

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Duke Energy Corporation
McGuire Nuclear Station Units 1 & 2
Catawba Nuclear Station Units 1 & 2

Docket Number: 50-369-LR et al.

Location: (telephone conference)

Date: Monday, July 29, 2002

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL
LICENSING RENEWAL
TELEPHONE CONFERENCE CALL

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IN THE MATTER OF : Docket Nos.
DUKE ENERGY CORPORATION : 50-369-LR
(McGuire Nuclear Station, : 50-370-LR
Units 1 & 2, Catawba Nuclear : 50-413-LR
Station, Units 1 & 2) : 50-414-LR

-----x

Monday,
July 29, 2002

The above-entitled matter came on for hearing,
pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE ANN MARSHALL YOUNG, Chair
THE HONORABLE CHARLES N. KELBER
THE HONORABLE LESTER S. RUBENSTEIN

1 APPEARANCES:

2 On Behalf of the Licensee, Duke Energy Corp.:

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10 AND

11 LISA F. VAUGHN, ESQ.

12 Of: Duke Energy Corporation

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16 On Behalf of the Nuclear Regulatory Commission:

17 JARED HECK, ESQ.

18 SUSAN L. UTTAL, ESQ.

19 U.S. Nuclear Regulatory Commission

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1 APPEARANCES: (cont.)

2 On Behalf of the Intervenors:

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4 Washington, D.C.

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12 LOU ZELLER, Executive Director

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16 ALSO PRESENT:

17 Michael Barrett, Duke Energy

18 Duncan Brewer, Duke Energy

19 Ken Canady, Duke Energy

20 Bob Gill, Duke Energy

21 Dr. Ed Lyman

22 Robert Palla, NRC staff

23 Greg Robison, Duke Energy

24 Jim Wilson, NRC staff

25 James Wilson

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

(10:07 a.m.)

1
2
3 JUDGE YOUNG: Okay. So, then, going on
4 the record, Judge Kelber and Judge Rubenstein --
5 hello?

6 MS. COTTINGHAM: Judge Young? This is
7 Anne Cottingham. I'm sorry to interrupt. You're
8 cutting out. I can't hear you every sentence.

9 JUDGE YOUNG: Okay. Let me just ask -- I
10 know that this happens when more than one party is on
11 a speakerphone, and anyone rustles papers or makes any
12 noise or talks at the same time. It causes whoever is
13 speaking to sort of blank out.

14 So thanks for bringing that to my
15 attention, and please do it again if it seems like I
16 am. I know sometimes reading transcripts it appears
17 that that is what has happened. So any party or the
18 Court Reporter, please feel free to interrupt me or
19 anyone else if that seems like that's happening.

20 As I was saying, Judge Kelber, Judge
21 Rubenstein and I have all read the Commission's
22 CLI 02-17. And we have been deliberating and
23 conferring on how best to approach the remainder of
24 this proceeding in light of that, and have found
25 several helpful suggestions in the order, in the

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1 memorandum and order.

2 By the way, I wasn't here, but is Mike
3 Snodderly with us? I don't hear any response, so I
4 assume he's not.

5 What I'd like to do is just -- just tell
6 the parties sort of our thinking on how we are
7 inclined to proceed at this point and -- well, we
8 would like to get the three --

9 MS. UTTAL: Judge Young, excuse me. This
10 is Susan Uttal. You keep on fading out, so we're only
11 hearing part of your sentence.

12 JUDGE YOUNG: Okay. I'm going to start
13 over again. Judge Rubenstein, Judge Kelber, and I
14 have all read the Commission's recent order of --
15 what's the date? July 23rd. And I assume the parties
16 have also. In light of that order, Judge Rubenstein,
17 Judge Kelber, and I have considered and deliberated on
18 what is the best manner in which to proceed from this
19 point forward in this proceeding.

20 We found many helpful suggestions in the
21 order, either -- such as the direct suggestion on
22 proceeding with summary disposition and in other
23 language found in the order. What we would like to do
24 at this point is I will read or I will go over with
25 you our proposed sort of outline for proceeding in the

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1 most efficient manner, and then we would like to hear
2 responses from the parties on whether you agree,
3 disagree, see any problems, have any suggestions, have
4 any fine tunings that you would like to offer.

5 And then, if we go with our outline, we do
6 not necessarily see any need to hear further argument
7 on the remaining four subparts of the Petitioners'
8 proposed amended contention 2. But if at the end of
9 our outline there does develop a need to hear further
10 argument, we can hear what you have to say on that.

11 So what I'd like to do at this point is
12 just sort of go through that outline and then start a
13 discussion with the parties on the best manner in
14 which to proceed.

15 First, in light of the suggestion to this
16 effect in the Commission's order, we are inclined to
17 proceed at this point in the context of a Motion for
18 Summary Disposition, which would follow a 60-day
19 period of discovery among all parties, including the
20 staff.

21 Forthwith, as soon as possible, we would
22 expect the parties to negotiate on any necessary
23 agreements with regard to protective orders on any
24 proprietary information, and then get very quickly
25 into whatever discovery is needed in light of the rest

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1 of what I have to say and the Commission's order.

2 After the close of discovery, there would
3 be appropriate deadlines for motions for summary
4 disposition and responses and then oral argument on
5 those. We are thinking in terms of the party --
6 possibly the only party filing such a motion being
7 Duke. However, obviously, that would not foreclose
8 any other party from filing their own motions.

9 We would expect that any motions for
10 summary disposition would address a number of
11 concerns, including the following. First, in view of
12 the criteria used in risk-informed regulations, as set
13 forth in NUREG/BR-0058, Regulatory Analysis Guidelines
14 of the U.S. Nuclear Regulatory Commission, Revision 3,
15 which set of estimates goes in Duke's analysis or
16 those of the Sandia study, NUREG-6427, of conditional
17 containment failure probability are more appropriate
18 for use in the SAMA -- Duke's SAMA analysis in this
19 license renewal proceeding.

20 That is, do the Sandia assumptions reflect
21 better estimates than Duke's? And should the values
22 from the Sandia study have been utilized in the
23 analyses of mitigation alternatives for hydrogen
24 control during station blackout?

25 There are other examples of language in

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1 the Commission's order, but basically this category
2 would include all of the issues of adequacy and which
3 approach is more appropriate, as discussed in various
4 places by the Commission, and as has been discussed at
5 various points in this proceeding before the Board.

6 Also, was Duke's overall cost-benefit
7 assessment skewed or incomplete because of a failure
8 to include the higher event frequencies used in the
9 Sandia study?

10 Next, because they address the Sandia
11 study results, do the draft SEISs, as the Commission
12 said, they made indeed largely appear to render moot
13 the contention's first concern, i.e. the SAMA analysis
14 failure to include information from the Sandia study.
15 In other words, do the RAIs and the SEISs moot the
16 contention?

17 Next, we would like to have the criticisms
18 of the Sandia study alluded to in footnote 24 of
19 CLI 02-17 to be addressed. And this is not an
20 exhaustive list, but these are issues that, in light
21 of the Commission's order, we think should be
22 addressed either in a motion or a response to a
23 motion, or both.

24 Next, in light of the Commission's order
25 and the foregoing -- how we are proposing that we

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1 proceed, obviously, we will hear any argument of the
2 parties. But in light of these, our ruling on the
3 Motion to Amend consolidated contention 2, we are
4 inclined to find -- we are inclined not to admit the
5 contention as such, because we find that good cause
6 for late filing of those parts that are outside this
7 -- has not been shown, such that they -- they --

8 MS. CURRAN: You're cutting out there,
9 Judge Young.

10 JUDGE YOUNG: And I think I hear people
11 sort of rustling papers, and I think that's the
12 reason. I hope we haven't missed anything -- other
13 things I've said. So if there are any blanks, please
14 interrupt me.

15 MS. CURRAN: There was one blank at the
16 end where you said, "We are inclined not to allow the
17 amendment of the contention." There was a blank in
18 there. But the rest I heard, I thought.

19 JUDGE YOUNG: I'll start over on that one.
20 In light of the Commission's order and the sort of
21 alternative approach that we have developed and are
22 inclined to follow, we are inclined to rule on the
23 Motion to Amend consolidated contention 2 in the
24 following manner: that we would not admit it as such,
25 because we -- one, because we find that good cause for

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1 late filing of those parts outside the scope of
2 consolidated contention 2 has not been shown, such
3 that we would find that they do not meet the criteria
4 for late-filed contentions, nor do we find good cause
5 has been shown for the late filing of any parts that
6 do not arise out of the RAI responses.

7 And then, finally, we find -- we would
8 find that the intent of any portions that might
9 otherwise -- as arising out of the RAI responses and
10 otherwise meeting the standards for late-filed -- may
11 be addressed --

12 THE COURT REPORTER: I'm sorry, Judge.
13 Could you start that sentence over again?

14 JUDGE YOUNG: The last five minutes have
15 been one sentence, but -- did you get the first two
16 parts of it?

17 MS. CURRAN: I think we -- I heard, "No
18 good cause for admission of issues outside the scope
19 of contention 2 or arising out of RAI responses," and
20 then I -- I didn't hear very well after that.

21 JUDGE YOUNG: Okay. I'm going to start
22 over, and I'm going to ask everyone to please stay
23 quiet so -- let me just say it. I'll use the handset.
24 And then, when we listen to what you have to say, I'll
25 put you back on speaker.

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1 Okay. Let me try again. In light of the
2 Commission's order and of our proposed outline for how
3 to proceed in this -- in the remainder of this
4 proceeding before the Board, our inclination on the
5 Motion to Amend consolidated contention 2 is to rule
6 as follows: that we would not admit it as such,
7 because we find that good cause for late filing of
8 those parts outside the scope of consolidated
9 contention 2, the original contention, has not been
10 shown, such that we would find that they do not meet
11 the criteria for late-filed contentions under
12 10 CFR 2.714, I believe it's (a). If I'm mistaken
13 about that section, we can correct that.

14 Nor do we find -- second, nor do we find
15 that good cause has been shown for the late filing of
16 those parts that do not arise out of the RAI
17 responses.

18 And, finally, we would find that the
19 intent of any portions that might otherwise be
20 considered to arise out of the RAI responses, and
21 otherwise meet the standards for late-filed
22 contentions, may be addressed appropriately in the
23 context of a Motion for Summary Disposition in which
24 subjects, including those listed above, including
25 those we have -- I have already gone through, are

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1 addressed either in a motion or a response.

2 That is, all subjects of the late-filed
3 contentions may be raised in a response to a Duke
4 Motion for Summary Disposition, and would be
5 considered by the Board in that context.

6 Some, like, for example, Subpart 1 in
7 particular, may not receive much attention by the
8 Board, but we would not prohibit you from arguing any
9 part, and all parts would be considered as they would
10 be in considering any Motion for Summary Disposition
11 and responses thereto.

12 And now that Ms. Curran is on board
13 representing the Petitioners, I don't think I need to
14 explain the standards for -- and the requirements for
15 motions for summary disposition and responses.

16 Then, if -- to conclude on the Motion for
17 Summary Disposition context, obviously, if the motion
18 were granted, that would end the proceeding. And if
19 the motion were denied, we would go to hearing.

20 Also, Judge Kelber has located some other
21 reference which -- references which may be cited in
22 any filings relating to such a motion, and I'm going
23 to let him read those to you.

24 I'm going to go back on speaker now.

25 JUDGE KELBER: Has everyone heard Judge

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1 Young completely?

2 MS. CURRAN: This is Diane Curran. I
3 think I heard it all.

4 MR. REPKA: Yes, sir. This is Dave Repka.

5 MR. HECK: This is Jared Heck for the
6 staff. We heard that.

7 JUDGE KELBER: Okay. In studying all of
8 this, I came across two other references which --
9 well, three other references which may be relied upon,
10 I believe, in one way or the other. The first is
11 NUREG/CR-6595 -- an approach for estimating the
12 frequencies of various containment failure modes and
13 bypass events.

14 This was written by Trevor Pratt and
15 others in January 1999 and has received Commission
16 endorsement in the formulation of national standards
17 for PRAs.

18 Secondly, there is a report available on
19 the web -- Flame Acceleration and Deflagration to
20 Detonation Transition in Nuclear Safety -- a state-of-
21 the-art report by a group of experts, OECD Nuclear
22 Energy Agency. Its number is NEA/CSNI/R 2000(7). And
23 this was August 2000. But it's available on the web
24 at, well, [www.galcit](http://www.galcit.caltech.edu/~jeshep/soar/) -- that's G-A-L-C-I-T --
25 [.caltech.edu/~jeshep/soar/](http://www.galcit.caltech.edu/~jeshep/soar/).

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1 And, finally, Elizabeth Bettay Carnell has
2 published a paper in the latest issue of Risk Analysis
3 entitled "Risk and Uncertainty Analysis in Government
4 Safety Decisions." And it's in Volume 22, Number 3.
5 That's June. And it's pages 633 to 646. It's also
6 available on the web, but I think the risk analysis
7 journal article is available widely.

8 MS. CURRAN: Judge Kelber, this is Diane
9 Curran. I want to ask -- I think I got numbers 1 and
10 3, but number 2, if you could send us an e-mail with
11 that information. It's just a little hard to hear all
12 the words and the numbers and all.

13 JUDGE KELBER: Let me give you the
14 website, and then it becomes clearer. It's
15 www.galcit.caltech.edu/~jeshep/soar/. If you have
16 trouble locating it, give me an e-mail and I'll send
17 it -- I'll send you the link directly.

18 MS. CURRAN: Okay.

19 JUDGE YOUNG: All right. You've heard, I
20 hope -- this is Judge Young again. You've heard, I
21 hope, what we have had to say to you this morning, and
22 we would like to hear your responses, based on your
23 own -- and I'm sure everyone -- all of you have read
24 the Commission's order -- based on your own reading of
25 it.

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1 At this point, I'd like to hear your
2 responses to what we have said this morning.

3 MS. CURRAN: Judge Young, this is Diane
4 Curran. I want to make a request. This is all new
5 here, what you've laid out this morning. And I would
6 like to have a chance to talk it over with our expert
7 and my client, and, of course, we're in different
8 places. I wonder if it would be possible to take a
9 15-minute break and then come back on the line. I
10 feel like I could give a better response if we were
11 able to do that.

12 JUDGE YOUNG: That might be a good idea.
13 That way everyone could talk with your respective
14 clients and come back and maybe more efficiently
15 address the issues we've raised.

16 Before we do that, does anyone have any
17 questions, just to clarify what we've said, that would
18 make it easier for you in your consultations
19 separately?

20 MR. REPKA: Yes, Judge Young. This is
21 Dave Repka. I think what I'm trying to understand is
22 going through your outline you talk about the fact
23 that you would be non-inclined to admit -- that are
24 shown to be outside the scope --

25 JUDGE YOUNG: Now you're breaking out.

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1 We're missing I think a lot of your words. So maybe
2 you should --

3 MR. REPKA: Okay. I've picked up the
4 phone. Does that help?

5 JUDGE YOUNG: That does. Thank you.

6 MR. REPKA: What we're trying to
7 understand, I think, is what really the Board intends
8 to do with the eight proposed amended contentions. If
9 we talk about going into discovery and addressing
10 certain things in a summary disposition motion,
11 obviously, we have an original consolidated
12 contention 2, which defined a specific issue, and that
13 we can address in summary disposition as well as the
14 issues that you have identified here this morning.

15 But I think, as you know, our position is
16 on the eight amended contentions that they are beyond
17 the scope of the original contention and/or have no
18 basis. And we're not clear what the Board
19 contemplates in terms of allowing discovery on those
20 issues and needing to address all of those issues in
21 summary disposition or not.

22 JUDGE YOUNG: Okay. I'm going to speak up
23 -- I'm going to pick up the receiver now and just try
24 to answer your questions. Our thinking is that we
25 want to address -- we want to proceed at this point in

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1 the most efficient manner possible.

2 We could continue with argument on the
3 proposed amended contention. However, after reading
4 the Commission's order, and several references in the
5 Commission's order to the broad issue that might be
6 described as relating to the adequacy of Duke's SAMA
7 analysis in its consideration of NUREG-6427, or with
8 regard to which assumptions reflect better estimates,
9 which approach would -- which set of estimates would
10 be more appropriate for use in the SAMA analysis --
11 Duke's or NUREG-6427.

12 We are sort of viewing the original
13 consolidated contention 2, at this point, based on the
14 Commission's order, as implicitly including what could
15 be described as the intent of Subpart 4 of the
16 proposed amended contention, and that various other
17 parts of the proposed amended contention might fall
18 within that general scope.

19 For example, on discovery it's not unusual
20 for parties to challenge PRAs. I know that Duke said
21 in our last conference -- I think it was the last one
22 -- that the original PRAs are available and that the
23 recent revisions have been provided to the NRC not as
24 sort of revamped PRAs but as revisions which someone
25 could read and apply to the original PRAs and see how

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1 they would make them differ. That might be an area
2 for discovery.

3 Several other parts of the proposed
4 amended contention might fall within the general issue
5 of the adequacy of Duke's consideration of NUREG-6427
6 and basically which approach, which estimates, which
7 assumptions, which values are more appropriate to be
8 used in the SAMA analysis for the McGuire and Catawba
9 plants.

10 So we could take the time to hear the
11 argument of all of you on all of these separate
12 subparts of the amended contention. And we could then
13 take the time to write up a long -- much longer than
14 I've gone through a moment ago -- order addressing
15 each subpart of the proposed amended contention.

16 The Commission, however, has suggested
17 that summary disposition would be an appropriate route
18 to follow as the next step in this case. We are
19 inclined to think that it is not the most efficient
20 use of the parties' time, or of our time, to go more
21 in depth into the proposed amended contention, given
22 that, in light of the Commission's order, we would now
23 construe the original contention to allow for adequacy
24 issues, which approach is more appropriate issues,
25 those types of issues, to be argued under the original

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1 consolidated contention 2.

2 In effect, as Ms. Curran had argued I
3 think on April 29th when the issue of mootng first
4 came up -- in other words, I think we would probably
5 not, after the Commission's order, be inclined to
6 entertain favorably -- and this is -- I'm talking
7 about our inclination now, and I'm speaking -- and,
8 obviously, I have not conferred privately with Judge
9 Kelber and Judge Rubenstein, but I think that after
10 the Commission's order, if Duke, for example, were to
11 file a Motion for Summary Disposition saying we have
12 done the analysis with NUREG-6427 -- and that's enough
13 to moot it out without getting to issues of adequacy
14 and which approach is more appropriate -- we would not
15 be inclined, I think, to grant a simple Motion for
16 Summary Disposition limited in that way, which I think
17 was how Duke was looking at it earlier on.

18 By virtue of the clarification and
19 assistance offered in the Commission's order, we think
20 that the Commission's suggestion to proceed in a
21 context of a Motion for Summary Disposition is more
22 appropriate.

23 We think that the adequacy, which is --
24 which approach is more appropriate issues, can be
25 dealt with in both the motion and responses to that.

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1 And then, to the degree they would be relevant, that
2 the Petitioners might find them relevant, or any other
3 party for that matter, the various other subparts of
4 the proposed amended contention 2, those same issues
5 could be argued in the context of a Motion for Summary
6 Disposition.

7 Given that, what we are inclined to do is
8 make a fairly concise and condensed ruling on proposed
9 amended contention 2, as I stated earlier. In other
10 words, without going into detail on which parts fall
11 within which categories, we would find either that
12 certain parts might not be within the scope of the
13 original consolidated contention 2, such that the sort
14 of exception we created by setting deadlines would not
15 make them fall within or meet the late filing criteria
16 of 10 CFR 2.714.

17 Other parts -- we might find that good
18 cause has not been shown for the late filing of them,
19 because they do not arise out of the RAI responses.
20 Subpart 1, in particular, comes to mind there.

21 And then, finally, we would find that the
22 intent of any portions that might otherwise be
23 considered as arising out of the RAI responses, and
24 otherwise meeting the standards for late-filed
25 contentions, may be addressed in the context of a

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1 Motion for Summary Disposition by Duke in which the
2 various subjects that we listed would be addressed.

3 I think probably Subpart 4 -- the intent
4 of that would be -- would go to the general
5 adequacy/which approach is better issue. Some of the
6 other subparts might be, in effect, subissues of the
7 general adequacy issue, and could be raised in a
8 response to a Motion for Summary Disposition.

9 And in contrast to how we might have
10 proceeded prior to issuance of the Commission's order
11 on July 23rd, at this point we would not be inclined
12 to just knock them out of the ball park or knock them
13 out of the ball game based on the previous arguments
14 on scope and on interpretation of the original
15 consolidated contention that we've been hearing and
16 discussing and considering.

17 Does that assist you in understanding what
18 we would be intending to do with the pending Motion to
19 Amend the contention 2? In other words, rather than
20 doing a long, detailed order on it, we would -- we
21 would resolve it in the somewhat condensed manner that
22 I outlined briefly before.

23 I'm going to put you back on speaker now.

24 MR. REPKA: Judge Young, this is Dave
25 Repka again. Do I -- when you talk about resolving in

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1 a short or a condensed form, do I hear you to say that
2 you would give us some indication as to what issues
3 you would like to see addressed versus those that
4 you've determined would not be on scope or good cause
5 filed?

6 I guess we would have a concern for any
7 summary disposition motion that we would need to tell
8 what the universe of what we need to address is. And
9 without that kind of specificity, we would feel like
10 we're shooting at a moving target.

11 JUDGE KELBER: This is Judge Kelber. The
12 Commission, in addition to noting the question of
13 whether or not the -- SEISs moot the consolidated
14 contention, the Commission has also drawn attention,
15 on the bottom of page 11 and top of page 12 of its
16 decision, to the question of the -- appropriate.

17 And I think that defines the scope of
18 topics -- deal with the appropriateness of the
19 contention, and that's why I mentioned NUREG/BR-0058,
20 which defines the regulatory analysis guidelines.

21 JUDGE YOUNG: Also, I think the -- I agree
22 with Judge Kelber, and I think if Duke files a Motion
23 for Summary Disposition -- this is Judge Young again
24 for the Court Reporter -- that your motion would
25 address the general issue that Judge Kelber just

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1 referenced, the general adequacy/which approach is
2 better issue.

3 Now, then, with regard to the other
4 subparts -- and I think that we're sort of looking at
5 Subpart 4 as being the broad, which is better for
6 short, issue. The other subparts would either be
7 rendered unnecessary for consideration through the --
8 by virtue of the discovery process or they would be
9 issues that the Petitioner could argue in the context
10 of a -- a Duke Motion for Summary Disposition.

11 So based on that, we would find it
12 unnecessary to do -- to give any -- to go into any
13 greater detail and ruling on the proposed amended
14 contention, at this point, in light of the
15 Commission's order. And in light of our ability to
16 assess all of those issues in the context of summary
17 disposition. And I say a motion, but, obviously, any
18 party could file a motion.

19 JUDGE RUBENSTEIN: This is Judge
20 Rubenstein. One might look to additional guidance
21 under Commission's licensing instruction, wherein they
22 state the contention is admissible, but only insofar
23 as it raises the question whether the values from the
24 study should have been utilized in the analysis of
25 mitigation alternatives for hydrogen control during a

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1 station blackout.

2 So this provides some narrowing guidance
3 on where we should be going. In effect, should the
4 Sandia assumptions have been used? Did the RAI and
5 SEIS moot the contention? And should Duke's SAMA have
6 addressed the study?

7 So those are the core issues which we have
8 to come to grips with, and which we are looking for
9 arguments on within the framework of what Judge Young
10 laid out.

11 JUDGE YOUNG: Other questions?

12 JUDGE RUBENSTEIN: Are there any questions
13 on that?

14 MS. CURRAN: So, Judge -- this is Diane
15 Curran -- just to clarify, before discovery commences,
16 there would be a ruling on the Motion to Amend
17 contention 2?

18 JUDGE YOUNG: Assuming none of your
19 arguments -- this is Judge Young. Assuming none of
20 your arguments change our minds, we would proceed as
21 I just laid out -- in other words, with a fairly
22 condensed, brief ruling on the proposed amendment to
23 contention 2, with the understanding that virtually
24 all of the issues that you have raised could be
25 addressed in the context of a summary disposition

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1 motion more efficiently at this point in light of the
2 guidance offered by the Commission.

3 MS. CURRAN: Okay. I understand.

4 JUDGE YOUNG: Any other questions before
5 we take a short break to let each party confer with
6 your --

7 MS. OLSON: Judge Young, this is Mary
8 Olson. I apologize for being late. I just wanted to
9 let Ms. Curran know that I'm here.

10 JUDGE YOUNG: And whatever arrangements
11 you all need to make with each other for conferring
12 privately, you can do that. I think you can come back
13 on the line if you go off. Either that or you can put
14 it on mute.

15 So, any other questions before we take a
16 break?

17 MR. REPKA: What time should we come back?

18 MS. CURRAN: I'd like to ask for at least
19 20 minutes.

20 JUDGE YOUNG: Five after 11:00?

21 MS. CURRAN: Okay.

22 JUDGE YOUNG: All right.

23 MS. CURRAN: And I'll call the other
24 intervenors.

25 JUDGE YOUNG: Okay. Great.

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1 JUDGE KELBER: Now, before you start your
2 considerations, I suggest that you really consider the
3 guidelines, because this is not an open -- this is not
4 an open hunting season. We are limiting it on the
5 guidelines for regulatory analysis. That's what the
6 Commission has in mind.

7 MS. CURRAN: Could you just explain that
8 a little more, Judge Kelber?

9 JUDGE KELBER: NUREG/BR-0058 combines the
10 guidelines contained in the Commission's various
11 statements, both published in the Federal Register and
12 elsewhere, on how regulatory analysis is performed,
13 and there is a substantial portion on the use of PRAs
14 in regulatory analysis. And I think that has to be
15 kept in mind. And we're not proposing that there be
16 open hunting season on every number in every PRA.

17 JUDGE YOUNG: We are considering -- and,
18 obviously, as in other cases, parties can challenge
19 PRAs. And, you know, that -- that would be something
20 that would be resolved in the discovery process.

21 We'll give you a few more minutes, since
22 we are taking up a little bit more time here.

23 But I -- but I guess one thing that I
24 would say, and that you might want to talk about with
25 your respective clients, is that given that Duke has

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1 said that the original PRAs are available, given the
2 general interest in proceeding as efficiently as
3 possible, what we would suggest is that immediately,
4 assuming we proceed as our outline would indicate, we
5 would suggest that starting immediately after the
6 conclusion of this conference -- if not immediately,
7 within the next day or so -- that the parties would
8 commence informal discovery to the extent possible.

9 In other words, to the degree that -- that
10 getting together and talking about what you need and
11 how would be the easiest way to achieve that, if you
12 can do that informally that helps everyone, saves
13 everyone attorney fees and time. And, in fact, if at
14 the end of our conference today there are any issues
15 on that that people might want to ask our assistance
16 on, we can discuss those briefly.

17 With that said, if there are no more
18 questions, let's say 10 after 11:00, at this point,
19 we'll reconvene.

20 (Whereupon, the proceedings in the
21 foregoing matter went off the record at
22 10:49 a.m. and went back on the record at
23 11:13 a.m.)

24 JUDGE YOUNG: All right. Any party have
25 a desire to go first?

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1 MR. REPKA: This is Dave Repka for Duke.
2 I'm happy to go first.

3 JUDGE YOUNG: Go ahead.

4 MR. REPKA: After discussing the Board's
5 proposal, it's Duke's position that it's very
6 important that before we proceed with discovery and
7 summary disposition, that we have a decision on the
8 eight proposed subissues or amended subissues.

9 In our view, the Commission allowed the
10 one consolidated contention 2, which dealt with the
11 containment failure probabilities related to the
12 hydrogen combustion event as a result of station
13 blackout -- fairly specific issue, and the question is
14 how well has that been dealt with in the original SAMA
15 analysis and in the RAI responses.

16 Before we -- and before we evaluate and
17 deal with any resolution of that issue and summary
18 disposition and discovery, it's very important to have
19 a decision that limits the scope of issues, so that we
20 know what it is that we're having discovery on and
21 what it is that needs to be and can be addressed in
22 summary disposition.

23 Most importantly, as we discussed on the
24 conference call a couple of weeks ago, and as we
25 discussed in our papers on a couple of the additional

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1 proposed amended contentions, the Intervenor have
2 raised issues related to the Level 1 PRA as well as
3 the Level 3 PRA. Those are matters that are
4 completely unrelated to the analysis, either the
5 original SAMA analysis or the revised SAMA analysis,
6 based upon the NUREG-6427 numbers.

7 And I think it's very important to define
8 the scope of the proceeding in discovery, that those
9 Level 1 issues and Level 3 issues not be included for
10 all the reasons we've said. The SAMA analysis, to try
11 to draw a picture of it, both originally and the
12 revised version, you can look at it almost as a
13 Level 1 number times a Level 2 number times a Level 3
14 number gives you a result.

15 And the issue that's been admitted by the
16 Commission, and the issue that's really related to the
17 issues raised in NUREG-6427, relates to the Level 2
18 number.

19 When Duke submitted revised information
20 based upon the NUREG-6427 containment failure
21 probabilities, that changed the Level 2 number. And
22 we don't think it's appropriate to go into amended
23 issues that talk about those numbers which really were
24 constant in the revised analysis -- the Level 1
25 numbers and the Level 3 numbers. And several of these

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1 subissues do precisely that.

2 JUDGE YOUNG: Mr. Repka?

3 MR. REPKA: Yes, Judge.

4 JUDGE YOUNG: I really want to make sure
5 that we don't get off course. With regard to the
6 Level 1 numbers, page 9 of the Commission's order, the
7 -- it said that the Sandia study found significantly
8 higher station blackout frequencies, and I believe
9 that goes to the Level 1 PRA.

10 And then, it goes on to say, "And,
11 consequently, higher probabilities of containment
12 failure, particularly for the McGuire Station."
13 That's one example of how we find that the Commission
14 has provided some assistance to us in how they
15 interpreted the original contention.

16 What you started out by saying --

17 JUDGE KELBER: I differ with that.

18 MR. REPKA: Judge Young, I just -- before
19 you go too far on that, I want to -- without being too
20 disrespectful, but that statement of the Commission is
21 just wrong. The Sandia study did not find anything
22 about station blackout frequency.

23 JUDGE YOUNG: Well, you can raise your
24 disagreement with the Commission with the Commission.
25 But the Commission stated what it stated, and with

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1 that guidance --

2 JUDGE KELBER: I differ with that, and we
3 will have to consider --

4 MR. REPKA: This is Dave Repka again. I
5 think the bottom line on our position is that before
6 we proceed on discovery I think in some form it's very
7 important to have a statement of what issues are in
8 and what issues are not.

9 JUDGE YOUNG: Mr. Repka, let me ask you
10 another question. Before, when I said that the
11 primary thing that I would expect a Duke Motion for
12 Summary Disposition to -- I may need to refer to that.
13 That I would expect a Duke Motion for Summary
14 Disposition to address is the adequacy of your SAMA
15 analysis in light of 6427.

16 In other words, is the more appropriate
17 approach to take a comparison of the two? That is
18 something that you were arguing at the -- at our last
19 meeting. I believe it was July 10th. You were
20 arguing that that was not relevant -- that going into
21 the cost-benefit analysis was not relevant, that all
22 you had to do was show the two -- how the two
23 calculations would be done, which you had done, but
24 that the evaluation issue didn't come into play.

25 It seems clear to us that the evaluation

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1 of which approach is the more appropriate does come
2 into play based on the Commission's order. And that's
3 all that you would need to address in a motion.

4 With regard to some of the other subparts,
5 it might be helpful today for you or any other party
6 to raise how specific portions of the proposed amended
7 contention 2 would come into play if what we said
8 earlier did not make sense to you.

9 But I'm not following what you're saying
10 at this point as to why it would be necessary or an
11 efficient use of anybody's time for us to go into a
12 detailed ruling on the proposed amended contention, if
13 all of the issues can be addressed in the manner we
14 spoke of earlier.

15 So while you are saying that you want us
16 to do that, so that it can be clear what the scope of
17 the Motion for Summary Disposition and what discovery
18 would include, I think it would be more helpful if you
19 would be more specific in where you see problem areas.

20 In other words, you have mentioned the
21 Level 1 PRA. You say you believe the Commission was
22 wrong. I'm not willing to go to that extent.

23 JUDGE KELBER: I am.

24 JUDGE YOUNG: Judge Kelber will agree with
25 you. But I think we -- we need to accept what the

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1 Commission has said as such and --

2 JUDGE KELBER: And, again, I differ with
3 that. It is possible that they have made a technical
4 mistake and it is.

5 JUDGE YOUNG: Moving on from that, apart
6 from the Level 1 PRA issue -- and I believe that you
7 said that those were all available anyway, did you
8 not, last time?

9 MR. REPKA: I think what we explained the
10 last time was what is -- there is a substantial amount
11 of information on the PRA on the docket, summary
12 reports subsequent to the initial PRA filing. So very
13 substantial information from which you can derive the
14 station blackout frequency numbers that were used.

15 That number -- station blackout frequency
16 number was -- has been held at a constant in the
17 various calculations Duke has submitted on the SAMA
18 analysis. So that information can be derived from
19 what's in the public domain.

20 Now, you asked for more specificity with
21 respect to those things that we would like to see a
22 ruling on, and I think proposed amended contention 3
23 is one example where it raises the station blackout
24 frequency number. That's a number, again, that didn't
25 change in any way based on the RAI responses -- the

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1 Level 1 number. And we don't think that that's within
2 the scope of either timeliness or the scope of the
3 original contention.

4 Another example of that, very
5 specifically, would be proposed amended contention 6,
6 I believe it is, that goes to a number of Level 3
7 factors that are used in the SAMA analysis. Those did
8 not change between the original SAMA analysis and the
9 revised SAMA analysis based upon the NUREG-6427
10 number. Constants -- the NUREG-6427 report did not go
11 to the Level 3 numbers.

12 So those are things that are clearly
13 beyond the scope of the new information. They are
14 beyond the scope of the original contention.

15 JUDGE YOUNG: Mr. Repka, you broke up just
16 a little bit. Let me make sure I understand you. The
17 two subparts that you referred to as your needing
18 clarification on were subparts 3 and 6, correct?

19 MR. REPKA: Correct.

20 JUDGE YOUNG: It may be that in our
21 conference today we can discuss those and see exactly
22 what the parties' positions on those are. I think
23 that what we intended to say earlier is that Duke
24 addresses the which is more appropriate/adequacy issue
25 in any Duke Motion for Summary Disposition.

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1 And if it's understood that that is a
2 subject that is open for briefing and argument in a
3 summary disposition context, that there may be
4 portions -- other parts of the proposed amended
5 contention besides Subpart 4, which is the general
6 one, that could be brought into play either in a
7 response or in a discovery context.

8 And so it's very helpful that you provided
9 those two areas for us to talk about, because it may
10 be, by the end of our discussion today, that we will
11 have resolved your concerns to an extent that we do
12 not need to proceed on with a detailed consideration,
13 argument on, and ruling on all separate parts of the
14 proposed amended contention.

15 Just those same things can be dealt with
16 in another context. There is no reason to spend undue
17 time at this point to delay everything by doing a
18 detailed ruling on that. So --

19 MR. REPKA: Judge Young, this is Dave
20 Repka. Having said that, I'm not -- it's not our
21 intent to abandon our conclusions on any of the other
22 contentions with respect to whether there is any
23 regulatory basis on the arguments about uncertainty
24 and those kinds of things.

25 But it's -- the two I mentioned are those

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1 that go directly to the threshold for what really
2 would be the scope of discovery here. And so it would
3 be contention 6 or --

4 JUDGE KELBER: This is Judge Kelber. Of
5 course, Mr. Repka, if there is a discovery request
6 that you think is not within the scope, you can always
7 ask -- raise an objection and leave it up to our
8 tender hands.

9 MR. REPKA: That's true.

10 JUDGE KELBER: This is why I've mentioned
11 repeatedly NUREG/BR-0058, which lays out how you would
12 do it and how anyone should do it when approaching the
13 Commission with a proposal for a change.

14 JUDGE YOUNG: Judge Young again. I think
15 that if -- if a discovery dispute arises -- and,
16 again, we would encourage, first, informal discovery
17 through just simply talking with each other and seeing
18 what -- telling each other what's out there, what you
19 want, how you can go about getting it in the most --
20 in the least expensive and cumbersome manner.

21 If you raise -- if there are disputes on
22 discovery, then what I would expect all parties to
23 address would be how the particular request relates to
24 the issue of which approach is better. And I think
25 that based on other cases in the history of NRC cases

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1 that the PRAs would be relevant.

2 As to whether the Level 1 ones would be
3 relevant, I think the Commission states that they are,
4 and there may be some disagreement about that. But --

5 JUDGE KELBER: The Commission does not
6 state that. That's -- if you want to discuss it,
7 we'll discuss it. Put it on mute.

8 JUDGE YOUNG: But -- hold on one second.

9 (Pause.)

10 All right. What I was saying is any --
11 any types of issues that the parties disagree on, I
12 think that you can make your arguments on how they
13 relate to the broader issue of which approach is
14 better in light of the language -- various language of
15 the Commission in its order.

16 And given that this -- that all of these
17 issues can be raised either in a discovery context or
18 in the context of a response to a Motion for Summary
19 Disposition, in which any party could argue whatever
20 they want to, whether or not -- without indicating how
21 we would rule, obviously, on anything at this point,
22 what I would encourage you to do is address why
23 something would need to be addressed in the context of
24 ruling on a Motion for Summary -- I'm sorry -- why
25 something would need to be addressed in the context of

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1 ruling on the proposed amended contention in the level
2 of detail which you seem to be seeking and why that
3 could not be as easily addressed in the context of
4 summary disposition and discovery.

5 MR. HECK: Judge Young, this is Jared Heck
6 for the staff.

7 JUDGE YOUNG: Go ahead.

8 MR. HECK: In our view, discovery is not
9 appropriate until the admissibility of the contentions
10 has been determined. It would be, at this point, a
11 preliminary question as to whether the contentions are
12 admissible in the first instance.

13 JUDGE YOUNG: Mr. Heck, let me see if I
14 can clarify. What we are saying here is that the
15 Commission, in ruling on Duke's and the staff's appeal
16 of our admission, our -- the original consolidated
17 contention 2, the Commission discusses issues of
18 adequacy and -- nice music, but -- okay.

19 MR. HECK: Judge Young, may I interject?
20 This is Jared Heck again.

21 JUDGE YOUNG: Well, I have -- I was in the
22 middle of a sentence when the music interrupted me.
23 What I'm trying to get across to you is the
24 Commission's order addressed the original contention.
25 The Commission's -- much of the Commission's language

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1 throughout addresses the issue of the adequacy of how
2 -- how well Duke's SAMA analysis takes into account
3 the analysis found in Sandia's study, NUREG-6427.

4 The Commission makes various references to
5 which are the better estimates, which is the more
6 appropriate approach to take. In light of that, in
7 light of that construction of the original
8 consolidated contention 2, we do not see the need --
9 the discovery would be on the original contention 2 as
10 construed by the Commission in various places, and
11 Subpart 4 of the proposed amended contention
12 essentially goes to the adequacy/which is better
13 issue.

14 Other parts of the proposed amended
15 contention could be raised in a discovery context or
16 in responses under the -- the general issue of which
17 approach is better as the Commission construed the
18 original consolidated contention 2, the part of it
19 relating to NUREG-6427.

20 So I want to encourage you to try to
21 understand the substance of what I'm saying and not
22 get sidetracked onto a procedural issue of whether we
23 have ruled on all of the separate parts of the
24 proposed amended contention. If there are any
25 particular parts that you do not see could be resolved

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1 in the manner in which we have proposed, that's what
2 we would like to hear, rather than just a conclusory
3 statement that you think that we need to rule on it,
4 period.

5 MR. HECK: Judge Young, this is Jared Heck
6 again. I understand your interpretation of CLI 02-17.
7 But the staff respectfully disagrees with that
8 construction. In our view, the Commission, while
9 ruling on the initial contention's admissibility,
10 stated that it would be more efficient to resolve the
11 question of whether Duke included information from the
12 Sandia study in its environmental report through
13 summary disposition, not whether one -- whether the
14 Sandia numbers were better than Duke's numbers, but
15 simply whether Duke has, in fact, in some way taken
16 those numbers into account, so that the staff can then
17 consider the cost-benefit analysis resulting from that
18 consideration by Duke in its final environmental
19 impact statements.

20 JUDGE YOUNG: How do you view all of the
21 Commission's statements on the adequacy issue and the
22 -- which is the better approach, which is the more
23 appropriate approach?

24 MR. HECK: Judge Young, I think that in
25 the summary of the Commission's statement on page 17

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1 -- is really instructed here -- and I think it was
2 Judge Rubenstein that noted this is a limiting
3 construction. The contention is admissible but only
4 insofar as it raises the question of whether the
5 values from the Sandia study should have been utilized
6 in the McGuire and Catawba analyses.

7 And our position is that those values
8 were, in fact, utilized when Duke performed a
9 reanalysis in its SAMA evaluation using the
10 conditional containment failure probabilities from the
11 Sandia study.

12 JUDGE YOUNG: But you didn't answer my
13 question. My question was: how do you view the
14 Commission's statement throughout its order referring
15 to the adequacy issue, which, in effect, would come
16 under the language whether the values from the Sandia
17 study should have been utilized. I think utilized
18 goes farther than providing -- not making any
19 evaluation of which is better.

20 Utilized I think probably goes to a lot of
21 the Commission's language on adequacy and which is
22 better, and the SEIS goes into some level of
23 evaluation. And what I'm asking you, which you have
24 not answered, is, how do you view all of the language
25 in the order on that issue?

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1 MR. HECK: Judge Young, the language I see
2 that may refer to adequacy -- the only language I see
3 is on page 12. The Commission states that the Board
4 did not resolve the merits questions, whether the
5 Sandia studies' assumptions reflected better estimates
6 than Duke's, or whether Duke's SAMA analysis should
7 have addressed that study. Is that the language
8 you're referring to?

9 JUDGE YOUNG: That's one -- that's one
10 point in the decision. And I think even -- just
11 addressing that one, how do you view that? I mean,
12 I'm having a hard time understanding how you don't --
13 and if you do, please correct me if I'm wrong. But
14 I'm having a hard time understanding how you don't see
15 that, in effect, the Commission has construed the
16 original contention 2, the part of it relating to
17 6427, as including the adequacy issue, the issue of
18 which approach is the more appropriate approach to
19 take.

20 Obviously, Duke has done the calculations
21 and has provided the results of those in the RAI
22 responses based on NUREG-6427 and has provided two
23 parallel sets of calculations. The thing that seems
24 to be the obvious issue sitting out there on the
25 table, which the Commission obviously saw, is, which

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1 approach is more appropriate? And that's what we
2 would expect a Motion for Summary Disposition to
3 address.

4 And insofar as the other issues in the
5 proposed amended contentions are concerned, those
6 could come in under that broad issue, and the parties
7 could argue the extent to which they could come in in
8 a context of summary disposition and discovery, rather
9 than continuing to spend a lot of all parties' time
10 and expense on the proposed amended contention.

11 MS. CURRAN: Judge Young, this is Diane
12 Curran. As I have been sitting here listening to the
13 discussion, and thinking back to how we got in the
14 position of filing this amended contention in the
15 first place, it seems to me that we -- we're almost
16 back in April or something when we had that last
17 discussion about what did your decision mean, and was
18 the issue of adequacy encompassed in the contention.
19 We thought it was, and there was some disagreement
20 about whether it was.

21 It seems to me that now the Commission has
22 said, yes, the issue of adequacy is encompassed in
23 this contention. And I'm not used to doing this, but
24 I'm wondering if it would be helpful if BREDL and NIRS
25 withdrew amended contention 2 with the understanding

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1 that, based on the Commission's order, the issue of
2 adequacy is now encompassed in the contention. And
3 that way it removes the question of whether you have
4 to rule on it.

5 JUDGE YOUNG: I would like to hear what
6 the other parties have to say to that. I think that
7 would simplify matters greatly. Does Duke or the
8 staff have any objection to a construction of the
9 original consolidated contention 2 as encompassing the
10 issue of adequacy as Ms. Curran just stated, and as I
11 have stated several times earlier?

12 JUDGE RUBENSTEIN: This is Judge
13 Rubenstein. Adequacy is too nebulous and broad a term
14 for me right now. Would Ms. Curran explain what she
15 means by that? Are we to go into the Level 1 and the
16 Level 3 PRAs? Are we to go into the uncertainty? Are
17 we to go into the assumptions in the IPE?

18 MS. CURRAN: Well, it is certainly our
19 position that those issues are relevant, yes. The
20 Level 1 is integrally related with Level 2.

21 JUDGE KELBER: No, it is not, Ms. Curran.
22 That's why I referenced 6595. Take a look.

23 DR. LYMAN: This is Dr. Lyman. With all
24 due respect, Level 1 and Level 2 are integrated.

25 JUDGE KELBER: Sir, please --

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1 DR. LYMAN: You have to propagate every
2 accident sequence through, and they are not -- it is
3 not an independent calculation that is defensible on
4 a technical basis.

5 JUDGE KELBER: Sir, read NUREG-6595.

6 JUDGE YOUNG: Let me interrupt here. I
7 want to try to get us off arguments on the merits, so
8 to speak, of these subissues. I think --

9 JUDGE RUBENSTEIN: This is Judge
10 Rubenstein.

11 JUDGE YOUNG: Let me --

12 JUDGE RUBENSTEIN: I don't think adequacy
13 talks to the merits. It talks to the scope, and I
14 have a very hard time accepting that now, even before
15 hearing the arguments from Duke and the staff.

16 JUDGE YOUNG: Let me see if I can --

17 JUDGE RUBENSTEIN: So I would not go along
18 clearly -- my intent at this time, prior to full
19 argument, is not to go along with that proposal.

20 JUDGE YOUNG: But let me see if I can
21 clarify what I was trying to say. That's what I was
22 trying to do here. When I said merits, what I was
23 referring to was the discussion about whether or not
24 Level 1 PRAs relating to station blackout frequency is
25 -- was addressed in NUREG-6427 and would be relevant

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1 to that.

2 What I -- what I think we're trying to get
3 to is the most efficient means of ruling on things
4 like that. And I think Judge Rubenstein's request
5 that Ms. Curran clarify what you mean by adequacy
6 would be helpful. The context in -- the procedural
7 context, so to speak, in which -- or framework in
8 which we are sort of discussing this I see as what is
9 the most efficient manner to address all of these
10 concerns.

11 If we construe the original contention 2
12 as encompassing the issue of adequacy/which approach
13 -- NUREG-6427 or Duke's SAMA analysis using Duke's
14 figures -- is better, which is more appropriate to
15 apply, then I hear Ms. Curran offering to withdraw the
16 original -- I'm sorry -- withdraw the proposed amended
17 contention 2.

18 That would, then, place the issues, or at
19 least some of them, and possibly all of the issues
20 that are raised in proposed amended contention 2, all
21 of the parts -- obviously, the Petitioners, in any
22 response to a Duke summary judgment motion, which we
23 would expect to address the issue of which approach is
24 better, the response could raise whatever arguments
25 the Petitioners wish to raise.

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1 They would be resolved by us in that
2 context, rather than this context, without any
3 suggestion at this point about which would come in,
4 which would be considered, and which wouldn't, because
5 the arguments would be made in the context of the
6 summary -- the response to Duke's Motion for Summary
7 Judgment.

8 So none of what is being said at this
9 point should indicate the Board's ruling on any of
10 those subparts. I think the maximum that we're saying
11 is that this whole adequacy issue, which approach is
12 the better approach, is -- is encompassed within the
13 original contention, thereby making -- well, thereby
14 leading Ms. Curran to offer to withdraw the amended
15 contention, and with the understanding that adequacy
16 can be addressed.

17 So if that clarifies things, I hope it
18 does -- in other words, we're not making any rulings
19 on the merits at this point. When disputes arise in
20 discovery and/or when the response is filed to any
21 Motion for Summary Disposition, to the extent those
22 issues arise, we'll resolve them at that time.

23 MR. HECK: Judge Young, this is Jared Heck
24 for the staff. If I may, I'd like to respond to your
25 question to me earlier regarding our interpretation of

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1 CLI 02-17.

2 In our view, we read this with sort of a
3 background concept in mind, and that is that no matter
4 whether Duke uses Sandia's numbers or its own numbers
5 in conducting the SAMA analysis here, that issue is
6 sort of irrelevant to the ultimate purpose of a SAMA
7 analysis, which is to identify cost beneficial
8 mitigative measures.

9 They have taken into account Sandia's
10 numbers and come out with a range of risk reductions
11 that can be viewed by the staff and judged for their
12 cost benefit and implementation.

13 JUDGE YOUNG: Mr. Heck, I understand what
14 you're saying, and I would expect that a Motion for
15 Summary Disposition filed by Duke or your -- or the
16 staff for that matter, would no doubt take that
17 approach on the issue of how adequate Duke's SAMA
18 analysis is in its consideration of NUREG-6427, and
19 which approach is better.

20 And I would expect, further, that in
21 response to that the Petitioners would likely
22 challenge that conclusion, as they have every right to
23 do, and that we would then make a ruling on the Motion
24 for Summary Disposition based on the arguments of the
25 parties, the affidavits that are filed with them, and

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1 we would decide whether there is, in fact, any
2 disputed facts such that we needed to go further with
3 a hearing.

4 Or if there is -- if, on the other hand,
5 Duke and/or the staff have shown that there is no
6 dispute of fact, and that Duke is entitled to judgment
7 in its favor as a matter of law, then we would rule in
8 their favor.

9 I think we need to try to remember the
10 context here. We're talking about a procedural
11 framework within which to address these issues. We're
12 not talking about or suggesting in any way what our
13 rulings would be on the merits of any of these issues.

14 MS. UTTAL: Your Honor, this is Susan
15 Uttal from the staff. I think that we're getting the
16 cart before the horse. Before we can decide or even
17 get to the merits, we have to decide whether there are
18 contentions that should be admitted -- late-filed
19 contentions that should be admitted.

20 And the procedural posture of this case
21 is, at this time, a motion to file late-filed
22 contentions. And I believe -- and it's the staff's
23 position that we need a decision on that motion before
24 we can proceed any further with this case.

25 MS. CURRAN: This is Diane Curran. It

1 seems to us that the reason for filing the amended
2 contention was to delineate ways in which the
3 Intervenors considered the SAMA analysis to be
4 inadequate with respect to its incorporation of the
5 NUREG. And now it essentially is -- the issue has
6 been mooted by the issuance of the Commission's
7 decision.

8 So it seems to me more appropriate to
9 treat our amended contention as a first discovery
10 response, as a listing of ways in which we believe the
11 analysis is deficient.

12 MS. UTTAL: I think that that is a very --
13 this is Susan Uttal -- a very expansive reading of the
14 Commission's opinion.

15 JUDGE YOUNG: Ms. Uttal, let me interrupt
16 you at this point. Let's go back a step. A few
17 minutes ago, Ms. Curran offered to withdraw the
18 proposed amended contention, with the understanding
19 that the original contention and any Motion for
20 Summary Judgment with regard to it would be viewed as
21 encompassing the adequacy issue.

22 The question was then asked, what do you
23 mean by adequacy? I think it might be helpful for us
24 all to go back to that point and look at that alone.

25 With regard to Ms. Curran's suggestion

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1 just now that all parts of the proposed amended
2 contention could be viewed as discovery requests,
3 assuming we get to the point of, for example, the
4 Petitioners withdrawing the proposed amended
5 contention, then I would expect that any discovery
6 request would, first, be undertaken in an informal
7 manner through discussion between the parties on what
8 things are requested and where they can be obtained,
9 and the degree to which Duke and the staff agree to
10 provide them, and that any discovery requests -- any
11 formal discovery requests -- should any informal
12 attempts not work out -- any formal requests would be
13 couched, would be drafted and couched, in terms of
14 requests and would -- and it would not be simply a
15 matter of taking the existing proposed amended
16 contention and plopping it into our laps as a
17 discovery request. And I'm taking what Ms. Curran
18 said as not suggesting that.

19 With that said, I think it would be
20 helpful to step back to Ms. Curran's earlier offer and
21 ask Ms. Curran, first, I'm assuming that your offer is
22 still out there, and there has been a question raised,
23 I believe by Judge Rubenstein, about how you view the
24 adequacy issue.

25 Let me ask you, do you view the adequacy

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1 issue as encompassing anything other than which
2 approach -- NUREG-6427 or Duke's -- is more
3 appropriate and allowing the subissues to make their
4 way through the process through discovery or responses
5 to a Motion for Summary Disposition with the rulings
6 to fall where they may.

7 Did that make sense? And can you address
8 that further, Ms. Curran?

9 MS. CURRAN: Well, I'd like to -- I don't
10 want to paraphrase the Commission's order without
11 studying it pretty carefully. But it seems to me as
12 I look at the -- just the summary on the very last
13 page, the way the Commission summarizes it is whether
14 the values from the Sandia study should have been
15 utilized in the McGuire and Catawba analyses as
16 mitigation alternatives.

17 And, you know, the word "values" is not --
18 that is not a narrowly defined term. They don't say
19 "some of the values in NUREG-6427." They say "the
20 values." So I guess what we would go back to is the
21 -- the entirety of NUREG-6427 in terms of all of the
22 values that were used and in what way were they taken
23 into consideration in Duke's SAMA analysis as --

24 JUDGE YOUNG: Let me interrupt you for a
25 second. If we look at the original consolidated

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1 contention 2, the first part of it relating to 6427,
2 if we look at that and consider that the Commission,
3 in CLI 02-17, has -- I'm sorry, I lost my train of
4 thought.

5 JUDGE RUBENSTEIN: This is Judge
6 Rubenstein.

7 JUDGE YOUNG: Let me try to finish getting
8 out this thought first. I'm having a little
9 difficulty here. Pardon the interruption.

10 If we look at the original consolidated
11 contention 2, in light of the Commission's order as
12 construing the original contention, to raise -- to
13 raise the question of whether the values of the Sandia
14 study should have been utilized in the McGuire and
15 Catawba analyses of mitigation alternatives for
16 hydrogen control during station blackout, as stated in
17 the summary, if we view that to mean whether the
18 NUREG-6427 values should have been utilized, whether,
19 in other words, they are better than the Duke numbers,
20 and such that litigation of the contention would call
21 for a conclusion on which approach is the better
22 approach as the broad issue, then if we can get that
23 far together as agreeing that that's the broad issue,
24 then could not we all also get to a point of
25 understanding that issues such as whether Level 1 PRAs

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1 come into play in determining that general which is
2 better issue, that those could be resolved in several
3 contexts.

4 If we were to take the time to do a
5 detailed ruling on the proposed amended contention, we
6 could do it in that context. If, on the other hand,
7 the Petitioners withdraw the proposed amended
8 contention or we do a brief ruling on it, as we set
9 forth at the beginning of the conference. It could be
10 done in the context of a request for a discovery or in
11 the context of ruling on the motion for some
12 redistribution in light of various responses filed by
13 the Petitioners.

14 I don't think at this point, I don't see
15 that we need to say anything about how we feel or any
16 party needs to say anything about how they feel about
17 the merits of all these issues because what we're
18 talking about is what's the best, most efficient
19 context in which to resolve them.

20 They will be resolved whether in this
21 context of ruling on the amended contentions or in the
22 context of discovery or in the context of summary
23 disposition. For some reason, it seems to me that
24 we're having a hard time getting to the point of
25 seeing that all we're talking about is what's the most

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1 efficient way of resolving these disputes between the
2 parties.

3 JUDGE RUBENSTEIN: This is Judge
4 Rubenstein. Based on what Judge Young just said, is
5 it possible that the amended contention could be
6 withdrawn without qualification and then we could go
7 on to use the Commission's guidance in CLI 02-17?

8 MS. CURRAN: That seems like a reasonable
9 approach to me, Judge Rubenstein. This is Diane
10 Curran.

11 JUDGE RUBENSTEIN: Well, I thank you for
12 being gracious.

13 JUDGE YOUNG: So then in other words, the
14 issue of adequacy would be left open. I guess the
15 first thing I would ask how the parties suggest would
16 be the most efficient manner of ruling on that.
17 Because if we don't, if we're not all together on
18 understanding that adequacy and which approach is
19 better should be addressed in any summary judgement
20 motion, if we get a summary judgement motion saying
21 for example, Duke has addressed it. It did its
22 calculations and that's all we have to do, then that
23 gets us back to ground zero and I can see a lot of
24 complications arising at that point.

25 So to the degree that we can get a common

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1 understanding on that basic issue, I think it would
2 help us a lot in terms of getting this case moving
3 along in the most efficient manner.

4 MR. REPKA: Judge Young, this is Dave
5 Repka, may I respond?

6 JUDGE YOUNG: Please.

7 MR. REPKA: First, obviously, we have no
8 objection to withdrawal of the amended contentions and
9 proceeding from there. That's a given. Second is
10 that we still think it's very important to define the
11 scope of the proceeding up front because efficiently
12 as we go into discovery, it's better to have a common
13 understanding of scope than it is to proceed without
14 that.

15 JUDGE YOUNG: That's what I was trying to
16 get you to address. And I guess my question to you
17 is, do you have any problem with proceeding under the
18 understanding that the scope is a fairly broad issue
19 of whether the NUREG-6427 values should be utilized,
20 understanding that to mean which approach is the
21 better approach to take? NUREG-6427 or Duke's SAMA
22 analysis, getting into an evaluation of that.

23 If you can agree that that issue defines
24 the scope of contention two, than I think we're
25 probably getting close to being on the same page here.

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1 MR. REPKA: Well, Judge Young, I think
2 it's a matter of degree. I don't think that we agreed
3 that the original contention was one of which approach
4 is better. We think it was one of you have not
5 considered the NUREG data. So we went back and we
6 considered the NUREG data and incorporated it straight
7 up, and therefore gave the Staff a range of numbers.
8 It was really up to the Staff at that point to
9 determine what to do with that range of cost benefit
10 numbers.

11 From the standpoint of where the Staff is
12 of putting this whole issue into the generic issue,
13 we're really in the most conservative possible space.
14 They've decided that some of these SAMAs may be cost
15 beneficial. They're not license renewal issues
16 because they don't relate to equipment aging, and
17 they'll go off and examine that in current licensing
18 bases part 50 space. So we're in the most
19 conservative position with respect to the SAMAs.

20 Now our position is we've done everything
21 we need to do for a license renewal SAMA evaluation.
22 That's a given. Now, if you come back and the Board
23 decides that the issue is which approach is better,
24 now we will clearly in a summary disposition motion,
25 go the next step beyond what I've just articulated and

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1 we'll explain exactly why which approach is better and
2 why. I have no concern about doing that.

3 Having said that, let me go on, why is it
4 important to understand scope even further. If the
5 issue is which approach is better, because I think
6 it's very important up front, the most efficient thing
7 to do up front is to clearly articulate if we're
8 talking about two approaches, a and b, and the
9 argument is which is better, the argument has to focus
10 on what is different between a and b. And the only
11 thing different between a and b is level two. The
12 level one and the level three are no different.

13 And so if the question is which is better,
14 it's very important to realize it has to focus on that
15 which changed. We're not here reinventing the wheel
16 from the very first step, and that the entire PRA is
17 not open to debate. Because that would introduce some
18 third alternative which we don't even know what it
19 might be because we've never seen a basis for what new
20 level one numbers might be used, what new level three
21 numbers might be used. That's not a narrow issue, and
22 that's not the issue that was in consolidation.

23 MS. CURRAN: Judge Young, this is Diane
24 Curran. Can I make a comment?

25 JUDGE YOUNG: Go ahead, and then I want to

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1 get a little clarification because I really think Mr.
2 Repka has raised several issues that I'd like to sort
3 of separate out.

4 MS. CURRAN: Well, I'd like to ask to use
5 a discovery process. The first step is going to be
6 discovery. And we are going to ask for the level one
7 PRA and Duke is going to say no. And then we're going
8 to do a motion to compel. And we're going to lay out
9 our arguments according to the standard of relevance
10 and ask the Board for a ruling on that.

11 I guess I'd like to recommend using the
12 process that's given to us to resolve those disputes
13 instead of having an abstract discussion here today.

14 JUDGE YOUNG: Mr. Repka, I'd like to hear
15 your response to that. In giving your response, just
16 to reflect back on what you said, I think that it
17 would be very helpful if today -- we, the Board, has
18 construed quite a bit of the language in the
19 Commission's order as opening up in the context of the
20 original contention two, the issue of adequacy or
21 which approach is better. If we start from ground --

22 JUDGE RUBENSTEIN: This is Judge
23 Rubenstein. I see it as a little more precise, and
24 when you're finished, I'm going to state how I see it
25 at this time.

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1 JUDGE YOUNG: Okay. With regard, if we
2 can start from ground zero with an understanding of
3 the basic scope of contention two, the original
4 contention two, as incorporating adequacy which has
5 the better estimates to use the Commission's language.
6 Basically, as I'm sort of summarizing it here, or
7 paraphrasing, which approach is the most appropriate
8 approach to take I think is Judge Kelber's language.

9 If we can start from there, Ms. Curran's
10 suggestion is let's work out issues of whether level
11 one PRAs should come in the course of a discovery
12 motion to compel, for example.

13 Now, at that point, what I would expect to
14 accompany or be included in any such motion to compel
15 would be a reference to the part of 6427 that makes
16 that relevant. I have not read NUREG-6427 in any
17 detail. I do not know whether there is or there are
18 statements in it that make level one PRAs relevant.
19 I would expect that a motion to compel would point me
20 to any parts in NUREG-6427 that do make them relevant.
21 And the resolution of the issue would then be based on
22 looking at those parts of the NUREG, seeing whether
23 they make them relevant or not.

24 And then the same approach would be taken
25 with any other discovery request. They would have to

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1 be obviously a basis for getting access to the
2 materials that are requested based on a relevant
3 standard. And to limit them at this point prior to
4 having really given them any of these issues the kind
5 of deliberation that they would warrant in any of the
6 context in which we could consider them, I think would
7 be premature.

8 So what I guess what I'm trying to do is
9 encourage us to get on the same page here with regard
10 to the scope of the original contention two on
11 adequacy issues, which is more appropriate, etcetera,
12 and then the appropriate context in which to resolve
13 the other sub-issues with the understanding that we're
14 not saying that any party is right or wrong. We're
15 leaving it open for resolution in whatever context is
16 most appropriate.

17 Judge Rubenstein, did you want to --

18 JUDGE RUBENSTEIN: Yes, I'd like to say
19 something. My reading of the Commission's guidance
20 can be expressed in five bullets. The first bullet is
21 the underlying point of the SAMA analysis is cost
22 benefit and this is confirmed, affirmed, by the
23 Commission's writing, once the overall cost benefit
24 assessment, skewed or incomplete, the cost of a
25 failure to include or acknowledge or discount the

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1 higher events sequences used in the Sandia study.

2 So the object is a thing of the entire
3 exercise is ultimately an input to the decision
4 process in 189. Then they go on to say the contention
5 is admissible, but only insofar as it raises the
6 question of whether the values from the study should
7 have been utilized in the analysis of mitigational
8 alternatives for hydrogen control during station
9 blackout.

10 In clarifying that, in the text of the
11 CLI, any and all, pretty much direct quotes, number
12 one, should Duke's SAMA have addressed the study?
13 Two, have the RAI and the SEIS mooted into question?
14 And finally, through the Sandia assumption, reflect
15 better estimates in Duke's?

16 So somehow inherent at least in my mind is
17 this sort of redefines the scope as we wrote it in our
18 original contention.

19 JUDGE YOUNG: I think that's an excellent
20 summary of --

21 JUDGE RUBENSTEIN: Then I would add
22 parenthetically, that all these points are not made in
23 a vacuum. Dr. Kelber early on in the discussion said
24 you should be also guided by what the Commission's
25 policy of PRA is. And this is expounded in a variety

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1 of places; in their policy statement on PRA, in the
2 NUREG, in the standard review plan, and other
3 guidelines. So if we get into discovery or arguments
4 which are contrary to the Commission's general
5 guidance on the use of the PRA, we're going to find
6 ourselves in a difficult area because we're going to
7 start to turn down discovery and we're going to start
8 to turn down motions. So, with this context, I want
9 you to focus on what the Commission has said. Thank
10 you.

11 JUDGE YOUNG: Thank you. I think that
12 provides an excellent summary of the sort of adequacy
13 issue and how the Commission has construed the
14 original contention, and if we can proceed with that
15 understanding and leave these other issues for
16 resolution later based on the standard for discovery
17 or the ultimate -- whether there's a genuine dispute,
18 such as when a summary disposition is not appropriate
19 or is appropriate, then I think that would be a good
20 approach to take.

21 MR. HECK: Judge Young, this is Jared Heck
22 for the Staff. Whatever the Board decides is the best
23 approach to take today, I want to go on the record and
24 say that we disagree that the Commission's decision
25 expanded the scope in any way of amended consolidated

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1 contentions.

2 MR. REPKA: And this is Dave Repka for
3 Duke. I would just add that I still think if the
4 issue of what is, what it boils down to now, what is
5 the better way to proceed, what is the most efficient
6 way to proceed, do we go through the discovery process
7 to resolve these issues. I just don't agree with
8 that.

9 I think there are some basic discovery
10 disputes that are inevitable. And I think they go to
11 the scope of the contention, and I think that some
12 definition of scope that would, and I think what Judge
13 Rubenstein just read is a definition of scope that
14 would lead to the conclusion that level one and level
15 three information is not relevant to that proposed
16 contention because there were no changes between the
17 original SAMA and the supplemented based upon the
18 NUREG number, and there are good reasons for that.

19 And I don't see how after submitting at
20 least two rounds of paper on that issue, several hours
21 of conference calls on these amended contentions, how
22 we're going to get any further efficiency by having a
23 motion to compel and responses demotions to compel.

24 I think this issue can and should be
25 resolved right up front.

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1 JUDGE YOUNG: Mr. Repka, the argument that
2 you just made -- first you said that you agreed with
3 Judge Rubenstein's summary of the issue which includes
4 which is the better, which provides the better
5 estimate, which is the better approach in effect. And
6 then you thought if that's the scope, that you don't
7 think the level one PRAs would come in because you
8 don't think that includes that, and it basically gets
9 to the issue of whether 6427 used any different
10 numbers or discussed the level one in any way such
11 that it would be relevant.

12 Now when I was talking about that earlier,
13 I said I would expect that any discovery motion to
14 compel would point us to a part of 6427 that would
15 make that relevant and I would expect that you would
16 make the argument that you just made. And that's
17 pretty straightforward and simple and we would look at
18 6427, the parts of it that were pointed to by you, the
19 Staff, by the Petitioners, and resolve it in that
20 context. And it would be fairly simple and
21 straightforward to do that.

22 To go through, on the other hand, if we
23 can agree on the scope, to go through the motions and
24 to take the time to hear further arguments on the
25 proposed amended contentions and make detailed rulings

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1 on that, I don't see how that would be any more
2 efficient and how it would be even as efficient as a
3 fairly straight forward discovery request.

4 JUDGE RUBENSTEIN: This is Judge
5 Rubenstein.

6 Ms. Curran, have you reconsidered your
7 standing on withdrawing the motion?

8 MR. DUNCAN: I've been thinking about it
9 and we would continue to stand by our request to
10 withdraw the motion but I guess I have some hesitance
11 because there seems to be such a disagreement about
12 what the Commission's decision means.

13 JUDGE KELBER: This is Judge Kelber.
14 Somebody should ask them to clear it up. It's clear
15 that the decision is trying to carry water on one and
16 a half shoulders, and that's causing quite a bit of
17 confusion. And I don't know of any way to resolve
18 that other than what has been proposed here today --
19 say, someone going back to the Commission and saying
20 we don't understand, please clear it up.

21 JUDGE YOUNG: Let me pose again. Given
22 the summary given by Judge Rubenstein, and it was a
23 five point summary. The underlying point of the SAMAs
24 is cost benefit analysis and was the original cost
25 benefit analysis skewed or incomplete by virtue of not

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1 adequately considering NUREG 6427. I didn't get down
2 all your words, but I was taking a few notes, Judge
3 Rubenstein.

4 Second, whether the values of NUREG 6427
5 should have been utilized in the SAMA analysis.
6 Third, Duke's REI responses and/or the SEISS mooted
7 out the original contention. Which provides the
8 better estimates NUREG 6427 or Duke's own numbers.

9 Within that context, if we go forward,
10 leaving open these other issues to be resolved in the
11 context of discovery leading to summary disposition
12 motions based on the understanding of the original
13 contention as summarized by Judge Rubenstein and
14 paraphrased by me just now, all of the issues that are
15 out there will be resolved one way or another. And
16 all parties' rights to make to make your arguments on
17 them will be preserved and to the degree that Mr.
18 Repka, for example, you want us right now to say no,
19 we're going to rule against someone -- rule against a
20 Petitioner on any particular sub-issue.

21 Whichever way we do it, we're not prepared
22 to do it at this point. And so we leave those open
23 and they get resolved in the most appropriate context
24 for most efficiently going forward in the case.

25 The Commission has suggested some

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1 redistribution context and that is why we have
2 proposed the approach that we have proposed this
3 morning and I think that if Ms. Curran does still wish
4 to withdraw the proposed amended contention without
5 giving up the Petitioner's right to make their
6 arguments in discovery context or response to summary
7 judgement motions, allowing them to make those
8 arguments does not foreclose the Staff and Duke from
9 arguing that the Petitioners are wrong and how we
10 ultimately rule will be based on the parties'
11 arguments.

12 And if you just repeat the same arguments
13 you've already made, that's fine. I'm sure you all
14 got them on your computers and you can cut and paste
15 just as well as I can.

16 Again, I guess we're back to the start and
17 if all this discussion has helped in clarifying what
18 it is that we're proposing and getting us on that
19 track, are there still any problems with proceeding in
20 that manner?

21 MS. CURRAN: Judge Young, this is Diane
22 Curran. I do want to restate that the Intervenors
23 would like to withdraw amended contention two based on
24 the discussion that we have had here today and Judge
25 Rubenstein's characterization of the decision and

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1 CLI-0217.

2 JUDGE YOUNG: All right.

3 MR. REPKA: And this is Dave Repka for
4 Duke. Obviously, if the Intervenors have withdrawn
5 the proposed amended contentions, we have nothing
6 there to object to. With respect to the scope of the
7 contended issue, we do continue to believe that the
8 scope of the issue is a limited one with respect to
9 whether the NUREG data was used or not. We don't
10 necessarily agree that which is better was within the
11 scope of the original contention or even makes sense
12 in a SAMA review.

13 However, having said that for the record,
14 we do understand Judge Rubenstein's statement of where
15 he sees the issue today. We believe that's an issue
16 we can address and will address. That was not meant,
17 and I think Judge Young, you characterized my
18 agreement with that issue. That was not meant to say
19 that we concede that was within the scope of the
20 original contention.

21 Beyond that, with respect to discovery
22 going forward on the issue that the Board believes is
23 appropriate, we understand what you're saying and
24 we'll make our objections at the appropriate time. We
25 do continue to believe that level one and level three

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1 issues are beyond the scope of that contention as
2 articulated by Judge Rubenstein.

3 MR. HECK: This is Jared Heck with Staff.
4 I would just stand by our previous statements
5 regarding the scope of the contention as admitted and
6 also note that under the Commission's referral order
7 in this case, the Staff is not subject to formal
8 discovery regarding its environmental findings until
9 its final environmental impact statements have been
10 issued.

11 JUDGE YOUNG: On that issue, Mr. Heck, let
12 me just ask you what the basis, since you have issued
13 the supplements eight and nine to the GEIS, even
14 though they're in drafts, in draft form, you have out
15 there the Staff's position at this point on that. So
16 on what would you rely for declining or arguing that
17 you should not have to be subject to discovery at this
18 point?

19 MR. HECK: Judge Young, the Commission's
20 referral order CLI 01-20 on page four says formal
21 discovery against the Staff regarding the Staff's
22 environmental review documents will be suspended until
23 after issuance of the final supplemental environmental
24 impact statement.

25 JUDGE KELBER: What's the -- this is Judge

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1 Kelber. What's the time scheduled you think for the
2 final?

3 MR. HECK: It's currently expected to be
4 issued in January.

5 JUDGE KELBER: Thank you.

6 JUDGE YOUNG: Yes, and thank you for that
7 reference. On what part of that? I thought I had
8 seen something like that. Which part of that of the
9 Commission's referral order --

10 MR. HECK: That is page four, Judge.

11 JUDGE YOUNG: Four, and I got a computer
12 printout, I mean e-mail

13 MR. HECK: Section B.

14 MS. UTTAL: Judge, this is Susan Uttal.
15 It's the bottom of the second to last paragraph of
16 section b of the Commission's order.

17 JUDGE YOUNG: Thank you, I see. Yes, that
18 is the case and again when did you say? January.

19 Let me ask the Petitioners. Do you feel
20 that in order to proceed forward and respond to Duke's
21 motion for summary disposition assuming that's what
22 arises, that you would need discovery from the Staff
23 at this point or that discovery against Duke would be
24 sufficient, with the understanding that, of course, as
25 in any response to summary disposition motion that you

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1 at the point of responding feel that you do need more
2 discovery you could raise that in your response? Does
3 that make sense?

4 MS. CURRAN: Right off the top of my head
5 at this point, I think we would want to have some
6 opportunity for discovery against the Staff before
7 responding to a dispositive motion like that. That
8 would end the case, and I think it's important to have
9 had a chance to see what's the Staff's position and
10 what's the basis for it.

11 JUDGE KELBER: Mr. Repka, how about Duke?
12 Do you anticipate discovery against the Staff?

13 MR. REPKA: We would not anticipate that.
14 And I would observe that the Staff's position is
15 already available as the draft's supplemental
16 environmental impact statement.

17 JUDGE KELBER: I guess they're reserving
18 the right to change their mind.

19 MR. REPKA: Sure, but it's not like we're
20 in a vacuum.

21 JUDGE YOUNG: I think if we go forward
22 with discovery again between Duke and the Intervenors,
23 if we do get to the point it may be that that's
24 enough. Now, I don't know. I obviously can't say
25 that for the Petitioners, but the rule on summary

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1 dispositions at 10 CFR 2.749B does state we may permit
2 affidavits to be supplemented or posed by deposition
3 answers to interrogatories of further affidavits. If
4 the Petitioners feel that they need further affidavits
5 or further discovery against the Staff in order to
6 supplement their affidavits, then that's something we
7 could consider at that point.

8 I'm sort of of the mind that we don't want
9 to wait until January to start the process. We can go
10 ahead and start now and if at the point of filing your
11 responses, the Petitioners feel that you need
12 discovery in order to supplement your affidavits, then
13 that could be taken up at that point.

14 Ms. Curran?

15 MS. CURRAN: I'm a little bit concerned
16 about that, but perhaps if we could think about it and
17 get a chance to comment on it. It just seems like the
18 discovery process is one in which the Staff's position
19 is an important issue in a NEPA case especially
20 because the Staff's the ultimate party that resolves
21 NEPA issues. So this is a NEPA issue here and I guess
22 I'd like to look at the case law. I'd be really
23 surprised if it were possible to resolve at least, to
24 resolve a NEPA issue in favor of the Applicant. In
25 other words to deny hearing on a NEPA issue before the

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1 Staff had reached its ultimate conclusion in the final
2 EIS which may, in fact, change from the draft.

3 It seems unlikely to me that that is
4 legitimate under Commission jurisprudence.

5 JUDGE YOUNG: I guess what I was saying
6 was that if it were to turn out that by the time we
7 got to the point of your filing responses that you
8 felt that you could not respond adequately without
9 having the Staff's final position, without conducting
10 discovery against the Staff, then you could make that
11 request at that point, and that could be considered
12 after we've made some progress already so that we
13 would not have wasted all that time in the interim not
14 making any progress at all.

15 MS. CURRAN: Well, I can tell you right
16 now that when faced with a summary judgement motion,
17 one wants to have every available resource that one
18 can. And the Staff's position on it so far there's
19 been a certain amount of disagreement between Duke and
20 the Staff on this, the factual issues related to this.
21 And so we want to be able to utilize whatever we could
22 from the Staff.

23 So, you know, just from the point of view
24 of a lawyer who is trying to defend against the
25 summary disposition motion, if there was a big piece

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1 of information out there that just didn't have it all,
2 in this case, the Staff's position and some
3 understanding of how they got there, it's hard for me
4 to imagine going into a summary disposition proceeding
5 and not wanting to insist on that piece being
6 available.

7 JUDGE YOUNG: Let me propose something and
8 ask how the parties feel about this. If we were to
9 say start a 60-day discovery period between Duke and
10 the Petitioners starting, let's say the middle of
11 August. That would take us to the middle of October.
12 And at that point, we could have a status conference
13 to determine whether the case is ripe for motions for
14 summary dispositions and then set appropriate
15 deadlines at that point.

16 Would any party have any objection to
17 proceeding in that manner?

18 MR. REPKA: This is Duke. No, we have no
19 objection.

20 MR. HECK: This is Jared Heck for the
21 Staff. If the Board chooses to proceed in the way
22 it's outlined today, we would not object to discovery
23 between the Intervenors and Duke. But again, just
24 reassert our position as stated in the Commission's
25 referral order.

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1 MS. CURRAN: Judge Young, this is Diane
2 Curran. I wonder if it's necessary to limit discovery
3 to 60 days. Would 90 days be acceptable?

4 JUDGE YOUNG: Well, in view of the Staff's
5 pointing out the Commission's delaying of discovery
6 against the Staff until after issuance is a final
7 SEIS, it would seem to me that given that, a 90-day
8 period might not be unreasonable. And how do you feel
9 about that?

10 JUDGE KELBER: I feel 60 days and if more
11 is needed after the final environmental impact
12 statement, then it could be extended at that time.

13 MS. CURRAN: Are we expected to do
14 informal discovery first? Because mid-August is two
15 weeks from now, approximately.

16 JUDGE YOUNG: How would you feel about
17 doing -- allowing a month for informal discovery and
18 then starting a 60-day period starting September 1st,
19 taking us through the end of October, and then we
20 would have a status conference early in November to
21 see where we are, to see whether the Staff is still on
22 track and whether any more discovery against or
23 between Duke and the Intervenors is necessary. How
24 does that sound to everyone?

25 MS. CURRAN: This is Diane Curran and that

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1 sounds reasonable to me.

2 MR. REPKA: This is Dave Repka for Duke.
3 I mean, we certainly believe that this is a narrow
4 contention and 60 days is sufficient. I'm not
5 confident that informal discovery is going to lead
6 anywhere given our discussions here today about the
7 scope. So we're more inclined to just say let's begin
8 discovery, and if we have to go through a formal
9 process to resolve what the scope of discovery is we
10 might as well get on with that. So we would start the
11 discovery period along the lines of the original
12 suggestion, in August.

13 JUDGE YOUNG: But Mr. Repka, given what
14 the Staff's position here is on the timing, and given
15 the value of informal discovery, if it can be
16 achieved, you're not saying that you wouldn't even
17 make an effort to talk about telling each other where
18 things are and what things you might be willing to
19 provide, are you?

20 MR. REPKA: Of course not. And we have
21 already done that by pointing to the information
22 several times that's in the public docket.

23 JUDGE YOUNG: Well, under the
24 circumstances and given the timing of the Staff's
25 final SEIS, we can -- do you want to take a moment to

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1 confer?

2 Maybe we'll hear last statements by all of
3 you and then Judge Kelber and Judge Rubenstein and I
4 can confer for a moment and then make a decision on
5 the timing. And meanwhile, if everyone has their
6 calendars, we could look at dates in early November
7 for another status conference which would put us a lot
8 closer to the date for the final SEIS and SER.

9 So does anyone want to say anything else
10 before we confer and then Judge Rubenstein, Judge
11 Kelber, and I can call you separately. Are you at
12 your regular number?

13 MS. CURRAN: Judge Young, this is Diane
14 Curran. Just to add more item on the discovery
15 schedule, I still have a little vacation left in
16 August and I don't know about our expert. We would
17 just like to have enough time to prepare the
18 discovery, and it would be helpful to me personally to
19 start it. If it's a 60-day period, that goes by
20 pretty fast, and it would be helpful to start it in
21 September.

22 JUDGE YOUNG: Okay.

23 JUDGE RUBENSTEIN: I'm not sure. I need
24 to confer and that seems like a reasonable offer from
25 Ms. Curran. Start it in September. Ignore the

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1 informal period and go forward in that way.

2 JUDGE YOUNG: I think Judge Kelber and I
3 agree and except that I'd say if you can have informal
4 discovery, we always encourage that. If not, we'll
5 start formal in September, but --

6 JUDGE KELBER: One thing you could do is
7 use the intervening time for any protective orders you
8 think you might need. I would encourage the parties
9 to take a look at the references that we cited
10 earlier. They're very important. They're used by
11 everybody in the regulatory process and please take
12 heed.

13 MS. CURRAN: Judge Young, this is Diane
14 Curran. I just have one more procedural request. I'd
15 like a chance just for five minutes to consult with my
16 client before we conclude this call just to make sure
17 I don't need to raise anything else.

18 JUDGE YOUNG: Why don't everyone do that
19 and we'll come back at a quarter until one.

20 MS. CURRAN: Thank you.

21 (Off the record.)

22 JUDGE YOUNG: Okay, Ms. Curran you
23 requested the time. Have you conferred with your
24 people and are you --

25 MS. CURRAN: Yes, I have and we don't have

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1 anything more to add at this point.

2 JUDGE YOUNG: Okay, then I think -- well,
3 let me ask the other parties. Do you have anything to
4 add or say?

5 MR. HECK: Jared Heck with the Staff. No,
6 Judge Young, we have nothing to add.

7 MR. REPKA: Duke has nothing else.

8 JUDGE YOUNG: Then I think probably when
9 we get the transcript back we will issue an order
10 reflecting that Petitioners have withdrawn their
11 motion to amend contention two. I guess in the end,
12 Ms. Curran, there were not any qualifications on that.
13 But we on the Board understood the original contention
14 two insofar as it relates to NUREG 6427 as
15 incorporating the five points summarized by Judge
16 Rubenstein. And so in light of that, there would be
17 no need for any written withdraw.

18 MS. CURRAN: But Judge Young, I just want
19 to clarify that our withdrawal is based on Judge
20 Rubenstein's clarification or paraphrasing of where
21 the contention stands now.

22 JUDGE YOUNG: And obviously if our order,
23 when it is issued omits anything or leaves anything --
24 in a timely manner requests --

25 REPORTER: Judge Young, you dropped off

1 after you said that if our order omits anything.

2 JUDGE YOUNG: All right, thank you. If
3 our order omits anything that needs to be in it or
4 otherwise misstates anything, any party can timely
5 request a modification or correction and we may for
6 that purpose put in say a 10-day deadline for
7 requesting any such thing. Normally, I would not do
8 that, but given what we talked about today I think it
9 would be best and I think though we have everything
10 clear.

11 We're going to be going forward with the
12 60-day discovery period, and starting September 1st.
13 Oh, I'm glad I said that because we were going to set
14 a status conference for early November and I asked
15 everyone to look at your calendars.

16 The first week of November, the 5th is
17 election day. I would suggest the 6th. November 6th,
18 which is a Wednesday.

19 JUDGE RUBENSTEIN: That's good for me.
20 Judge Rubenstein.

21 JUDGE YOUNG: Everyone else? November
22 6th?

23 MR. REPKA: This is Dave Repka for Duke.
24 We're just looking around the table. Just give us one
25 second.

1 MS. UTTAL: Your Honor, this is Susan
2 Uttal for the Staff. The day looks clear for us.

3 MS. CURRAN: Diane Curran for the
4 Intervenors. November 6th is fine with us. I think,
5 unless --

6 MR. ZELLER: The 6th is good for me. This
7 is Lou.

8 JUDGE RUBENSTEIN: Would that be at ten
9 o'clock again?

10 JUDGE YOUNG: Yes, that seems to be the
11 best time to balance the west coast time and Ms.
12 Uttal's need to leave early.

13 MR. REPKA: This is Dave Repka for Duke.
14 We have one conflict on the 6th. Is the 5th fifth not
15 available?

16 MR. ZELLER: Election day.

17 JUDGE YOUNG: That's election day. That's
18 the only reason. What about the 7th?

19 MS. CURRAN: November 7th, I think would
20 be fine for us.

21 MR. ZELLER: Also okay.

22 JUDGE YOUNG: Would that work out your
23 conflict, Mr. Repka?

24 MR. REPKA: Actually, that does not. The
25 5th was better. But we will find a way to work around

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1 it and we'll do it on the 6th.

2 JUDGE YOUNG: Okay, it's just that on
3 election day I don't know -- it would not interrupt
4 me, and if everyone wants to agree to do it on that
5 day, that's fine.

6 MS. OLSON: This is Mary Olson. I'm not
7 available on that day.

8 JUDGE YOUNG: Let's just set it on the
9 6th. Okay, any other questions? Anything that any
10 party wants to address before we adjourn for today?

11 MS. CURRAN: Diane Curran, no.

12 JUDGE YOUNG: Staff?

13 MR. HECK: No, Judge Young.

14 JUDGE YOUNG: And Duke?

15 MR. REPKA: No.

16 JUDGE YOUNG: Okay, thank you all for
17 working through all this and getting us to a point
18 where I think we're on our way -- forward in a
19 efficient manner. Thank you. Bye.

20 (Whereupon, at 12:53 p.m., the
21 teleconference was concluded.)

22

23

24

25

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

McGuire Nuclear Station

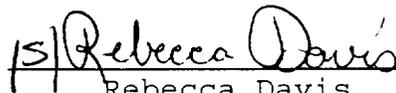
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Docket Number: 50-369-LR, et al

Location: Telephone Conference

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.



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