

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION



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Millstone Nuclear Power Plant, Unit 3

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12 ALSO PRESENT:

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14 NEIL SHEEHAN, NRC/OPA:RGN-I/FO

15 VICTOR NERSES, NRR

16 LEE DEWEY, ESQ., ASLBP

17 MICHELLE MCKOWN, ESQ., ASLBP

18 PAUL GUNTHER, NIRS

19 BRANDON PLAPP, Office of Representative

20 . Ed Markey

21 RICH BICKERS, MCGRAW HILL

22 DAVID LOCHBAUM, Union of Concerned Scientists

23 PETE REYNOLDS, CCAM

24 JOE BESADE, CCAM

25 PAUL SCHOINIÈRE, The Day Newspaper

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

(9:32 a.m.)

1
2
3 CHAIRMAN BECHOEFER: I would like the
4 various participants, for the reporter's sake, to
5 identify themselves, but first I'll identify the
6 Board. Most of you know who we are, but my name is
7 Charles Bechoefer. I'm Chairman of the Board.

8 The other Board members are Dr. Charles
9 Kelber.

10 JUDGE KELBER: Good morning.

11 PARTICIPANTS: Good morning.

12 CHAIRMAN BECHOEFER: Also present with me
13 two attorneys from the Licensing Board panel, Lee
14 Dewey, the chief counsel, who's an attorney with our
15 panel and will be doing some work on this case or has
16 done some work on this case.

17 Would the parties and others whom I don't
18 recognize from lists that we had written down, would
19 people identify themselves for the record?

20 MS. BURTON: Good morning, Judge Bechoefer
21 and Judge Kelber and Judge Cole. This is Nancy Burton
22 for the Intervenors.

23 MR. REPKA: Yes, and this is David Repka
24 from Winston & Strawn, counsel for Dominion Nuclear
25 Connecticut, and with me is my colleague, Donald

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1 Ferraro.

2 MR. BICKERS: This is Rich Bickers with
3 McGraw Hill.

4 MS. HODGDON: This is Ann Hodgdon for the
5 NRC staff, and with me is Norman St. Armour, who is
6 co-counsel here, and Victor Nerses, who is the project
7 manager for Millstone 3.

8 MS. SCRENCI: This is Diane Screnci. I'm
9 the Region 1 Public Affairs Officer and with me on the
10 phone is Neil Sheehan, the other Regional and Public
11 Affairs Officer.

12 MR. REYNOLDS: This is Pete Reynolds. I'm
13 from Waterford, Connecticut. I'm a concerned citizen,
14 also a member of Connecticut Coalition Against
15 Millstone.

16 MR. LOCHBAUM: David Lochbaum, with the
17 Union of Concerned Scientists.

18 MR. GUNTHER: Paul Gunther, Nuclear
19 Information and Resource Service.

20 MR. PLAPP: Brandon Plapp, office of
21 Congressman Edward Markey.

22 MS. BURTON: Judge Bechoefer, this is
23 Nancy Burton.

24 I think we're expecting a couple of more
25 call-ins. Somebody did call me and say they were

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1 having trouble getting through. There may have been
2 some confusion about the password number because it
3 had a number sign at the end that might have appeared
4 to have been a typo. I'm not sure, but we are
5 definitely expecting to hear from the Executive
6 director of STAR Foundation, which is one of the
7 member organizations of the Long Island Coalition
8 Against Millstone, a former Department of Energy
9 official. He is due to call in and a number of
10 others.

11 So I don't know if there's any problem
12 with making connections, if there were enough lines
13 and so forth.

14 CHAIRMAN BECHOEFER: We actually have 12
15 lines available. I don't know if we're -- we're only
16 up to nine, I guess, so there's room for a couple of
17 people.

18 MS. BURTON: Okay.

19 PARTICIPANT: Is Mr. Richter there?

20 CHAIRMAN BECHOEFER: Hello.

21 PARTICIPANT: There's a conference call
22 going on right now with the NRC.

23 CHAIRMAN BECHOEFER: That's correct.

24 PARTICIPANT: In relation to Millstone
25 Unit 3. And the number to call is (301) 231-5539.

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1 The pass code -- sorry. We're getting ready to start
2 now if he would like to join in.

3 MR. SCHOINIÈRE: Can people hear me?

4 CHAIRMAN BECHOEFER: Yes.

5 MR. SCHOINIÈRE: For some reason when I
6 first called in the voice wasn't working. It's Paul
7 Schoiniere from the Day Newspaper, New London,
8 Connecticut. I'll be listening in.

9 CHAIRMAN BECHOEFER: How do you spell
10 that?

11 MR. SCHOINIÈRE: S-c-h-o-i-n-i-e-r-e.

12 CHAIRMAN BECHOEFER: Thank you.

13 Ms. Burton, were there others, one or two
14 more?

15 MS. BURTON: Well, yes. I am anticipating
16 Mr. Bob Alvarez from Thora Foundation to call in.
17 Also, Mr. Joseph Besade, a member of the Connecticut
18 Coalition Against Millstone. He is the gentleman who
19 called me at about quarter after nine to tell me that
20 after two tries he was unsuccessful to come in, but he
21 may have been trying to call to early. I'm not sure.

22 MR. REYNOLDS: Possibly the First
23 Selectman of Waterford.

24 MS. BURTON: That would be Paul Eccard?

25 MR. REYNOLDS: Paul Eccard, yes. He's in

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1 a conference of his own right now, but he's going to
2 try.

3 CHAIRMAN BECHOEFER: Well, as I said, we
4 only have 12 lines, and I don't know whether we have
5 any leftovers or not. Mr. Besade has been in a
6 significant portion of the case that CCAM has put on,
7 and so that we would expect that he would wish to
8 participate.

9 So do you think we should start?

10 MR. REYNOLDS: I'm calling Mr. Besade now
11 on another line if I can get him.

12 MS. BURTON: If we could just wait for
13 just one more moment, Judge Bechoefer.

14 MR. REYNOLDS: Yeah, his line is busy so
15 he's still trying. This won't take up to -- I called
16 him and told him I got through and try again. So he's
17 just run into a busy.

18 CHAIRMAN BECHOEFER: I just want to make
19 sure. We do have a court reporter on line; is that
20 correct?

21 THE REPORTER: Yeah, I'm here.

22 CHAIRMAN BECHOEFER: Okay, good.

23 MR. REYNOLDS: Mr. Bechoefer, if you could
24 identify the court reporter, I think that would help
25 us contact them to get a copy of this transcript.

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1 THE REPORTER: Hold on a minute.

2 (Whereupon, the foregoing matter went off
3 the record at 9:39 a.m. and went back on
4 the record at 9:39 a.m.)

5 CHAIRMAN BECHOEFER: I would guess by the
6 way that the transcript will eventually be available
7 on the ADAMS, through the ADAMS system. The
8 Commission has and most of you have tried to use, I
9 think -- how long that will take I can't tell you.

10 Okay. I'm told that it will take five
11 days beyond the time that the Board receives its hard
12 copies of the transcript for it to be put into ADAMS,
13 but eventually it should be there, and I assume most
14 of you at least are aware of what the ADAMS system is,
15 how you use it, et cetera. But if not, there are help
16 lines.

17 MR. REYNOLDS: Try again.

18 CHAIRMAN BECHOEFER: Okay. Is Mr. Besade
19 on yet?

20 MR. REYNOLDS: We're trying to wait on
21 him.

22 We're trying to wait on you. Try it
23 again. There are 12 lines available. There's still
24 a couple available. Don't hit the number sign.

25 (Whereupon, the foregoing matter went off

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1 the record at 9:41 a.m. and went back on
2 the record at 9:47 a.m.)

3 CHAIRMAN BECHOEFER: I think since we got
4 the staff's motion to hold the proceeding in abeyance
5 because of an OI investigation, that's what we should
6 talk about first, and there's a policy statement which
7 is some years old. It was published on September
8 13th, 1984.

9 As far as I can figure out it's still in
10 effect, which indicates that we should defer certain
11 activities pending an OI investigation.

12 Ms. Hodgdon, is that policy statement
13 still good law? It's some years old, but I can't find
14 that it's ever been changed.

15 MS. HODGDON: I think it applies
16 specifically only to immediate effective orders under
17 2.202. However, to be extent that it might be
18 applicable to -- to the extent that this is similar,
19 it would be --

20 CHAIRMAN BECHOEFER: This isn't the one on
21 the meeting effectiveness. This is the one on --
22 talks about the NRC's need to protect investigative
23 materials from premature public disclosure.

24 MS. HODGDON: Well, I'm afraid that I
25 didn't address that in this motion. Actually, I

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1 didn't write it, but in any event, I don't know the
2 answer to that.

3 CHAIRMAN BECHOEFER: You cite it in the
4 case you cited, and that --

5 MS. HODGDON: We did cite it? We did not
6 cite.

7 CHAIRMAN BECHOEFER: You cited the case.

8 MS. HODGDON: Oh, okay.

9 CHAIRMAN BECHOEFER: A case cited --

10 MS. HODGDON: Vogtel. Yes?

11 CHAIRMAN BECHOEFER: The Vogtel case.

12 MS. HODGDON: The Vogtel case, yes, we're
13 familiar with that case.

14 CHAIRMAN BECHOEFER: And that relies on
15 this policy statements and that was a couple of years
16 ago. As far as I know it's still in effect. Am I not
17 correct?

18 MS. HODGDON: The policy statement is
19 still in effect. I thought you were talking about the
20 other policy statement. I apologize. The --

21 CHAIRMAN BECHOEFER: Prior
22 investigative --

23 MS. HODGDON: Effective order. Yes, that
24 policy statement is still in effect as well, and it is
25 recited in the case we cited, which is Georgia Power

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1 Company, Vogtel Electric Generating Plants, 41 NRC
2 404, 1995.

3 CHAIRMAN BECHOEFER: I might say the
4 policy statements seems to authorize boards to -- if
5 it becomes necessary to hold an in camera hearing
6 session, where only the Board and OI and the staff
7 would be present to consider how long the rule was
8 staying in effect or what would be the result of --

9 MS. HODGDON: That's correct.

10 CHAIRMAN BECHOEFER: Yeah. I don't think
11 we're at that stage yet obviously. I might ask when
12 you indicate that you're -- oh, by the way, I've been
13 told now we have 16 lines available. So if any
14 further people are trying to get in, it will be okay
15 for them.

16 MS. BURTON: I'm sorry. May I pass a
17 message over to one of the gentlemen, Mr. Reynolds,
18 who seems to have a line free. If he could please
19 perhaps telephone one of our missing people at STAR
20 Foundation.

21 MR. REYNOLDS: What's the number?

22 MS. BURTON: (631) 324-0655.

23 MR. REYNOLDS: 0655. Okay. I'll do that.

24 MS. BURTON: Thank you.

25 CHAIRMAN BECHOEFER: Okay. In any event,

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1 to continue, if that -- assuming that policy statement
2 is still in effect, it would indicate that we should
3 defer for at least some time any further activities
4 that might impinge upon OI's investigation.

5 Ms. Burton, do you have any different
6 views?

7 MS. BURTON: Thank you. Nancy Burton.

8 I have a -- I do have reference to the
9 Georgia Power Company case you're referring to, but I
10 read it a little bit differently, and I'm quoting
11 here. "It is not unusual in our practice for an
12 adjudicatory proceeding in an OI investigation on the
13 same general subject matter to proceed simultaneously,
14 even where issues may overlap.

15 "This allows the NRC to use all of its
16 tools for carrying out its broad responsibilities to
17 protect public health and safety."

18 Going on in that decision, there is a
19 discussion of the level of "substantial prejudice"
20 which is required to be shown to enjoin a proceeding
21 such as ours.

22 So being aware of the policy, nevertheless
23 that policy seems to afford a board, such as this
24 Board, discretion to consider whether the public
25 interest issues of health and safety in a particular

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1 case would override concerns that are being raised now
2 by the staff.

3 And I would suggest that the very brief
4 conclusory affidavit that we've been provided with by
5 Mr. Letts, five paragraphs in length, only makes in
6 the third paragraph what we see as a vague and
7 conclusory statement that "continuing the NRC
8 adjudicatory proceeding at this time could interfere
9 with or jeopardize the integrity of OI's ongoing
10 investigation."

11 I'll continue.

12 There are no facts in this affidavit that
13 explain that. It's just a pure conclusion, and in
14 another case, with the Oncology case that is cited in
15 Georgia Power, there is a discussion of the factual
16 steps that specificity that should be set forth in an
17 affidavit to establish the substantial prejudice or
18 potential impairment to an OI investigation.

19 We just don't have that here. And there's
20 also, of course, the issue of safety and what issues
21 really are in overlap here. I don't believe that the
22 OI is necessarily going to be looking at the same
23 issues as we are in the adjudicatory proceeding.

24 We're in this proceeding directly
25 concerned with the issues of public health and safety.

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1 The investigation is concerned with specific acts of
2 conduct on the part of the licensee, potentially going
3 back a long period of time, but not directly presently
4 implicating safety and the issues of the Unit 3 spent
5 fuel pool.

6 So our position would be that a policy
7 statement would not be properly applied here to -- in
8 support of granting the staff's motion.

9 MS. HODGDON: Ann Hodgdon.

10 Ms. Burton has not identified the safety
11 issue that she believes to be involved here, and the
12 staff is somewhat -- doesn't understand it either in
13 the Board's order on the motion for reconsideration.
14 And so perhaps if we could hear from Ms. Burton about
15 what she regards the safety issue to be here, we would
16 be better able to address that.

17 MS. BURTON: Judge Bechoefer.

18 CHAIRMAN BECHOEFER: Yes.

19 MS. BURTON: I just wonder in these
20 proceedings, we do have on hand Mr. Lochbaum, who is -
21 - has a great deal of technical expertise. I would
22 defer to him on any technical issue if he may be
23 permitted to speak. I could give you a general
24 statement, but it might be more useful to hear from
25 him directly.

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1 MS. HODGDON: Excuse me, Judge Bechoefer.
2 I don't believe -- Ann Hodgdon -- I don't believe that
3 we should have statements from persons who might be
4 witnesses at this pre-hearing conference. I think
5 it's a very bad practice.

6 Ms. Burton should be able to identify what
7 she believes the health and safety issue raised here
8 is.

9 MS. BURTON: Well, if I may, I thought it
10 was very self-evident that we were raising an issue in
11 Contention 4 as to the unnecessary escalation of
12 serious consequences from the utility's persistent
13 failure to adhere to administrative controls at the
14 Millstone station, leading to increased probability of
15 a criticality accident at the Unit 3 spent fuel pool.
16 I thought that that had been pretty self-evident
17 throughout these proceedings.

18 MS. HODGDON: And perhaps if the
19 connection between that and the unaccounted for rods
20 at Millstone 1 is identified, is that a criticality
21 concern?

22 MS. BURTON: It would seem to be that in
23 light of the decision of the Board, that's exactly
24 what is contemplated.

25 MS. HODGDON: Perhaps Ms. Burton could

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1 point us to somewhere in the Board's decision where
2 that determination is made.

3 MS. BURTON: Judge Bechoefer.

4 CHAIRMAN BECHOEFER: Yes.

5 MS. BURTON: Did you wish for us to engage
6 in this kind of back-and-forth discussion with staff
7 or --

8 JUDGE KELBER: This is Judge Kelber.

9 May I interject a question to Ms. Burton,
10 maybe a little bit?

11 Is there a -- in your mind or are you
12 contending that there's a current safety issue or does
13 this issue arise only at the time of the fuel
14 reloading and disposition of further spent fuel into
15 the spent fuel pool?

16 MS. BURTON: Well, what we understand is
17 from information that has been disclosed to the public
18 generally at this point, which is that the licensee,
19 Northeast Utilities and its successor, Dominion, both
20 are unable to account for two highly irradiated spent
21 fuel rods and have been for more than 20 years, and
22 frankly, until they're able to account for them, we do
23 believe that the health and safety of the public are
24 directly implicated.

25 JUDGE KELBER: Ms. Burton, let's talk

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1 about Contention 4. Let's focus on Contention 4.

2 MS. BURTON: Yes, sir. I was. I'm aware
3 that -- excuse me?

4 JUDGE KELBER: Do you see a current safety
5 issue regarding the management of the spent fuel pool
6 at Millstone Unit 3 or does occur only at the next
7 fueling cycle?

8 MS. BURTON: I understand from the
9 licensee's submissions that after the license
10 amendment was issued, by which time the new racks had
11 already been installed, that there was a movement of
12 fuel during most recent fueling outage into the new
13 areas at the pool.

14 It is our contention that that movement of
15 fuel definitely implicates health and safety issues,
16 and that those issues are implicated in the very same
17 issues that go back to this failure to account for the
18 missing rods from Unit 1.

19 JUDGE KELBER: Do you mean that the spent
20 fuel pool is pulled out?

21 MS. BURTON: Pardon me? The spent fuel
22 pool is?

23 JUDGE KELBER: Do you mean that -- in
24 accordance with your Contention 4, do you mean to
25 imply that you think the spent fuel pool is now critical?

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1 MS. BURTON: It's now more apt to be
2 critical.

3 JUDGE KELBER: I don't understand. Is it
4 critical or is it not critical?

5 MS. BURTON: At the present time?

6 I'm not sure I understand your question.

7 JUDGE KELBER: Well, it's a simple one.
8 A system containing six elements is either critical or
9 it's not critical.

10 MS. BURTON: Well, sitting where I am, I
11 wouldn't have any direct knowledge, but the legal
12 issues and factual issues that we raise in the
13 contention are that the risk to the public health and
14 safety are presently escalated by virtue of the
15 movement of fuel into the new configuration.

16 JUDGE KELBER: Okay. Now, now we're
17 narrowing it down. Now, are these risks apparent in
18 the next refueling cycle? In other words, the system
19 is there, and what happens -- what happens to change
20 it until the next refueling cycle?

21 MS. BURTON: I'm sorry. I think I missed
22 a word in there. Would you mind repeating it, Judge
23 Kelber?

24 JUDGE KELBER: Do the risks change between
25 now and the next refueling cycle?

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1 MS. BURTON: We believe that with the
2 implementation of the new administrative controls
3 that, yes, that would be the case.

4 JUDGE KELBER: Does the risk change even
5 though there's no movement in or out of the spent fuel
6 pool?

7 The risks do change even though there's no
8 movement. What I'm getting at, Ms. Burton, is I think
9 we have -- I think we have sometimes -- the next
10 refueling cycle is at least 15 months away roughly.

11 MS. BURTON: I'm sorry. How many?

12 JUDGE KELBER: I think it's roughly 15
13 months. I think they're on an 18 month cycle.

14 MS. HODGDON: That's correct.

15 JUDGE KELBER: So I think they have about
16 15 months before the next refueling cycle. So I think
17 we have some time here to make a decision.

18 MS. BURTON: Well, I think our position is
19 that the public health and safety are at greater risk
20 now that there has been a fuel movement and that in
21 order to meet --

22 JUDGE KELBER: That's the contention, the
23 one you -- Contention 4.

24 MS. BURTON: That's what I'm talking
25 about.

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1 JUDGE KELBER: Is that a different
2 contention?

3 I thought Contention 4 applies to
4 criticality that might occur during a fuel reloading.

5 CHAIRMAN BECHOEFER: No, as a result of a
6 --

7 JUDGE KELBER: Doesn't this refer to
8 criticality that occurs during a fuel reloading?

9 MS. BURTON: I don't think it's limited to
10 fuel reloading.

11 JUDGE KELBER: It can occur at any time?

12 MS. BURTON: That's right.

13 JUDGE KELBER: Okay.

14 MS. BURTON: And also, of course, I think
15 your question assumes that there has been proper
16 adherence to the new administrative controls. We
17 don't really have any direct evidence of that.

18 JUDGE KELBER: All I'm assuming is that
19 the spent fuel pool is not critical right now.

20 MS. BURTON: Well, you may do that if you
21 wish.

22 CHAIRMAN BECHOEFER: Well, no. We'd hear
23 about it if it --

24 JUDGE KELBER: I think we would know if it
25 were --

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1 CHAIRMAN BECHOEFER: That is true.

2 Well, in any event, what I was trying to
3 figure out was whether deferral pending the OI
4 investigation wouldn't be appropriate, given all the
5 circumstances.

6 Now, the other question I would like to
7 ask is if the OI investigation should produce some
8 information that would result in a referral to the
9 Department of Justice for possible criminal action,
10 would the effect of the deferral of this proceeding
11 extend until Department of Justice either took
12 jurisdiction or declined to take any action?

13 Because that has happened in a bunch of
14 cases.

15 MS. HODGDON: The answer to that is yes.

16 CHAIRMAN BECHOEFER: Is that Ms. Hodgdon?

17 MS. HODGDON: Yes. It's Ms. Hodgdon.

18 MR. REPKA: Judge Bechoefer, this is Dave
19 Repka.

20 I would like to be heard on that question.

21 CHAIRMAN BECHOEFER: Of course.

22 MR. REPKA: A number of things. First, on
23 the issue of the staff's motion that the proceeding be
24 held in abeyance, we support that motion, probably for
25 other reasons. As you know in our filing on Tuesday,

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1 we asked that the proceeding be held in abeyance
2 pending the resolution of the Unit 1 investigation
3 being conducted by Dominion and Northeast Utilities.

4 I think that with respect -- I agree with
5 Ms. Burton that the substance of the OI investigation
6 is not really an issue in this case.

7 This contention is a Unit 3 contention
8 related to a specific amendment related to the new
9 regional configuration of the spent fuel pool and
10 whether that produces added complexities and added
11 administrative controls that would lead to a
12 criticality event. I think the substance of the
13 investigation related to issues in the past, issues
14 that aren't necessarily criticality related.

15 The outcome of that investigation is not
16 germane to this particular contention. We certainly
17 respect Mr. Letts and the staff's view that the
18 proceeding be held up while they conduct their
19 investigation so that the proceeding doesn't in any
20 way interfere with the progress of that investigation.

21 Dominion Nuclear cooperates with the
22 government in their investigation, but that's not the
23 same as saying we agree that the substance of that
24 investigation is germane to the particular to this
25 particular contention.

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1 And I think Ms. Burton has already agreed
2 to that.

3 Now, with respect to the Board's question
4 as to the safety of the current configuration, I think
5 we put in our filing -- there are really many reasons
6 why the current configuration has been shown on the
7 record in this proceeding and elsewhere is perfectly
8 safe.

9 You know, the fact that there's a Unit 1
10 issue, the issue here is is there any commonality
11 between the special nuclear material accountability
12 procedures at Unit 1 and the procedures that are issue
13 here at Unit 3.

14 We filed an affidavit for Mr. Perrillo in
15 January in response to the motion to reopen, which I
16 think demonstrates fairly well that the issues are
17 really very different at Unit 1 and Unit 3 for several
18 reasons.

19 First, because the time and nature of the
20 disassembly of the pins at Unit 1;

21 Second, because of the very nature of the
22 procedures, the accountability procedures themselves
23 at Unit 1. The issue relates to the disassembled
24 pins.

25 What we are talking about at Unit 3 is

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1 moving fuel assemblies intact to regions.

2 And thirdly, the fact that from a
3 criticality perspective, his affidavit discusses the
4 fact that the licensing bases criticality calculations
5 as supplement in the proceeding. In the record of
6 this proceeding, the calculations performed by Dr.
7 Turner show the substantial defense in depth with
8 respect to criticality.

9 So I think there is ample record in this
10 proceeding for the safety of the current configuration
11 and the issues at Unit 1 just by their very nature and
12 their time of those issues are very different than
13 what's at issue in Contention 4.

14 So that's a long way of saying that the
15 current configuration is perfectly safe. Ongoing
16 investigation, we certainly respect it, but the
17 substance of that investigation, the outcome of that
18 investigation is not germane to Contention 4.

19 And with respect to the Board's final
20 question as to whether or not if there is some OI
21 referral down the road following the OI investigation,
22 I think that's a -- whether we defer further at that
23 point, whether we defer further at that point is
24 really a question to cross at that time when we know
25 more, but at the outset I would say in general, I'm

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1 not convinced that we would have to defer at that
2 point.

3 I think that the technical issues in
4 Contention 4 will be able to be addressed, as we
5 discussed in our filing, based upon the fuel rod
6 accountability project report and the root cause
7 assessment report. And those technical safety issues,
8 you know -- those will be the relevant documents.
9 Those will be the relevant facts to be explored in
10 this proceeding, given what the Board -- the issue the
11 Board has defined as its reason for reopening.

12 JUDGE COLE: Mr. Repka, this is Judge
13 Cole.

14 Do you have any current estimate of the
15 completion time for the fuel rod accountability
16 project report and the root cause assessment report?

17 MR. REPKA: Yes, sir. The fuel rod
18 accountability project made a presentation last week
19 to the Nuclear Energy Advisory Council in Connecticut,
20 and that presentation has been made available to the
21 parties, and the date given there was a June target
22 date for the completion of the accountability project.
23 That's the same date as in the updated licensee event
24 report on the issue.

25 We say that with the recognition, however,

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1 that the project -- that is a target date and the
2 project has a substantial amount of work to do, and
3 they've made the same statements -- NRC, in their
4 presentation to the NRC on the issue -- that they
5 don't feel like -- you know, they're not going to
6 issue a report on June 30th, just to meet a June 30th
7 date.

8 The quality of the investigation, the
9 completeness of the investigation is more important
10 than the schedule.

11 So, in any event, June -- the end of June
12 is the target date with the root cause assessment to
13 follow on by some delta of a matter of weeks, on the
14 theory that the root cause is proceeding to do their
15 work now, but can't really determine a final and
16 complete a final root cause assessment until the
17 accountability project has come to their conclusions
18 regarding the most likely -- or likely facts involved.

19 Those are the target dates.

20 JUDGE COLE: Thank you, Mr. Repka.

21 MS. BURTON: Judge Bechoefer?

22 CHAIRMAN BECHOEFER: Yes.

23 MS. BURTON: May I respond?

24 I think I've been misunderstood if Mr.
25 Repka believes that I agreed with him that the outcome

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1 -- with respect to what he said about the outcome of
2 the OI investigation not being germane. The outcome is
3 germane. However, the OI investigation is not going
4 to, in any way, impact whether or not the fuel that
5 has been reconfigured or placed in reconfigured areas
6 of the pool at Unit 3 are properly legally there. So
7 there may be overlapping issues, but I don't agree
8 with Mr. Repka's characterization of what I said.

9 I'd like to go back just for a moment to
10 Dr. Kelber's question concerning the present status of
11 Unit 3 spent fuel pool configuration and the prospect
12 of another refueling outage a ways off, about a year
13 and a half away.

14 I just -- I have to recall the evidence
15 that we did present as to the long, long, in many
16 cases years long, delay in recognition of errors in
17 fuel movements at the Millstone station. It seemed to
18 be a pattern almost of failures of administrative
19 controls that the licensee itself presented to us, and
20 also I go back to the testimony that we presented, the
21 deposition testimony of Mr. Jensen, as to the what
22 sounded like a very, very scrupulous efforts recently
23 to inventory the spent fuel at Unit 1, which had been
24 unsuccessful in apparently identifying these missing
25 rods.

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1 So as far as whether we believe the public
2 can safely sit by for a year and a half with the new
3 fuel at Unit 3, we don't believe that the history here
4 at Millstone would justify that, and certainly the
5 Board's decision, granting Contention 4 relied in
6 part, in significant part, I would say, on the well
7 known, notorious history of this station to fail to
8 comply with administrative procedures.

9 CHAIRMAN BECHOEFER: Ms. Burton, does not
10 your contention of both the ability and the
11 willingness, and I stress the word "willingness" of
12 either NNECO or DNC to carry out administrative
13 controls successfully or adequately, and if so, does
14 not the OI investigation, at least, seem to overlap in
15 part at least what your contention was all about?

16 MS. BURTON: Well, of course we have no
17 direct knowledge of what the OI is looking into.

18 CHAIRMAN BECHOEFER: Nor do we.

19 MS. BURTON: In fact, we've been trying to
20 determine when it began because we're a little bit
21 surprised to hear this week about it since it was
22 perhaps appropriately brought up by staff and the
23 licensee who probably knew about it when we spoke at
24 our informal conference on Friday.

25 MS. HODGDON: If Ms. Burton is finished --

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1 it's Ann Hodgdon -- I would like to read the
2 contention as admitted by the Board. It is:

3 Contention 4. The new set of
4 administrative controls trades reliance on physical
5 protection for administrative controls to an extent
6 that poses an undue and unnecessary risk on a
7 criticality accident, particularly due to the fact
8 that the licensee has a history of not being able to
9 adhere to administrative controls with respect to,
10 amongst other things, to spent fuel pool
11 configurations.

12 MR. REPKA: Ms. Hodgdon, are you done?

13 MS. HODGDON: Yes, I finished.

14 MR. REPKA: This is Dave Repka. I'd like
15 to respond briefly.

16 On the issue, Ms. Burton's
17 characterizations of the record in this, I think that
18 that may have made a very nice sound bite, but I think
19 it had very little to do with what the record in this
20 case actually shows. With respect to the charges that
21 the record shows an inability to adhere to
22 administrative controls related to the spent fuel
23 pool, the record is fairly substantial on compliance
24 with administrative controls with respect to fuel
25 handling and regional storage in spent fuel pools.

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1 The Board's decision -- its initial
2 decision in this case is, I think, very clear on that
3 point, and I think that the -- it's important that the
4 Commission has, in fact, already affirmed that portion
5 of the decision in this case.

6 So to recharacterize the record as saying
7 something it does not I think it's completely
8 inappropriate.

9 MS. BURTON: If I could just quickly
10 respond. Nancy Burton.

11 Obviously we have our differences and
12 obviously our differences led to our conclusion that
13 there are outstanding issues, material issues of fact
14 that are in dispute that we believe justified or
15 should have justified the Board in taking the next
16 step here to invoke a full evidentiary hearing.

17 MS. HODGDON: Ann Hodgdon.

18 I believe that Ms. Burton's reference --
19 she had no documentation for -- she just spoke
20 generally, but I think her reference must have been to
21 discovery in which she asked for errors at the three
22 pools, and the licensee came up with 11 instances of
23 errors, none of which were LERs at Millstone 3, but
24 there was one instance at Millstone 1 that involved
25 two errors, which was with regard to something stored

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1 at the pool like -- I can't remember exactly what it
2 was. Maybe Mr. Repka remembers, but that would appear
3 to be the documentation.

4 Certainly the allegation that there was
5 any widespread, long, undiscovered -- in any of those
6 pools is just not substantiated.

7 MS. BURTON: Again, I would beg to differ.
8 The record really speaks for itself. That was
9 information that the licensee turned over to us in the
10 discovery proceedings.

11 We would like to note that we remain
12 deeply skeptical of the circumstances surrounding the
13 timing of the disclosure of the revelation of missing
14 spent fuel rods that Unit 1, and we certainly stand on
15 all of our protestations about that because it would
16 seem to be information that ought to have been
17 uncovered during the close scrutiny that Mr. Jensen
18 and others gave to the inventory at Unit 1 in the
19 recent period.

20 MS. HODGDON: That was not my point. My
21 point was that Ms. Burton had offered no documentation
22 in support of her characterization of fuel handling
23 practices at Millstone generally, and that there have
24 been -- well, whatever -- whatever that is.

25 MS. BURTON: I think Ms. Hodgdon is

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1 forgetting our lengthy deposition with Mr. Jensen and
2 going through the various documents which were rather
3 voluminous, I thought, as had been produced by
4 Northeast Nuclear Energy Company.

5 MS. HODGDON: I recall the deposition very
6 well. It's just my recollection is different, and
7 it's not really relevant to this point.

8 Those errors were discussed at that
9 deposition. There were 11 of them, I believe seven at
10 Millstone 1, and a couple at the other two plants.

11 MR. REPKA: This is Dave Repka.

12 I think that the record on those issues is
13 very substantial and very complete, and I'm feeling a
14 sense of deja vu here to the summer of 2000, and I
15 don't think by any stretch of the imagination, the
16 Board's decision to reopen was intended to reopen all
17 the issues of last year.

18 As I read the decision, and it's fairly
19 clear on the point, the issue which we're here to
20 address is the commonality of the issue, special
21 nuclear material accountability at Unit 1, whatever
22 that issue turns out to be, and the Unit 3 procedures
23 at issue in the license amendment.

24 Now, I think that's a very clear issue.
25 I think that's what we're here to address. That's

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1 what we will address as we proposed in our filing upon
2 the completion of the accountability project report
3 and the root cause assessment report, and I think that
4 to try to revisit old arguments is simply unwarranted
5 and unnecessary and inefficient.

6 MS. BURTON: I'd like to make an
7 observation. At this point, I don't believe that we
8 have yet heard anything specific from the staff as to
9 how it expects that continuation of our proceedings
10 that involve and directly impact the public health and
11 safety from our point of view will be impaired. If
12 there's an investigation which may or may not lead to
13 criminal charges by the Department of Justice, I think
14 that we can appropriately look back to other
15 investigations by the Office of Investigations,
16 including Unit 1's practice that helped the station
17 achieve great notoriety a few years ago involving the
18 full core off-loading and the apparent persistent
19 wilful violation of license conditions at Unit 1.

20 We aren't aware that those practices ever
21 led to any criminal charges, either against the
22 company or against any individuals.

23 We're also aware there was a question as
24 to whether if a stay were to be granted here, whether
25 it should have a term that will expire when and if the

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1 Department of Justice ever does anything.

2 Well, we certainly couldn't go along with
3 that because we are aware that there was an
4 investigation by the Department of Justice into
5 allegations of serious environmental violations.

6 There was a long period of time when an
7 investigation apparently was ongoing; yet it never
8 lead to anything. There was never any -- there were
9 never any charges brought against any individuals
10 despite what we think was significant evidence of
11 that, although the company was charged with serious
12 felony charges. There were never any charges against
13 individuals, and the Department of Justice
14 nevertheless, I think, gave the impression that it was
15 continuing an investigation, but time lapsed and
16 nothing ever happened.

17 So we are certainly not willing to let
18 this matter rest for an indefinite period of time that
19 would be dependent on whether or not the Department of
20 Justice ever decided to do anything about this. That
21 won't -- I think in this issue, there is great deal of
22 legal guidance that the Board has to weigh here, the
23 public interest that will be served by what it does.
24 And I still haven't heard any demonstration that the
25 public will be protected with an indefinite delay of

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1 these proceeding.

2 And I'd like to on that point, again, go
3 back to briefly address what Mr. Repka has been saying
4 with regard to the fuel rod accountability project.
5 I'm familiar with what was present at that NEF
6 meeting. I may have missed it, but I don't think
7 there was any reference to the Millstone Unit 3 spent
8 fuel pool. Yet Mr. Repka is representing in his
9 papers that Millstone 3 issues will be considered as
10 part of that project.

11 I think that may have been something added
12 later. It wasn't -- I don't believe that is what was
13 presented at the meeting he referred to, nor does it
14 appear in any of the materials that he presented to
15 me.

16 So I don't think that that accountability
17 project really implicates what are the issues here,
18 and therefore, I don't think we should suffer a delay
19 until that is completed, besides which, that appears
20 to be a completely voluntary effort on the part of the
21 licensee, with a self-imposed deadline.

22 We're also troubled by the fact that,
23 according to Mr. Repka, that report will be filed when
24 the investigation is complete, and that troubles us
25 because it doesn't say it will be filed when the spent

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1 rods are found.

2 And we're not given, again, any assurance
3 that the licensee is going to be continuing to look
4 for them. So I think it would be sensible --

5 CHAIRMAN BECHOEFER: Ms. Burton, it's my
6 impression that we will get the report, and if it says
7 that they couldn't find it and couldn't figure out
8 why, that will be the report. Am I not correct, Mr.
9 Repka?

10 MR. REPKA: That's true. I mean, that's
11 a true statement. We don't want to speculate as to
12 what the report might say, but if there is no clear
13 resolution, then certainly we'll discuss the most
14 likely resolutions.

15 And with respect to Ms. Burton's arguments
16 that the report won't address Unit 3, I think what we
17 said in our filing is the root cause assessment will
18 by necessity address the applicability to Unit 3, at
19 least with respect to special nuclear material
20 accountability procedures.

21 I think there's a second then nexus with
22 respect to do those procedures have any bearing on the
23 Unit 3 procedures related to implementing reactivity
24 restrictions in the spent fuel pool.

25 We would certainly address those as well,

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1 not in the root cause assessment necessarily, but in
2 the proceeding, in whatever we would file in this
3 proceeding.

4 In addition, we feel to a very large
5 degree that latter issue we've already addressed.

6 MS. HODGDON: Ann Hodgdon here.

7 Ms. Burton has stated that this activity
8 on the part of NETO DNC is purely voluntary. That's
9 not the case, and I believe that we've explained that
10 in some part to Ms. Burton.

11 This is a follow-on to the LER, and the
12 LER does state that it will be addressed again, and as
13 the Board knows, this is the way LERs are written, and
14 there are certain issues that have to be addressed in
15 LERs, such as are there implications for the other
16 facilities at the site, and so certainly that will be
17 addressed.

18 Also, the staff is -- the staff has an
19 inspection activity regarding this and there will be
20 an inspection report from the staff, which I believe
21 the final will await -- will have to await this FRAP
22 and the root cause analysis.

23 However, there will be interim reports,
24 and I understand that the first one will be out next
25 week. There are weekly telephone conference calls

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1 with the licensee and with all the states that are
2 involved, that might be involved, South Carolina,
3 Washington, and Connecticut Bureau of Radiation
4 Protection or whatever that's called.

5 Those telephone calls are ongoing, and so
6 the staff is involved in this. This effort is not
7 voluntary, and that's yet another report that we will
8 want to look at, the inspection reports that the staff
9 will write.

10 JUDGE COLE: Ms. Hodgdon?

11 MS. HODGDON: Yes.

12 JUDGE COLE: Do you have any idea of the
13 time gap between the issuance of their -- by DNC of
14 their report and the issuance of the inspection
15 report? Do you have any feeling for that?

16 MS. HODGDON: I think it will be fairly
17 soon, and the reason I think so is that the staff
18 is -- I told you what the staff effort was regarding
19 that, that Region 1 has telephone -- they know. They
20 keep up with the investigation as it goes on, and this
21 is an inspection activity.

22 So I don't know, and I didn't get that.
23 I talked with Mr. Bellamy this morning, and he didn't
24 give me a good answer, but I'm happy to get that
25 information. I should think it will be -- I don't

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1 know. I can't say for sure. It won't take very long.

2 JUDGE COLE: Ms. Hodgdon, this is Judge
3 Cole.

4 Do you happen to have an estimate of the
5 time when the OI report will be completed?

6 MS. HODGDON: I believe that we have that
7 and Mr. Letts' affidavit. I think he says --

8 JUDGE COLE: Is that July?

9 MS. HODGDON: Late summer. Late summer is
10 August to me, but I don't know.

11 JUDGE COLE: Late summer would be
12 September.

13 MS. HODGDON: Late summer, that's early
14 fall.

15 JUDGE COLE: By Labor Day, more or less.

16 MS. HODGDON: Summer is before Labor Day.
17 Yes, I think so. I can't -- middle of August I'm
18 told. The estimate is the middle of August.

19 JUDGE COLE: I give up.

20 CHAIRMAN BECHOEFER: I'm going to go off
21 the record for a minute.

22 (Whereupon, the foregoing matter went off
23 the record at 10:32 a.m. and went back on
24 the record at 10:33 a.m.)

25 CHAIRMAN BECHOEFER: The Board has decided

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1 that we should defer for some period of time, and that
2 we think it should be no longer than Labor Day, but we
3 would require periodic reports from -- the type of
4 reports the staff indicated it would make available
5 about the progress of the investigation.

6 They have to hold the kind of in camera
7 hearing that it looks like the investigation is going
8 to take much longer than projected, and we will have
9 to hold one of these in camera hearings to determine
10 the degree of overlap, the particular issues involved,
11 et cetera.

12 We see no reason that deferral till Labor
13 Day would effect the outcome of the particular issue
14 insofar as it has any effect on the future safety of
15 the reactor, the potential future safety.

16 Well, be that as it may, we think we defer
17 for that period of time. We would also ask -- well,
18 the licensee has volunteered to send its report to the
19 parties, including some background documentation as I
20 read their statement. Am I correct, Mr. Repka?

21 MR. REPKA: That would be correct, sir.

22 CHAIRMAN BECHOEFER: That would be forward
23 to the parties.

24 And certainly by the end of the summer, we
25 should have information to know whether we should

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1 continue to defer or -- and that could be, if they
2 decide to, if OI decides to refer a question to the
3 Department of Justice, we would have to hear that,
4 probably in the in camera session I'm talking about,
5 to determine whether -- what issues should be deferred
6 or there's a very narrow issue.

7 Mr. Repka's prior description of the issue
8 that we've reopened for is pretty accurate as far as
9 I'm concerned and as far as the Board is concerned.

10 MS. BURTON: May I ask for a point of
11 clarification, Judge Bechoefer?

12 It's Nancy Burton.

13 And that is I wonder if we could inquire
14 of the staff, as the staff inquired of me on the
15 safety issue, what the actual facts of alleged
16 jeopardy failure to stay our a case would have on the
17 investigation, on the office investigation.

18 MS. HODGDON: Stop. The Board has ruled
19 on this, and I don't believe that it's productive to
20 follow on with what the facts are. We should move on
21 to something else. We haven't even got to the other
22 things to be discussed today.

23 CHAIRMAN BECHOEFER: That's correct, but
24 by the way, the Board will have a much more thorough
25 inquiry to what the facts are if we should come to the

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1 end of the summer and the investigation is not
2 complete, and we would then through this in camera
3 process that the policy statement envisions or permits
4 -- we would find out and determine what further action
5 we ought to take.

6 So it won't be indefinite. By the end of
7 the summer, either the investigation will be complete,
8 and we do wish, by the way, that the investigation
9 report, sanitized if necessary to protect confidential
10 informants, but the investigation report should be
11 furnished to the parties as well, and that's been done
12 in a number of cases.

13 MS. HODGDON: Hodgdon.

14 We believe that that's usually the case,
15 and we don't see any reason that that would not be
16 done here.

17 CHAIRMAN BECHOEFER: Well, we just wanted
18 to make it a matter of record that we would expect
19 that to be furnished but you -- these reports are
20 often sanitized to cut out names of individuals who
21 were informants.

22 MS. HODGDON: They need to be sanitized.

23 CHAIRMAN BECHOEFER: Yes.

24 MS. HODGDON: For Privacy Act purposes,
25 and that's routinely done.

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1 The other thing that the Board directed or
2 asked Mr. Repka if he would supply certain
3 documentation. The staff --

4 CHAIRMAN BECHOEFER: -- was volunteering
5 in --

6 MS. HODGDON: Yes, right. Right. So
7 anyway, the staff will also furnish the Board and
8 parties with the interim inspection reports that will
9 become public anyway, and as I indicated there's --
10 one will come out next week, and so those will be
11 furnished. We'll just do them as -- we'll just
12 provide those to the Board with a latter and so forth,
13 and that doesn't go to opening discovery of course.
14 It's just that we will --

15 JUDGE KELBER: Will that report update the
16 material that was in the letter to Congressman Markey?

17 That's February 1st, the discussion in
18 that letter about some efforts of the staff --

19 MS. HODGDON: Well, Judge --

20 JUDGE KELBER: -- at headquarters.

21 MS. HODGDON: I am so glad you asked that
22 question because I thought that no one had read that
23 letter.

24 CHAIRMAN BECHOEFER: We all have read it.

25 MS. HODGDON: I didn't see any indication

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1 that the letter had been read, and I thought maybe you
2 hadn't read all those voluminous documents that I put
3 in and the staff's response to the motion for
4 reconsideration.

5 Will the letter to Markey be updated?

6 I really don't know. I mean, normally
7 that's for the Chairman to decide, and he answers his
8 mail, and if there were any further inquiry, I'm sure
9 he would answer it as appropriate, but I don't see any
10 need for him to update it unless it's obvious in the
11 letter, but he said, "I'll give you the LER," which in
12 fact he did.

13 So I'm sure that he would give Congressman
14 Markey the follow-on to the LER, which is the FRAP
15 report and so forth.

16 JUDGE KELBER: What I was discussing here
17 was you discussed in that letter the reconciliation of
18 inventories and searching of records locally, that is,
19 in headquarters by the staff. That's in one of the
20 paragraphs in the letter to Congressman --

21 MS. HODGDON: Okay. Yes, I think that
22 insofar as that is left open, that we would provide
23 that. I have no idea of the status of it.

24 JUDGE KELBER: Okay. Thank you.

25 MS. BURTON: Excuse me. As a point of

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1 procedure -- Nancy Burton -- I would like to
2 strenuously here note an exception to the Board's
3 ruling. I think it's completely inconsistent with the
4 Board's justification for reopening the record here,
5 and I just wanted to -- I hadn't done this, but I did
6 want to state a little bit more clearly our position
7 on all of this, which is that we wouldn't have an
8 objection to a stay if the licensee would be willing
9 to return matters to status quo ante, and unless we
10 hear that the licensee is willing to do that, we
11 perceive a necessity to file in this matter
12 appropriate motions addressed to that relief.

13 CHAIRMAN BECHOEFER: Well, we will note
14 that for the record, but we think we've taken the
15 appropriate procedure at the moment, but we have a few
16 other matters. Of the matters we ought to decide is
17 that when the record -- when the reopened hearing
18 takes place, will it be subject to the Subpart K
19 procedures, and by that I mean affidavits or
20 declarations and an oral argument, perhaps held --
21 likely held up in New London as we did before, or will
22 we go full evidentiary hearing?

23 And as I read the rules, as well as the
24 responses of the staff and the licensee, it looks like
25 once Subpart K is elected, you have to go Subpart K,

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1 which would mean declarations or affidavits plus oral
2 argument, and the criteria, the specific criteria for
3 an evidentiary hearing is that we, in effect, would
4 have to find that there would be factual questions
5 that cannot be adequately resolved unless we go to an
6 evidentiary hearing.

7 And so far, I haven't heard any of those
8 yet. I would like Ms. Burton to address that and --
9 we're required, unless the licensee who initially
10 requested Subpart K should waive it for -- and that I
11 haven't heard yet, but Mr. Repka would wish to address
12 that, but absent a waiver --

13 MR. REPKA: And Judge Bechoefer, of
14 course, if you've read our filings you know we have
15 not waived the Subpart K at all.

16 CHAIRMAN BECHOEFER: That's correct, but
17 absent a waiver, I almost think we're required to go
18 with Subpart K.

19 MS. BURTON: Nancy Burton.

20 I wouldn't disagree with that, but we are
21 looking for discovery, an opportunity for discovery.
22 I understand Mr. Repka is opposed to that. I don't
23 know that I am certain as to the staff's position. I
24 think they are going to plan to wait to after more
25 information is generated from OI and also the

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1 licensee, but that would be our position, that we
2 proceed with discovery and then go back on to the
3 Subpart K procedures and ultimately to an evidentiary
4 hearing.

5 CHAIRMAN BECHOEFER: Well, you could get
6 there, but you have to go through the affidavits and
7 declarations and convince us that there's unresolved
8 factual questions, which there may or may not be by
9 that time.

10 I, too, believe that some discovery is
11 warranted, particularly under Subpart K. How much,
12 and what degree I'm not -- I don't think the
13 discovery, while we are suspending pending the OI
14 investigation, and in addition, prior to our receipt
15 of the licensees report, background material, et
16 cetera; I don't think discovery should take place
17 during that time frame.

18 At some point we would want to have
19 discovery beyond maybe what is indicated by the
20 material that the licensee is going to provide to us
21 and the parties.

22 MR. REPKA: Judge Bechoefer, this is Dave
23 Repka.

24 CHAIRMAN BECHOEFER: Right.

25 MR. REPKA: I tend to agree with your

1 assessment. I mean, certainly there would not be
2 discovery in a deferral period. That would be the
3 whole basis for the deferral. But with respect to
4 discovery after the OI report and the FRAP report and
5 root cause assessment are out, I think it's important
6 to emphasize this is a Subpart K proceeding, and we
7 are beyond the time for discovery in Subpart K. I
8 recognize it's been reopened, but there is no
9 entitlement at this point to further be under the
10 rule.

11 Therefore, the only way there can be
12 further discovery after these documents come out is
13 based upon some showing of need. Certainly, it's our
14 position that given the scope of the issue, which the
15 Board has reopened to hear, that the FRAP report, root
16 cause assessment, and supporting documentation will
17 provide more than ample information to address that
18 question.

19 I don't think we need to have further
20 discovery into the same issues that we've already
21 heard last summer. We have a substantial record
22 already on those points.

23 But be that as it may, I don't think we
24 necessarily --

25 CHAIRMAN BECHOEFER: I would think the

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1 discovery would be much more limited, but if there
2 were further discovery, it could bear on particularly
3 the handling of the issue that we've identified, and
4 which you've identified as well.

5 MR. REPKA: And I think the only point I
6 want to make at this point is that it would -- any
7 discovery would come after those documents are
8 released because that's the whole logic of this
9 approach. It is that those documents will give us a
10 basis to go forward and to determine whether there's
11 a need for particular further discovery.

12 So beyond saying that is -- you know, I
13 think it's important that to any discovery, if any, it
14 would be limited and confined to the issues before us.

15 CHAIRMAN BECHOEFER: I would think that's
16 accurate and maybe we should wait until we get the
17 report from the licensee and other materials to
18 determine whether further discovery is warranted or
19 necessary. We could await any decision on that.

20 MR. REPKA: I agree with that approach.

21 MS. BURTON: Judge Bechoefer, I had --
22 Nancy Burton again.

23 I have a different thought, and that is it
24 seems that the decision of the Board rests on a
25 presumption that the rearrangement at Unit 3 in the

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1 spent fuel pool has been appropriately carried out and
2 procedures adhered to and so forth. Now, there's no
3 basis, whatsoever, for this board to reach such a
4 conclusion, and I would suggest the Board go back in
5 its memory to the most recent refueling outage before
6 this one, which was Refueling Outage 6, in which it
7 seemed that there was a spirit close to pandemonium
8 that prevailed for a good part of the outage, and that
9 certainly is quite clear in the record.

10 I think that it would not in any way
11 remotely impair or impede the Office of
12 Investigations' investigation if we were to have
13 limited discovery as to this -- to bring us current on
14 the status at the Millstone 3 spent fuel pool, current
15 since the end of discovery in the earlier part of the
16 proceedings.

17 I think we're entitled to that. I think
18 that there's no basis in the record for the Board to
19 simply accept the representations of the licensee and
20 the staff, with all respect, without us having an
21 opportunity to examine the basis for those
22 representations.

23 And I can't emphasize enough how we
24 believe that the public health and safety of this
25 community are directly implicated. I don't think it's

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1 enough to say that, "No, there is not a present
2 criticality at the spent fuel pool."

3 I think that is too -- I think we're
4 entitled to more protection than just an assurance
5 that the pool hasn't gone critical, and that
6 tolerating the present circumstances in light of the
7 decision to reopen really calls for at least a
8 concession here with respect to looking at Unit 3.
9 That is not what I understand to be within the scope
10 of what the OI is looking into.

11 MR. REPKA: Just to respond to that
12 briefly, the characterization of Refueling Outage 6 is
13 a characterization that was made last year. It's a
14 completely inaccurate one. It was shown to be
15 inaccurate last year by the evidence of record, and I
16 think it's irresponsible to keep making that charge in
17 the face of a clear record and clear decisions.

18 Beyond that, I think that the idea that we
19 have to now somehow look at refueling outage or the
20 last refueling outage in discovery is really beyond
21 the issue that the Board has reopened to look at. I
22 think it's really asking the Board to assume the
23 regulatory function and oversight function with
24 respect to Unit 3 that's really beyond the scope of
25 this proceeding.

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1 There is no need to do that. The
2 enforcement/inspection function of the NRC is adequate
3 to assure that there is no criticality in the Unit 3
4 spent fuel pool.

5 MS. BURTON: Mr. Repka, again -- Nancy
6 Burton -- I would differ. The Board has specifically
7 addressed itself to the question of the ability and
8 willingness of the licensee, and now that includes a
9 new licensee, and I'm not aware in these proceedings
10 that the prior licensee is even represented, Northeast
11 Utilities, and apparently it is the subject of the
12 investigation.

13 So I have a question about whether, since
14 the current owner is now -- has now apparently been
15 substituted, whether it is appropriate to have any
16 stay under those circumstances.

17 But because the Board has specifically
18 addressed itself to these issues of ability and
19 willingness, and the proceedings are ongoing, they're
20 continuing, I think we're entitled to understand those
21 issues and the present circumstances.

22 I don't see how we can go into further
23 proceedings without having the opportunity to address
24 the ability and willingness of the -- of the current
25 operators, and that would be -- that would include the

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1 period up to the conclusion of discovery in the prior
2 round.

3 CHAIRMAN BECHOEFER: We'll go off the
4 record for a minute.

5 (Whereupon, the foregoing matter went off
6 the record at 10:54 a.m. and went back on
7 the record at 10:56 a.m.)

8 CHAIRMAN BECHOEFER: On the record.

9 The Board has decided that all discovery
10 should be deferred until the end of the deferral
11 period, and then we will consider at that time what
12 additional discovery is warranted.

13 We think under Subpart K, where there has
14 not been specific discovery with respect to the
15 reopened question, that some further discovery may be
16 warranted, but I think it depends on what's in the
17 report that the licensee is going to furnish, the
18 report and background material that the licensee will
19 furnish, and we don't know whether further discovery
20 would be warranted.

21 I think under Subpart K, there may be --
22 to further discovery and this is critical information
23 and we've reopened the record. We don't know how long
24 or extensive, but there may well be a right to
25 discovery built into Subpart K.

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1 But we don't have to decide that. We
2 would like to determine the question later, after the
3 end of this deferral period.

4 MS. BURTON: Judge Bechoefer, Nancy Burton
5 again. I've been --

6 CHAIRMAN BECHOEFER: -- hold a pre-hearing
7 conference, perhaps we would like a motion to permit
8 certain discovery at time.

9 MS. BURTON: Judge Bechoefer, Nancy Burton
10 again.

11 I just wanted then to take this occasion
12 to ask Mr. Repka, on behalf of his client, to
13 voluntarily provide us with the records of this most
14 recent refueling outage so that we can enjoy the same
15 confidence that apparently the other parties and the
16 Board have with respect to the reconfigured spent fuel
17 pool.

18 MR. REPKA: We'll respond to discovery at
19 the time the Board establishes that schedule.

20 MS. BURTON: You're declining that offer?

21 CHAIRMAN BECHOEFER: We do suggest that --
22 I don't know whether you count this as discovery or
23 not -- that the staff indicated that there would be an
24 inspection, an inspection report.

25 MS. HODGDON: That's with regard to Unit

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1 1.

2 MS. BURTON: Oh, I see. Okay.

3 MS. HODGDON: In regard to Unit 3 the
4 staff would say that there are inspection reports of
5 that outage and they are public documents. However,
6 if Ms. Burton is unable to find them the staff will
7 provide them to her. The staff would like further to
8 say that regarding these allegations about pandemonium
9 at RFO 6, that the Board specifically found that there
10 was absolutely no safety -- things that Intervenors
11 put on about RFO 6.

12 MS. BURTON: If I can please respond.

13 CHAIRMAN BECHOEFER: We did make a finding
14 that the staff was going to make sure that certain
15 things happened as a result of what was shown in RFO
16 6, and we sort of presume that the staff followed
17 through on that.

18 MS. HODGDON: Well, I am citing to --
19 because I like documentation, I'm citing to 52 NRC at
20 200, where the Board says there's an economic
21 incentive for NECO to make the proposed repairs, and
22 no safety significance if they do not.

23 MS. BURTON: Nancy Burton again.

24 I think Ms. Hodgdon has mischaracterized
25 the Board's ruling, and really the facts do speak for

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1 themselves. But when in the course of a refueling
2 outage there's a repetitious resort to emergency
3 bypass procedures, chronic failure of key equipment,
4 and all kinds of other problems constantly cropping
5 up, reading the reactor engineering logs as we did,
6 when I used that term "spirit of pandemonium," that
7 was a well considered characterization.

8 JUDGE KELBER: Ms. Burton, I don't think
9 we need to rehash what has already been gone over, and
10 I think we should move on. I don't think it's useful
11 to use incendiary language about matters which have
12 already been settled.

13 CHAIRMAN BECHOEFER: No, we have ruled on
14 those questions before, and what we're really looking
15 for is what implications, if any, arise from the --
16 well, from the loss of the rods and also the report
17 that the licensee is going to be preparing and
18 distributing.

19 So I do think that we will await any
20 further discovery until we get all this information
21 and the deferral period ends. We will have another
22 conference of this sort perhaps to determine how much
23 more discovery and what scope, et cetera.

24 JUDGE KELBER: By the way, Ms. Hodgdon, if
25 you're going to the -- this is Judge Kelber -- if

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1 you're going to distribute the inspection reports on
2 Unit 3 to the -- to new persons, we could send up
3 some. I have a terrible time finding those reports
4 myself.

5 MS. HODGDON: Apparently, the inability to
6 use ADAMS is widespread. We're happy to provide them
7 to everybody.

8 CHAIRMAN BECHOEFER: We have had more
9 problems getting this out of ADAMS.

10 MS. HODGDON: I know. If, Judge Kelber,
11 if I may ask a question, is your request to us about
12 answering Congressman Markey further related to the
13 statement that the staff is still investigating why
14 the anomaly was not identified or in later years we
15 may elect to require additional actions at other
16 facilities?

17 JUDGE KELBER: Correct.

18 MS. HODGDON: Okay. Got it. All right.
19 We'll do that.

20 CHAIRMAN BECHOEFER: The last question we
21 wanted to raise, but we've already discussed pretty
22 much the so-called immediate effectiveness of our
23 order in LBP-0026, and we were looking at the question
24 whether the authorization for controls, which was put
25 into effect after our order; should it remain in

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1 effect pending the reopened hearing?

2 And I've cited a couple of cases,
3 Philadelphia Electric, the Limerick case, CLI-8917,
4 and the Midland case, ALBP-395 where the Commission
5 balanced -- Commissioner Appeal Board -- balanced
6 various factors and said we could consider -- well,
7 that various factors could be considered in
8 determining whether authorization should be suspended
9 pending a reopened hearing.

10 I might add both of these cases are
11 environmental cases. Would there be any difference
12 where a safety issue is involved, such as I think I
13 would characterize as is involved here?

14 And I would ask the parties to comment on
15 that.

16 MS. BURTON: Nancy Burton.

17 CHAIRMAN BECHOEFER: Yes.

18 MS. BURTON: I will be filing more
19 formally a response to that, and I anticipate it will
20 be in the form of a motion that we will be requesting
21 the Board to suspend the -- suspend its authorization.

22 This is, I think, you are correct, Judge
23 Bechoefer, to distinguish our case from the other
24 cases being environmental cases. Pardon me. I think
25 we have possibly a higher safety concern here, and in

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1 any event, I will be addressing that further.

2 MR. REPKA: This is Dave Repka for
3 Dominion.

4 I find that the idea of filing a motion on
5 this to be a bit curious since the Board has
6 specifically raised this question at this time, and it
7 seems to me that this is the time to address the
8 question, not later in a motion.

9 But beyond that, our position, I think, is
10 very clear in our filing. I think that the
11 distinction between the environmental and safety issue
12 is really irrelevant here, particularly with respect
13 to the fact that the real issue, be an environmental
14 or safety issue, is is there any basis that the
15 current condition, the current authorization is
16 unsafe, and in this environmental case clearly there
17 was none.

18 And in this case there also is none, and
19 there's really two reasons. One, the substantial
20 record in this case already shows that the history of
21 implementation of storage based on reactivity limits,
22 and the decision there by the Licensing Board is well
23 supported and has been affirmed by the Commission to
24 the extent that it doesn't include the Unit 1 issue.
25 But there is, therefore, a substantial record that

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1 documents the safety and the control.

2 Second is the fact that we've already put
3 in the affidavit for Mr. Perrillo in January, which
4 really discusses the continued safety, a further sound
5 basis for distinguishing the Unit 1 issue and why that
6 doesn't lead to a conclusion that the current -- the
7 current racks and the current regional storage
8 configuration is unsafe.

9 Most tellingly, apart from the differences
10 between the very issues at Unit 1 and Unit 3, the most
11 telling being the undisputed criticality calculations
12 that show the substantial defense in depth. He
13 documented there the fact that a single fuel assembly,
14 the licensing basis event of a single fuel assembly
15 misload, which is many, many more fuel rods than
16 what's at issue at Unit 1, is bounded by the
17 criticality calculations.

18 So I think that there's -- between the
19 record, between Mr. Perrillo's affidavit, there are
20 very sound reasons to conclude that the information in
21 the current amendment is safe.

22 Now, having said all that, there's the
23 further consideration of the fact that the fuel is in
24 the new racks. The pools have been reconfigured for
25 the new storage configuration, and the idea that we

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1 would go back to the old configuration is really, I
2 mean, that's counter intuitive, counter to safety in
3 the sense that moving fuel around fuel around, while
4 safe, is certainly not the optimal thing to do. To go
5 put all the fuel back would simply be an unwarranted
6 operational and safety -- from an operational and
7 safety perspective.

8 You know, as we said in our pleading, it
9 would also require us to go back from an analytical
10 standpoint and a licensing basis standpoint and credit
11 the bora flex, which in the original spent fuel racks,
12 which we no longer credit in the new analysis, the
13 boar flex, because of the degradation, the generic
14 degradation issues related to bora flex, it simply
15 makes no sense to go back.

16 And as the case as you cited, Judge
17 Bechoefer, I think make it very clear that that kind
18 of a traditional balancing of the equities could be
19 applied here, and certainly from that standpoint
20 there's no reason the amendment should not be and
21 continue to be effective.

22 CHAIRMAN BECHOEFER: Let me add the only
23 reason I raised the question is because conceivably,
24 and I'm not saying there is or isn't, but conceivably
25 there could be a difference between environmental

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1 matters and safety matters. If one could construe,
2 and I'd say I've heard it construed, at least
3 theoretically construed this way, that once you failed
4 to establish a complete safety review, you'd
5 discontinue everything and go back from square one and
6 start over again.

7 I've heard at least theoretical
8 discussions of the Atomic Energy Act in those terms
9 and the implementing rules. So I don't know whether
10 it's the case, and I didn't find any different cases
11 for either safety or environmental matters. I'm just
12 raising the question theoretically, and I don't know
13 whether there would be any such things or not.

14 MR. REPKA: I think --

15 CHAIRMAN BECHOEFER: I couldn't find any.
16 I might say I did a little research.

17 MR. REPKA: I think the paramount
18 consideration, be it an environmental issue or a
19 technical issue, would be whether or not there's an
20 issue with respect to an environment impact or a
21 safety impact. And in the cases you cited, there was
22 no environmental impact that justified a lack of
23 immediate effectiveness. Likewise here, there is no
24 safety issue that would justify a lack of
25 effectiveness.

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1 I will also add that the amendment itself
2 was evaluated by the licensee and determined to
3 involved no significant hazardous consideration, which
4 really relates to the issue of the issuance of the
5 amendment while any hearing is pending.

6 In this case a final determination never
7 needed to be made because the decision came out prior
8 to -- prior to the amendment being issued. But the
9 fact remains, it was proposed as a no significant
10 hazards consideration, and that remains a valid
11 determination from our perspective.

12 CHAIRMAN BECHOEFER: Well, in order to
13 leave the authorization in effect, should the staff go
14 back and make whatever determination that it would
15 make for significant hazards?

16 MR. REPKA: I don't believe it's required
17 to do that, given the very cases you cite.

18 CHAIRMAN BECHOEFER: All right. It still
19 could. Do you not agree?

20 MR. REPKA: But it certainly could.

21 CHAIRMAN BECHOEFER: So that if the staff
22 were to make such a finding --

23 MS. HODGDON: If the Board wants the staff
24 to make a final finding, it would seem to me to be
25 extraordinary because it wasn't necessary because --

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1 well, however, if that would help the situation the
2 staff would be happy to do that.

3 MR. REPKA: It would certainly moot the
4 issue before the Board.

5 MS. HODGDON: Excuse me.

6 CHAIRMAN BECHOEFER: That's correct.

7 MS. HODGDON: The regulations don't
8 contemplate that except -- no, I mean, had the staff
9 issued the license prior to the decision, there would
10 have been a final finding. However, there was none.
11 But the staff is happy to -- well, I don't know.
12 Whatever will help the Board out here, the staff does
13 not see that there's any significant hazard
14 consideration involved here, and in fact, as of course
15 this -- this decision, the difference between
16 Limericks and the cases that the Board sites and this
17 case is that even where those cases were reversed and
18 remanded, the staff -- there's no reversal in
19 remanding here.

20 What it is is it's a motion to reopen.
21 Had they been reversed and remanded on a health and
22 safety matter, then the outcome might have been
23 different, but that's not really relevant here.
24 What's relevant here is the kind of analysis you do in
25 order to decide whether immediate effectiveness needs

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1 to be suspended.

2 CHAIRMAN BECHOEFER: Yeah. I might say
3 that the way I read the rules, as well, in a case like
4 this if we should determine that the staff -- that no
5 significant hazard determination should be made, I
6 think it would have to be made by the Commission
7 itself, the way I read the rule, as distinguished from
8 the staff apart from the Commission.

9 As of May I'm not sure it's necessary.

10 MS. HODGDON: Excuse me, Judge Bechoefer.
11 I am looking at -- Mr. Nerses tells me that we did
12 make such a finding, and that was because there was a
13 petition for review, and so we had to make a final
14 finding.

15 CHAIRMAN BECHOEFER: Oh, I see. Well, we
16 weren't aware if it had --

17 MS. HODGDON: Okay. Final finding of no
18 significant hazards consideration. This is page 19 of
19 the license issued on November 28, the year 2000. The
20 staff is determined -- does not -- does not -- okay,
21 you have the final finding there.

22 CHAIRMAN BECHOEFER: Oh, okay. I wasn't
23 aware of that.

24 MR. REPKA: I overlooked that as well. I
25 apologize.

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1 MS. HODGDON: I knew it, but I had
2 forgotten it. I apologize. We've got three or four
3 pages here starting on page 19, and the staff
4 concludes that the proposed amendment meet the three
5 criteria 10 CFR 5092. Therefore, the staff has made
6 a final determination that the proposed amendment does
7 not involve a significant hazard consideration.

8 CHAIRMAN BECHOEFER: We weren't aware. We
9 were aware of the proposed one, and which was made in
10 the notice of opportunity for hearing in this case.

11 MS. HODGDON: The staff had to make the
12 final finding because the Intervenors had petitioned
13 for review even though the -- right, right. The
14 proceeding was ongoing. So the determination was
15 made.

16 I'm sorry. I had forgotten that. Thank
17 you.

18 CHAIRMAN BECHOEFER: That's beyond our
19 authority to interfere with. So once made, then that
20 means you can keep the amendment in effect pending the
21 results of the reopened hearing.

22 MS. HODGDON: That's correct.

23 CHAIRMAN BECHOEFER: I think that's pretty
24 clear and --

25 MR. REPKA: That would certainly moot the

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1 issue.

2 CHAIRMAN BECHOEFER: Yeah. I think that
3 moots the issue, and therefore, Ms. Burton, I don't
4 think would be -- there would be no reason for a
5 further briefing on the effectiveness because the no
6 significant hazard finding supersedes that really.

7 However, if the reopened issue turns out
8 differently, then modifications may be made. So that
9 would really conclude that issue based on information
10 that I didn't have available or didn't find. Maybe I
11 should have but I didn't.

12 So beyond that I don't know that we have
13 much more to discuss.

14 JUDGE KELBER: I have some questions.
15 This is Judge Kelber.

16 CHAIRMAN BECHOEFER: Dr. Kelber has --

17 JUDGE KELBER: If we have some time, I'd
18 like to assign some homework. I am not -- I awaiting
19 some questions for the licensee in view of the OI
20 work, but there are some things that I would like you
21 to consider to put into any brief that comes forward
22 later on in the year.

23 One is to simply describe technical
24 specifications governing the unit inventory at Unit 1,
25 and describe the procedures responding to that

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1 technical specification, and similar for Unit 3.

2 And in doing so I would appreciate if you
3 would show the computer generated inventory of the
4 fuel in the core in both cases. Well, of course Unit
5 1 doesn't have any fuel in the core any more.

6 But you maintain a computer generated
7 inventory, both in the core -- of where things should
8 go in the spent fuel pool, and I'd like to know what
9 those computer generated lists -- if any, is in the
10 inventory.

11 MR. REPKA: I'm sorry, Judge Kelber.
12 There was a lot of static on the line and I believe --

13 JUDGE KELBER: You have computer generated
14 -- lists.

15 MR. REPKA: And in the pool is what you'd
16 be looking for?

17 JUDGE KELBER: Yes. What role do they
18 play in the inventory?

19 MR. REPKA: Yes, sir.

20 JUDGE KELBER: Okay. Finally, if
21 possible, any information you might have on whether
22 there are practices in the industry -- fuel inventory
23 similar to the -- merchants control their inventory
24 goods through bar coding or similar systems where you
25 have -- and an individual check as you do now and also

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1 an automated check through beings (phonetic) of bar
2 codes or similar -- it would be interesting; it's not
3 essential, but it would be interesting to know if
4 that's -- I think personally, I think there should be.

5 I have some questions for Ms. Burton to
6 consider in the intervening months. Ms. Burton, I
7 would ask that you consider what objective criteria
8 exist for predicting failure to implement a procedure
9 properly.

10 And secondly, if that performance is an
11 indicator of future performance, how is allowance made
12 for a remedial measure? And by that I mean objective
13 allowance.

14 I don't know that those kind of questions
15 can be answered in any way satisfactorily, but I would
16 like you -- I would appreciate it if you would
17 consider them.

18 MS. BURTON: Certainly.

19 JUDGE KELBER: And try to address them in
20 any briefing you make.

21 MS. BURTON: Yes.

22 JUDGE KELBER: Thank you.

23 There will be no written quiz following
24 those submissions of your homework.

25 MS. HODGDON: Judge Kelber, are we not --

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1 is not the staff to get questions?

2 JUDGE KELBER: You have your homework
3 already on the supplements in the letters that
4 Congressman Markey -- you were to keep us informed
5 about having direct location of inventories as the
6 searching of records, could the staff supplement any
7 of the information about the staff's efforts contained
8 in the letter to Congressman Markey.

9 MS. HODGDON: We have that. Nothing
10 further.

11 JUDGE KELBER: In short, what does NSMM do
12 with these inventories when they get them?

13 I keep thinking that this is an effort to
14 reconcile a checkbook. It's the same activity. And
15 I have troubles with mine, but I'd like to know what
16 troubles they have.

17 Thank you very much.

18 CHAIRMAN BECHOEFER: That was facetious.
19 It wasn't intended to --

20 MS. HODGDON: Thank you.

21 CHAIRMAN BECHOEFER: Anything further that
22 the parties think we should consider this morning?
23 Otherwise we will sign off.

24 We will issue an order summarizing this
25 conference once we get the transcript, and we will

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1 issue an order summarizing our rulings and various
2 matters we discussed.

3 I imagine that will be more than a week
4 from now by the time we get the transcript. So that
5 would be the time frame at least.

6 Anything further?

7 MS. BURTON: Judge Kelber, Nancy Burton.

8 May we know if any additional people
9 joined our conference after we -- after it got
10 underway, if they could be identified if anybody did?

11 CHAIRMAN BECHOEFER: We don't know if the
12 people who joined after we started the -- after we
13 identified anybody at the start, if they're --

14 JUDGE KELBER: They could identify
15 themselves now.

16 CHAIRMAN BECHOEFER: Right now, perhaps.

17 MS. BURTON: I just heard different kinds
18 of beeps and noises in the background. I just
19 wondered if anybody was trying to get through.

20 CHAIRMAN BECHOEFER: We'd be interested as
21 well in knowing everybody who's on.

22 MR. SCHOINIÈRE: Paul Schoiniere of the
23 Day Newspaper.

24 I had to jump off a couple of times to
25 take other calls. That might have been my beeps

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1 and --

2 CHAIRMAN BECHOEFER: Okay. You were
3 identified earlier.

4 MR. SCHOINIÈRE: That may explain what
5 Nancy was hearing.

6 I just had a quick question before I go.
7 Just I was wondering if I could get the names and
8 spellings of the attorneys for the NRC and for
9 Dominion one more time to make sure I have them right
10 before I sign off.

11 MS. HODGDON: NRC is Ann Hodgdon, H-o-d-g-
12 d-o-n, and I have Norman St. Amour. That's the normal
13 spelling of Norman, S-t. A-m-o-u-r. Yeah, capital A,
14 he says. Okay. S-t, period, capital S, capital A-m-
15 o-u-r.

16 And if -- Victor Nerses is the project
17 manager. He's here, too. It's N-e-r-s-e-s.

18 MR. SCHOINIÈRE: And for the attorney who
19 was speaking for Dominion during the proceeding?

20 MR. REPKA: Yes. It's David Repka. R-e-
21 p, as in Peter, k-a.

22 MR. SCHOINIÈRE: Thank you.

23 MR. REPKA: You're welcome.

24 MS. HODGDON: Thank you.

25 CHAIRMAN BECHOEFER: Okay. I guess, we've

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1 enjoyed talking to you all this morning, and I guess
2 until our next conference, which may not be for a
3 while, but we wish you adieu.

4 PARTICIPANTS: Thank you.

5 (Whereupon, at 11:24 a.m., the pre-hearing
6 conference 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:

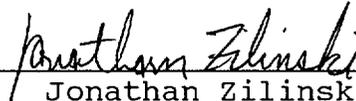
Name of Proceeding: Pre-Hearing Conference

Docket Number: 50-423-LA-3

ASLBP Number: 00-771-01-LA-R

Location: Teleconference

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



Jonathan Zilinski
Official Reporter
Neal R. Gross & Co., Inc.