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10:02 a.m.

JUDGE YOUNG: On the record. This is Ann Young. I'd just like to have everyone introduce yourselves for the record. Judge Baratta and then let's start with the staff and BREDL and Duke.

JUDGE BARATTA: This is Judge Anthony J. Baratta.

MS. UTTAL: This is Susan Uttal, attorneys for NRC Staff ("Staff") and with me is Antonio Fernandez.

MS. CURRAN: This is Diane Curran for BREDL and Dr. Edwin Lyman is also on the phone.

JUDGE YOUNG: Incidentally BREDL is B-R-E-D-L. That's the acronym.

MR. REPKA: And for Duke Energy this is David Repka. With me is Mr. Mark Wetterhahn as well as Ms. Anne Cottingham has joined me. On a separate line from Charlotte are Ms. Lisa Vaughn and Mr. Michael Cash.

JUDGE YOUNG: Okay. I assume by the fact that everyone's with us that everyone received my email of yesterday afternoon. Could I just ask? Have you talked with each other to try to see whether you can agree on how to proceed from here?

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1 MS. CURRAN: This is Diane Curran. I
2 haven't heard from anyone.

3 MS. UTTAL: Your Honor, I wasn't in the
4 office yesterday. I got in this morning around 9:00
5 a.m. That's when I first got this motion. Mr.
6 Fernandez was not in the office yesterday so we did
7 not have the opportunity to speak to anybody.

8 JUDGE YOUNG: Okay. Well, I guess we
9 need to hear responses to the motion and then see
10 where we are. Does the Staff care to go first? It's
11 sort of directed to you so I think that might be
12 appropriate. What's the Staff's position on this?

13 MS. UTTAL: It's the Staff's position
14 that Dr. Lyman and Ms. Curran would not be permitted
15 to come to this meeting. It's a closed meeting.
16 They have no need to know what Staff's RAIs are not
17 based contentions.

18 JUDGE YOUNG: Excuse me. You're breaking
19 up and I'm not catching all your words.

20 MS. UTTAL: I don't know how to fix it,
21 Judge.

22 JUDGE YOUNG: We may need to do the same
23 thing we've done here which is to go off speaker
24 while you're talking and then go back on speaker
25 while you're listening.

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1 MS. UTTAL: Okay. Can you hear me now?

2 JUDGE YOUNG: Yes, that's much better.

3 Thank you.

4 MS. UTTAL: The Staff's position that the
5 meeting is closed, that the Petitioners who have not
6 been admitted to this proceeding yet have no need to
7 know the RAIs, what the Request for Additional
8 Information is to frame their contentions because
9 they do not base their contentions on the existence
10 of RAI.

11 Therefore the fact that there's a protective order is
12 not particularly relevant to -- Well, it is relevant
13 but it doesn't answer the question of need to know.

14 JUDGE YOUNG: What about our suggestion in
15 my email yesterday?

16 MS. UTTAL: The Staff is proceeding as it
17 normally would under these circumstances. There is
18 ample reason to have the closed meeting because there
19 will be certain things discussed regarding the RAIs.

20 JUDGE YOUNG: I was talking about your
21 suggestion that you transcribe the meeting.

22 MS. UTTAL: That is not the normal way that
23 we do things. The Staff is not amenable to doing
24 that.

25 JUDGE YOUNG: Anything further from the

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1 Staff?

2 MS. UTTAL: I'll respond to whatever
3 anybody else says, but that's my major point.

4 JUDGE YOUNG: We'll go ahead. Mr. Repka or
5 whoever is representing Duke who wishes to speak.

6 MR. REPKA: This is Mr. Repka. Duke
7 concurs with the NRC Staff's position that there's no
8 need to know with respect to the discussions at this
9 meeting. The way Duke understands the meeting is it
10 will be opportunity for the NRC Staff to explain to
11 Duke the RAIs that will be issued with respect to the
12 security plan submittal.

13 So it's not a discussion per se of the
14 plan, but an explanation of the Staff's questions
15 with respect to what's already been submitted.
16 Obviously at some point in the future, Duke will be
17 required to respond to the RAIs to in effect
18 supplement the security plan submittal and that's
19 information that at least in the abstract, it's
20 potentially within the scope of the protective order
21 and I think it's really a bit different character
22 than the subject of the meeting itself which is just
23 the RAIs.

24 With respect given that it's the nature of
25 the meeting, Duke as a holder of safeguards

1 information concurs that there would be no basis for
2 a need to know determination at this point.
3 Obviously there will be as with any staff meeting we
4 expect that the Staff would put together a meeting
5 summary that would be publicly available that would
6 have a copy of the RAIs attached, redacted if
7 necessary, but that would be publicly available.
8 That would be sufficient.

9 As Ms. Uttal said, there is ample
10 commission precedent including in the Oconee license
11 renewal case that the RAI itself can't be the basis
12 for a contention. The subject of the contention has
13 to be the Petitioner's independent analysis of the
14 plan which information the Petitioner already has
15 access to. Of course if there is additional
16 information submitted later that would be perhaps
17 information available during the discovery process
18 that could be used to supplement a contention or
19 whatever consisted with the rules. But at this point
20 to simply have access to the RAIs would not provide
21 a basis for a contention. In addition, we would cite
22 to the fact that the Commission's open meeting policy
23 which is available in the Federal Register May 28,
24 2002, 67 Federal Register 36920.

25 JUDGE YOUNG: Sixty-seven 36920?

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1 MR. REPKA: That's correct, Judge Young. At
2 page 36921, it specifically talks about an exception
3 to open meetings for meetings between the NRC Staff
4 and external stakeholders that contain safeguards or
5 other protective information. So in the ordinary
6 course, that would be a closed meeting of the
7 Commission policy.

8 JUDGE YOUNG: What's the basis for the
9 exception? The fact that the information is
10 safeguards, is that the only basis for the exception?

11 MR. REPKA: Yes.

12 JUDGE YOUNG: It sounded as if that's what
13 you were saying, but since I don't have that in front
14 of me.

15 MR. REPKA: There are number of exceptions
16 and one exception would be the sole basis that the
17 discussion contains safeguards or other protective
18 information.

19 JUDGE YOUNG: Are there any other
20 exceptions that you're arguing apply here?

21 MR. REPKA: No, that would be the one that
22 would apply directly.

23 JUDGE YOUNG: Can I just ask a question
24 while we're on the safeguards? Do you plan to
25 discuss any other safeguards information than the

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1 submittal itself? I guess the Staff would need to
2 answer this too.

3 MR. REPKA: Well from our perspective the
4 discussion would be the RAIs and the Staff explaining
5 what they are which would relate directly to the
6 submittal. However we believe that it's quite
7 possible that it may get into other safeguards
8 information that's not specifically part of the plan.
9 We can't rule that out. I think the Staff would know
10 perhaps better than I what the subject of that
11 discussion will be.

12 MS. UTTAL: This is Susan Uttal. If I
13 might. I generally agree with what Mr. Repka said.
14 The subject of the meeting will be for the Staff to
15 explain the RAI. The RAIs are based on questions
16 that were asked. I would like to point out something
17 else to the Board that these are the posing of the
18 RAIs and asking of RAIs as part of the Staff's normal
19 review of a license application or a license --

20 JUDGE YOUNG: Sorry. I'm losing things
21 that you're saying again. You might need to repeat
22 that last thing.

23 MS. UTTAL: Okay, Judge. The posing, the
24 asking of RAIs, is part of the Staff's normal review
25 of a license amendment application and other

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1 applications. It is not part of this proceeding. It
2 is part of the Staff's administrative task in
3 reviewing license applications and license amendment
4 applications and thus it is not really within the
5 bailiwick of this Board to put limits or to put
6 requirements on such meetings. I believe there's
7 ample case law on that. I can get you some sites if
8 you would like.

9 JUDGE YOUNG: Yes, except that I guess I
10 thought when you interrupted that you were going to
11 say something about the possibility of any other
12 safeguards information besides the submittal since
13 that's what Mr. Repka was talking about just then.

14 MS. UTTAL: I'm sorry. I thought you heard
15 that part when I said it. I generally agree with
16 what Mr. Repka said. This would be an opportunity
17 for the Staff to explain the RAIs and then what they
18 are looking for.

19 JUDGE YOUNG: So are you saying that it is
20 or is not contemplated that other safeguards
21 information than the submittal will be discussed?

22 MS. UTTAL: Yes.

23 JUDGE YOUNG: It is possible. Okay. Mr.
24 Repka, were you finished? I had interrupted you and
25 then I got the impression that you had something more

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1 to say.

2 MR. REPKA: Just one further point which I
3 think follows up with what Ms. Uttal said about the
4 administrative review of the application which is a
5 Staff function. In the NRC's regulations, 10 CFR
6 2.102(a) it states just as an example of that,
7 "During the review of an application by the Staff an
8 applicant may be required to supply additional
9 information. The staff may request any one party to
10 the proceeding to confer with the staff informally."
11 I frame that as an example of the fact that the
12 administrative review process will go on and that the
13 regulations do not contemplate that it's necessarily
14 a process that's open to petitioners in hearing
15 cases.

16 JUDGE YOUNG: Anything else from the Staff
17 before we hear from BREDL?

18 MS. UTTAL: No, Your Honor.

19 JUDGE YOUNG: Okay. Ms. Curran, could you
20 respond to the point phrased by Ms. Uttal and Mr.
21 Repka?

22 MS. CURRAN: Sure. First I think it's
23 important to point out that the protective order
24 specifically refers to requests for additional
25 information and responses to RAIs. This is covered

1 in a protective order that was negotiated by the
2 Staff and Duke and BREDL. So we're revisiting ground
3 that's already been gone over that was agreed to and
4 we're frankly kind of surprised because it seems to
5 me that in this protective order this was anticipated
6 and it's also surprising to me that the Staff argues
7 this is an administrative matter that basically the
8 Interveners don't have any business in these
9 administrative matters.

10 In my experience and based on the policy
11 statement that we cited in our motion, that's just
12 not the case. The back and forth between the Staff
13 and the Applicant is very relevant to the
14 Interveners' ability to formulate contentions and
15 litigate them. Here we have a situation where the
16 Staff is going to be talking with the Applicant about
17 two things, a revised security plan and an exemption
18 request.

19 The Staff could just issue a letter to Duke
20 saying "Here are our questions and explain the
21 questions in the letter." But instead the Staff and
22 Duke have arranged a conversation in which there's
23 going to be a back and forth I would think where some
24 information is exchanged by both sides and some
25 understanding is reached about what's being asked and

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1 what's been submitted and a relationship between
2 those two things.

3 The open meeting policy basically gives the
4 public access to those kinds of meetings and says
5 "We're only going to keep the public out of these
6 meetings under certain limited circumstances." The
7 one that is being used here is the safeguards
8 limitation. But I don't see why that should be a
9 limitation because we have gone through the necessary
10 procedures. We've gotten a clearance to get these
11 documents. The RAIs and responses have been
12 specifically mentioned in the protective agreement.

13 The Staff has said to the Commission "We
14 are not using any safeguards related standards to
15 judge this application." All we have from the Staff
16 is a very vague statement here that maybe some other
17 safeguards information will be discussed, but that
18 doesn't seem to me to be an adequate reason to
19 completely preclude us from attending this meeting.

20 JUDGE BARATTA: Could I ask a question at
21 this point?

22 MS. CURRAN: Sure.

23 JUDGE BARATTA: Correct me if I'm wrong.
24 This question I guess is for the Staff. Is it
25 customary to have such meetings as opposed to simply

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1 sending out a letter with the RAIs in it?

2 MS. UTTAL: Yes, it is customary.

3 JUDGE BARATTA: And is that the usual case
4 or is it maybe not the usual case, but fairly
5 frequently done?

6 MS. UTTAL: I would say that it's fairly
7 frequently done. It's not usual to have face-to-face
8 meetings.

9 JUDGE BARATTA: Thank you.

10 JUDGE YOUNG: Are the meetings generally
11 open to the public when safeguards information is not
12 discussed?

13 MS. UTTAL: No. When it's not discussed?

14 JUDGE BARATTA: Yes.

15 MS. UTTAL: They are.

16 JUDGE YOUNG: They are.

17 MS. UTTAL: I did want to say one more
18 thing because Ms. Curran keeps on referring to BREDL
19 as an intervener. They haven't granted intervention
20 yet. The organization is still just a petitioner and
21 clearly I want to just emphasize that under
22 Commission law, they are to base their contentions on
23 the application, not on the Staff review. Based on
24 that, the Staff emphasizes again that they have no
25 need to know what these RAIs are.

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1 MS. CURRAN: Can I respond to that, Judge
2 Young?

3 JUDGE YOUNG: Sure.

4 MS. CURRAN: We certainly understand that
5 our contentions have to be based on the security
6 plans submittal. There's no argument about that.
7 But the proposition that RAIs are completely
8 irrelevant to the development of contention that's
9 not correct because RAIs often raise issue that
10 petitioners or Interveners wish to pursue. So it's
11 very important to the public to be able to gain
12 access to the Staff's concern so that they can be
13 pursued and the public can share those concerns and
14 bring them up and assure that they have been
15 resolved. That's also a part of the process.

16 Now an intervener can't rely exclusively on
17 an RAI and nothing more, but the Staff's expressions
18 of concerns are something that's considered relevant,
19 probative and useful for purposes of developing
20 contention. We're talking about a well established
21 policy and means of going about the NRC's business
22 here.

23 The opening meeting policy has been in
24 effect since long before 2002. It existed before
25 that. Generally as soon as one of these cases starts

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1 up, the meeting are to be held open to the public
2 unless there's some specific reason to keep them out.
3 That reason just doesn't exist here by virtue of this
4 protective agreement.

5 MR. REPKA; Judge Young, I would like to
6 respond to the issue of the protective agreement.
7 The protective order defines protected information to
8 include a category of information. However that does
9 not grant access independent of a need to know
10 determination. The protective order doesn't
11 eliminate the need to know issue and that's the crux
12 of the issue here. It's need to know.

13 The fact of the matter is that this is a
14 meeting to explain RAIs. The RAIs will be available
15 perhaps in a redacted form but would be available
16 with a meeting summary. The responses to the RAIs
17 would be available in due course. So that's a very
18 different issue than needing access to attend this
19 meeting. The determination is need to know and that
20 requires more than just a desire to know.

21 JUDGE YOUNG: Let me ask a question and I'd
22 like to get responses from Duke and the Staff at
23 least and BREDL if you wish to respond. What I hear
24 is that if this meeting did not involve any
25 possibility of discussing safeguards information it

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1 would be open to the public. As everyone knows,
2 Judge Baratta and I issued an order finding a need to
3 know with regard to the first three documents listed
4 in BREDL's motion regarding need to know occurrence,
5 BREDL's earlier motion.

6 As everyone knows, the Commission has
7 stayed that and I believe this Friday is the deadline
8 for responses to the Staff's appeal if I'm recalling
9 correctly. So the issue of need to know with regard
10 to what would seem to be all the safeguards
11 information that might arise it's sort of pending at
12 this moment.

13 In light of that and in light of the fact
14 that these meetings according to the Staff are
15 generally opened presumably under the open meeting
16 policy referred to by Ms. Curran, what would be the
17 problem with having the meeting transcribed so that
18 in the event the Commission were to rule that BREDL
19 does have a need to know with regard to the
20 information addressed in Judge Baratta and my order?
21 In other words, if the Commission upholds our order
22 so that the transcript would then be available to
23 BREDL at this point since it's pending, we're sort of
24 in an unusual situation. That was the basis for the
25 idea of having the transcript available in the event

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1 that the ultimate ruling would find a need to know
2 with regard to the material that would be discussed
3 among other things in the meeting.

4 MS. UTTAL: Judge, this is Susan Uttal.

5 JUDGE YOUNG: Hello?

6 MS. UTTAL: I'm sorry. I'm not so sure
7 that the appeal before the Commission is relevant.

8 JUDGE YOUNG: If it weren't for the appeal,
9 then our determination that there is a need to know
10 with regard to that material would more or less
11 nullify the safeguards exception.

12 MS. UTTAL: No, because we're talking about
13 a different set of documents here. There's a
14 specific set of documents that the Board decided
15 there was a need to know for. Here we're talking
16 about a meeting regarding a different set of
17 documents, the RAIs.

18 JUDGE YOUNG: Wait. Hold on for just a
19 second. As I understand it, if this were just a
20 meeting regarding RAIs that did not relate to any
21 safeguards information, then the meeting would be
22 open and the safeguards information that will come
23 into play in the meeting is the submittal along with
24 the documents described in the first three numbers in
25 our recent order. Is that not right?

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1 MS. UTTAL: No, that's not correct. I'm
2 not so sure that the documents in your recent order
3 have anything to do with what is going to be
4 discussed at this meeting. In the meeting, we'll be
5 discussing the RAIs and there may be other safeguards
6 information that may come up at this meeting that's
7 not necessarily in the order. And I absolutely don't
8 think we will be discussing anything that relates to
9 your January 29th order.

10 JUDGE YOUNG: You say you don't think so.
11 Are you certain of that?

12 MS. UTTAL: Well I can't really read the
13 future. Can you hold on a minute please? No, they
14 will not be discussing them.

15 JUDGE YOUNG: I'm sorry. They will not be
16 discussing what?

17 MS. UTTAL: The documents that are covered
18 by the Board's order of January 29th will not be
19 discussed at this meeting. We will be discussing the
20 RAIs.

21 JUDGE YOUNG: So the additional category of
22 safeguards information besides the Duke submittals
23 that might come up in the discussion would be the
24 RAIs themselves.

25 MS. UTTAL: Hold on just a second.

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1 MR. FERNANDEZ: Judge, Antonio Fernandez
2 for the Staff. The specific documents and the
3 specific information that will be the subject of the
4 meeting is specific protective measures that the
5 licensee may or may not be taking as part of their
6 security --

7 JUDGE YOUNG: I'm sorry. Could you get off
8 the speaker?

9 MR. FERNANDEZ: I'm not on the speaker
10 phone.

11 JUDGE YOUNG: You're not? Then maybe
12 somebody else could back away from theirs because I'm
13 getting some inference.

14 MR. FERNANDEZ: Can you hear me now, Your
15 Honor?

16 JUDGE YOUNG: Go ahead.

17 MR. FERNANDEZ: The meeting on Friday, the
18 specific subject of the meeting is going to be actual
19 specific security measures that the licensee is
20 expected to take during the time that they have
21 fresh, unirradiated MOX fuel at the facility at the
22 explanation of questions that the Staff has with
23 regard to those specific measures. It does not
24 relate to any other documents covered by the January
25 29th order.

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1 JUDGE BARATTA: May I interject something
2 here?

3 JUDGE YOUNG: Who's that?

4 JUDGE BARATTA: It's Judge Baratta.

5 JUDGE YOUNG: Go ahead.

6 JUDGE BARATTA: In looking at the
7 protective order that everybody agreed to, it would
8 seem that there is some item which says any
9 information obtained, developed or created by virtue
10 of these proceedings in any form it's otherwise a
11 matter of public record and it indeed deals with the
12 prescribed need of the security plan submittal is
13 therefore covered by this protective order. Would
14 somebody clarify that for MEI guess starting with the
15 Staff?

16 MR. FERNANDEZ: If you keep on reading
17 further down in the order, the substantive matter of
18 need to know is covered as well. Just because
19 something now may or may not be protected information
20 as defined in the order, it does not in fact become
21 available to people party to the order. There may be
22 information out there that wouldn't qualify as
23 protected information under the order. However, each
24 individual piece of information, and in this case
25 that comes up when requested by BREDL, have to

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1 undergo an independent need to know determination
2 before it's turned over to the person or persons
3 requesting it.

4 JUDGE YOUNG: What I was trying to get
5 clarification on was what pieces of information
6 you're talking about without disclosing the
7 information itself? I think you could describe those
8 and what I'm trying to understand is a part from
9 Duke's submittal and I'm understanding from Ms. Uttal
10 the RAIs themselves, apart from those, what
11 additional information or types of information would
12 come up that would be safeguards information.

13 MR. FERNANDEZ: Well without getting into
14 the specifics of the meeting and then completely
15 circumvent the need for a need to know determination
16 in general terms what I can tell you is that we will
17 be discussing specific measures that the licensee may
18 or may not take in support of their request for
19 exemptions from certain parts of the regulations.

20 JUDGE YOUNG: In addition to those that
21 Duke has described in its submittal.

22 MR. FERNANDEZ: Or maybe further discussion
23 of the ones that they have already described.

24 JUDGE YOUNG: Would those measures be
25 included the RAIs?

1 MR. FERNANDEZ: Maybe in the RAI responses.
2 Your Honor, let me put you on mute for a second and
3 I'll get back in one second.

4 MR. REPKA: This is Dave Repka.

5 JUDGE YOUNG: Do you want to wait until
6 they get back?

7 MR. REPKA: Okay.

8 (Pause.)

9 MR. FERNANDEZ: We're back, Your Honor.
10 Sorry about that.

11 JUDGE YOUNG: Okay. Mr. Repka, do you want
12 to say what you were going to say first? Did it
13 relate to something that was already said? Would it
14 make more sense to hear you first or hear from the
15 Staff?

16 MR. REPKA: We'll listen to see if the
17 Staff was going to say more.

18 JUDGE YOUNG: Good ahead, Mr. Fernandez or
19 Ms. Uttal.

20 MR. FERNANDEZ: We don't have anything to
21 add, Your Honor.

22 MR. REPKA: Okay. To follow up on the
23 Staff's earlier point what we would say is without
24 knowing exactly what the substance of the meeting
25 would be we find it difficult to guarantee that the

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1 subject or information in the design-basis threat and
2 other orders would not necessarily come up. But
3 otherwise we would expect some of the additional
4 information that might come up would be on the lines
5 of beyond what was already included in the security
6 plan submittal with the specific implementing
7 procedures and the like.

8 JUDGE YOUNG: That are different from
9 what's in any of the documents that are addressed by
10 our earlier order.

11 MR. REPKA: That are different from the
12 security plan submittal of September 15th. Now with
13 respect to the order itself, it's certainly
14 contemplates RAIs and RAI responses and I think
15 that's an issue that is fundamentally different from
16 attending a meeting. Whereas the latter, the
17 meeting, is at least potentially more open-ended
18 discussion that could range into additional
19 safeguards information and for that very reason is
20 closed under the policy.

21 Again coming back to need to know, it's one
22 thing to talk about the meeting. It's another thing
23 to talk about the RAIs themselves and the RAI
24 responses. We think that with respect to the meeting
25 given the open-ended nature of it and the information

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1 that could come up there is certainly no need to know
2 about the meeting itself.

3 JUDGE YOUNG: Let me just see if I can get
4 a response from you on this situation that was
5 described earlier. Let's say the Commission were to
6 rule tomorrow and they're not because Friday is the
7 response date. But let's say hypothetically the
8 Commission were to rule tomorrow that BREDL had a
9 need to know with regard to all of the documents that
10 our order of last week covered and gave some
11 indications that the type of information that may be
12 discussed at the meeting was the kind of information
13 that BREDL would also have a need to know.

14 Were that to be the case I would expect
15 that you and the staff would be deferring to the
16 Commission's order and might be more amenable to
17 having BREDL come to the meeting which they would
18 normally come to were it not to concern safeguards
19 information? Am I correct in assuming that?

20 MR. REPKA: If the Commission were to order
21 that there's a need to know with respect to the
22 design basis threat and other orders plus that
23 there's a need to know with respect to the other
24 issues that might come up in the meeting, we would
25 certainly defer to that Commission order on those two

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1 need to know determinations. Obviously we're not
2 there at this point.

3 JUDGE YOUNG: Right, and that's sort of the
4 problem we're in because right now everything's
5 pending.

6 MR. REPKA: That's correct. We agree.
7 Everything is pending and certainly attendance at the
8 meeting while that's pending would be premature and
9 would feed the Commission's stay. The problem is
10 that the issue before the Commission would go to a
11 discrete set of documents procedurally with respect
12 to the issue of any other safeguards information
13 beyond the mere printed RAIs and in the future, RAI
14 responses that might come up in Friday's meeting.

15 That information's not procedurally before
16 the Commission. That's not subject to the order that
17 the Commission would be ruling upon. So I'm not sure
18 how the Commission could or would address that issue.
19 Our position is that given that and given all of the
20 various circumstances that apply and particularly
21 given that the protective order doesn't abrogate a
22 need to know determination and the information that
23 will subsequently be available on this meeting
24 including the RAIs and Duke's responses to the RAIs,
25 there's no need to know with respect to attending the

1 meeting or a transcript of the meeting.

2 JUDGE YOUNG: I guess what I was trying to
3 get at -- Hold on one second. I guess what I was
4 trying to get at is if the Commission were to issue
5 this hypothetical order tomorrow and the tenor of the
6 order were to suggest that the type of information
7 that might be discussed at this meeting tomorrow
8 would be something that BREDL would have a need to
9 know, that's what I was really getting at.
10 Ultimately what I'm getting at is trying to get a
11 response to the question given that the Commission's
12 statement on the three classifications of documents
13 on which Judge Baratta and I earlier ruled given that
14 the Commission's decision on that is now pending and
15 that the decision might well provide some elucidation
16 with regard to need to know issues in this case
17 generally, what would be the reason not to order a
18 transcript which if the Commission's ultimate ruling
19 would suggest that there were no need to know with
20 regard to the information discussed in the meeting,
21 the transcript would remain sealed and BREDL would
22 never see it. On the other hand, if the Commission's
23 ruling went the other way, the transcript would be
24 there so that it would allow for the status quo to be
25 maintained more effectively than not allowing a

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1 transcript.

2 MS. CURRAN: Judge Young, do you think I
3 could answer that question? This is Diane Curran.

4 JUDGE YOUNG: Well you can but I know
5 pretty much what you're going to say. I wanted to
6 try and hear that from Mr. Repka as well. So go
7 ahead.

8 MS. CURRAN: I have not a chance to comment
9 on that issue. I think this is really important.
10 What's before the Commission now isn't relevant to
11 this February 6th meeting. I don't think it is at
12 all. I agree with the Staff on that because if you
13 look at the Staff's motion for interlocutory review,
14 the one the Staff refiled on February 2, they say
15 "We're not using any of these confidential safeguards
16 documents to review the security plan submittal."
17 Their position is these confidential standards are
18 irrelevant. So they made it really clear. They are
19 not going to talk about those things in this meeting.

20 Then the question is what are they going to
21 talk about and do we have a need to know that? I
22 think Mr. Fernandez said it really clearly a few
23 minutes ago that they are going to talk about the
24 specific measures that Duke is going to take under
25 its security measures for using the LTAs at Catawba.

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1 That is precisely the subject of the security plan
2 submittal. If they are going to embellish it, if
3 they are going to say "Well, the plan may not satisfy
4 you but here look at these procedures," we want to be
5 there. We want to hear what it is Duke is offering
6 the Staff to satisfy the Staff that the security plan
7 submittal is adequate.

8 I don't see that the Commission's decision
9 is going to have any bearing on that. The only real
10 subject matter of this meeting is the security plan
11 submittal and what the Staff wants to know about it.
12 That's it. There's already been a determination of
13 a need to know with respect to the security plan
14 submittal and we've read it.

15 If Duke is going to explain more, embellish
16 on what they said in their written filing in this
17 meeting, to us it's very clearly something that we
18 need to know. It's quite relevant. It's an oral
19 submission.

20 MR. REPKA: There's a presumption --

21 JUDGE YOUNG: Hold on. Let's not everyone
22 jump in at once. Before we get too far down the
23 line, I want to just try to lay out two issues as I'm
24 hearing them discussed here. I'd like to get
25 responses from everyone on those. First on the issue

1 that Ms. Curran is raising that the Staff is not
2 going to be getting into the other documents, but
3 will be discussing specific additional measures which
4 I think Duke anyway and I think the Staff would
5 probably agree ultimately the RAIs themselves and the
6 RAI responses would probably be something that the
7 Petitioners would need to know. What I hear Ms.
8 Curran saying is given that this information seems to
9 be so closely tied to the submittal itself and the
10 submittal has already been agreed to be something
11 that the Petitioners have a need to know on, why
12 would not any additional measures likewise be
13 something they would need to know. That's one issue.
14 I would like to get responses on that.

15 But before I do, Ms. Curran, with regard to
16 transcribing the proceeding, I guess even though the
17 issue before the Commission relates to specific
18 documents I think we can probably all agree that
19 there's a possibility that whatever the Commission
20 rules will provide some elucidation on how they see
21 the security issues and need to know with regard to
22 security issues generally in this proceeding. There
23 might be something that would provide guidance for us
24 in the future conduct of this proceeding.

25 Because of that, that's why I wanted to

1 hear from everyone on why a transcript would or would
2 not be something that would be appropriate in light
3 of the pending status of any elucidation and guidance
4 that the Commission might provide to us in their
5 ruling on the Staff's appeal.

6 MS. CURRAN: Judge Young?

7 JUDGE YOUNG: Yes.

8 MS. CURRAN: This is Diane Curran. We did
9 ask in the alternative that a transcript of the
10 meeting be made. That would be at least some form of
11 relief for us. We prefer to simply attend the
12 meeting but short of that having a transcript made
13 would certainly be helpful so we'd certainly be
14 willing to settle for that.

15 JUDGE YOUNG: Okay. Mr. Repka, I think you
16 were talking before and I was trying to get your
17 response from that question. Could you respond to
18 that?

19 MR. REPKA: There were so many questions.
20 I'm not sure what one you want me to respond to.

21 JUDGE YOUNG: The issue of the transcript
22 and then let's move on to the other issue raised by
23 Ms. Curran.

24 MR. REPKA: The transcript. We did not
25 object per se to the transcript. It certainly would

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1 preserve the status quo and we certainly agree that
2 if the Commission provides some guidance on what's
3 appropriate in this proceeding that it can be
4 applied. The problem we have with that is what I
5 explained earlier which is that the Commission does
6 have this issue of attending a meeting on the RAIs
7 directly in front of them.

8 JUDGE YOUNG: That's true, but we're
9 talking about the kind of guidance that they might
10 provide.

11 MR. REPKA: Right.

12 JUDGE YOUNG: And that might lead in one
13 path or another and if we have the transcript then
14 the status quo is maintained and we don't have to go
15 back and make new tracks.

16 MR. REPKA: Right. I agree with that. But
17 to the extent that there's additional guidance as
18 needed or there's still a dispute after the
19 Commission comes out with respect to additional
20 information in this transcript, I think that we can't
21 assume that it will be and have been resolved.
22 That's number one. That's my response.

23 JUDGE YOUNG: But there's no real harm in
24 having a transcript done is what I hear you saying.

25 MR. REPKA: No harm to Duke.

1 JUDGE YOUNG: Okay.

2 MR. REPKA: Now with respect to Ms.
3 Curran's last argument about needing to hear the
4 additional measures that Duke is going to take, etc.,
5 I think Ms. Curran is presuming something about the
6 meeting that is not consistent with our understanding
7 of the meeting. The meeting is an opportunity for
8 the Staff to explain the RAIs to Duke. It is not an
9 opportunity for Duke to explain its responses, to
10 describe additional measures. Duke will be doing
11 that in its formal written responses to the RAIs.

12 I don't think there's any expectation that
13 this meeting Friday is an attempt to answer all Staff
14 questions or even any Staff questions. I think it's
15 important that -- Did I say something funny? I heard
16 some laughter on the telephone.

17 JUDGE YOUNG: I don't know.

18 MR. REPKA: But I think it's important we
19 understand and characterize correctly what will be
20 happening and not happening on Friday.

21 JUDGE YOUNG: Ms. Uttal?

22 MS. UTTAL: Yes. I think that I have to
23 clear up a couple of things. At this meeting on
24 Friday, the Staff will be explaining its RAIs but I
25 believe that we'll be expecting the informal

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1 responses from Duke. But all the responses that will
2 be considered will have to be reduced to writing and
3 submitted to the Staff under oath or affirmation.
4 Therefore what happens at the meeting will be reduced
5 to writing after the meeting and submitted as answers
6 to RAIs. Therefore there is again no need to know
7 the actual questions before they are answered.

8 MS. CURRAN: Is anyone --

9 JUDGE YOUNG: Go ahead, Ms. Curran.

10 MS. CURRAN: Well, I'm presuming that the
11 Staff is going to be objecting if we try to get the
12 answers to the RAIs too. It seems to me if it's all
13 right for us to get the answers to the RAIs it should
14 be all right for us to be a party to that meeting.
15 One thing about going to a meeting is that if someone
16 is there to observe it who is not one of the
17 principals then at least you know what was discussed.
18 If we don't go who would ever have an idea of what
19 was discussed at this meeting.

20 JUDGE YOUNG: Or have a transcript I
21 presume you're saying.

22 MS. CURRAN: Yes, if there's no transcript,
23 if we're not allowed to go, there isn't any control
24 on what's discussed at the meeting at all when it's
25 obvious that the subject matter of that meeting is

1 the application in which we have expressed an
2 interest in preparing contention.

3 I don't understand what Ms. Uttal implying
4 is that eventually we'll be able to see RAIs
5 responses. Well, if we're going to be able to see
6 those, then why shouldn't we be able to attend the
7 meeting?

8 MS. UTTAL: Your Honor, I'm not implying
9 that they will eventually be able to see RAI
10 responses. That would require another need to know
11 determination.

12 MS. CURRAN: Okay. So what you're saying
13 is that at this meeting Duke is going to be supplying
14 information orally, perhaps informally, but they're
15 going to be supplying information related to the
16 security plan submittal. What I hear you saying is
17 that you don't think we should be able to get that
18 under any circumstances.

19 JUDGE YOUNG: Ms. Uttal.

20 MS. UTTAL: I'm sorry. She was asking me
21 a question.

22 MS. CURRAN: Yes.

23 MR. FERNANDEZ: Your Honor, this is Antonio
24 Fernandez. We're not saying that. At the time that
25 their licensee submits its responses if Ms. Curran

1 requests them, we'll review the responses and
2 determine whether she has a need to know that
3 information. Currently BREDL does not have a need to
4 know as the Staff has determined and that's why we've
5 denied them access to the meeting. I think it's very
6 important to go back to a fundamental principle in
7 the meeting that we all keep forgetting. The
8 Petitioners in this case are required to look at the
9 docketed information and frame their contentions
10 based on that information.

11 If there are gaps in that information, if
12 information they feel is inadequate, they need to
13 point that out. They have not done so. We would
14 point out to the Board that this is akin to granting
15 discovery prior to having contentions admitted in
16 this case.

17 BREDL has yet to get one contention on any
18 issue admitted in this proceeding and we are being
19 obligated that there are actions of the Board to
20 force the Staff to produce documents which originally
21 would not be available at this stage of the
22 proceeding particularly because of the nature of the
23 documents here as safeguards. Going back to what I
24 said initially, they have yet to frame any
25 contention. If they believe that there are

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1 deficiencies on the face of the document as submitted
2 by Duke, then they should point those out. They
3 should not rely on the Staff's questions regarding
4 the submittal as basis for their contentions or as an
5 opportunity to go on a fishing expedition to get
6 issues for framing contentions.

7 JUDGE YOUNG: Mr. Fernandez or Ms. Uttal,
8 I hear both BREDL and Duke saying that ordering a
9 transcript of this obviously through a cleared court
10 reporter would be an appropriate way to preserve the
11 status quo that would not create any harm. I just
12 want to make sure that you've had full opportunity to
13 give your input on that. I haven't heard you say
14 anything different than that.

15 MS. UTTAL: Well at the beginning of this
16 phone conference, I stated that the Staff was not
17 amendable to a transcript. I don't believe it's
18 within the Board's jurisdiction to order the Staff to
19 make a transcript. This meetings are not normally
20 transcribed and the Staff is not willing to do it.

21 JUDGE YOUNG: If I could get some
22 clarification, I think it would help us. If you
23 would explain where you see the harm especially given
24 that the other two participants don't see any harm in
25 approaching it in that way. All that would do is to

1 preserve the status quo and then depending upon what
2 develops in the future including what guidance the
3 Commission may provide to us on the security related
4 issues, that transcript would be available and would
5 or would not be provided based on future
6 developments.

7 JUDGE BARATTA: I think I would like to add
8 on that if I may, Judge Young.

9 JUDGE YOUNG: Please.

10 JUDGE BARATTA: It is the Board's
11 prerogative to determine or make a ruling on the need
12 to know as well. Having the transcript clearly
13 enables us then to make that ruling.

14 JUDGE YOUNG: I agree. That would be very
15 helpful. It would be pretty hard to make that
16 ultimately without that as a matter of fact.

17 MS. UTTAL: Well, Judge Young and Judge
18 Baratta, I believe that it's the Staff's prerogative
19 to make order that effect this meeting and the
20 proceedings before the Board. This is a Staff
21 function. Having this meeting is a Staff function on
22 which the administrative responsibility is to review
23 this license amendment application.

24 JUDGE YOUNG: What I was really trying to
25 get you to address without needing to get into

1 jurisdictional questions is where's the harm in
2 preserving the status quo by having a transcript
3 made?

4 MS. UTTAL: I'm not so sure that the
5 standard is what's the harm.

6 JUDGE YOUNG: Well I'm asking you to
7 address that because that would be helpful to us in
8 ruling on the motion that's before us.

9 MS. UTTAL: It's a harm to the process.
10 Staff is proceeding as it normally would in any case
11 and it's a blurring of the responsibilities between
12 the Staff and the Board.

13 JUDGE YOUNG: I'm sorry. You said
14 something about the harm to the process. I didn't
15 catch what you said or meant by that.

16 MS. UTTAL: Hold on a minute.

17 MR. FERNANDEZ: Your Honor, this is Antonio
18 Fernandez from the Staff. The status quo ordinarily
19 would be that these documents would not be available
20 to the petitioners. So we are preserving the status
21 quo in making this information not available to them.

22 If in the event that at a later time the
23 Board or the Commission were to rule that this
24 information should be made available to the
25 Petitioners the information would have been reduced

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1 to writing and it would be embodied in a document,
2 not a transcript necessarily, but a more relevant
3 document which is the docketed response from the
4 licensee addressing each individual RAI. So there
5 would be a document. Let me point out --

6 JUDGE YOUNG: Excuse me for a moment.

7 (Pause.)

8 MR. FERNANDEZ: And let me point out that
9 more importantly the discussions at the meeting would
10 not be what the Staff would base its ultimate
11 decision on. It would be based on the docketed
12 responses under oath or affirmations. So, yes, there
13 would be a document that in the future would preserve
14 any need that BREDL may or may not have to access
15 information.

16 JUDGE YOUNG: I think my question was where
17 would be the harm in having a transcript which would
18 provide obviously a lot more in-depth and detailed
19 accounting of the actual interactions that would
20 normally be open but for the safeguards information.
21 Where is the harm in ordering a transcript?

22 MR. FERNANDEZ: First of all, let me say
23 that normally these meetings are not open to anybody
24 except for the two parties involved in communication.

25 JUDGE BARATTA: Is that a true statement if

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1 it were not safeguards information?

2 MS. UTTAL: But it is safeguards
3 information.

4 JUDGE BARATTA: Is that a true statement if
5 it were not safeguards information?

6 JUDGE YOUNG: I thought you said earlier
7 that normally they were open if they do not involve
8 safeguards information.

9 MR. FERNANDEZ: RAI meetings regarding non-
10 safeguards information are conducted under the open
11 meeting policy and noticed to the public. RAI
12 meetings or other meetings in which safeguards
13 information is discussed are not open to stakeholders
14 that do not have a need to know.

15 JUDGE YOUNG: If you could, could you
16 address the issue of harm because I still don't hear
17 you giving a reason why there would be any harm in
18 having a transcript made? Then I think we probably
19 need to conclude the argument and we'll get an order
20 out on this today.

21 MR. FERNANDEZ: Yes, Your Honor. The
22 reason why the Staff feels that it would be harmed is
23 without addressing the issue that the Board has no
24 authority to order the Staff to do a transcript the
25 Staff does not ordinarily transcribe these meetings.

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1 The Staff tries to limit the generation of new
2 documents containing safeguards to a minimum.

3 In essence this would be yet another
4 document containing safeguards, therefore, expanding
5 the possibility that this information ultimately be
6 made inadvertently public. The Staff regards this
7 meeting as one that is just within the course of its
8 ordinary business and there shouldn't be any reason
9 why it shouldn't follow that course as it would do
10 otherwise. To oblige the Staff to do otherwise would
11 cause a harm on the Staff by setting a precedent that
12 would be quite unfortunate in that it would be
13 preserving something other than the status quo
14 because the status quo naturally precludes the
15 petitioners from this discussion.

16 Ultimately the Board's and the Petitioner's
17 interest in making the information the Staff is going
18 to use ultimately available to the Petitioner would
19 still be preserved, not in performing this unnatural
20 function of doing a transcript, but in what normally
21 is done which is that licensees' docketed response to
22 RAIs. That would be the more natural course of
23 business that would maintain the status quo as
24 normally the Staff conducts its business.

25 JUDGE YOUNG: Mr. Fernandez, how often does

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1 the Staff hold meetings about RAIs with Applicants or
2 Licensees that concern safeguards information?

3 MR. FERNANDEZ: Hold on one second to
4 answer that question.

5 (Pause.)

6 MR. FERNANDEZ: Your Honor, it is my
7 understanding that normally these types of requests
8 are not something that's done very often. However
9 common practice has been that the times a
10 clarification is needed in a Staff document that
11 contains safeguards information, there are such
12 meetings between the stakeholders that have a need to
13 know the information and the Staff.

14 JUDGE YOUNG: I guess just to give us an
15 idea. When was the last time you had a meeting like
16 this that involved safeguards information?

17 MR. FERNANDEZ: I don't think I have
18 anybody here that can answer that question.

19 JUDGE YOUNG: So you're not aware of any.

20 MR. FERNANDEZ: Not personally, no.

21 JUDGE BARATTA: Could you maybe rephrase
22 what you said about the time the classification
23 takes? Somehow I didn't quite what your point was
24 there. I apologize for that.

25 MR. FERNANDEZ: I don't know what you're

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1 talking about, Judge Baratta.

2 JUDGE BARATTA: You made a statement just
3 recently a minute or so ago that the time the
4 classification takes and then something about there
5 is a meeting with the stakeholder parties. I didn't
6 quite follow what you were saying there.

7 MR. FERNANDEZ: To my just recent response
8 to Judge Young?

9 JUDGE BARATTA: Yes, about a minute ago.

10 MR. FERNANDEZ: Okay.

11 JUDGE YOUNG: He said that there would be
12 a meeting with stakeholders who had a need to know.

13 JUDGE BARATTA: Right.

14 JUDGE YOUNG: I didn't follow that
15 completely either now that you mentioned it, Judge
16 Baratta.

17 MR. FERNANDEZ: Let's say for example the
18 Staff issued an order to a licensee, similar to the
19 orders that were issued before. If those licensees
20 or NEI or whoever had a need to know the information
21 and had asked for clarification on statements that
22 the Staff made in that safeguard document, the Staff
23 would ordinarily as a matter of its normal course of
24 business meet with the stakeholders that had a need
25 to know and address whatever questions that had

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1 arisen regarding the Staff's request in whatever form
2 they may be, either for addition information or for
3 an immediate action or whatever it may be.

4 JUDGE YOUNG: Just one last question. How
5 does the Staff make those need to know determinations
6 on who would be the stakeholders that would be
7 admitted to any such meetings?

8 MR. FERNANDEZ: The Staff would make the
9 need to know determinations following Part 73 and are
10 made on a case-by-case basis.

11 MR. REPKA: Judge Young, this is Dave
12 Repka. I have one point I'd like to make.

13 JUDGE YOUNG: Excuse me. I have to close
14 my door. I keep getting knocks on my door all the
15 time. I apologize. I want to be able to hear
16 everyone better. Go ahead.

17 MR. REPKA: I just wanted to follow up on
18 a couple of things that Mr. Fernandez said. Number
19 one with respect to the transcript, my position
20 before was that there is no harm to Duke, not there
21 is no harm generally. There is no harm to Duke of
22 such a transcript and that is my position.

23 But with respect to the jurisdictional
24 point that Mr. Fernandez is raising, I think that
25 really does take us back to the point I made at the

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1 very top of this discussion which was that 10 CFR
2 2.102(a) talks about meetings in the ordinary course
3 of the Staff's review process and that the Staff may
4 meet informally with a party including the applicant
5 to discuss requests for additional information.

6 JUDGE YOUNG: But wouldn't the open meeting
7 policy override that to the extent that the issue is
8 who may be present at those meetings?

9 MR. REPKA: Yes, it would to the extent
10 that the meeting was going to be held subject to the
11 policy. Those kinds of RAI discussion don't
12 necessarily have to be the subject of a public
13 meeting.

14 JUDGE YOUNG: But we've been told that they
15 are if they don't involve safeguards information.

16 MR. REPKA: Well, I think experience would
17 teach in some cases that RAIs are discussed by
18 teleconference that wouldn't necessarily be an open
19 meeting. But that's not the point I was really
20 getting at. The question about what to 2.102 means,
21 a couple cases have just been called to my attention
22 through the Practice and Procedure Digest that I
23 think the Board would want to look at. I haven't
24 read the cases in detail but at least according to
25 the Digest it characterizes them as saying that --

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1 JUDGE YOUNG: Let me get out my Digest and
2 you can tell me what page to look on. Hold on. Have
3 you the most recent one?

4 MR. REPKA: Well, I have Digest 12.

5 JUDGE YOUNG: June 2003.

6 MR. REPKA: That would be it.

7 JUDGE YOUNG: Okay.

8 MR. REPKA: You want to look at section
9 6.5.4.1 which is on "General Matters" page 25.

10 JUDGE YOUNG: "General Matters"?

11 MR. REPKA: Yes, "General Matters" page 25
12 or if you follow the sections it's 6.5.4.

13 JUDGE YOUNG: All right. There are no
14 separate page numbers. I'm almost there.

15 MR. REPKA: Okay.

16 JUDGE YOUNG: 6.5.4 "Staff-Applicant
17 Communications."

18 MR. REPKA: Right and right under that .1,
19 it cites 2.102(a) and says the staff may confer
20 privately with the applicant.

21 JUDGE YOUNG: Informally. Privately, okay.

22 MR. REPKA: Right. Well, putting that
23 aside, it's the next statement set that potentially
24 are relevant. "While a licensing board has
25 supervisory authority over staff actions that are

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1 part of the hearing process, it has no jurisdiction
2 to supervise the staff's review process and as such
3 cannot order the staff and applicant to hold their
4 private discussions in the vicinity of the site"
5 which is not what we're talking about "or to provide
6 transcripts of such discussions." Citing two cases,
7 a Northeast Nuclear Licensing Board decision and a
8 Rancho Seco Commission decision. I think perhaps
9 those cases go to Mr. Fernandez's jurisdictional
10 argument.

11 JUDGE YOUNG: We're both looking in the
12 Digest and I'm looking back at the motion and the
13 policy statement is a 2002 policy statement. I'm
14 wondering whether you know or anyone knows of any
15 case law post-2002.

16 MS. CURRAN: Well, if you keep looking
17 down, Judge Young, I have an older version of the
18 Digest but there's also cases that say "With certain
19 exceptions, all meetings conducted by the NRC
20 technical staff as part of its review, etc. are to be
21 open to attendance by all parties." I guess this is
22 citation to the open meeting policy.

23 MR. REPKA: And, of course, what we're
24 talking about a meeting that is specifically excepted
25 from the open meeting policy and these cases refer to

1 the Regulation 2.102. I think that the relevant
2 issue is the issue of may the licensing board order
3 the staff to create a transcript. That's a more
4 narrow issue than the broad presumption of the open
5 meeting policy.

6 MS. CURRAN: Well is anybody here denying
7 that the Board can order that the meeting be held
8 open? Because it seems to me what the Board was
9 trying to do was say "Here's an alternative interim
10 measure that can be taken while we work this out"
11 that no one else seems to be interested. What I hear
12 the Board saying is whether or not the Board has
13 authority to order the transcript. It's a way of
14 preserving the status quo until the Board gets
15 further guidance from the Commission. The Board also
16 has the alternative of ordering that BREDL will be
17 allowed to attend the meeting.

18 MS. UTTAL: This is Susan Uttal. I don't
19 believe that the Board has that authority. I believe
20 that the first blurb in the section 6.5.4.1 makes
21 that clear that the Board has the authority to make
22 --

23 JUDGE YOUNG: I missed the last bit of what
24 you said. Go ahead.

25 MS. UTTAL: The Board does not the

1 authority to order the staff to hold a meeting and I
2 believe the blurb in section 6.5.4 --

3 JUDGE YOUNG: We're missing words. I'm
4 missing words that you're saying. About every third
5 words it sounds like I'm missing.

6 MS. UTTAL: Can you hear me better now?

7 JUDGE YOUNG: Yes.

8 MS. UTTAL: Okay. I do not believe that
9 the Board has the authority to order the Staff to
10 hold this meeting open. I believe that the first two
11 cases cited in section 6.5.4.1 makes that clear that
12 the licensing board has the authority over staff
13 actions at a part of the hearing process. The
14 meeting is part of the Staff's administrative process
15 in reviewing this license amendment application and
16 the Board cannot order the Staff to hold it open or
17 to provide transcripts of the discussion.

18 MS. CURRAN: Well, there seems to be a
19 difference between private discussions and meetings.
20 We all probably should read these cases because there
21 is this open meeting policy that doesn't seem to be
22 the subject of the cases. I don't have the cases in
23 front of me, but it seems like it would be important
24 to read them.

25 MS. UTTAL: I'm not so sure that a policy

1 can override the regulation or override the case law.
2 JUDGE YOUNG: I do note Ms. Curran's
3 distinction between a private conversation and a
4 meeting and I'm just looking here through the January
5 30th memorandum to John Nakoski from Robert Martin
6 referring to this as a meeting. Let me just see if
7 I can cut through some issues here. It strikes me
8 that wherever we do the likelihood is that if we do
9 anything other than agree with the Staff that we
10 don't have jurisdiction and not order a transcript
11 that the Staff would likely appeal that to the
12 Commission.

13 We do have a motion before us and we
14 obviously have jurisdiction to rule on that motion.
15 If we were to find that we did not have jurisdiction
16 to order a transcript, I believe -- Hold on just a
17 second. Well I may want to get back to this but
18 putting aside the issue of whether we would have
19 authority to find a need to know and order that the
20 meeting be open to Petitioners if we were to suggest
21 a transcript as the least intrusive way of
22 maintaining status quo and allow the parties to take
23 the issue further to the Commission, let me hear the
24 parties' responses on that approach.

25 I don't know whether my presumption here

1 will hold true, but I would like to think that we can
2 try to work together cooperatively to facilitate the
3 most efficient and effective process possible with
4 regard to issues that are likely going to be coming
5 up in this adjudication process notwithstanding that
6 they are also coming up in the Staff's separate
7 review. So in that vein, do any of you wish to
8 address the approach that I just posed?

9 MS. CURRAN: This is Diane Curran. Judge
10 Young, we would like a ruling from the Board on a
11 motion, but the Board decides for whatever reason
12 that it doesn't have jurisdiction, we'd like to see
13 something done to preserve the status quo, to
14 preserve the record of that meeting while we go to
15 the Commission.

16 JUDGE YOUNG: Anyone else?

17 MR. REPKA: This is Dave Repka. I don't
18 think I'm prepared to say what position we will take
19 if you ordered the transcript of the meeting whether
20 we would appeal that to the Commission. I'm just not
21 prepared to say at this point what would happen. Our
22 fundamental position at this point on the motion is
23 that there is no need to know and we have to look at
24 that need to know determination in the context of
25 this entire proceeding.

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1 JUDGE YOUNG: What I was really trying to
2 get you to address is my suggestion that we suggest
3 a transcript and urge the parties to go to the
4 Commission if they disagree with that suggestion.

5 MR. REPKA: I have no objection to that
6 suggestion or that urging.

7 MS. UTTAL: Your Honor, I don't know what
8 status the suggestion would have. The Staff as I
9 said from the beginning is not amenable to having a
10 transcript made of this meeting.

11 JUDGE BARATTA: Judge Young, may I ask a
12 question?

13 JUDGE YOUNG: Go ahead please.

14 JUDGE BARATTA: Hypothetically speaking
15 now, if a meeting that is conducted and I use the
16 word "meeting" as defined in the second paragraph
17 which deals with certain exceptions etc. and there is
18 material that is discussed there that is relevant to
19 a case and it is safeguards information, is there any
20 dispute that the Board has then the authority to
21 review that information and determine if a party has
22 a need to know? I would like to hear from the Staff
23 if I could.

24 MS. UTTAL: You're asking if the Staff in
25 the normal course of its administrative duties holds

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1 a meeting and then something comes up about a case.

2 JUDGE BARATTA: No, I'm talking in regards
3 that the Staff holds a meeting as part of its review
4 of a particular domestic license or permit
5 application as defined in the third paragraph on page
6 25 there under 6.5.4.1.

7 MS. UTTAL: I would have to look.

8 JUDGE YOUNG: Let me see if I understand.
9 Pardon me. I was just trying to sign under Westlaw
10 to see if I could find anything quickly under there.
11 You're saying if there were a request for a need to
12 know determination that the Staff disagree that we
13 would make that ruling.

14 JUDGE BARATTA: That we would have that
15 authority to make that ruling.

16 MS. UTTAL: Your Honor, I disagree that you
17 could make a need to know ruling having to do with a
18 Staff meeting. That is not part of the hearing
19 process.

20 JUDGE YOUNG: Under your protective order,
21 you agreed that any disputes on need to know with
22 regard to the information in the protective order
23 would be resolved by the Board.

24 MS. UTTAL: Yes.

25 JUDGE YOUNG: And some of the information

1 described in the protective order as Ms. Curran has
2 pointed out relates to RAIs and RAI responses. So it
3 would seem that under the protective order you have
4 agreed that the Board would resolve any disputes
5 about need to know determinations.

6 MS. UTTAL: Within the context of the
7 hearing. This is not within the context of the
8 hearing. This is within the context of the Staff's
9 review of the filed license renewal application.

10 JUDGE YOUNG: Maybe the other parties and
11 you could address whether the protective order is
12 limited to the hearing. I'm trying to get the
13 protective order out from under my files right now.
14 I had it a second ago. Here it is. I assumed that
15 the protective order dealt with anything related to
16 the proceedings.

17 MS. CURRAN: Judge Young, this is Diane
18 Curran. That's how I interpreted it partly because
19 the security plan submittal itself is not part of the
20 hearing at this point. It is part of the licensing
21 proceeding. To make any sense, I think this
22 protective order relates to information that
23 generated during the licensing proceeding.

24 I also want to clarify that I don't think
25 I made a request in writing to make a need to know

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1 determination and a motion. But I do want to make
2 that now, clarifying that we are asking for a need to
3 know determination from the Board.

4 JUDGE YOUNG: Could we have the Staff and
5 Duke speak to the need to know issue and speak to
6 that in the context of -- The status quo right now
7 with regard to our previous ruling is that it stands.
8 It has been stayed but it has been stayed as a
9 housekeeping matter so that the status quo can be
10 maintained while the Commission receives responses to
11 the Staff's appeal.

12 Let's assume for a moment that - - Well
13 let's not assume the Commission upholds this. Let's
14 just as a given that at this moment our order of last
15 week stands. In light of that and in any other
16 arguments you want to make, what would be your
17 response to Ms. Curran's request for a need to know
18 determination regarding the information to be
19 discussed in the meeting and attending the meeting?

20 MR. REPKA: This is Dave Repka for Duke.
21 We have not contested the Board's authority to make
22 a need to know determination with respect to either
23 the earlier request and have not made that argument
24 today with respect to the information that could come
25 up in the meeting. We're simply not contesting that

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1 in the context of this particular issue.

2 Ultimately the protective order which
3 provides recourse to the licensing board for need to
4 know determinations is limited in its scope to the
5 scope of the protective order and the licensing
6 board's jurisdiction, but we're not making any
7 argument with respect to this specific request that
8 a need to know determination would be beyond the
9 Board's jurisdiction. Our argument is that there is
10 no need to know.

11 JUDGE YOUNG: Assuming that we have
12 jurisdiction to make a need to know determination and
13 given that the parties have agreed that we should
14 resolve any disputes on that and assuming further
15 that ordering a transcript would be in a sense a
16 lesser included measure, do you have anything further
17 to say on that, Mr. Repka? Then I'd like to hear
18 from the Staff on both issues.

19 MR. REPKA: No. I don't really have
20 anything further to say.

21 JUDGE YOUNG: Okay. From Ms. Uttal or Mr.
22 Fernandez?

23 MS. UTTAL: I'm trying to remember what you
24 want to know.

25 JUDGE YOUNG: Responding to Ms. Curran's

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1 request for a need to know determination and then my
2 question. I guess part of the reason I ask the
3 question about the transcript being a lesser included
4 measure is because I don't know to what extent it's
5 falling on receptive ears. I do think that
6 proceedings tend to move along more efficiently when
7 the parties can work together cooperatively to the
8 greatest extent possible.

9 MS. UTTAL: Judge, the Staff is willing
10 with the parties for reasonable requests. We don't
11 think that there's a need to know this information
12 and that's been our position from the beginning. So
13 to the extent that the Board is considering making a
14 need to know finding that there is no need to know
15 what the RAIs are and we have to remember what
16 context is referring now that BREDL is right now a
17 petitioner. They have not filed any contentions.
18 They do not need to know what the RAIs are.

19 JUDGE YOUNG: Could you get off the speaker
20 again? I'm having a hard time hearing you.

21 MS. UTTAL: Hello. Did you hear everything
22 I said?

23 JUDGE YOUNG: No, I coughed and I blocked
24 you out while I was coughing.

25 MS. UTTAL: The Staff's position is there

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1 is no need to know. I wish I could remember what I
2 was saying again.

3 JUDGE YOUNG: Maybe it would be helpful if
4 you could distinguish between what I understood Mr.
5 Fernandez to say that there would be a written
6 document produced that came out of this. Maybe I
7 misunderstood him but I thought that he was, if not
8 saying, implying that there would be a need to know
9 with regard to information that came out of the
10 meeting. So if you could distinguish between that,
11 if I understood it correctly, and a need to know with
12 regard to the actual meeting itself and why there is
13 no need to know.

14 MS. UTTAL: Your Honor, the written
15 document that may result from this meeting would be
16 the licensee's response to the RAIs which would be
17 filed on the docket under oath or affirmation. It
18 would not be a public document if it contained
19 safeguards. It may be that the Interveners or the
20 petitioners have a need to know that somewhere down
21 the line, but that would have to be a separate need
22 to know determination based on the content of those
23 documents.

24 There is no need to know what the RAIs are.
25 If the intervener has read the application, then the

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1 intervener ought to be able to use their expert to
2 develop contentions from the application. The fact
3 that the Staff may be asking additional questions is
4 not relevant to the development of the contention and
5 there's no need to know that. That's the position on
6 those two different things, the meeting and the final
7 response to the RAI, two different documents.

8 JUDGE YOUNG: And your position on the
9 final responses to the RAIs would be again, I thought
10 I heard you say that a future need to know
11 determination would be made with regard to set the
12 facts.

13 MS. UTTAL: Under the protective order, a
14 need to know determination has to be made to each
15 document individually.

16 JUDGE YOUNG: Right. What I'm trying to
17 get you to address is the need to know with regard to
18 the information that would come out of the meeting.

19 MS. UTTAL: You mean a future document?
20 I'm not going to address that now because that would
21 be a separate need to know finding.

22 JUDGE YOUNG: Well could you address that
23 now?

24 MS. UTTAL: No, I'm not going to make
25 supposition as to what may happen in the future and

1 we don't know what status the case is going to be in,
2 whether they are actually going to be some
3 contentions filed regarding the security plan or
4 whether the Petitioners are actually going to get
5 some contentions admitted to this proceeding. So I'm
6 not going to speculate.

7 JUDGE YOUNG: Judge Baratta, do you have
8 more questions?

9 JUDGE BARATTA: No. Is it possible that we
10 could confer for a moment at this time?

11 JUDGE YOUNG: Yes. If everyone would give
12 us a few minutes. Now the only thing I'm wondering
13 about is I think we have two hours though on the
14 conference call. I don't think we'll lose you.
15 We're going to take a few minutes and put you on mute
16 and get back to you. Off the record.

17 (Whereupon, the foregoing matter went
18 off the record at 11:32 a.m. and went
19 back on the record at 11:34 a.m.)

20 JUDGE YOUNG: On the record. I think we're
21 all back. Before we adjourn, we will be issuing an
22 order on this this afternoon. Before we adjourn,
23 does any party or participant have any further
24 arguments you'd like to make on any of these issues?

25 MS. UTTAL: The Staff has nothing further.

1 MR. REPKA: Nothing from Duke.

2 MS. CURRAN: And nothing from BREDL.

3 JUDGE YOUNG: All right. We'll get you a
4 ruling by this afternoon and as I said in my email,
5 I'm not going to be in the office the next couple of
6 days. Whatever we rule and whichever way it goes, if
7 any party wishes to appeal that to the Commission,
8 you obviously know how. We will leave that for the
9 next two days. Is there anything else that anyone
10 anticipates arising in the next two days? I will be
11 back Monday assuming my plane gets me back. Hearing
12 nothing, I assume we're all set apart from the motion
13 and the need to know request currently before. We
14 will be ruling on that this afternoon then. Does the
15 Court Reporter need any spellings or anything else
16 from us?

17 COURT REPORTER: Yes, the last page number.

18 JUDGE YOUNG: I believe that was 946. So
19 you would start on page 947. I will someone call
20 Neal Gross and correct that if I'm wrong on that.

21 COURT REPORTER: And my only other question
22 is Rancho Seco. Is that S-E-C-C-O?

23 JUDGE YOUNG: I just one C. Is that right?

24 MR. REPKA: Yes, one C.

25 COURT REPORTER: All right.

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JUDGE YOUNG: Thank you all.

(Chorus of thank yous.)

JUDGE YOUNG: Off the record.

(Whereupon, the above-entitled matter was
concluded at 11:37 a.m.)

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

Docket Number: 50-413/414-OLA

Location: Rockville, MD

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

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