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NUCLEAR REGULATORY COMMISSION

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ORIGINAL

Title: Nuclear Fuel Services, Inc.
Erwin, Tennessee

Docket Number: 70-143-MLA

Location: (Telephone Conference)

Date: Friday, January 17, 2003

Work Order No.: NRC-741

Pages 1-46

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD (ASLB)

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TELECONFERENCE

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IN THE MATTER OF: :

NUCLEAR FUEL SERVICES, INC. : Docket No.

ERWIN, TENNESSEE : 70-143-MLA

(Material License Amendment :)

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Friday, January 17, 2003

The ASLB met by telephone conference call
at 9:00 a.m., Alan S. Rosenthal, Chair, presiding.

BOARD MEMBERS:

ALAN S. ROSENTHAL, Chair

DR. RICHARD F. COLE, Member

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P R O C E E D I N G S

(9:02 a.m.)

ADMINISTRATIVE JUDGE ROSENTHAL: On the record. This is Judge Alan Rosenthal, and ordinarily we would request that when one speaks that they identify themselves for the benefit of the court reporter, who may not be able to differentiate between one person's voice and another.

I have this preliminary statement. As previously announced, the purpose of this telephone conference is to discuss with the parties to this proceeding and the NRC staff whether in the seemingly unusual circumstances presented, there is good reason to hold the proceeding in abeyance at this juncture to await further developments.

More specifically, the question at hand is whether it makes sense to go forward with the proceeding at this time, given that all that is now before Judge Cole and me are hearing requests directed to the first of three license amendment applications that either are now on file, or will later be filed in connection with the overall BLEU project.

In order to expedite the discussion of this question, I would stress at the outset that Judge Cole and I are satisfied, first, that I have the

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1 authority to proceed at this time on the first license
2 amendment application, and the hearing requests
3 addressed to it; and second, that I have equally the
4 authority to hold the proceeding in abeyance either in
5 response to the pending motion, or sura sponte, should
6 it appear to us that that course is warranted as a
7 matter of good case management.

8 Accordingly, we are not interested in
9 hearing from any of the participants with regard to
10 what I might be empowered to do. Rather, we desire
11 the participants to confine their comments to the
12 question of what is the most desirable course as a
13 practical matter in the totality of the circumstances
14 at hand.

15 In that connection, it seems off-hand that
16 there are these two viable options. The first is for
17 Judge Cole and me to pass judgment at this time on the
18 viability of the hearing requests now in-hand on the
19 basis of whether in the context of the limited
20 activity sought to be authorized by the first license
21 amendment application, the particular request both
22 meets the standing requirement and sets forth at least
23 one area of concern germane to the subject matter of
24 the proceeding.

25 Should one or more of the requests satisfy

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1 those tests provided in Section 2.1205 of the
2 Commission's Rules of Practice for SubPart L
3 proceedings such as this one, the proceeding would
4 then go forward on the merits of the accepted
5 challenges to that proposed license amendment.

6 With respect to the now filed second
7 license amendment application, and the forthcoming
8 third such application, any hearing requests submitted
9 in response to pertinent Federal Register notices of
10 opportunity for hearing would receive separate and
11 independent consideration that might or might not lead
12 to the conduct of hearings on the merits of those
13 applications.

14 The second apparent option is to suspend
15 all further consideration of the pending hearing
16 requests. Under that option, the existing hearing
17 requestors would be expected to file additional
18 hearing requests in response to the Federal Register
19 notices directed to the second and third license
20 amendment requests within the 30 day period specified
21 in the notices.

22 Those additional requests might
23 incorporate by reference the content of the hearing
24 request or requests already on file and go on to offer
25 any further support for the standing claim, or for any

1 further areas of concern that might be thought to be
2 associated with the activity sought to be authorized
3 by the particular amendment application.

4 Once all hearing requests addressed to the
5 three license amendments and the responses thereto
6 were in hand, a determination would be made respecting
7 whether each of the hearing requestors had met the
8 requirements imposed in section 2.1205.

9 If one or more of the hearing requests
10 were granted, the case would then move forward on the
11 merits with regard to the entire BLEU project.
12 Against this background, I will now call upon the
13 participants to present their views on the matter as
14 succinctly as possible.

15 I will start with Ms. Curran. If any of
16 the other representatives of hearing requestors has
17 anything to offer that is not merely a repetition of
18 what Ms. Curran has set forth, he or she will next be
19 heard.

20 Then we will hear from counsel for the
21 licensee and NRC staff in that order. I will now
22 start with Ms. Curran. You may proceed.

23 MS. CURRAN: Thank you. I don't want to
24 repeat what has already been said in our request to
25 hold the proceeding in abeyance, but we do continue to

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1 believe, and I was looking things over this morning,
2 and in our hearing request the environmental issues
3 that we raised are common, and we believe they will be
4 common to all three license applications, licensing
5 amendment applications, and their global environment
6 issues.

7 And we are concerned about the question of
8 segmentation, and we would like the chance to evaluate
9 in the environmental contentions, to evaluate the BLEU
10 project as a whole.

11 ADMINISTRATIVE JUDGE ROSENTHAL: Would you
12 give us one or two illustrative examples as what you
13 regard as being global environmental issues?

14 MS. CURRAN: All right. Well, for
15 instance, one example is we are concerned about an
16 NFS' past operating history, and that there has been
17 a record of non-compliance with the permit and
18 contamination of the environment, and whether that
19 should be addressed in an environmental impact
20 statement as causing a significant impact.

21 Now, that would apply to the permit as a
22 whole, and to me it really does not make sense to
23 divide it up into individual pieces. It pertains to
24 issues that relate to management of the project as a
25 whole.

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1 And the history -- and we would be putting
2 in the same history in each case of non-compliance,
3 the same analysis of what are the reasons for the non-
4 compliance, and what is the extent of the
5 contamination, and the significance of this for the
6 future projects.

7 So there is one example of an issue that
8 we would be basically litigating the same facts and
9 legal arguments three separate times. With respect to
10 the two safety issues that we have raised, they also -
11 - that financial assurance and management issues
12 again, they also relate to the same -- they will be
13 the same kind of global concerns for all three license
14 amendment applications.

15 Does this in light of all of the
16 obligations that this applicant has for other
17 decontamination projects at the site, does the
18 applicant have enough in the way of funding to take
19 care of problems of decontamination at the end of this
20 facility's life, and we would think it would be most
21 efficient to look at the project as a whole.

22 We plan to get expert help with this case,
23 but we have limited resources, and we don't want to
24 basically put on the same case three times.

25 ADMINISTRATIVE JUDGE ROSENTHAL: All

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1 right.

2 MS. CURRAN: I did have another comment.
3 You had raised the question of how to deal with the
4 hearing requests, and it seems to me that we do have
5 to comply with the Commission's notice that went into
6 the Federal Register a few weeks ago and submit
7 another hearing request, but then the question is
8 should the board consider the hearing request that has
9 already been submitted or postpone it until later.

10 One concern that we have is that the issue
11 of standing is controversial in this case. The
12 applicant is opposing the standing of all the
13 petitioners very vigorously, and these petitioners are
14 all very serious about participating in this case.

15 And we would appreciate getting some
16 guidance from the presiding officer as to whether at
17 this point we have satisfied the Commission's standing
18 requirements, or whether we need to go further.

19 And so if it is possible, I would like to
20 get some guidance from the presiding officer on this
21 issue, and not wait until the very end, the third
22 license amendment, and still be litigating the issue
23 of standing.

24 ADMINISTRATIVE JUDGE ROSENTHAL: Well, I
25 don't think, Ms. Curran, that if we were to pursue the

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1 second option, that is, of holding up any further
2 adjudicatory consideration until the third license
3 application was filed, and noticed in the Federal
4 Register, and then hearing requests were received, if
5 we pursue that option, I am not inclined quite frankly
6 to address at this time the viability of the hearing
7 requests already on file.

8 I mean, I think what I would have in mind
9 would be when all of the hearing requests were on the
10 table, the hearing requests with respect to the second
11 and third applications as well, I would then decide
12 whether in the context of the entire project the
13 various hearing requesters had met the standing
14 requirements.

15 And in addition had set forth at least one
16 genuine issue of concern, or a germane area of
17 concern. So that obviously if we pursue the first
18 option, I would go ahead at this time and act on the
19 hearing request.

20 But then again in the context of simply
21 the first license amendment application, where the
22 standing was established with respect to that
23 application, and whether at least one germane area of
24 concern was set forth with respect to that
25 application.

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1 And that might or might not, if I were to
2 determine that the standing had not been established,
3 or that area of concern had not been set forth, that
4 might or might not be helpful with regard to the
5 second and third applications.

6 But in any case, my current thinking is
7 that either I go forward now on the first application,
8 or I hold up everything in abeyance until the third
9 application has been filed. So given that choice what
10 would you want?

11 MS. CURRAN: We would choose the second
12 option of holding everything in abeyance until you had
13 received all three license applications.

14 ADMINISTRATIVE JUDGE ROSENTHAL: Okay.
15 All right. Do you have anything further?

16 MS. CURRAN: No, not at this time.

17 ADMINISTRATIVE JUDGE ROSENTHAL: Not at
18 this time. All right. Is there -- Mr. Chapman, do
19 you have anything to add?

20 MR. CHAPMAN: No, Your Honor. My clients
21 have the same position as Ms. Curran has elucidated so
22 eloquently in her pleadings, and again this morning,
23 and we would adopt that same position.

24 ADMINISTRATIVE JUDGE ROSENTHAL: All
25 right. Ms. Helms-Hughes.

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1 MS. HELMS-HUGHES: Yes, Your Honor.

2 ADMINISTRATIVE JUDGE ROSENTHAL: Do you
3 have anything to add?

4 MS. HELMS-HUGHES: Yes, sir. In going
5 through the environmental assessment this morning and
6 just quickly skimming it, there are at least six
7 references to license future amendment requests that,
8 and that information should be in the EA and will be
9 reported in future license amendment requests, or
10 integrated safety analysis.

11 Also, on page 31 of the EA, there is a
12 question mark regarding the OCV building, and there
13 another one in reference to the UNB building, which
14 just says (inaudible), and gives no number whatsoever.

15 You know, I don't see how the public is
16 expected to come up with a full picture when there are
17 obvious blanks left in this EA.

18 ADMINISTRATIVE JUDGE ROSENTHAL: Okay.
19 Anything further?

20 MS. HELMS-HUGHES: No. I am in agreement
21 with Diane and Mr. Chapman.

22 ADMINISTRATIVE JUDGE ROSENTHAL: Okay.
23 Mr. Shapiro.

24 (Discussion off the record.)

25 ADMINISTRATIVE JUDGE ROSENTHAL: Let's

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1 stay on the subject of the conference, and it might be
2 interesting as to what conditions are in particular
3 places, but let's confine ourselves to what is under
4 consideration. Mr. Shapiro.

5 MR. SHAPIRO: Yes, Your Honor, Daryl
6 Shapiro, counsel for NFS. We continue to believe
7 strongly that any discussion of when to hear the
8 hearing and how to hold the hearing remains premature
9 until there is a determination that one or more
10 petitioners have a right to a hearing.

11 That has not been established in this
12 case, and no hearing right has been established by
13 anyone.

14 ADMINISTRATIVE JUDGE ROSENTHAL: All
15 right. Why isn't it my prerogative under the powers
16 that are given to me as the presiding officer to
17 determine on my own initiative that good case
18 management calls for a postponement of the
19 consideration of the current hearing request until all
20 hearing requests relating to all three license
21 amendments are in hand?

22 MR. SHAPIRO: Your Honor, it seems to us
23 that the possibility of multiple parties and multiple
24 issues that don't coincide, and that are not parallel,
25 exists.

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1 It may be that different parties are
2 admitted for different license amendment applications,
3 and it may be that different issues are admitted for
4 different applications.

5 In such cases, case management would
6 suggest that we try them separately. It may be as Ms.
7 Curran hypothesizes that you will have identical
8 parties and identical issues, and in such cases, it
9 may be appropriate to consider combining the cases.

10 But I don't think we can determine that
11 until we established anyone's right to a hearing.
12 Moreover, there may be parties down the line that
13 don't exist now. There may be parties that request a
14 hearing to amendment number two.

15 ADMINISTRATIVE JUDGE ROSENTHAL: That's
16 right.

17 MR. SHAPIRO: They have a right under the
18 NRC rules to file a hearing request, and we will of
19 course respond, and they have at least an expectation,
20 if not a right, for that hearing request to be ruled
21 upon.

22 ADMINISTRATIVE JUDGE ROSENTHAL: And it
23 will be ruled upon eventually.

24 MR. SHAPIRO: They may have no interest in
25 waiting until later this year when amendment three is

1 filed, and file a request then. They may have solely
2 an interest in challenging amendment number two.

3 ADMINISTRATIVE JUDGE ROSENTHAL: Well,
4 then at the end of the line they can attack just
5 amendment number two.

6 MR. SHAPIRO: That's true, but they may
7 want to attack it, and they may want to have their
8 legal challenge ruled on it a more timely fashion.
9 They may not want to wait.

10 Right now our expectation is amendment
11 number three will be filed in the May-June time frame.
12 That is an expectation.

13 ADMINISTRATIVE JUDGE ROSENTHAL: Well, I
14 don't know who might file with respect to amendment
15 number two that does not have a hearing request
16 pending with regard to amendment number one.

17 But it seems that at least the hearing
18 request with respect to amendment number one had no
19 problem about waiting until all of the license
20 amendments are on the table before having their
21 hearing request acted upon.

22 I mean, that I think was clear from what
23 Ms. Curran ultimately said in response to one of my
24 questions, and her views were endorsed by the others.

25 Now, let me ask you this, Mr. Shapiro. Do

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1 you know of any other case in which a particular
2 project was put out to the Commission in the form of
3 this kind of segmentation?

4 MR. SHAPIRO: No, and let me address that
5 point. When NFS met with the NRC technical staff, and
6 walked through what this project would entail, the NRC
7 staff agreed and suggested, and endorsed three
8 separate amendments, and so that the NRC staff could
9 manage its resources.

10 This was more their idea than ours.
11 Secondly, I think it is important to emphasize that we
12 could do one, two, or all of these amendments, or
13 none. They are separate stand alone licensing
14 actions, and they will be reviewed separately for
15 safety purposes.

16 It is only for NEPA that the NRC
17 appropriately looked at the environmental impact of
18 the project as a whole. I continue to stress that we
19 are not advocating that the petitioners should try the
20 same case three times.

21 If indeed it turns out that based on their
22 hearing request and the issues that they raise that
23 there is such an overlap, I think it is appropriate to
24 discuss once their right to a hearing is determined
25 how or what kind of a hearing we should have, and when

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1 we should have the hearing.

2 In our review of Subpart L cases that
3 seems to be a rather common issue, the timing of the
4 hearing, after the party's right to a hearing has been
5 determined.

6 The common issues are petitioners often
7 wanting to delay the hearing until the NRC completes
8 its safety evaluation, or until the NRC issues more
9 documents on that. Those are all relevant and fair
10 issues to discuss and debate, but not until a party's
11 right to a hearing has been established.

12 ADMINISTRATIVE JUDGE ROSENTHAL: Do you
13 have anything further at this point?

14 MR. SHAPIRO: Not that is not in our reply
15 and I don't want to take more of the court's time.

16 ADMINISTRATIVE JUDGE ROSENTHAL: Well, all
17 right. Let's turn to Mr. Cummings.

18 MR. CUMMINGS: Yes, Your Honor. First for
19 clarification, based on what Mr. Shapiro has stated,
20 it was not the staff's idea, nor were we advocating or
21 pushing, NFS to submit individual license amendments.

22 It was their choice to take this course of
23 action. Mr. Shapiro is correct that these are
24 separate and distinct projects; however, they are all
25 related. So it is -- the staff is taking no position

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1 as to whether or not this proceeding needs to be held
2 in abeyance.

3 We are simply stating the fact that while
4 there are three independent projects, they are
5 related.

6 ADMINISTRATIVE JUDGE ROSENTHAL: Well, Mr.
7 Cummings, in your December 6th letter, or at least the
8 staff's letter -- I don't recall whether it was your
9 letter or your colleagues.

10 MR. CUMMINGS: It was my colleagues'
11 letter, sir, yes.

12 ADMINISTRATIVE JUDGE ROSENTHAL: All
13 right. It was noted in passing that the staff agreed
14 with Ms. Curran that it would be more expeditious to
15 postpone the proceeding pending the submission of all
16 of the related license amendments.

17 MR. CUMMINGS: Yes, Your Honor.

18 ADMINISTRATIVE JUDGE ROSENTHAL: And then
19 when I called upon the staff to advise me as to
20 whether it still held that position in light of the
21 licensee's opposition, the staff didn't return the
22 same.

23 Now, that is not to say that's right, and
24 I am not suggesting that the staff couldn't change its
25 mind. But I didn't find anything in your filing that

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1 really went to the issue as to whether it would be as
2 it had been previously suggested by the staff, more
3 expeditious to hold the matter in abeyance.

4 As I read your response, it basically came
5 down to the proposition, which I don't think is in
6 dispute, that it would be quite permissible to move
7 forward on the first license amendment at this time.

8 So I would sort of like to get a feel at
9 this juncture, and indeed this is why I asked the
10 staff to participate in this telephone conference as
11 to why the staff has apparently changed its mind on
12 the matter as to whether there would be practical
13 advantages to holding this whole matter in abeyance
14 until all of the license amendments hit the table.

15 MR. CUMMINGS: Yes, Your Honor, your
16 characterization of the events is correct. It is the
17 staff's position now -- and we have always maintained
18 -- there could be some efficiency in holding this
19 proceeding in abeyance for the simple reason that one
20 proceeding, as opposed to three, would likely be a
21 little more efficient.

22 However, it is also our position, both
23 then and now, that the projects are independent, such
24 that they could be dealt with in separate proceedings.

25 In our first letter, dated December 6th,

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1 we did give a mistaken impression that we favored one
2 option over the other. And we attempted to address
3 that mistaken impression in our second letter, in
4 which we tried to state the staff's position which we
5 have always held, which is that while there may be
6 some deficiencies, these are separate and can be dealt
7 with in a separate proceeding.

8 And that the staff's position, since we
9 are not a party, is that we do not advocate one option
10 over the other. We fully trust in your authority and
11 ability to determine if the efficiencies outweigh the
12 licensee's concerns.

13 ADMINISTRATIVE JUDGE ROSENTHAL: Well,
14 although as you addressed that these are independent,
15 you have also acknowledged that they are interrelated.

16 MR. CUMMINGS: Yes, Your Honor. There is
17 the chance, and the second amendment has just come in,
18 and we are reviewing that currently, but we have yet
19 to see a third amendment, and Mr. Shapiro states that
20 it may not be coming in until May or June now.

21 So we can't be assured exactly what is
22 going to be in that amendment. So there is no real
23 way to state with any certainty how related each of
24 these issues may be similar between all three.

25 So we can just presume just based on the

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1 information that they have provided to us that there
2 may be some interrelated issues. But it is the
3 staff's determination that these three amendments can
4 be held as separate projects, and dealt with
5 accordingly.

6 ADMINISTRATIVE JUDGE ROSENTHAL: Now, I
7 asked Mr. Shapiro whether he knew of any prior
8 instance where a project was put into segments as this
9 one has been. Do you know of any instance?

10 MR. CUMMINGS: Your Honor, I cannot think
11 off the top of my head of one, no, sir, nor does my
12 colleague.

13 ADMINISTRATIVE JUDGE ROSENTHAL: Well, let
14 me ask you this. Just Cole and I recently had
15 occasion to consider some Subpart L proceeding -- and
16 I think more than one -- involving IUSA and the White
17 Mesa Mill out in Utah. I take it that you are
18 familiar with that proceeding? Or maybe not.

19 MR. CUMMINGS: Well, no, Your Honor, I am
20 not familiar with that proceeding.

21 ADMINISTRATIVE JUDGE ROSENTHAL: Well, let
22 me put it this way. What that involved was the
23 receipt at this mill of certain materials containing
24 uranium, and the materials were then processed to
25 extract the uranium that was in the material.

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1 And the remainder was stored in tailing
2 cells on the site. Now, there were a number of people
3 that had objections to one facet or another of that
4 operation.

5 There were some people that were troubled
6 about the transportation of the material from the --
7 wherever it was coming from, to the mill. There was
8 a lot of concern about traffic congestion, and about
9 accidents, and the like.

10 Then there were people that were concerned
11 about the processing of the material. And then there
12 were people who were concerned about the storage.

13 Now, obviously that whole process -- the
14 transportation to the mill, the processing at the
15 mill, the storage of the residue -- can up in the
16 process of one license amendment.

17 Now, do you think in that situation that
18 could have been compartmentalized into three different
19 applications, with then a separate and distinct
20 consideration first of the transportation; second, of
21 the processing; and, third, of the resident storage?

22 I mean, I thought that that would have
23 been regarded as entirely inappropriate, and I frankly
24 don't see the distinction offhand between that
25 situation and the one at bar.

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1 I mean, this is a full project that has an
2 end objective, and it has got several stages in the
3 process of getting to that end objective.

4 MR. CUMMINGS: Yes, Your Honor, with
5 regards to the example of the White Mesa, I am really
6 not able to answer that question for the simple reason
7 that I am not certain not having reviewed the
8 materials what type of license would have been
9 necessary for each individual segment of that project.

10 And whether a separate license could have
11 authorized independently one of those aspects. In the
12 case that we have before us in NFS, the three separate
13 amendments -- the two that are now before us and the
14 third that is proposed -- the elements related to each
15 amendment could have been filed independent of any of
16 the others.

17 If they have come in with the first
18 amendment without ever telling us of the second or the
19 third, or had they brought in the second amendment
20 without the first or the third; or the proposed third
21 amendment without the first or the second, the staff
22 could have analyzed the amendment in total and
23 authorized the license if it was appropriate.

24 And I am not sure if that would
25 distinguish it from the White Mesa example that you

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1 cited.

2 ADMINISTRATIVE JUDGE ROSENTHAL: Well,
3 that is possibly the case. Well, does it in your
4 judgment, Mr. Cummings, that these may be independent
5 elements of an overall project, would there have been
6 any reason to have thought the first license
7 amendment, or in other words, any reason to have
8 engaged in the activities to be authorized by that
9 amendment if they were not the ultimate objective of
10 this project?

11 In other words, it seems to me that what
12 they wanted to do in the first license amendment is
13 tie it together what their ultimate objective is in
14 carrying out this project. Am I wrong about that?

15 MR. CUMMINGS: Your Honor, it would, and
16 certainly the fact that NFS approached with this
17 overall idea of the BLEU project, and it is much
18 easier to see that connection for the first amendment
19 with the second and third.

20 However, there are possibilities where a
21 licensee could come in with an amendment seeking to
22 construct the storage building as in this case if the
23 aim of storing it there, or possibly shipping those
24 materials on to another site for processing.

25 So there was the possibility that these

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1 amendments could have stood alone without the other
2 two. But the simple fact that NFS desires to place
3 all the processing facilities at the one site would
4 not necessary preclude them from sending these
5 materials off-site for processing.

6 ADMINISTRATIVE JUDGE ROSENTHAL: Yes., but
7 their objective is to do the processing on-site; is
8 that not correct?

9 MR. CUMMINGS: I'm sorry, Your Honor, but
10 could you repeat that?

11 ADMINISTRATIVE JUDGE ROSENTHAL: Well, it
12 is my understanding that while they might as you
13 suggest hand up should the material be on-site, their
14 objective as stated is to process the material on-
15 site.

16 MR. CUMMINGS: Yes, Your Honor, that is
17 true, and that is why for purposes of this HEPA
18 segmentation, we have decided to look at the
19 information that we have before us as far as what
20 their intention may be.

21 However, it would still be well within the
22 licensee's prerogative to withdraw their second
23 amendment, and never even put in their third
24 amendment, in which case we would still act on this
25 first amendment.

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1 ADMINISTRATIVE JUDGE ROSENTHAL: Well, if
2 they withdrew the second amendment, and informed us
3 that they did not plan to submit the third amendment,
4 then obviously we would then go ahead and consider the
5 first amendment.

6 MR. CUMMINGS: Absolutely, Your Honor.

7 ADMINISTRATIVE JUDGE ROSENTHAL: As it now
8 stands, it is -- they have submitted their second
9 amendment, and it is our understanding that in the
10 next couple of months that they plan to submit the
11 third one.

12 MR. CUMMINGS: Yes, Your Honor, but we
13 don't know that would -- the fact that the second
14 amendment is in, and the third amendment is still
15 proposed as far as we know, still does not necessitate
16 that the first amendment cannot exist without the
17 second or the third.

18 We still believe that these are
19 independent projects, although they are clearly
20 related based on the licensee's own --

21 ADMINISTRATIVE JUDGE ROSENTHAL: Well, Mr.
22 Cummings, again as I tried to make clear both in the
23 order relating to this conference, and in my opening
24 statement this morning, there is no question in the
25 minds of either Judge Cole or myself that we are fully

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1 empowered to go forward on the first amendment.

2 The question again is whether in the
3 totality of circumstances that makes good sense, and
4 that is what I would like to hear from you.

5 MR. CUMMINGS: Your Honor, as we are not
6 a party to this proceeding, we don't feel that we
7 should be advocating a position that the efficiencies
8 outweigh the licensee's concerns here.

9 ADMINISTRATIVE JUDGE ROSENTHAL: Well,
10 first of all, I can assure you that if this case gets
11 to the hearing stage, you will be parties.

12 MR. CUMMINGS: Yes, Your Honor.

13 ADMINISTRATIVE JUDGE ROSENTHAL: I mean,
14 I have a firm rule that the staff can stay out on the
15 matter of the consideration of the hearing request.
16 But if one or more hearing requests are granted in one
17 of my cases, the staff is brought in. I mean, that is
18 just a rule of thumb of mine.

19 And it does seem to me that even though
20 you are not a party at this point, it is not
21 unreasonable to ask the staff for its view as to what
22 is the most expeditious course given the fact -- and
23 gain if there is a hearing request granted in this
24 case, the staff is going to be a party.

25 MR. CUMMINGS: I understand, Your Honor,

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1 and we are not trying to be evasive on this. The
2 staff's position honestly is that we have not made a
3 determination as to whether or not the efficiencies
4 would outweigh proceeding upon with these three
5 amendments individually.

6 We have no problem with either option one
7 or option two. We would be ready to proceed either
8 way, Your Honor.

9 ADMINISTRATIVE JUDGE ROSENTHAL: okay.
10 That's fair enough. I have one further question for
11 you. Can you tell us what the current status is for
12 the safety review for either amendment one or
13 amendment two?

14 MR. CUMMINGS: Your Honor, I believe the
15 safety review on amendment one is ongoing, and I don't
16 know about the second amendment, Your Honor.

17 ADMINISTRATIVE JUDGE ROSENTHAL: All
18 right. Do you have anything add, Mr. Cummings?

19 MR. CUMMINGS: No, Your Honor. I do
20 believe that with regard to the second amendment, they
21 are still in the process of the environmental review.
22 So they may have not yet begun the safety review at
23 this point. But I could try and clarify that.

24 ADMINISTRATIVE JUDGE ROSENTHAL: All
25 right. I am going to make just one final round of

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1 comments with Ms. Curran and Mr. Shapiro to see if
2 there is anything else in light of the staff's
3 observations that they might wish to contribute. Ms.
4 Curran.

5 MS. CURRAN: Yes, thank you. I think it
6 is important to distinguish between whatever process
7 NFS and the staff agreed on for submittal of these
8 license amendment applications piecemeal, and the NEPA
9 consideration of the project as a whole.

10 It seems that NFS decided that it would be
11 more feasible for them to break the project up into
12 three parts for purposes of preparing license
13 amendment applications.

14 But I think it is one project and it is
15 being treated as one project. Now, if it changes
16 later, that makes it a different animal, but right now
17 it is a single project, with three different features.

18 And that also for no aspect of the BLEU
19 project has the NRC reached a final conclusion that
20 there is no significant impact. And if we get to the
21 point that the board follows the first option that you
22 outlined and decides to go ahead with a hearing on the
23 first license amendment, we would argue that the
24 hearing file will not be complete until the NRC staff
25 makes the conclusive finding of no significant impact.

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1 And in order to avoid segmentation,
2 because that is an important part of NEPA, and not to
3 cut things up into little pieces and look at them with
4 blinders on, the NRC staff can't sign off on the first
5 license amendment for purposes of NEPA considerations
6 until it is has finished the consideration of the
7 whole BLEU project.

8 And you see it right there on the
9 environmental assessment that the NRC has left the
10 door open to revisit all of its environmental
11 findings. So I think that there is a real procedural
12 problem here with cutting this case up into three
13 pieces for purposes of consideration, if only because
14 the hearing file will not be complete until that final
15 NEPA review is done.

16 ADMINISTRATIVE JUDGE ROSENTHAL: And,
17 when, Mr. Cummings, would that take place?

18 MR. CUMMINGS: Well, Your Honor, we need
19 to clarify what was just stated, because there are
20 inaccuracies The agency has made a final
21 determination for a departmental review with regards
22 to the first amendment when we issued our FONSI.

23 The FONSI was for the first amendment
24 alone. But it is the final agency decision there. We
25 will never revisit that FONSI. What we stated in the

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1 EA, and which there may be some understanding, but we
2 tried to clarify in our later pleadings, was that with
3 the submission of the second amendment and the
4 proposed third amendment, the staff will be doing a
5 separate, independent environmental assessment, or an
6 EIF, if a FONSI is not issued, for each individual
7 amendment, the second and the third.

8 So the staff has issued its final agency
9 determination on the first amendment, which we will not
10 be revisiting.

11 ADMINISTRATIVE JUDGE ROSENTHAL: So then
12 in your view there would be no problem along the lines
13 that were suggested by Ms. Curran if we went forward
14 at this time on the first license amendment.

15 MR. CUMMINGS: No, Your Honor.

16 MS. CURRAN: Judge Rosenthal, can I make
17 a comment on that?

18 ADMINISTRATIVE JUDGE ROSENTHAL: Who is
19 this?

20 MS. CURRAN: This is Diane Curran.

21 ADMINISTRATIVE JUDGE ROSENTHAL: Go ahead.

22 MS. CURRAN: Well, it seems to me that the
23 staff has been saying all along that it wants to avoid
24 segmentation here, and that if the staff -- I don't
25 believe that the environmental assessment has having

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1 made a conclusive separate finding on the first
2 license amendment.

3 But even if it has that in fact is
4 segmentation, because NEPA requires that the BLEU
5 project be looked at as a whole, and if any part of
6 the BLEU project is found to have significant impacts,
7 then the entire BLEU project has to be addressed in an
8 environmental impact statement, and that is the point
9 of NEPA here.

10 So if the staff has divorced the first
11 part of this project for purposes of NEPA review, we
12 believe that is illegal.

13 ADMINISTRATIVE JUDGE ROSENTHAL: Well,
14 now, Ms. Curran, what would have happened if the
15 applicant had -- the licensee had just put forth the
16 first amendment, and there had been no reference at
17 all to the possibility of a second and third
18 amendment.

19 Just the first one, which the licensee and
20 the staff insists stands independently. In that
21 circumstance, what would have happened? Wouldn't we
22 have gone forward and passed judgment on that first
23 amendment, in the context of any hearing requests that
24 met the requirements of the rules of practice?

25 MS. CURRAN: Well, the first license

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1 amendment relates to the storage of the end product of
2 this downblending process. And the petitioners' may
3 have come in and said we are concerned that the other
4 shoe hasn't dropped yet.

5 Where is this HEU going to be processed,
6 and we want to see what the whole picture is here.
7 That one doesn't build a facility and put in storage
8 tanks for a process that there is no indication that
9 it is going to be occur.

10 So we probably would have come in and said
11 that you have not described the whole project here in
12 this.

13 ADMINISTRATIVE JUDGE ROSENTHAL: But they
14 probably would have said that this is what we are
15 asking for. We are asking for a license amendment for
16 this limited purpose, and that is all that should be
17 considered.

18 MS. CURRAN: Well, I think it would have
19 become a very complicated case, but I am just telling
20 you that we would have questioned where the HEU was
21 going to be downblended. We may have gone -- I don't
22 know what forum we would have gone to, but we probably
23 would have raised the segmentation issue.

24 But I think the more important fact is
25 that is not what happened here. The NSF has a project

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1 that it wants to go forward with. There has been NEPA
2 considerations since the late '90s about HEU was going
3 to be downblended and where.

4 And here is one project where a company
5 has put together a proposal and plans to go through
6 with it. So I don't think we need to deal with the
7 abstraction of what if they only come in with a
8 storage proposal.

9 We deal with an entire proposal that goes
10 from A through Z.

11 ADMINISTRATIVE JUDGE ROSENTHAL: Okay.

12 MR. SHAPIRO: Your Honor, this is Daryl
13 Shapiro. May I be heard?

14 ADMINISTRATIVE JUDGE ROSENTHAL: Yes,
15 indeed.

16 MR. SHAPIRO: I don't think that there is
17 any NEPA issue. It is without question that this
18 project involves three separate processes, and
19 therefore we submitted three separate license
20 amendments.

21 They are different buildings, and
22 different processes and they are different issues to
23 review as the staff and our technical staff agreed
24 that it was better to submit them separately for
25 purposes of their review.

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1 For NEPA purposes, we submitted
2 environmental information on the entire process as Ms.
3 Curran likes to say, from A to Z. The staff concluded
4 in its EA that the entire project will have no
5 significant environmental impacts. Let me finish.

6 With respect to amendment number one, they
7 issued a FONSI, because they had the amendment at
8 hand, and they could make a final determination. What
9 they said with respect to amendment two and three, if
10 anything changes, we may revisit.

11 If they change what they have told us that
12 they are going to apply for, if they intend now to
13 build something different that would work in a
14 particularly different environmental issue that we
15 didn't analyze, we of course reserve the right to
16 reevaluate that.

17 But the expectation clearly from the EA,
18 and from their Federal Register notices is if things
19 stay the same, and if there is nothing that we haven't
20 already analyzed that comes in, there is not going to
21 be any further environmental analysis.

22 But we can't say go forever on amendment
23 two and three because when they published the first
24 FONSI, they didn't have them. Therefore, there is no
25 segmentation of a environmental review.

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1 Now, with respect to the first amendment,
2 Mr. Cummings is directly on point. That is complete,
3 final, and behind us. They have made a final
4 determination of no significant hazard, of no
5 significant environmental impact, and that is
6 absolutely ripe for a hearing.

7 With respect to amendment number two,
8 Subpart L proceedings typically are noted upon the
9 receipt of the amendment, if they are noticed at all,
10 long before any EA is completed, and long before any
11 environment safety review is completed.

12 And the petitioners are required to
13 establish standing in at least one area of concern
14 germane to the proceedings based on the application.
15 Only after that hurdle is overcome --

16 (Brief Interruption.)

17 ADMINISTRATIVE JUDGE ROSENTHAL: Were you
18 in the middle of a sentence, Mr. Shapiro?

19 MR. SHAPIRO: I am not sure where I got
20 cut off, if I was cut off at all.

21 ADMINISTRATIVE JUDGE ROSENTHAL: I think
22 you were.

23 MR. SHAPIRO: If anyone would be so kind
24 as to tell me where I was cut off, I will restate what
25 I said.

1 ADMINISTRATIVE JUDGE ROSENTHAL: Well, I
2 don't think you were cut off.

3 MR. SHAPIRO: Well, let me conclude with -
4 - I can't emphasize any more strongly that we are not
5 opposing defining an objective and efficient, and fair
6 way to proceed in adjudicating this issue, if in fact
7 we adjudicate it.

8 And we are not proposing any kind of
9 process or time frame that is going to strap the
10 intervenors, or be unfair to them in terms of
11 resources.

12 We think they have a right to file a
13 hearing request, and it should be decided on a timely
14 basis, and after hearing rights are determined,
15 positive or negative, and issues determined, that is
16 the appropriate time to figure out if indeed as Ms.
17 Curran is concerned about, they are going to be forced
18 to try the same case three times.

19 Or if there are different issues that are
20 best to be adjudicated in separate proceedings. But
21 I don't know how you can determine that now without
22 determining if there are any people or parties that
23 have a right to a hearing in this matter.

24 ADMINISTRATIVE JUDGE ROSENTHAL: Okay.

25 MR. CUMMINGS: Your Honor, David Cummings.

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1 ADMINISTRATIVE JUDGE ROSENTHAL: Yes.

2 MR. CUMMINGS: I would like to clarify two
3 things that I have heard from Ms. Curran and Mr.
4 Shapiro that needs to be clarified on the record.
5 First, Ms. Curran stated that she did not believe that
6 this was a final EA determination based on what she
7 has read in the EA.

8 And we think that it is important to maybe
9 clarify and explain that the EA is separate from the
10 FONSI, and the fact that it is the FONSI that is the
11 final agency determination. It is not the EA.

12 And the staff has issued a FONSI on the
13 first amendment. Therefore, we have our final agency
14 determination. The EA involves some issues on the
15 second and third amendments for environmental NEPA
16 purposes.

17 But the EA was not meant to address a
18 final approval of the BLEU project, and that leads
19 into the clarification of something that Mr. Shapiro
20 stated, which was that it was their belief that the EA
21 covered and was final for all three amendments that
22 would only be revisited if the staff determined that
23 there had been some changes when the second and third
24 amendments came in.

25 And we want to clarify again on the

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1 record, and we have stated this numerous times, that
2 when the EA looked at information on all three
3 amendments, the EA only covered the first amendment.

4 And that when the second amendment, which
5 has now come in, has been reviewed, an EA or an EIS
6 will be prepared on the second amendment; and if they
7 choose to come in with a third amendment, we will do
8 the same for that.

9 But the first EA is not a final document
10 for the entire BLEU project, nor is it intended to be.

11 ADMINISTRATIVE JUDGE ROSENTHAL: But you
12 did review the entire project did you not in the EA
13 that was already prepared?

14 MR. CUMMINGS: Yes, Your Honor, and what
15 we attended to do was that NFS submitted a great deal
16 of material on the first amendment so that we could
17 complete our environmental review.

18 And they also supplemented their positions
19 with information related to the second and third
20 amendment, and the staff examined that for the
21 purposes of making its third environmental review if
22 they could.

23 And to avoid segmentation problems. The
24 staff also sees that it would be efficient so when the
25 proposed at that time second and third amendments came

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1 in, some review would already be completed. So that
2 when an separate EA was prepared for the second
3 amendment, not all the issues may have to be
4 completely readdressed.

5 So issues may not have changed, and the
6 findings that had already been made would still stand.
7 But that did not mean that the staff was not going to
8 revisit the issue for any of the issues related to the
9 second amendment.

10 A new environmental review, a complete
11 environmental review for the second amendment, will be
12 undertaken and will be expressed in either an EA or an
13 EIS. And we just want to make sure that is clear to
14 the licensee.

15 ADMINISTRATIVE JUDGE ROSENTHAL: Well, let
16 me make certain that I understand this. The EA that
17 was already prepared did address the entire project,
18 but as a matter of law, it only had consequences in
19 terms of the first amendment, and therefore the FONSI
20 that was issued applied only to that first amendment.

21 And that with the second and third
22 amendments, there will be an environmental assessment
23 prepared that may incorporate some of the content of
24 the first amendment EA, and there will be then a
25 determination with respect to the second and third

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1 amendments based upon the EA that are prepared
2 specifically for them. Do I understand you correctly?

3 MR. CUMMINGS: That is exactly correct,
4 Your Honor. We just wanted to also just reclarify
5 that when we looked at the information provided on the
6 proposed second and third amendments, at that time we
7 had nothing before us that was a submission from the
8 licensee of an amendment for the second and third
9 part.

10 We looked at the information that they had
11 provided purely for cumulative impact purposes to
12 avoid segmentation under NEPA. We were not at that
13 time attempting to address the BLEU project in toto as
14 giving approval for the entire project.

15 We only had one amendment before us at
16 that time, and so there was no possible way that we
17 could possibly approve something that was not proposed
18 before this agency.

19 But, yes, your characterization is
20 correct, sir.

21 ADMINISTRATIVE JUDGE ROSENTHAL: Thank
22 you, Mr. Cummings. All right. Is there anything that
23 either Ms. Curran or Mr. Shapiro wants to add? I
24 think that we have probably covered the territory.

25 MR. SHAPIRO: Your Honor, Daryl Shapiro.

1 I would like to very briefly just read one paragraph
2 of the EA into the record, because I think it is
3 important however one characterizes what the staff
4 does that it best understood by what they wrote.

5 And on page 1-1 of the EA, it states under
6 the introduction, which tells us what they have done,
7 "This EA does not serve as approval for the three
8 proposed activities. Rather, it assesses the
9 environmental impacts of the action.

10 As each amendment application is submitted
11 the NRC staff will do a safety evaluation, which will
12 be the basis for the approval or denial of the
13 request. As part of the safety evaluation the NRC
14 will perform an environmental review.

15 If the review indicates that this EA
16 effectively assesses the environmental effects of the
17 proposed action then no further assessment will be
18 performed.

19 However, if the environmental review
20 indicates that this EA does not fully evaluate the
21 environmental effects, another EA or environmental
22 impact statement will be prepared in accordance with
23 NEPA." That is the end of the EA.

24 MR. CUMMINGS: Your Honor, may I clarify?

25 ADMINISTRATIVE JUDGE ROSENTHAL: Yes.

1 MR. CUMMINGS: This is David Cummings.
2 What Mr. Shapiro read is in the EA and that is
3 correct, but I can't believe that Mr. Shapiro would be
4 advocating a particular legal action in that there is
5 no possible way that the agency could prepare an
6 environmental assessment and issue a FONSI on two
7 proposals that weren't even before the agency.

8 So we apologize if that statement is
9 misleading and maybe confused Mr. Shapiro, but --

10 ADMINISTRATIVE JUDGE ROSENTHAL: That
11 statement also appears in the Federal Register notice?

12 MR. CUMMINGS: Yes, it does, Your Honor.

13 ADMINISTRATIVE JUDGE ROSENTHAL: And it is
14 word for word.

15 MR. SHAPIRO: Yes, Your Honor, I believe
16 that is true. That does appear in the Federal
17 Register notice summarizing what the EA covers, and
18 the EA did cover or did look at and examine the
19 information that had been provided on the second and
20 third amendments.

21 But there is no way that the staff could
22 issue an EA or a FONSI when the staff does not even
23 have a proposal before it.

24 ADMINISTRATIVE JUDGE ROSENTHAL: It was
25 not clear to me, Mr. Shapiro, whether in calling

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1 attention to this provision in the EA, which again
2 also appeared in the Federal Register notice, that you
3 were challenging Mr. Cummings' statement as to what
4 was the legal effect of the EA that was previously
5 prepared.

6 MR. SHAPIRO: Let me make two points.
7 One, I don't think that the EA did or didn't do is
8 crucial to determining the most efficient way to
9 proceed with this process.

10 ADMINISTRATIVE JUDGE ROSENTHAL: Okay.

11 MR. SHAPIRO: And it has been entered into
12 the record what the NRC has done in an official
13 document just to clarify some things that we have
14 heard of on this conference call, and that I don't
15 think are consistent.

16 ADMINISTRATIVE JUDGE ROSENTHAL: Okay.

17 MS. CURRAN: Judge Rosenthal, this is
18 Diane Curran. I just would like to point out that in
19 the second paragraph on page 1-1, the first sentence
20 starts, "To avoid segmentation of the environmental
21 review, NFS has submitted environmental documentation
22 for three proposed license amendments, and then it
23 goes on.

24 ADMINISTRATIVE JUDGE ROSENTHAL: I think,
25 Ms. Curran, that you can assume that we will read the

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1 assessments.

2 MS. CURRAN: Well, I do want to point out
3 that the NRC correctly decided that this was one
4 project that could not be segmented in an
5 environmental review, and we question how a hearing
6 can be held that is segmented when the NRC itself has
7 said we are not going to segment this environmental
8 review.

9 The way this environmental review has been
10 conducted so far seems to us like a case of wanting to
11 have your cake and eat it, too; of wanting to tell the
12 NFS to go ahead and start this project, and approve
13 license amendment number one, and yet say that this is
14 all of one piece, and we have not finished our
15 environmental review. And the staff can't have it
16 both ways.

17 ADMINISTRATIVE JUDGE ROSENTHAL: Okay.
18 Thank you, Ms. Curran. Judge Cole, do you have
19 anything?

20 JUDGE COLE: No, I have nothing.

21 ADMINISTRATIVE JUDGE ROSENTHAL: I think
22 we have fully explored the issues. I want to thank
23 all of the participants. I am going to at this point
24 relieve the court reporter, as well as everybody but
25 Mr. Shapiro and Ms. Helms-Hughes.

1 MS. CURRAN: Excuse me, Judge Rosenthal,
2 before you go on, I would just like to notify the
3 Board and parties that the petitioners are planning to
4 file a motion before the presiding officer probably
5 early next week to enjoin NSF from conducting further
6 construction activities of the buildings that are
7 involved in this BLEU project.

8 We understand that construction is about
9 to commence on the oxide conversion building, and I
10 did want to let you know that that was coming.

11 ADMINISTRATIVE JUDGE ROSENTHAL: Well, all
12 right. Well, file your motion and Mr. Shapiro will
13 respond to it in due course. All right. At this
14 point, this conference is over, but I want Mr. Shapiro
15 and Ms. Helms-Hughes to remain on the line.

16 (Whereupon, the hearing was concluded at
17 10:02 a.m.)
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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of:

Name of Proceeding: Nuclear Fuel Services, Inc.

Erwin, Tennessee

Docket Number: 70-143-MLA

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
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