date. It was
20 irrelevant. I didn't notice that there was a second
21 RAI response of the same date.

22 So it is one of those resource issues
23 about what a single individual, interacting with this
24 process, can pull off compared to large organizations
25 with many paid people dedicating all of their time.

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1 So to that degree I have stepped back from
2 some of the issues that I have raised. However, I do
3 so not because I feel that they are completely
4 resolved, necessarily.

5 I think quality assurance in nuclear fuel
6 is completely relevant set of concerns. However, I
7 think that to the degree that there may or may not be
8 a next round, that that may be the opportunity to
9 revisit some of these same concerns, if they rise to
10 the level of expertise, and the ability to
11 specifically challenge and make a contention that
12 rises to that level.

13 So I'm having to acknowledge that I don't
14 have those resources at this time. And, as I say, to
15 some degree my suggestion of independent certification
16 was a gratuitous thing. It is not intended to
17 challenge the NRC regulations.

18 It is merely a reflection on the fact that
19 there have been some fairly scandalous events, not
20 necessarily with Framatome, although I hear there has
21 been some difficulty with their fuel in Germany. I
22 don't know all the details on that.

23 So, again, I'm not really in a position to
24 pursue this. But I think that since British Nuclear
25 Fuels has had major quality assurance problems, it

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1 would be worth their money to create an unassailable
2 fact form for this.

3 But, you know, I don't think that that is
4 something that we have to litigate at this point. And
5 I think that in terms of the industrial scale
6 production of plutonium fuel at a new factory in the
7 United States, that those will be significantly
8 different sets of issues in quality assurance, that
9 that would be a more appropriate place to pursue
10 further concerns.

11 ADMINISTRATIVE JUDGE ELLEMAN: Mr. Repka
12 had suggested that the information provided on a QA
13 program may have addressed your concerns there. Is
14 the satisfactory degree of a QA program one of the
15 issues you have stepped back from, at this time?

16 MS. OLSON: I feel, sir, that you are
17 asking me to give my commendation of their intended
18 program. And all I am doing is saying that at this
19 time I do not choose to engage with it.

20 ADMINISTRATIVE JUDGE ELLEMAN: Thank you.

21 CHAIR YOUNG: Just to be clear, and I'm
22 not trying to push you into saying or doing anything.
23 But should we take any of your remarks as withdrawing
24 any part of the contention formally?

25 MS. OLSON: No, I leave it all there.

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1 However, I'm emphasizing in my oral arguments point
2 one, which is the inclusion, in the official materials
3 of this event, and the event not being granting the
4 license amendment, but even considering the license
5 amendment.

6 Including in that the origin and process
7 history, and other specifications that may not be
8 currently in the acceptance criteria for the
9 plutonium, the stuff that is going in, in the very
10 beginning, the stuff that DOE has in their possession
11 right now.

12 CHAIR YOUNG: Thank you. Anything further
13 on NIRS Contention 1?

14 (No response.)

15 CHAIR YOUNG: Then I think we are back to
16 the Environmental Omission Contentions. And BREDL 4
17 is the next one on the list.

18 MS. CURRAN: BREDL Contention 4 challenges
19 the failure of Duke's environmental report to evaluate
20 the future batch use of plutonium fuel.

21 And what we rely on there, principally, is
22 the application for the security plan that will cover
23 both the LTA testing, and the batch use of plutonium
24 fuel.

25 And Duke has also applied for an exemption

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1 from the security regulations that would govern both
2 the testing program and the eventual batch use of
3 plutonium fuel.

4 Of course we are not privy to the details
5 of these applications, but we rely on the fact that
6 they have been made, and the supposition that there
7 may be significant modifications to the Catawba plant
8 as a result.

9 And that would tilt the decision making
10 process towards using the Catawba plant for batch use
11 of plutonium fuel. Both Duke and the Staff oppose
12 this contention. They argue that the security plan
13 changes, and the related exemption don't elevate the
14 possibility of future batch use to a proposal.

15 And they also argue that there is no nexus
16 because simply by making a commitment, a general
17 commitment to batch plutonium use, and a commitment to
18 these plant modifications it is not -- it doesn't
19 necessarily render it unwise, and irrational, not to
20 go forward with the plutonium fuel use.

21 I think it is important, here, to look at
22 what the purposes of evaluating connected actions
23 under NEPA. And, by the way, neither the Staff nor
24 Duke argues that this situation does not meet the CEQ
25 criteria for what is a connected action that ought to

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1 be evaluated under NEPA.

2 The idea is that you look at the -- the
3 government agency should look at whatever set of
4 actions are going to follow, from a certain decision,
5 together so that to you don't break the decision
6 making process up into little pieces.

7 From our perspective we also want to be
8 careful that the decisions that are made in the LTA
9 process do not render batch plutonium use, or the use
10 of Catawba and McGuire for batch use a fait accompli
11 because various commitments have been made.

12 And in NRC case law, I believe there is
13 case law saying that some cost can't be -- that those
14 costs are gone, and that it has to be considered that
15 an investment has been made, and a certain
16 alternative, when one is looking at other
17 alternatives.

18 Here it seems to us that the decision
19 making process is leading inexorably towards batch
20 plutonium use at the Catawba nuclear plant, because of
21 the investments that are being made, and the changes.

22 And I think we all heard, yesterday, that
23 there is a tremendous drive towards plutonium use in
24 these nuclear plants, such that the NRC and Duke are
25 prepared to go ahead without having all the data that

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1 they ought to have, in order to evaluate the risks of
2 the project.

3 That is a big debate here, as to whether
4 there is enough information gathered in order to go
5 ahead in a reasonable and safe manner. But there is
6 a drive to do it. And that drive is partly coming
7 from the fact that the Department of Energy has said
8 that instead of a combination of immobilization and
9 plutonium use in nuclear plants, we are now going to
10 have all plutonium use, that is how we are going to
11 get rid of this weapons material.

12 That is the ultimate resolution of these
13 two EISs that were done in '96 and '99. So in our
14 view this proposal has reached a point of concreteness
15 and inexorableness, that it is time now to look at the
16 environmental impacts of using plutonium fuel in
17 batch, as a complete project.

18 CHAIR YOUNG: I'd like to ask you some
19 questions to see if I can focus on the analysis that
20 we have to go through in looking at the connectedness,
21 nexus, cumulative impact, the whole analytical process
22 that we are in, in this particular NEPA issue. You
23 cite the CFR1508.25, and the definition for connected
24 actions. And the one that you rely on is the small
25 roman numeral iii, that the actions are interdependent

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1 parts of a larger action, and depend on the larger
2 action for their justification?

3 MS. CURRAN: Yes. I think we also rely on
4 ii, under the nexus test.

5 CHAIR YOUNG: Cannot or will not proceed
6 unless other actions are taken previously?

7 MS. CURRAN: Yes.

8 CHAIR YOUNG: Okay. By comparison, and I
9 think we all know here what happened, at least the
10 participants do, and I'm sure everyone can explain, to
11 whoever is in the audience, at breaks, some of the
12 history if that needs to be done.

13 I don't know that I need to recount all
14 that at this point. But I guess what I would do is
15 ask you to compare, for example, in the license
16 renewal situation that we were in, in the other case,
17 an argument was made, among others that the reason
18 that license renewal and MOX use needed to be
19 considered together, is because of the aging effects
20 that were asserted about the MOX fuel, and that if
21 those aging effects were not considered, at the time
22 of license renewal, then they might not be considered
23 adequately, because license renewal was the point at
24 which aging effects are focused on.

25 And so there is some potential harm from

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1 not considering them together. Here I understand what
2 you are saying about once momentum builds up for
3 something, and a lot of money is sunk, there is sunken
4 costs, I think is the term, it is harder to turn back.

5 But the process, as it has been described,
6 and as I think we need to assume, if we are all doing
7 our jobs, is that if, or when, there is a license
8 amendment application to do the batch use of MOX fuel,
9 at that point then all of the concerns that need to be
10 addressed, in an environmental impact statement, will
11 be addressed at that point.

12 Examples have been given where tests,
13 actions comparable to lead tests, the use of lead test
14 assemblies have not led to general use. When I'm
15 looking at this, analytically, I'm wondering, under
16 iii, what is the larger action of which both the lead
17 test assemblies and the use of batch MOX are
18 interdependent parts, and on which both depend.

19 And other than your reference to a sort of
20 general inexorable sense about things, I don't see a
21 larger action. I see an experimental or test action
22 at this point, which may or may not lead to something
23 in the future.

24 The problem I have with two, and I'm
25 telling you all of this because I want you to address

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1 my concerns, and I want you to have the opportunity to
2 do that, with ii, if we were at the point of batch
3 MOX, or if there were some several step process where
4 the plan from the beginning was to go first one, then
5 two, then three, and only go to two if one is
6 successful, then I could see an argument under number
7 two.

8 But I'm not sure that I see the problem in
9 the relationship between the use of lead test
10 assemblies which may or may not lead to future batch
11 use of MOX fuel. Where the concern lies, other than
12 your sort of general concern about inexorability.

13 When there is a license amendment
14 application, if there is a license amendment
15 application for batch use, there will be an
16 opportunity for a hearing, and I would expect that
17 you, and whoever else, would file petitions at that
18 point, and would raise contentions at that time.

19 And if we are all doing our jobs they
20 would be considered, at that point, fully. And I'm
21 not sure that in doing this analysis, under NEPA, we
22 can rule on a contention based on a fear that that
23 process might not work as it should work.

24 If we were in a situation where it was a
25 multi-step process, and we knew that one step was

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1 automatically going to follow from the next, I think
2 you would have a stronger argument.

3 But the arguments that Duke and the Staff
4 have made, that it may not happen in the future, and
5 that there have been other tests where they did not
6 lead to, they did not lead inexorably to a broader
7 program, I'm having difficulty finding an analytical
8 framework in which to put your argument, other than
9 the general inexorability fear, which I just don't --
10 I'm not seeing at this point how that is enough to
11 find the nexus that you are asking us to find.

12 MS. CURRAN: Okay. Well, I think there is
13 two concerns that your questions raise. One is, what
14 difference does it make if we have an environmental
15 report that addresses the whole picture versus just
16 looking at LTA testing?

17 And the second is there just doesn't
18 appear to be an inevitable larger action here. And to
19 address your first point, I think you had said, when
20 you get to the point of, if this process results in an
21 application for batch plutonium use, then you will get
22 an opportunity to raise all your environmental
23 concerns.

24 But there is some concerns that we may not
25 be able to raise simply because as a practical matter,

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1 a commitment has already been made.

2 CHAIR YOUNG: Yes, and if you could focus
3 on those things, what are those -- you did refer to
4 the, you were concerned about the -- whether there
5 might be some major design changes involved in some of
6 the security issues.

7 And it may be that something further would
8 come out of that once we get to the security part of
9 this case. But apart from things like that, that we
10 don't know about at this point, are there any specific
11 concrete things that you know of, at this point, that
12 would fall into the category you are talking about?

13 MS. CURRAN: No. And it may be that we
14 will get more information about what is the
15 significance, what is the degree of those changes. At
16 this point we are handicapped by the fact that we
17 simply don't know.

18 ADMINISTRATIVE JUDGE BARATTA: Let me
19 raise the following question. In some of the
20 discussions on your other contentions you raised the
21 issue of inadequate data base. And my question is, if
22 might it not be premature at this point, even, to ask
23 for an environmental report which would include batch
24 burn, in light of the knowledge that might be gained
25 from this test?

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1 MS. CURRAN: Well, you kind of are raising
2 a chicken and egg question. I think that to wait is
3 a balancing that has to be done, to wait until the
4 test is done is maybe waiting until the project is a
5 fait accompli.

6 And in that case, yes, you might get
7 information that is useful. But at that point you
8 are, as a practical matter, precluded from making
9 effective choices about alternatives, because the die
10 is cast, and you are committed to a certain course of
11 action. That is what we are trying to avoid.

12 And that is the wisdom of looking at
13 connected actions together, so that you don't find
14 yourself committed to a course of action by virtue of
15 actions that you have taken earlier, without realizing
16 it.

17 So that is why we think that this issue
18 needs to be dealt with now. And to the extent that
19 information is unknown, that needs to be admitted, and
20 the significance of that discussed. But that it
21 should go ahead now.

22 CHAIR YOUNG: Apart from the things that
23 we don't know, that involve security information, and
24 the sort of general concern about momentum building
25 towards this inexorable end, are there any specific

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1 things that you can point to that would illustrate the
2 point that you are making about being afraid that
3 something may become a fait accompli?

4 MS. CURRAN: Well, with respect to this
5 particular case we have a concern that there are
6 financial commitments, physical changes that are going
7 to be made to the Catawba plant that will render this,
8 the choice of Catawba, the decision to go ahead with
9 batch use as a fait accompli.

10 You had asked this question about whether
11 you've got more than a sense of inexorability about
12 this. Yes, we have more than that. It is the general
13 decision, by the U.S. government, that the only way
14 for disposing of this quantity of weapons grade
15 fissile material, and this was discussed in the 1996
16 storage and disposition programmatic DIS, in the 1999
17 surplus plutonium disposition EIS.

18 The only way that the U.S. government has
19 identified to dispose of this quantity of plutonium,
20 which is in conjunction with what is being done in
21 Russia, so we are tethered to Russia on this, we've
22 made a mutual commitment to do it, is to use plutonium
23 in nuclear power plants.

24 That is a really significant commitment.
25 And it seems to me very unlikely that these tests are

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1 going to result in a decision not to do it. I think
2 it is more likely that they are going to result in
3 modifications to the operations.

4 But this is a significant commitment and
5 decision that has been made by the United States
6 government about how to dispose of a large quantity of
7 weapons grade fissile material.

8 So that sense of inevitability stems
9 directly from decisions that the government has made.
10 And also is fueled by the discussions that we have had
11 here, over the last two days, that there is a drive to
12 do this, in this particular case.

13 CHAIR YOUNG: The Commission in the
14 decision on the MOX contention, in the license renewal
15 case, and I can't remember the cite off the top of my
16 head, I've got it in my files somewhere here.

17 But the Commission seemed very definite
18 that the opportunity would be provided. And there
19 seems to be a clear commitment that once a proposal is
20 made to use MOX fuel that that would open up the whole
21 area of enquiry that you are talking about.

22 And in light of that I'm still having a
23 little bit of difficulty finding something specific
24 that I can put my finger on that would tell me that if
25 we don't do it at this point it cannot be done

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1 effectively at a later, at the point of which if it
2 happens there is a license amendment request for the
3 batch fuel.

4 And I'm telling you that because I want to
5 give you an opportunity to point to something more
6 specific.

7 MS. CURRAN: Well, I think I have given
8 you what we have to offer. And perhaps the only thing
9 left to do is to emphasize the importance of being
10 able to consider alternatives in the NEPA process.

11 That is one of the key purposes of an
12 environmental impact statement, is to first of all
13 describe the impacts of the proposed action, look at
14 other things that could be done, and to compare the
15 impacts of various courses of action so that it is
16 possible to choose among a reasonable array of
17 alternatives ones that will minimize, or avoid, the
18 worst impacts.

19 CHAIR YOUNG: What if you got -- I'm
20 sorry.

21 MS. CURRAN: That is the goal, a NEPA goal
22 that is equally important to just talking about what
23 the impacts of the proposed action are. So the
24 decision making process needs to protect the ability
25 to make meaningful consideration of alternatives.

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1 That is the basis for what we are saying
2 here.

3 CHAIR YOUNG: Why don't --

4 MS. CURRAN: We don't have any doubt that
5 once the MOX bath application for plutonium use is
6 made, we will have an opportunity to evaluate the
7 impact of that proposal.

8 But what we are concerned about, here, is
9 that alternatives may have slipped away as a result of
10 commitments that are being made now.

11 CHAIR YOUNG: I'd like to hear a little
12 bit more about the type of alternatives you are
13 talking about. But if I could go back to the question
14 that Judge Baratta asked.

15 What if you were to get the EIS that you
16 are asking for, now, before the lead test assemblies
17 have been used, before the information is produced
18 from that process, and the results of that cast in
19 stone, so to speak, certain understandings that it
20 might be difficult to move back from, later, should
21 information arise as a result of the test that would
22 suggest that the batch use not take place?

23 Couldn't it operate against you in that
24 way? There would be an opportunity for a supplemental
25 EIS most likely. But that same inexorability argument

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1 could be made on the other side, couldn't it?

2 MS. CURRAN: Well, in life you never have
3 all the information that you want to make decisions.
4 When you see a fork in the road, where you could go
5 one way or the other, you take the information that
6 you have and you make the best decision that you can.

7 That is true under NEPA, I think, and that
8 is true in life. And that the purpose of NEPA is to
9 make sure that the government has considered all of
10 the available information that is relevant, and made
11 good decisions in advance, instead of waiting until
12 after you have decided, and looked back, and see that
13 you were wrong, but that you've already committed
14 resources to the wrong alternative.

15 CHAIR YOUNG: So are you suggesting that
16 one of the possible outcomes of the EIS you are asking
17 for would be to say, well, we shouldn't even undertake
18 the test?

19 MS. CURRAN: It might be to say that
20 Catawba is not the right place for this, because long-
21 range this isn't a good place to be using plutonium.
22 And there are reasons for that, that we raised in
23 another contention.

24 CHAIR YOUNG: Right, you need --

25 MS. CURRAN: It might be, and it might be,

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1 and this is raised in some of the contentions that we
2 filed day before yesterday, and in our discussion
3 yesterday, it might be that some of these tests ought
4 to be done in France, not on the lead test assemblies,
5 but tests should be done before the testing process
6 for these four assemblies goes forward.

7 There is a lot of different ways that this
8 problem could be approached. And the thing that we
9 are looking for is to step back and look at the whole
10 thing. What is the best way to get information about
11 the risk of using plutonium fuel in a testing basis,
12 what is the best long-range plan for disposing of this
13 plutonium in reactors; is this the right place to do
14 it?

15 That is what we would hope to see. We are
16 looking for a lot of things from this environmental
17 report as came up yesterday, with respect to testing,
18 and with respect to long range use. A more
19 comprehensive view of what is the wise way to approach
20 this from an environmental protection standpoint.

21 CHAIR YOUNG: I think we may get into this
22 more, later, so it may not be appropriate to talk
23 about it now. But you seem to be going into this area
24 of the relationship between the DOE process and things
25 that NRC may or may not have jurisdiction over.

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1 MS. CURRAN: Right.

2 CHAIR YOUNG: And it may be that it would
3 be better to save those for the contentions that are
4 more on that relationship unless there are particular
5 things related to this one that you want to bring out?

6 MS. CURRAN: If you would prefer to wait
7 on that, that is fine with us.

8 CHAIR YOUNG: Well, thank you for
9 answering my questions. I thought it, given the
10 history of these types of issues, I thought it would
11 be good to sort of focus on some of the specific
12 concerns arising out of those, and the context of this
13 case.

14 Anything further from you, at this point?

15 MS. CURRAN: No.

16 CHAIR YOUNG: Mr. Repka?

17 MR. REPKA: Yes. I really have just a few
18 points on this contention. First I would like to
19 provide a citation to the Board that is not in our
20 response.

21 It stands for the proposition that the NRC
22 is not bound by CEQ regulations, that the agency has
23 not expressly adopted. That citation is Limerick
24 Ecology Action 869-F2nd-719 at 743.

25 CHAIR YOUNG: You know, before you go on,

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1 I'm aware of that. And in that context I believe that
2 the NRC has, despite the fact that it is not bound by
3 them, has referred to the CEQ regulations. So you
4 might want to address that in the context of what you
5 are talking about.

6 MR. REPKA: Yes, and certainly the
7 Commission has looked to the CEQ regulations as
8 guidance. And the point I was going to make is that
9 they are not specifically adopted.

10 And what the Commission did in the license
11 renewal case, the McGuire Catawba license renewal
12 case, and that citation I had a second ago, was the
13 CLI02-14, that I think you were looking to.

14 CHAIR YOUNG: Yes, right.

15 MR. REPKA: Has provided us with a much
16 more specific and precise test to apply to this
17 situation. And so we believe that is the operative
18 standard.

19 And we have addressed that in our
20 response. That standard is the two part test where
21 both parts need to be satisfied. First is the issue
22 of ripeness, is the batch proposal ripe at this point?

23 And, second, is there sufficient nexus to
24 require an environmental review at this point? With
25 respect to ripeness, just a couple of points. In

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1 addition to those we made in our response, clearly
2 there is no batch application at this point.

3 And what we tried to point out was that
4 there are many things beyond the control of Duke
5 Energy, and DOE as well, that certainly will affect
6 the ultimate outcome of the plutonium disposition
7 program, that go directly to the ripeness test.

8 Another factor, I think, is the fact that
9 to point out that Duke's contract with the Department
10 of Energy to use the mox fuel assemblies, the batch
11 irradiation is an option to the contract, that has not
12 been exercised at this point. Lead assemblies are
13 under what is known as a base contract.

14 So at this point, just to -- I want to
15 point out, in response to the notion that there is a
16 certain inevitability, or inexorability, certainly is
17 a matter of contract law that is not necessarily the
18 case.

19 There has also been a reference to the
20 security plan revisions proposed, and the exemption
21 proposed related to security. I think we did point
22 out, in our filing, that certainly that does not
23 affect either the ripeness, or the nexus.

24 And, in fact, since that filing, or just
25 about contemporaneous with that filing, I think the

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1 NRC staff has clarified and responded back to Duke
2 Energy and said that they will review those security
3 plan revisions only in the context of the lead
4 assemblies application, and only with respect to
5 Catawba, not McGuire.

6 So certainly that further supports the
7 notion that there is no nexus established by the
8 security plan.

9 With respect to the reference to --

10 CHAIR YOUNG: On the security plan could
11 I just ask you a question? And don't answer me if it
12 is something that you shouldn't say because of
13 security concerns.

14 But can you say whether there are any
15 plant design changes, or things of the nature that Ms.
16 Curran referred to, and I see Mr. Fernandez looking
17 back at Mr. STapleton. And so I don't want to get
18 into something here that we shouldn't.

19 But if you can say, I wanted to just bring
20 that up at that point.

21 (Pause.)

22 MR. REPKA: I am going to try to step
23 around this, and with Mr. Fernandez' advice. There
24 are, in general, changes related to the batch use,
25 related to security, that will not necessarily be

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1 implemented for lead assemblies, or will not be --
2 that could be addressed, and will be addressed by comp
3 measures.

4 So there is a different approach, as
5 between the two applications, the two approvals.

6 CHAIR YOUNG: The two approvals being?

7 MR. REPKA: First for lead assemblies, and
8 then a subsequent application, if that goes forward,
9 with respect to batch use.

10 CHAIR YOUNG: Did you mean to say batch
11 use a second ago when you said lead assemblies?

12 MR. REPKA: I don't know, perhaps. But
13 what I meant, what I said --

14 CHAIR YOUNG: You said it would not cover
15 lead assemblies?

16 MR. REPKA: It would not cover batch use.

17 CHAIR YOUNG: That is what I thought.

18 MR. REPKA: There could be compensatory
19 measures in it for it first, and then security plant
20 modifications that would be implemented only for batch
21 use, later.

22 CHAIR YOUNG: That is what I thought you
23 meant, okay.

24 MR. REPKA: Now, let me address other
25 plant modifications, design modifications. Certainly

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1 there are some design modifications that will be made
2 to Catawba related, that will accommodate the MOX fuel
3 lead assemblies.

4 Those modifications do not commit Catawba
5 to continue to use MOX fuel, don't commit Catawba to
6 use any MOX fuel in the future. They do not impair
7 the ability to use LEU fuel, and so in that sense
8 there is -- they don't automatically trigger, and
9 don't create this inexorability that I think Ms.
10 Curran is trying to -- the picture she is trying to
11 paint.

12 Another factor on that, and this may be a
13 bit gratuitous on my part, but all those modifications
14 are being funded by the Department of Energy, as part
15 of this program. So it is not a matter, for Duke
16 Energy, of sinking costs and, therefore, feeling that
17 we must go forward with this project. It is not Duke
18 Energy money that is on the line.

19 I think that another important factor,
20 here, in response to hearing this morning, there
21 really was nothing identified that suggests an
22 environmental issue that will somehow escape review.

23 There has been no single factor related to
24 the batch use that might occur in the future, that
25 cannot be addressed at that time. Indeed, I think

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1 that this whole discussion of this contention creates
2 a -- it appears as if the discussion is looking
3 through a telescope in the wrong direction.

4 We have too narrow a focus, it is being
5 pictured as a segmentation case, where you have this
6 larger action that is escaping review because we are
7 looking at the microscopic.

8 In fact, what has really happened here,
9 this is not a segmentation case at all, this is a case
10 of agency's tiering their environmental reviews as in
11 fact is encouraged by the CEQ regulations.

12 A couple of particular cites I will give
13 you to the CEQ regulations, on the tiering concept,
14 are 40CFR1502.20, which states, and I will quote,
15 agencies are encouraged to tier their environmental
16 impact statement to eliminate repetitive discussions
17 of the same issues, and to focus on the actual issues
18 ripe for decision at each level of environmental
19 review.

20 A similar concept is reflected in the
21 regulations at 40CFR1508.28, and one example there,
22 given of tiering, is 1508.28, paragraph A, from a
23 program, plan, or policy, environmental impact
24 statement to a program plan or policy statement, or
25 analysis of lesser scope, or to a site specific

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1 statement, or analysis.

2 What we have here is a situation where the
3 Department of Energy has invested a substantial amount
4 of effort, over many years, to create the programmatic
5 environmental impact statements embodied in the 1996
6 programmatic impact statement, and in the 1999 SPD
7 EIS, which has been referred to.

8 Each of those efforts is approximately,
9 has taken approximately two and a half years. There
10 has been extensive opportunity for public input and
11 comment, at the cost of approximately 10 million
12 dollars each for those environmental reviews.

13 Looking at all of the broad policy
14 implications of all aspects of the plutonium
15 disposition program, including the use of MOX fuel
16 fabricated by the Department of Energy, at commercial
17 power mission reactors, including McGuire, Catawba,
18 and North Anna, specific reference to the SPD EIS I
19 can give you there, is section 3.7 and section 4.28.
20 That is the 1999 DOE document.

21 So what we have, essentially, to use an
22 analogy, the classic church analogy. DOE has
23 conducted very extensive environmental reviews that
24 constitute the church, here.

25 BREDL is claiming that if we look at what

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1 is probably one pew of the program, which would be use
2 of MOX fuel at mission reactors, and then we should
3 look at one seat in that pew, which is the lead
4 assembly application, and in that context we should
5 replicate at least some significant portion of the
6 work that has already been done, by the Department of
7 Energy on the broader picture.

8 And I think that would be the kind of
9 redundancy, and inefficiency, that the very concept of
10 tiering is defined to avoid. So I think that creating
11 an image that there is something that is escaping
12 review is simply not appropriate.

13 Because, number one, the policy issues
14 have been looked at. And number two, of course, the
15 NRC will do an environmental review in connection with
16 any batch application.

17 The last thing I just want to emphasize,
18 and I think this comes across in our written filing,
19 and I don't want to belabor it. But, again, I think
20 the Board, in one of your questions earlier, referred
21 to does anything become fait accompli? And I just want
22 to emphasize that certainly by using four MOX fuel
23 lead assemblies nothing becomes fait accompli with
24 respect to the batch, the potential for batch use.

25 CHAIR YOUNG: Thank you. Staff?

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1 MR. FERNANDEZ: Your Honor, just quickly
2 on what Mr. Repka says. To give you further
3 reference, in Appendix A to part 51 --

4 CHAIR YOUNG: Appendix 8?

5 MR. FERNANDEZ: Appendix A.

6 CHAIR YOUNG: A.

7 MR. FERNANDEZ: To part 51, the Commission
8 specifically has incorporated the CEQ regulations
9 regarding tiering and incorporation by reference. And
10 if you have the blue cover version of the CFR it is on
11 page 45 and 46.

12 Very briefly, the first point that, the
13 Staff and Mr. Repka alluded to, and the Staff cited to
14 in their written response to the Petitioner's
15 contention, is that for some reason the Petitioners
16 believe that the security plan changes, or would
17 result in design modifications that would make it a
18 given that the use of batch quantities of MOX fuel
19 would have to be approved, given sunk costs, or other
20 considerations to that effect at the Catawba, McGuire
21 reactors.

22 That is definitely not the case. In
23 October 31st the Staff sent a letter to the licensee
24 expressing their view that their letter of February
25 27th of 2003 in fact was a withdrawal of McGuire from

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1 the lead test assembly program.

2 And that subsequently the Staff would only
3 consider, as a whole, only Catawba in this process.
4 And with regards to security plant changes, and the
5 license amendment request, the Staff is only
6 considering those changes in light of the lead test
7 assembly proposal before it.

8 And I will quote from the letter the last
9 two sentences. The NRC Staff review and findings
10 regarding your physical security plant submittal,
11 dated September 15, 2003, will be applicable only to
12 the lead test assembly program at Catawba. Any
13 physical security clearance plan revisions associated
14 with the potential use of batch quantities of MOX fuel
15 will be reviewed if and when the NRC Staff receives
16 such proposals.

17 And I think the reason why I'm citing from
18 the Staff's document is to, at least, allay some of
19 the fears, on the part of the Petitioner, that the
20 Staff is not prejudging the issue in the area of
21 security, or any other area, environmental or safety
22 with regards to the use of batch quantities of MOX
23 fuel.

24 That decision is independent of this
25 decision. And at that point in time the Staff will

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1 make the appropriate security environmental and safety
2 reviews of such an application, if it ever is
3 submitted.

4 Which leads me -- go ahead.

5 CHAIR YOUNG: Refresh my memory, do we
6 have a copy of that letter?

7 MR. FERNANDEZ: I think it is attachment
8 2, or attachment 1 to the Staff's written pleading.
9 It is one of the attachments, if I remember correctly.

10 CHAIR YOUNG: Thank you.

11 MR. FERNANDEZ: One second, Your Honor.

12 (Pause.)

13 CHAIR YOUNG: I thought we probably did,
14 I just didn't want to get by it and then --

15 MR. FERNANDEZ: It is attachment 1, Your
16 Honor.

17 CHAIR YOUNG: Okay, thank you.

18 MR. FERNANDEZ: I think that further leads
19 us to the discussion that we previously had with
20 regards to the Commission's decision in CLI0214. And
21 I think the licensee presented the nexus argument in
22 a way that we agree with them.

23 But we would like to emphasize something
24 about the rightness argument. In their decision the
25 Commission specifically cites to the -- to Duke's

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1 pleading in that case, and points to three particular
2 circumstances that made the Commission believe that at
3 that point in time the issue of batch use of batch
4 quantities of MOX fuel was not ripe at that time.

5 And it cited, I'm just going to read from
6 the Commission's decision. The ultimate use of any
7 MOX fuel is dependent on a number of factors entirely
8 outside of Duke's control. These include, but are not
9 limited to actions by DOE, including the consummation
10 of certain international agreements, the outcome of
11 the current licensing proceeding for the proposed MOX
12 fuel fabrication facility in South Carolina, and
13 plutonium disposition activities in Russia.

14 We believe that those three factors, that
15 the Commission considered relevant and particularly
16 important in disposing of the contention at that time,
17 have still not been met.

18 And Petitioner in this case has not
19 alleged any facts that would cure the Commission's
20 concerns with regards to ripeness of the license
21 amendment application to irradiate batch quantities of
22 MOX fuel, because none of those circumstances have
23 been resolved yet.

24 And in the trade press, and people that
25 follow the issues with regards to MOX, there is a lot

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1 of outstanding questions with regards to plutonium
2 disposition in Russia.

3 As the Board is aware, from the written
4 presentations from both Petitioners, this is a
5 parallel program that has been carried out between the
6 United States and Russia, and the administration has
7 been fairly clear that these are to proceed in
8 parallel, and right now they are not.

9 So it is not entirely clear that the use
10 of batch quantities of MOX fuel is a fait accompli,
11 specifically at the Commission, but more broadly as a
12 matter of policy of the federal government.

13 I would like to end, furthermore, by just
14 merely stating that the alternatives that Ms. Curran
15 is talking about, with regards to slipping away, and
16 not being able to be addressed in the future, I
17 believe is a misguided argument at best.

18 Because at the point in time when the
19 batch quantities of MOX fuel is before the Commission,
20 the Petitioner, or any other groups that have an
21 interest in that proceeding, will have an opportunity
22 to raise issues about the adequacy of the
23 environmental report, then submitted, and about the
24 adequacy of the Staff's review of that report.

25 If the report is in any way deficient with

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1 regards to its disclosures, as to the alternatives
2 considered, or the range of alternatives that failed
3 to be considered, then at that point in time they
4 would have the opportunity to raise those issues.

5 And even issues with regards to cumulative
6 impacts, or anything of that sort. So we believe
7 that, as we stated in our written filing, that this
8 contention is inadmissible, and it should be
9 dismissed, or not admitted into the proceeding. Thank
10 you.

11 CHAIR YOUNG: Thank you. Anything further
12 from you, Ms. Curran?

13 MS. CURRAN: Yes. Mr. Repka did not bring
14 up, until today, an argument about the applicability
15 of the CEQ regulations, and so I didn't come prepared
16 with case law that has a different result than the
17 case he decided.

18 I know the Third Circuit has a ruling, but
19 there is other rulings, from other circuits, and the
20 Supreme Court, that indicate that indeed the CEQ
21 regulations do apply to the NRC.

22 And I would just like a chance to provide
23 those to the Board in writing.

24 CHAIR YOUNG: Is there any objection to
25 their doing that?

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1 MR. REPKA: No, subject to our ability to
2 comment on what is provided.

3 MS. CURRAN: Okay.

4 CHAIR YOUNG: I will add that to the list
5 of things that we need to address before we leave.

6 MS. CURRAN: Okay. I think Mr. Fernandez
7 said that, and both Mr. Repka and Mr. Fernandez, said
8 that the Staff is only going to evaluate the security
9 plan changes with respect to the LTA application.

10 But two points in response to that. There
11 is nothing in the letter, in the application that was
12 submitted by Duke, on September 15th, put any
13 limitation on their request for security plan changes.
14 And, also, in our view the fact that the Staff is
15 doing the review in a staged way doesn't really answer
16 the problem that we posed.

17 Because if changes are made to the
18 facility that are, A, expensive; or B, irreversible,
19 then the commitment has still been made, whether or
20 not the review just related to the LTA application.

21 When Mr. Repka got into his church
22 analogy, which I never heard before, but I think what
23 it boiled down to, what he was trying to say, was that
24 the alternatives to using the Catawba plant for
25 testing have already been considered by the DOE in one

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1 of those EISs, 96 or 99.

2 But this raises another issue that we have
3 brought before you, in our contentions, which is that
4 we think there is new information in changed
5 circumstances which should result in consideration of
6 new and different alternatives for using plutonium
7 fuel.

8 Therefore we don't believe that the issue
9 of consideration of alternatives has been put to rest.
10 And maybe we should just wait and discuss that with
11 respect to Contention 5.

12 CHAIR YOUNG: That makes sense, unless
13 anybody disagrees.

14 MS. CURRAN: Okay. That is all I had on
15 this.

16 ADMINISTRATIVE JUDGE BARATTA: May I?
17 When you say that modifications will be made that may
18 be expensive and irreversible, what I thought I heard
19 Mr. Repka say is that yes, there is going to be
20 modifications, but those modifications will not
21 preclude not using MOX. In other words, using LEU.

22 MS. CURRAN: That they will be what?

23 ADMINISTRATIVE JUDGE BARATTA: They will
24 not preclude using just strictly LEU instead of MOX.
25 And that seems to undermine your position on the

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1 inevitability of the use of batch MOX.

2 MS. CURRAN: Well, we just have his word
3 for it, we haven't seen these proposed changes. So we
4 don't want to accept that without being able to look.

5 CHAIR YOUNG: I am just writing on my list
6 that we need to talk about the schedule for all the
7 relevant clearances and so forth. We can take care of
8 that later.

9 Anything more on this?

10 ADMINISTRATIVE JUDGE ELLEMAN: Ms. Curran,
11 in your discussion of this issue you alluded to a Duke
12 request for waiver of certain regulatory requirements.
13 And I can attest that I was puzzled by what those
14 were.

15 Mr. Repka, in enclosure 1, attachment 6,
16 I find a section that is entitled Request for
17 Exemptions from Certain Provisions. And there are a
18 number of items listed here.

19 Are these not the exemptions that were
20 requested by Duke in the accompanying letter that we
21 had received on this?

22 MR. REPKA: Judge Elleman, are you
23 referring to the license amendment request?

24 ADMINISTRATIVE JUDGE ELLEMAN: Yes, I'm
25 referring to the LAR.

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1 MR. REPKA: Enclosure 6?

2 ADMINISTRATIVE JUDGE ELLEMAN: Well, it is
3 attachment 6, page 6-8, and it is at the end of my
4 grouping of enclosure 1.

5 MR. REPKA: Let me make sure I understand
6 your question. We were having a momentary panic
7 attack here, that you were referring to the security
8 plan submittal.

9 ADMINISTRATIVE JUDGE ELLEMAN: I don't
10 believe so, no.

11 MR. REPKA: Your question is whether these
12 are the exemptions that relate to security, or do any
13 of them relate to security?

14 ADMINISTRATIVE JUDGE ELLEMAN: No, that
15 wasn't quite the question. We had received a letter
16 that indicated Duke had requested waiver of certain
17 requirements.

18 I believe that is what I heard Ms. Curran
19 allude to in her earlier discussion. And I'm asking
20 whether the items in attachment 6 are, indeed, the
21 items that were requested under that waiver.

22 MR. REPKA: I think that reference to the
23 waiver is the security exemption request, which is a
24 separate submittal, which has been determined to be
25 safeguards information.

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1 ADMINISTRATIVE JUDGE ELLEMAN: So it is
2 not these items, but it is, indeed, safeguards related
3 material?

4 MR. REPKA: That is correct.

5 MS. CURRAN: That is what I meant, Judge
6 Elleman, we meant the exemption related to security
7 issues.

8 ADMINISTRATIVE JUDGE ELLEMAN: Oh, okay.

9 MR. REPKA: May I make one comment
10 responding to something Ms. Curran said at the end,
11 there? A reference to the security plan changes and
12 she said she wanted to see it before she would believe
13 us.

14 I just want to make the comment that we,
15 Duke Energy, can't conceive of any security plan
16 change that would preclude the use of LEU fuel in the
17 future.

18 MS. CURRAN: I didn't meant to suggest
19 personal mistrust of Mr. Repka. I just meant to say
20 that we have found that we have, often, very different
21 interpretations of the meaning of the documents we are
22 reading.

23 CHAIR YOUNG: That is one of the things
24 that makes law so much fun. Anyway, is there anything
25 further on this contention?

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1 (No response.)

2 CHAIR YOUNG: If not I think now would be
3 a good time to take a break. Before we do I just
4 wanted to quickly go over what more we want to talk
5 about here today.

6 I have a note to myself, on my list here,
7 that I wrote the word substitute, and crossed out
8 BREDL 8. Was one of your new contentions to
9 substitute for BREDL 8?

10 MS. CURRAN: Yes.

11 CHAIR YOUNG: Then I was right, we can
12 mark that off for today?

13 MS. CURRAN: Yes.

14 CHAIR YOUNG: So we have NIRS 5, BREDL 9,
15 BREDL 5, NIRS 4, and I have a circle around NIRS --
16 oh, okay, NIRS 3, we still need to talk about. I was
17 wondering whether --

18 MS. OLSON: Your Honor, I'm not going to
19 argue 3 today.

20 CHAIR YOUNG: You are not, okay.

21 MS. OLSON: I'm not going to withdraw it,
22 but I'm not going to argue it today.

23 CHAIR YOUNG: The reason I was asking was
24 because Duke had responded to 3 and 8 together.

25 MS. OLSON: Well that --

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1 CHAIR YOUNG: So you want to leave it in
2 place, as you did your other one, but you are not
3 going to make any argument on it?

4 MS. OLSON: Right.

5 CHAIR YOUNG: So then that leaves 1, 2, 3,
6 4, NIRS 5, BREDL 9, BREDL 5, BREDL 4. So it looks
7 like we may have time to talk about the Motion for
8 Protective Order this afternoon, along with some of
9 these scheduling issues.

10 I meant to say NIRS 4, let's see, NIRS 5,
11 BREDL 9, BREDL 5, and NIRS 4. So I just want to say
12 that so that people could be prepared to talk about
13 that this afternoon, because it looks as though we
14 probably will have time to do that.

15 So let's take a ten minute break and be
16 back at 10:15 and go into NIRS 5.

17 (Whereupon, the above-entitled matter
18 went off the record at 10:05 a.m. and
19 went back on the record at 10:20 a.m.)

20 CHAIR YOUNG: On the record. Ms. Olson,
21 before you start on your argument on NIRS 5, I would
22 just like to ask you if you would first address the
23 Staff's point that they haven't yet decided whether
24 they are going to do an EIS.

25 And once they make that decision, that

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1 that would be a more appropriate time to raise any
2 issues about what it is that they have decided to do
3 at that point.

4 MS. OLSON: I appreciated the Staff's
5 perspective. And I understand the point they are
6 raising and certainly a late filed contention, at the
7 time that the Staff makes that decision, could be
8 anticipated.

9 And so I think we are all on the same page
10 with regard to that. But I also think that this
11 process, whether anybody is going to admit it or not,
12 is part of a very large picture, with many discussions
13 that have been ongoing since 1996.

14 And the most recent of which I was
15 personally a part of, was two years ago downstairs
16 here, on the oral arguments on the question of whether
17 MOX fuel use should be considered in the license
18 renewals for Catawba and McGuire.

19 And because of that previous record, and
20 because for whatever reasons organizations who are
21 representing locally affected individuals, that is the
22 way I'm going to put that, I'm not going to say about
23 who is public, seemed to have to really exhaust every
24 remedy.

25 I don't mean just sort of exhaust

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1 remedies, we seem to have to, like, go the extra
2 10,000 miles to be sure that we aren't told, at some
3 future point, you didn't raise that back then, so you
4 can't raise that now.

5 And because of that kind of overarching
6 rejection by those authorities who are supposedly paid
7 to protect us, we feel incumbent upon us to raise this
8 issue at every step of the way, to ensure that it has
9 been fully ventilated.

10 And in that regard I want to touch on a
11 few things that were said in the previous arguments
12 about the BREDL contention. And I'm not here to argue
13 their case for them. Ms. Curran is amply able to
14 argues BREDL's points.

15 But there were a few things that pertain
16 to the same issue that were mentioned, and I want to
17 respond to them. The first was made by yourself,
18 Judge Young, when you referred to the oral arguments
19 two years ago in December of 2001.

20 And I want to clarify that there was not,
21 on that day, or days, any promise made that there
22 would be an environmental impact statement on the use
23 of MOX fuel in reactors. Nor has there been any
24 promise, from the Commission, that there would be an
25 environmental impact statement on the use of MOX fuel

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1 in reactors.

2 There has been an assurance that the Staff
3 will do an environmental review. Those are two
4 different things. And, indeed, two years ago we were
5 dealing with the process on license renewal of the
6 very reactors we are now talking about, Catawba 1 and
7 2, and an environmental impact statement was being
8 conducted by the Nuclear Regulatory Commission
9 supplemental to the GEIS for license renewal.

10 But, nonetheless, a site specific
11 proceeding that follows the, to me, one of the
12 cornerstones of NEPA, which is the engagement of the
13 public in the consideration of alternatives, and in
14 consideration of scope, and in the consideration of
15 impacts and acceptability.

16 So I need to also point out another
17 cornerstone of NEPA. And that is the consideration of
18 the application of regulations in the responses to our
19 concerns about whether or not there will be a full
20 NEPA process, meaning an environmental impact
21 statement, when it will occur, etcetera, etcetera.

22 Both Duke and NRC have implied that
23 meeting regulations was a sufficient reason for us to
24 not need, or that there is -- that somehow that
25 satisfies things, that regulations are met.

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1 These activities are inherently impactful,
2 they make an impact, inherently. That is why they are
3 regulated. If nuclear energy, nuclear electricity
4 from splitting atoms did not cause ionizing radiation,
5 we would all be dancing around in the streets, going
6 yippee, aye, kayo. It is too cheap to meter, it is
7 safe, it is clean.

8 But the truth is it creates ionizing
9 radiation, it is very expensive to deal with, it is
10 hazardous, it does create an impact and, therefore, it
11 is a regulated activity.

12 And one of the functions of doing
13 environmental impact statement is to consider whether
14 the implementation of those regulations, again, or in
15 a new way, is justified; whether there is benefit
16 which offsets the cost.

17 So those two cornerstones are there for
18 me. Engaging the public and considering the question
19 of even regulating, even having an impactful activity
20 that requires regulation, implementing those
21 regulations, because of the impact, there are
22 inherently.

23 So I want to now bring two specific points
24 in relation to those cornerstones. And they are
25 related. There has been much mention of the

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1 Department of Energy's environmental impact
2 statements. And the idea that much of the analysis
3 has already been done.

4 And, therefore, any revisitation will be
5 repeating and/or extra, and/or superfluous. I'm not
6 suggesting that a new environmental impact statement
7 might not import some of the work that has been done,
8 that is usual for one agency to look at the work that
9 another agency has done.

10 But what I can tell you is that there has
11 been no site specific environmental impact statement
12 that included the public in the immediate areas of the
13 Catawba reactors in a scoping process, in a draft
14 environmental impact statement consideration process,
15 specifically on the use of plutonium fuel in those
16 reactors.

17 And, you know, it is a little bit tongue
18 and cheek to bring this up, but there was this great
19 funny book called "Hitchhiker's Guide to the Galaxy".
20 And the climax of the story is that the earth is going
21 to be vaporized because there was a public comment
22 period at alpha centauri, or some other place, and
23 nobody had made any comments.

24 And so in this cleanup process, at the
25 galactic level, boom, we were going to be gone. And to

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1 some degree the plutonium analysis that was done by
2 the Department of Energy, prior to even selecting the
3 Savannah river site as the location for fabrication of
4 the fuel, is about like that, for people who live in
5 the immediate area of the Catawba reactor.

6 And so I don't believe that the Department
7 of Energy has yet met that. Now, the other thing that
8 I want to point out that was mentioned in the earlier
9 arguments, I'm very happy that Duke pointed this out,
10 or Mr. Repka for Duke.

11 That they are, in fact, acting under
12 contract for the Department of Energy, and to that
13 extent they are the taxpayers, bringing a program to
14 a specific locale. And I think that changes, a little
15 bit, the manner in which the Nuclear Regulatory
16 Commission should hear this.

17 Now, I'm pausing because I certainly
18 believe that commercial entities, Duke Energy coming
19 in the form of its corporate interests, should have
20 the same and equal treatment from the NRC in terms of
21 protecting the public.

22 But in terms of these questions of
23 procedure, in terms of these questions of truncation,
24 or severing, or is it all one program, etcetera,
25 etcetera, I deeply disagree with the Commission's

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1 decision that the batch irradiation has to be elevated
2 to its own bubble, if you will.

3 That it cannot be considered unless, and
4 until, Duke under its contract with DOE, tenders an
5 application. I have been deeply concerned about the
6 number and types of preparations that have been made.
7 And, quite frankly, I need to put in this record that
8 the Nuclear Regulatory Commission has in no way upheld
9 what the Department of Energy promised the public in
10 relation to this program.

11 The Department of Energy promised,
12 repeatedly, in public, that this would be a one time
13 only 50 tons of plutonium, now we are down to 34, but
14 nonetheless, a singular program for a singular purpose
15 in a unique reversal of our position on plutonium
16 fuel.

17 When this program came to the Nuclear
18 Regulatory Commission for regulation, that is not what
19 NRC did. And they created what I'm going to call mix
20 MOX, the standard review plan and the revision of Part
21 70 is for any plutonium fuel factory, anywhere.

22 If you go back into the records of
23 meetings in the mid and late 1990s, between Duke, and
24 the NRC, and Commonwealth Edison, they were openly
25 talking about the broad scale use of plutonium fuel in

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1 U.S. light water reactors across the fleet.

2 And not just 40 percent, they were talking
3 about even going to full core in the hallways, if not
4 in their slide presentation. So, you know, it warms
5 my heart that the NRC is going on record to say that
6 we have to take this LTA irradiation as a little tiny
7 action that means nothing compared to anything else.

8 But you have to compare that against the
9 backdrop of part 70, the standard review plan, the
10 licensing process for the fuel factory, and ask
11 yourself who is in denial, and who is hiding behind
12 the fact that they want to get this program, no matter
13 what. No matter what.

14 So, again, it warms my heart that Mr.
15 Fernandez says that the NRC, and the U.S. program, and
16 the Department of Energy, are moving in parallel with
17 the Russian program. That warms my heart because
18 there has been every indication that the Department of
19 Energy intends to proceed with this program whether
20 Russia does or not.

21 So I'm glad to hear that there are some
22 breaks in this system, that there is some honoring of
23 the agreements. But if we are asked to believe those
24 agreements, then I would ask that we also believe the
25 agreements that NEPA offers the public.

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1 Because this program is like a snowball
2 going downhill, getting bigger and bigger as it goes.
3 And you all can say that it is not a commitment to
4 irradiate the lead test assemblies, okay, let's hold
5 you to it.

6 And if the Russian program falls, let's
7 see every single last one of you professionals helping
8 to stop this program.

9 CHAIR YOUNG: Are you pausing, or does
10 that conclude your --

11 MS. OLSON: I will look at my notes for a
12 moment.

13 CHAIR YOUNG: Okay.

14 (Pause.)

15 MS. OLSON: I guess the final thing that
16 I want to emphasize that I will argue in another
17 contention about the cost benefit. But I think that
18 that has to be part of the considerations that are
19 made, because the consequences of an accident in a
20 reactor with MOX fuel of any amount clearly more with
21 a batch quantity, but clearly more with LTAs than with
22 only LEU, those consequences far outstrip practically
23 any other moment in the event chain that constitutes
24 this program except for, perhaps, the concerns about
25 diversions of weapons grade material which, of course,

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1 would be the ultimate cost.

2 So I don't think it is appropriate to say
3 that the cost and benefit issues have been resolved by
4 the previous NEPA considerations because the local
5 affected community was not served, was not included,
6 was not a participatory member, unless the --

7 I mean, the day I went to North Augusta in
8 1998 there were people there who had the concern about
9 use of reactors. But there was no opportunity to sign
10 up to speak, the microphone was mobile, and was being
11 passed amongst over 400 workers who admitted, openly,
12 that they were paid to be there.

13 I had to personally throw a fit with the
14 DOE meeting organizer to get a standing microphone
15 where a line could be formed, so that there might be
16 some opportunity for people who had a different point
17 of view, than the paid workers.

18 I mean, there really has not been an
19 implementation of a process that included an
20 opportunity for this affected community to
21 participate.

22 CHAIR YOUNG: I'll just say, before we go
23 to Mr. Repka, I think that you certainly show, by your
24 argument, that you are a zealous representative of the
25 public. And we commend you, I commend you for your

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1 participation.

2 Obviously we have a job to do, and we do
3 it based on the law, and not on our personal
4 viewpoints. And I encourage you to stay in the
5 process, whatever happens at this point, with regard
6 to any of your contentions.

7 MS. OLSON: Thank you.

8 CHAIR YOUNG: Mr. Repka?

9 MR. REPKA: I really have just a couple of
10 points. First I want to, in response to something
11 that Ms. Olson said, I want the record to reflect that
12 Duke has been involved in the MOX fuel program with
13 the Department of Energy for its non-proliferation
14 purposes.

15 It has never been Duke's intent, as it has
16 pursued this program, to pursue MOX fuel for any other
17 reason. And I think there is some implication that
18 this is about full cores of MOX fuel. And from Duke's
19 perspective that is not why Duke has engaged in the
20 program.

21 Second, I do want to just point out, with
22 respect to the Department of Energy's environmental
23 work in the programmatic environmental impact
24 statement, and in the SPD EIS, DOE has looked at the
25 use of MOX fuel fabricated by DOE, and using that fuel

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1 at commercial power mission reactors, including the
2 McGuire, Catawba, and North Anna sites.

3 And that was done, more specifically, in
4 the 1999 SPD EIS, in sections 3.7 and sections 4.28.
5 So the local impacts of use at Catawba and McGuire is
6 something that was addressed by DOE.

7 To the extent this contention really is an
8 argument with respect to the DOE plutonium disposition
9 program, obviously it is beyond the scope of what is
10 before the Board. And the program is a program of the
11 federal government, of the Administration.

12 And, again, its purpose is non-
13 proliferation, and to the extent that there is a
14 debate about that program it really is not in this
15 forum.

16 CHAIR YOUNG: For the Staff? I never know
17 who to call on. Ms. Kannler?

18 MS. KANNLER: Thank you. I would just
19 like to reiterate that the Staff has not determined
20 whether an EIS is necessary yet. Thank you.

21 CHAIR YOUNG: Thank you. Anything
22 further, Ms. Olson, in response to Mr. Repka?

23 MS. OLSON: Well, I would just like to
24 briefly say that we had a meeting with Commonwealth
25 Edison and Duke in the late 1990s. And I think it was

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1 a beneficial meeting, I think progress was made on
2 understanding whether or not the public of this
3 country would accept broad scale use of plutonium
4 fuel.

5 I think the message was pretty well
6 delivered that the answer is no. And I think that is
7 part of why Dominion has stated that they are out of
8 the program, although I would like to put into this
9 record that no license amendment was ever made to take
10 them out of the program so, therefore, who knows what
11 that really means.

12 So, you know, I understand that we are
13 making some progress in getting our points across.

14 CHAIR YOUNG: Thank you. Anything else on
15 this one?

16 ADMINISTRATIVE JUDGE ELLEMAN: Ms. Olson,
17 you said something like a severe accident with
18 plutonium in the reactor would far outstrip any
19 benefits, or something like that.

20 Were you suggesting that a severe accident
21 in the core that included the four plutonium
22 subassemblies would be more hazardous than a similar
23 accident that did not have the four assemblies? Or is
24 that not what you were implying?

25 MS. OLSON: Yes, sir. I am, I'm not

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1 dismissing the danger that LEU fuel would cause in a
2 severe accident. I am asserting that there would be
3 more consequences to, you know, in terms of health
4 impacts if Catawba had a major accident with four
5 assemblies in it.

6 And then I'm also, similarly,
7 acknowledging that those impacts increase even further
8 if they go to batch use. So I'm sort of, you know,
9 saying there is a spectrum, and my concern is that we
10 are now at the juncture of evaluating, in a decision.

11 I mean, you have to take a leap of faith
12 that there is a difference between having regulations
13 and choosing to use them. And this is a decision on
14 whether to implement the regulations in relation to
15 putting plutonium fuel into Catawba, which is a major
16 programmatic change for that reactor.

17 It has never used plutonium fuel before,
18 the people who live around Catawba reactor have never
19 had weapons grade plutonium on the reactor sites.
20 This is not, fundamentally, a security contention.

21 But I'm suggesting to you that these are
22 changes in Duke's program that are substantial, that
23 will require the implementation of regulation. And
24 there is a decision to implement that regulation or
25 not.

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1 And there are impacts from implementing
2 it. And in that decision there should be a cost
3 benefit analysis, in a broad sense of we are going to
4 get a benefit, the stated benefit is we are going to
5 irradiate weapons grade plutonium.

6 But there are also costs that must be
7 considered. And in terms of, on balance, the
8 potential for public impact, you know, I'm not going
9 to say the factory is safer, it wouldn't have impact.

10 But I'm going to say that an operating
11 reactor is a far greater source term in terms of
12 accident scenarios. And so it deserves its own
13 consideration of the potential cost, and the potential
14 benefits of implementing these regulations in relation
15 to this programmatic change in Duke's program, and its
16 impact on this area, these people, these communities.

17 ADMINISTRATIVE JUDGE ELLEMAN: Yesterday
18 we had extensive discussion over the efforts Duke has
19 made to try to evaluate the safety implications of
20 adding the four plutonium subassemblies.

21 Do you have anything new to add to that
22 discussion, in any way?

23 MS. OLSON: I would defer to Mr. Lyman's
24 expertise and BREDL contentions. But I would say that
25 in my reading of the literature there are outstanding

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1 individuals, like Mr. Powers, Mr. Gillinsky, my brain
2 is fogging on the name of the man at Princeton I'm
3 trying to come up with, Dr. Makhijani.

4 Mr. Lyman is not alone as an expert in
5 asserting that this is premature, if you are going to
6 do it at all. That there is a lot we don't know. And
7 that the assumption that there is no difference
8 between weapons grade and reactor grade, falls on the
9 security issues, if nothing else.

10 ADMINISTRATIVE JUDGE ELLEMAN: I would
11 fully support Judge Young's comments about the
12 desirability of keeping the public informed on what is
13 going on. And I would hope that your organization
14 would feel an obligation to play a role in telling
15 people what is being done to try and address the
16 issues, and the problems, as well as just raising your
17 concerns that you have.

18 MS. OLSON: Thank you, Judge Elleman, I
19 appreciate that.

20 CHAIR YOUNG: Thank you. BREDL 9, are you
21 ready on that?

22 MS. CURRAN: I wonder if I could ask for
23 a five minute break before we go to 9? Thank you.

24 CHAIR YOUNG: Sure. Off the record.

25 (Whereupon, the above-entitled matter

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1 went off the record at 10:45 a.m. and
2 went back on the record at 10:50 a.m.)

3 CHAIR YOUNG: Back on the record. BREDL
4 9, and just as a preliminary on this, if you could
5 address jurisdictional issues of what the NRC can or
6 cannot tell DOE to do.

7 MS. CURRAN: Okay. I do not read the NRC
8 regulations as precluding consideration of impact of
9 foreign imports. I agree that under case law many
10 agencies, or many courts interpreting agency
11 decisions, impacts on foreign jurisdictions, are
12 outside the scope of NEPA.

13 But there have been cases in recent years
14 saying, holding that NEPA requires the consideration
15 of impacts of exports on the global commons. And I
16 want to give you a citation to one of those,
17 Greenpeace v Stone, 748FSUP749. This was in the U.S.
18 District Court for Hawaii, decided in 1990.

19 I believe it was Duke's cite a case
20 involving Edlow, from 1976, holding that the
21 Commission decided not to consider impacts of an
22 export. But this predated these more recent
23 decisions.

24 And also, in that case I believe there had
25 been a generic environmental impact statement prepared

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1 by ERDA, the Energy Research and Development
2 Administration. And the export was apparently an
3 independent export that was not related to any other
4 actions. And here the export is part of a general
5 program for which an environmental impact statement
6 had been prepared.

7 And, in fact, the 1996 environmental
8 impact statement prepared by DOE for storage and
9 disposition of weapons usable fissible material
10 evaluated environmental impact on the global commons
11 on shipping plutonium back and forth to France for
12 processing.

13 CHAIR YOUNG: Could I just stop you for a
14 second? The cite that you referred to, that Duke had
15 provided, is that in the response to this one, or --

16 MS. CURRAN: As a matter of fact it is in
17 response to Contention 8. But that is, I think, what
18 they are relying on to say that Contention 9 shouldn't
19 be considered.

20 CHAIR YOUNG: Thanks.

21 MS. CURRAN: Some of the regulations that
22 Duke refers to, there is the scoping regulation, it
23 just says that this part applies, part 51 applies to
24 domestic licensing.

25 And I don't read that to say that NEPA, we

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1 don't believe NEPA applies at all to exports. It just
2 says these regulations are for domestic licensing.
3 And Duke also cites some regulations and statutory
4 language saying that NEPA doesn't apply to regulations
5 involving exports. But that is not what is at issue
6 here, a licensing action.

7 And, again I think the law has changed
8 somewhat. It has only been in recent years, I
9 believe, as a result of an Executive Order, that the
10 courts are requiring agencies to consider impacts on
11 the global commons.

12 And, of course, this plutonium is to be
13 shipped across the Atlantic ocean on the global
14 commons.

15 CHAIR YOUNG: Which Executive Order are
16 you that?

17 MS. CURRAN: I'm sorry, I don't the
18 number, but it is referenced in the Greenpeace case.

19 CHAIR YOUNG: And do you know if it is
20 still in effect?

21 MS. CURRAN: No, I don't. But I can
22 certainly find that out. And I expect that we may be
23 briefing that issue because our substitute for
24 Contention 8 addresses the environmental impacts of
25 exporting plutonium to France. So we would be glad to

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1 provide that information in written form.

2 CHAIR YOUNG: Could you clarify, given
3 that you are substituting one of your new late filed
4 contentions for Contention 8, what about contention 9
5 is different such that you want us to still consider
6 it separately? Just so that I can get a better handle
7 on --

8 MS. CURRAN: Well, we left contention 9
9 because we didn't see any reason to change it. But
10 there is a discrepancy between what the original EIS
11 said and -- which one was this?

12 CHAIR YOUNG: The reason I asked is just
13 because you made a reference to your briefing in the
14 other one. But I'm not trying to encourage you to
15 withdraw anything that would not be encompassed by
16 anything new. But I was just wondering for
17 information.

18 MS. CURRAN: The new documents submitted
19 by Duke, that were prepared by DOE, the supplemental
20 analysis that is attached to Duke's response to our
21 contentions, doesn't clear up this discrepancy. So we
22 left contention 9 as it is.

23 CHAIR YOUNG: Thank you.

24 MS. CURRAN: And just moving to the
25 substance of the contention, what we are concerned

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1 about here is that this is not an insignificant
2 discrepancy, this is 40 percent of the amount of
3 plutonium that DOE originally said was needed for the
4 fuel assemblies. It is quite a difference.

5 CHAIR YOUNG: For the lead test
6 assemblies?

7 MS. CURRAN: Yes. And we don't think that
8 it is answered by a general reference to there is
9 going to be waste, and there is going to be, what do
10 they call them, archived material.

11 In its response Duke doesn't really give
12 an accounting of how this could add up to an extra 40
13 percent of the material. And in fact the French brag
14 about how they don't have waste in their processing.
15 So to our minds we would have been interested in a
16 substantive explanation of why so much extra material
17 is being shipped here, but it is quite general, it
18 doesn't resolve the issue that we've raised.

19 And, of course, this amount of plutonium
20 is enough to make ten bombs, it is a lot, forty extra
21 kilograms. So we think that there should be some
22 accounting for that in the environmental report.

23 CHAIR YOUNG: Do you want to address the
24 Staff's argument about the relevance in this
25 proceeding?

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1 MS. CURRAN: Oh, because we should be
2 raising it in the export license case, was that the
3 Staff's argument, this is the wrong forum?

4 Okay, well, the scope of a NEPA analysis
5 includes the steps leading up to the test, that NEPA
6 doesn't allow the isolation of a very, very specific
7 action, say the testing, without also looking at what
8 are the necessary prerequisites to that.

9 And, of course, there is no fuel that is
10 ready to be tested, it has to be manufactured, it has
11 to be gotten from somewhere. And, originally, in 1996
12 it was planned that it would be manufactured in the
13 United States, and that plan has changed, and now it
14 is going to be manufactured in France.

15 So this particular project encompasses
16 preparing the fuel for testing. And Duke, in fact,
17 effectively acknowledged that by including a
18 discussion of that in the environmental report and
19 saying DOE is going to be addressing that, we will
20 leave it to them.

21 And they submitted, DOE did claim to
22 revise its analysis, and they submitted that. It is
23 something that both Duke and DOE appeared to consider
24 to this testing of lead test assemblies.

25 It certainly, I am representing BREDL and

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1 Greenpeace, and we have requested a hearing in the
2 export license case. But it is not clear whether a
3 hearing is going to be granted, the standing issues
4 are different, whether a contention would be admitted.

5 But it clearly is relevant to this
6 proceeding, also. So we don't really want to litigate
7 it twice, in two different proceedings. But if it
8 can't be litigated in the export license case, it
9 should be litigated here.

10 CHAIR YOUNG: Do you have any information
11 on when you will know whether a hearing will be
12 granted in the export license?

13 MS. CURRAN: None at all. We filed a
14 hearing request the day before Thanksgiving, and it
15 was filed by first class mail. And since it has to go
16 through an irradiator I understand I'm not expecting
17 it to even get to the secretary's office for something
18 like two weeks, that is what I have heard it takes.

19 And you know what the procedure is after
20 that, it takes a little while to find out whether
21 there will, in fact, be a hearing.

22 I don't have anything more to add at this
23 point.

24 CHAIR YOUNG: Mr. Repka?

25 MR. REPKA: It is really just a couple of

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1 points on this contention. First the contention
2 itself, if you look at the contention, never really
3 references NEPA, and doesn't give any indication that
4 that is a concern.

5 However, we have addressed it as a NEPA
6 issue, and --

7 CHAIR YOUNG: I think there was a heading
8 that the contentions were divided into, wasn't there
9 a heading listing certain contentions that fell under
10 NEPA?

11 MR. REPKA: My point was going to be we
12 have addressed it that way, nonetheless.

13 CHAIR YOUNG: Okay.

14 MR. REPKA: Really the only issue in this
15 contention is your so-called 40 kilogram discrepancy
16 between the export license and the SPD EIS. And our
17 position is that that is not a matter that is material
18 to this particular license amendment application, this
19 particular approval before the NRC.

20 The discrepancy itself, as we pointed out
21 in our filing, is addressed in the export license
22 application, and it is addressed, as well, in the DOE
23 supplement analysis. Those are issues perhaps germane
24 to the export license proceeding before the NRC.

25 I don't think we need to argue that point

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1 here, because it will be argued in another forum. Our
2 point is simply it is not a material matter with
3 respect to this particular approval before the NRC.

4 I would say, in addition to that, which is
5 essentially a jurisdictional type argument, the
6 factual argument that it really is, in our view, the
7 discrepancy, the so-called discrepancy is really a
8 non-issue, and is easily explainable by the export
9 application, which is for an export of up to 140
10 kilograms.

11 It doesn't say that there will be a
12 specific number as to what -- it could be less than
13 140 kilograms. And the fact of the matter is, the
14 supplement analysis, and the export application
15 explain that any archived, and extra material, will be
16 returned to Los Alamos, and are addressed in that
17 fashion.

18 It is simply not as a matter of
19 jurisdiction, or fact, a significant genuine issue
20 that is material to this proceeding.

21 CHAIR YOUNG: Just a matter of
22 information, to clarify. Am I correct in
23 understanding that the 140 kilograms is specifically
24 for the lead test assemblies?

25 MR. REPKA: The 140 kilograms of plutonium

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1 oxide that would be exported by DOE are for the
2 manufacture of the lead assemblies, that is correct.

3 CHAIR YOUNG: Is there any -- was the
4 export license application done at the point, before
5 you withdrew McGuire from consideration, is that a
6 factor here, in terms of the amount?

7 MR. REPKA: I think McGuire was withdrawn
8 before the export application, it was October 1.

9 CHAIR YOUNG: I just wondered whether --

10 MR. REPKA: And there is no connection
11 because there was never an intent to use lead
12 assemblies at more than one facility. It was one unit
13 of one of the two facilities to be decided, based upon
14 schedule and other factors.

15 CHAIR YOUNG: Okay.

16 MR. FERNANDEZ: Very briefly, Your Honor.
17 We would agree with the licensee that the materiality
18 of this issue to the instant proceeding is unclear,
19 and it is not explained very carefully in the
20 Petitioner's contention.

21 From what the Petitioner has stated today,
22 and what is in the pleading, the basis that is offered
23 is the concern with regards to 40 kilograms of
24 plutonium being diverted by a third party for a
25 potential malevolent use.

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1 Or at least that is what we can glean from
2 what has been said today. I would remind the Board
3 that about a year ago the Commission issued a series
4 of decisions with regard to the National Environmental
5 Policy Act scope in issues related to terrorism, and
6 third party malevolent acts.

7 So to the extent that within the scope of
8 NEPA the Petitioners are seeking a remedy, such as a
9 discussion of the impacts of what would happen with 40
10 stray kilograms of plutonium, that definitely, the
11 Commission has determined that it is not within the
12 scope of the statute.

13 Since we don't see any other basis for
14 this contention, either in the oral argument today, or
15 in the written pleadings before the board, we fail to
16 see how this contention is material to the issues in
17 this proceeding, and therefore we believe that the
18 contention should not be admitted. Thank you.

19 CHAIR YOUNG: Thank you. Do you want to
20 respond, specifically to the terrorism, I don't think
21 that was raised before.

22 MR. FERNANDEZ: I don't think it was until
23 today, Your Honor.

24 MS. CURRAN: Okay. Well, it is -- Mr.
25 Fernandez is right about the Commission's ruling. In

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1 this case the Department of Energy has already
2 addressed impacts of terrorism, and considers them
3 relevant.

4 You can find that discussion in the EIS
5 for storage and disposition of plutonium that was
6 prepared in 1996, in Appendix G. So that is something
7 that the DOE has already decided to address, that has
8 already been made an issue.

9 CHAIR YOUNG: Which appendix, I'm sorry?
10 G, did you say?

11 MS. CURRAN: Appendix G.

12 CHAIR YOUNG: Thank you, pardon me for
13 interrupting.

14 MS. CURRAN: The DOE has already decided
15 that that issue is relevant and should be discussed.
16 I believe it is their policy, with respect to other
17 environmental impact statement, also. So the
18 situation is a little bit different in that the
19 program, as DOE conceived it, for purposes of the
20 environmental review includes consideration of risk of
21 sabotage and terrorism.

22 CHAIR YOUNG: Did DOE, after 9/11
23 undertake any similar broad based consideration of
24 terrorism issues, which was, essentially, as I recall
25 the basis for the Commission's terrorism rulings, if

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1 I'm recalling them correctly.

2 There may have been other basis but I
3 think that was the -- correct me if I'm wrong, staff.

4 MR. FERNANDEZ: There were several basis
5 to the decision, that was one of them. Among others
6 were also the Commission's determination that in the
7 Commission's view the statute was never intended to
8 resolve such issues.

9 That those issues related to the securing
10 of -- well, there were a variety of cases, as you
11 recall. But the security of nuclear materials was an
12 issue that was ongoing, and not a static issue, like
13 an EIS that is done for a one time decision. And
14 those issues are better addressed in other fora, and
15 pursuant to other statutes.

16 And that NEPA was never really intended to
17 resolve how we should deal with impacts arising from
18 a terrorist attack to X facility or material.

19 CHAIR YOUNG: Well, the reason I asked
20 that was because part of the basis did have to do with
21 the broad based consideration after 9/11, and you are
22 talking about 1996.

23 So I was wondering whether anything had
24 changed at DOE since then.

25 MS. CURRAN: I can tell you that in the

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1 supplemental analysis that was sent to you by Duke,
2 and is attached to its response to the contention, if
3 you look at page 11 the DOE summarizes the analysis
4 that was done in 1996, regarding the impacts of
5 sabotage and terrorism, and makes a new finding that
6 the conclusions that were reached then don't need to
7 be reevaluated.

8 So DOE has not said we no longer consider
9 this to be relevant. They simply reviewed what they
10 did and said, we continue to stand by what we said.

11 CHAIR YOUNG: And this was one of the two
12 attachments to --

13 MS. CURRAN: Right.

14 CHAIR YOUNG: -- Duke's response?

15 MS. CURRAN: This is -- let me give you
16 the title. It is the supplemental analysis, I just
17 want to --

18 (Pause.)

19 MR. FERNANDEZ: Your Honor, it was sent to
20 the Board in a letter from Ann Cunningham to the
21 Board, on November 10th, 2003.

22 MS. CURRAN: There is two attachments,
23 attachment A and attachment B, and I think this is
24 attachment A. I copied --

25 MR. REPKA: That is correct. It was as an

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1 addendum to our filing.

2 MS. CURRAN: And I would just like to
3 respond to Mr. Repka's statement that this 40 kilogram
4 discrepancy is insignificant. The quantity, as we've
5 stated, 40 kilograms is a significant amount compared
6 to 100, it is 40 percent more.

7 And, again, we don't think it is
8 sufficient to make generalizations about what might
9 happen to it. There needs to be more of an accounting
10 for this discrepancy. And we do think the contention
11 invokes NEPA, the headings of the contention is
12 clearly stated.

13 They were NEPA contentions, the contention
14 itself discusses environmental impacts. Obviously the
15 susceptibility of this material to theft, and
16 diversion, is a major concern. But we are also
17 concerned about the environmental impacts of having an
18 amount of plutonium that doesn't really need to be
19 shipped across the ocean, shipped for purposes of --
20 whether there were an accidental release.

21 If there were an accident why would you
22 want to have even more material than you actually need
23 to be putting in transport?

24 And, of course, within the United States
25 the material will have to be transported from, I

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1 think, Los Alamos laboratories to the port. So that
2 is another transportation leg, domestically, that some
3 impacts could be avoided if this an excessive amount
4 of plutonium.

5 It may not be excessive, it is just that
6 there has been no justification for it, and it is
7 quite a significant amount.

8 MR. FERNANDEZ: Your Honor, can I briefly
9 say something? Something that Ms. Curran raised with
10 regard to the department's statement to the
11 supplemental analysis.

12 And although the department may have made
13 such an analysis I would like to take the opportunity
14 to remind the Board that that is not dispositive of
15 the issue in this case. And what should be
16 dispositive is the Commission's precedent with regards
17 to malevolent acts and how they are considered in the
18 scope of NEPA.

19 Within the limited scope of jurisdiction
20 that we have over this program, it wouldn't surprise
21 me that DOE has made statements in their programmatic
22 EISS about a whole variety of issues that we wouldn't
23 consider.

24 One of which, in this case, is the issue
25 with regards to malevolent acts. And what I would

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1 like to say, specifically, about that is that the
2 Board exercises its jurisdiction, as it is conferred
3 upon it from the Commission.

4 And the Commission has interpreted its
5 jurisdiction with regards to NEPA in a limited
6 fashion, when it comes to malevolent acts. So even
7 though the Department of Energy may have considered
8 malevolent acts in association with export of this
9 material, it doesn't a priori decide, then the Board
10 has the authority to consider those sorts of issues
11 and give the Petitioner the remedy which it seeks,
12 which is the discussion of such impacts on the
13 environmental report and then subsequently in any
14 document that the Staff creates.

15 I think that the Commission spoke fairly
16 clearly on that issue. And, unfortunately, I don't
17 have the citation to the Commission's decisions, but
18 I would hope that the Board could get them. Thank
19 you.

20 CHAIR YOUNG: Just as a matter of
21 information, Mr. Repka, I think it was you who in your
22 pleadings said that it was up to 140 kilograms. Is
23 there something that can be said that would be
24 permissible to say, under security restraints, to
25 explain?

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1 I mean, do you know, is that --

2 MR. REPKA: A couple of things. The
3 export application is for export of up to 140
4 kilograms of plutonium oxide. Then it also clearly
5 states, in the application and in the notice, that
6 that translates to 123.48 kilograms of plutonium,
7 because some of the weight is, obviously, oxide.

8 So -- and then with respect to that
9 number, what gets shipped will almost undoubtedly be
10 less than that, is our understanding. And the point
11 then being that as explained, in the export
12 application in the supplemental analysis, that
13 anything that is shipped, and anything that is extra,
14 will come back.

15 If there is any extra there is really no
16 nexus between that issue, how much there might be
17 extra, or archived material, and security, and
18 sabotage and terrorism.

19 To the extent that that risk exists, and
20 has been evaluated by the Department of Energy, it is
21 really independent of the amount of extra material,
22 because it is all treated the same.

23 But I think the answer to your question
24 is, it will be something less than 123 kilograms of
25 plutonium that is shipped.

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1 CHAIR YOUNG: And so would it be a
2 reasonable assumption to say that an amount was
3 selected that would assure that once the plutonium was
4 extracted, or whatever the correct word is, there
5 would be enough after the oxide --

6 MR. REPKA: I think that is right. The
7 amount is selected to ensure that there is enough to
8 manufacture enough pellets to create four lead
9 assemblies. And to the extent there may be some extra
10 for archive material then so be it.

11 But the intent is not to create a large
12 volume of archive material.

13 ADMINISTRATIVE JUDGE BARATTA: Could you
14 be more specific on how much material is actually
15 needed for assembly? For example, let's say if by
16 weight five percent, how much will be needed?

17 MR. REPKA: Yes, the estimates are
18 approximately 20 kilograms per assembly of plutonium.
19 And I think the SPD EIS uses an estimate of 100
20 kilograms, I believe. But it is approximately 20 per
21 assembly.

22 ADMINISTRATIVE JUDGE BARATTA: Thank you.

23 CHAIR YOUNG: Anything further on BREDL
24 Contention 9?

25 MS. CURRAN: Well, if it takes 20

1 kilograms of plutonium to make one assembly, then that
2 is 80, so the DOE has already built in a margin of 20
3 kilograms per waste. So I'm not sure that -- we have
4 advanced maybe a little bit, but we haven't resolved
5 the issue.

6 MR. REPKA: But I think our point is, to
7 the extent that there is an issue with DOE, and how
8 much they've asked for in their export application, it
9 is really an issue for the export application
10 licensing.

11 MS. CURRAN: Well, it is a NEPA issue. It
12 is not just an issue for the export license
13 application, it is a NEPA issue that needs to be
14 addressed in this proceeding.

15 Before -- if BREDL raises inadequacy in
16 the environmental analysis that is supporting this
17 licensing decision, it is our position that they need
18 to be resolved before this license amendment can be
19 issued.

20 Now, maybe they will get resolved in the
21 export license case, but it needs to happen before
22 this license amendment is issued, and you have to be
23 satisfied that they are resolved.

24 Because your decision has to be
25 accompanied by an adequate environmental analysis, it

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1 can't be shunted off to some other proceeding that may
2 happen later.

3 CHAIR YOUNG: Could you speak to the
4 terrorism issues that Mr. Fernandez spoke about? I
5 know you mentioned that the environmental impacts you
6 referred to aren't limited to purposeful activity, but
7 accidental release.

8 But using the words falling into the wrong
9 hands sort of seems to bring back in the terrorism
10 issue. And, obviously, we follow our integrity, and
11 our, the value of what we do, is based on our
12 following the law, and precedent, wherever that leads
13 us, and that includes the Commission's rulings on
14 terrorism.

15 So if you could address that more
16 specifically?

17 MS. CURRAN: As I said earlier, I think
18 the distinction here is one that hasn't been addressed
19 by the Commission yet, and that is where the decision
20 involves integration within an environmental analysis
21 by another agency that has declared, implicitly, that
22 terrorism and sabotage are relevant.

23 CHAIR YOUNG: But if the NRC has, and I
24 believe that those rulings were at least partially in
25 the context of NEPA issues --

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1 MS. CURRAN: Yes, they were, I'm familiar
2 with all of them.

3 CHAIR YOUNG: All we have jurisdiction to
4 do is what NRC can do. And I am not sure that the fact
5 that DOE is involved would necessarily change the
6 result of the Commission's rulings, because DOE would
7 be similar to a party in this case.

8 Well, they wouldn't be a party in this
9 case, they would be a party -- right. The point is
10 that DOE, before the NRC, is not in a position of
11 telling the NRC what to do.

12 At this point the NRC is being asked to
13 make a decision, and the NRC has made rulings on how
14 terrorism types of issues are to be handled. So I'm
15 not sure how DOE's stance on that would lead to a
16 different conclusion by the NRC on how it handles
17 terrorism issues, no matter who is involved, whether
18 it be an individual person, an entity, a state,
19 another agency.

20 MS. CURRAN: Well, it is an interesting
21 question, and I think one element is that there has
22 been an environmental review process here that started
23 with the DOE some years ago, and the DOE initiated it,
24 and set a certain standard for what the environmental
25 review would include.

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1 And at this point the NRC has taken up the
2 responsibility for taking it another step. And the
3 agencies are, in a sense, collaborating. And when all
4 is said and done, if we were to look down into the
5 future and see what would happen, if we all ended up
6 in federal court, our position would be that whether
7 it is the DOE, or the NRC, this is a relevant issue.

8 First of all, we think it is relevant, we
9 disagree with the Commission's position, clearly. And
10 DOE thinks it is relevant. And so this needs to be
11 addressed.

12 And therefore wouldn't it be more
13 efficient to do it now than to wait and force the
14 issue somewhere down the road in federal court?

15 CHAIR YOUNG: You know, since this
16 terrorism issue wasn't raised until today, this
17 strikes me as something that might benefit from giving
18 you the opportunity to do further briefing on it, or
19 all of you, as a matter of fact, if you want to. This
20 was not part of your argument before.

21 I think Mr. Fernandez agreed that you
22 didn't raise this before today.

23 MR. FERNANDEZ: I don't think that the
24 Petitioner had styled their arguments in the way that
25 they did today, their oral arguments, and made it

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1 particularly clear that what they were concerned with
2 was theft and diversion of the material, and possible
3 malevolent acts with the material.

4 So it was not addressed previously for
5 that reason. I think the oral argument today is what
6 brought that to light.

7 MS. CURRAN: But certainly our substitute
8 for Contention 8 is going to be much more -- is going
9 to have a lot more content with respect to that issue.
10 So maybe that would be a good idea to brief it with
11 respect to that contention, which is going to be the
12 central contention on environmental impacts of
13 malevolent acts.

14 CHAIR YOUNG: Well, we will discuss it,
15 and if we need to get back to it, we can get back to
16 it.

17 MR. FERNANDEZ: Your Honor, can I say one
18 last thing? I promise.

19 Ms. Curran raised, distinguished this
20 situation from the other cases that the Commission
21 previously decided in that in those other cases the
22 DOE, you didn't have the interrelationship that you
23 have in this case.

24 However, in the MOX fuel fabrication
25 facility a similar contention was raised. The MOX

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1 fuel fabrication facility was covered in the SPD EIS,
2 and in the SPD EIS the Department of Energy did
3 address terrorism related impacts from operation of
4 the facility itself.

5 And even in that case the Commission held
6 that those impacts were outside the scope of the
7 Commission's NEPA review. So it is not as easily
8 distinguishable as one may argue.

9 MS. CURRAN: Well, let me just address
10 that, because that was my case. And that was very
11 interesting because we raised this issue of impacts of
12 a terrorist attack in August of 2001. This was before
13 September 11th.

14 And it was something that we did, knowing
15 that the Commission had a standard response always for
16 such contentions, saying terrorist attacks are not
17 foreseeable, we don't look at them. But we did it
18 anyway, because we disagree.

19 And we think this is something that we
20 have been learning more and more about, that one can
21 foresee them in a different way. There has been
22 rulemaking, the truck bomb rulemaking where the
23 Commission has said we are learning more about this,
24 we know how to anticipate them better, and so we put
25 in that contention.

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1 And then, of course, the attacks of
2 September 11th occurred, and the Board ruled, after
3 that, it was a pretty early stage of raising this type
4 of issue, in NRC licensing hearings.

5 And when GANE prepared that contention, we
6 were not focused on the DOE's environmental impact
7 statement the way we are now, because it wasn't such
8 a well developed issue. So it wasn't addressed in the
9 MOX case is, I guess, the basic point.

10 We didn't address the fact that the DOE
11 had looked at it, and the licensing board didn't
12 address it, and the Commission didn't address it. But
13 here we are raising it, that this is something the DOE
14 is looking at, this is part of a bigger program than
15 just the NRC's environmental analysis.

16 ADMINISTRATIVE JUDGE ELLEMAN: Mr. Repka,
17 the excess plutonium is, presumably, going to be
18 returned as fuel elements. Has Duke taken a position
19 on their willingness, or unwillingness, they might
20 have to store that material at Catawba, given an
21 appropriate change to allow storage of the material?

22 MR. REPKA: The excess or archived
23 material is coming back in the form of fuel rods, not
24 of fuel assemblies, but fuel rods. And those fuel
25 rods will go to Los Alamos National Lab, not to

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1 Catawba, and will be stored at Los Alamos.

2 ADMINISTRATIVE JUDGE ELLEMAN: So you see
3 no possibility that material would end up for storage
4 at Catawba?

5 MR. REPKA: No.

6 CHAIR YOUNG: Does that change any of your
7 arguments?

8 MS. CURRAN: No.

9 CHAIR YOUNG: Anything else on this one?

10 (No response.)

11 CHAIR YOUNG: Let's see, we have two more
12 contentions, BREDL 5 and NIRS 4, relating to
13 alternatives.

14 MS. OLSON: Your Honor, when it comes to
15 schedule for the day, I don't know if it is possible
16 to have the safeguards discussion after the other
17 housekeeping matters, but Nuclear Information and
18 Resource Service is not part of the safeguards
19 discussion.

20 So if it is possible to order things this
21 afternoon so that we can leave, that would be
22 appreciated.

23 CHAIR YOUNG: Yes, sure. I think that is
24 possible.

25 ADMINISTRATIVE JUDGE BARATTA: I think

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1 that is quite reasonable, thank you for that
2 suggestion.

3 MS. CURRAN: Ms. Olson and I were
4 wondering if we might be able to switch the order of
5 our contentions. That would let her --

6 CHAIR YOUNG: I actually was thinking
7 about asking you that, anyway, if there is no
8 objection and it makes more sense to you to do it that
9 way, that is -- we all agree that is all right.

10 (No response.)

11 CHAIR YOUNG: None stated. Let us make
12 sure we've all got it in front of us.

13 MS. OLSON: That is fine.

14 (Pause.)

15 CHAIR YOUNG: Go ahead.

16 MS. OLSON: Your Honor, I have just the
17 desire to mention the name of Dr. Von Hippel, was the
18 name I couldn't come up earlier, V-O-N, H-I-P-P-E-L.

19 And the second thing, very briefly, on the
20 break Sherry Lorenz, who is one of the NIRS members
21 who I am representing, wanted me to make a comment to
22 Judge Elleman in response to your comment.

23 That she hopes that the NRC will realize
24 that informing the public is part of their job, and
25 that that is a very good reason to do an environmental

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1 impact statement.

2 And they have a lot more money, and a lot
3 more staff, as she pointed out. So I want to register
4 her comment in response to your encouragement of my
5 organization, which I also appreciate.

6 And it also suggests to me actions that we
7 might consider taking about how to improve how the NRC
8 reaches people, and that maybe we have a
9 responsibility to engage in that process in a way we
10 haven't yet.

11 CHAIR YOUNG: One thing, I want to just
12 interrupt here and say, and that is a lot of times
13 when you are talking about the NRC you say you, and
14 you look up to us. And I think you need to realize
15 that part of our jobs is not to pass along messages to
16 the Commission.

17 We are a separate, independent, panel of
18 administrative judges whose sole function is to
19 conduct adjudication proceedings. And we maintain
20 separateness from the rest of the NRC, other parts of
21 the NRC can't even get into our office with their key
22 cards.

23 So just to clarify, don't assume by saying
24 things here that we will be passing on messages.

25 MS. OLSON: I do not make that assumption.

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1 But in the course of dialogue, forgive me for using a
2 broad you when I'm facing the front of the room.

3 CHAIR YOUNG: No problem in saying it, I
4 just wanted to make sure that you didn't think that
5 that was going to happen as a matter of course.

6 MS. OLSON: No, I don't. However, there
7 is a usefulness in entering this arena in terms of
8 forcing my perspective on our responsibility as an
9 active organization, in engaging these issues with the
10 agency.

11 And I understand that there are many
12 arenas beyond this one. So thank you for reminding
13 me.

14 To this contention, I just want to say a
15 few brief things. One is to remind us that we have
16 acknowledged, throughout yesterday and today, that
17 this program is a moving target, it is evolving. It
18 is evolving in a very complex space.

19 And since 1996 there are substantial
20 changes. Ms. Curran just referred to the attack of
21 2001 that were very palpable when we filed the
22 contentions about MOX and security in the license
23 renewal case.

24 Our concerns have not diminished in that
25 regard. I'm not bringing security contentions, but it

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1 does not mean that we don't fully support Blue Ridge
2 Environmental Defense League, and any other party that
3 would bring them, because they are crucial.

4 And I just want to say, just outright to
5 everybody in this room, it is not only the September
6 11th attacks and terrorism that has changed. We have
7 an administration in Washington, under the Bush/Cheney
8 occupancy of the White House, that is reviving nuclear
9 weapons production at a full scale in the United
10 States, totally rewriting nuclear posture, threatening
11 openly reported in the press for strike use of nuclear
12 weapons.

13 There is every reason to believe that the
14 goal of diverting weapons usable plutonium resides in
15 more individuals and/or nation states and/or
16 organizations that are not nation states, at an
17 absolutely exponentially growing number as the result
18 of changes since 1996, many of which are here in our
19 country.

20 So you all are globally in this room,
21 corporations and/or agencies mandated under our
22 government to protect the public health and safety.
23 And I understand what I've written here probably does
24 not constitute a contention.

25 I'm not going to withdraw it, because I

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1 want smart people, who know the regulations a whole
2 lot better than me, to have to respond to these
3 issues, at the very least read them.

4 And I admit I put them in, in that spirit.
5 But it is because you do know the regulations, and you
6 do have to read it, that I brought the concerns that
7 this program is going as fast as it can in the
8 opposite direction of its stated purpose of non-
9 proliferation.

10 And it is placing us all at risk, we are
11 in a burning house, and smart people need to take
12 action to remedy that. Thank you.

13 CHAIR YOUNG: Mr. Repka?

14 MR. REPKA: I really have nothing to say
15 beyond what we have said in our written filing to
16 respond to what Ms. Olson said this morning.

17 I will just say that the contention asks
18 that the Board and the NRC select the no-action
19 alternative, and that NEPA requires only that the no-
20 action alternative be addressed. That the agency is
21 not in any position, under NEPA, to reverse the policy
22 choices of the federal government to pursue the
23 plutonium disposition program, which is what this
24 contention is really all about.

25 So I concur with Ms. Olson's observation

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1 that this really is not a contention. It certainly
2 does not raise any genuine dispute within the scope of
3 this particular approval.

4 CHAIR YOUNG: Ms. Uttal? Ms. Kannler,
5 pardon me.

6 MS. KANNLER: I don't have anything to
7 add.

8 CHAIR YOUNG: Anything further on NIRS
9 contention 4?

10 MS. OLSON: Just that I ask that the
11 spirit of cost benefit analysis be taken very
12 seriously.

13 CHAIR YOUNG: All right. BREDL 5, and I
14 believe that is the last one. Before we go to this
15 one, do we want to make a decision about whether we
16 want to continue after argument on this, on the other
17 issues, and try to get done earlier?

18 We don't have to address this right now,
19 but since it is getting close to lunch I thought if
20 people could think in terms of what you want to do for
21 the next couple of hours, rather than being hit with
22 it, after we finish the discussion of this contention,
23 maybe you will be able to express your preferences.

24 Mr. Repka, you look like you have
25 something to say.

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1 MR. REPKA: Well, I'm not sure I have
2 something significant to say. We are content to press
3 ahead to get done earlier. I think that, you know,
4 just so that we could adjust our own travel schedule,
5 knowing, having a sense of when we get done would be
6 of interest to us.

7 CHAIR YOUNG: Ms. Curran, did you have --

8 MS. CURRAN: I'm content to go ahead.

9 CHAIR YOUNG: Okay. Then let's
10 concentrate on contention 5 now, and then we will move
11 on to the other issues.

12 MS. CURRAN: Okay. BREDL Contention 5
13 challenges the environmental report for its failure to
14 consider other alternatives to using the Catawba, it
15 said McGuire, but that is inapplicable, plants for
16 testing of the plutonium fuel assemblies.

17 And we invoke the precedent and NRC
18 regulations involving consideration of significant new
19 information and changed circumstances. In this case
20 the new information involves, first of all, the
21 vulnerability of ice condenser containments, which has
22 come to light more recently than the 1996 EIS by DOE.

23 And also the vulnerability of ice
24 condenser plants to containment sump failure, which I
25 don't plan to go into in detail here, but just to

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1 address the arguments made by Duke and the NRC staff,
2 and there are four.

3 First they argue that because Duke is the
4 Applicant, the only viable alternatives are ones that
5 Duke can carry out. We disagree with that
6 interpretation because this is not like the cases that
7 Duke cites, which involve projects that where the
8 impetus for the project is purely the desire of the
9 Applicant to do something.

10 And the question is whether to give this
11 Applicant a permit. Duke has volunteered to be the
12 licensee who will test and perhaps use the plutonium
13 fuel. But this is part of a federal government
14 program that is being funded by the federal
15 government.

16 This isn't solely Duke's initiative, this
17 is Duke being a part of that federal program. So that
18 the alternatives, the span of alternatives that we,
19 the taxpayers, should be granted consideration of is
20 the full range of alternatives that would be available
21 for testing this fuel, which include all of the
22 nuclear plants in the country.

23 Whether there are some that are more
24 suited to the activity than Catawba is, because of its
25 unique characteristics. So we disagree with that

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1 interpretation.

2 And, in any event, Duke does own other
3 nuclear plants, Duke owns three other plants, the
4 Oconee plants, that are not ice condenser containment
5 plants.

6 The second argument is that the risks that
7 we are concerned about are independent of plutonium
8 fuel use. That the use of plutonium fuel isn't going
9 to cause the risk. I believe that is the argument.

10 And the Staff also argues that there is --
11 these are the -- the containment sump issue is a
12 generic issue that is not in the scope of this
13 proceeding, and the causation issue is also raised
14 there.

15 The posture of this issue is very similar
16 to the posture of the generic safety issue in the
17 license renewal case. Under NEPA it is our position
18 that additional risk raised by that problem has to be
19 addressed in the NEPA context.

20 And if it is resolved in the generic
21 safety issue context, that can be considered. But it
22 somehow has to be addressed and dealt with. And with
23 respect to the causation issue, this was discussed
24 yesterday, also.

25 But I would like to remind the licensing

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1 board that in the NRC's, in the context of NEPA
2 decision making, as well as safety decision making in
3 the context of the Atomic Energy Act, for risk based
4 decision making, the NRC looks at the overall risk,
5 not just the causation.

6 So here we have a combination of increased
7 consequences of using the plutonium fuel, taken
8 together with the heightened vulnerability of the
9 Catawba reactor to an accident. And that raises the
10 risk of an accident. That is what we would like to be
11 taken into consideration. And so that alternatives
12 that may be less dangerous can be considered.

13 I believe Duke also argues that we are in
14 a wrong forum, that only DOE can make the changes that
15 we seek. We don't think that is true. We think that
16 the NRC can prepare an environmental impact statement
17 here, and can, more importantly, decide that this
18 license amendment can't be issued unless it is
19 accompanied by an adequate environmental analysis,
20 including an environmental impact statement by either
21 the NRC or the DOE.

22 It doesn't really matter, in our view,
23 whether the NRC or the DOE prepares the environmental
24 analysis. It simply has to be done. An adequate
25 environmental analysis has to be done by one agency or

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1 the other.

2 And we agree that it is not within your
3 control to make DOE do anything. But you do have the
4 authority to decide that there is not a sufficient
5 basis for issuing a license amendment because the
6 requirements of NEPA have not been satisfied.

7 Finally, Duke argues that there is no
8 merit to considering alternatives because BREDL hasn't
9 shown that the impacts of using plutonium fuel LTAs
10 are significant. We went into this issue in detail
11 yesterday, and I don't want to reprise all the reasons
12 why we disagree.

13 We think that these risks are significant.
14 I rest on what we said yesterday.

15 CHAIR YOUNG: You are referring to the
16 calculations that Dr. Lyman provided?

17 MS. CURRAN: To a couple of things. First
18 of all that the -- that Duke has not taken a hard look
19 at what those impacts might be. That it has done a
20 very cursory review so far, and NEPA does require a
21 hard look at environmental impacts.

22 And Dr. Lyman did provide information
23 suggesting those impacts could be more significant
24 than Duke has said. In addition, even if one accepts
25 the numbers that Duke has come up with, we think that

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1 those numbers are significant.

2 So that summarizes our position on the
3 issue.

4 MS. CURRAN: Let me see if I understand
5 your position is that not withstanding the generic
6 nature of the sump issue, for example, that that would
7 still be an issue that should be addressed under NEPA,
8 and should be taken into account by us.

9 You agree that we don't have authority to
10 order that another plant be used. What you are saying
11 that we have the authority to do is to decide that
12 there is no basis for this license amendment, which
13 would leave open, I'm extrapolating here, but which
14 would leave open the issue of whether and what other
15 plant might subsequently be issued, if we were to rule
16 in the way that you would like us to, if we were
17 ultimately, assuming the contention were admitted.

18 Am I understanding your argument
19 correctly?

20 MS. CURRAN: Yes. I'm trying to picture,
21 if you were ultimately to rule on the merits of our
22 contention, in our favor, what the ruling would look
23 like would be, we have considered evidence on whether
24 this information that you present is new and
25 significant, such that it warrants the consideration

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1 of alternatives.

2 And if when we finally get to the merits
3 portion of this case there has not been a discussion
4 of alternatives in either the environmental report or
5 an environmental impact statement prepared by the NRC,
6 or an environmental assessment, whatever the NRC comes
7 out with, then your decision would say we cannot
8 accept the sufficiency of this environmental analysis
9 by the NRC to support this license amendment
10 application because it doesn't consider significant
11 new information regarding impacts that throw into
12 question the wisdom of this alternative, and warrant
13 consideration of other alternatives.

14 CHAIR YOUNG: Thank you.

15 MS. CURRAN: And, again, in terms of
16 consideration of the unresolved safety issue, we don't
17 ask for the licensing board to resolve that issue in
18 this NEPA context, in this NEPA proceeding, but that
19 you require that its implications be considered.

20 That is all I have.

21 CHAIR YOUNG: Okay. Go ahead, Mr. Repka.

22 MR. REPKA: Ms. Curran grouped her
23 arguments into four categories just now, and I will
24 try to address those in the same structure.

25 First is the question of what other

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1 alternatives might be available. I think it is very
2 important for NEPA purposes always to look at what the
3 proposal is. And the proposal in this particular
4 application that is before the NRC and the Board, is
5 for Duke to use MOX fuel at Catawba.

6 The NEPA rule of reason does not dictate
7 that other alternatives, using MOX fuel at other
8 reactors, or other reactors not even owned by Duke,
9 are within the scope of that NEPA review.

10 The Department of Energy's proposal may
11 have been broader to look at use of MOX fuel at
12 mission reactors anywhere. However the proposal now
13 has been narrowed down to something that is
14 significantly different. it is for Duke to use MOX
15 fuel at Catawba.

16 DOE, just a little bit of history here,
17 did pursue other proposals with respect to the mission
18 reactors. They put out a request for proposals to the
19 industry, and received at least several bids to be the
20 mission reactors.

21 The one that was selected by the
22 Department of Energy was the Duke Cogema Stone Webster
23 proposal, that would utilize the -- Duke's reactors at
24 McGuire or Catawba as the mission reactors.

25 So at that particular point the proposal

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1 is now something fundamentally different than what was
2 on the table at the Department of Energy before they
3 went out with their proposal for mission reactors.

4 Now we have a situation where the only
5 mission reactor on the table are McGuire and Catawba.
6 And with respect to the lead assembly, the only one
7 that is under contract, and the only plants that exist
8 are Catawba, and that is the only application before
9 the NRC.

10 So the rule of reason does not dictate
11 that you go off to find alternatives that are
12 completely different, or would serve different
13 purposes.

14 Ms. Curran mentioned the possibility --

15 MS. CURRAN: But what about Oconee?

16 MR. REPKA: I was just about to say that.
17 The possibility of Oconee, Oconee has never been under
18 contract with the Department of Energy, has never been
19 part of the proposal to DOE as one of the mission
20 reactors.

21 Fundamentally Oconee utilizes a different
22 fuel type so that particular alternative has just
23 really never been on the table, and is not currently
24 before the NRC, or the Department of Energy.

25 The second category of arguments that Ms.

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1 Curran made, really, address whether or not -- argues
2 that some additional risk associated with ice
3 condenser plants should be addressed.

4 I think, again, we have to back up into
5 history and look at the overall church here that
6 constitutes the environmental review that we talked
7 about earlier.

8 The SPD EIS prepared by DOE did include an
9 evaluation of the risks associated with mission
10 reactors. It included McGuire, Catawba, and North
11 Anna, North Anna being not an ice condenser plant.

12 It specifically, in evaluating Catawba and
13 McGuire at the time, evaluated the risks associated
14 with ice condenser plants, concluded that the risk
15 impacts were essentially insignificant. And,
16 therefore, would bound any other risk impacts, the
17 risk impacts associated with other alternatives.

18 So the point is that the Department of
19 Energy did look at the broader issue in the context of
20 its review of a more global proposal than what is now
21 on the table.

22 CHAIR YOUNG: Do we have that document?

23 MR. REPKA: The SPD EIS was something we
24 referenced in our list of documents that we provided
25 to the Board.

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1 CHAIR YOUNG: Is there a specific section
2 in there that you are referring to?

3 MR. REPKA: That document extends to
4 thousands of pages. But I would reference you to
5 sections 3.7 and sections 4.28.

6 CHAIR YOUNG: The same ones you mentioned
7 before?

8 MR. REPKA: Yes. That involved the use of
9 MOX fuel fabricated at a DOE site at commercial power
10 mission reactors, which included McGuire, Catawba, and
11 North Anna.

12 CHAIR YOUNG: And that includes the
13 discussion you just referenced about the selection of
14 the plant?

15 MR. REPKA: Well, the conclusion there is
16 with respect to all of the mission reactors. The risk
17 is essentially small, and so that is where that
18 discussion is made.

19 Now, that leads to the next point, which
20 is really our argument that Ms. Curran characterized,
21 that we are arguing that the complaints that BREDL has
22 with respect to the environmental review are in the
23 wrong forum.

24 And I think that is, essentially, correct.
25 To the extent that there is an issue with respect to

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1 how DOE has evaluated the relative risks of all the
2 alternatives that may, at one time, have been
3 available to DOE, that is not an issue related to the
4 current proposal. That is related to the DOE
5 documents.

6 BREDL would need, or would have needed, at
7 an appropriate time, to pursue any remedies with
8 regard to the DOE documents, in whatever forum may
9 have been appropriate.

10 It is not an acceptable argument to say we
11 are disappointed with what DOE did, or we think what
12 DOE did was inadequate with respect to the broader
13 proposal. So, therefore, we now have to look at those
14 issues in this particular NRC application.

15 It is certainly not the NRC's role to make
16 up for any perceived deficiencies in the DOE review.
17 Finally Ms. Curran addressed the argument, again, and
18 I think we addressed yesterday at some length, with
19 respect to the impacts of utilizing MOX fuel at
20 Catawba, and raising the issue of ice condensers GSI-
21 189, the if of sump clogging; GSI-191.

22 And I think thrown into there is a little
23 bit of the issues associated with 40 percent MOX fuel
24 cores, not just the lead assemblies. Whether that is
25 a NEPA issue, or a safety issue, the fact of the

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1 matter is that they are issues outside of the scope of
2 the current proposal.

3 Again, sump clogging issues are not caused
4 by using four MOX fuel assemblies. The ice condenser
5 issues exist irrespective of the MOX fuel application.
6 And, of course, forty percent MOX fuel cores are not
7 presently on the table.

8 So these are issues that, again, whether
9 it is in the safety context or the NEPA context, they
10 are simply out of scope. Beyond that I would say
11 that, again, we are back to the issue of is there some
12 risk significance that has been shown?

13 That gets back to the fact that the entire
14 basis for that argument, when you get to the four MOX
15 fuel assemblies and the change of consequences there
16 would be Dr. Lyman's paper, which translates to the
17 1.6 percent potential change in risk.

18 And for all the reasons that we argued
19 yesterday we believe that that is simply not a risk
20 significant number, does not need to be addressed in
21 a safety review, and does not need to be addressed in
22 a NEPA evaluation.

23 Fundamentally, though, I think you have to
24 get back on this contention to what is the scope of
25 alternatives before the NRC with respect to this

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1 specific proposal. And this specific proposal is to
2 use four MOX fuel assemblies at Catawba.

3 And really the only other alternative
4 within that rule of reason is the no-action
5 alternative. And that is how it has been addressed in
6 the license application.

7 CHAIR YOUNG: I have a couple of
8 questions, but I will save them. Go ahead with the
9 Staff and then you may address them, and if you do,
10 then I won't have to ask him.

11 MS. KANNLER: Ms. Curran seems to be
12 arguing that this situation is different from Busey in
13 its progeny, because the licensing action before the
14 agency is a part of a broad government program.

15 CHAIR YOUNG: From what and its progeny?

16 MS. KANNLER: Busey, the Citizens of
17 Burlington v Busey, and this progeny.

18 CHAIR YOUNG: Thank you.

19 MS. KANNLER: As cited in our pleading.

20 CHAIR YOUNG: Thank you.

21 MS. KANNLER: Our authority is limited to
22 licensing under the plutonium program. And when we
23 examine license applications we look at what the
24 proposed action is, and the goals of that action.

25 And the goals of the action in this case

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1 is to use MOX at one of Duke's, one of the reactors
2 that Duke owns or operates. It is not the broader
3 goal of using plutonium in any reactor, as it is under
4 the DOE program.

5 CHAIR YOUNG: So do you, then, disagree
6 with Mr. Repka that Ocone is not open to
7 consideration?

8 MS. KANNLER: The Staff feels that Ocone
9 should be considered. We don't know the process
10 behind how DOE chose which reactors would be looked
11 at. We don't know if DOE looked at Ocone. So we do
12 feel that Ocone should be considered.

13 CHAIR YOUNG: Thank you.

14 MS. KANNLER: As to the use of plutonium
15 and Ms. Curran's arguments relating to an increased
16 risk, she never establishes that the use of MOX
17 creates the sump containment problems.

18 She fails to establish that the
19 interrelationship of MOX and the sump clogging would
20 lead to greater consequences, or why.

21 CHAIR YOUNG: I'm missing some of your
22 words. In the sub what?

23 MS. KANNLER: The sump clogging.

24 CHAIR YOUNG: Sump clogging, thank you.

25 MS. KANNLER: I apologize. Therefore we

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1 don't feel that non-ice condenser containments have to
2 be looked at, in and of themselves.

3 Thank you.

4 ADMINISTRATIVE JUDGE ELLEMAN: Mr. Repka,
5 on the last of Ms. Curran's points, the safety
6 analysis that has been prepared for the use of the
7 four sub assemblies is based on the presumption that
8 MOX fuel behaves pretty much like LEU fuel.

9 The differences are differences related to
10 fission product yields, and slight differences in
11 thermal conductivity, had those sorts of things. From
12 Dr. Lyman's paper there was at least one suggestion
13 that MOX fuel may behave differently.

14 The material that Ms. Curran gave us
15 yesterday morning, and I confess I haven't had a
16 chance to look at it thoroughly yet, but it appears to
17 have in it an additional suggestion that MOX fuel did
18 not behave the way LEU fuel behaved at high burnup.

19 And, rather, there was slumping of the
20 fuel that occurred at temperatures well below that
21 would occur in LEU fuel.

22 Has Duke carefully researched the state of
23 the art, and the state of knowledge on the radiation
24 performance of MOX fuels?

25 MR. REPKA: With respect to your first

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1 comment on the materials that were distributed
2 yesterday, we would like to respond to that in the
3 specific context of the proposed contentions, and
4 address that there.

5 With respect to your second question as to
6 whether there has been a comprehensive evaluation of
7 the experience, our answer to that is yes. Duke has
8 done that in conjunction with the fuel manufacturer,
9 the fabricator, Framatome.

10 Again, we discussed, yesterday at some
11 length, that there is a substantial experience base in
12 Europe with MOX fuel, and that is something that Duke
13 has looked at, and the Framatome has certainly looked
14 at, as well.

15 So I think the answer to your question is
16 yes.

17 ADMINISTRATIVE JUDGE ELLEMAN: Has Duke
18 prepared any internal corporate document that would
19 help confirm for us that MOX fuel is going to behave
20 like LEU fuel in a radiation environment?

21 MR. REPKA: We think the best document to
22 do that is not a Duke internal document, but it is the
23 MOX fuel design report prepared by Framatome, which is
24 referenced in the application, and that is a public
25 document.

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1 ADMINISTRATIVE JUDGE ELLEMAN: Do you
2 think that document takes cognizance of this material
3 we were given yesterday? Which apparently was
4 presented at a recent conference between the NRC and
5 French representatives?

6 MR. REPKA: Yes. At this point we just
7 haven't had enough chance to look at the material that
8 was presented to answer that one way or the other.

9 ADMINISTRATIVE JUDGE ELLEMAN: I guess I
10 would also direct my question on cognizance of the
11 state of the art of plutonium fuels to the public
12 staff. Is this an issue the Staff is maintaining
13 close contact with, and has a good understanding of
14 the state of the art?

15 MS. KANNLER: Yes, the Staff has been
16 following it since 1998.

17 ADMINISTRATIVE JUDGE ELLEMAN: Do you have
18 any additional references for us to look at on this
19 subject, other than the one just cited by Mr. Repka?

20 MS. UTTAL: Judge Elleman I think we will
21 have to get back to you on that.

22 ADMINISTRATIVE JUDGE ELLEMAN: Okay.

23 MS. UTTAL: We have to search the archives
24 and see if there is anything, and whether it is
25 releasable to the public.

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1 ADMINISTRATIVE JUDGE ELLEMAN: I would
2 personally appreciate that, because the validity of
3 the safety analysis rests on having reasonable
4 assurances that it is going to behave like LEU fuel.

5 And I would like very much to see what the
6 evidence is for that.

7 MS. UTTAL: I will try to get together a
8 list.

9 ADMINISTRATIVE JUDGE ELLEMAN: Okay.

10 CHAIR YOUNG: Did you want to say
11 something else before I --

12 MR. REPKA: At some point I would like to
13 respond to something that the Staff said about Oconee,
14 but I can do that --

15 CHAIR YOUNG: Go ahead.

16 MR. REPKA: Okay. Again, a little bit of
17 history here with respect to the DOE program. They
18 did send out bids for proposals, for participation as
19 mission reactors. And they received at least three
20 proposals from different teams.

21 And each team, including mission reactors,
22 as far as the Duke Cogema Stone and Webster proposal,
23 Oconee was never part of that and is, therefore, not
24 viable in any sense, as an alternative for Catawba and
25 McGuire. And we would continue to maintain that that

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1 is not a reasonable alternative, simply as a matter of
2 contract under the program.

3 But beyond that, there are the reasons we
4 discussed earlier, different fuel design. And as I
5 would additionally point out, that since Oconee is not
6 a mission reactor, a lead assembly program, which is
7 what we are talking about here, at Oconee, would
8 really make no sense, it wouldn't be viable to run a
9 lead assembly program at Oconee to support McGuire and
10 Catawba as mission reactors for this program.

11 And, finally, I would say that to the
12 extent the Staff believes that alternative of Oconee
13 needs to be addressed in the environmental review that
14 the Staff is going to prepare, I don't think that
15 anything that the Staff would need to say about Oconee
16 would need to rise to the level of a detailed
17 comparison of relative risk and probabilistic risk
18 assessment as between the sites.

19 In fact, again, I think DOE has done that,
20 to some degree, in its original SPD EIS looking at
21 McGuire, Catawba, and North Anna. And I don't have
22 that in front of me right now but I'm told, in fact,
23 that North Anna, the non-ice condenser plant actually
24 comes out with greater risks, and greater change in
25 risk.

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1 CHAIR YOUNG: Does North Anna use the same
2 kind of fuel that Oconee does?

3 MR. REPKA: No, North Anna is comparable
4 to McGuire and Catawba, which is why -- North Anna was
5 originally part of the DCS proposal that the three
6 reactor sites would be the mission reactors.

7 So when DOE selected that team, with those
8 three mission reactors, those three became the
9 alternatives where the MOX fuel could be used for DOE.

10 ADMINISTRATIVE JUDGE BARATTA: I just want
11 to clarify, Oconee is a B&W plant?

12 MR. REPKA: Yes, it is a B&W plant with 15
13 by 15 fuel as compared to the 17 by 17 at McGuire and
14 Catawba.

15 ADMINISTRATIVE JUDGE BARATTA: And the
16 French MOX experience has been with fuel similar to
17 the -- basically what Westinghouse is on?

18 MR. REPKA: That is correct, 17 by 17.

19 CHAIR YOUNG: Just a couple of questions.
20 First for the Staff. On page 14 of your response, I
21 think it is the third paragraph of your response, you
22 say the contention is inadmissible because it does not
23 limit the alternative analysis to the reactors owned
24 or operated by Duke.

25 Given that you say that you will be

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1 looking at Oconee, and I don't know how obviously the
2 Staff will be looking at it in the context of the
3 statements that were just made.

4 But given that you say the Staff will be
5 looking at that, is -- would you, are you still
6 contending the contention, the entire contention is
7 inadmissible because it does not limit the
8 alternatives analysis to Duke's reactors, or would you
9 say that it is inadmissible to the extent that it does
10 not limit the alternatives analysis to Duke's
11 reactors?

12 And change your view to the extent that
13 Oconee, alone, would be considered as one of the
14 alternatives, or as an alternative?

15 MS. KANNLER: As the contention is written
16 we feel it is inadmissible because it is too broad, it
17 doesn't narrow it on Oconee, it just says other
18 reactors. It is very general.

19 CHAIR YOUNG: But to the extent that it
20 could be limited to consideration of Oconee, as
21 opposed to non-Duke reactors, do you have a viewpoint
22 on that? Or what would your viewpoint on that be?

23 MS. KANNLER: That is a distinction that
24 wasn't made in the pleading. And, therefore, it is
25 inadmissible still.

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1 CHAIR YOUNG: Well, if I ask you to
2 address that distinction how would you address it?

3 MS. KANNLER: The contention, as it refers
4 to Oconee is admissible.

5 CHAIR YOUNG: Thank you. The other --
6 well, actually, before I move on to the other
7 question, what would the Staff's position be as to any
8 relief that we could grant were we to admit the
9 contention?

10 Ms. Curran has said that the relief that
11 BREDL says we could grant would be to just simply say
12 there is no basis for issuing the license amendment as
13 written, after considering alternatives.

14 Is your view any different from that, or
15 would your view be that we would have the authority to
16 make a ruling on alternatives? I'm just asking for
17 what your view is, not suggesting any ruling one way
18 or the other.

19 And I'm not sure that we have even been
20 asked to make a ruling. But since you said you are
21 looking at Oconee, I'm wondering what your position is
22 on what we have authority to do.

23 MS. KANNLER: One second.

24 (Pause.)

25 MS. KANNLER: Could we have five minutes?

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1 CHAIR YOUNG: Sure. Then let me, before
2 we take five minutes, let me just ask the other
3 question, so that you and also Duke can be thinking
4 about it. It is a little bit more involved.

5 In the other contention relating to
6 failure to evaluate the sump clogging issue, we
7 discussed the fact that that issue would exist,
8 whether or not there were a MOX -- whether or not
9 there were this application relating to the MOX lead
10 test assemblies.

11 In the context of NEPA and evaluating the
12 environmental impacts whether or not the sump clogging
13 issue, or any other issue for that matter, is being
14 handled on a generic basis, I'm wondering how you
15 both, or all parties for that matter, would -- I think
16 I know BREDL's point of view, Ms. Curran has stated
17 that.

18 But how you would suggest that the sump
19 clogging issue, for example, be considered? It is
20 being handled generically, but to the -- given the
21 state of knowledge that exists at this point, or at
22 whatever point, and the argument is being made, or
23 decision is being made, wouldn't that have to play
24 into a consideration of the overall impact in somewhat
25 the way that Dr. Lyman has discussed, and Ms. Curran

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1 has argued?

2 In other words, in one sense I understand
3 BREDL to be arguing that you can't just turn a blind
4 eye to, and ignore, certain elements that would
5 possibly add to the impact simply because they are
6 being handled generically?

7 I think that is a paraphrasing, to some
8 extent, of the issue. And I'm wondering how the Staff
9 would plan to address that themselves, and how you
10 would say that should play into this NEPA issue of
11 having, of considering all the impacts and
12 alternatives, which would now include Oconee.

13 So that is the other question. And I'm
14 not asking you to answer it now, but I thought it
15 might be good to put it out there, and then after the
16 break maybe you can be prepared to answer that as
17 well.

18 And if we need to take five more minutes,
19 make it ten minutes total, since there are now two
20 questions, that would be fine with me.

21 And, actually, maybe this would be the
22 break that we would take before moving on to the other
23 issues.

24 ADMINISTRATIVE JUDGE BARATTA: And I have
25 one other question that I wanted to ask, just briefly.

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1 Unfortunately it doesn't pertain to this contention.

2 Just, this is more of a factual question.

3 On the BREDL contention 9, referring to failure to
4 identify the quantity of plutonium being shipped to
5 France, does Duke have an advisory committee,
6 citizen's advisory committee?

7 MR. REPKA: I think Judge Baratta, you are
8 probably referring to the typical plant operating
9 review committee, and nuclear safety review board.

10 ADMINISTRATIVE JUDGE BARATTA: No.

11 MR. REPKA: Duke has those two and all
12 license amendments go through that.

13 ADMINISTRATIVE JUDGE BARATTA: I'm not
14 referring to that, no. I'm referring to something
15 similar to what was put together for the TMI effort
16 back in the '80s.

17 MR. REPKA: I think the answer to that is
18 no.

19 ADMINISTRATIVE JUDGE BARATTA: Let's take
20 10 minutes.

21 MS. CURRAN: Would it be a good time to
22 break for lunch?

23 CHAIR YOUNG: Well, I think the suggestion
24 was made to try to press on since we don't -- I don't
25 know how much time this issue of the motion for

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1 protective order is going to take. That will come out
2 as we discuss it.

3 But I think at least for Ms. Olson's
4 benefit, it would make sense to press on with the
5 other sort of minor scheduling issues, leaving the
6 Motion for Protective Order, and then we might assess
7 our progress at that point, and see how much time that
8 would take.

9 MS. CURRAN: Sure.

10 ADMINISTRATIVE JUDGE BARATTA: Let's take
11 10, and then what we will do is see how long it will
12 take to wrap these scheduling issues up.

13 CHAIR YOUNG: All right.

14 (Whereupon, the above-entitled matter
15 went off the record at 12:25 p.m. and
16 went back on the record at 12:45 p.m.)

17 CHAIR YOUNG: Go ahead, Ms. Kannler.

18 MS. KANNLER: As to your first question
19 regarding Oconee, the relief would be to tell Duke to
20 supplement its ER with a discussion of why Oconee is
21 not viable.

22 CHAIR YOUNG: The relief from the Staff,
23 or are you speaking also to what the licensing board
24 would have authority to order? Did your answer apply
25 to both, or -- when you said relief, that sort of

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1 implies that you are talking about what we would do,
2 but it sounds as though you are talking about -- I'm
3 not sure whether you are talking about both or not.

4 MS. KANNLER: Well, I thought your
5 question was what the Board would do.

6 CHAIR YOUNG: Okay, so that is what you --
7 okay, thank you.

8 MS. KANNLER: As to the second question,
9 the sump clogging is not related to the application
10 before the agency. The impacts of severe accidents at
11 Catawba were evaluated in its license renewal EIS.

12 That EIS is still applicable independent
13 of fuel use. If the Staff considers the impacts from
14 severe accidents in this application, that are
15 associated with sump clogging, we will tier from the
16 previous analysis done in the EIS, and supplement 9 to
17 NUREG 1437.

18 CHAIR YOUNG: The first part of that you
19 made some reference to -- and I'm not sure whether I'm
20 hearing you correctly, also. But you made a reference
21 to independent fuel? Did I misunderstand you?

22 MS. KANNLER: Sump clogging issue being
23 discussed is independent of what type of fuel is used
24 in the reactor.

25 CHAIR YOUNG: Okay, independent of, okay.

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1 So basically what you are saying is that the -- you
2 are saying if the Staff considers it, it would do it
3 in a tiered fashion.

4 But am I understanding you correctly that
5 the Staff -- you are not saying that the Staff is not
6 going to look at it in terms of coming up with total
7 impact, will that play into what the Staff looks at?

8 MS. KANNLER: We have not decided what
9 type of document to prepare yet. Our decision on what
10 type of document is necessary will dictate what
11 analysis is done, the depth of the analysis, excuse
12 me.

13 CHAIR YOUNG: So if you decide to do an
14 EIS you will consider it, if you decide not to do an,
15 if you -- I see you are turning around to confer. Go
16 ahead.

17 (Pause.)

18 MS. KANNLER: It would be addressed, yes.

19 CHAIR YOUNG: Okay. And in any event, is
20 that what you are saying?

21 MS. KANNLER: If an EIS is done.

22 CHAIR YOUNG: And if an EIS is not done?
23 You would do an EA, is that --

24 (Pause.)

25 MS. KANNLER: If there is a finding of no

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1 significant impact from the EA, then nothing more will
2 be done.

3 CHAIR YOUNG: In determining whether there
4 is going to be a finding of no significant impact,
5 will the sump clogging issue be looked at in the
6 context of this application?

7 MS. KANNLER: It is not clear that this
8 issue would be directly addressed in an ER done by the
9 Staff to support an EA. ER stands for environmental
10 review.

11 CHAIR YOUNG: Let me ask BREDL a question
12 now, if I could, to sort of see where we are on this.

13 Insofar as this contention relates to the
14 -- I don't remember how you phrased it, the assertion
15 that ice condenser containments are particularly
16 vulnerable to reactor sump clogging accidents.

17 Given that the Staff has just said that if
18 they do an EIS they will address that issue, is this
19 something that, and I want to get the Staff to respond
20 to this, too. Is this something that, like the NIRS
21 contention about there should be an EIS, could be
22 deferred until the Staff makes its decision on whether
23 it is going to do an EIS, and at that point it would
24 seem to, at least, that part of the contention would
25 disappear.

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1 And if they decide not to then it could be
2 raised again, at that point. And I'm asking both of
3 you, because I don't want BREDL to agree to defer and
4 then have a response saying that they should have
5 raised it sooner.

6 It just seemed like, maybe, a more
7 efficient way of dealing with this. I'm asking for
8 the parties responses.

9 MS. CURRAN: Well, from our perspective we
10 have to be very careful in submitting environmental
11 contentions to base them on the environmental report.
12 That is a requirement of 2.714.

13 CHAIR YOUNG: Right.

14 MS. CURRAN: And we would not want to get
15 in a position where we could be penalized for having
16 waited, because that is --

17 CHAIR YOUNG: And then that is --

18 MS. CURRAN: -- environmental contention.

19 CHAIR YOUNG: That is what I raised, I
20 wanted to find out from the Staff.

21 MS. CURRAN: So we certainly, if the Board
22 decides that that is how it wants to deal with the
23 issue, that is one thing. But I wouldn't want to
24 withdraw the contention based on the supposition that
25 at some point the Staff may address it.

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1 We are under a legal obligation to file
2 contentions based on the environmental report.

3 CHAIR YOUNG: Does the Staff have an idea
4 when it expects to make a decision on whether it is
5 going to do an EIS?

6 MS. KANNLER: It will have a decision as
7 soon as possible.

8 CHAIR YOUNG: Does that mean within weeks,
9 months, or a year?

10 MS. KANNLER: In the spring.

11 CHAIR YOUNG: In the spring. So does the
12 Staff have a position on deferring the issue, or Duke
13 for that matter?

14 MR. REPKA: Our position is that the
15 contention is inadmissible. And having said that,
16 when the Staff is done, I would like to come back to
17 the two questions that the Board asked before the
18 break.

19 CHAIR YOUNG: Okay.

20 MS. KANNLER: The contention is still
21 inadmissible. So there is no reason to defer.

22 CHAIR YOUNG: Okay. Mr. Repka, you are
23 next.

24 MR. REPKA: Yes. Right before the break,
25 Judge Young, you asked two questions. The first was

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1 returning to the issue of Oconee, and whether that
2 alternative needs to be addressed, and to what degree.

3 Our position is, again, as a matter of
4 law, that alternative does not need to be addressed.
5 As I stated before, Duke is not offering Oconee for
6 the MOX program, never has offered Oconee.

7 In fact, used DOE terminology, Oconee
8 doesn't meet the DOE mission need. In the context of
9 the present proposal for lead assemblies Oconee is not
10 a viable alternative. It is beyond the purpose of the
11 present proposal. It would be entirely speculative
12 and, therefore, would exceed a rule of reason, under
13 NEPA, for consideration of alternatives.

14 And, therefore, no review of Oconee needs
15 to be considered. I think the Staff pointed out that
16 even to the extent it would be considered, it would
17 just be to say that it is not a viable alternative.

18 I don't think we need to have a contention
19 to say that, that that is not meaningful relief, it is
20 not required, and that would be simply a formalistic
21 kind of thing, and it is not necessary.

22 CHAIR YOUNG: Let me interrupt right
23 there, because the Staff did say, notwithstanding what
24 the Staff just said about the contention being
25 admissible, on the sump clogging issue, earlier Ms.

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1 Kannler said that you agreed the contention was
2 admissible to the extent that it deals with the
3 consideration of Oconee as an alternative.

4 And you said that the Staff was going to
5 consider Oconee as an alternative, correct? That is
6 what I heard you to say?

7 MS. KANNLER: I believe that I said that,
8 not that the Staff would consider Oconee, but just
9 that the Staff would find that it was lacking, the
10 discussion of Oconee was lasting from Duke's ER,
11 environmental report.

12 CHAIR YOUNG: Well, the consideration of
13 it is relevant, basically.

14 MS. KANNLER: Yes.

15 CHAIR YOUNG: Okay. So in light of that I
16 wanted to clarify that, because you were
17 characterizing what the Staff had said, and I didn't
18 understand the Staff to be saying --

19 MR. REPKA: I think what the Staff said
20 earlier was that if they found that the discussion of
21 Oconee was lacking, the relief that would be required,
22 either by themselves or the Board in that context
23 would be an explanation of why Oconee is not a viable
24 alternative.

25 CHAIR YOUNG: Right.

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1 MR. REPKA: And my point is, number one,
2 that discussion is not required, as a matter of law,
3 for the reasons I've articulated. And, number two,
4 even if it were, in some sense, required or the Staff
5 wanted to see that, that is -- it is a formalistic
6 kind of relief, and there is nothing to litigate in
7 this proceeding.

8 The fact of the matter is Oconee is not a
9 viable alternative, and is not on the table for
10 technical and contractual issues. So there is nothing
11 to litigate.

12 Now, with respect to the second question,
13 I believe, you asked before the break, related to the
14 question of generic issues, and whether or not it was
15 their generic nature that excludes them from review.

16 Our position is that those issues in GSI-
17 189 and GSI-191, they are excluded from review in both
18 the safety analysis and the NEPA analysis, not just
19 because they are generic but more fundamentally
20 because they are issues that are not caused by the
21 license amendment application before us. It is a
22 causation issue.

23 The fact that, I think UNN asked the
24 question, is the overall impact, how is that issue
25 addressed. I think that -- and suggested that are we

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1 turning a blind eye to the overall impact.

2 The fact of the matter is we are not.
3 These are generic safety issues, where the NRC has
4 concluded that the plants are currently safe to
5 operate pending the resolution of the generic issue.

6 The proposal before us addresses a change
7 in risk based upon that proposal. Again, we talked
8 about that yesterday as being 1.6 percent at most,
9 that is what has been put on the table.

10 And that change in risk is what is
11 attributable to this specific proposal. Any change in
12 risk attributable to the GSIs, either 189 or 191, is
13 not a result of this proposal, and the relative change
14 is the same, from this proposal, regardless of the
15 resolution of GSI 189 and 191.

16 So that is number one. Number two is,
17 with respect to those specific issues, again,
18 addressing those issues in this forum would, in a very
19 real sense, be premature because those issues are
20 being evaluated right now and by the NRC, and by the
21 industry, and there is no basis on which to address
22 those issues and to determine what is the change of
23 risk attributable to the GSIs.

24 We would be in a position, in this forum,
25 of addressing and litigating the GSI, and we would be

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1 out ahead of the NRC, we would be out ahead of really
2 the generic issues. So there is no basis for
3 litigation here.

4 We would end up, and I think I tried to
5 say this yesterday, in the position of -- that kind of
6 logic would lead you to conclude that in any license
7 amendment case the overall impact, not just the impact
8 of that particular amendment application, but the
9 overall impact would need to be addressed.

10 And that would have the effect of causing
11 the license amendment hearing in any case of becoming
12 a forum to litigate the GSIs. And that is, of course,
13 not the NRC's position.

14 CHAIR YOUNG: Let me ask you about the
15 case law, and I can't give you the citation for it,
16 but we discussed it in the license renewal case. The
17 case law for the proposition that generic issues,
18 issues that are being handled generically should not
19 be addressed in an adjudication unless there would be
20 a delay in the resolution of the generic issue such
21 that it would be warranted to consider the issue in
22 the adjudication.

23 And I'm paraphrasing there, but there is
24 case law to that effect. And I think that is the
25 standard that has been defined in the case law, that

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1 absent delay, that would affect the resolution of an
2 adjudication, you defer.

3 But, obviously, if you just mentioned
4 being out ahead of, and in a sense the delay issue
5 might result in that.

6 MR. REPKA: Well, I think there is a
7 fundamental distinction to be drawn. This is a
8 license amendment case, not a case of initial
9 licensing, either a construction permit, or an
10 operating license application.

11 If this were an initial license case, at
12 least by some -- you could make the argument that the
13 generic issue, the overall risk of the plant is within
14 the scope of the proceeding.

15 However, the Commission there has said, if
16 it is choosing to address that issue in rulemaking, it
17 doesn't need to be addressed in an individual
18 licensing case.

19 CHAIR YOUNG: But the delay issue is not,
20 as far as I recall, and this could be another issue
21 that you can elucidate us further on.

22 But as I recall that definition of how to
23 approach these generic issues, and whether or not they
24 delay adjudications, is not limited to initial
25 licenses.

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1 MR. REPKA: Well, I think that it is. I
2 think that my view would be those cases were initial
3 licensing cases, and the idea there is that overall
4 risk would potentially be an issue, absent the NRC
5 choosing to address a specific aspect of that, on a
6 generic basis.

7 Here we have a license amendment case.
8 The NRC, by choosing to address the issue as a generic
9 safety issue has made the determination that continued
10 operation of the plant is safe, is consistent with the
11 safety goals, whatever the basis that might be, the
12 NRC has made that determination.

13 Delay is not the relevant criteria here.
14 If it were, and if that were the logic, then we would
15 be in a position of litigating, in an individual
16 license amendment case, no matter what the license
17 amendment might involve, whether it be MOX fuel,
18 whether it be a power upgrade, whether it be --
19 whatever it might be, it could be anything, it could
20 be purely administrative tech spec change.

21 And the argument would be that the generic
22 safety issue is now in the license amendment case
23 because of the overall risk. And that, simply, is not
24 a logical or reasonable conclusion. It gets us back,
25 also, to the arguments we made yesterday, that we are

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1 talking about a plant that is on the order, an ice
2 condenser plants were shown in NUREG 1150 to be some
3 200 times the risk, 200 times below that of the safety
4 goal.

5 We are talking about taking a very low
6 risk, 1.6 percent of that risk attributable to this
7 application.

8 CHAIR YOUNG: Right.

9 MR. REPKA: It remains a very small
10 number.

11 ADMINISTRATIVE JUDGE BARATTA: So what you
12 are saying, if I can paraphrase it, that a license
13 amendment stands or falls on its own merit?

14 MR. REPKA: That is exactly what I'm
15 saying. And where its own merit is defined by the
16 changes involved in the effects of that change, caused
17 by that change.

18 ADMINISTRATIVE JUDGE BARATTA: Thank you.

19 MR. FERNANDEZ: If I may, Your Honor?
20 There is something that I believe that should be added
21 to the discussion, that may not have been clear from
22 our initial response.

23 If an environmental impact statement is
24 prepared by the Staff, the Staff will necessarily
25 analyze all the reasonably foreseeable impacts from

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1 the proposal before it, including low probability,
2 high consequence events, as required by NEPA.

3 Those types of events, if considered to be
4 reasonably foreseeable, could include certain accident
5 sequences that include severe accidents. When the
6 Staff conducts that analysis it would, necessarily,
7 have to look at how those type of impacts relate to
8 the licensing proposal before the agency.

9 Although Ms. Curran has talked about how
10 causation is not what the Board should be looking at,
11 in looking at this contention, necessarily causation
12 is a big part of that analysis. And I will get to a
13 lower risk in a second.

14 But if you completely divorce what the
15 licensing proposal before the agency is, from the
16 review that the agency must conduct, you are
17 completely ignoring what NEPA requires from the
18 agency.

19 And just to say that irradiating four MOX
20 LTAs would cause some indeterminate increase in
21 overall risk, is not sufficient to gain admissibility
22 for the contention.

23 CHAIR YOUNG: Back up for a second. You
24 said, if you divorce -- say that again, and tell me
25 what you mean by that. Because I'm not sure that I

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1 followed what you were talking about.

2 MR. FERNANDEZ: The licensing action
3 before the Commission is to allow these four MOX LTAs
4 to be inserted into the Catawba nuclear power reactor.

5 CHAIR YOUNG: Right.

6 MR. FERNANDEZ: We, in conducting our
7 environmental analysis would look at the environmental
8 consequences of that action. So, necessarily, you
9 have to look to see what placing those four --

10 CHAIR YOUNG: You, the generic you, or you
11 the Board you?

12 MR. FERNANDEZ: I'm sorry. We, meaning
13 the Staff in performing our environmental assessment,
14 I mean, our environmental reviews, whatever form it
15 would take. We would, necessarily, look at the
16 consequences of the actions to determine their
17 environmental impacts.

18 The generic safety issue that we are
19 talking about makes, complicates this issue, because
20 it has nothing to do with the type of fuel that is
21 used at a power plant.

22 So what is happening here, and I think we
23 are talking around in circles, it seems like, is that
24 we are trying to address sump clogging in a license
25 amendment that has nothing to do, and would have no

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1 effect on sump pump clogging itself.

2 The nature of the fuel used will have
3 nothing to do with whether debris accumulates on the
4 pump, and whether there is emergency recirculation, or
5 any of that. They are two very separate and distinct
6 issues.

7 So when the Staff does their analysis of
8 the consequences from the action before it, and
9 considers low probability high consequence events that
10 are mandated by NEPA, they may or may not include an
11 analysis of impact similar to those that would occur
12 if you had an accident from containment sump pump
13 failure.

14 It is not clear that it would be,
15 necessarily, reviewed because the nature of the fuel
16 has nothing to do with the GSI. So getting out to the
17 argument about the increase in the overall risk, and
18 how that relates to how the Staff would address that,
19 if it chose to prepare an EIS, we get to what the
20 contentions before the Board are, actually.

21 And before the Board, the contentions
22 specifically don't identify how this perceived
23 increase in overall risk is going to occur. There is
24 no support for that proposition.

25 If you look at the contentions as filed,

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1 it is not, there is no adequate support for stating if
2 you irradiate MOX the Petitioners have shown that
3 there will be, consequently, an increase in overall
4 risk to the public.

5 CHAIR YOUNG: What they say is that they
6 refer to the heightened vulnerability of Catawba and
7 McGuire containments to breach eruption, the
8 heightened vulnerability of plant cooling systems to
9 clogging, which could significantly increase the
10 overall risk of an accident over other nuclear power
11 plants, if MOX fuel were used.

12 MR. FERNANDEZ: Yes, Your Honor. And
13 that, that you just read, describes the generic safety
14 issue 191. That describes what the --

15 CHAIR YOUNG: That is from the contention,
16 that is what the contention is.

17 MR. FERNANDEZ: And I don't have it in
18 front of me but, yes, that is fine that it says that.
19 But how does that have anything to do with MOX? It
20 has nothing to do with MOX.

21 MOX would not cause a greater core damage
22 frequency as a result of sump pump clogging has
23 nothing to do with the type of fuel you irradiate at
24 the reactor.

25 CHAIR YOUNG: But if you calculate the

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1 overall risk you are saying that that risk would not
2 play any role in that calculation?

3 MR. FERNANDEZ: No. What I'm saying is
4 that the Petitioner has not adequately supported an
5 assertion that there would actually be an increase in
6 the overall risk.

7 CHAIR YOUNG: It is my understanding, and
8 correct me if I'm wrong, that there have been
9 statements made that the sump clogging is a particular
10 problem with ice condenser plants?

11 MR. FERNANDEZ: There was a generic study
12 done by the Los Alamos National Laboratory, there were
13 two studies done, where they looked at generic plants,
14 non-specific. And the reports themselves disclosed
15 that these reports should not be used to asses the
16 operability of any particular plant in the United
17 States.

18 And what the --

19 CHAIR YOUNG: Just let's cut straight to
20 it, and I want you to tell me, for my own knowledge,
21 are you saying that the generic issue, the sump
22 clogging issue, there is no suggestion, whatsoever,
23 that ice condenser plants are more vulnerable to that?

24 If that is the case, then just say it
25 straight out.

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1 MR. FERNANDEZ: There is, in the reports,
2 there is a statement regarding ice condensers, and
3 small break loss of coolant accidents. Small break
4 loss of coolant accidents, according to the report,
5 have a higher incidence of occurring at an ice
6 condenser facility, and challenge the facilities
7 emergency core cooling system.

8 CHAIR YOUNG: Right, that is what I'm
9 referring to.

10 MR. FERNANDEZ: Yes, that is a true
11 statement. However, nothing in the generic safety
12 issue studies done so far has anything to do with the
13 type of fuel irradiated at the reactor. They are two
14 very separate and distinct issues.

15 And what the Petitioner is trying to do is
16 to confuse the issue, and make them related, when they
17 truly are not.

18 CHAIR YOUNG: Let me ask you this question
19 again, and see if I can put it another way, because I
20 really want to try to understand what your position is
21 on it.

22 In analyzing the environmental impacts of
23 the proposed use of this MOX fuel, and taking as a
24 hypothetical, the 1.6 percent increase that was
25 discussed earlier, and taking into -- and doing the

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1 analysis of the environmental impacts of using that
2 fuel, all elements of risk would play into the total
3 calculation, would they not?

4 I may not be stating this, using the exact
5 right terms. But there would be some calculation of
6 the complete environmental impact or impacts of using
7 this fuel in this plant, which would take into account
8 any unique characteristics of this plant.

9 And we see, from time to time, new
10 developments on the sump clogging issue, and how
11 plants are approaching that, and whether they are
12 approaching it effectively or not, or whether
13 different approaches should be taken.

14 There is some time issues in terms of
15 getting this case resolved if the sump clogging issue,
16 generic issue, is not resolved within the time frame
17 in which this adjudication needs to be resolved, I'm
18 having some difficulty understanding how the case law
19 that talks about deferring to the generic issue,
20 except where it -- where a delay would prevent it from
21 adequately being considered in the adjudication.

22 I'm having some difficulty seeing how that
23 doesn't come into play here. If there is knowledge
24 that there is -- that there are particular
25 vulnerabilities in ice condenser plants to the sump

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1 clogging issue, I mean, it may be resolved next month,
2 but it may be resolved -- I don't know when it will be
3 resolved.

4 But if there is a delay that issue is out
5 there, and it is an issue that, as you've just stated,
6 everyone is aware of. So I think, just speaking from
7 a purely practical standpoint, I'm having a hard time
8 understanding how you are arguing that these things
9 should be totally divorced and separated from each
10 other, even though there may be some real impact that
11 might not be addressed by the generic issue, because
12 the generic issue might not be resolved in time to
13 apply it in the context of this request, this license
14 amendment request.

15 And I think that is, obviously, what is
16 being raised in this contention, that is how I've read
17 it.

18 MR. FERNANDEZ: May I respond, Your Honor?

19 CHAIR YOUNG: Sure, that is why I'm asking
20 you.

21 MR. FERNANDEZ: If the Petitioners had,
22 with appropriate specificity and basis, supported an
23 argument that went, say, in the following way I think
24 it would be acceptable, and this is the way I would
25 say it would be acceptable.

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1 If they would argue that irradiating MOX
2 LTAs would unnecessarily increase the risk to the
3 public because of containment sump clogging at
4 Catawba, and adequately provided information to
5 support that assertion, and the impacts from such an
6 event have not been adequately disclosed in the
7 environmental report, then yes, Your Honor, I would
8 agree with you that that would be an admissible
9 contention.

10 CHAIR YOUNG: Isn't that what they've
11 done?

12 MR. FERNANDEZ: No, Your Honor.

13 CHAIR YOUNG: Let me just ask you, and
14 then I want to hear what you said about --

15 MR. FERNANDEZ: And please say what page
16 you are talking about.

17 CHAIR YOUNG: I'm in BREDL contention 5,
18 I've pulled it out. The second page of the discussion
19 of BREDL Contention 5. Whatever page that is. Do you
20 have it in front of you?

21 MR. FERNANDEZ: Yes, Your Honor.

22 CHAIR YOUNG: Okay. The paragraph that
23 begins, the first full paragraph on that page that
24 begins with the word second.

25 MR. FERNANDEZ: Yes, Your Honor.

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1 CHAIR YOUNG: Plans with ice condenser
2 containments, such as Catawba and McGuire, are
3 particularly vulnerable to reactor sump clogging
4 accidents. See discussion in Contention 2 above.

5 Because this vulnerability was identified,
6 only recently, by the NRC its impact on accident risk
7 for Catawba and McGuire is not addressed in the SPD
8 EIS. The new information described above, regarding
9 the heightened vulnerability of the Catawba and
10 McGuire containments, breach rupture, and the
11 heightened vulnerability of plant cooling systems to
12 clogging, could significantly increase the overall
13 risk of an accident over other nuclear power plants,
14 if MOX fuel were used.

15 ADMINISTRATIVE JUDGE BARATTA: The
16 question I have on that is, the statement that if MOX
17 fuel were used. It implies that there is a linkage
18 between the two. Which am I correct in your saying
19 there isn't?

20 MR. FERNANDEZ: Not only that, but even
21 if, arguably, there were there has been no basis
22 provided for that assertion by the Petitioner.

23 ADMINISTRATIVE JUDGE BARATTA: I mean, in
24 this statement I don't see a basis for that.

25 CHAIR YOUNG: Let me see if I can restate

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1 it in a way that gets across my understanding. What
2 I understand the Petitioners to be saying is, using
3 MOX fuel in any plant will raise the risk, a certain
4 amount, which would be equivalent for all plants.

5 And let's say it is the 1.6 percent. That
6 is sort of implicit in everything that they have been
7 saying, and that we all understand.

8 MR. FERNANDEZ: Well, I would disagree
9 with you, Your Honor. I don't understand it to be
10 that way, and I never read that in the contentions,
11 and I don't find it implicit there.

12 And I think the Contention Rule specifically
13 requires that that information be explicit in their
14 contention --

15 CHAIR YOUNG: Let me restate what I said.
16 I understand them to be saying that whether it is
17 significant or not, when you look solely at the MOX
18 fuel, the risk as applied to any plant would be the
19 same, except that they are saying in ice condenser
20 plants there is this sump clogging issue, that ice
21 condenser plants have heightened vulnerability to this
22 sump clogging issue.

23 MR. FERNANDEZ: Your Honor, without any
24 basis they are stating that, yes.

25 CHAIR YOUNG: Well, the basis -- are you

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1 suggesting that the discussion of the generic issue
2 and the report that says that you just said to me,
3 recognizes the heightened vulnerability of ice
4 condenser plants?

5 MR. FERNANDEZ: Yes, I'm telling you that
6 that report says nothing about MOX, therefore it
7 cannot be used to support that.

8 CHAIR YOUNG: Let's go back to ground
9 zero.

10 MR. FERNANDEZ: Okay.

11 CHAIR YOUNG: You have ten plants, there
12 is one plant that is an ice condenser plants, there
13 are nine plants that are not ice condenser plants.
14 The generic issue, the report that you talked about
15 said that there were some increased vulnerability to
16 the sump clogging issue in ice condenser plants,
17 correct?

18 Isn't that what you said a little while
19 ago?

20 MR. FERNANDEZ: I think so, yes. I don't
21 know if I specifically stated it the way you are
22 saying it. But, yes, I think we are in agreement.

23 CHAIR YOUNG: I'm sure you stated it
24 differently, but we are trying to get to, pretty much,
25 an understanding with each other. Do you think we

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1 understand each other on that issue at this point?

2 MR. FERNANDEZ: I think so, yes.

3 CHAIR YOUNG: Now, what I understand the
4 contention to be is given that, bringing in the MOX
5 fuel and considering how, considering the effect it
6 would have on all ten of these plants, what their
7 contention is, is that the increased vulnerability of
8 the ice condenser plants would add to the overall
9 risk, increase the overall risk of an accident over
10 other nuclear power plants if the MOX fuel were used
11 there.

12 In other words, that if you are choosing
13 which plant to use MOX fuel in, if you choose a plant
14 that has this increased sump clogging risk, I
15 understand them to be saying that you would add that
16 risk to whatever risk there is or is not with the MOX
17 fuel, and the total number would be greater than for
18 other plants.

19 That is what I understand the contention
20 to be, very plainly, simply put. And maybe I'm
21 missing something.

22 MR. FERNANDEZ: No, I think you have
23 stated what their contention is. But there is no
24 basis for the assertion in the increase in the risk
25 associated with irradiating the four MOX LTAs in the

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1 Petitioner's contention.

2 ADMINISTRATIVE JUDGE BARATTA: I don't
3 even see that in their statement, because it says,
4 increase the overall risk of an accident if MOX fuel
5 were used. Implying that the use of MOX fuel directly
6 causes some sort of an increase associated with the
7 ice condenser plants. And I don't see that --

8 CHAIR YOUNG: What I understand the
9 contention to be saying is that the sump clogging is
10 the thing that increases the overall risk, and that
11 that is why the ice condenser plants should not be
12 used. That is what I understand the contention to be.

13 MS. CURRAN: Would it help if I just
14 referred to the sentence in the contention that --

15 CHAIR YOUNG: Pardon?

16 MS. CURRAN: Would it be helpful to
17 identify the --

18 CHAIR YOUNG: Go ahead.

19 MS. CURRAN: On page 13.

20 CHAIR YOUNG: What paragraph, what is the
21 first word in the paragraph? I don't have the --

22 MS. CURRAN: It starts the third line
23 down, it is in a paragraph that continues from a
24 previous page.

25 CHAIR YOUNG: The paragraph that starts

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1 with the word first on the previous page?

2 MS. CURRAN: Well, maybe I've got, it is
3 in the second to the last paragraph of the basis.

4 CHAIR YOUNG: Okay.

5 MS. CURRAN: It is the --

6 ADMINISTRATIVE JUDGE BARATTA: Read the
7 paragraph as it starts out.

8 MS. CURRAN: THE paragraph begins, first
9 as discussed in NUREG CR6427. And there is a sentence
10 that says, under the circumstances it would be
11 foolhardy to use fuel that will increase the
12 radiological harm in a containment breach accident, in
13 plants that have such vulnerable containments.

14 CHAIR YOUNG: I think that is actually in
15 reference to the hydrogen ignition issue.

16 ADMINISTRATIVE JUDGE BARATTA: That is
17 GSI-189.

18 MS. CURRAN: Okay, well, then in the last
19 paragraph it says the new information described above,
20 regarding the heightened vulnerability of the Catawba
21 and McGuire containments to breach, or rupture, and
22 the heightened vulnerability of plant cooling systems
23 to clogging, could significantly increase the overall
24 risk of an accident over other nuclear power plants if
25 MOX fuel were used.

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1 So we are looking at a combination of
2 consequences and causation, which is what risk is
3 composed of. And causation, we have been talking
4 about the word "cause". In our view the question in
5 the environmental impact statement is, would the
6 proposed action cause environmental harm?

7 That is true. But here the causation is
8 an increase in risk. And the two elements are, the
9 two elements of increase in risk are potential for the
10 accident to occur, which is heightened by the
11 particular vulneraBility of these plants, taken
12 together with the increased consequences of using
13 plutonium fuel.

14 And that is how the NRC traditionally
15 looks at risk, looks at them together.

16 CHAIR YOUNG: Let me state my
17 understanding one more time and see if we can
18 communicate here.

19 My understanding of what the Petitioners
20 are saying is, if you take the MOX fuel, and they may
21 not be saying this exactly, but at least they are
22 saying that if you take the MOX fuel, and the effect
23 on risk that it alone has, even if it may not be
24 significant on its own, if it is used in a plant with
25 increased vulnerability, from other causes, then those

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1 things would add together to cause an increased
2 overall risk that would mitigate against using the MOX
3 fuel in the plant where there are these increased
4 vulnerabilities.

5 That is what I understand them to be
6 saying. And they appear to be basing it on the generic
7 issues themselves.

8 MR. FERNANDEZ: I agree with you, Your
9 Honor, I think you've described how we also read the
10 Petitioner's contention to read. However, I think
11 where we may be differing is that, as the attorney
12 that works on GSI-191, I know that there is nothing in
13 those documents that talks about an increase in risk,
14 at any facility, from using MOX.

15 There is nothing about MOX in there. So
16 you can't use those documents to support an assertion
17 that MOX would cause a, what do they say, that there
18 would be an increase in overall risk that --

19 CHAIR YOUNG: Right, you are right.

20 MR. FERNANDEZ: -- if you use MOX fuel.

21 CHAIR YOUNG: You are right. All you
22 could use those documents for would be for the amount
23 of increase in risk caused by the heightened
24 vulnerability in those plants.

25 And the contention, as I understand it, is

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1 saying when you add that together, when you add that
2 to any increase that is caused by the MOX, which is
3 totally separate, when you add those two things
4 together, the total increase, the total would be
5 unacceptable such that an ice condenser plants should
6 not be used.

7 Now, what I'm doing here is I'm stating my
8 understanding of their contention.

9 MR. FERNANDEZ: Yes.

10 CHAIR YOUNG: Whatever is determined as a
11 result of the generic issues is out there. But we all
12 know that they are being looked at, and we all know
13 some of the things that have been said about them.

14 MR. FERNANDEZ: And can I say --

15 CHAIR YOUNG: And so I never have
16 understood the contention to be that the sump clogging
17 had any connection with the MOX fuel use, but simply
18 that the two factors, when added together, produced an
19 overall risk figure that would be higher for the ice
20 condenser plants.

21 I understand Mr. Repka to be saying that
22 the margin of safety is so great that it still
23 wouldn't matter, the increase in risk would still be
24 within what is acceptable. I may be paraphrasing you
25 wrong, but I thought I understood you to be saying

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1 that.

2 MR. REPKA: That is one thing I'm saying.

3 CHAIR YOUNG: Right, one thing you are
4 saying. I understand you are saying a lot of other
5 things.

6 MR. REPKA: I'm also saying the issue of
7 the overall risk, which I agree with your
8 characterization of the contention, that that is what
9 it is about. But the issue of overall risk is not an
10 issue.

11 Overall risk attributable to a generic
12 safety issue is not an issue in a license amendment
13 case. That is what I'm saying.

14 CHAIR YOUNG: But when an EIS is done it
15 is not done out of context. I mean, an EIS takes into
16 account the context in addressing and discussing the
17 environmental impact, correct?

18 MR. REPKA: I think in a license amendment
19 case that environmental review has to look at the
20 increase attributable to the amendment. Otherwise it
21 would lead to absurd results.

22 Beyond that I would say you have to
23 remember that this is a contention about alternatives.

24 CHAIR YOUNG: Right.

25 MR. REPKA: And so, fundamentally, it is

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1 bounded by the rule of reason on alternatives. So
2 even if you were comparing alternatives based upon
3 overall risk, you have to have an alternative, and
4 there is no alternative.

5 CHAIR YOUNG: Yes, but the Staff has said
6 Oconee could be an alternative.

7 MR. REPKA: We disagree with that.

8 CHAIR YOUNG: Now, I know that other
9 considerations -- I know you disagree, but --

10 MR. REPKA: But there are --

11 CHAIR YOUNG: -- and there are other
12 considerations there, and it may turn out that when
13 you add together all the risks at Oconee, that it
14 might be over all higher.

15 But the point, the point is that the
16 contention is, and they appear to have a dispute with
17 you, over the impact of the overall risk, when
18 compared to other alternatives.

19 MR. REPKA: Well, I didn't hear the Staff
20 to say that they were going to look at relative
21 overall risks between even Oconee and --

22 CHAIR YOUNG: No, I don't think they did,
23 but they said that they were going to consider whether
24 Oconee should be looked at as an alternative.

25 ADMINISTRATIVE JUDGE BARATTA: Their exact

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1 statement was that it -- and that Ocone is not
2 discussed, as to reasons why it should not be used.

3 CHAIR YOUNG: Right.

4 ADMINISTRATIVE JUDGE BARATTA: I think we
5 need to discuss this, so I would like to propose a
6 recess.

7 CHAIR YOUNG: Let's break for lunch. And
8 then if you want to address it further, when we come
9 back from lunch you can, as well.

10 (Whereupon, at 1:40 p.m., the above-
11 entitled matter was recessed for lunch.)
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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2:40 p.m.

CHAIR YOUNG: Back on the record. We apologize for stretching things out here, but we needed to confer with each other about some issues.

Is everybody here who needs to be here, or are we waiting for other people?

MS. CURRAN: Yes, Your Honor. I'm ready.

CHAIR YOUNG: Okay. Again, we apologize for stretching this out, we needed to discuss some issues. And I want to make clear that in raising the questions that I was raising, that I have absolutely no desire, or intention, that any particular answer be provided.

And I want everyone to understand that what we are talking about here is what -- what I'm trying to get the parties to address here, is to clarify what it is that the parties are arguing.

Because to some extent my perception has been that the parties have been sort of talking past each other. And whatever the outcome I think that is important that we all are sort of on the same page with regard to the issues that we are discussing.

I see a couple of issues where clarification would be helpful. And after I ask about

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1 those, Judge Baratta and Judge Elleman may also have
2 some questions about clarification. But just to
3 start.

4 My perception is that everyone is not on
5 the same page with regard to what the actual
6 contention is. Whether the contention is to the
7 effect that because of certain allegedly, arguably
8 argued to be greater, or I think to use the words of
9 the contention, particular vulnerabilities of ice
10 condenser plants, that using the MOX fuel in them
11 would, by either adding or multiplying the effect of
12 these particular vulnerabilities, sump clogging we
13 were talking about, and the -- any additional risk
14 contributed by the MOX fuel use, in an ice condenser
15 plant makes an ice condenser plant a less attractive
16 alternative for the use of the MOX fuel.

17 That is one understanding of what the
18 contention is. And one possible alternative
19 understanding of what the contention is, is that
20 somehow it is being asserted, in the contention, that
21 the use of MOX fuel will increase the risks, any risk,
22 that may be caused by the sump clogging.

23 And so I would appreciate some
24 clarification on that, insofar as we are talking about
25 what the actual contention is. And then secondly, I

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1 would ask Ms. Curran if she could address the issue
2 of, that Duke has raised about the order of magnitude
3 of risk for the Catawba plant, or there being two
4 orders of magnitude of risk for the Catawba plant
5 below what is acceptable, such that as I understand
6 Duke's argument, any increased risk would fall well
7 below what is allowable.

8 Did I state that more or less correctly,
9 as one of the things you are saying, Mr. Repka?

10 MR. REPKA: Yes, I think that is an
11 accurate statement.

12 CHAIR YOUNG: Okay. Then what I would
13 like to have Ms. Curran address, with regard to that,
14 after we get past what the actual contention is, is to
15 respond to that and talk about what significance, what
16 dispute, what is the genuine dispute in response to
17 that.

18 And then I think it would be helpful if
19 each party addressed the issue of whether there is a
20 genuine dispute, and if so, what that genuine dispute
21 would be.

22 So since the first question has to do with
23 what the actual contention is, Ms. Curran, do you want
24 to start?

25 MS. CURRAN: When you were given your

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1 first paraphrasing of the contention, it sounded
2 reasonable to me. The second one to me I wasn't sure
3 that it sounded all that different from the first one,
4 but was shorter.

5 I really had trouble --

6 CHAIR YOUNG: Are you saying that the MOX
7 fuel, the use of MOX fuel would somehow cause a
8 greater, cause the sump clogging problem to be greater
9 than it otherwise would be?

10 MS. CURRAN: What we were saying is that
11 the risk of this proposal, the risk posed by this
12 particular proposal, is increased over the risk of --
13 well, it is significantly greater or potentially
14 significantly greater than the risk posed by other
15 alternatives.

16 And, therefore, other alternatives should
17 be looked at.

18 CHAIR YOUNG: And the nature of the
19 increased risk is?

20 MS. CURRAN: Because other plants don't
21 have these -- supposing you, if you picked another
22 plant, say a PWR with a regular containment, to test
23 the plutonium fuel, you wouldn't have these two
24 vulnerabilities that we identified in the contention.

25 The vulnerability to small break LOCA

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1 because of -- it would have the sump clogging issue,
2 but not the particularly heightened vulnerability.
3 And it wouldn't have the containment vulnerability.
4 So the risk of using this higher consequence fuel, to
5 coin a phrase, would be lower.

6 Because if there were an accident the
7 consequences wouldn't be as bad, and the chances of an
8 accident -- look, if there were an accident, with a
9 breach of containment, in both cases the consequences
10 would be the same.

11 But in one case the chances of that
12 happening would be lower. So, overall, the risk would
13 be lower. And that is the reason that alternatives
14 should be examined.

15 CHAIR YOUNG: I understood Mr. Fernandez
16 to be saying that the contention was to the effect,
17 and Mr. Fernandez you feel free to correct me if I'm
18 misstating you.

19 But that the contention was to the effect
20 that the MOX fuel use somehow, you were somehow saying
21 that it caused the risk arising out of the sump
22 clogging issue to be greater.

23 MS. CURRAN: Well, the word risk, the way
24 we are using the word risk is a combination of the
25 potential for an accident, and the consequences of an

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1 accident.

2 We are not saying that using plutonium
3 fuel increases the potential for a sump clogging
4 accident. We are not saying that. But we are saying
5 it increases the risk of such an accident.

6 CHAIR YOUNG: Because of?

7 MS. CURRAN: The combination of the
8 heightened vulnerability of this plant to that type of
9 accident, and the increased consequences of using
10 plutonium fuel.

11 CHAIR YOUNG: Does that -- did my
12 statement of what you said before accurately reflect
13 what you were saying, Mr. Fernandez?

14 MR. FERNANDEZ: I think so, Your Honor,
15 with one caveat. That we also said that there was no
16 adequate basis provided for that assertion. That was
17 our argument.

18 CHAIR YOUNG: Right, but apart from the
19 basis --

20 MR. FERNANDEZ: Yes, Your Honor.

21 CHAIR YOUNG: -- does her explanation
22 resolve for you the issue of causation, in terms of
23 what the contention actually is?

24 MR. FERNANDEZ: I think Ms. Curran
25 adequately described what the contention actually is,

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1 yes.

2 CHAIR YOUNG: Okay. Ms. Curran, if next
3 you could respond to Duke's --

4 MR. REPKA: Perhaps I could respond to
5 that portion first, and then --

6 CHAIR YOUNG: Oh, sure, go ahead.

7 MR. REPKA: -- second.

8 Here is what I think I heard. I heard
9 that the contention is the overall risk, and the
10 overall risk is made up of three components, the GSI-
11 191 sump clogging component, the GSI-189 ice condenser
12 component, and any component attributable to MOX fuel,
13 it is overall.

14 The second read was that the version that
15 does MOX fuel in some way exacerbate, in and of
16 itself, either GSI-191 or GSI-189. I don't think that
17 is what I heard that the contention is. And certainly
18 there is nothing in the contention that says that.

19 So the only thing the contention does is
20 it vaguely links GSI-191 and 189, those two issues.
21 It doesn't link either to the MOX fuel. So, of
22 course, what our position, and I said this before, was
23 in this license amendment proceeding overall risk is
24 not an issue, or at least that component of overall
25 risk that is attributable to the GSI's is not an issue

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1 here.

2 What could be an issue, in this
3 proceeding, is that portion of overall risk
4 attributable to the MOX fuel, which leads us to your
5 second question.

6 CHAIR YOUNG: If I could clarify, before
7 we move on? Are you, is it your position that if
8 there is an issue that would otherwise be included in
9 an analysis of the overall risk, and all the
10 environmental impacts, if there is an issue that is
11 currently being handled as a generic issue, that that
12 issue should be separated out from the overall
13 analysis of environmental impacts and overall risk?

14 MR. REPKA: Yes, in a license amendment
15 case the issue is that change in consequences, that
16 change in risk, attributable to that particular
17 license amendment?

18 The other risk, whatever it is, exists
19 irrespective of the license amendment, and the
20 Commission would be addressing that through the
21 generic safety issue process.

22 CHAIR YOUNG: And in the part of the
23 analysis that would consider alternatives, are you
24 saying that the only two alternatives that can be
25 considered are Catawba or the no-action alternative,

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1 because there are no other alternatives that may or
2 should be considered in this proceeding?

3 MR. REPKA: That is correct. And because
4 there is no viable alternative that serves the purpose
5 of this particular license amendment application,
6 everything else is speculative.

7 Now, let me take that a step further and
8 just say, assuming for the sake of argument, another
9 plant, let's just say hypothetically, Oconee were
10 considered in that analysis, the environmental
11 analysis would be limited to whether or not Oconee is
12 viable, which we've explained it is not.

13 But even if you were then, assuming for
14 argument, that you had to look at relative risk versus
15 Oconee, the issue would not be the overall GSI risk,
16 the issue would be, is there a difference as between
17 the --

18 CHAIR YOUNG: The overall --

19 MR. REPKA: The overall risk attributable
20 to the GSI plus MOX fuel. The issue would be is there
21 a difference as between Catawba and Oconee, relative
22 to the change in risk created by MOX fuel. Is there
23 anything about Oconee that is any different from
24 Catawba, that would change that maximum 1.6 percent
25 consequence increase that would be significant.

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1 If Oconee were viable, which it is not,
2 that might be an issue you could look at, not the GSI.

3 CHAIR YOUNG: If Oconee were viable, in
4 your view, and analyzing the relative environmental
5 impacts of using MOX fuel in Catawba as compared to
6 using MOX fuel in Oconee, you are saying that you
7 would not analyze the, all factors that might
8 contribute to that risk?

9 You would separate out the GSI ones, and
10 if that -- I guess my question is, wouldn't that lead
11 to an artificial result for the plant from which the
12 GSI issue were extracted?

13 MR. REPKA: Yes, I would separate that
14 out. And, no, it would not lead to an artificial
15 result. It would lead to a more accurate comparison
16 of the relative effects of the license amendment that
17 is being discussed.

18 With respect to the GSI impact that, of
19 course, would be developed and addressed at the time
20 the GSI is resolved and any risk that actually is
21 attributable to the GSI would be resolved in that
22 forum.

23 Again, getting off into those issues in a
24 license amendment proceeding would be premature, at
25 best.

1 CHAIR YOUNG: Then one more question. If
2 down the line, after this proceeding were over, and
3 this proceeding did not consider the risk related to
4 the GSI issue, if down the line the GSI issue were
5 resolved in such a way that it showed there was
6 increased risk would you then go back and apply that,
7 at that point, or how would you handle that?

8 MR. REPKA: Well, again, the assumption
9 right now, and I think it is a valid one, is that the
10 plants are safe to operate, notwithstanding the GSI.
11 So there is a presumption that a resolution of the GSI
12 would mean that there is a finding that the plants are
13 not safe.

14 And I don't believe that that is a
15 realistic expectation.

16 CHAIR YOUNG: But if it were wrong, just
17 hypothetically, if in the end it turned out
18 differently?

19 MR. REPKA: The resolution of the GSI
20 would be pursued in due course, once that risk is
21 understood, and appropriate corrective actions, if
22 any, are determined.

23 CHAIR YOUNG: And so with regard to this
24 action, you wouldn't go back and open it up again?

25 MR. REPKA: No, I would not.

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1 CHAIR YOUNG: It would be separated from
2 this?

3 MR. REPKA: No, I would not. They are two
4 completely separate things.

5 CHAIR YOUNG: Okay. Ms. Curran, I think
6 you were going to respond to Duke's argument about
7 what difference does it make because even increasing
8 the risk, it would be below what is allowable, if I'm
9 stating it correctly.

10 And if you want to respond to the other
11 things as well, go ahead.

12 MS. CURRAN: Okay.

13 CHAIR YOUNG: Actually I would ask you to.

14 MS. CURRAN: All right. Well, first of
15 all, NEPA is not based on allowable limits. That is
16 the Atomic Energy Act. NEPA is based on where there
17 are significant impacts then one looks at alternatives
18 for mitigating or avoiding them.

19 And that goes beyond the Atomic Energy
20 Act. And there has been, I think the Limerick Ecology
21 Action case, which I don't have the cite to, it was a
22 Third Circuit case, in the 1980s, held that NEPA
23 requires the NRC to go further.

24 And so we would say this is the kind of
25 situation where whether or not this operation falls

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1 within the safety goal, and I want to get to that
2 question next, that that doesn't end the enquiry.
3 That is what was required in the Limerick case, where
4 the NRC was required to look at, I think, it was
5 containment filtering as an alternative that would
6 mitigate accidents.

7 The other part of this answer is that
8 NUREG 1150 was issued in 1990, and it took years to
9 do. I think it started ten years earlier, something
10 like that. And since 1990 we have new information
11 about that plant, and all plants, but in particular
12 about Catawba.

13 We now know about the vulnerability of the
14 containment, which I'm not sure was known in 1990, at
15 all. It wasn't until 2000 when Sandia Labs issued
16 NUREG 6427 and said that if a containment of an ice
17 condenser plant is put under a certain amount of
18 stress, it is inevitable that it is going to fail.

19 I doubt that went into NUREG 1150. And
20 the containment sump clogging issue didn't go into
21 NUREG 1150. So I'm just not sure how valid that is in
22 terms of if you are trying to find a justification for
23 not enquiring further here.

24 What we have is significant new
25 information showing that conclusions that may have

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1 been reached earlier should be reexamined. And I
2 would like --

3 CHAIR YOUNG: And the new information is?

4 MS. CURRAN: The information about two
5 things, the vulnerability of ice condenser
6 containments, and to containment failure, and also to
7 small break LOCA accidents. Two things.

8 CHAIR YOUNG: I'm going to stretch this
9 just a little bit further. I would like to have the
10 parties address two more issues. And that is what is
11 the actual risk that GSI-191 addresses with regard to
12 ice condenser plants, and what if any is the dispute,
13 genuine dispute between the parties that is at issue
14 in this contention.

15 MS. CURRAN: I don't know, I haven't seen
16 the document that describes what GSI-191 is. But I
17 think the important thing, for purpose of our enquiry
18 here, it whether this safety -- has been identified as
19 applicable to Catawba, and what is the significance
20 from a safety perspective.

21 The most important thing about it is that
22 it is a factual issue that affects the risk of
23 operating a plant. However it is described in an NRC
24 safety document. And as for the issue that is in
25 dispute here, I would say that it is whether the

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1 environmental impact statement should, in light of new
2 information about the risk posed by this proposal,
3 should consider alternatives that would mitigate or
4 avoid the impacts posed by this proposed alternative.

5 MR. REPKA: I am not sure I know what the
6 question is right now. I guess the question is, is
7 there any genuine dispute?

8 CHAIR YOUNG: First question was what is
9 the -- how does GSI-191 describe the risk or problem
10 with regard to sump clogging in ice condenser plants?
11 And, two, if there is a dispute, what is the dispute?
12 And if there is no dispute, why is there no dispute?

13 MR. REPKA: GSI-191 related to sump
14 clogging applies to all plants. I don't think that
15 there is anything in that particular GSI that
16 addresses whether or not it is unique, or exacerbated
17 for ice condenser plants.

18 The ice condenser issue is a completely
19 separate issue in GSI-189. I think that there is a
20 suggestion in the contention, and the attached report
21 that, in fact, that there may be something, a link
22 between 189 and 191.

23 However that is, really, I think a
24 question for the Petitioners. Our argument is any
25 dispute that may exist with respect to 189, 191,

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1 whether or not there is any unique issue as between
2 ice condenser plants relate to sump clogging, that is
3 not a material issue for this proceeding.

4 And most fundamentally, apart from the
5 fact that that issue is not created, or affected, by
6 MOX fuel use, more fundamentally there is no
7 alternative that is viable, that could be addressed.
8 So my answer is there is no dispute within the scope
9 of the proceeding.

10 CHAIR YOUNG: Am I understanding your
11 statement to mean that you agree that the only
12 alternative to be considered is the no-action
13 alternative?

14 MR. REPKA: That is our position, yes.

15 CHAIR YOUNG: Okay. Mr. Fernandez, Ms.
16 Uttal, or Ms. Kannler? And/or?

17 MR. FERNANDEZ: It will be me. I think
18 you asked what is the actual risk that GSI-191
19 addresses. The documents that have been prepared, so
20 far, by contractors to the agency, particularly the
21 Los Alamos National Laboratory, to support the Office
22 of Research's inquiry into the GSI-191 issue, have
23 been two documents that looked at PWRs and containment
24 sump clogging.

25 Those documents are generic documents that

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1 contain parametric studies, where parameters were
2 extrapolated from a variety of plants, and those
3 parameters were modeled to ascertain how these
4 hypothetical plants would operate in the event of a
5 containment sump clogging challenge during emergency
6 core cooling recirculation.

7 Those documents come to the conclusion
8 that in the contractor's opinion there are a higher
9 incidence of, for example, small break loss of coolant
10 accidents, challenging PWRs for ice condenser plants.
11 Yes, that is correct.

12 But those documents come to no conclusions
13 with regards to the operability or the safe operations
14 of any particular plant. And those documents are very
15 clear in their forewords, and in their conclusions,
16 that their conclusions are limited by the data that
17 they used.

18 And for a lot of plants they didn't even
19 have sufficient data, so they had to just make up a
20 number based on averages from a lot of facilities. So
21 a lot of the numbers in the conclusions in there, by
22 their own terms, are limiting.

23 Where the Staff is now with regards to
24 GSI-191 is that a generic letter was issued to all
25 PWRs, asking them to address the GSI-191 issue. And

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1 the licensees are in the process of responding to that
2 generic letter.

3 The Staff would then go ahead and review
4 the responses that the licensees have provided, and
5 determine whether further action is necessary. That
6 determination has not yet been made.

7 So the first thing that I would like to
8 say is that to read into the Los Alamos reports any
9 particular statement regarding the operability of
10 Catawba as an individual power plant, does not follow
11 what the report says, on its face.

12 The report itself on its face says that no
13 conclusions are being made regarding any individual
14 plant. It is a study based on parameters and
15 hypothetical facilities.

16 CHAIR YOUNG: Would there be any
17 relevance, in your view, to the increased challenges
18 that the report referred to?

19 MR. FERNANDEZ: Any relevance in this
20 proceeding?

21 CHAIR YOUNG: Well, any relevance to the
22 safety, the relative safety of ice condenser plants
23 with regard to those challenges.

24 MR. FERNANDEZ: As a generic matter
25 probably so, and that is why the Staff has issued

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1 generic letters asking the owners of PWRs to respond
2 to the findings in that particular document.

3 As a specific matter, with regards to a
4 particular plant's operations, I doubt that there
5 would be a relevance, because the state of the art,
6 with regard to the information available to the Staff
7 and the industry, I should say particularly to the
8 Staff, is that it is difficult to know how a
9 particular plant would handle that particular issue.

10 That is the step in the GSI process in
11 which we are engaged in right now. The resolution of
12 that issue has not occurred.

13 CHAIR YOUNG: If I could ask you the same
14 question I asked Mr. Repka? If down the line, after
15 this proceeding were finished, it were to be
16 determined that there was some increased risk, what
17 does that do to the current analysis of environmental
18 impacts at this point?

19 MR. FERNANDEZ: Under NEPA, and I think we
20 can all agree on this, environmental impact statements
21 once the action is taken, are static documents.
22 These documents, either EISs or EAs, are not living
23 documents that you supplement as you continue
24 operation of the plant.

25 Once the major federal action is taken

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1 you've satisfied the requirements of the statute, and
2 you don't have an ongoing obligation to supplement
3 those environmental analyses.

4 On the safety side if, for example, we
5 found that there were certain challenges to facilities
6 because of GSI-191, and let's say that the license
7 amendment is granted to irradiate MOX fuel, if at that
8 point in time, when GSI-191 is resolved, the Staff for
9 any reason had reason to feel that there was not
10 adequate protection at the facility, and we are
11 talking safety now, the Staff would have an occasion
12 to, through the process of an order, or something to
13 that effect, to ask the licensee to address the issue,
14 if one is identified then.

15 Environmentally, though, NEPA does not
16 have a component that would require the federal agency
17 that has taken the action to once it has completed the
18 action, to continue updating the document it used to
19 satisfy its NEPA obligations.

20 CHAIR YOUNG: What does it require with
21 regard to the completeness of the analysis at the
22 stage in this circumstance, of being at a point prior
23 to eventual resolution of the generic issue, if there
24 is a possibility that the ultimate resolution might
25 point out dangers that might, if considered now, have

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1 an impact on the environment?

2 And I'm speaking hypothetically here, and
3 that is all.

4 MR. FERNANDEZ: Assuming arguing that
5 GSI-191 was properly within the scope of the
6 proceeding, and that it had to be addressed by the
7 Staff in order to issue the license amendment in
8 question, NEPA would require that if the Staff did not
9 have sufficient information currently to assess the
10 environmental impacts that would derive from such a
11 circumstance, like Ms. Curran has stated before, NEPA
12 would ask you to disclose the fact that you don't have
13 sufficient information.

14 But in light of that you are still go
15 ahead and take the action, or not take the action.
16 And NEPA is a disclosure statute, so you would
17 disclose that fact, and then go on and either take or
18 not take the federal action that is being proposed.

19 And to the second question, I think that
20 Mr. Repka properly summarized what we feel are the
21 issues in question, and I think it is a little
22 confusing, and I think the record will be better
23 served if I don't engage and try to recite again what
24 has been said already.

25 CHAIR YOUNG: That is fine. Anything else

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1 on BREDL contention 5?

2 MS. CURRAN: Well, there were a few things
3 that I wanted to address. There was quite a lot of
4 argument by Duke and the Staff.

5 CHAIR YOUNG: I'm sorry, go ahead.

6 MS. CURRAN: I haven't had my rebuttal
7 yet, and I will try to be as efficient as possible.

8 CHAIR YOUNG: Go ahead.

9 MS. CURRAN: In light of the hour.

10 CHAIR YOUNG: Pardon me for overlooking.
11 We haven't had lunch yet, so --

12 MS. CURRAN: Oh, my goodness.

13 CHAIR YOUNG: Never mind that, go ahead,
14 pardon me for overlooking that.

15 MS. CURRAN: And I'm going to address
16 these in the order that I heard them. I believe Mr.
17 Repka characterized the scope of this enquiry as being
18 limited by the proposal as it is given in the
19 environmental report.

20 We disagree with that because this is a
21 piece of a broader action which is described on page
22 5-5 of the environmental report, where the first full
23 paragraph it says, in December 1996 DOE published the
24 S&D PEIS. This document analyzed the potential
25 environmental consequences of alternative strategies

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1 for the long term storage of weapons usable plutonium,
2 and the disposition of weapons usable plutonium that
3 has been, or may be, declared surplus to a national
4 security needs.

5 So this is one step in a very broad study
6 of disposing of weapons grade plutonium. And Mr.
7 Repka also discussed the concept of tiering, which is
8 definitely at play here. And we think tiering is
9 legitimate.

10 There was a broad overall impact
11 statement, and then we've gotten down to a more
12 discrete piece of that, of the proposal that we are
13 now looking at, and further environmental enquiries
14 being made in a different setting.

15 But we still have to go back to the
16 original purpose of what this is about. And if we
17 come across new information that calls into question
18 the alternatives that were put before us in the
19 original study, then NEPA raises an obligation to
20 revisit those issues, up until the point at which the
21 action is taken, and in that particular environmental
22 impact statement, and project is finished.

23 I agree with Mr. Fernandez, once the
24 action is taken, that is the end of the NEPA enquiry.
25 And that is one reason to do the analysis before the

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1 action is taken, because you can't go back and redo
2 it.

3 And, in any event, there is no point,
4 because the action has been taken, the commitment of
5 resources has been made.

6 CHAIR YOUNG: Let me just interject here.
7 Assuming that Oconee does not come into play, would
8 you say, taking Mr. Repka's statement that the only
9 alternative to be considered is a no-action
10 alternative, would you contend -- your contention,
11 would there still be anything to -- that there would
12 still be any dispute with regard to the contention, if
13 that is the case?

14 MS. CURRAN: Yes. Certainly Oconee should
15 come into consideration as an alternative, but so
16 should other plants. In the, I think it was the SPD
17 EIS in '99, several so-called mission reactors were
18 looked at, but none was actually chosen.

19 There were several proposals by different
20 utility consortiums. And I believe there were three,
21 I think Mr. Repka said there were three. And two were
22 actually withdrawn, so they were left with the one
23 remaining one, which was the one submitted by Duke
24 Cogema Stone and Webster.

25 But that doesn't mean that the -- that it

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1 is inappropriate now to go back and revisit the
2 alternatives that were looked at, or to look at other
3 alternatives.

4 It seems as though there were some
5 alternatives that were presented to the DOE, because
6 the DOE did an RFP. And these were the three groups
7 that responded. And then --

8 CHAIR YOUNG: I'm sorry to interrupt. But
9 the question I was really trying to get to is, if it
10 were agreed, or if it were ruled, if the situation
11 were, for whatever reason, that the only alternative
12 to look at were the no-action alternative, is there
13 anything remaining in this contention that would be,
14 constitute a genuine dispute that we should look at?

15 MS. CURRAN: If the no-action alternative
16 were the only alternative to be looked at?

17 CHAIR YOUNG: Right.

18 MS. CURRAN: Yes, I think they should have
19 to look at no-action again, because of the increased
20 risk. But I also think that other reasonable
21 alternatives, that no-action and Oconee do not define,
22 that does not define the scope of reasonable
23 alternatives that should be looked at here.

24 It should be a broader scope, because this
25 is a broader program. It is a national program that

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1 was intended to look at, programmatically, what is the
2 best way to dispose of this plutonium?

3 CHAIR YOUNG: And if we agree with Duke,
4 and the Staff, that certainly things that Duke has no
5 control over would be viable alternatives in this
6 license amendment request, is there anything remaining
7 of your contention?

8 MS. CURRAN: The no-action alternative,
9 that is all.

10 CHAIR YOUNG: And your contention at that
11 point would be?

12 MS. CURRAN: That the no-action
13 alternative ought to be looked at in comparison to the
14 risks posed by the action alternative, is it worth it.
15 But, again, I really -- we do not think that the scope
16 of -- this is not like -- this case is not like the
17 cases where the instigator of the permanent
18 application is solely a private business.

19 In those cases clearly hold that the
20 Government can't require the Applicant to look at
21 other alternatives, than what it can reasonably
22 accomplish, or within the realm of what is reasonable
23 for that entity.

24 But that is not the kind of situation we
25 are dealing with, here.

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1 CHAIR YOUNG: Is there any case law
2 addressing the kind of situation you say we are
3 dealing with?

4 MS. CURRAN: I can't cite you any at this
5 point. I can just tell you that this is a different
6 situation. And, certainly, it would be more in line
7 with government projects where the government was
8 planning to do something, and the question was, did it
9 look at reasonable alternatives, not was it issuing a
10 permit, but was it proposing to take some action
11 itself?

12 In which case the taxpayers are paying for
13 the accident, for the action, and the government is to
14 look at reasonable alternatives, within its ability.
15 And that is much more the situation that we have here.

16 This is the federal government deciding
17 this is how we are going to dispose of plutonium. And
18 the only reason that Duke is involved in this proposal
19 is because it is a government project that the DOE put
20 out for contract.

21 And the DOE could establish a contract in
22 a way that would target safer plants to use this
23 plutonium fuel and say, we will subsidize this. There
24 is a variety of ways, the government is already
25 subsidizing this, it could subsidize to a greater

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1 extent, using a safer plant that it had identified.

2 CHAIR YOUNG: Assuming that, taking that
3 for a moment out of the mix, what would be the genuine
4 dispute if we are looking only at what Duke has
5 control over, what would be the genuine dispute that
6 the contention asserts?

7 MS. CURRAN: Whether Duke has made an
8 adequate analysis of the alternatives over which it
9 has control, including the three other plants, and the
10 no-action alternative.

11 CHAIR YOUNG: Anything --

12 MS. CURRAN: I move on?

13 CHAIR YOUNG: Go ahead.

14 MS. CURRAN: Okay. I think Mr. Repka also
15 argued that we are in the wrong forum here, that we
16 should have come before the Department of Energy if we
17 didn't like the choice of mission reactors that was
18 given by the Department of Energy in 1999.

19 But the answer to that is that at that
20 time NUREG 6427 had not been issued, we were not aware
21 of the containment sump clogging issue. The whole
22 point of our being here in this proceeding is that
23 another decision making juncture has come up.

24 Actually, it may be the first actual
25 decision making juncture that is involving actual

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1 action. There has been a lot of planning that has
2 gone into this, since 1996, when the first
3 programmatic EIS was issued.

4 But now we are at the point of actually
5 deciding to take action. And so that is the juncture
6 at which it is appropriate to look and see whether new
7 information that was not previously considered in the
8 EIS warrants reconsideration, reevaluation of
9 environmental impacts and alternatives. And that is
10 the point of this contention.

11 It is similar to the situation that we
12 were in, in the license renewal case, in the sense
13 that NUREG 1437, in its earliest iteration, was issued
14 in early '90s, or maybe it was 1997, I can't remember.
15 But it was some time in the 1990s.

16 And to the best of its abilities the NRC
17 looked at the environmental impacts of renewing
18 operating licenses. Well, it wasn't until afterwards
19 that we got NUREG CR6426, which raised for the first
20 time the very high vulnerability of ice condenser
21 containments to breach, if they were stressed.

22 And so we came in with that new
23 information saying, that generic impact statement
24 isn't sufficient to justify this licensing decision,
25 and the issue of environmental impacts of license

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1 renewal needs to be reevaluated.

2 It is a similar situation that we are in
3 here, with respect to how tiering works. That was a
4 generic impact statement that ordinarily would have
5 governed the individual license renewal decision. But
6 it was outdated, it needed to be reevaluated.

7 Here there is two generic impact
8 statements that have been overtaken by new
9 information, and that need to be updated, in those
10 particular respects relating to the risk of using
11 plutonium fuel at the Catawba plant.

12 I'd like to revisit, one more time, the
13 significance of the 1.6 percent, and emphasize that it
14 is not Dr. Lyman's number, it is not Dr. Lyman's
15 translation of something else. It is something that
16 Duke proposed as an interpretation of Dr. Lyman's
17 work.

18 I just want to make that really clear,
19 that is not our number. It has been used for many
20 purposes during this argument, but it is not something
21 that Dr. Lyman proposed to you, and we have expressed
22 our qualifications about that number.

23 Also I think the number 1.6 percent was
24 used by Mr. Repka in an argument to say that if you
25 were going to look at the relative merits of testing

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1 the plutonium fuel, in other plants besides Catawba,
2 all you would look at is the 1.6 percent increase in
3 risk, in consequences between using LEU and plutonium
4 fuel.

5 And we disagree with that. And just to
6 summarize it very briefly, we think that for the
7 plants that are examined, as alternatives to Catawba,
8 one would look at the overall risk of using plutonium
9 in those plants.

10 So just as we are concerned about the
11 vulnerability of Catawba, and certain individual
12 respects, you would want to look at the vulnerability
13 of other plants, whether -- their relative merits on
14 the whole, not just some narrow question of whether
15 the consequences would increase.

16 I think an argument was made, by Mr.
17 Repka, that if to consider our contention in this case
18 would be opening the barn door to just total chaos,
19 and in every single license amendment case, no matter
20 how significant, that the NRC would be forced to
21 reexamine all kinds of generic safety issues, whatever
22 might be the safety problems at a nuclear plant would
23 be somehow dragged into the license amendment
24 proceeding by virtue of the precedent that would be
25 set in this case.

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1 And that is absolutely not the case. The
2 reason, here, that we are proposing that this -- that
3 the alternatives, that other plants should be
4 considered because of the vulnerabilities of this
5 particular plant, has to do not just with those
6 generic safety issues, but with the combined impact of
7 using a vulnerable plant with fuel that has higher
8 consequences associated with an accident.

9 And you are not going to get that in most
10 license amendment cases because they are going to be
11 about using low enriched uranium, which is not going
12 to result in the proposal having a significant
13 environmental impact.

14 Because the -- supposing this amendment
15 request had to do with using more LEU fuel in the
16 Catawba case. We wouldn't be sitting here asking you
17 for an environmental report that evaluates those
18 impacts and alternatives that would mitigate them,
19 because the use of more LEU fuel, by itself, would not
20 exacerbate the risk of operating that plant.

21 It is the increased consequences that come
22 with using plutonium fuel that interact with the
23 potential, the higher potential for an accident, that
24 exists as a result of preexisting conditions, and make
25 the risk posed by this license amendment application

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1 significant.

2 So this is a unique case, this is not
3 going to lead to a precedent that is going to affect
4 every license amendment case.

5 Mr. Repka also argued that by considering
6 this contention the licensing board would put this
7 proceeding way out ahead of the resolution of generic
8 safety issue 191. And this just gets back to the
9 point of the purpose of NEPA is to make sure that
10 significant risk issues associated with the proposal
11 are resolved before the proposal goes ahead.

12 And if that is getting ahead of the agency
13 on a safety issue, then so be it. NEPA is an action
14 forcing statute. It is supposed to ensure that if
15 there are significant issues that are facing an agency
16 and that relate to a decision that it is about to
17 make, that might have an impact on the environment,
18 those issues have to be addressed then, they can't be
19 shunted off to some separate proceeding and say, well
20 we will address that when we get to it.

21 The agency needs to assure itself that it
22 has adequately addressed those issues in the context
23 of the proceeding. I also heard an argument that
24 overall risk is only relevance to initial licensing
25 decisions.

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1 All I can say is that I don't see that as
2 a valid distinction. Overall risk is a NEPA
3 consideration, it is valid in any decision that the
4 NRC makes with respect to the licensing of nuclear
5 facilities, whether it is initial licensing, or
6 license amendments.

7 I think maybe I have addressed that, more
8 or less, with respect to another issue, but I wanted
9 to touch on it. That is all I have.

10 CHAIR YOUNG: Anything further?

11 MR. REPKA: Just a couple of points.
12 First Ms. Curran suggests that it takes us all the way
13 back to the top of this argument on this contention,
14 earlier this morning. And really takes us back to a
15 higher tier in the decision making analysis.

16 She honors the concept of tiering, but
17 then proceeds to ignore it by essentially asking that
18 a range of alternatives be looked at, that is far
19 broader than what reasonably relates to the current
20 proposal.

21 When brought a little bit more back in
22 tune with this particular proposal, by excluding those
23 things outside the control of Duke, and excluding
24 Oconee, she argues that the no-action alternative
25 still needs to be considered.

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1 That, in fact, has been considered in the
2 license amendment application. And, in fact, by
3 looking at the risk attributable to the use of MOX
4 fuel, it seems to me, and maybe I'm admittedly a
5 novice, you are looking at the risk of the no-action
6 alternative, the risk attributable to the change would
7 be the risk avoided by the no-action alternative.

8 Next there is some discussion of NUREG
9 CR6427. Just as a matter of fact Ms. Curran asserts
10 that the ice condenser issue was raised, for the first
11 time, in that NUREG. That is not true.

12 The ice condenser issue was addressed long
13 before NUREG CR6427, it was known, it was specifically
14 addressed in the context of NUREG 1150, which is a
15 risk document that we discussed earlier.

16 In addition I want to point out that there
17 is some argument that DOE has ignored that issue.
18 That, in fact, also is not true. In DOE's record of
19 decision on the plutonium disposition program, the
20 record of decision of January 11th, 2000, in the
21 Federal Register, at 65 FEREg 1608, page 1616, DOE
22 specifically addresses --

23 CHAIR YOUNG: Repeat that, please.

24 MR. REPKA: It is 65 Federal Register
25 1608, at page 1616.

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1 CHAIR YOUNG: Thank you.

2 MR. REPKA: Specifically, and that is
3 January 11th, 2000, specifically addressed comments
4 related to the risk of ice condenser containments.

5 Next I would like to say that in -- I
6 believe throughout there has been a tendency to vastly
7 overstate NUREG CRC 6427. In doing that Ms. Curran is
8 ignoring significant new information. In fact, GSI-
9 189 has progressed substantially. GSI-189 has evolved
10 to a focus on one particular issue, the issue of
11 whether backup power should be provided to the
12 hydrogen igniters and the air return fans, an issue we
13 are familiar with, from the license renewal case.

14 And I would just say, in that context,
15 that whether or not a particular backfit should be
16 required, is cost justified, is at best what I would
17 characterize as a closed question.

18 So I think that the continued
19 characterization of this extreme risk posed by ice
20 condenser containments is what I would characterize as
21 an extreme overstatement.

22 Finally I think Ms. Curran characterized
23 my position on overall risk as overall risk should not
24 be considered in the license amendment case. That is
25 not my position. My position is overall risk

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1 attributable to the license amendment is what you are
2 looking at, you are not looking at overall risk
3 attributable to the license amendment, plus other
4 generic safety issues.

5 CHAIR YOUNG: But can you elaborate on
6 that, in terms of what is overall risk?

7 MR. REPKA: The overall risk --

8 CHAIR YOUNG: When -- I'm not finished
9 with my question. What is overall risk when you are
10 considering a license amendment in the context of a
11 given plant? To what extent does the overall risk
12 include all risk factors at that given plant?

13 MR. REPKA: It includes all risk factors
14 based upon the current licensing basis of the plant.
15 Let's just take that hypothetical 1.6 percent risk
16 increase attributable to the MOX fuel application.

17 That reflects the core damage frequency,
18 the containment performance, all of the assumptions on
19 which the plant is currently operating, plus the
20 addition of MOX fuel.

21 It doesn't address the unknowns of the
22 GSIs, it addresses the overall risks attributable to
23 the current licensing basis of the plant, the
24 licensing basis that the NRC has concluded is
25 sufficient to justify public health and safety, plus

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1 the MOX fuel. So that 1.6 percent public health risk
2 is an overall risk number.

3 CHAIR YOUNG: I think I already asked you
4 the question about if down the line increased safety -
5 - I know I asked Mr. Fernandez, and I think I asked
6 you before. Did you want to --

7 MR. REPKA: You did, and the answer was
8 no.

9 CHAIR YOUNG: Okay.

10 MR. REPKA: I would just add another
11 perspective on that particular question. I think in
12 discussing it with Mr. Fernandez you asked what is the
13 standard of completeness. And at some fear of
14 reopening old wounds, and old discussions, one
15 possible phraseology of what is the standard is
16 5145(c), which is to the extent practicable.

17 And, obviously, at this present time that
18 is based upon the current licensing basis, and the
19 current understanding, and that would not include
20 generic safety issues that are still being analyzed.

21 MR. FERNANDEZ: We have nothing to add,
22 Your Honor.

23 CHAIR YOUNG: Okay.

24 MS. CURRAN: One more, if I may?

25 CHAIR YOUNG: Oh, do you have anything?

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1 MS. CURRAN: We are whittling down.

2 CHAIR YOUNG: Okay, go ahead.

3 MS. CURRAN: First of all, it doesn't seem
4 to us to be exaggerated to be concerned about the
5 results of NUREG CR6427, which characterized the
6 probability of containment failure under certain
7 conditions as one.

8 That is very, very significant, that is
9 important. It is not being alarmist to be very
10 concerned that that be taken into account in an
11 environmental impact statement.

12 And I don't know what was, I believe this
13 was the first place where this finding was written in
14 an NRC sponsored report, and circulated, and in an
15 important public document. I have no idea to what
16 extent that idea was circulating before the year 2000.

17 But it seems to me that the publication of
18 that report is an important turning point in the
19 understanding of the risks of ice condenser
20 containments. And that whether or not the DOE gave
21 some lip service, or some degree of consideration to
22 the differences in ice condenser containments, I doubt
23 that they took that particular finding into
24 consideration.

25 That is all I have.

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1 CHAIR YOUNG: Well, thank you very much.
2 We have taken a little bit longer on some contentions,
3 shorter on others, and that discussion was helpful to
4 me, anyway. And so I appreciate all participants'
5 elaboration there, in taking the time and energy to
6 answer the questions.

7 Is there anything else that we need to
8 address before we go to these scheduling issues, on
9 which I've been making a list?

10 MS. CURRAN: Judge Young, there is one
11 thing I have. And that is I would just like to refer
12 the Board to a citation that will be helpful in
13 considering contention 9.

14 I noticed this at the lunch break. You
15 had asked me what is the Executive Order that relates
16 to consideration of impacts on the global commons.
17 And it is actually discussed in a license amendment
18 request. It is in section 5.3 at page 5-2.

19 CHAIR YOUNG: Okay. Anything else?

20 MR. FERNANDEZ: Just one thing about the
21 Executive Order, Your Honor. I am not familiar with,
22 and I don't know if Ms. Curran is, but when executive
23 orders are issued, usually the Commission either sends
24 a letter to the White House, or there is some
25 documentation on whether the Commission feels that it

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1 is bound by the Executive Order.

2 As an independent regulatory agency, the
3 way that they define federal agency in executive
4 orders is very important to see if the executive
5 order, by its terms, is binding on the agency.

6 And off the top of my head I can't
7 specifically say whether this executive order is
8 considered to be binding upon the Commission, by the
9 Commission itself.

10 And also --

11 CHAIR YOUNG: Also as to how the
12 Commission might apply it?

13 MR. FERNANDEZ: Yes, Your Honor. So there
14 may be something more --

15 CHAIR YOUNG: That might be something to
16 add to our list in terms of things that you could
17 provide, if you --

18 MR. FERNANDEZ: Sure, why not.

19 MR. REPKA: Judge Young, our point in the
20 license application that Ms. Curran cited, is that the
21 Executive Order is something that DOE is addressing in
22 the context of their reviews. It is a DOE obligation.

23 CHAIR YOUNG: Anything else?

24 (No response.)

25 CHAIR YOUNG: Let me read my list, if I

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1 could, and then maybe we can see if it is complete,
2 see if anything is on there that shouldn't be on
3 there. And it seems to me that, and I've just taken
4 them down in the order they've come up.

5 But if we can arrive at some organized way
6 of dealing with these things, that might -- that would
7 be desirable.

8 I noticed that Ms. Olson is not here any
9 more. Does that -- is she coming back?

10 MS. CURRAN: Not today, but she said we
11 should go on without her, and just communicate to her
12 what we decide. And she asked if she could have it in
13 writing, from the Board, if there is some kind of
14 schedule that is set.

15 CHAIR YOUNG: Okay, right, everybody would
16 be served.

17 The reason I asked that, at this point, is
18 after I read through my list, it may be that in terms
19 of scheduling these things, we will know more after we
20 hear whatever you have to say about the Motion for
21 Protective Order that would play into that.

22 And if she is not here now we don't need
23 to put that off until the very end. Is that -- would
24 that be a correct assumption? Okay.

25 The list I've made is the timing for

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1 responses to the late filed contentions that came in
2 on Tuesday, I guess it was, the 2nd. And then the
3 Protective Order hearing, argument on that, and
4 whether, ascertaining whether there are any further
5 proceedings that we need to take with regard to that.

6 Related security concerns, what has
7 happened, where we are in the clearance process. Then
8 the issue of whether section 3.8, Duke's offer, or
9 statement with regard to withdrawal of that. And Ms.
10 Curran's statement about possible amendment of the
11 contention.

12 And how we treat that, off the top of my
13 head, I'm not -- since the pleading requirements are
14 different in NRC, I'm not sure whether this particular
15 situation has come up in an NRC pleading context
16 before. But, anyway, that is one of the things on the
17 list.

18 We already discussed the 30 day deadline
19 for amended contentions, or contentions based on new
20 information. So we don't have to decide anything, but
21 I will try to remember to put that in whatever order
22 comes out of this.

23 The next thing is the provision of further
24 case law with regard to the applicability of the CEQ
25 regulations. I think the parties agreed that Ms.

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1 Curran could provide that, and Mr. Repka wanted to
2 reply, and I would assume the Staff may or may not.
3 But they obviously could, as well.

4 The issue of possible further briefing,
5 brief briefing on the Commission's terrorism rulings.
6 Obviously not bringing into play anything that was
7 security related, but just simply the legal effect of
8 those in this proceeding, is how I understood that
9 issue, since that was something that I think was
10 mentioned for the first time here.

11 And then the -- I have a question mark on
12 NEPA case law, and alternatives. And then additional
13 authorities and sources on the state of the art with
14 regard to the MOX fuel that Judge Elleman brought up.

15 And then finally the one you just
16 mentioned, the -- how the NRC has addressed the
17 Executive Order, addressed or approached the Executive
18 Order that has been mentioned.

19 It seems that since we've got this Motion
20 for Protective Order out there, and there has been a
21 request to hear argument on it today, it strikes me,
22 and I want to hear if anyone disagrees, since Ms.
23 Olson is not asking us to hold off on that, at this
24 point, that at least finding out how much of an issue
25 there is there, whether all parties are in agreement,

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1 whether the security people have signed off on the
2 provisions that are proposed, whether we are talking
3 about something that is very straightforward, and no
4 one has any disputes, and the security clearances are
5 on their way such that we don't have to worry about
6 those, or whether the other extreme, there is some
7 argument or concerns that either the participants, or
8 the security people would have to raise about that.

9 Can you elucidate us on that, the Staff,
10 since you all filed the Motion?

11 MR. FERNANDEZ: I'm sorry, Your Honor, I
12 apologize but I was not listening. So if you could
13 just briefly restate?

14 CHAIR YOUNG: You mean you weren't alert
15 every single minute?

16 MR. FERNANDEZ: I'm so sorry, I was not.
17 As far as I understand it, there is no matters in
18 controversy with regards to the Protective Order and
19 to the Motion before you, except for three things that
20 Petitioner BREDL has raised.

21 And if Ms. Curran is okay, I will talk
22 about those right now.

23 MS. CURRAN: Okay.

24 MR. FERNANDEZ: Is that okay with the
25 Board?

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1 CHAIR YOUNG: Go ahead.

2 MR. FERNANDEZ: The first issue that the
3 Petitioners raised was under the terms of the Order,
4 and the Non-Disclosure Agreement, the parties would
5 protect safeguards, and protected information, in a
6 particular way.

7 For example, if they are filing a set of
8 contentions based on safeguards information, they will
9 probably themselves contain safeguards information.

10 CHAIR YOUNG: I'm sorry, they will what?

11 MR. FERNANDEZ: They will probably,
12 themselves, the contentions, also contain safeguards
13 information.

14 CHAIR YOUNG: Right.

15 MR. FERNANDEZ: So they would follow a
16 particular method of filing those contentions and
17 sending them to the board, and handling how they
18 prepare those contentions.

19 What the Petitioners raised was because of
20 their interest in serving the public, and in giving
21 the public as much information as they can, with
22 regards to their activities in this proceeding, how
23 could they accomplish preparing a different document
24 that would describe, in generic terms, what they've
25 done in this area, without disclosing safeguards

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1 information.

2 In my mind what that compares to is when
3 a licensee prepares, for example, a document that has
4 proprietary information, they also prepare another
5 document that is the non-proprietary version of a
6 document. I think that is what Dianne was talking
7 about.

8 The Staff would not have a problem with
9 the Petitioners engaging in such an exercise, and
10 preparing such a document to distribute among their
11 members. I would, however, caution everybody here
12 that any disclosures that are made, now that you are
13 the holder of protected information, should be made in
14 light of the statutory restrictions on disclosure of
15 safeguards information.

16 And one should very carefully review one's
17 documents before making them publicly available, to
18 assure oneself that those documents do not contain
19 such information.

20 CHAIR YOUNG: Have you talked about a
21 method for checking on things like that, such as
22 circulating things among yourselves, first, on a
23 secure basis? And also just so it will be out there,
24 have you talked about the restrictions on not using
25 email, using certain stand-alone computers, and

1 printers, and types of practical issues like that?

2 MS. CURRAN: Yes.

3 MR. FERNANDEZ: We have talked about that
4 and that is in the Order itself, and in the non-
5 disclosure agreement.

6 What I would say is in the PFS proceeding,
7 for example, the Staff as a matter of courtesy has
8 been reviewing certain documents, not a large volume,
9 because of the limited resources that the information
10 security staff has, when the state of Utah has wanted
11 to make a non-safeguards version of a document.

12 CHAIR YOUNG: I'm sorry, so the Staff has
13 been reviewing -- is it only the Staff, or do all the
14 parties get involved in that?

15 MR. FERNANDEZ: One second.

16 CHAIR YOUNG: Whatever you agree on, I
17 mean, would be --

18 MS. CURRAN: Could I just make a
19 suggestion to cut down on the discussion that we have
20 to have here? That we get together, BREDL, its
21 counsel, and the Staff and Duke, we get together and
22 work out a process for this, and a set of criteria,
23 and what we would like to ask if there is any
24 disagreement, between the parties, on a particular
25 pleading, that we be able to come to the Board for

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1 review, just as in the Protective Order, I think there
2 is a provision that if we can't agree about need-to-
3 know, then we come to you.

4 If we can't agree about what should be
5 able to be disclosed, in a given situation, we come to
6 you. But hopefully we can agree about those things.
7 And to me it makes the most sense for us to just work
8 that out, and then amend the agreement.

9 MR. FERNANDEZ: I would agree, but there
10 is one concern that I have. And, normally, boards
11 have not been injected into the process of marking
12 documents as safeguards. And that process is within
13 the purview of the Staff.

14 And within the regulations there is no
15 appeals process for that final determination by the
16 Staff, that a particular document is considered to be
17 safeguards by the Staff. So at this point in time,
18 without having really thought about it, my initial
19 reaction would be that we would not expect the Board
20 to be involved on the marking of documents as
21 safeguards information or not safeguards information.

22 CHAIR YOUNG: You know, I don't have any
23 particular desire, personally, to be involved in that.
24 I know that there has been some discussion, that I
25 have heard in my office, with the Chief Judge, and the

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1 Deputy Legal Chief Judge, about similar types of
2 issues.

3 I guess, personally, I would encourage you
4 to reach an agreement. And if you agree on
5 everything, and part of the Staff's agreeing would be
6 that the Staff would have consulted with Mr. Stapleton
7 and the security people, if you agree then we don't
8 have to worry about this.

9 So that is the optimum, in my view, of --

10 ADMINISTRATIVE JUDGE BARATTA: May I make
11 a suggestion?

12 CHAIR YOUNG: Sure.

13 ADMINISTRATIVE JUDGE BARATTA: Ms. Curran,
14 you may consider, as a suggestion, that if a dispute
15 arises then you can ask for a second opinion from
16 someone else, on the Staff, who is not involved at all
17 in any way, shape or form, with this particular
18 situation. Think about that as a possible
19 alternative.

20 MS. CURRAN: We get the message that you
21 would rather not be involved and --

22 CHAIR YOUNG: I don't want you to take
23 from this that we are saying we won't be. And
24 certainly, you know, these types of issues are
25 becoming more with us these days.

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1 And so don't take it that we won't do what
2 we need to do with regard to anything that is brought
3 to us. I was speaking, somewhat, humorously. But
4 obviously it is better if the parties can agree.

5 MR. FERNANDEZ: And one thing that I would
6 like to say is that I was not prepared to address
7 these issues today, because I just found out about
8 them today.

9 So in my initial reaction would be that
10 there is a question of whether the Board would even
11 have the authority to make such a determination.

12 CHAIR YOUNG: And that is the thing I was
13 referring to, and I am just not that up on the issue.
14 But since I have heard discussions of it in my office,
15 I don't want to sign off on something where I'm just
16 simply not sure what legal positions the Chief Judge,
17 or the Deputy Chief may have taken with regard to
18 similar issues in other cases.

19 I think there is a desirability of trying
20 to treat these types of issues consistently from one
21 case to the next. And I express no opinion, I just
22 think that it is better to get everything clear, and
23 out on the table, so that something doesn't come back
24 and bite us later, where we haven't --

25 MR. FERNANDEZ: What I would say to that

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1 point is that at least in the Staff's opinion, the
2 documents that were presented to you in the Proposed
3 Order, and in the Non-Disclosure Affidavit, are
4 adequate to address the process which we are about to
5 embark on, which is giving or sharing information with
6 the Petitioner, so that they can frame contentions.

7 In that process we could also take it upon
8 us to prepare a framework on how we would address with
9 these issues. But in the Staff's opinion, nothing in
10 the issues that I'm about to tell you, that the
11 Petitioner has raised with the Staff, are issues that
12 will prevent us from beginning the process of
13 preparing and litigating the contentions regarding
14 security.

15 I don't know if Ms. Curran disagrees with
16 that statement?

17 MS. CURRAN: Yes, there is only one thing,
18 and that would be to broaden the scope of documents
19 that is covered by the agreement, that covers staff
20 standard. That should be easily done.

21 But the other things I agree we could work
22 out separately.

23 MR. FERNANDEZ: What she just mentioned
24 brings me to the second point that Ms. Curran raised,
25 which was what documents are covered by the Draft

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1 Order, and the Non-Disclosure Affidavit.

2 CHAIR YOUNG: Right. We noticed that four
3 was left out, and we didn't know if there were others
4 at the end, in addition.

5 MR. FERNANDEZ: And the protected
6 information is specifically defined as a term in the
7 order. And if we were to subsequently add new
8 documents to it, we would move to amend the order to
9 cover those additional documents that may, or may not,
10 become part of the proceeding.

11 CHAIR YOUNG: What is the status of those,
12 of document number 4, I think it was?

13 MR. FERNANDEZ: Attachment 4?

14 CHAIR YOUNG: Attachment 4, and any others
15 -- I don't know whether there are others in addition
16 to four that are not addressed by the Protective
17 Order. What is the status of those, has the --

18 MR. FERNANDEZ: Under --

19 CHAIR YOUNG: -- been made, will it be
20 made?

21 MR. FERNANDEZ: Under the terms of the
22 Draft Protective Order, the entire document that was
23 submitted by Duke for convenience of all the parties,
24 has been determined to be covered by the Order, by the
25 terms of the Order, as protected information.

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1 CHAIR YOUNG: As safeguards?

2 MR. FERNANDEZ: As protected information
3 under the terms of the Order. What you are asking
4 about is the cover letter that I sent to the Board
5 with the Staff's determination.

6 The Staff has determined that as far as
7 the security document that was submitted by Duke, the
8 cover letter, and attachment 4 did not contain
9 safeguards information, and the entirety of all the
10 other attachments did constitute safeguards
11 information.

12 So with regards to what documents are
13 covered, in the future, other than the ones that are
14 defined right now in the Protective Order, what we
15 would say is that as those documents become necessary
16 to the Petitioner in this case, we would move to amend
17 the Protective Order to cover those documents, once
18 they've identified they need those documents.

19 CHAIR YOUNG: Maybe I'm jumping the gun,
20 but we are talking --

21 MR. REPKA: Yes, Your Honor, all of the
22 individuals that Ms. Curran had proposed to be
23 involved in the -- all the individuals that are listed
24 in the Draft Protective Order have undergone the
25 trustworthiness review to receive safeguards

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1 information.

2 CHAIR YOUNG: And there is nobody else
3 waiting?

4 MR. FERNANDEZ: No.

5 CHAIR YOUNG: And that took care of Mr.
6 Repka?

7 MR. FERNANDEZ: Yes, Mr. Repka, Ms.
8 Cunningham, and Mr. --

9 CHAIR YOUNG: And did we decide, I
10 apologize for not having it right in front of me, but
11 was a decision made about the secretaries?

12 MR. FERNANDEZ: Yes, and they have been
13 approved.

14 MR. REPKA: And just to be clear on that,
15 it is a trustworthiness review for safeguards
16 information, we are not talking L clearances here,
17 this is --

18 CHAIR YOUNG: I meant that as sort of a
19 generic term to use --

20 MR. FERNANDEZ: Although I will say that
21 I think that Ms. Curran and Dr. Lyman have both
22 obtained, or soon will obtain L clearances -- they
23 have obtained them.

24 MS. CURRAN: But that is for the fuel
25 fabrication facility. And we were told that doesn't

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1 apply to this case, although it will probably be
2 fairly simple to expand it. It takes a long time. I
3 think once you've got one, it is probably not that
4 hard to expand the scope.

5 CHAIR YOUNG: Is there any possibility
6 that we would, that additional information would be
7 classified at a higher level?

8 MR. FERNANDEZ: At this point in time the
9 Staff does not foresee the proceeding covering
10 classified information.

11 MS. CURRAN: I just want to raise a point
12 about the scope of the documents that is covered.
13 Once you approve the Protective Order then that will
14 probably result in our getting the security plan
15 within a matter of days, and then a clock will start
16 to run.

17 And Mr. Repka and I talked about a 30 day
18 clock for us and maybe a 21 day clock for responses.
19 But because that clock is going to start to run on us,
20 we want to make sure that the Protective Order covers
21 all the documents that we would need to see, in order
22 to be able to do a meaningful review for purposes of
23 contentions.

24 And I think it would, undoubtedly, include
25 whatever standards the Staff is applying to the

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1 security plan, and also to the exemption request.

2 CHAIR YOUNG: Have you all talked about
3 that among yourselves, in terms of defining which
4 documents?

5 MS. CURRAN: This morning we did.

6 MR. FERNANDEZ: Yes, we briefly talked
7 about it this morning. And the standards that are
8 going to apply to the application are in the
9 regulations. So there is --

10 CHAIR YOUNG: Those are public?

11 MR. FERNANDEZ: Those are public
12 information.

13 MS. CURRAN: There is nothing, there is no
14 safeguards, or proprietary, or classified information
15 in any kind -- for instance, the design basis threat
16 is classified.

17 MR. FERNANDEZ: And the design basis
18 threat orders that were issued to Cat 1 facilities are
19 classified, yes. And the design basis threat under
20 which category 1 facilities are currently operating is
21 classified.

22 However, we do not feel, or the Staff does
23 not feel that that would be a document that is
24 relevance in this proceeding.

25 MR. REPKA: Let me amplify on that. It is

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1 our view, this is a part 50 facility, it is not a
2 category 1 facility. And that is the basis for what
3 Mr. Fernandez is saying, in the design basis threat
4 related to a part 50 nuclear power plant, is
5 safeguards information.

6 ADMINISTRATIVE JUDGE BARATTA: I'm sorry,
7 did you say that the design basis threat for a part 50
8 facility is safeguards?

9 MR. REPKA: Safeguards, correct. Not
10 classified.

11 ADMINISTRATIVE JUDGE ELLEMAN: Mr.
12 Fernandez, you lost me at one point. I think I heard
13 you say the entire submission was identified as
14 protected information, and the attachments were
15 identified as safeguards information.

16 Did I get that right, what you said?

17 MR. FERNANDEZ: The documents which have
18 been determined by the Staff to be safeguards
19 information are attachments 1 through 3, and 5 through
20 7. The cover letter, and attachment 4, the Staff has
21 determined that they do not contain safeguards
22 information.

23 For ease of handling the documents, the
24 Protective Order defines everything as protected
25 information, so that we all know that all of these

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1 documents should be kept together, and safely stored
2 according to the terms of the Protective Order.

3 ADMINISTRATIVE JUDGE ELLEMAN: So there is
4 a storage classification for everything under the
5 Protective Order, and there may be more rigorous
6 storage classifications for those things that are
7 safeguards?

8 MR. FERNANDEZ: No. Everything is
9 protected at the safeguards level.

10 ADMINISTRATIVE JUDGE ELLEMAN: Everything,
11 okay.

12 MR. REPKA: Let me try to clarify that,
13 because everything was submitted by Duke as
14 proprietary information related to security. Some of
15 which, most of it, was determined by the Staff to be
16 safeguards.

17 So it is all being treated as protected
18 information under the agreement, under the Protective
19 Order, for convenience. There is a provision, in the
20 Protective Order, with respect to any portion of the
21 protected information, which is defined as everything
22 in the submittal, and everything that is generated
23 based upon the submittal.

24 If any portion of that is determined to be
25 not safeguards information, there are a few specific

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1 provisions that do not apply. They can be applied,
2 certainly, but they do not apply.

3 But generally speaking the vast majority
4 of the restrictions apply and, in some cases, that
5 means they will be overprotected, if it is not
6 safeguards.

7 CHAIR YOUNG: Let me interject a question
8 here. Is it possible that -- it sounds as though
9 there are a few issues hanging out there about how to
10 handle some things.

11 Is it possible that all the parties can
12 get together and agree, try again to come to an
13 agreement on everything?

14 MR. FERNANDEZ: I think that we all agree,
15 Your Honor. I think that what we may be having a bit
16 of a dispute about is what other documents aside from
17 what is already covered by the Order, may also need to
18 be provided to the Petitioner.

19 But I think we are all eager to get this
20 going, and we all agree on, at least, the protection
21 of the security supplement.

22 CHAIR YOUNG: So am I understanding you to
23 be saying, and all of you, are you in agreement that
24 this could be signed off, it would probably be Monday
25 before we could meet the SECY filing requirements.

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1 And I think that they have provided to us
2 in an electronic --

3 MR. FERNANDEZ: With the caveats that we
4 are working on resolving these issues that Ms. Curran
5 identified.

6 CHAIR YOUNG: Well, that is what I was
7 trying to get to. If it is ready to sign, if
8 everybody is in agreement it is ready to sign, and
9 nobody has any reservations about that, then on
10 Monday, assuming I could get it in electronic form
11 such that we could print it out, sign it, and file it
12 also, and send it in electronic form, then --

13 MR. FERNANDEZ: I think it would be up to
14 Ms. Curran, because I think so.

15 MS. CURRAN: What I would like to do is to
16 talk to Mr. Fernandez, and Mr. Repka, about amending
17 the list of documents that are subject to the Order.

18 This all happened kind of fast, because
19 the Staff was trying to get this to you. We looked at
20 it really quickly on Tuesday, while we were getting
21 ready to go to the airport.

22 And I don't think it would hurt any for us
23 to talk about it, to put the other documents in, maybe
24 to work out this agreement about redacting the
25 pleadings. And we also have a question about how we

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1 make a request to downgrade the classification, or
2 whatever you call it.

3 Just to work all that stuff out, send it
4 to you some time early next week, and have it ready to
5 go. It doesn't seem like there is any significant
6 dispute here. There are just a few things that need
7 to get ironed out.

8 And I would rather have a little more time
9 to do that.

10 ADMINISTRATIVE JUDGE BARATTA: Ms. Curran
11 suggested that we have this early next week, can we
12 come to an agreement that this will happen early next
13 week, that we will have something in our hands by --

14 MS. CURRAN: Close of business Tuesday?

15 CHAIR YOUNG: I think the next thing we
16 need to do is start talking about specific dates for
17 that, and all the other things. That is definitely
18 the next thing we need to go into.

19 We would not be able, in any event, to do
20 anything until Monday, because our plan at this point
21 is to drive back to Raleigh with Judge Elleman so that
22 we will have some time to confer with each other, and
23 then we won't be getting back into the office until
24 late tomorrow afternoon.

25 We could all get our -- I suggest -- here

1 is what I suggest. Let's take a ten minute break. We
2 have to be out of here in 45 minutes. Get our
3 calendars. If we can come to some agreement on dates
4 for these various things, at this point, that would be
5 great.

6 Another alternative would be to set a
7 telephone conference at which time the parties will
8 have talked to each other, and be ready with the
9 Protective Order, be ready with some dates to propose
10 to us, or alternatives. And we can go forward from
11 that point, and we could do that early next week, as
12 sort of an alternative to presenting just the
13 Protective Order, but giving us the whole collection
14 of things, so that the parties have had a chance to
15 say how it works.

16 It makes sense to me that to the extent
17 possible, rather than have a whole bunch of dates for
18 all these different things, that we try to simplify it
19 as much as possible, and get early dates for several
20 things to occur, and follow-up dates for any necessary
21 responses, and one thing that just occurred to me, as
22 well, is Ms. Curran has requested that we consider the
23 late filed December 2nd contentions, along with the
24 contentions we just heard argument on the last two
25 days.

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1 And I don't know whether the parties are in
2 agreement to that. I have a suspicion you may not be.
3 And I don't know whether you have discussed how you
4 might approach any statement of your positions on
5 that.

6 Go ahead, Mr. Repka, you look like you
7 have something.

8 MR. REPKA: On that particular question of
9 whether we should wait on the second set of
10 contentions, to deal with the first, we disagree with
11 that, we object to that.

12 We think that we need to get going in this
13 proceeding, so we need to deal with the first set of
14 contentions, and if necessary the second in parallel.

15 And I would make, in terms of schedule,
16 schedule is important in this proceeding, because
17 there is a lot that must happen, that is dependent, in
18 part, upon the schedule of this proceeding.

19 CHAIR YOUNG: Right.

20 MR. REPKA: So schedule is important. And
21 with respect to security, I just want to add the
22 observation that I think the time line of when we are
23 going to do this next iteration of the Protective
24 Order is crucial.

25 We've now gone to the Board twice with

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1 Protective Orders that we thought, each time, we were
2 all in agreement.

3 CHAIR YOUNG: You did. But in fact you
4 were not in agreement the last time, which caused
5 further delay. And we are not proposing that this be
6 delayed in any way, shape, or form.

7 But since I don't think that it would be
8 possible to get it signed, and filed with SECY any
9 earlier than Monday, there is not going to be a
10 significant delay to give you all a chance to talk
11 with each other, between now and Monday or Tuesday,
12 and have your ducks more in a row.

13 As a group I think that would contribute
14 greatly to the efficiency and expeditiousness with
15 which we can handle this proceeding.

16 MS. CURRAN: Your Honor, I would just like
17 to add that in our view it will expedite things if we
18 get clarity about what documents are relevance for
19 purposes of filing contentions.

20 Because if we wind up kind of floundering
21 because we didn't get all the documents we need, it is
22 just going to add more time to the period for filing
23 contentions. So hopefully just spending a little bit
24 of time working this out will expedite things.

25 And I would also like to say that I agree

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1 with Judge Young's suggestion that we should work out
2 a schedule for these things that you have listed here.

3 One thing that really would matter a lot
4 to us is when a transcript of the oral argument
5 becomes available on ADAMS, or whether we could borrow
6 one from the licensing board, because we can't afford
7 to buy one.

8 And I think we are going to need to read
9 the transcript in order to answer, at least, some of
10 these questions.

11 CHAIR YOUNG: If we didn't order overnight
12 transcript it may still be possible -- did we? Okay,
13 we probably, I don't know whether it would be possible
14 to change it at this point.

15 MS. CURRAN: Well, because we can't afford
16 to buy it we need to wait until it gets to the ADAMS
17 system, or borrow it from the licensing board, or from
18 one of the parties.

19 So that is all I'm saying, is we would be
20 glad to cooperate in terms of finding a way to read
21 it. But I think that is going to be necessary to do
22 some of these things, so --

23 CHAIR YOUNG: Why don't all of you get
24 together, and spend as much time as you need to spend,
25 I don't know when you are getting back, so that you

1 could do it tomorrow. But certainly by Monday, and
2 hash all these things out, and present us Tuesday
3 morning with a list of things that you are in
4 agreement about, and things that you are not in
5 agreement about.

6 And we can set up a telephone conference
7 on Tuesday, assuming everyone is available Tuesday
8 morning. Let's take a break, and everyone look at
9 their calendars and see when we can get back together,
10 when is the soonest time that we can all get back
11 together on the telephone to hear anything that you
12 have to say, be it we are all on agreement, and this
13 is it, and you could send us something in writing,
14 saying we are all in agreement, and this is it, and
15 there are no disagreements that you need to work out.

16 Or we are all in agreement in X, Y, Z, and
17 these things are the things that we are in
18 disagreement about, and these are the parties position
19 on the timing for these various things on this lists.

20 MS. UTTAL: My only problem is they
21 confiscated my calendar when I walked in.

22 (Whereupon, the above-entitled matter
23 went off the record at 4:20 p.m. and
24 went back on the record at 4:35 p.m.)

25 CHAIR YOUNG: Would it be possible for you

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1 all to meet, get us something by Tuesday morning, and
2 then get together on the phone Wednesday morning?

3 MR. REPKA: Yes.

4 CHAIR YOUNG: Good, excellent.

5 MS. UTTAL: Yes, for the Staff.

6 MR. REPKA: And just to clarify what that
7 is, I think that would be -- we have gone a long way
8 towards agreeing on the schedules, we still have a few
9 things. But it would be the schedule as well as the
10 Protective Order.

11 CHAIR YOUNG: Right. And you want me to
12 go over them again?

13 MR. REPKA: I don't think so. I think we,
14 no I just wanted to clarify that it would be both
15 components.

16 CHAIR YOUNG: If you all can come together
17 on dates for all these things that we talked about,
18 that would be excellent.

19 MR. REPKA: I agree, it would be
20 excellent.

21 CHAIR YOUNG: And you are going to try
22 really, really hard.

23 MR. REPKA: And when we get on the phone
24 on Wednesday we won't find out that somebody doesn't
25 agree, hopefully.

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1 CHAIR YOUNG: Ask every question to
2 foreclose the possibility of any remaining ambiguity,
3 or --

4 MR. REPKA: You just never know.

5 CHAIR YOUNG: Undisclosed disagreements.

6 ADMINISTRATIVE JUDGE BARATTA: One word of
7 caution on the security thing, and I'm not trying to
8 postpone it, but just make sure that you build in some
9 time to make sure that you get physical facilities for
10 whatever is required. It may take a little bit of
11 time to do that, and just be very careful of that.
12 That has to be built into the schedule. And we just
13 don't want to have that situation arise.

14 CHAIR YOUNG: We are going to have to make
15 sure, with regard to Judge Elleman, that we figure out
16 ways to handle his participation in our communications
17 with each other.

18 MR. REPKA: Yes, and just to make sure, I
19 think you are referring to a couple of things. Safes
20 is obviously one. The communication issue is another,
21 email and telephone being problematic, printers and
22 computers.

23 ADMINISTRATIVE JUDGE BARATTA: I thought
24 the package that was provided by the Staff was an
25 excellent guide. And I would assume that if there

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1 were any questions about any of the requirements, that
2 they would be more than happy to arrange for you to
3 get those questions answered.

4 MR. FERNANDEZ: And I also would add that
5 once all this gets going the Staff, since some of the
6 parties that would be receiving safeguards information
7 are parties that normally do not handle safeguards
8 information, I'm assuming that the information
9 security staff will probably want to inspect the way
10 that those materials are being stored, and make sure
11 that everybody is complying.

12 CHAIR YOUNG: Are you talking about both
13 of the parties?

14 MR. FERNANDEZ: Any of the parties are
15 actually subject to making sure that they are
16 protecting safeguards information adequately.

17 CHAIR YOUNG: So when you get together
18 with everybody else you will have checked on that and
19 be able to tell your colleagues, the other
20 participants, what the situation is there.

21 MR. FERNANDEZ: Yes. And even if Judge
22 Elleman wants some guidance on how to store documents
23 at his home, or wherever he will be storing them, I'm
24 sure the physical security staff will be willing to do
25 that.

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1 ADMINISTRATIVE JUDGE ELLEMAN: I would
2 very much appreciate that. I can make arrangements,
3 and have established that the university has
4 safeguards storing capability on an initial basis,
5 until I would get set up. So I would be able to
6 handle documents.

7 MR. FERNANDEZ: And I'm assuming that all
8 could be handled internally by the Board on the
9 physical security staff. I don't anticipate that we
10 would be involved with that.

11 CHAIR YOUNG: The other issue with us is
12 that we can't talk about it over the phone, and we
13 can't email about things, so arrangements need to be
14 made for however we are going to handle that.

15 We've looked, to some degree, whether
16 there are secure phones, but haven't found any at this
17 point.

18 MR. FERNANDEZ: They are very expensive,
19 Your Honor.

20 ADMINISTRATIVE JUDGE BARATTA: Not only
21 that, but you have to treat them as classified. I
22 just wanted to make that caution.

23 MR. FERNANDEZ: Thank you, Your Honor.

24 CHAIR YOUNG: So Wednesday morning at 10
25 o'clock telephone conference. Mr. Repka, you said you

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1 didn't need to have me go over the list again. Does
2 anybody else, or does everyone have it down?

3 (No response.)

4 CHAIR YOUNG: Great, all right. And Ms.
5 Valloch, can we see about expediting the transcript so
6 that as soon as we get it we can immediately take it
7 over and get it put on ADAMS?

8 MS. CURRAN: To you.

9 CHAIR YOUNG: And we probably better
10 switch, in this proceeding, to overnight transcripts,

11 like we were doing in one of the others, just because
12 of the time constraints.

13 Anything else? Ms. Uttal?

14 MS. UTTAL: The Staff has nothing.

15 MR. REPKA: Nothing for Duke.

16 CHAIR YOUNG: Then we will talk Wednesday
17 morning at 10 o'clock. I will send out a short little
18 order with the call-in instructions, and so forth, on
19 Monday or Tuesday. And we look forward to hearing how
20 you have worked out all these thorny issues by
21 agreement.

22 MR. REPKA: And I do have one clarifying
23 thing. We will submit something, the collective we,
24 on Tuesday.

25 CHAIR YOUNG: Thank you.

1 MR. REPKA: And I assume that we can do
2 that via an email, as opposed to some sort of formal
3 pleading?

4 CHAIR YOUNG: Yes. Actually, that reminds
5 me, I will try to get the Order done Monday,
6 certainly. Is there anything else?

7 (No response.)

8 CHAIR YOUNG: So Tuesday morning, 9 a.m.
9 to file the materials.

10 MS. CURRAN: We will be talking Monday, so
11 it shouldn't be a problem.

12 MR. REPKA: Why don't we say mid-day?

13 CHAIR YOUNG: Okay, noon.

14 MR. REPKA: Yes.

15 CHAIR YOUNG: Wednesday at 10 o'clock
16 conference call. If there is nothing else today it
17 has been a pleasure spending these two days with
18 everyone. We have covered a lot of ground, and
19 managed to make it intact.

20 And we look forward to talking with you
21 again on Tuesday. Obviously I will serve Ms. Olson
22 with the order and she can participate -- there would
23 be some things in it that she might have an interest
24 in, so she probably needs to -- would you mind giving
25 her a call?

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1 MS. CURRAN: I will call her.

2 CHAIR YOUNG: Okay. All right, then,
3 unless there is anything else, that will conclude the
4 proceedings for today. Thank you all.

5 (Whereupon, at 4:45 p.m., the above-
6 entitled matter was concluded.)

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CERTIFICATE

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

Name of Proceeding: Duke Energy Corporation

Catawba Nuclear Station

Units 1 and 2

Oral Arguments

Docket Number: 50-413-OLA and 50-414-OLA

Location: Charlotte, NC

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