

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Duke Energy Corp: Catawba Nuclear Station  
Units 1 & 2: Oral Arguments

Docket Number: 50-413-OLA and 50-414-OLA

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UNITED STATES OF AMERICA  
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NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

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IN THE MATTER OF: :

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

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Thursday, December 4th, 2003

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

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

BEFORE:

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

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

8:35 a.m.

1  
2  
3 CHAIR YOUNG: Let's go on the record. I  
4 believe we were going to finish up on BREDL 6, if  
5 there was anything left on that one, and then go  
6 straight back to NIRS 1.

7 Does anyone have anything to add on BREDL  
8 6, briefly?

9 (No response.)

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

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

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

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

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

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

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

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

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1 batch irradiation.

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

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

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

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

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

25 And while there may, indeed, be some

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

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

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

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

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

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

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

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

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

25           I believe that is why it is called

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

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

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

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

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

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

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

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

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

16 CHAIR YOUNG: Mr. Repka?

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

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

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1 filed.

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

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

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

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

25 However, and in fact, when the

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

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

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

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

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

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1 appendix B QA program.

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

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

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

13 CHAIR YOUNG: Staff?

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

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

25 CHAIR YOUNG: Ms. Olson?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. REPKA: One moment, please.

16 (Pause.)

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

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

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

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

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

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

10 MR. REPKA: Yes, impurities.

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

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

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

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

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

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

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

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

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

25                  And then should problems develop, dealing

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

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

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

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

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

25 ADMINISTRATIVE JUDGE ELLEMAN: Ms. Olson,

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1 I have two questions, please.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 ADMINISTRATIVE JUDGE ELLEMAN: Thank you.

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

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

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

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

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

14                      (No response.)

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

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

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

25                      And Duke has also applied for an exemption

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

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

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

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

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

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1 be evaluated under NEPA.

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

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

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

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

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

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

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

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

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

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

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

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

7 MS. CURRAN: Yes.

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

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

25 And so there is some potential harm from

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 a commitment has already been made.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3                   CHAIR YOUNG: Why don't --

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

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

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

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

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

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

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

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

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

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

24 CHAIR YOUNG: Right, you need --

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

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

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

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

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

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1 MS. CURRAN: Right.

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

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

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

14 Anything further from you, at this point?

15 MS. CURRAN: No.

16 CHAIR YOUNG: Mr. Repka?

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

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

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

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

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

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

14 CHAIR YOUNG: Yes, right.

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

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

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

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

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

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

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

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

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

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

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

9 With respect to the reference to --

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

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

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

21 (Pause.)

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

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

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

6 CHAIR YOUNG: The two approvals being?

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

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

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

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

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

17 CHAIR YOUNG: That is what I thought.

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 statement, or analysis.

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

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

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

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

25 BREDL is claiming that if we look at what

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

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

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

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

25 CHAIR YOUNG: Thank you. Staff?

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

4 CHAIR YOUNG: Appendix 8?

5 MR. FERNANDEZ: Appendix A.

6 CHAIR YOUNG: A.

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

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

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

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1 the lead test assembly program.

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

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

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

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

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

4 Which leads me -- go ahead.

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

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

10 CHAIR YOUNG: Thank you.

11 MR. FERNANDEZ: One second, Your Honor.

12 (Pause.)

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

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

17 CHAIR YOUNG: Okay, thank you.

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

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

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

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

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

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

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

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

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

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

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

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

25 If the report is in any way deficient with

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

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

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

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

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

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

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

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

3 MS. CURRAN: Okay.

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

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

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

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

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

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1 of those EISs, 96 or 99.

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

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

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

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

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

22 MS. CURRAN: That they will be what?

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

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1 inevitability of the use of batch MOX.

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

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

9 Anything more on this?

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

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

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

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

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

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1 MR. REPKA: Enclosure 6?

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

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

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

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

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

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

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

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

4 MR. REPKA: That is correct.

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

8 ADMINISTRATIVE JUDGE ELLEMAN: Oh, okay.

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

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

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

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

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1 (No response.)

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

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

10 MS. CURRAN: Yes.

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

13 MS. CURRAN: Yes.

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

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

20 CHAIR YOUNG: You are not, okay.

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

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

25 MS. OLSON: Well that --

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

4 MS. OLSON: Right.

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

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

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

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

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

25 And once they make that decision, that

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

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

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

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

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

25 I don't mean just sort of exhaust

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

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

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

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

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

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1 in reactors.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13                   CHAIR YOUNG: Okay.

14                   (Pause.)

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

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1 would be the ultimate cost.

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

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

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

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

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

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1 participation.

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

7 MS. OLSON: Thank you.

8 CHAIR YOUNG: Mr. Repka?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 CHAIR YOUNG: Sure. Off the record.

25 (Whereupon, the above-entitled matter

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

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

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

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

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

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

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

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

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

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

20 CHAIR YOUNG: Thanks.

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

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

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

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

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

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

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

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

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

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1 provide that information in written form.

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

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

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

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

23 CHAIR YOUNG: Thank you.

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

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

5 CHAIR YOUNG: For the lead test  
6 assemblies?

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

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

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

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

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

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

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

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

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

25 It certainly, I am representing BREDL and

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

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

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

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

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

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

24 CHAIR YOUNG: Mr. Repka?

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

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

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

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

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

13 CHAIR YOUNG: Okay.

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

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

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

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

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

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

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

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

25 MR. REPKA: The 140 kilograms of plutonium

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

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

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

9 CHAIR YOUNG: I just wondered whether --

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

15 CHAIR YOUNG: Okay.

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

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

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

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

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

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

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

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

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

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

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

11 MS. CURRAN: Appendix G.

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

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

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

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1 I'm recalling them correctly.

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

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

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

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

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

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

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

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

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

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

13 MS. CURRAN: Right.

14 CHAIR YOUNG: -- Duke's response?

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

18 (Pause.)

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

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

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

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1 addendum to our filing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 ADMINISTRATIVE JUDGE BARATTA: Thank you.

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

25 MS. CURRAN: Well, if it takes 20

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

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

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

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

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

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

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

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

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

15 So if you could address that more  
16 specifically?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 Catawba, and will be stored at Los Alamos.

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

5 MR. REPKA: No.

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

8 MS. CURRAN: No.

9 CHAIR YOUNG: Anything else on this one?  
10 (No response.)

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

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

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

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

25 ADMINISTRATIVE JUDGE BARATTA: I think

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

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

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

10 (No response.)

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

13 MS. OLSON: That is fine.

14 (Pause.)

15 CHAIR YOUNG: Go ahead.

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

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

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

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1 impact statement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 CHAIR YOUNG: Mr. Repka?

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

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

25 So I concur with Ms. Olson's observation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 interpretation.

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

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

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

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

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

25 But I would like to remind the licensing

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

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

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

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

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1 the other.

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

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

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

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

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

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

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1 those numbers are significant.

2 So that summarizes our position on the  
3 issue.

4 MS. CURRAN: Let me see if I understand  
5 your position is that notwithstanding the generic  
6 nature of the sump issue, for example, that that would  
7 still be an issue that should be addressed under NEPA,  
8 and should be taken into account by us.

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

18 Am I understanding your argument  
19 correctly?

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

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1 of alternatives.

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

14 CHAIR YOUNG: Thank you.

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

20 That is all I have.

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

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

25 First is the question of what other

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

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

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

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

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

25 So at that particular point the proposal

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

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

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

14 Ms. Curran mentioned the possibility --

15 MS. CURRAN: But what about Oconee?

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

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

25 The second category of arguments that Ms.

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

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

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

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

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

22 CHAIR YOUNG: Do we have that document?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 CHAIR YOUNG: From what and its progeny?

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

18 CHAIR YOUNG: Thank you.

19 MS. KANLER: As cited in our pleading.

20 CHAIR YOUNG: Thank you.

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

25 And the goals of the action in this case

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

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

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

13 CHAIR YOUNG: Thank you.

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

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

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

23 MS. KANNLER: The sump clogging.

24 CHAIR YOUNG: Sump clogging, thank you.

25 MS. KANNLER: I apologize. Therefore we

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

3 Thank you.

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

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

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

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

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

25 MR. REPKA: With respect to your first

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

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

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

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

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

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

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

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

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

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

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

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

22 ADMINISTRATIVE JUDGE ELLEMAN: Okay.

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

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

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

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

9 ADMINISTRATIVE JUDGE ELLEMAN: Okay.

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

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

15 CHAIR YOUNG: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Given that you say that you will be

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

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

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

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

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

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

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

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

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

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

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

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

23 MS. KANNLER: One second.

24 (Pause.)

25 MS. KANNLER: Could we have five minutes?

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

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

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

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

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1 has argued?

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

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

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

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

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

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

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1 Unfortunately it doesn't pertain to this contention.

2 Just, this is more of a factual question.  
3 On the BREDL contention 9, referring to failure to  
4 identify the quantity of plutonium being shipped to  
5 France, does Duke have an advisory committee,  
6 citizen's advisory committee?

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

10 ADMINISTRATIVE JUDGE BARATTA: No.

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

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

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

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

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

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

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

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

9 MS. CURRAN: Sure.

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

13 CHAIR YOUNG: All right.

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

17 CHAIR YOUNG: Go ahead, Ms. Kannler.

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

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

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

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

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

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

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

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

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

25 CHAIR YOUNG: Okay, independent of, okay.

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

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

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

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

17 (Pause.)

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

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

21 MS. KANNLER: If an EIS is done.

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

24 (Pause.)

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

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

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

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

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

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

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

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

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

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

13                  CHAIR YOUNG: Right.

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

17                  CHAIR YOUNG: And then that is --

18                  MS. CURRAN: -- environmental contention.

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

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

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

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

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

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

10                  MS. KANNLER: In the spring.

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

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

19                  CHAIR YOUNG: Okay.

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

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

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

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1 returning to the issue of Oconee, and whether that  
2 alternative needs to be addressed, and to what degree.

3 Our position is, again, as a matter of  
4 law, that alternative does not need to be addressed.  
5 As I stated before, Duke is not offering Oconee for  
6 the MOX program, never has offered Oconee.

7 In fact, used DOE terminology, Oconee  
8 doesn't meet the DOE mission need. In the context of  
9 the present proposal for lead assemblies Oconee is not  
10 a viable alternative. It is beyond the purpose of the  
11 present proposal. It would be entirely speculative  
12 and, therefore, would exceed a rule of reason, under  
13 NEPA, for consideration of alternatives.

14 And, therefore, no review of Oconee needs  
15 to be considered. I think the Staff pointed out that  
16 even to the extent it would be considered, it would  
17 just be to say that it is not a viable alternative.

18 I don't think we need to have a contention  
19 to say that, that that is not meaningful relief, it is  
20 not required, and that would be simply a formalistic  
21 kind of thing, and it is not necessary.

22 CHAIR YOUNG: Let me interrupt right  
23 there, because the Staff did say, notwithstanding what  
24 the Staff just said about the contention being  
25 admissible, on the sump clogging issue, earlier Ms.

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1 Kannler said that you agreed the contention was  
2 admissible to the extent that it deals with the  
3 consideration of Oconee as an alternative.

4 And you said that the Staff was going to  
5 consider Oconee as an alternative, correct? That is  
6 what I heard you to say?

7 MS. KANNLER: I believe that I said that,  
8 not that the Staff would consider Oconee, but just  
9 that the Staff would find that it was lacking, the  
10 discussion of Oconee was lasting from Duke's ER,  
11 environmental report.

12 CHAIR YOUNG: Well, the consideration of  
13 it is relevant, basically.

14 MS. KANNLER: Yes.

15 CHAIR YOUNG: Okay. So in light of that I  
16 wanted to clarify that, because you were  
17 characterizing what the Staff had said, and I didn't  
18 understand the Staff to be saying --

19 MR. REPKA: I think what the Staff said  
20 earlier was that if they found that the discussion of  
21 Oconee was lacking, the relief that would be required,  
22 either by themselves or the Board in that context  
23 would be an explanation of why Oconee is not a viable  
24 alternative.

25 CHAIR YOUNG: Right.

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1 MR. REPKA: And my point is, number one,  
2 that discussion is not required, as a matter of law,  
3 for the reasons I've articulated. And, number two,  
4 even if it were, in some sense, required or the Staff  
5 wanted to see that, that is -- it is a formalistic  
6 kind of relief, and there is nothing to litigate in  
7 this proceeding.

8 The fact of the matter is Oconee is not a  
9 viable alternative, and is not on the table for  
10 technical and contractual issues. So there is nothing  
11 to litigate.

12 Now, with respect to the second question,  
13 I believe, you asked before the break, related to the  
14 question of generic issues, and whether or not it was  
15 their generic nature that excludes them from review.

16 Our position is that those issues in GSI-  
17 189 and GSI-191, they are excluded from review in both  
18 the safety analysis and the NEPA analysis, not just  
19 because they are generic but more fundamentally  
20 because they are issues that are not caused by the  
21 license amendment application before us. It is a  
22 causation issue.

23 The fact that, I think UNN asked the  
24 question, is the overall impact, how is that issue  
25 addressed. I think that -- and suggested that are we

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1 turning a blind eye to the overall impact.

2 The fact of the matter is we are not.  
3 These are generic safety issues, where the NRC has  
4 concluded that the plants are currently safe to  
5 operate pending the resolution of the generic issue.

6 The proposal before us addresses a change  
7 in risk based upon that proposal. Again, we talked  
8 about that yesterday as being 1.6 percent at most,  
9 that is what has been put on the table.

10 And that change in risk is what is  
11 attributable to this specific proposal. Any change in  
12 risk attributable to the GSIs, either 189 or 191, is  
13 not a result of this proposal, and the relative change  
14 is the same, from this proposal, regardless of the  
15 resolution of GSI 189 and 191.

16 So that is number one. Number two is,  
17 with respect to those specific issues, again,  
18 addressing those issues in this forum would, in a very  
19 real sense, be premature because those issues are  
20 being evaluated right now and by the NRC, and by the  
21 industry, and there is no basis on which to address  
22 those issues and to determine what is the change of  
23 risk attributable to the GSIs.

24 We would be in a position, in this forum,  
25 of addressing and litigating the GSI, and we would be

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1 out ahead of the NRC, we would be out ahead of really  
2 the generic issues. So there is no basis for  
3 litigation here.

4 We would end up, and I think I tried to  
5 say this yesterday, in the position of -- that kind of  
6 logic would lead you to conclude that in any license  
7 amendment case the overall impact, not just the impact  
8 of that particular amendment application, but the  
9 overall impact would need to be addressed.

10 And that would have the effect of causing  
11 the license amendment hearing in any case of becoming  
12 a forum to litigate the GSIs. And that is, of course,  
13 not the NRC's position.

14 CHAIR YOUNG: Let me ask you about the  
15 case law, and I can't give you the citation for it,  
16 but we discussed it in the license renewal case. The  
17 case law for the proposition that generic issues,  
18 issues that are being handled generically should not  
19 be addressed in an adjudication unless there would be  
20 a delay in the resolution of the generic issue such  
21 that it would be warranted to consider the issue in  
22 the adjudication.

23 And I'm paraphrasing there, but there is  
24 case law to that effect. And I think that is the  
25 standard that has been defined in the case law, that

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1 absent delay, that would affect the resolution of an  
2 adjudication, you defer.

3 But, obviously, if you just mentioned  
4 being out ahead of, and in a sense the delay issue  
5 might result in that.

6 MR. REPKA: Well, I think there is a  
7 fundamental distinction to be drawn. This is a  
8 license amendment case, not a case of initial  
9 licensing, either a construction permit, or an  
10 operating license application.

11 If this were an initial license case, at  
12 least by some -- you could make the argument that the  
13 generic issue, the overall risk of the plant is within  
14 the scope of the proceeding.

15 However, the Commission there has said, if  
16 it is choosing to address that issue in rulemaking, it  
17 doesn't need to be addressed in an individual  
18 licensing case.

19 CHAIR YOUNG: But the delay issue is not,  
20 as far as I recall, and this could be another issue  
21 that you can elucidate us further on.

22 But as I recall that definition of how to  
23 approach these generic issues, and whether or not they  
24 delay adjudications, is not limited to initial  
25 licenses.

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1 MR. REPKA: Well, I think that it is. I  
2 think that my view would be those cases were initial  
3 licensing cases, and the idea there is that overall  
4 risk would potentially be an issue, absent the NRC  
5 choosing to address a specific aspect of that, on a  
6 generic basis.

7 Here we have a license amendment case.  
8 The NRC, by choosing to address the issue as a generic  
9 safety issue has made the determination that continued  
10 operation of the plant is safe, is consistent with the  
11 safety goals, whatever the basis that might be, the  
12 NRC has made that determination.

13 Delay is not the relevant criteria here.  
14 If it were, and if that were the logic, then we would  
15 be in a position of litigating, in an individual  
16 license amendment case, no matter what the license  
17 amendment might involve, whether it be MOX fuel,  
18 whether it be a power upgrade, whether it be --  
19 whatever it might be, it could be anything, it could  
20 be purely administrative tech spec change.

21 And the argument would be that the generic  
22 safety issue is now in the license amendment case  
23 because of the overall risk. And that, simply, is not  
24 a logical or reasonable conclusion. It gets us back,  
25 also, to the arguments we made yesterday, that we are

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1 talking about a plant that is on the order, an ice  
2 condenser plants were shown in NUREG 1150 to be some  
3 200 times the risk, 200 times below that of the safety  
4 goal.

5 We are talking about taking a very low  
6 risk, 1.6 percent of that risk attributable to this  
7 application.

8 CHAIR YOUNG: Right.

9 MR. REPKA: It remains a very small  
10 number.

11 ADMINISTRATIVE JUDGE BARATTA: So what you  
12 are saying, if I can paraphrase it, that a license  
13 amendment stands or falls on its own merit?

14 MR. REPKA: That is exactly what I'm  
15 saying. And where its own merit is defined by the  
16 changes involved in the effects of that change, caused  
17 by that change.

18 ADMINISTRATIVE JUDGE BARATTA: Thank you.

19 MR. FERNANDEZ: If I may, Your Honor?  
20 There is something that I believe that should be added  
21 to the discussion, that may not have been clear from  
22 our initial response.

23 If an environmental impact statement is  
24 prepared by the Staff, the Staff will necessarily  
25 analyze all the reasonably foreseeable impacts from

1 the proposal before it, including low probability,  
2 high consequence events, as required by NEPA.

3 Those types of events, if considered to be  
4 reasonably foreseeable, could include certain accident  
5 sequences that include severe accidents. When the  
6 Staff conducts that analysis it would, necessarily,  
7 have to look at how those type of impacts relate to  
8 the licensing proposal before the agency.

9 Although Ms. Curran has talked about how  
10 causation is not what the Board should be looking at,  
11 in looking at this contention, necessarily causation  
12 is a big part of that analysis. And I will get to a  
13 lower risk in a second.

14 But if you completely divorce what the  
15 licensing proposal before the agency is, from the  
16 review that the agency must conduct, you are  
17 completely ignoring what NEPA requires from the  
18 agency.

19 And just to say that irradiating four MOX  
20 LTAs would cause some indeterminate increase in  
21 overall risk, is not sufficient to gain admissibility  
22 for the contention.

23 CHAIR YOUNG: Back up for a second. You  
24 said, if you divorce -- say that again, and tell me  
25 what you mean by that. Because I'm not sure that I

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1 followed what you were talking about.

2 MR. FERNANDEZ: The licensing action  
3 before the Commission is to allow these four MOX LTAs  
4 to be inserted into the Catawba nuclear power reactor.

5 CHAIR YOUNG: Right.

6 MR. FERNANDEZ: We, in conducting our  
7 environmental analysis would look at the environmental  
8 consequences of that action. So, necessarily, you  
9 have to look to see what placing those four --

10 CHAIR YOUNG: You, the generic you, or you  
11 the Board you?

12 MR. FERNANDEZ: I'm sorry. We, meaning  
13 the Staff in performing our environmental assessment,  
14 I mean, our environmental reviews, whatever form it  
15 would take. We would, necessarily, look at the  
16 consequences of the actions to determine their  
17 environmental impacts.

18 The generic safety issue that we are  
19 talking about makes, complicates this issue, because  
20 it has nothing to do with the type of fuel that is  
21 used at a power plant.

22 So what is happening here, and I think we  
23 are talking around in circles, it seems like, is that  
24 we are trying to address sump clogging in a license  
25 amendment that has nothing to do, and would have no

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1 effect on sump pump clogging itself.

2 The nature of the fuel used will have  
3 nothing to do with whether debris accumulates on the  
4 pump, and whether there is emergency recirculation, or  
5 any of that. They are two very separate and distinct  
6 issues.

7 So when the Staff does their analysis of  
8 the consequences from the action before it, and  
9 considers low probability high consequence events that  
10 are mandated by NEPA, they may or may not include an  
11 analysis of impact similar to those that would occur  
12 if you had an accident from containment sump pump  
13 failure.

14 It is not clear that it would be,  
15 necessarily, reviewed because the nature of the fuel  
16 has nothing to do with the GSI. So getting out to the  
17 argument about the increase in the overall risk, and  
18 how that relates to how the Staff would address that,  
19 if it chose to prepare an EIS, we get to what the  
20 contentions before the Board are, actually.

21 And before the Board, the contentions  
22 specifically don't identify how this perceived  
23 increase in overall risk is going to occur. There is  
24 no support for that proposition.

25 If you look at the contentions as filed,

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1 it is not, there is no adequate support for stating if  
2 you irradiate MOX the Petitioners have shown that  
3 there will be, consequently, an increase in overall  
4 risk to the public.

5 CHAIR YOUNG: What they say is that they  
6 refer to the heightened vulnerability of Catawba and  
7 McGuire containments to breach eruption, the  
8 heightened vulnerability of plant cooling systems to  
9 clogging, which could significantly increase the  
10 overall risk of an accident over other nuclear power  
11 plants, if MOX fuel were used.

12 MR. FERNANDEZ: Yes, Your Honor. And  
13 that, that you just read, describes the generic safety  
14 issue 191. That describes what the --

15 CHAIR YOUNG: That is from the contention,  
16 that is what the contention is.

17 MR. FERNANDEZ: And I don't have it in  
18 front of me but, yes, that is fine that it says that.  
19 But how does that have anything to do with MOX? It  
20 has nothing to do with MOX.

21 MOX would not cause a greater core damage  
22 frequency as a result of sump pump clogging has  
23 nothing to do with the type of fuel you irradiate at  
24 the reactor.

25 CHAIR YOUNG: But if you calculate the

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1 overall risk you are saying that that risk would not  
2 play any role in that calculation?

3 MR. FERNANDEZ: No. What I'm saying is  
4 that the Petitioner has not adequately supported an  
5 assertion that there would actually be an increase in  
6 the overall risk.

7 CHAIR YOUNG: It is my understanding, and  
8 correct me if I'm wrong, that there have been  
9 statements made that the sump clogging is a particular  
10 problem with ice condenser plants?

11 MR. FERNANDEZ: There was a generic study  
12 done by the Los Alamos National Laboratory, there were  
13 two studies done, where they looked at generic plants,  
14 non-specific. And the reports themselves disclosed  
15 that these reports should not be used to asses the  
16 operability of any particular plant in the United  
17 States.

18 And what the --

19 CHAIR YOUNG: Just let's cut straight to  
20 it, and I want you to tell me, for my own knowledge,  
21 are you saying that the generic issue, the sump  
22 clogging issue, there is no suggestion, whatsoever,  
23 that ice condenser plants are more vulnerable to that?

24 If that is the case, then just say it  
25 straight out.

1 MR. FERNANDEZ: There is, in the reports,  
2 there is a statement regarding ice condensers, and  
3 small break loss of coolant accidents. Small break  
4 loss of coolant accidents, according to the report,  
5 have a higher incidence of occurring at an ice  
6 condenser facility, and challenge the facilities  
7 emergency core cooling system.

8 CHAIR YOUNG: Right, that is what I'm  
9 referring to.

10 MR. FERNANDEZ: Yes, that is a true  
11 statement. However, nothing in the generic safety  
12 issue studies done so far has anything to do with the  
13 type of fuel irradiated at the reactor. They are two  
14 very separate and distinct issues.

15 And what the Petitioner is trying to do is  
16 to confuse the issue, and make them related, when they  
17 truly are not.

18 CHAIR YOUNG: Let me ask you this question  
19 again, and see if I can put it another way, because I  
20 really want to try to understand what your position is  
21 on it.

22 In analyzing the environmental impacts of  
23 the proposed use of this MOX fuel, and taking as a  
24 hypothetical, the 1.6 percent increase that was  
25 discussed earlier, and taking into -- and doing the

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1 analysis of the environmental impacts of using that  
2 fuel, all elements of risk would play into the total  
3 calculation, would they not?

4 I may not be stating this, using the exact  
5 right terms. But there would be some calculation of  
6 the complete environmental impact or impacts of using  
7 this fuel in this plant, which would take into account  
8 any unique characteristics of this plant.

9 And we see, from time to time, new  
10 developments on the sump clogging issue, and how  
11 plants are approaching that, and whether they are  
12 approaching it effectively or not, or whether  
13 different approaches should be taken.

14 There is some time issues in terms of  
15 getting this case resolved if the sump clogging issue,  
16 generic issue, is not resolved within the time frame  
17 in which this adjudication needs to be resolved, I'm  
18 having some difficulty understanding how the case law  
19 that talks about deferring to the generic issue,  
20 except where it -- where a delay would prevent it from  
21 adequately being considered in the adjudication.

22 I'm having some difficulty seeing how that  
23 doesn't come into play here. If there is knowledge  
24 that there is -- that there are particular  
25 vulnerabilities in ice condenser plants to the sump

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1 clogging issue, I mean, it may be resolved next month,  
2 but it may be resolved -- I don't know when it will be  
3 resolved.

4 But if there is a delay that issue is out  
5 there, and it is an issue that, as you've just stated,  
6 everyone is aware of. So I think, just speaking from  
7 a purely practical standpoint, I'm having a hard time  
8 understanding how you are arguing that these things  
9 should be totally divorced and separated from each  
10 other, even though there may be some real impact that  
11 might not be addressed by the generic issue, because  
12 the generic issue might not be resolved in time to  
13 apply it in the context of this request, this license  
14 amendment request.

15 And I think that is, obviously, what is  
16 being raised in this contention, that is how I've read  
17 it.

18 MR. FERNANDEZ: May I respond, Your Honor?

19 CHAIR YOUNG: Sure, that is why I'm asking  
20 you.

21 MR. FERNANDEZ: If the Petitioners had,  
22 with appropriate specificity and basis, supported an  
23 argument that went, say, in the following way I think  
24 it would be acceptable, and this is the way I would  
25 say it would be acceptable.

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1           If they would argue that irradiating MOX  
2 LTAs would unnecessarily increase the risk to the  
3 public because of containment sump clogging at  
4 Catawba, and adequately provided information to  
5 support that assertion, and the impacts from such an  
6 event have not been adequately disclosed in the  
7 environmental report, then yes, Your Honor, I would  
8 agree with you that that would be an admissible  
9 contention.

10           CHAIR YOUNG:   Isn't that what they've  
11 done?

12           MR. FERNANDEZ:  No, Your Honor.

13           CHAIR YOUNG:  Let me just ask you, and  
14 then I want to hear what you said about --

15           MR. FERNANDEZ:  And please say what page  
16 you are talking about.

17           CHAIR YOUNG:  I'm in BREDL contention 5,  
18 I've pulled it out.  The second page of the discussion  
19 of BREDL Contention 5.  Whatever page that is.  Do you  
20 have it in front of you?

21           MR. FERNANDEZ:  Yes, Your Honor.

22           CHAIR YOUNG:  Okay.  The paragraph that  
23 begins, the first full paragraph on that page that  
24 begins with the word second.

25           MR. FERNANDEZ:  Yes, Your Honor.

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1 CHAIR YOUNG: Plans with ice condenser  
2 containments, such as Catawba and McGuire, are  
3 particularly vulnerable to reactor sump clogging  
4 accidents. See discussion in Contention 2 above.

5 Because this vulnerability was identified,  
6 only recently, by the NRC its impact on accident risk  
7 for Catawba and McGuire is not addressed in the SPD  
8 EIS. The new information described above, regarding  
9 the heightened vulnerability of the Catawba and  
10 McGuire containments, breach rupture, and the  
11 heightened vulnerability of plant cooling systems to  
12 clogging, could significantly increase the overall  
13 risk of an accident over other nuclear power plants,  
14 if MOX fuel were used.

15 ADMINISTRATIVE JUDGE BARATTA: The  
16 question I have on that is, the statement that if MOX  
17 fuel were used. It implies that there is a linkage  
18 between the two. Which am I correct in your saying  
19 there isn't?

20 MR. FERNANDEZ: Not only that, but even  
21 if, arguably, there were there has been no basis  
22 provided for that assertion by the Petitioner.

23 ADMINISTRATIVE JUDGE BARATTA: I mean, in  
24 this statement I don't see a basis for that.

25 CHAIR YOUNG: Let me see if I can restate

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1 it in a way that gets across my understanding. What  
2 I understand the Petitioners to be saying is, using  
3 MOX fuel in any plant will raise the risk, a certain  
4 amount, which would be equivalent for all plants.

5 And let's say it is the 1.6 percent. That  
6 is sort of implicit in everything that they have been  
7 saying, and that we all understand.

8 MR. FERNANDEZ: Well, I would disagree  
9 with you, Your Honor. I don't understand it to be  
10 that way, and I never read that in the contentions,  
11 and I don't find it implicit there.

12 And I think the Contention Rule specifically  
13 requires that that information be explicit in their  
14 contention --

15 CHAIR YOUNG: Let me restate what I said.  
16 I understand them to be saying that whether it is  
17 significant or not, when you look solely at the MOX  
18 fuel, the risk as applied to any plant would be the  
19 same, except that they are saying in ice condenser  
20 plants there is this sump clogging issue, that ice  
21 condenser plants have heightened vulnerability to this  
22 sump clogging issue.

23 MR. FERNANDEZ: Your Honor, without any  
24 basis they are stating that, yes.

25 CHAIR YOUNG: Well, the basis -- are you

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1 suggesting that the discussion of the generic issue  
2 and the report that says that you just said to me,  
3 recognizes the heightened vulnerability of ice  
4 condenser plants?

5 MR. FERNANDEZ: Yes, I'm telling you that  
6 that report says nothing about MOX, therefore it  
7 cannot be used to support that.

8 CHAIR YOUNG: Let's go back to ground  
9 zero.

10 MR. FERNANDEZ: Okay.

11 CHAIR YOUNG: You have ten plants, there  
12 is one plant that is an ice condenser plants, there  
13 are nine plants that are not ice condenser plants.  
14 The generic issue, the report that you talked about  
15 said that there were some increased vulnerability to  
16 the sump clogging issue in ice condenser plants,  
17 correct?

18 Isn't that what you said a little while  
19 ago?

20 MR. FERNANDEZ: I think so, yes. I don't  
21 know if I specifically stated it the way you are  
22 saying it. But, yes, I think we are in agreement.

23 CHAIR YOUNG: I'm sure you stated it  
24 differently, but we are trying to get to, pretty much,  
25 an understanding with each other. Do you think we

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1 understand each other on that issue at this point?

2 MR. FERNANDEZ: I think so, yes.

3 CHAIR YOUNG: Now, what I understand the  
4 contention to be is given that, bringing in the MOX  
5 fuel and considering how, considering the effect it  
6 would have on all ten of these plants, what their  
7 contention is, is that the increased vulnerability of  
8 the ice condenser plants would add to the overall  
9 risk, increase the overall risk of an accident over  
10 other nuclear power plants if the MOX fuel were used  
11 there.

12 In other words, that if you are choosing  
13 which plant to use MOX fuel in, if you choose a plant  
14 that has this increased sump clogging risk, I  
15 understand them to be saying that you would add that  
16 risk to whatever risk there is or is not with the MOX  
17 fuel, and the total number would be greater than for  
18 other plants.

19 That is what I understand the contention  
20 to be, very plainly, simply put. And maybe I'm  
21 missing something.

22 MR. FERNANDEZ: No, I think you have  
23 stated what their contention is. But there is no  
24 basis for the assertion in the increase in the risk  
25 associated with irradiating the four MOX LTAs in the

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1       Petitioner's contention.

2                   ADMINISTRATIVE JUDGE BARATTA:    I don't  
3       even see that in their statement, because it says,  
4       increase the overall risk of an accident if MOX fuel  
5       were used.  Implying that the use of MOX fuel directly  
6       causes some sort of an increase associated with the  
7       ice condenser plants.  And I don't see that --

8                   CHAIR YOUNG:       What I understand the  
9       contention to be saying is that the sump clogging is  
10      the thing that increases the overall risk, and that  
11      that is why the ice condenser plants should not be  
12      used.  That is what I understand the contention to be.

13                  MS. CURRAN:       Would it help if I just  
14      referred to the sentence in the contention that --

15                  CHAIR YOUNG:       Pardon?

16                  MS. CURRAN:       Would it be helpful to  
17      identify the --

18                  CHAIR YOUNG:       Go ahead.

19                  MS. CURRAN:       On page 13.

20                  CHAIR YOUNG:       What paragraph, what is the  
21      first word in the paragraph?  I don't have the --

22                  MS. CURRAN:       It starts the third line  
23      down, it is in a paragraph that continues from a  
24      previous page.

25                  CHAIR YOUNG:       The paragraph that starts

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1 with the word first on the previous page?

2 MS. CURRAN: Well, maybe I've got, it is  
3 in the second to the last paragraph of the basis.

4 CHAIR YOUNG: Okay.

5 MS. CURRAN: It is the --

6 ADMINISTRATIVE JUDGE BARATTA: Read the  
7 paragraph as it starts out.

8 MS. CURRAN: THE paragraph begins, first  
9 as discussed in NUREG CR6427. And there is a sentence  
10 that says, under the circumstances it would be  
11 foolhardy to use fuel that will increase the  
12 radiological harm in a containment breach accident, in  
13 plants that have such vulnerable containments.

14 CHAIR YOUNG: I think that is actually in  
15 reference to the hydrogen ignition issue.

16 ADMINISTRATIVE JUDGE BARATTA: That is  
17 GSI-189.

18 MS. CURRAN: Okay, well, then in the last  
19 paragraph it says the new information described above,  
20 regarding the heightened vulnerability of the Catawba  
21 and McGuire containments to breach, or rupture, and  
22 the heightened vulnerability of plant cooling systems  
23 to clogging, could significantly increase the overall  
24 risk of an accident over other nuclear power plants if  
25 MOX fuel were used.

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1           So we are looking at a combination of  
2 consequences and causation, which is what risk is  
3 composed of. And causation, we have been talking  
4 about the word "cause". In our view the question in  
5 the environmental impact statement is, would the  
6 proposed action cause environmental harm?

7           That is true. But here the causation is  
8 an increase in risk. And the two elements are, the  
9 two elements of increase in risk are potential for the  
10 accident to occur, which is heightened by the  
11 particular vulnerability of these plants, taken  
12 together with the increased consequences of using  
13 plutonium fuel.

14           And that is how the NRC traditionally  
15 looks at risk, looks at them together.

16           CHAIR YOUNG:       Let me state my  
17 understanding one more time and see if we can  
18 communicate here.

19           My understanding of what the Petitioners  
20 are saying is, if you take the MOX fuel, and they may  
21 not be saying this exactly, but at least they are  
22 saying that if you take the MOX fuel, and the effect  
23 on risk that it alone has, even if it may not be  
24 significant on its own, if it is used in a plant with  
25 increased vulnerability, from other causes, then those

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1 things would add together to cause an increased  
2 overall risk that would mitigate against using the MOX  
3 fuel in the plant where there are these increased  
4 vulnerabilities.

5 That is what I understand them to be  
6 saying. And they appear to be basing it on the generic  
7 issues themselves.

8 MR. FERNANDEZ: I agree with you, Your  
9 Honor, I think you've described how we also read the  
10 Petitioner's contention to read. However, I think  
11 where we may be differing is that, as the attorney  
12 that works on GSI-191, I know that there is nothing in  
13 those documents that talks about an increase in risk,  
14 at any facility, from using MOX.

15 There is nothing about MOX in there. So  
16 you can't use those documents to support an assertion  
17 that MOX would cause a, what do they say, that there  
18 would be an increase in overall risk that --

19 CHAIR YOUNG: Right, you are right.

20 MR. FERNANDEZ: -- if you use MOX fuel.

21 CHAIR YOUNG: You are right. All you  
22 could use those documents for would be for the amount  
23 of increase in risk caused by the heightened  
24 vulnerability in those plants.

25 And the contention, as I understand it, is

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1 saying when you add that together, when you add that  
2 to any increase that is caused by the MOX, which is  
3 totally separate, when you add those two things  
4 together, the total increase, the total would be  
5 unacceptable such that an ice condenser plants should  
6 not be used.

7 Now, what I'm doing here is I'm stating my  
8 understanding of their contention.

9 MR. FERNANDEZ: Yes.

10 CHAIR YOUNG: Whatever is determined as a  
11 result of the generic issues is out there. But we all  
12 know that they are being looked at, and we all know  
13 some of the things that have been said about them.

14 MR. FERNANDEZ: And can I say --

15 CHAIR YOUNG: And so I never have  
16 understood the contention to be that the sump clogging  
17 had any connection with the MOX fuel use, but simply  
18 that the two factors, when added together, produced an  
19 overall risk figure that would be higher for the ice  
20 condenser plants.

21 I understand Mr. Repka to be saying that  
22 the margin of safety is so great that it still  
23 wouldn't matter, the increase in risk would still be  
24 within what is acceptable. I may be paraphrasing you  
25 wrong, but I thought I understood you to be saying

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1 that.

2 MR. REPKA: That is one thing I'm saying.

3 CHAIR YOUNG: Right, one thing you are  
4 saying. I understand you are saying a lot of other  
5 things.

6 MR. REPKA: I'm also saying the issue of  
7 the overall risk, which I agree with your  
8 characterization of the contention, that that is what  
9 it is about. But the issue of overall risk is not an  
10 issue.

11 Overall risk attributable to a generic  
12 safety issue is not an issue in a license amendment  
13 case. That is what I'm saying.

14 CHAIR YOUNG: But when an EIS is done it  
15 is not done out of context. I mean, an EIS takes into  
16 account the context in addressing and discussing the  
17 environmental impact, correct?

18 MR. REPKA: I think in a license amendment  
19 case that environmental review has to look at the  
20 increase attributable to the amendment. Otherwise it  
21 would lead to absurd results.

22 Beyond that I would say you have to  
23 remember that this is a contention about alternatives.

24 CHAIR YOUNG: Right.

25 MR. REPKA: And so, fundamentally, it is

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1 bounded by the rule of reason on alternatives. So  
2 even if you were comparing alternatives based upon  
3 overall risk, you have to have an alternative, and  
4 there is no alternative.

5 CHAIR YOUNG: Yes, but the Staff has said  
6 Oconee could be an alternative.

7 MR. REPKA: We disagree with that.

8 CHAIR YOUNG: Now, I know that other  
9 considerations -- I know you disagree, but --

10 MR. REPKA: But there are --

11 CHAIR YOUNG: -- and there are other  
12 considerations there, and it may turn out that when  
13 you add together all the risks at Oconee, that it  
14 might be over all higher.

15 But the point, the point is that the  
16 contention is, and they appear to have a dispute with  
17 you, over the impact of the overall risk, when  
18 compared to other alternatives.

19 MR. REPKA: Well, I didn't hear the Staff  
20 to say that they were going to look at relative  
21 overall risks between even Oconee and --

22 CHAIR YOUNG: No, I don't think they did,  
23 but they said that they were going to consider whether  
24 Oconee should be looked at as an alternative.

25 ADMINISTRATIVE JUDGE BARATTA: Their exact

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1 statement was that it -- and that Oconee is not  
2 discussed, as to reasons why it should not be used.

3 CHAIR YOUNG: Right.

4 ADMINISTRATIVE JUDGE BARATTA: I think we  
5 need to discuss this, so I would like to propose a  
6 recess.

7 CHAIR YOUNG: Let's break for lunch. And  
8 then if you want to address it further, when we come  
9 back from lunch you can, as well.

10 (Whereupon, at 1:40 p.m., the above-  
11 entitled matter was recessed for lunch.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2:40 p.m.

1  
2  
3 CHAIR YOUNG: Back on the record. We  
4 apologize for stretching things out here, but we  
5 needed to confer with each other about some issues.

6 Is everybody here who needs to be here, or  
7 are we waiting for other people?

8 MS. CURRAN: Yes, Your Honor. I'm ready.

9 CHAIR YOUNG: Okay. Again, we apologize  
10 for stretching this out, we needed to discuss some  
11 issues. And I want to make clear that in raising the  
12 questions that I was raising, that I have absolutely  
13 no desire, or intention, that any particular answer be  
14 provided.

15 And I want everyone to understand that  
16 what we are talking about here is what -- what I'm  
17 trying to get the parties to address here, is to  
18 clarify what it is that the parties are arguing.

19 Because to some extent my perception has  
20 been that the parties have been sort of talking past  
21 each other. And whatever the outcome I think that is  
22 important that we all are sort of on the same page  
23 with regard to the issues that we are discussing.

24 I see a couple of issues where  
25 clarification would be helpful. And after I ask about

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1 those, Judge Baratta and Judge Elleman may also have  
2 some questions about clarification. But just to  
3 start.

4 My perception is that everyone is not on  
5 the same page with regard to what the actual  
6 contention is. Whether the contention is to the  
7 effect that because of certain allegedly, arguably  
8 argued to be greater, or I think to use the words of  
9 the contention, particular vulnerabilities of ice  
10 condenser plants, that using the MOX fuel in them  
11 would, by either adding or multiplying the effect of  
12 these particular vulnerabilities, sump clogging we  
13 were talking about, and the -- any additional risk  
14 contributed by the MOX fuel use, in an ice condenser  
15 plant makes an ice condenser plant a less attractive  
16 alternative for the use of the MOX fuel.

17 That is one understanding of what the  
18 contention is. And one possible alternative  
19 understanding of what the contention is, is that  
20 somehow it is being asserted, in the contention, that  
21 the use of MOX fuel will increase the risks, any risk,  
22 that may be caused by the sump clogging.

23 And so I would appreciate some  
24 clarification on that, insofar as we are talking about  
25 what the actual contention is. And then secondly, I

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1 would ask Ms. Curran if she could address the issue  
2 of, that Duke has raised about the order of magnitude  
3 of risk for the Catawba plant, or there being two  
4 orders of magnitude of risk for the Catawba plant  
5 below what is acceptable, such that as I understand  
6 Duke's argument, any increased risk would fall well  
7 below what is allowable.

8 Did I state that more or less correctly,  
9 as one of the things you are saying, Mr. Repka?

10 MR. REPKA: Yes, I think that is an  
11 accurate statement.

12 CHAIR YOUNG: Okay. Then what I would  
13 like to have Ms. Curran address, with regard to that,  
14 after we get past what the actual contention is, is to  
15 respond to that and talk about what significance, what  
16 dispute, what is the genuine dispute in response to  
17 that.

18 And then I think it would be helpful if  
19 each party addressed the issue of whether there is a  
20 genuine dispute, and if so, what that genuine dispute  
21 would be.

22 So since the first question has to do with  
23 what the actual contention is, Ms. Curran, do you want  
24 to start?

25 MS. CURRAN: When you were given your

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1 first paraphrasing of the contention, it sounded  
2 reasonable to me. The second one to me I wasn't sure  
3 that it sounded all that different from the first one,  
4 but was shorter.

5 I really had trouble --

6 CHAIR YOUNG: Are you saying that the MOX  
7 fuel, the use of MOX fuel would somehow cause a  
8 greater, cause the sump clogging problem to be greater  
9 than it otherwise would be?

10 MS. CURRAN: What we were saying is that  
11 the risk of this proposal, the risk posed by this  
12 particular proposal, is increased over the risk of --  
13 well, it is significantly greater or potentially  
14 significantly greater than the risk posed by other  
15 alternatives.

16 And, therefore, other alternatives should  
17 be looked at.

18 CHAIR YOUNG: And the nature of the  
19 increased risk is?

20 MS. CURRAN: Because other plants don't  
21 have these -- supposing you, if you picked another  
22 plant, say a PWR with a regular containment, to test  
23 the plutonium fuel, you wouldn't have these two  
24 vulnerabilities that we identified in the contention.

25 The vulnerability to small break LOCA

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1 because of -- it would have the sump clogging issue,  
2 but not the particularly heightened vulnerability.  
3 And it wouldn't have the containment vulnerability.  
4 So the risk of using this higher consequence fuel, to  
5 coin a phrase, would be lower.

6 Because if there were an accident the  
7 consequences wouldn't be as bad, and the chances of an  
8 accident -- look, if there were an accident, with a  
9 breach of containment, in both cases the consequences  
10 would be the same.

11 But in one case the chances of that  
12 happening would be lower. So, overall, the risk would  
13 be lower. And that is the reason that alternatives  
14 should be examined.

15 CHAIR YOUNG: I understood Mr. Fernandez  
16 to be saying that the contention was to the effect,  
17 and Mr. Fernandez you feel free to correct me if I'm  
18 misstating you.

19 But that the contention was to the effect  
20 that the MOX fuel use somehow, you were somehow saying  
21 that it caused the risk arising out of the sump  
22 clogging issue to be greater.

23 MS. CURRAN: Well, the word risk, the way  
24 we are using the word risk is a combination of the  
25 potential for an accident, and the consequences of an

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1 accident.

2 We are not saying that using plutonium  
3 fuel increases the potential for a sump clogging  
4 accident. We are not saying that. But we are saying  
5 it increases the risk of such an accident.

6 CHAIR YOUNG: Because of?

7 MS. CURRAN: The combination of the  
8 heightened vulnerability of this plant to that type of  
9 accident, and the increased consequences of using  
10 plutonium fuel.

11 CHAIR YOUNG: Does that -- did my  
12 statement of what you said before accurately reflect  
13 what you were saying, Mr. Fernandez?

14 MR. FERNANDEZ: I think so, Your Honor,  
15 with one caveat. That we also said that there was no  
16 adequate basis provided for that assertion. That was  
17 our argument.

18 CHAIR YOUNG: Right, but apart from the  
19 basis --

20 MR. FERNANDEZ: Yes, Your Honor.

21 CHAIR YOUNG: -- does her explanation  
22 resolve for you the issue of causation, in terms of  
23 what the contention actually is?

24 MR. FERNANDEZ: I think Ms. Curran  
25 adequately described what the contention actually is,

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1 yes.

2 CHAIR YOUNG: Okay. Ms. Curran, if next  
3 you could respond to Duke's --

4 MR. REPKA: Perhaps I could respond to  
5 that portion first, and then --

6 CHAIR YOUNG: Oh, sure, go ahead.

7 MR. REPKA: -- second.

8 Here is what I think I heard. I heard  
9 that the contention is the overall risk, and the  
10 overall risk is made up of three components, the GSI-  
11 191 sump clogging component, the GSI-189 ice condenser  
12 component, and any component attributable to MOX fuel,  
13 it is overall.

14 The second read was that the version that  
15 does MOX fuel in some way exacerbate, in and of  
16 itself, either GSI-191 or GSI-189. I don't think that  
17 is what I heard that the contention is. And certainly  
18 there is nothing in the contention that says that.

19 So the only thing the contention does is  
20 it vaguely links GSI-191 and 189, those two issues.  
21 It doesn't link either to the MOX fuel. So, of  
22 course, what our position, and I said this before, was  
23 in this license amendment proceeding overall risk is  
24 not an issue, or at least that component of overall  
25 risk that is attributable to the GSI's is not an issue

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1 here.

2 What could be an issue, in this  
3 proceeding, is that portion of overall risk  
4 attributable to the MOX fuel, which leads us to your  
5 second question.

6 CHAIR YOUNG: If I could clarify, before  
7 we move on? Are you, is it your position that if  
8 there is an issue that would otherwise be included in  
9 an analysis of the overall risk, and all the  
10 environmental impacts, if there is an issue that is  
11 currently being handled as a generic issue, that that  
12 issue should be separated out from the overall  
13 analysis of environmental impacts and overall risk?

14 MR. REPKA: Yes, in a license amendment  
15 case the issue is that change in consequences, that  
16 change in risk, attributable to that particular  
17 license amendment?

18 The other risk, whatever it is, exists  
19 irrespective of the license amendment, and the  
20 Commission would be addressing that through the  
21 generic safety issue process.

22 CHAIR YOUNG: And in the part of the  
23 analysis that would consider alternatives, are you  
24 saying that the only two alternatives that can be  
25 considered are Catawba or the no-action alternative,

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1 because there are no other alternatives that may or  
2 should be considered in this proceeding?

3 MR. REPKA: That is correct. And because  
4 there is no viable alternative that serves the purpose  
5 of this particular license amendment application,  
6 everything else is speculative.

7 Now, let me take that a step further and  
8 just say, assuming for the sake of argument, another  
9 plant, let's just say hypothetically, Oconee were  
10 considered in that analysis, the environmental  
11 analysis would be limited to whether or not Oconee is  
12 viable, which we've explained it is not.

13 But even if you were then, assuming for  
14 argument, that you had to look at relative risk versus  
15 Oconee, the issue would not be the overall GSI risk,  
16 the issue would be, is there a difference as between  
17 the --

18 CHAIR YOUNG: The overall --

19 MR. REPKA: The overall risk attributable  
20 to the GSI plus MOX fuel. The issue would be is there  
21 a difference as between Catawba and Oconee, relative  
22 to the change in risk created by MOX fuel. Is there  
23 anything about Oconee that is any different from  
24 Catawba, that would change that maximum 1.6 percent  
25 consequence increase that would be significant.

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1           If Oconee were viable, which it is not,  
2           that might be an issue you could look at, not the GSI.

3           CHAIR YOUNG: If Oconee were viable, in  
4           your view, and analyzing the relative environmental  
5           impacts of using MOX fuel in Catawba as compared to  
6           using MOX fuel in Oconee, you are saying that you  
7           would not analyze the, all factors that might  
8           contribute to that risk?

9           You would separate out the GSI ones, and  
10          if that -- I guess my question is, wouldn't that lead  
11          to an artificial result for the plant from which the  
12          GSI issue were extracted?

13          MR. REPKA: Yes, I would separate that  
14          out. And, no, it would not lead to an artificial  
15          result. It would lead to a more accurate comparison  
16          of the relative effects of the license amendment that  
17          is being discussed.

18          With respect to the GSI impact that, of  
19          course, would be developed and addressed at the time  
20          the GSI is resolved and any risk that actually is  
21          attributable to the GSI would be resolved in that  
22          forum.

23          Again, getting off into those issues in a  
24          license amendment proceeding would be premature, at  
25          best.

1 CHAIR YOUNG: Then one more question. If  
2 down the line, after this proceeding were over, and  
3 this proceeding did not consider the risk related to  
4 the GSI issue, if down the line the GSI issue were  
5 resolved in such a way that it showed there was  
6 increased risk would you then go back and apply that,  
7 at that point, or how would you handle that?

8 MR. REPKA: Well, again, the assumption  
9 right now, and I think it is a valid one, is that the  
10 plants are safe to operate, notwithstanding the GSI.  
11 So there is a presumption that a resolution of the GSI  
12 would mean that there is a finding that the plants are  
13 not safe.

14 And I don't believe that that is a  
15 realistic expectation.

16 CHAIR YOUNG: But if it were wrong, just  
17 hypothetically, if in the end it turned out  
18 differently?

19 MR. REPKA: The resolution of the GSI  
20 would be pursued in due course, once that risk is  
21 understood, and appropriate corrective actions, if  
22 any, are determined.

23 CHAIR YOUNG: And so with regard to this  
24 action, you wouldn't go back and open it up again?

25 MR. REPKA: No, I would not.

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1 CHAIR YOUNG: It would be separated from  
2 this?

3 MR. REPKA: No, I would not. They are two  
4 completely separate things.

5 CHAIR YOUNG: Okay. Ms. Curran, I think  
6 you were going to respond to Duke's argument about  
7 what difference does it make because even increasing  
8 the risk, it would be below what is allowable, if I'm  
9 stating it correctly.

10 And if you want to respond to the other  
11 things as well, go ahead.

12 MS. CURRAN: Okay.

13 CHAIR YOUNG: Actually I would ask you to.

14 MS. CURRAN: All right. Well, first of  
15 all, NEPA is not based on allowable limits. That is  
16 the Atomic Energy Act. NEPA is based on where there  
17 are significant impacts then one looks at alternatives  
18 for mitigating or avoiding them.

19 And that goes beyond the Atomic Energy  
20 Act. And there has been, I think the Limerick Ecology  
21 Action case, which I don't have the cite to, it was a  
22 Third Circuit case, in the 1980s, held that NEPA  
23 requires the NRC to go further.

24 And so we would say this is the kind of  
25 situation where whether or not this operation falls

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1 within the safety goal, and I want to get to that  
2 question next, that that doesn't end the enquiry.  
3 That is what was required in the Limerick case, where  
4 the NRC was required to look at, I think, it was  
5 containment filtering as an alternative that would  
6 mitigate accidents.

7 The other part of this answer is that  
8 NUREG 1150 was issued in 1990, and it took years to  
9 do. I think it started ten years earlier, something  
10 like that. And since 1990 we have new information  
11 about that plant, and all plants, but in particular  
12 about Catawba.

13 We now know about the vulnerability of the  
14 containment, which I'm not sure was known in 1990, at  
15 all. It wasn't until 2000 when Sandia Labs issued  
16 NUREG 6427 and said that if a containment of an ice  
17 condenser plant is put under a certain amount of  
18 stress, it is inevitable that it is going to fail.

19 I doubt that went into NUREG 1150. And  
20 the containment sump clogging issue didn't go into  
21 NUREG 1150. So I'm just not sure how valid that is in  
22 terms of if you are trying to find a justification for  
23 not enquiring further here.

24 What we have is significant new  
25 information showing that conclusions that may have

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1       been reached earlier should be reexamined. And I  
2       would like --

3               CHAIR YOUNG: And the new information is?

4               MS. CURRAN: The information about two  
5       things, the vulnerability of ice condenser  
6       containments, and to containment failure, and also to  
7       small break LOCA accidents. Two things.

8               CHAIR YOUNG: I'm going to stretch this  
9       just a little bit further. I would like to have the  
10       parties address two more issues. And that is what is  
11       the actual risk that GSI-191 addresses with regard to  
12       ice condenser plants, and what if any is the dispute,  
13       genuine dispute between the parties that is at issue  
14       in this contention.

15              MS. CURRAN: I don't know, I haven't seen  
16       the document that describes what GSI-191 is. But I  
17       think the important thing, for purpose of our enquiry  
18       here, it whether this safety -- has been identified as  
19       applicable to Catawba, and what is the significance  
20       from a safety perspective.

21              The most important thing about it is that  
22       it is a factual issue that affects the risk of  
23       operating a plant. However it is described in an NRC  
24       safety document. And as for the issue that is in  
25       dispute here, I would say that it is whether the

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1 environmental impact statement should, in light of new  
2 information about the risk posed by this proposal,  
3 should consider alternatives that would mitigate or  
4 avoid the impacts posed by this proposed alternative.

5 MR. REPKA: I am not sure I know what the  
6 question is right now. I guess the question is, is  
7 there any genuine dispute?

8 CHAIR YOUNG: First question was what is  
9 the -- how does GSI-191 describe the risk or problem  
10 with regard to sump clogging in ice condenser plants?  
11 And, two, if there is a dispute, what is the dispute?  
12 And if there is no dispute, why is there no dispute?

13 MR. REPKA: GSI-191 related to sump  
14 clogging applies to all plants. I don't think that  
15 there is anything in that particular GSI that  
16 addresses whether or not it is unique, or exacerbated  
17 for ice condenser plants.

18 The ice condenser issue is a completely  
19 separate issue in GSI-189. I think that there is a  
20 suggestion in the contention, and the attached report  
21 that, in fact, that there may be something, a link  
22 between 189 and 191.

23 However that is, really, I think a  
24 question for the Petitioners. Our argument is any  
25 dispute that may exist with respect to 189, 191,

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1 whether or not there is any unique issue as between  
2 ice condenser plants relate to sump clogging, that is  
3 not a material issue for this proceeding.

4 And most fundamentally, apart from the  
5 fact that that issue is not created, or affected, by  
6 MOX fuel use, more fundamentally there is no  
7 alternative that is viable, that could be addressed.  
8 So my answer is there is no dispute within the scope  
9 of the proceeding.

10 CHAIR YOUNG: Am I understanding your  
11 statement to mean that you agree that the only  
12 alternative to be considered is the no-action  
13 alternative?

14 MR. REPKA: That is our position, yes.

15 CHAIR YOUNG: Okay. Mr. Fernandez, Ms.  
16 Uttal, or Ms. Kannler? And/or?

17 MR. FERNANDEZ: It will be me. I think  
18 you asked what is the actual risk that GSI-191  
19 addresses. The documents that have been prepared, so  
20 far, by contractors to the agency, particularly the  
21 Los Alamos National Laboratory, to support the Office  
22 of Research's inquiry into the GSI-191 issue, have  
23 been two documents that looked at PWRs and containment  
24 sump clogging.

25 Those documents are generic documents that

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1 contain parametric studies, where parameters were  
2 extrapolated from a variety of plants, and those  
3 parameters were modeled to ascertain how these  
4 hypothetical plants would operate in the event of a  
5 containment sump clogging challenge during emergency  
6 core cooling recirculation.

7 Those documents come to the conclusion  
8 that in the contractor's opinion there are a higher  
9 incidence of, for example, small break loss of coolant  
10 accidents, challenging PWRs for ice condenser plants.  
11 Yes, that is correct.

12 But those documents come to no conclusions  
13 with regards to the operability or the safe operations  
14 of any particular plant. And those documents are very  
15 clear in their forewords, and in their conclusions,  
16 that their conclusions are limited by the data that  
17 they used.

18 And for a lot of plants they didn't even  
19 have sufficient data, so they had to just make up a  
20 number based on averages from a lot of facilities. So  
21 a lot of the numbers in the conclusions in there, by  
22 their own terms, are limiting.

23 Where the Staff is now with regards to  
24 GSI-191 is that a generic letter was issued to all  
25 PWRs, asking them to address the GSI-191 issue. And

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1 the licensees are in the process of responding to that  
2 generic letter.

3 The Staff would then go ahead and review  
4 the responses that the licensees have provided, and  
5 determine whether further action is necessary. That  
6 determination has not yet been made.

7 So the first thing that I would like to  
8 say is that to read into the Los Alamos reports any  
9 particular statement regarding the operability of  
10 Catawba as an individual power plant, does not follow  
11 what the report says, on its face.

12 The report itself on its face says that no  
13 conclusions are being made regarding any individual  
14 plant. It is a study based on parameters and  
15 hypothetical facilities.

16 CHAIR YOUNG: Would there be any  
17 relevance, in your view, to the increased challenges  
18 that the report referred to?

19 MR. FERNANDEZ: Any relevance in this  
20 proceeding?

21 CHAIR YOUNG: Well, any relevance to the  
22 safety, the relative safety of ice condenser plants  
23 with regard to those challenges.

24 MR. FERNANDEZ: As a generic matter  
25 probably so, and that is why the Staff has issued

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1 generic letters asking the owners of PWRs to respond  
2 to the findings in that particular document.

3 As a specific matter, with regards to a  
4 particular plant's operations, I doubt that there  
5 would be a relevance, because the state of the art,  
6 with regard to the information available to the Staff  
7 and the industry, I should say particularly to the  
8 Staff, is that it is difficult to know how a  
9 particular plant would handle that particular issue.

10 That is the step in the GSI process in  
11 which we are engaged in right now. The resolution of  
12 that issue has not occurred.

13 CHAIR YOUNG: If I could ask you the same  
14 question I asked Mr. Repka? If down the line, after  
15 this proceeding were finished, it were to be  
16 determined that there was some increased risk, what  
17 does that do to the current analysis of environmental  
18 impacts at this point?

19 MR. FERNANDEZ: Under NEPA, and I think we  
20 can all agree on this, environmental impact statements  
21 once the action is taken, are static documents.  
22 These documents, either EISs or EAs, are not living  
23 documents that you supplement as you continue  
24 operation of the plant.

25 Once the major federal action is taken

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1 you've satisfied the requirements of the statute, and  
2 you don't have an ongoing obligation to supplement  
3 those environmental analyses.

4 On the safety side if, for example, we  
5 found that there were certain challenges to facilities  
6 because of GSI-191, and let's say that the license  
7 amendment is granted to irradiate MOX fuel, if at that  
8 point in time, when GSI-191 is resolved, the Staff for  
9 any reason had reason to feel that there was not  
10 adequate protection at the facility, and we are  
11 talking safety now, the Staff would have an occasion  
12 to, through the process of an order, or something to  
13 that effect, to ask the licensee to address the issue,  
14 if one is identified then.

15 Environmentally, though, NEPA does not  
16 have a component that would require the federal agency  
17 that has taken the action to once it has completed the  
18 action, to continue updating the document it used to  
19 satisfy its NEPA obligations.

20 CHAIR YOUNG: What does it require with  
21 regard to the completeness of the analysis at the  
22 stage in this circumstance, of being at a point prior  
23 to eventual resolution of the generic issue, if there  
24 is a possibility that the ultimate resolution might  
25 point out dangers that might, if considered now, have

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1 an impact on the environment?

2 And I'm speaking hypothetically here, and  
3 that is all.

4 MR. FERNANDEZ: Assuming arguendo that  
5 GSI-191 was properly within the scope of the  
6 proceeding, and that it had to be addressed by the  
7 Staff in order to issue the license amendment in  
8 question, NEPA would require that if the Staff did not  
9 have sufficient information currently to asses the  
10 environmental impacts that would derive from such a  
11 circumstance, like Ms. Curran has stated before, NEPA  
12 would ask you to disclose the fact that you don't have  
13 sufficient information.

14 But in light of that you are still go  
15 ahead and take the action, or not take the action.  
16 And NEPA is a disclosure statute, so you would  
17 disclose that fact, and then go on and either take or  
18 not take the federal action that is being proposed.

19 And to the second question, I think that  
20 Mr. Repka properly summarized what we feel are the  
21 issues in question, and I think it is a little  
22 confusing, and I think the record will be better  
23 served if I don't engage and try to recite again what  
24 has been said already.

25 CHAIR YOUNG: That is fine. Anything else

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1 on BREDL contention 5?

2 MS. CURRAN: Well, there were a few things  
3 that I wanted to address. There was quite a lot of  
4 argument by Duke and the Staff.

5 CHAIR YOUNG: I'm sorry, go ahead.

6 MS. CURRAN: I haven't had my rebuttal  
7 yet, and I will try to be as efficient as possible.

8 CHAIR YOUNG: Go ahead.

9 MS. CURRAN: In light of the hour.

10 CHAIR YOUNG: Pardon me for overlooking.  
11 We haven't had lunch yet, so --

12 MS. CURRAN: Oh, my goodness.

13 CHAIR YOUNG: Never mind that, go ahead,  
14 pardon me for overlooking that.

15 MS. CURRAN: And I'm going to address  
16 these in the order that I heard them. I believe Mr.  
17 Repka characterized the scope of this enquiry as being  
18 limited by the proposal as it is given in the  
19 environmental report.

20 We disagree with that because this is a  
21 piece of a broader action which is described on page  
22 5-5 of the environmental report, where the first full  
23 paragraph it says, in December 1996 DOE published the  
24 S&D PEIS. This document analyzed the potential  
25 environmental consequences of alternative strategies

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1 for the long term storage of weapons usable plutonium,  
2 and the disposition of weapons usable plutonium that  
3 has been, or may be, declared surplus to a national  
4 security needs.

5 So this is one step in a very broad study  
6 of disposing of weapons grade plutonium. And Mr.  
7 Repka also discussed the concept of tiering, which is  
8 definitely at play here. And we think tiering is  
9 legitimate.

10 There was a broad overall impact  
11 statement, and then we've gotten down to a more  
12 discrete piece of that, of the proposal that we are  
13 now looking at, and further environmental enquiries  
14 being made in a different setting.

15 But we still have to go back to the  
16 original purpose of what this is about. And if we  
17 come across new information that calls into question  
18 the alternatives that were put before us in the  
19 original study, then NEPA raises an obligation to  
20 revisit those issues, up until the point at which the  
21 action is taken, and in that particular environmental  
22 impact statement, and project is finished.

23 I agree with Mr. Fernandez, once the  
24 action is taken, that is the end of the NEPA enquiry.  
25 And that is one reason to do the analysis before the

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1 action is taken, because you can't go back and redo  
2 it.

3 And, in any event, there is no point,  
4 because the action has been taken, the commitment of  
5 resources has been made.

6 CHAIR YOUNG: Let me just interject here.  
7 Assuming that Oconee does not come into play, would  
8 you say, taking Mr. Repka's statement that the only  
9 alternative to be considered is a no-action  
10 alternative, would you contend -- your contention,  
11 would there still be anything to -- that there would  
12 still be any dispute with regard to the contention, if  
13 that is the case?

14 MS. CURRAN: Yes. Certainly Oconee should  
15 come into consideration as an alternative, but so  
16 should other plants. In the, I think it was the SPD  
17 EIS in '99, several so-called mission reactors were  
18 looked at, but none was actually chosen.

19 There were several proposals by different  
20 utility consortiums. And I believe there were three,  
21 I think Mr. Repka said there were three. And two were  
22 actually withdrawn, so they were left with the one  
23 remaining one, which was the one submitted by Duke  
24 Cogema Stone and Webster.

25 But that doesn't mean that the -- that it

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1 is inappropriate now to go back and revisit the  
2 alternatives that were looked at, or to look at other  
3 alternatives.

4 It seems as though there were some  
5 alternatives that were presented to the DOE, because  
6 the DOE did an RFP. And these were the three groups  
7 that responded. And then --

8 CHAIR YOUNG: I'm sorry to interrupt. But  
9 the question I was really trying to get to is, if it  
10 were agreed, or if it were ruled, if the situation  
11 were, for whatever reason, that the only alternative  
12 to look at were the no-action alternative, is there  
13 anything remaining in this contention that would be,  
14 constitute a genuine dispute that we should look at?

15 MS. CURRAN: If the no-action alternative  
16 were the only alternative to be looked at?

17 CHAIR YOUNG: Right.

18 MS. CURRAN: Yes, I think they should have  
19 to look at no-action again, because of the increased  
20 risk. But I also think that other reasonable  
21 alternatives, that no-action and Oconee do not define,  
22 that does not define the scope of reasonable  
23 alternatives that should be looked at here.

24 It should be a broader scope, because this  
25 is a broader program. It is a national program that

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1 was intended to look at, programmatically, what is the  
2 best way to dispose of this plutonium?

3 CHAIR YOUNG: And if we agree with Duke,  
4 and the Staff, that certainly things that Duke has no  
5 control over would be viable alternatives in this  
6 license amendment request, is there anything remaining  
7 of your contention?

8 MS. CURRAN: The no-action alternative,  
9 that is all.

10 CHAIR YOUNG: And your contention at that  
11 point would be?

12 MS. CURRAN: That the no-action  
13 alternative ought to be looked at in comparison to the  
14 risks posed by the action alternative, is it worth it.  
15 But, again, I really -- we do not think that the scope  
16 of -- this is not like -- this case is not like the  
17 cases where the instigator of the permanent  
18 application is solely a private business.

19 In those cases clearly hold that the  
20 Government can't require the Applicant to look at  
21 other alternatives, than what it can reasonably  
22 accomplish, or within the realm of what is reasonable  
23 for that entity.

24 But that is not the kind of situation we  
25 are dealing with, here.

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1 CHAIR YOUNG: Is there any case law  
2 addressing the kind of situation you say we are  
3 dealing with?

4 MS. CURRAN: I can't cite you any at this  
5 point. I can just tell you that this is a different  
6 situation. And, certainly, it would be more in line  
7 with government projects where the government was  
8 planning to do something, and the question was, did it  
9 look at reasonable alternatives, not was it issuing a  
10 permit, but was it proposing to take some action  
11 itself?

12 In which case the taxpayers are paying for  
13 the accident, for the action, and the government is to  
14 look at reasonable alternatives, within its ability.  
15 And that is much more the situation that we have here.

16 This is the federal government deciding  
17 this is how we are going to dispose of plutonium. And  
18 the only reason that Duke is involved in this proposal  
19 is because it is a government project that the DOE put  
20 out for contract.

21 And the DOE could establish a contract in  
22 a way that would target safer plants to use this  
23 plutonium fuel and say, we will subsidize this. There  
24 is a variety of ways, the government is already  
25 subsidizing this, it could subsidize to a greater

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1 extent, using a safer plant that it had identified.

2 CHAIR YOUNG: Assuming that, taking that  
3 for a moment out of the mix, what would be the genuine  
4 dispute if we are looking only at what Duke has  
5 control over, what would be the genuine dispute that  
6 the contention asserts?

7 MS. CURRAN: Whether Duke has made an  
8 adequate analysis of the alternatives over which it  
9 has control, including the three other plants, and the  
10 no-action alternative.

11 CHAIR YOUNG: Anything --

12 MS. CURRAN: I move on?

13 CHAIR YOUNG: Go ahead.

14 MS. CURRAN: Okay. I think Mr. Repka also  
15 argued that we are in the wrong forum here, that we  
16 should have come before the Department of Energy if we  
17 didn't like the choice of mission reactors that was  
18 given by the Department of Energy in 1999.

19 But the answer to that is that at that  
20 time NUREG 6427 had not been issued, we were not aware  
21 of the containment sump clogging issue. The whole  
22 point of our being here in this proceeding is that  
23 another decision making juncture has come up.

24 Actually, it may be the first actual  
25 decision making juncture that is involving actual

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1 action. There has been a lot of planning that has  
2 gone into this, since 1996, when the first  
3 programmatic EIS was issued.

4 But now we are at the point of actually  
5 deciding to take action. And so that is the juncture  
6 at which it is appropriate to look and see whether new  
7 information that was not previously considered in the  
8 EIS warrants reconsideration, reevaluation of  
9 environmental impacts and alternatives. And that is  
10 the point of this contention.

11 It is similar to the situation that we  
12 were in, in the license renewal case, in the sense  
13 that NUREG 1437, in its earliest iteration, was issued  
14 in early '90s, or maybe it was 1997, I can't remember.  
15 But it was some time in the 1990s.

16 And to the best of its abilities the NRC  
17 looked at the environmental impacts of renewing  
18 operating licenses. Well, it wasn't until afterwards  
19 that we got NUREG CR6426, which raised for the first  
20 time the very high vulnerability of ice condenser  
21 containments to breach, if they were stressed.

22 And so we came in with that new  
23 information saying, that generic impact statement  
24 isn't sufficient to justify this licensing decision,  
25 and the issue of environmental impacts of license

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1 renewal needs to be reevaluated.

2 It is a similar situation that we are in  
3 here, with respect to how tiering works. That was a  
4 generic impact statement that ordinarily would have  
5 governed the individual license renewal decision. But  
6 it was outdated, it needed to be reevaluated.

7 Here there is two generic impact  
8 statements that have been overtaken by new  
9 information, and that need to be updated, in those  
10 particular respects relating to the risk of using  
11 plutonium fuel at the Catawba plant.

12 I'd like to revisit, one more time, the  
13 significance of the 1.6 percent, and emphasize that it  
14 is not Dr. Lyman's number, it is not Dr. Lyman's  
15 translation of something else. It is something that  
16 Duke proposed as an interpretation of Dr. Lyman's  
17 work.

18 I just want to make that really clear,  
19 that is not our number. It has been used for many  
20 purposes during this argument, but it is not something  
21 that Dr. Lyman proposed to you, and we have expressed  
22 our qualifications about that number.

23 Also I think the number 1.6 percent was  
24 used by Mr. Repka in an argument to say that if you  
25 were going to look at the relative merits of testing

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1 the plutonium fuel, in other plants besides Catawba,  
2 all you would look at is the 1.6 percent increase in  
3 risk, in consequences between using LEU and plutonium  
4 fuel.

5 And we disagree with that. And just to  
6 summarize it very briefly, we think that for the  
7 plants that are examined, as alternatives to Catawba,  
8 one would look at the overall risk of using plutonium  
9 in those plants.

10 So just as we are concerned about the  
11 vulnerability of Catawba, and certain individual  
12 respects, you would want to look at the vulnerability  
13 of other plants, whether -- their relative merits on  
14 the whole, not just some narrow question of whether  
15 the consequences would increase.

16 I think an argument was made, by Mr.  
17 Repka, that if to consider our contention in this case  
18 would be opening the barn door to just total chaos,  
19 and in every single license amendment case, no matter  
20 how significant, that the NRC would be forced to  
21 reexamine all kinds of generic safety issues, whatever  
22 might be the safety problems at a nuclear plant would  
23 be somehow dragged into the license amendment  
24 proceeding by virtue of the precedent that would be  
25 set in this case.

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1           And that is absolutely not the case. The  
2 reason, here, that we are proposing that this -- that  
3 the alternatives, that other plants should be  
4 considered because of the vulnerabilities of this  
5 particular plant, has to do not just with those  
6 generic safety issues, but with the combined impact of  
7 using a vulnerable plant with fuel that has higher  
8 consequences associated with an accident.

9           And you are not going to get that in most  
10 license amendment cases because they are going to be  
11 about using low enriched uranium, which is not going  
12 to result in the proposal having a significant  
13 environmental impact.

14           Because the -- supposing this amendment  
15 request had to do with using more LEU fuel in the  
16 Catawba case. We wouldn't be sitting here asking you  
17 for an environmental report that evaluates those  
18 impacts and alternatives that would mitigate them,  
19 because the use of more LEU fuel, by itself, would not  
20 exacerbate the risk of operating that plant.

21           It is the increased consequences that come  
22 with using plutonium fuel that interact with the  
23 potential, the higher potential for an accident, that  
24 exists as a result of preexisting conditions, and make  
25 the risk posed by this license amendment application

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1 significant.

2 So this is a unique case, this is not  
3 going to lead to a precedent that is going to affect  
4 every license amendment case.

5 Mr. Repka also argued that by considering  
6 this contention the licensing board would put this  
7 proceeding way out ahead of the resolution of generic  
8 safety issue 191. And this just gets back to the  
9 point of the purpose of NEPA is to make sure that  
10 significant risk issues associated with the proposal  
11 are resolved before the proposal goes ahead.

12 And if that is getting ahead of the agency  
13 on a safety issue, then so be it. NEPA is an action  
14 forcing statute. It is supposed to ensure that if  
15 there are significant issues that are facing an agency  
16 and that relate to a decision that it is about to  
17 make, that might have an impact on the environment,  
18 those issues have to be addressed then, they can't be  
19 shunted off to some separate proceeding and say, well  
20 we will address that when we get to it.

21 The agency needs to assure itself that it  
22 has adequately addressed those issues in the context  
23 of the proceeding. I also heard an argument that  
24 overall risk is only relevance to initial licensing  
25 decisions.

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1 All I can say is that I don't see that as  
2 a valid distinction. Overall risk is a NEPA  
3 consideration, it is valid in any decision that the  
4 NRC makes with respect to the licensing of nuclear  
5 facilities, whether it is initial licensing, or  
6 license amendments.

7 I think maybe I have addressed that, more  
8 or less, with respect to another issue, but I wanted  
9 to touch on it. That is all I have.

10 CHAIR YOUNG: Anything further?

11 MR. REPKA: Just a couple of points.  
12 First Ms. Curran suggests that it takes us all the way  
13 back to the top of this argument on this contention,  
14 earlier this morning. And really takes us back to a  
15 higher tier in the decision making analysis.

16 She honors the concept of tiering, but  
17 then proceeds to ignore it by essentially asking that  
18 a range of alternatives be looked at, that is far  
19 broader than what reasonably relates to the current  
20 proposal.

21 When brought a little bit more back in  
22 tune with this particular proposal, by excluding those  
23 things outside the control of Duke, and excluding  
24 Oconee, she argues that the no-action alternative  
25 still needs to be considered.

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1           That, in fact, has been considered in the  
2 license amendment application. And, in fact, by  
3 looking at the risk attributable to the use of MOX  
4 fuel, it seems to me, and maybe I'm admittedly a  
5 novice, you are looking at the risk of the no-action  
6 alternative, the risk attributable to the change would  
7 be the risk avoided by the no-action alternative.

8           Next there is some discussion of NUREG  
9 CR6427. Just as a matter of fact Ms. Curran asserts  
10 that the ice condenser issue was raised, for the first  
11 time, in that NUREG. That is not true.

12           The ice condenser issue was addressed long  
13 before NUREG CR6427, it was known, it was specifically  
14 addressed in the context of NUREG 1150, which is a  
15 risk document that we discussed earlier.

16           In addition I want to point out that there  
17 is some argument that DOE has ignored that issue.  
18 That, in fact, also is not true. In DOE's record of  
19 decision on the plutonium disposition program, the  
20 record of decision of January 11th, 2000, in the  
21 Federal Register, at 65 FEREK 1608, page 1616, DOE  
22 specifically addresses --

23           CHAIR YOUNG: Repeat that, please.

24           MR. REPKA: It is 65 Federal Register  
25 1608, at page 1616.

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1 CHAIR YOUNG: Thank you.

2 MR. REPKA: Specifically, and that is  
3 January 11th, 2000, specifically addressed comments  
4 related to the risk of ice condenser containments.

5 Next I would like to say that in -- I  
6 believe throughout there has been a tendency to vastly  
7 overstate NUREG CRC 6427. In doing that Ms. Curran is  
8 ignoring significant new information. In fact, GSI-  
9 189 has progressed substantially. GSI-189 has evolved  
10 to a focus on one particular issue, the issue of  
11 whether backup power should be provided to the  
12 hydrogen igniters and the air return fans, an issue we  
13 are familiar with, from the license renewal case.

14 And I would just say, in that context,  
15 that whether or not a particular backfit should be  
16 required, is cost justified, is at best what I would  
17 characterize as a closed question.

18 So I think that the continued  
19 characterization of this extreme risk posed by ice  
20 condenser containments is what I would characterize as  
21 an extreme overstatement.

22 Finally I think Ms. Curran characterized  
23 my position on overall risk as overall risk should not  
24 be considered in the license amendment case. That is  
25 not my position. My position is overall risk

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1       attributable to the license amendment is what you are  
2       looking at, you are not looking at overall risk  
3       attributable to the license amendment, plus other  
4       generic safety issues.

5               CHAIR YOUNG:   But can you elaborate on  
6       that, in terms of what is overall risk?

7               MR. REPKA:   The overall risk --

8               CHAIR YOUNG:   When -- I'm not finished  
9       with my question.  What is overall risk when you are  
10       considering a license amendment in the context of a  
11       given plant?  To what extent does the overall risk  
12       include all risk factors at that given plant?

13              MR. REPKA:   It includes all risk factors  
14       based upon the current licensing basis of the plant.  
15       Let's just take that hypothetical 1.6 percent risk  
16       increase attributable to the MOX fuel application.

17              That reflects the core damage frequency,  
18       the containment performance, all of the assumptions on  
19       which the plant is currently operating, plus the  
20       addition of MOX fuel.

21              It doesn't address the unknowns of the  
22       GSIs, it addresses the overall risks attributable to  
23       the current licensing basis of the plant, the  
24       licensing basis that the NRC has concluded is  
25       sufficient to justify public health and safety, plus

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1 the MOX fuel. So that 1.6 percent public health risk  
2 is an overall risk number.

3 CHAIR YOUNG: I think I already asked you  
4 the question about if down the line increased safety -  
5 - I know I asked Mr. Fernandez, and I think I asked  
6 you before. Did you want to --

7 MR. REPKA: You did, and the answer was  
8 no.

9 CHAIR YOUNG: Okay.

10 MR. REPKA: I would just add another  
11 perspective on that particular question. I think in  
12 discussing it with Mr. Fernandez you asked what is the  
13 standard of completeness. And at some fear of  
14 reopening old wounds, and old discussions, one  
15 possible phraseology of what is the standard is  
16 5145(c), which is to the extent practicable.

17 And, obviously, at this present time that  
18 is based upon the current licensing basis, and the  
19 current understanding, and that would not include  
20 generic safety issues that are still being analyzed.

21 MR. FERNANDEZ: We have nothing to add,  
22 Your Honor.

23 CHAIR YOUNG: Okay.

24 MS. CURRAN: One more, if I may?

25 CHAIR YOUNG: Oh, do you have anything?

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1 MS. CURRAN: We are whittling down.

2 CHAIR YOUNG: Okay, go ahead.

3 MS. CURRAN: First of all, it doesn't seem  
4 to us to be exaggerated to be concerned about the  
5 results of NUREG CR6427, which characterized the  
6 probability of containment failure under certain  
7 conditions as one.

8 That is very, very significant, that is  
9 important. It is not being alarmist to be very  
10 concerned that that be taken into account in an  
11 environmental impact statement.

12 And I don't know what was, I believe this  
13 was the first place where this finding was written in  
14 an NRC sponsored report, and circulated, and in an  
15 important public document. I have no idea to what  
16 extent that idea was circulating before the year 2000.

17 But it seems to me that the publication of  
18 that report is an important turning point in the  
19 understanding of the risks of ice condenser  
20 containments. And that whether or not the DOE gave  
21 some lip service, or some degree of consideration to  
22 the differences in ice condenser containments, I doubt  
23 that they took that particular finding into  
24 consideration.

25 That is all I have.

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1 CHAIR YOUNG: Well, thank you very much.  
2 We have taken a little bit longer on some contentions,  
3 shorter on others, and that discussion was helpful to  
4 me, anyway. And so I appreciate all participants'  
5 elaboration there, in taking the time and energy to  
6 answer the questions.

7 Is there anything else that we need to  
8 address before we go to these scheduling issues, on  
9 which I've been making a list?

10 MS. CURRAN: Judge Young, there is one  
11 thing I have. And that is I would just like to refer  
12 the Board to a citation that will be helpful in  
13 considering contention 9.

14 I noticed this at the lunch break. You  
15 had asked me what is the Executive Order that relates  
16 to consideration of impacts on the global commons.  
17 And it is actually discussed in a license amendment  
18 request. It is in section 5.3 at page 5-2.

19 CHAIR YOUNG: Okay. Anything else?

20 MR. FERNANDEZ: Just one thing about the  
21 Executive Order, Your Honor. I am not familiar with,  
22 and I don't know if Ms. Curran is, but when executive  
23 orders are issued, usually the Commission either sends  
24 a letter to the White House, or there is some  
25 documentation on whether the Commission feels that it

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1 is bound by the Executive Order.

2 As an independent regulatory agency, the  
3 way that they define federal agency in executive  
4 orders is very important to see if the executive  
5 order, by its terms, is binding on the agency.

6 And off the top of my head I can't  
7 specifically say whether this executive order is  
8 considered to be binding upon the Commission, by the  
9 Commission itself.

10 And also --

11 CHAIR YOUNG: Also as to how the  
12 Commission might apply it?

13 MR. FERNANDEZ: Yes, Your Honor. So there  
14 may be something more --

15 CHAIR YOUNG: That might be something to  
16 add to our list in terms of things that you could  
17 provide, if you --

18 MR. FERNANDEZ: Sure, why not.

19 MR. REPKA: Judge Young, our point in the  
20 license application that Ms. Curran cited, is that the  
21 Executive Order is something that DOE is addressing in  
22 the context of their reviews. It is a DOE obligation.

23 CHAIR YOUNG: Anything else?

24 (No response.)

25 CHAIR YOUNG: Let me read my list, if I

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1 could, and then maybe we can see if it is complete,  
2 see if anything is on there that shouldn't be on  
3 there. And it seems to me that, and I've just taken  
4 them down in the order they've come up.

5 But if we can arrive at some organized way  
6 of dealing with these things, that might -- that would  
7 be desirable.

8 I noticed that Ms. Olson is not here any  
9 more. Does that -- is she coming back?

10 MS. CURRAN: Not today, but she said we  
11 should go on without her, and just communicate to her  
12 what we decide. And she asked if she could have it in  
13 writing, from the Board, if there is some kind of  
14 schedule that is set.

15 CHAIR YOUNG: Okay, right, everybody would  
16 be served.

17 The reason I asked that, at this point, is  
18 after I read through my list, it may be that in terms  
19 of scheduling these things, we will know more after we  
20 hear whatever you have to say about the Motion for  
21 Protective Order that would play into that.

22 And if she is not here now we don't need  
23 to put that off until the very end. Is that -- would  
24 that be a correct assumption? Okay.

25 The list I've made is the timing for

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1 responses to the late filed contentions that came in  
2 on Tuesday, I guess it was, the 2nd. And then the  
3 Protective Order hearing, argument on that, and  
4 whether, ascertaining whether there are any further  
5 proceedings that we need to take with regard to that.

6 Related security concerns, what has  
7 happened, where we are in the clearance process. Then  
8 the issue of whether section 3.8, Duke's offer, or  
9 statement with regard to withdrawal of that. And Ms.  
10 Curran's statement about possible amendment of the  
11 contention.

12 And how we treat that, off the top of my  
13 head, I'm not -- since the pleading requirements are  
14 different in NRC, I'm not sure whether this particular  
15 situation has come up in an NRC pleading context  
16 before. But, anyway, that is one of the things on the  
17 list.

18 We already discussed the 30 day deadline  
19 for amended contentions, or contentions based on new  
20 information. So we don't have to decide anything, but  
21 I will try to remember to put that in whatever order  
22 comes out of this.

23 The next thing is the provision of further  
24 case law with regard to the applicability of the CEQ  
25 regulations. I think the parties agreed that Ms.

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1 Curran could provide that, and Mr. Repka wanted to  
2 reply, and I would assume the Staff may or may not.  
3 But they obviously could, as well.

4 The issue of possible further briefing,  
5 brief briefing on the Commission's terrorism rulings.  
6 Obviously not bringing into play anything that was  
7 security related, but just simply the legal effect of  
8 those in this proceeding, is how I understood that  
9 issue, since that was something that I think was  
10 mentioned for the first time here.

11 And then the -- I have a question mark on  
12 NEPA case law, and alternatives. And then additional  
13 authorities and sources on the state of the art with  
14 regard to the MOX fuel that Judge Elleman brought up.

15 And then finally the one you just  
16 mentioned, the -- how the NRC has addressed the  
17 Executive Order, addressed or approached the Executive  
18 Order that has been mentioned.

19 It seems that since we've got this Motion  
20 for Protective Order out there, and there has been a  
21 request to hear argument on it today, it strikes me,  
22 and I want to hear if anyone disagrees, since Ms.  
23 Olson is not asking us to hold off on that, at this  
24 point, that at least finding out how much of an issue  
25 there is there, whether all parties are in agreement,

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1 whether the security people have signed off on the  
2 provisions that are proposed, whether we are talking  
3 about something that is very straightforward, and no  
4 one has any disputes, and the security clearances are  
5 on their way such that we don't have to worry about  
6 those, or whether the other extreme, there is some  
7 argument or concerns that either the participants, or  
8 the security people would have to raise about that.

9 Can you elucidate us on that, the Staff,  
10 since you all filed the Motion?

11 MR. FERNANDEZ: I'm sorry, Your Honor, I  
12 apologize but I was not listening. So if you could  
13 just briefly restate?

14 CHAIR YOUNG: You mean you weren't alert  
15 every single minute?

16 MR. FERNANDEZ: I'm so sorry, I was not.  
17 As far as I understand it, there is no matters in  
18 controversy with regards to the Protective Order and  
19 to the Motion before you, except for three things that  
20 Petitioner BREDL has raised.

21 And if Ms. Curran is okay, I will talk  
22 about those right now.

23 MS. CURRAN: Okay.

24 MR. FERNANDEZ: Is that okay with the  
25 Board?

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1 CHAIR YOUNG: Go ahead.

2 MR. FERNANDEZ: The first issue that the  
3 Petitioners raised was under the terms of the Order,  
4 and the Non-Disclosure Agreement, the parties would  
5 protect safeguards, and protected information, in a  
6 particular way.

7 For example, if they are filing a set of  
8 contentions based on safeguards information, they will  
9 probably themselves contain safeguards information.

10 CHAIR YOUNG: I'm sorry, they will what?

11 MR. FERNANDEZ: They will probably,  
12 themselves, the contentions, also contain safeguards  
13 information.

14 CHAIR YOUNG: Right.

15 MR. FERNANDEZ: So they would follow a  
16 particular method of filing those contentions and  
17 sending them to the board, and handling how they  
18 prepare those contentions.

19 What the Petitioners raised was because of  
20 their interest in serving the public, and in giving  
21 the public as much information as they can, with  
22 regards to their activities in this proceeding, how  
23 could they accomplish preparing a different document  
24 that would describe, in generic terms, what they've  
25 done in this area, without disclosing safeguards

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1 information.

2 In my mind what that compares to is when  
3 a licensee prepares, for example, a document that has  
4 proprietary information, they also prepare another  
5 document that is the non-proprietary version of a  
6 document. I think that is what Dianne was talking  
7 about.

8 The Staff would not have a problem with  
9 the Petitioners engaging in such an exercise, and  
10 preparing such a document to distribute among their  
11 members. I would, however, caution everybody here  
12 that any disclosures that are made, now that you are  
13 the holder of protected information, should be made in  
14 light of the statutory restrictions on disclosure of  
15 safeguards information.

16 And one should very carefully review one's  
17 documents before making them publicly available, to  
18 assure oneself that those documents do not contain  
19 such information.

20 CHAIR YOUNG: Have you talked about a  
21 method for checking on things like that, such as  
22 circulating things among yourselves, first, on a  
23 secure basis? And also just so it will be out there,  
24 have you talked about the restrictions on not using  
25 email, using certain stand-alone computers, and

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1 printers, and types of practical issues like that?

2 MS. CURRAN: Yes.

3 MR. FERNANDEZ: We have talked about that  
4 and that is in the Order itself, and in the non-  
5 disclosure agreement.

6 What I would say is in the PFS proceeding,  
7 for example, the Staff as a matter of courtesy has  
8 been reviewing certain documents, not a large volume,  
9 because of the limited resources that the information  
10 security staff has, when the state of Utah has wanted  
11 to make a non-safeguards version of a document.

12 CHAIR YOUNG: I'm sorry, so the Staff has  
13 been reviewing -- is it only the Staff, or do all the  
14 parties get involved in that?

15 MR. FERNANDEZ: One second.

16 CHAIR YOUNG: Whatever you agree on, I  
17 mean, would be --

18 MS. CURRAN: Could I just make a  
19 suggestion to cut down on the discussion that we have  
20 to have here? That we get together, BREDL, its  
21 counsel, and the Staff and Duke, we get together and  
22 work out a process for this, and a set of criteria,  
23 and what we would like to ask if there is any  
24 disagreement, between the parties, on a particular  
25 pleading, that we be able to come to the Board for

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1 review, just as in the Protective Order, I think there  
2 is a provision that if we can't agree about need-to-  
3 know, then we come to you.

4 If we can't agree about what should be  
5 able to be disclosed, in a given situation, we come to  
6 you. But hopefully we can agree about those things.  
7 And to me it makes the most sense for us to just work  
8 that out, and then amend the agreement.

9 MR. FERNANDEZ: I would agree, but there  
10 is one concern that I have. And, normally, boards  
11 have not been injected into the process of marking  
12 documents as safeguards. And that process is within  
13 the purview of the Staff.

14 And within the regulations there is no  
15 appeals process for that final determination by the  
16 Staff, that a particular document is considered to be  
17 safeguards by the Staff. So at this point in time,  
18 without having really thought about it, my initial  
19 reaction would be that we would not expect the Board  
20 to be involved on the marking of documents as  
21 safeguards information or not safeguards information.

22 CHAIR YOUNG: You know, I don't have any  
23 particular desire, personally, to be involved in that.  
24 I know that there has been some discussion, that I  
25 have heard in my office, with the Chief Judge, and the

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1 Deputy Legal Chief Judge, about similar types of  
2 issues.

3 I guess, personally, I would encourage you  
4 to reach an agreement. And if you agree on  
5 everything, and part of the Staff's agreeing would be  
6 that the Staff would have consulted with Mr. Stapleton  
7 and the security people, if you agree then we don't  
8 have to worry about this.

9 So that is the optimum, in my view, of --  
10 ADMINISTRATIVE JUDGE BARATTA: May I make  
11 a suggestion?

12 CHAIR YOUNG: Sure.

13 ADMINISTRATIVE JUDGE BARATTA: Ms. Curran,  
14 you may consider, as a suggestion, that if a dispute  
15 arises then you can ask for a second opinion from  
16 someone else, on the Staff, who is not involved at all  
17 in any way, shape or form, with this particular  
18 situation. Think about that as a possible  
19 alternative.

20 MS. CURRAN: We get the message that you  
21 would rather not be involved and --

22 CHAIR YOUNG: I don't want you to take  
23 from this that we are saying we won't be. And  
24 certainly, you know, these types of issues are  
25 becoming more with us these days.

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1                   And so don't take it that we won't do what  
2 we need to do with regard to anything that is brought  
3 to us. I was speaking, somewhat, humorously. But  
4 obviously it is better if the parties can agree.

5                   MR. FERNANDEZ: And one thing that I would  
6 like to say is that I was not prepared to address  
7 these issues today, because I just found out about  
8 them today.

9                   So in my initial reaction would be that  
10 there is a question of whether the Board would even  
11 have the authority to make such a determination.

12                  CHAIR YOUNG: And that is the thing I was  
13 referring to, and I am just not that up on the issue.  
14 But since I have heard discussions of it in my office,  
15 I don't want to sign off on something where I'm just  
16 simply not sure what legal positions the Chief Judge,  
17 or the Deputy Chief may have taken with regard to  
18 similar issues in other cases.

19                  I think there is a desirability of trying  
20 to treat these types of issues consistently from one  
21 case to the next. And I express no opinion, I just  
22 think that it is better to get everything clear, and  
23 out on the table, so that something doesn't come back  
24 and bite us later, where we haven't --

25                  MR. FERNANDEZ: What I would say to that

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1 point is that at least in the Staff's opinion, the  
2 documents that were presented to you in the Proposed  
3 Order, and in the Non-Disclosure Affidavit, are  
4 adequate to address the process which we are about to  
5 embark on, which is giving or sharing information with  
6 the Petitioner, so that they can frame contentions.

7 In that process we could also take it upon  
8 us to prepare a framework on how we would address with  
9 these issues. But in the Staff's opinion, nothing in  
10 the issues that I'm about to tell you, that the  
11 Petitioner has raised with the Staff, are issues that  
12 will prevent us from beginning the process of  
13 preparing and litigating the contentions regarding  
14 security.

15 I don't know if Ms. Curran disagrees with  
16 that statement?

17 MS. CURRAN: Yes, there is only one thing,  
18 and that would be to broaden the scope of documents  
19 that is covered by the agreement, that covers staff  
20 standard. That should be easily done.

21 But the other things I agree we could work  
22 out separately.

23 MR. FERNANDEZ: What she just mentioned  
24 brings me to the second point that Ms. Curran raised,  
25 which was what documents are covered by the Draft

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1 Order, and the Non-Disclosure Affidavit.

2 CHAIR YOUNG: Right. We noticed that four  
3 was left out, and we didn't know if there were others  
4 at the end, in addition.

5 MR. FERNANDEZ: And the protected  
6 information is specifically defined as a term in the  
7 order. And if we were to subsequently add new  
8 documents to it, we would move to amend the order to  
9 cover those additional documents that may, or may not,  
10 become part of the proceeding.

11 CHAIR YOUNG: What is the status of those,  
12 of document number 4, I think it was?

13 MR. FERNANDEZ: Attachment 4?

14 CHAIR YOUNG: Attachment 4, and any others  
15 -- I don't know whether there are others in addition  
16 to four that are not addressed by the Protective  
17 Order. What is the status of those, has the --

18 MR. FERNANDEZ: Under --

19 CHAIR YOUNG: -- been made, will it be  
20 made?

21 MR. FERNANDEZ: Under the terms of the  
22 Draft Protective Order, the entire document that was  
23 submitted by Duke for convenience of all the parties,  
24 has been determined to be covered by the Order, by the  
25 terms of the Order, as protected information.

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1 CHAIR YOUNG: As safeguards?

2 MR. FERNANDEZ: As protected information  
3 under the terms of the Order. What you are asking  
4 about is the cover letter that I sent to the Board  
5 with the Staff's determination.

6 The Staff has determined that as far as  
7 the security document that was submitted by Duke, the  
8 cover letter, and attachment 4 did not contain  
9 safeguards information, and the entirety of all the  
10 other attachments did constitute safeguards  
11 information.

12 So with regards to what documents are  
13 covered, in the future, other than the ones that are  
14 defined right now in the Protective Order, what we  
15 would say is that as those documents become necessary  
16 to the Petitioner in this case, we would move to amend  
17 the Protective Order to cover those documents, once  
18 they've identified they need those documents.

19 CHAIR YOUNG: Maybe I'm jumping the gun,  
20 but we are talking --

21 MR. REPKA: Yes, Your Honor, all of the  
22 individuals that Ms. Curran had proposed to be  
23 involved in the -- all the individuals that are listed  
24 in the Draft Protective Order have undergone the  
25 trustworthiness review to receive safeguards

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1 information.

2 CHAIR YOUNG: And there is nobody else  
3 waiting?

4 MR. FERNANDEZ: No.

5 CHAIR YOUNG: And that took care of Mr.  
6 Repka?

7 MR. FERNANDEZ: Yes, Mr. Repka, Ms.  
8 Cunningham, and Mr. --

9 CHAIR YOUNG: And did we decide, I  
10 apologize for not having it right in front of me, but  
11 was a decision made about the secretaries?

12 MR. FERNANDEZ: Yes, and they have been  
13 approved.

14 MR. REPKA: And just to be clear on that,  
15 it is a trustworthiness review for safeguards  
16 information, we are not talking L clearances here,  
17 this is --

18 CHAIR YOUNG: I meant that as sort of a  
19 generic term to use --

20 MR. FERNANDEZ: Although I will say that  
21 I think that Ms. Curran and Dr. Lyman have both  
22 obtained, or soon will obtain L clearances -- they  
23 have obtained them.

24 MS. CURRAN: But that is for the fuel  
25 fabrication facility. And we were told that doesn't

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1 apply to this case, although it will probably be  
2 fairly simple to expand it. It takes a long time. I  
3 think once you've got one, it is probably not that  
4 hard to expand the scope.

5 CHAIR YOUNG: Is there any possibility  
6 that we would, that additional information would be  
7 classified at a higher level?

8 MR. FERNANDEZ: At this point in time the  
9 Staff does not foresee the proceeding covering  
10 classified information.

11 MS. CURRAN: I just want to raise a point  
12 about the scope of the documents that is covered.  
13 Once you approve the Protective Order then that will  
14 probably result in our getting the security plan  
15 within a matter of days, and then a clock will start  
16 to run.

17 And Mr. Repka and I talked about a 30 day  
18 clock for us and maybe a 21 day clock for responses.  
19 But because that clock is going to start to run on us,  
20 we want to make sure that the Protective Order covers  
21 all the documents that we would need to see, in order  
22 to be able to do a meaningful review for purposes of  
23 contentions.

24 And I think it would, undoubtedly, include  
25 whatever standards the Staff is applying to the

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1 security plan, and also to the exemption request.

2 CHAIR YOUNG: Have you all talked about  
3 that among yourselves, in terms of defining which  
4 documents?

5 MS. CURRAN: This morning we did.

6 MR. FERNANDEZ: Yes, we briefly talked  
7 about it this morning. And the standards that are  
8 going to apply to the application are in the  
9 regulations. So there is --

10 CHAIR YOUNG: Those are public?

11 MR. FERNANDEZ: Those are public  
12 information.

13 MS. CURRAN: There is nothing, there is no  
14 safeguards, or proprietary, or classified information  
15 in any kind -- for instance, the design basis threat  
16 is classified.

17 MR. FERNANDEZ: And the design basis  
18 threat orders that were issued to Cat 1 facilities are  
19 classified, yes. And the design basis threat under  
20 which category 1 facilities are currently operating is  
21 classified.

22 However, we do not feel, or the Staff does  
23 not feel that that would be a document that is  
24 relevance in this proceeding.

25 MR. REPKA: Let me amplify on that. It is

1 our view, this is a part 50 facility, it is not a  
2 category 1 facility. And that is the basis for what  
3 Mr. Fernandez is saying, in the design basis threat  
4 related to a part 50 nuclear power plant, is  
5 safeguards information.

6 ADMINISTRATIVE JUDGE BARATTA: I'm sorry,  
7 did you say that the design basis threat for a part 50  
8 facility is safeguards?

9 MR. REPKA: Safeguards, correct. Not  
10 classified.

11 ADMINISTRATIVE JUDGE ELLEMAN: Mr.  
12 Fernandez, you lost me at one point. I think I heard  
13 you say the entire submission was identified as  
14 protected information, and the attachments were  
15 identified as safeguards information.

16 Did I get that right, what you said?

17 MR. FERNANDEZ: The documents which have  
18 been determined by the Staff to be safeguards  
19 information are attachments 1 through 3, and 5 through  
20 7. The cover letter, and attachment 4, the Staff has  
21 determined that they do not contain safeguards  
22 information.

23 For ease of handling the documents, the  
24 Protective Order defines everything as protected  
25 information, so that we all know that all of these

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1 documents should be kept together, and safely stored  
2 according to the terms of the Protective Order.

3 ADMINISTRATIVE JUDGE ELLEMAN: So there is  
4 a storage classification for everything under the  
5 Protective Order, and there may be more rigorous  
6 storage classifications for those things that are  
7 safeguards?

8 MR. FERNANDEZ: No. Everything is  
9 protected at the safeguards level.

10 ADMINISTRATIVE JUDGE ELLEMAN: Everything,  
11 okay.

12 MR. REPKA: Let me try to clarify that,  
13 because everything was submitted by Duke as  
14 proprietary information related to security. Some of  
15 which, most of it, was determined by the Staff to be  
16 safeguards.

17 So it is all being treated as protected  
18 information under the agreement, under the Protective  
19 Order, for convenience. There is a provision, in the  
20 Protective Order, with respect to any portion of the  
21 protected information, which is defined as everything  
22 in the submittal, and everything that is generated  
23 based upon the submittal.

24 If any portion of that is determined to be  
25 not safeguards information, there are a few specific

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1 provisions that do not apply. They can be applied,  
2 certainly, but they do not apply.

3 But generally speaking the vast majority  
4 of the restrictions apply and, in some cases, that  
5 means they will be overprotected, if it is not  
6 safeguards.

7 CHAIR YOUNG: Let me interject a question  
8 here. Is it possible that -- it sounds as though  
9 there are a few issues hanging out there about how to  
10 handle some things.

11 Is it possible that all the parties can  
12 get together and agree, try again to come to an  
13 agreement on everything?

14 MR. FERNANDEZ: I think that we all agree,  
15 Your Honor. I think that what we may be having a bit  
16 of a dispute about is what other documents aside from  
17 what is already covered by the Order, may also need to  
18 be provided to the Petitioner.

19 But I think we are all eager to get this  
20 going, and we all agree on, at least, the protection  
21 of the security supplement.

22 CHAIR YOUNG: So am I understanding you to  
23 be saying, and all of you, are you in agreement that  
24 this could be signed off, it would probably be Monday  
25 before we could meet the SECY filing requirements.

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1                   And I think that they have provided to us  
2                   in an electronic --

3                   MR. FERNANDEZ: With the caveats that we  
4                   are working on resolving these issues that Ms. Curran  
5                   identified.

6                   CHAIR YOUNG: Well, that is what I was  
7                   trying to get to. If it is ready to sign, if  
8                   everybody is in agreement it is ready to sign, and  
9                   nobody has any reservations about that, then on  
10                  Monday, assuming I could get it in electronic form  
11                  such that we could print it out, sign it, and file it  
12                  also, and send it in electronic form, then --

13                  MR. FERNANDEZ: I think it would be up to  
14                  Ms. Curran, because I think so.

15                  MS. CURRAN: What I would like to do is to  
16                  talk to Mr. Fernandez, and Mr. Repka, about amending  
17                  the list of documents that are subject to the Order.

18                  This all happened kind of fast, because  
19                  the Staff was trying to get this to you. We looked at  
20                  it really quickly on Tuesday, while we were getting  
21                  ready to go to the airport.

22                  And I don't think it would hurt any for us  
23                  to talk about it, to put the other documents in, maybe  
24                  to work out this agreement about redacting the  
25                  pleadings. And we also have a question about how we

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1 make a request to downgrade the classification, or  
2 whatever you call it.

3 Just to work all that stuff out, send it  
4 to you some time early next week, and have it ready to  
5 go. It doesn't seem like there is any significant  
6 dispute here. There are just a few things that need  
7 to get ironed out.

8 And I would rather have a little more time  
9 to do that.

10 ADMINISTRATIVE JUDGE BARATTA: Ms. Curran  
11 suggested that we have this early next week, can we  
12 come to an agreement that this will happen early next  
13 week, that we will have something in our hands by --

14 MS. CURRAN: Close of business Tuesday?

15 CHAIR YOUNG: I think the next thing we  
16 need to do is start talking about specific dates for  
17 that, and all the other things. That is definitely  
18 the next thing we need to go into.

19 We would not be able, in any event, to do  
20 anything until Monday, because our plan at this point  
21 is to drive back to Raleigh with Judge Elleman so that  
22 we will have some time to confer with each other, and  
23 then we won't be getting back into the office until  
24 late tomorrow afternoon.

25 We could all get our -- I suggest -- here



1 is what I suggest. Let's take a ten minute break. We  
2 have to be out of here in 45 minutes. Get our  
3 calendars. If we can come to some agreement on dates  
4 for these various things, at this point, that would be  
5 great.

6 Another alternative would be to set a  
7 telephone conference at which time the parties will  
8 have talked to each other, and be ready with the  
9 Protective Order, be ready with some dates to propose  
10 to us, or alternatives. And we can go forward from  
11 that point, and we could do that early next week, as  
12 sort of an alternative to presenting just the  
13 Protective Order, but giving us the whole collection  
14 of things, so that the parties have had a chance to  
15 say how it works.

16 It makes sense to me that to the extent  
17 possible, rather than have a whole bunch of dates for  
18 all these different things, that we try to simplify it  
19 as much as possible, and get early dates for several  
20 things to occur, and follow-up dates for any necessary  
21 responses, and one thing that just occurred to me, as  
22 well, is Ms. Curran has requested that we consider the  
23 late filed December 2nd contentions, along with the  
24 contentions we just heard argument on the last two  
25 days.

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1           And I don't know whether the parties are in  
2 agreement to that. I have a suspicion you may not be.  
3 And I don't know whether you have discussed how you  
4 might approach any statement of your positions on  
5 that.

6           Go ahead, Mr. Repka, you look like you  
7 have something.

8           MR. REPKA: On that particular question of  
9 whether we should wait on the second set of  
10 contentions, to deal with the first, we disagree with  
11 that, we object to that.

12           We think that we need to get going in this  
13 proceeding, so we need to deal with the first set of  
14 contentions, and if necessary the second in parallel.

15           And I would make, in terms of schedule,  
16 schedule is important in this proceeding, because  
17 there is a lot that must happen, that is dependent, in  
18 part, upon the schedule of this proceeding.

19           CHAIR YOUNG: Right.

20           MR. REPKA: So schedule is important. And  
21 with respect to security, I just want to add the  
22 observation that I think the time line of when we are  
23 going to do this next iteration of the Protective  
24 Order is crucial.

25           We've now gone to the Board twice with

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1 Protective Orders that we thought, each time, we were  
2 all in agreement.

3 CHAIR YOUNG: You did. But in fact you  
4 were not in agreement the last time, which caused  
5 further delay. And we are not proposing that this be  
6 delayed in any way, shape, or form.

7 But since I don't think that it would be  
8 possible to get it signed, and filed with SECY any  
9 earlier than Monday, there is not going to be a  
10 significant delay to give you all a chance to talk  
11 with each other, between now and Monday or Tuesday,  
12 and have your ducks more in a row.

13 As a group I think that would contribute  
14 greatly to the efficiency and expeditiousness with  
15 which we can handle this proceeding.

16 MS. CURRAN: Your Honor, I would just like  
17 to add that in our view it will expedite things if we  
18 get clarity about what documents are relevance for  
19 purposes of filing contentions.

20 Because if we wind up kind of floundering  
21 because we didn't get all the documents we need, it is  
22 just going to add more time to the period for filing  
23 contentions. So hopefully just spending a little bit  
24 of time working this out will expedite things.

25 And I would also like to say that I agree

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1 with Judge Young's suggestion that we should work out  
2 a schedule for these things that you have listed here.

3 One thing that really would matter a lot  
4 to us is when a transcript of the oral argument  
5 becomes available on ADAMS, or whether we could borrow  
6 one from the licensing board, because we can't afford  
7 to buy one.

8 And I think we are going to need to read  
9 the transcript in order to answer, at least, some of  
10 these questions.

11 CHAIR YOUNG: If we didn't order overnight  
12 transcript it may still be possible -- did we? Okay,  
13 we probably, I don't know whether it would be possible  
14 to change it at this point.

15 MS. CURRAN: Well, because we can't afford  
16 to buy it we need to wait until it gets to the ADAMS  
17 system, or borrow it from the licensing board, or from  
18 one of the parties.

19 So that is all I'm saying, is we would be  
20 glad to cooperate in terms of finding a way to read  
21 it. But I think that is going to be necessary to do  
22 some of these things, so --

23 CHAIR YOUNG: Why don't all of you get  
24 together, and spend as much time as you need to spend,  
25 I don't know when you are getting back, so that you

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1 could do it tomorrow. But certainly by Monday, and  
2 hash all these things out, and present us Tuesday  
3 morning with a list of things that you are in  
4 agreement about, and things that you are not in  
5 agreement about.

6 And we can set up a telephone conference  
7 on Tuesday, assuming everyone is available Tuesday  
8 morning. Let's take a break, and everyone look at  
9 their calendars and see when we can get back together,  
10 when is the soonest time that we can all get back  
11 together on the telephone to hear anything that you  
12 have to say, be it we are all on agreement, and this  
13 is it, and you could send us something in writing,  
14 saying we are all in agreement, and this is it, and  
15 there are no disagreements that you need to work out.

16 Or we are all in agreement in X, Y, Z, and  
17 these things are the things that we are in  
18 disagreement about, and these are the parties position  
19 on the timing for these various things on this lists.

20 MS. UTTAL: My only problem is they  
21 confiscated my calendar when I walked in.

22 (Whereupon, the above-entitled matter  
23 went off the record at 4:20 p.m. and  
24 went back on the record at 4:35 p.m.)

25 CHAIR YOUNG: Would it be possible for you

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1 all to meet, get us something by Tuesday morning, and  
2 then get together on the phone Wednesday morning?

3 MR. REPKA: Yes.

4 CHAIR YOUNG: Good, excellent.

5 MS. UTTAL: Yes, for the Staff.

6 MR. REPKA: And just to clarify what that  
7 is, I think that would be -- we have gone a long way  
8 towards agreeing on the schedules, we still have a few  
9 things. But it would be the schedule as well as the  
10 Protective Order.

11 CHAIR YOUNG: Right. And you want me to  
12 go over them again?

13 MR. REPKA: I don't think so. I think we,  
14 no I just wanted to clarify that it would be both  
15 components.

16 CHAIR YOUNG: If you all can come together  
17 on dates for all these things that we talked about,  
18 that would be excellent.

19 MR. REPKA: I agree, it would be  
20 excellent.

21 CHAIR YOUNG: And you are going to try  
22 really, really hard.

23 MR. REPKA: And when we get on the phone  
24 on Wednesday we won't find out that somebody doesn't  
25 agree, hopefully.

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1 CHAIR YOUNG: Ask every question to  
2 foreclose the possibility of any remaining ambiguity,  
3 or --

4 MR. REPKA: You just never know.

5 CHAIR YOUNG: Undisclosed disagreements.

6 ADMINISTRATIVE JUDGE BARATTA: One word of  
7 caution on the security thing, and I'm not trying to  
8 postpone it, but just make sure that you build in some  
9 time to make sure that you get physical facilities for  
10 whatever is required. It may take a little bit of  
11 time to do that, and just be very careful of that.  
12 That has to be built into the schedule. And we just  
13 don't want to have that situation arise.

14 CHAIR YOUNG: We are going to have to make  
15 sure, with regard to Judge Elleman, that we figure out  
16 ways to handle his participation in our communications  
17 with each other.

18 MR. REPKA: Yes, and just to make sure, I  
19 think you are referring to a couple of things. Safes  
20 is obviously one. The communication issue is another,  
21 email and telephone being problematic, printers and  
22 computers.

23 ADMINISTRATIVE JUDGE BARATTA: I thought  
24 the package that was provided by the Staff was an  
25 excellent guide. And I would assume that if there

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1 were any questions about any of the requirements, that  
2 they would be more than happy to arrange for you to  
3 get those questions answered.

4 MR. FERNANDEZ: And I also would add that  
5 once all this gets going the Staff, since some of the  
6 parties that would be receiving safeguards information  
7 are parties that normally do not handle safeguards  
8 information, I'm assuming that the information  
9 security staff will probably want to inspect the way  
10 that those materials are being stored, and make sure  
11 that everybody is complying.

12 CHAIR YOUNG: Are you talking about both  
13 of the parties?

14 MR. FERNANDEZ: Any of the parties are  
15 actually subject to making sure that they are  
16 protecting safeguards information adequately.

17 CHAIR YOUNG: So when you get together  
18 with everybody else you will have checked on that and  
19 be able to tell your colleagues, the other  
20 participants, what the situation is there.

21 MR. FERNANDEZ: Yes. And even if Judge  
22 Elleman wants some guidance on how to store documents  
23 at his home, or wherever he will be storing them, I'm  
24 sure the physical security staff will be willing to do  
25 that.

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1 ADMINISTRATIVE JUDGE ELLEMAN: I would  
2 very much appreciate that. I can make arrangements,  
3 and have established that the university has  
4 safeguards storing capability on an initial basis,  
5 until I would get set up. So I would be able to  
6 handle documents.

7 MR. FERNANDEZ: And I'm assuming that all  
8 could be handled internally by the Board on the  
9 physical security staff. I don't anticipate that we  
10 would be involved with that.

11 CHAIR YOUNG: The other issue with us is  
12 that we can't talk about it over the phone, and we  
13 can't email about things, so arrangements need to be  
14 made for however we are going to handle that.

15 We've looked, to some degree, whether  
16 there are secure phones, but haven't found any at this  
17 point.

18 MR. FERNANDEZ: They are very expensive,  
19 Your Honor.

20 ADMINISTRATIVE JUDGE BARATTA: Not only  
21 that, but you have to treat them as classified. I  
22 just wanted to make that caution.

23 MR. FERNANDEZ: Thank you, Your Honor.

24 CHAIR YOUNG: So Wednesday morning at 10  
25 o'clock telephone conference. Mr. Repka, you said you

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1       didn't need to have me go over the list again. Does  
2       anybody else, or does everyone have it down?

3                       (No response.)

4                       CHAIR YOUNG: Great, all right. And Ms.  
5       Valloch, can we see about expediting the transcript so  
6       that as soon as we get it we can immediately take it  
7       over and get it put on ADAMS?

8                       MS. CURRAN: To you.

9                       CHAIR YOUNG: And we probably better  
10       switch, in this proceeding, to overnight transcripts,

11           like we were doing in one of the others, just because  
12           of the time constraints.

13                           Anything else?   Ms. Uttal?

14                           MS. UTTAL:   The Staff has nothing.

15                           MR. REPKA:   Nothing for Duke.

16                           CHAIR YOUNG:  Then we will talk Wednesday  
17           morning at 10 o'clock.  I will send out a short little  
18           order with the call-in instructions, and so forth, on  
19           Monday or Tuesday.  And we look forward to hearing how  
20           you have worked out all these thorny issues by  
21           agreement.

22                           MR. REPKA:   And I do have one clarifying  
23           thing.  We will submit something, the collective we,  
24           on Tuesday.

25                           CHAIR YOUNG:  Thank you.

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1 MR. REPKA: And I assume that we can do  
2 that via an email, as opposed to some sort of formal  
3 pleading?

4 CHAIR YOUNG: Yes. Actually, that reminds  
5 me, I will try to get the Order done Monday,  
6 certainly. Is there anything else?

7 (No response.)

8 CHAIR YOUNG: So Tuesday morning, 9 a.m.  
9 to file the materials.

10 MS. CURRAN: We will be talking Monday, so  
11 it shouldn't be a problem.

12 MR. REPKA: Why don't we say mid-day?

13 CHAIR YOUNG: Okay, noon.

14 MR. REPKA: Yes.

15 CHAIR YOUNG: Wednesday at 10 o'clock  
16 conference call. If there is nothing else today it  
17 has been a pleasure spending these two days with  
18 everyone. We have covered a lot of ground, and  
19 managed to make it intact.

20 And we look forward to talking with you  
21 again on Tuesday. Obviously I will serve Ms. Olson  
22 with the order and she can participate -- there would  
23 be some things in it that she might have an interest  
24 in, so she probably needs to -- would you mind giving  
25 her a call?

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1 MS. CURRAN: I will call her.

2 CHAIR YOUNG: Okay. All right, then,  
3 unless there is anything else, that will conclude the  
4 proceedings for today. Thank you all.

5 (Whereupon, at 4:45 p.m., the above-  
6 entitled matter was concluded.)

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CERTIFICATE

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

Name of Proceeding: Duke Energy Corporation

Catawba Nuclear Station

Units 1 and 2

Oral Arguments

Docket Number: 50-413-OLA and 50-414-OLA

Location: Charlotte, NC

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.



---

Donna Willis  
Official Reporter  
Neal R. Gross & Co., Inc.

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