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NUCLEAR REGULATORY COMMISSION

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

Docket Number: 50-413/414-OLA; ASLBP No. 03-815-03-OLA

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

ORAL ARGUMENT

In the Matter of:

DUKE ENERGY CORPORATION

Catawba Nuclear Station,
Units 1 and 2Docket Nos. 50-413-OLA,
50-414-OLA
ASLBP No. 03-815-03-OLA

Friday, February 13, 2004

Auditorium, Building Two
15545 Wisconsin Avenue
Rockville, Maryland

The above-entitled matter came on for hearing,
pursuant to notice, at 9:00 a.m.

BEFORE:

ANN MARSHALL YOUNG Chair

ANTHONY J. BARATTA Administrative Judge

THOMAS S. ELLEMAN Administrative Judge

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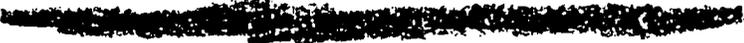
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MARVIN ITXKOWITZ, OGC

Duke Energy:

LISA F. VAUGHN
MICHAEL T. CASH

BREDL:

DR. EDWIN LYMAN

I-N-D-E-X

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

9:05 a.m.

1
2
3 CHAIR YOUNG: Let's go on the record. My
4 name is Ann Marshall Young, I'm the Chair of this
5 Licensing Board. To my left is Judge Anthony Baratta,
6 to my left is Judge Thomas Elleman. We are here in a
7 continuation of proceedings that have been going on
8 for several months now.

9 In a moment I'm going to ask everyone here
10 to identify yourself. I'm also going to ask counsel
11 for each party or participant to state the need to
12 know with regard to any people other than counsel who
13 are here, so that we can have that on the record. So
14 let's start over here to the right.

15 MS. UTTAL: Good morning. My name is
16 Diane Curran. I'm here representing Blue Ridge
17 Environmental Defense League, and with me is Dr. Edwin
18 Lyman, our expert. We both are asserting a need to
19 know.

20 CHAIR YOUNG: I have asked the Court
21 Reporter to interrupt us if she doesn't hear anything,
22 or needs a translation or spelling, so we will try to
23 be mindful of that.

24 Mr. Repka, could you introduce your
25 people?

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1 MR. REPKA: Yes. I am David Repka,
2 counsel for Duke Energy. On my left is Mr. Mark
3 Wetterhahn, also counsel for Duke Energy in this
4 matter. And on my far left is Mr. Steve Nesbit, who
5 is the MOX Fuel Project Manager for Duke Energy, and
6 all of us have a need to know with respect to
7 Safeguards Information.

8 CHAIR YOUNG: And you expect one other
9 person to be coming?

10 MR. REPKA: Yes. Actually, behind me is
11 Ms. Cottingham as well, counsel for Duke Energy, and
12 there is a possibility that Mr. Cash from Duke Energy
13 will be here. He was in a cab from Dulles about a
14 half-hour ago.

15 CHAIR YOUNG: Michael Cash?

16 MR. REPKA: Yes.

17 CHAIR YOUNG: And then I'm going to
18 introduce in the back, Barry Manili, who has been
19 assisting the Board with regard to security
20 classification and related issues. And now to Ms.
21 Uttal or Mr. Fernandez, if you could introduce the
22 staff.

23 MS. UTTAL: Your Honor, Susan Uttal,
24 representing the staff, and with me is Antonio
25 Fernandez, counsel for the staff, and Marvin

1 Itxkowitz, who is our supervisor at OGC, also counsel
2 for the staff. Behind us are Bern Stapleton and Al
3 Garrett, who will be acting as our security experts
4 for today, to advise us if we are treading into
5 forbidden territory, as it were. Also with us are
6 Sherri Cross and Vona Ordaz from NSIR, John Nakosi
7 from NRR, and Kay Cameron from OGC, and they all have
8 a need to know.

9 CHAIR YOUNG: Actually, that brings me to
10 the next thing I want to say, and that is that as
11 indicated in e-mails that have previously been sent,
12 it is our intent to avoid saying anything that would
13 cause the transcript of this proceeding to be
14 classified information. Obviously, we're going to be
15 talking about some classified information. It's the
16 subject matter that is before us, in a sense, but we
17 have asked Mr. Manili to be on the alert and to stand
18 up and interrupt if he thinks that we are about to
19 move into actually disclosing any classified
20 information or making any reference to it that would
21 raise this proceeding to that level. So, if he speaks
22 up -- and please speak loudly, feel free -- whoever is
23 talking will just at that moment stop talking. And if
24 the staff, likewise, notices anything like that, if
25 the staff security experts notice anything like that,

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1 you may feel free to do the same thing.

2 One thing that would happen at that point,
3 if we do go into that, would be that some people in
4 the room now would have to leave the room, those who
5 are not cleared for access to classified information.
6 I think that we can probably avoid that, but I do want
7 everyone to be on the alert to that. And if you think
8 you need to talk about anything that would take us
9 across that line, say so in advance.

10 Mr. Manili, anything else that you would
11 like to say about that?

12 MR. MANILI: I think you've covered
13 everything except for the conversation we had the
14 other day about speculation about numbers and that
15 sort of thing.

16 CHAIR YOUNG: I'll just repeat what he
17 said. He referred to a conversation that we had had
18 about the type of discussion that could lead into that
19 area being speculation about specific numbers, et
20 cetera, and I think everyone probably knows what I'm
21 talking about such that I don't need to explain that
22 any further.

23 Your notes today you need to treat as
24 being at least Safeguards because if you don't treat
25 them as such, then I've been told by security people

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[REDACTED]

1 that we would need to have someone check them to
2 determine what classification they would be. So,
3 obviously, to protect attorney-client privilege,
4 attorney work product, you're going to need to assume
5 that they are. We can provide cover sheets and also
6 double envelopes, if we need to, so that things can be
7 mailed from our mailroom rather than have you hand-
8 carry them.

9 All non-NRC people will need to be
10 escorted. There is a bathroom right outside this
11 room, and to be safe, probably have someone -- I think
12 we have someone outside, so that's enough. Beyond
13 there, you will need to have escorts, any of the non-
14 NRC people.

15 I'm saying all these things so that we all
16 are going to be appropriately attentive to the types
17 of issues that we need to think about whenever we're
18 talking about protected information. This is not to
19 limit anybody in making whatever argument you feel you
20 need to make, but if we do approach an area that would
21 possibly change the classification of this proceeding,
22 as I said, we have a Court Reporter who is cleared to
23 do classified proceedings, but if it looks like we are
24 going to get into that area, we need to stop and
25 prepare for that because there are some people in the

[REDACTED]

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[REDACTED]

1 room who are not cleared for access to that.

2 Also, with regard to security, I think I
3 need to disclose on the record that in discussing with
4 Mr. Bodin yesterday, trying to get everyone on the
5 list appropriately approved and cleared, he did bring
6 to my attention that the reason that there was a
7 problem with some of the Duke people was that Duke is
8 apparently in noncompliance with a Commission order
9 requiring updated security investigation clearances,
10 so forth. I think there was a deadline of January
11 7th.

12 MR. WETTERHAHN: Your Honor, we
13 respectfully disagree with that view. It is not
14 necessary to carry it further, but I didn't want the
15 record to indicate that we were in noncompliance. It
16 is Duke's view that with regard to Safeguards
17 Information access, we are in compliance with all
18 regulations and orders of the Commission. Thank you.

19 CHAIR YOUNG: Okay. You can feel free to
20 make whatever argument you want to make. The main
21 reason that I'm telling you this is because I felt
22 that I did need to disclose it. When he told me that,
23 it did not occur to me at first that that was anything
24 that would make any difference in this hearing, but
25 obviously there have been issues raised as to whether

[REDACTED]

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various persons have a need to know such that they should appropriately see or be part of various discussions of not only classified material, but Safeguards material. So I felt it important to disclose that statement that had been made to me and if, either now or in the ensuing argument that we're going to hear, you want to address that, you are free to do so.

MS. CURRAN: Judge Young, I'd just like to ask a clarifying question. Is that order a matter of public record, the Commission order?

CHAIR YOUNG: When I asked Mr. Bodin whether there was any procedure for challenging any determinations on who could attend, basically, he said that he could provide to any party the name of a person who had the order, and I don't know whether it's a matter of public record. I think I've told you all no. Oh, I think basically it was left that it was a Commission order so that any questions could be raised with the Commission.

MS. CURRAN: You don't know the date of the order?

CHAIR YOUNG: I think he said it was an order that was about two years ago. If anyone else knows anything more about that, they can correct me.

1 I'm just more or less reporting and disclosing the
2 information that was provided to me, in attempting to
3 help ensure that everyone could be here.

4 MR. FERNANDEZ: Your Honor, could I
5 address that point for a second, please? As counsel
6 for the staff, it is not the staff's position right
7 now, and as far as I'm aware -- and I'm having
8 somebody check that -- Duke is in noncompliance with
9 the regulations or the Commission's orders.

10 CHAIR YOUNG: I'm sorry, you say that it
11 is not the staff's position?

12 MR. FERNANDEZ: It is not the staff's
13 position right now.

14 CHAIR YOUNG: It is your position that
15 they are not in compliance -- that they are in
16 compliance?

17 MR. FERNANDEZ: As the sole person that
18 can speak here for the staff, I'm telling you right
19 now that the staff has never said that Duke is in
20 noncompliance with the orders from the Commission, and
21 I'm having somebody check on that, and I will update
22 the record as soon as I get -- I had not heard about
23 this, so this is catching me a little --

24 CHAIR YOUNG: This is something, as I
25 said, the security people have shared with me.

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1 MR. FERNANDEZ: I will clarify that later
2 for the record.

3 CHAIR YOUNG: Okay, that would be great.
4 Thanks. And, Mr. Wetterhahn and Mr. Repka, did you
5 want to add anything?

6 MR. REPKA: We believe that's an issue
7 that can be addressed in due course with the NRC
8 staff.

9 CHAIR YOUNG: Okay.

10 JUDGE BARATTA: I have one more item. I
11 want to get on the record that on Friday, February 7,
12 when I received a copy of a document that was filed by
13 Blue Ridge Environmental Defense League that alluded
14 to a January 30th e-mail that was sent out by the
15 staff, by Mr. Fernandez, and indicated that there may
16 have been Protected Information in that.

17 I first attempted to contact Mr. Manili to
18 discuss handling of that information, and he was not
19 available and had left, and Mr. Kelly, who is his
20 alternate, and Mr. Kelly was not available. And then
21 I contacted Ms. Harbaugh, and she suggested that the
22 only person that was available at the time was Mr.
23 Stapleton, who I did contact and discussed with him
24 and had him look at the material to make sure that we
25 would properly safeguard it, so that it was strictly

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an issue of whether or not that material was being handled properly within the ASLB.

And on the following Monday, the 9th, when Mr. Manili was available, he then also reviewed the handling of the material and concurred with Mr. Stapleton's actions. I just wanted to make sure everybody was aware of that communication.

MS. CURRAN: I'm sorry, what was the conclusion?

JUDGE BARATTA: That it was handled properly within our office. That was the only issue that I was concerned with.

CHAIR YOUNG: We did -- just following up on that -- we do want to remind everyone -- I mean, obviously it's not easy to remember all the things that we have to do with regard to the security issues sometimes, and everyone has slipped up, it seems like, at one point or another, none in any major way, but we do want to remind everyone that if anyone does become aware of any issue or problem, to try to notify us and the other participants immediately so that any problem can be corrected right away. And it's probably best that you notify all of us, particularly Judge Baratta and I, who are here, because if one of us is not here -- I wasn't here last Friday -- then the other one

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will be more apt to receive the information and be able to deal with it, or contact the appropriate security people.

Are there any other sort of housekeeping issues that you can think of?

JUDGE BARATTA: No.

JUDGE ELLEMAN: No.

CHAIR YOUNG: Any counsel have any preliminary housekeeping issues? What we want to do after we finish with these types of issues is ask the parties if you have anything you'd like to say before we get into the argument about the issue of the potential impact of future Commission rulings on the two appeals that are now pending with them, the impact of any such ruling on these proceedings since we don't have them yet. Are there any before we move into that, and then we'll move into the arguments on the motion with regard to the classified information. Ms. Curran?

MS. CURRAN: I have two preliminary matters that have to do with the Protective Order. I notice that when I get packages from other parties, the words safeguards information are stamped on the inside envelope, and that's not in the instructions in the Protective Order. I try to follow those

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1 instructions very carefully, and I have them open when
2 I'm preparing these packages. And if there are other
3 requirements that we need to follow, it would be
4 really helpful to me if they were all in one place so
5 that -- it's easier that way for us to make sure that
6 we follow the right procedures.

7 I notice that in the Main Yankee case
8 there was a Protective Order that had a requirement to
9 label the inner envelope "Safeguards Information", and
10 I had assumed that when we did the order in our case
11 that there was some reason not to, as though maybe it
12 was dangerous to alert people that it was very
13 valuable information, but now I see that it was the
14 case in that other case. I'd like to ask the Board to
15 address that.

16 Another thing that I thought maybe should
17 go in the Protective Order is a requirement for a
18 cover sheet, and I have asked Mr. Bodin to provide us
19 with cover sheets, which I think he brought today.

20 CHAIR YOUNG: Has anyone given you those
21 yet, because we do have some for you.

22 MS. CURRAN: I asked for them a while
23 back, I haven't gotten any yet, but I hope I get some
24 today.

25 CHAIR YOUNG: I'll give you some that I

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1 have right now. Does anyone else need any of those?

2 Just before you go on, Mr. Stapleton, I
3 think through Mr. Fernandez, did provide a stack of
4 requirement, but obviously if there are any that come
5 to mind that should be especially highlighted -- we
6 now have the one about indicating Safeguards on the
7 inside envelope -- if anyone is aware of anything else
8 like that that people should particularly pay
9 attention to, you could tell us now, or later on in e-
10 mail. We've been having fairly good communication
11 through e-mail when we need to.

12 MS. CURRAN: What I was hoping was that
13 the Board could issue an amended Protective Order just
14 so that there is one document where everything is laid
15 out that we need to do.

16 CHAIR YOUNG: Would there be any objection
17 to our doing that and adding in the cover sheet
18 requirement? And if there are any other requirements
19 --

20 MS. CURRAN: It might be useful to use the
21 Main Yankee Protective Order as a template. I don't
22 know if there may be other provisions in there that
23 didn't make it into this one, I'm not sure.

24 CHAIR YOUNG: Maybe the parties could look
25 at those two orders together and jointly propose any

1 new paragraphs?

2 MR. REPKA: I don't know that it's
3 necessary to reissue the whole Protective Order, there
4 could be an addendum to it. With respect to the inner
5 envelope, the Duke program requires that the inner
6 envelope be marked as "Safeguards" and that's how
7 we've handled the material, and certainly have no
8 objection to that being specifically called out, if
9 it's not already in the Protective Order. I haven't
10 looked at that.

11 With respect to the cover sheet, it's not
12 a program requirement for Duke. We don't have any
13 objection to doing that in this case, but don't see
14 that as absolutely necessary given the requirement
15 which is to mark every page.

16 CHAIR YOUNG: What is the staff's view on
17 doing either an amended Protective Order or an
18 addendum to it?

19 MR. FERNANDEZ: We don't have any
20 objection. We leave the form that it will take to the
21 Board.

22 CHAIR YOUNG: Maybe the simplest thing
23 would be to just do a short addendum, and if anyone
24 thinks of any additional thing and if, in comparing
25 those two orders, you find anything else, forward that

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1 to us and we will include that in an addendum.

2 Any other preliminary matters? I know
3 these things do get confusing. For example, our
4 physical security person, Cindy Harbaugh, had told us
5 not to disclose the meeting location so that people
6 who shouldn't be here wouldn't know where to come, and
7 apparently that got -- there was a little snafu with
8 that this morning. Partly in explanation of the
9 procedures this morning, I'll impart that information
10 to you so on some occasions it is appropriate to not
11 broadcast that you're going to be addressing protected
12 issues whereas in other circumstances the opposite
13 might apply.

14 Are you Mr. Cash, sir?

15 MR. CASH: Yes, ma'am.

16 CHAIR YOUNG: Mr. Repka, did you mention
17 him with regard to need to know earlier?

18 MR. REPKA: Yes, Your Honor. If I didn't,
19 yes.

20 CHAIR YOUNG: He's one of your program
21 people who is assisting you?

22 MR. REPKA: Correct. Mr. Cash is an
23 engineer on the MOX Fuel Project.

24 CHAIR YOUNG: All right. If there are no
25 further preliminary issues -- oh, I'm sorry, I see my

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1 note here. Ms. Curran, Mr. Lyman, and Mr. Nesbit,
2 we've been asked to make sure that before you leave
3 today, since you are the three people, non-NRC people
4 who are cleared for the classified, to stop and get
5 your photo made for the appropriate badge, and we can
6 -- either Mr. Manili or we can find Ms. Harbaugh, who
7 is the one that asked us to ask you all to do that.
8 I think that's all.

9 All right. Hearing nothing further, just
10 briefly before we start -- and this is not to
11 foreclose you from raising these kinds of issues in
12 your argument on the motion -- but before we start,
13 just separately we'd like to hear from you on anything
14 you'd like to tell us with regard to the potential
15 impact of the future Commission orders at this point
16 in this proceeding, and I don't have any preference on
17 who goes first. Does anyone want to go first?

18 (No response.)

19 If not, then I think probably in this
20 session we'll revert to what would be the normal
21 order, start with BREDL, then move to Duke, and then
22 the staff. Go ahead, Ms. Curran.

23 MS. CURRAN: To us, it seems that many of
24 the principles that were discussed in our last oral
25 argument on January 21st, and that have been briefed

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before the Commission now, are applicable to the subject matter that we're discussing today. So I think that to some degree whatever the Commission decides is going to be applicable to the issue of whether BREDL has a need to know classified information. As a matter of fact, it's difficult for me to see any particular distinction between the concepts that are applicable to the classified information and those that are applicable to the safeguards information. It was one of the reasons why it was frustrating in our last oral argument, that's because the issue of the need to know the safeguards information and need to know the classified information, those issues are intertwined.

We've been arguing to you that we really can't understand the security plan submittal until we see the entire suite of applicable standards here, and that we addressed in the brief that we file before the Commission on February 6th, I think it would probably be useful to the Board to have a look at some of the arguments that are made in that brief because they are certainly applicable to what we'll be discussing today.

CHAIR YOUNG: We have received copies of those and the responses, and the staff's appeal. Mr.

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1 Repka?

2 MR. REPKA: On the issue of the impact of
3 the pending Commission matters, I think clearly
4 whatever the Commission decides and what direction
5 they give will be relevant to the issue that's before
6 us today, which is need to know with respect to
7 specific Category I information, but I don't believe
8 that it's necessarily dispositive of that issue
9 because the issue of access need to know with respect
10 to safeguards information and need to know with
11 respect to national security classified information is
12 not entirely the same.

13 I think, for example, if the Commission
14 were to say there's need to know with respect to
15 safeguards information -- we don't believe they should
16 say that, but if they were to say that -- I don't
17 believe that's necessarily dispositive of the question
18 that there's need to know with respect to classified
19 information.

20 So, obviously, it will be important what
21 the Commission says, but I think that does not
22 necessarily resolve the issue here.

23 CHAIR YOUNG: You're speaking triggered
24 another memory, and that is Duke had asked us to
25 certify a ruling earlier to the Commission, and we did

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1 not, for the reasons stated in our January 29th order.
2 We are considering doing so with whatever our ruling
3 will be on the issues before us today, for the reason
4 that there are already two appeals now pending with
5 the Commission, and we would presume that whichever
6 way our ruling goes, it's likely that the party or
7 parties against whom it pertains would want to appeal
8 that to the Commission. So, if anyone has anything to
9 say about our certifying our ruling on the issues
10 before us today, you can do that as well at this point
11 or later. And we can back up to Ms. Curran and go
12 back to Mr. Repka.

13 MS. CURRAN: What we're engaged in here is
14 a hearing, an adjudicatory proceeding on Duke's
15 license amendment application for the plutonium fuel
16 testing program. If the Commission were to determine
17 that BREDL doesn't have a need to know either the
18 safeguards aspects of the standards that govern that
19 application or the classified aspects, it's tantamount
20 to saying there will be no hearing. We have decided
21 that the protection of this information from the
22 public under any circumstances is more important than
23 giving BREDL a hearing because it isn't possible for
24 BREDL to address whether this application satisfies
25 NRC security standards or provides something that's

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1 comparable to satisfaction of security standards, if
2 we don't know what the standards are.

3 CHAIR YOUNG: Actually, what I was hoping
4 you would address more is the idea that whichever way
5 we rule, we would certify that directly to the
6 Commission, without requiring any of the parties to do
7 an appeal to get it to the Commission.

8 MS. CURRAN: To us, it's so fundamental,
9 and you have the precedent -- at least it was dicta in
10 the Duke, Cogema, Stone & Webster case and some of the
11 other cases that we cited, in which the Appeal Board
12 and the Licensing Board have said that these types of
13 materials need to be provided in order to allow a
14 party to one of these proceedings to make their case.
15 It doesn't seem to us to be the kind of thing that
16 warrants referral to the Commission, although in this
17 particular instance the Commission is taking review.
18 So it has no different effect for us whether you refer
19 it or whether another party takes it up, we know that
20 that's where it's going to end up.

21 CHAIR YOUNG: Well, I think that our
22 thinking, or maybe my thinking, was that there's been
23 delay already, and so to the extent that certifying it
24 rather than waiting for an appeal -- I mean, I'm going
25 to assume that you would probably appeal our ruling if

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1 it goes against you, and I'm going to assume that the
2 staff would probably appeal our ruling if it goes
3 against their views, and I'm assuming Duke might also.
4 Maybe those are wrong assumptions, but I just wanted
5 to give everyone an opportunity to address that in the
6 context of these issues, of the impact of the
7 Commission ruling.

8 JUDGE ELLEMAN: Ms. Curran, you said it
9 would be not impossible for you to frame a comparison
10 between the requested exemptions and the allowed
11 standards, without getting the needed information. Is
12 that the same as saying that you would be unable to
13 develop any contentions for submission before this
14 panel, without receiving the information?

15 MS. CURRAN: That's right. We don't think
16 that we could prepare contentions in any meaningful
17 kind of way. We'd be stabbing in the dark, and that's
18 not what's contemplated -- as a matter of fact, if we
19 were in a public proceeding, if there was no issue of
20 confidentiality, we would be held to a very high
21 standard of addressing what the standards are and what
22 the deficiencies in the application are in comparison
23 to that standard. And here it's hard for us to see
24 how we can do an effective job of pleading a
25 contention, if we don't know what the standards are.

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1 And when we get into the argument, I'd like to talk a
2 little bit about the staff's interpretation of why we
3 don't need to see the standards. We don't think
4 that's correct, and we think that the information
5 they've provided in writing about their review plan
6 helps illustrate why we need to see the standards.

7 CHAIR YOUNG: Did I understand you
8 correctly in that you said -- well, let me ask you.
9 Are you arguing against our certifying this decision,
10 or are you saying that given the circumstances, which
11 is the fact that there are two appeals currently
12 before the Commission and whichever way we go this
13 issue will likely get to them, that you didn't have
14 any strong opinion about whether we do or not? Why
15 don't you address that?

16 MS. CURRAN: We think that you should
17 decide that we should have access to the standards for
18 the Category I facilities, and that it's pretty clear
19 that there is a need to know.

20 CHAIR YOUNG: But I'm not talking about
21 how we rule, I'm saying -- we'll rule one way or the
22 other, but I'm asking the parties to address whether
23 after we've ruled, we should certify it directly to
24 the Commission, or leave it for any party to appeal.
25 Those are the two options. It's not that we will or

1 won't rule.

2 MS. CURRAN: I would prefer that you leave
3 it for the parties to appeal because I think it's
4 helpful to, when the parties are required, to brief
5 exactly what it is that they disagree with. Here we
6 are in an oral argument. I think that the process of
7 reducing this dispute to writing has been helpful.

8 CHAIR YOUNG: So the parties should be
9 required to brief issues of dispute to clarify issues.
10 All right. Anything further from you?

11 MS. CURRAN: No.

12 CHAIR YOUNG: Mr. Repka, anything from you
13 on that?

14 MR. REPKA: On the question of whether or
15 not the Board should refer its ruling, we certainly
16 support that, or at least have no objection to it.
17 This is an issue that cries out for prompt resolution
18 of any appeal, so it would be appropriate.

19 Beyond that -- and we'll get into this in
20 the argument -- I disagree completely with Ms.
21 Curran's position that a decision that there's no need
22 to know is tantamount to having no hearing. For the
23 reasons we've said before and will get into again this
24 morning, I think that the Petitioners have ample
25 information to frame contentions, and if they have

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contentions, we need to get on with that.

CHAIR YOUNG: Mr. Fernandez or Ms. Uttal?

MR. FERNANDEZ: Just a couple issues to respond to everything that's been said before. First, the Board asked regarding what the staff's position was regarding the appeals currently pending before the Commission, as to what the nature of the Commission's resolution, we wouldn't speculate as to that. We don't know really --

CHAIR YOUNG: We weren't asking you to speculate or talk about your appeals, what we were asking is whether you have any argument you'd like to make to us, or statements that you'd like to make to us with regard to the potential impact of any Commission more really as a procedural matter than anything else, or anything else you'd like to argue with regard to that, but not to get into the merits of your appeal.

MR. FERNANDEZ: Since we don't know what the Commission is going to do, we'd rather not do that at this point. We want to also respond to the issue of whether the Board's ruling should be referred to the Commission. The staff supports Duke's motion to certify the Board's ruling in the event that it finds that there is a need to know this information for Mr.

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Lyman and Ms. Curran.

Also, we wanted to address briefly -- and we'll get to it as well in the merits portion of our presentation -- Ms. Curran said briefly that they would be stabbing in the dark and that they couldn't prepare contentions. Commission precedent specifically directs Petitioners to address their contentions in the first instance on the basis of the Licensee's submittal. In this case, they have those submittals, they are available to them, and we believe that the Board, if it were not to follow that long-standing precedent and award them this information in contravention of that long-standing precedent, would be particularly troubling in a case where we're talking about national security confidential information.

CHAIR YOUNG: Is there anything either of you would like to ask about this part?

JUDGE BARATTA: This is more a point of information. When you mentioned them getting their badge, we need to let Ms. Harbaugh know well in advance of when they would do that because it has to be specially arranged.

CHAIR YOUNG: She knows. I told her. We're hoping to get done this morning. All right.

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Ms. Curran, then to the merits of your motion -- and I'm just going to put a sort of preliminary thought out there for you to address in your argument, and that is, given that part of our ruling with regard to the safeguards information had to do with Duke's reliance on certain information that was more or less presumed by everyone, I think, at the last argument -- although a question has been raised about that -- Duke's reliance on standards that appears to be contained within some of the Safeguards documents we were talking about. Could you address whether and the extent to which that same issue applies to the classified information in the course of whatever other argument you want to make.

MS. CURRAN: All right. As I said earlier, our reason for seeking the classified information regarding the Category I standards are very similar to the reasons that we are seeking the safeguards information with respect to the security requirements for Catawba, and that's because both of the standards are applicable. Duke has submitted a security plan submittal that attempts to satisfy some aspect of the Category I standards by taking the existing security plan and modifying it somewhat. And then the question is, does that provide a level of

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1 security that is comparable to what would be obtained
2 by compliance with the Category I standards? And if
3 we don't have the Category I standards and we don't
4 have the nuclear power plant standards that are being
5 slightly modified, it is impossible for us to tell
6 whether the measures that Duke is proposing are
7 adequate or appropriate. And I think it's really
8 helpful to look at the memorandum that the staff
9 provided to you a copy of, it's a memorandum from
10 Joseph W. Shea to Glen M. Tracy, dated January 29,
11 2004. The subject is "Review Plan for evaluating the
12 physical security protection measures needed for mixed
13 oxide fuel and its use in commercial nuclear power
14 reactors". You remember receiving a copy of that? To
15 us, this memo graphically illustrates the difficulty
16 that we face if we don't have these Category I
17 standards.

18 Now, this is not the security plan
19 submittal, this is the staff's proposal for how it's
20 going to evaluate it. Well, we are in a similar
21 position to the staff, we're trying to evaluate the
22 security plan submittal and determine whether it's
23 adequate. The staff makes a number of assumptions
24 that we believe are based on a knowledge of what the
25 design basis threat is for Category I facilities. If

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1 you look at page 2 of this memorandum, down towards
2 the bottom there is a section entitled "Technical
3 Analysis". In the second sentence of the first
4 paragraph, the staff says, "However, the staff's
5 assessment is that the MOX material, while meeting the
6 criteria of a formula quantity, is not attractive to
7 potential adversaries from a proliferation standpoint
8 due to its low plutonium concentration, composition
9 and form".

10 Now, in order to make that statement, the
11 staff has to know something about what the potential
12 adversaries are. To figure out whether something is
13 attractive to an adversary, you need to know what the
14 adversary is like what is the adversary's capability,
15 what is the adversary's level of determination. To
16 say just that it's not attractive to an adversary
17 doesn't really mean much unless you know something
18 about the adversary.

19 JUDGE BARATTA: Could I ask a question at
20 this point because if you look at the experience with
21 LAU, it's well known -- or there have been discussions
22 about enrichment in a research reactor fuel program
23 mode in keeping it below a certain point because that
24 makes it unattractive. So, can't that -- is it
25 possible to extrapolate that experience, which is I

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1 believe in the open literature and should be available
2 to most anyone, to this case, or am I --

3 MS. CURRAN: No. Can I pass the mike to
4 Dr. Lyman?

5 DR. LYMAN: Could you clarify, are you
6 saying that -- are you equating the enrichment of
7 uranium-235 in enriched uranium to the concentration
8 of plutonium in MOX fuel?

9 JUDGE BARATTA: Not exactly. I'm trying
10 to draw a parallel that there's a threshold below
11 which physically it's not suitable to --

12 DR. LYMAN: Yes, that is correct, but
13 those are absolutely not equivalent. Highly enriched
14 uranium is defined both domestically and
15 internationally as any enriched uranium with a U-235
16 concentration greater or equal to 20 percent. That's
17 a definition of highly enriched uranium which is a
18 strategic special nuclear material. Plutonium is a
19 strategic special nuclear material in itself, and MOX
20 fuel, no matter what the concentration of plutonium,
21 is strategic special nuclear material as long as it
22 contains more than a formula quantity of plutonium.
23 In this case, MOX fuel assemblies each contain about
24 10 times the formula quantity of plutonium. So,
25 according to NRC regulations and international

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standards, there is no distinction between the MOX fuel for any plutonium concentration and pure plutonium. That's just the nature of the regulations.

JUDGE BARATTA: Thank you.

CHAIR YOUNG: Let me just add a question while you're in a pause there. Duke's argument is that -- I'm going to paraphrase it and maybe carry it another step -- to the effect that, let's say, apart from your argument about having a need to know the standards, that you should be able to criticize the proposed measures that it has included in its security submittal on their own merit, more or less. Can you respond to that argument?

MS. CURRAN: Whose standard? On their own merit -- whenever you judge something, you're judging it against some standard or other. Certainly, BREDL isn't entitled to make up the standard, it's an NRC safety standard. I can't think of any issue involving nuclear regulation where a member of the public would be entitled to make up a standard and say "We judge this thing to be inadequate based on our standards".

CHAIR YOUNG: Well, I guess what I'm getting to is the discussion that Duke has provided to us before about the weight and difficulty removing the material because of being in the assemblies, in the

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1 rods, the need to have a lifting mechanism and so
2 forth, those are more or less factual things that Duke
3 is saying you should be able to -- or among the types
4 of things that you should be able to address just
5 purely as a factual matter. I think I'm not
6 overstating what they are saying.

7 MS. CURRAN: All right. Well, let's take,
8 for example, the issue of a weight. In our view -- so
9 the practical question there is, are the assemblies so
10 heavy that the intruder couldn't remove them from the
11 facility and get them out of there? That's the
12 practical question.

13 That question can't be answered without
14 knowing how many people are available to do this. And
15 what kind of equipment do they have, and what
16 resources are at their disposal to do the job? What
17 does Duke assume when they say it is too heavy?

18 CHAIR YOUNG: Could you say given the
19 information that we know about the assemblies and
20 where they're going to be and how they're going to be
21 moved, we don't think that Duke's measures are
22 sufficient because we think X, Y, Z could happen,
23 separate and apart from what the standard is? I mean,
24 I'm just trying to put their argument before you so
25 you can address the specifics of it.

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1 MS. CURRAN: Well, there we have an
2 example of stabbing in the dark. And then the answer
3 is, you lose because you didn't pick the right design
4 basis threat. We know what it is, we're not going to
5 tell you what it is, we're just going to tell you you
6 guessed wrong. That doesn't seem like very fair play.

7
8 If we're to be given an opportunity to
9 evaluate -- the purpose of a hearing is to give the
10 public an opportunity to evaluate the application
11 against the safety and security standards, and make a
12 comment to the agency, seek an improved application
13 because the member of the public has shown this
14 particular aspect isn't sufficient to meet the
15 standard.

16 JUDGE BARATTA: You said something that
17 was interesting and I wanted to follow up a little bit
18 on it. Could you not develop what I'll call a
19 "minimum" scenario that given your knowledge of the
20 security plan that you've already had access to, that
21 would say, okay, in order to simply handle -- what is
22 it -- an 1100 pound assembly --

23 JUDGE ELLEMAN: 1500.

24 JUDGE BARATTA: -- 1500 pound assembly,
25 that you would need so many people, so much equipment

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1 and such, and then knowing what you do about the
2 security force, game it to see whether or not -- is
3 that not --

4 JUDGE ELLEMAN: You're talking about
5 working backwards.

6 JUDGE BARATTA: Yes, I'm talking about
7 working backwards instead of working forward.

8 MS. CURRAN: We don't have the security
9 plan, all we have is the security plan submittal. We
10 don't have Duke's basic security plan.

11 CHAIR YOUNG: You have the revision?

12 MS. CURRAN: It doesn't have numbers of
13 security force personnel in it, that I can recall. So
14 I don't think that we could do that. But I guess
15 you're asking, in principle, would it be possible to
16 do.

17 JUDGE BARATTA: Or disregarding the
18 security plan for the moment, or the actual numbers,
19 lay out like a minimum type of vehicle that would be
20 required, and the minimum number of personnel and
21 such, and then -- I presume that in any of these
22 scenarios there's a strong desire to at least maintain
23 some clandestine activity up to a certain point when
24 it become obvious what's happening. Could you just
25 assess that without having a knowledge of what the

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1 threat that is used --

2 DR. LYMAN: I think what you're saying is
3 that by virtue of our understanding, what it would
4 take to be able to divert or steal this material, we
5 could come up with our own adversarial scenario to
6 accomplish that, but that still begs the question of
7 whether that adversarial scenario can be dealt with
8 within the existing response force plus these
9 compensatory measures, or not. So, again, we can't
10 formulate a contention without -- we can't say that
11 your plan does not meet NRC regulations, if we don't
12 know, again, what they are. So, we can do that, but
13 like Ms. Curran said, that's stabbing in the dark, so
14 we wouldn't be able to meet the standards for
15 contention.

16 CHAIR YOUNG: Is there any distinction
17 between the type of information that would be
18 contained in the safeguards information that Judge
19 Baratta and I addressed earlier, which sort of would
20 form part of the baseline of the -- everything that
21 would be available -- the starting point, if you will
22 -- is there any distinction -- I can see what you're
23 saying more with regard to that kind of information
24 than with regard to the upper limit set by the
25 Category I information. Can you address that?

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1 DR. LYMAN: Let me just state clearly so
2 that it's on the record. This is the key issue. The
3 threat, the Category I threat is not an incremental
4 addition to the threat for radiological sabotage.
5 That was the allegation. We've heard the staff say
6 that, I think, at the last oral argument, that the
7 threat is incremental. The threat is not incremental,
8 the threat is discrete and significant. We're talking
9 about a difference based on the choice an adversary
10 would make if they were going to try to steal
11 strategic special nuclear material as opposed to
12 attempt a suicide mission to commit sabotage against
13 the plant. That means you have to get out.. That
14 means you're going to go into substantially greater
15 resources than if you were simply going to try a
16 suicide mission where you're going to sabotage the
17 plant and cause a radiological release. So the threat
18 itself is of a completely different character than the
19 threat for radiological sabotage, and that is why --
20 but what Duke is proposing as an incremental solution
21 to a major change in threat.

22 So what we are simply saying is that the
23 threat as defined by the adversaries who seek to steal
24 strategic special nuclear material for producing a
25 nuclear weapon -- I'd like to point out that Al Qaeda

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[REDACTED]

1 and Osama Bin Ladin have said that acquiring nuclear
2 weapons is a religious duty -- there's no similar
3 statement with regard to sabotaging a nuclear plant.
4 That is the sine qua non of the objective of nuclear
5 terrorism in the post 9/11 world. That is the threat,
6 and one has to expect that terrorists who want to
7 acquire nuclear material and remove it from the site
8 so that they can then fabricate a nuclear device from
9 it are going to have greater resources, greater
10 planning, greater numbers of adversaries, greater
11 capability. Duke is saying that with these
12 compensatory measures, [REDACTED]
13 [REDACTED] that
14 that plus the existing security force which is
15 designed only to protect against radiological
16 sabotage, that that is going to be enough to defend
17 against this substantially greater threat, and we say
18 that we do not believe that's true, but we cannot
19 ascertain whether it is unless we know the two threats
20 as NRC has defined in consultation with intelligence
21 authorities and their own internal processes and
22 compare them.

23 JUDGE ELLEMAN: If you are successful in
24 getting the materials you seek, do you have any way of
25 evaluating the sufficiency of the Duke exemption

[REDACTED]
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request, other than your own judgment, that personal judgment that you would exercise in this matter? Is there a process you would have available to you for making the kind of judgments you want to make?

DR. LYMAN: Well, we're constrained by resources, by BREDL's resources. I can't say what the nature of our review would comprise, but it would certainly be with all the expertise that I can bring to bear on the situation.

MS. CURRAN: To get back to the NRC's memo, a minute ago Dr. Lyman talked about how the threat is very distinct for theft of material than for sabotage. On page 4 of the memo, down in the third paragraph -- actually, in the second paragraph, at the end of the paragraph, the NRC staff explains that even though the staff is basically going to accept nuclear plant security plans as sufficient to protect MOX fuel, supplemental measures are deemed necessary for the MOX fuel assemblies because "safeguards to prevent theft or diversion are not currently explicitly required". So, there the staff is admitting that it isn't sufficient, that this is different, something else is needed in the security plan besides just the measures that are ordinarily used for sabotage.

And then in the next paragraph the staff

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1 talks about how it's going to use a graded approach to
2 safeguards and security when evaluating requests for
3 exemptions from 10 CFR 73.45 and 73.46. Well, how
4 does one evaluate a graded approach to security if you
5 don't know what's at either end of the spectrum?
6 That's the position we're in.

7 If you look down in the last paragraph
8 just before you come to the section entitled "Review
9 Criteria", the staff talks about -- sets kind of a
10 standard for this review and says "The additional
11 safeguards measures should provide an overall
12 acceptable level of safeguard system performance".
13 Well, how are we to determine what the words "overall
14 acceptable" mean? This is all very vague, very
15 general. We need to see what are the standards here
16 that are being imposed, and where on the spectrum is
17 Duke proposing to fall and the NRC proposing to let
18 them fall?

19 Again, if you turn to page 5 of the memo,
20 there's a series of bulleted points which set forth
21 the measures or the items that will be evaluated for
22 MOX fuel assembly. Each one of these refers to some
23 level of control or procedures that is "appropriate".
24 How are we to evaluate what's appropriate if we don't
25 know what the standard for appropriateness is at

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1 either end of the spectrum?

2 Judge Young, you had asked about whether
3 we could show Duke's reliance on the Category I
4 standards?

5 CHAIR YOUNG: Just address that issue in
6 comparison to how you raised it with regard to the
7 safeguards documents that sets the baseline standards,
8 if you will.

9 MS. CURRAN: Well, for instance, if you
10 look at page 7 of our motion, we give an example in
11 which Duke seeks an exemption from NRC-U and NRC-R
12 special nuclear material access requirements on the
13 ground that it is "[REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]". And there we
17 explain that in order to evaluate the question of
18 whether compliance with the existing access, control
19 and fitness for duty requirements provides equivalent
20 security protection to the NRC-U and NRC-R special
21 nuclear material access requirements, it is necessary
22 to be able to evaluate both the NRC-U and the NRC-R
23 special nuclear material access requirements and the
24 existing access, control and fitness for duty
25 requirements.

[REDACTED]
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1 So, if someone is coming and saying this
2 compliance with this standard, with standard A, is
3 unnecessary because compliance with standard B will do
4 the trick, how can you evaluate that statement unless
5 you know what the bulk of the standards are?

6 I just want to point out Duke said that
7 the information that we're seeking is all in the
8 regulations.

9 CHAIR YOUNG: Right. I had written in my
10 notes from last time that they were found at 10 CFR
11 11.11 and 11.15, I think?

12 MR. FERNANDEZ: Yes, Your Honor.

13 MS. CURRAN: We believe that the Category
14 I training standards may have superseded those
15 standards. And the access authorization order may
16 also have superseded the publicly available standard.
17 In fact, it has.

18 MR. FERNANDEZ: Can we get some
19 clarification? Since we're talking about the access
20 authorization order, I thought that today we are
21 merely talking about the two orders are classified.
22 The access authorization we addressed at the previous
23 conference. So we're talking just about the two
24 orders issued to NFS and BWXT, I just want to make
25 sure that's correct.

1 MS. CURRAN: We just don't know, we're not
2 privy to whether there is also a Category I order with
3 respect to access.

4 CHAIR YOUNG: Well, I actually have a
5 question maybe for the staff, but let me throw it out
6 there for anyone who wants to speak to it. Since the
7 11.11 and 11.15 are under the heading "Requirements
8 for special nuclear material access authorization", my
9 question is, since we're talking about special nuclear
10 material access, does that take it into Category I?

11 MR. FERNANDEZ: Yes, and that is why the
12 Licensee has requested an exemption from these
13 provisions of the regulations.

14 CHAIR YOUNG: The reason I ask that is
15 because I thought what you said a minute ago -- I
16 thought you were referring in what you said a minute
17 ago, to the safeguards documents that relate to power
18 plant standards as opposed to orders that relate to
19 Category I standards.

20 MR. FERNANDEZ: The orders that we're
21 discussing today with regard to the need to know
22 determination that we're trying to make, as I
23 understand it, it's two orders we're talking about
24 two, one issued to NFS and one issued to BWXT, and
25 both of those orders concern physical security. So I

1 don't know how those two orders would elucidate any
2 further regarding access authorization.

3 CHAIR YOUNG: Okay. What I'm confused
4 about is I thought that what you were referring to in
5 your statement a moment ago was an order or orders
6 that dealt with power plants and not Category I
7 facilities or special nuclear material. Did I
8 understand you correctly or incorrectly?

9 MR. FERNANDEZ: I think I was referring to
10 Ms. Curran's argument, and I think, yes, she was
11 referring to the orders which we discussed earlier in
12 the proceeding, in the other security portion of this
13 proceeding. And at that point in time, we did address
14 access authorization with regard to the orders for
15 nuclear power plants.

16 CHAIR YOUNG: So, what you're saying is
17 that the standards insofar as they have been changed
18 since 9/11 with regard to special nuclear material
19 access authorization, those standards are contained in
20 safeguards information or in classified information?

21 MR. FERNANDEZ: There has been no change
22 in the standards applicable to access to strategic
23 special nuclear material since 9/11. There were no
24 orders -- and by virtue of an order, the Commission
25 cannot rescind or amend its regulations published for

1 notice and comment unless the order is issued to a
2 particular licensee.

3 CHAIR YOUNG: But didn't you just say that
4 they had been revised through an access authorization
5 order? I see you shaking your head. I'm asking him
6 a question. I thought that's what you said earlier,
7 and that's what I'm trying to clarify, is what you
8 said and what you intended to say.

9 MR. FERNANDEZ: There was an access
10 authorization order issued to Catawba as a nuclear
11 power plant Part 50 licensee post September 11th, the
12 same as all the other reactors.

13 CHAIR YOUNG: But what you were referring
14 to was an upgrading of the requirements found in
15 Section 11.11 --

16 MR. FERNANDEZ: No, I was not.

17 CHAIR YOUNG: Well, that's what I thought
18 we were talking about.

19 MR. FERNANDEZ: Well, I'm sorry I gave you
20 that impression, but that's not the case.

21 CHAIR YOUNG: Okay. Was that what you
22 were talking about -- that's what I thought you were
23 talking about, that the standards under 11.11 and
24 11.15 you were arguing had been revised after 9/11.
25 I thought that's what you were saying, which then led

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1 Mr. Fernandez to say those had been changed by the
2 access authorization order. Did I miss that whole --

3 MS. CURRAN: We find it hard to believe
4 that the NRC hasn't upgraded access authorization for
5 Category I facilities since September 11th.

6 CHAIR YOUNG: Is that what you were
7 talking about?

8 MS. CURRAN: Yes.

9 CHAIR YOUNG: Okay. So we all know what
10 we're talking about, and Mr. Fernandez is saying that
11 there has been no change since 9/11 for access
12 authorization for special nuclear material. Did you
13 want to clarify something?

14 MR. FERNANDEZ: No.

15 MS. CURRAN: I guess I would like a
16 clarification. Does that mean there was no change for
17 the NFS facility or the BWXT facility?

18 MR. FERNANDEZ: I believe that answering
19 that question would actually ask me to disclose the
20 substance of the orders issued to those facilities,
21 and at this point in time I don't believe that we can
22 do that.

23 MS. CURRAN: Well, now I think we're
24 playing a semantic game. I think when Mr. Fernandez
25 says there's been no change, he means the regulation

hasn't changed. That doesn't mean that the access control requirements for the two plants that received these orders hasn't changed. That's what I'm hearing.

MR. FERNANDEZ: Well, since we are concerned with Catawba in this proceeding and not NFS and BWXT and the requirements that apply to those facilities are the ones that are promulgated in the regulations, I assume that we're not going to be litigating what's in the content of the orders in this proceeding.

CHAIR YOUNG: Let me see if I can understand a couple of things -- and any of the security people, if I start to go over the line, stop me. The statement that Duke seeks an exemption from the NRC-U and NRC-R special nuclear material access requirements on the ground that it is unnecessary, I'm assuming nobody disputes that.

People are conferring.

I have in my notes that with regard to that statement on exemption that Duke was seeking from the NRC-U and NRC-R special nuclear material access requirement, that the staff said those requirements are in the public domain found at 10 CFR 11.11 and 11.15.

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1 MR. FERNANDEZ: That's correct, Your
2 Honor.

3 MR. REPKA: We agree with that as well.

4 CHAIR YOUNG: And you don't dispute that
5 you are seeking an exemption from those requirements.

6 MR. REPKA: From the requirements for NRC-
7 U and NRC-R, that's correct. This is a quotation from
8 the security --

9 CHAIR YOUNG: They are found at 11.11 and
10 11.15, we've been told.

11 MR. FERNANDEZ: Yes, Your Honor.

12 CHAIR YOUNG: Those refer to Category I
13 facilities or situations because the definition of
14 special nuclear material takes it into Category I, as
15 I understand it. Am I correct in assuming that?

16 MR. FERNANDEZ: That's correct, Your
17 Honor.

18 CHAIR YOUNG: All right. What I
19 understand BREDL to be saying is that they understand
20 that since 9/11 those standards have been raised, and
21 I understand the staff to be saying that they have not
22 been raised, and I'm assuming by that statement the
23 staff means they have not been raised with regard to
24 any Category I facility.

25 MR. FERNANDEZ: I don't know if I can

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1 answer that question, Your Honor. They have not been
2 raised for the facility that's the subject of this
3 proceeding.

4 CHAIR YOUNG: The facility that is the
5 subject of this proceeding is not a Category I
6 facility.

7 MR. FERNANDEZ: That's correct, it is not.

8 CHAIR YOUNG: But the question relates to
9 requirements that are applicable only to Category I
10 facilities, which Duke is seeking an exemption from
11 because absent an exemption the formula quantity of
12 the plutonium would put them into Category I.

13 MR. FERNANDEZ: Yes, Your Honor.

14 CHAIR YOUNG: Okay. So, what you're
15 telling me is you don't know whether you can answer my
16 question, and I don't know whether you're saying that
17 because you don't know the answer, or because you
18 don't want to get into classified information.

19 MR. FERNANDEZ: Well, I don't want to get
20 into classified information. The contents of the
21 orders issued to NFS and BWXT I'm not going to
22 disclose in this proceeding because they are not
23 relevant to this proceeding.

24 CHAIR YOUNG: Do you know the answer to
25 the question, though, whether the standards for

Category I facilities with regard to NRC-U and NRC-R special nuclear materials have been raised since 9/11. That's the issue that is before us.

MR. FERNANDEZ: Yes, I know the answer to the question.

CHAIR YOUNG: You know the answer to the question.

MR. FERNANDEZ: Yes, we know the answer to the question.

CHAIR YOUNG: Okay. Your hesitancy in answering the question is not because you don't know the answer, it's because answering the question would constitute classified information. Is that the reason you are saying that?

MR. FERNANDEZ: If I answer what you are asking me right now, you are asking me to disclose the contents of the orders issued to those facilities, and that's why I'm not willing to do so at this time.

CHAIR YOUNG: So the answer is yes, it would constitute classified information.

MR. FERNANDEZ: It is in a classified document, the information that you are asking.

CHAIR YOUNG: Okay. We may need some guidance here because this is --

MR. REPKA: May I comment on that?

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1 just not the case. The issue raised by the exemption
2 is not what the requirements are for BWXT and NFS, the
3 issue is whether Catawba is anything like those
4 facilities, and the basis for the exemption is they
5 are not.

6 CHAIR YOUNG: You are evading my question.
7 My question is, if you're asking for an exemption from
8 these requirements, and if these requirements have in
9 any way been made more stringent across-the-board for
10 Category I facilities since 9/11, then absent the
11 exemption I think it would be a reasonable presumption
12 that you would be held to those raised standards.

13 MR. REPKA: If somebody determined that
14 (a) they needed to raise standards, which we don't
15 know, and (b) that it should be applied "across-the-
16 board", which we don't know, but if they said that,
17 then we would need an exemption, but nobody has said
18 that. In the issue before us in this application is
19 does there need to be any raised standards beyond
20 what's in 11.11 and 11.15, or beyond what's required
21 for a Part 50 facility, and that's the whole point of
22 what the burden is on the Petitioner right now, which
23 is if they have a reason that they believe that (a)
24 11.11 and 11.15 should be applied and an exemption not
25 given, they should state it. If they have a reason to

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1 believe that something even more than those public
2 requirements must be applied in the access
3 authorization arena, they should state it. And if
4 their expert can provide a basis for that, now is the
5 time.

6 CHAIR YOUNG: We're getting into the
7 merits of your argument and it's not your turn yet on
8 that. I was trying to clarify a real specific thing
9 here that's sort of fundamental to my understanding
10 anyway of what's going on. And, again, I guess it
11 goes back to the staff, and I don't know whether
12 you'll answer me or not at this point. Can the staff
13 answer this question -- have all Category I facilities
14 been subjected to raised requirements in light of 9/11
15 in the same way that power plants have been required
16 to comply with raised requirements after 9/11?

17 MR. FERNANDEZ: After 9/11, CAT-I
18 facilities have different requirements than they did
19 before 9/11.

20 CHAIR YOUNG: And the way you said that
21 sentence leads me to conclude that there are some
22 across-the-board requirements that have been changed
23 in light of 9/11, for all Category I facilities.

24 MR. FERNANDEZ: That is not correct. When
25 the Commission acts in the form of issuing an order,

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1 it issues it to the specific licensee to whom, so it
2 cannot issue --

3 CHAIR YOUNG: I understand that, but what
4 we're talking about is content.

5 MR. FERNANDEZ: I think this is very
6 important, so let me finish my thought. So the
7 Commission, by issuing these orders post 9/11, could
8 not have changed prospectively the requirements for
9 licensees under Part 11 or Part 73. When a licensee
10 comes into the door and says -- and a very good
11 example, it's a new case, LES -- the staff has a new
12 application before it -- and it's for what could
13 possibly be a Category I facility. The requirements
14 that apply to the facility are what's on the books,
15 what's been promulgated through notice and comment.
16 The orders that were issued to the individual
17 licensees did not in any way change the requirements
18 for any prospective individuals that may come seeking
19 --

20 CHAIR YOUNG: Mr. Fernandez, I'm going to
21 interrupt you because I asked you a real simple
22 question and I'd really like to get an answer to it
23 because it's sort of fundamental to my understanding
24 of what we're talking about here.

25 The question is this: I understand that

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1 you're saying that the Commission issues separate
2 orders to each facility, but if, in fact, the contents
3 of all those orders is basically the same for all
4 Category I facilities, that is what I'm getting at.

5 MR. FERNANDEZ: And I think the way you
6 are styling your question now is asking me to address
7 the contents of the orders, and I'm not willing to do
8 that at this time.

9 CHAIR YOUNG: That's what I've been trying
10 to get at for some time. My question to you is this:
11 Has not the Commission, in raising or changing the
12 standards for Category I facilities after 9/11, have
13 not the content of those changes been essentially the
14 same across-the-board for Category I facilities, just
15 as parallel changes in requirements for nuclear power
16 plants were made after 9/11?

17 MR. FERNANDEZ: Again, you're asking me to
18 comment on the contents of the orders, and I can't do
19 that.

20 CHAIR YOUNG: I don't know whether we want
21 to go further with that, I think that's a significant
22 issue here.

23 MS. CURRAN: I'd like to.

24 CHAIR YOUNG: I don't know whether that
25 will require us to go into a more closed session.

1 MR. FERNANDEZ: Your Honor, before we
2 would do that, we believe that you'll be asking us to
3 disclose the contents of the orders prior to you
4 making a need to know determination for Dr. Lyman and
5 Ms. Curran, and we would be unwilling to proceed any
6 further in the proceeding if that is the intent of the
7 Board.

8 CHAIR YOUNG: In other words, to answer
9 the question as to whether there's any common across-
10 the-board characteristics of any enhanced requirements
11 post 9/11 for Category I facilities?

12 MR. FERNANDEZ: Yes, we believe that in
13 order for us to answer that question, we'd be going
14 into the substance of the order prior to your making
15 a need to know determination for Ms. Curran and Dr.
16 Lyman.

17 CHAIR YOUNG: And I want to be careful
18 about those requirements, but let me ask you another
19 question, and you can confer if you need to, and any
20 of the security people can advise us on this. Is that
21 something that could be answered hypothetically,
22 assuming that scenario and assuming alternatively that
23 there are different enhancements?

24 MR. FERNANDEZ: We would be unwilling to
25 do that at this point, to answer a hypothetical.

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1 CHAIR YOUNG: Okay. Let's get back to
2 BREDL for now.

3 JUDGE ELLEMAN: I would have a question,
4 but it's moving away from the issue you were pursuing.
5 Ms. Curran, I can appreciate why it would be helpful
6 for you to have the information you are requesting in
7 formulating your contentions. I think my question is
8 parallel to the one Dr. Baratta asked. Could you not
9 formulate contentions in a way that said if a force
10 consisted of certain characteristics, then we would
11 find the exemptions posed by Duke to be unsatisfactory
12 and inadequate for the following reasons, which you
13 would list. And then you could alternatively say, but
14 if the force were reduced to something else, then we
15 would agree that what they have done is acceptable and
16 we could live with it. Now, admittedly, this is
17 cumbersome.

18 You wouldn't know whether your forces were
19 realistic or not, but we would know. And so we would
20 be in a position to judge the validity of your
21 contention even though this is a rather obtuse way of
22 having to pose it. Do you think this is possible? I
23 see Dr. Lyman smiling.

24 MS. CURRAN: Well, I could tell you my
25 answer. This is a little hard because we don't know

1 what these standards look like, but there's a certain
2 amount of subjective judgment that goes on when you're
3 evaluating the compliance of an application with a
4 standard. You have to interpret the application and
5 you also have to interpret what the standard means,
6 and there's an element of unfairness if only one party
7 has the standard and is able to interpret it, and we
8 can't do the same because often two different people
9 have a different interpretation of the same standard.

10 So, there's a measure of accountability of
11 fairness that's provided from the parties being able
12 to all have access to the same language and see if
13 they agree on what it means.

14 CHAIR YOUNG: If I could follow up, let's
15 assume for a minute that if you were to do what Judge
16 Elleman and Judge Baratta talked about, if you were
17 to, in effect, propose what you think the standard
18 should be in the current threat environment, and there
19 was not a chance -- either the staff and Duke could
20 not then come back and completely knock you out of the
21 water by saying no because this is not what the
22 standard in fact is, or if they said something to that
23 effect, you would then have the right to file an
24 amended contention, what would keep you from posing
25 measures that, in effect, would be proposing what the

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1 .. standard should be?

2 MS. CURRAN: This sounds like the case
3 could go on forever and ever.

4 CHAIR YOUNG: Well, apart from that, just
5 logically, what would keep you from proposing measures
6 that would, in effect, establish what you think the
7 standard should be?

8 MS. CURRAN: It just would seem like such
9 an exercise in futility, in a way. We'd eventually be
10 formulating our own regulation, kind of running up the
11 flagpole and seeing if anybody else agreed with us.

12 CHAIR YOUNG: Well, let's get it back on
13 a more practical level. If we know how the material
14 is going to be delivered to Duke, and how after they
15 accept delivery it's going to be moved to the spent
16 fuel pool, it's going to be in assemblies, they're
17 going to weigh X-amount, you're going to need various
18 measures to lift it, et cetera, what would keep you
19 from saying, "We think in order to prevent the theft
20 and diversion of this material, you need to do these
21 things in addition to those measures that Duke is
22 proposing. We don't think that Duke is doing enough.
23 We think you need to proposed these additional
24 specific concrete practical measures". What would
25 keep you from specifying what those concrete practical

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1 additional measures would be?

2 MS. CURRAN: What if we guess too low?

3 You know, we are the --

4 CHAIR YOUNG: Well, but --

5 MS. CURRAN: Can I just finish my thought?

6 CHAIR YOUNG: Yes.

7 MS. CURRAN: We're entitled to some kind
8 of demonstration that the application meets the
9 requirement. We're not the NRC. We don't have the
10 resources that the NRC has to devise what the
11 appropriate design basis threat is. Suppose we come
12 up with a threat that's lower than what the NRC says
13 it is, then we haven't had a chance to determine
14 whether what this agency says is the credible threat
15 is being met by this application. That's what we are
16 looking for, is a chance to determine whether -- this
17 is an agency with a lot of resources, that has spent
18 the last two years reviewing its regulations top to
19 bottom -- those were the words that Chairman Meserve
20 used -- to re-evaluate security requirements after
21 9/11. We don't have the resources to do that, but we
22 are entitled to some kind of opportunity to see
23 whether this application meets that threat.

24 CHAIR YOUNG: Okay. Let me pose another
25 question to you. I understand your argument that

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1 without knowing what the standards are it is hard to
2 address them, but when you talk about taking a guess -
3 - for contentions, you are required to have some basis
4 or some factual support or expert opinion -- and so
5 totally apart from a contention that would be based on
6 noncompliance with a standard that you know, it would
7 seem that Duke's argument that you should be able to
8 address the specific measures that they are proposing
9 and, through the expertise that you do have, to
10 describe what is wrong with those standards or how
11 they should be strengthened or how additional measures
12 should be added to them, that's in a separate logical
13 category of a type of contention. And I think that
14 what we're all expressing here is a desire to have
15 better understanding of why you should not be able to
16 at least suggest why the specific measures that Duke
17 proposes are not enough to counter theft or diversion
18 of the material by terrorists or whoever. I mean, we
19 all hear the news and read the newspapers on what
20 types of measures terrorists use, and you say you have
21 an expert who can address these kinds of issues, so
22 why shouldn't you be able to criticize those standards
23 and suggest why they don't go far enough -- I mean,
24 those measures that Duke proposes, and tell us why
25 they don't go far enough.

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1 MS. CURRAN: Well, it would be
2 inconsistent with all of the years of NRC precedence
3 would say the NRC sets the standards here, not the
4 companies, not the --

5 CHAIR YOUNG: Well, I'm talking about a
6 different issue there. I'm saying, okay, I can
7 understand how the type of contention you're talking
8 about would challenge whether Duke has met standards,
9 Category I standards. That's the type of contention
10 you're talking about.

11 What I'm talking about is another type of
12 contention which would say the specific things that
13 Duke is proposing to do are not enough in our expert
14 opinion to protect against the kinds of threat of
15 theft or diversion from Al Qaeda, such as Dr. Lyman
16 mentioned.

17 MS. CURRAN: In effect, we'd be saying
18 because you will not tell us what the word "enough"
19 means, we will tell you what we think the word
20 "enough" means, and if we happen to get it right, then
21 maybe we'll be able to litigate this contention. I
22 guess we maybe should leave it at that. I think
23 that's impossible. I think that we would have to drop
24 the contention and appeal it to Federal Court because
25 I don't think it can be done that way, and I don't

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1 think it's fair to ask us to do it that way, to change
2 years of NRC precedent of this is the agency sets the
3 standards, and your opportunity here is to determine
4 whether the standard is met.

5 I just want to also take this from another
6 angle which I think is important to understand, and
7 get back to some things Mr. Fernandez was saying.
8 What I understand the staff to be saying here -- and
9 Duke also -- is that those two orders that were issued
10 to NFS and BWXT are plant-specific orders. There has
11 been no industry-wide upgrade to Category I security
12 standards since September 11th. There have only been
13 two plant-specific orders. You will not find any
14 reliance by Duke on upgraded Category I standards in
15 its security plan submittal because Duke did not
16 consider itself required to address such things since
17 there were only these two plant-specific orders. That
18 may be true, but I want to refer you back to what is
19 the standard for an exemption, and that is described
20 or paraphrased on page 2 of the memo from Joseph Shea
21 that we were discussing earlier, the January 29th
22 memo. The general standard for an exemption -- and
23 it's similar language that appears in all the
24 standards --

25 CHAIR YOUNG: Where are you reading from?

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MS. CURRAN: I'm reading on page 2, the end of the second paragraph, the last sentence of that paragraph says "Exemptions will be granted only if they are authorized by law and will not constitute an undue risk to the common defense and security".

Now, if Duke is going to come in and argue that this exemption is authorized by law in the sense that only the security regulations that are published in this book are applicable, we are going to argue, whether or not that is the case, this exemption poses an undue risk to the common defense and security because it does not address post 9/11 security upgrades that have been required by the Commission for every single operating Category I facility. And it is a fiction to say that this license application, this exemption application, can be judged adequate to protect the common defense and security if it completely ignores what has been learned after September 11th.

So, what is in the content of those two enforcement orders and the content of this also, I believe, confidential classified aspects of the existing Category I requirements, the ones in the book, on the number of intruders, we need to be able to see those standards in order to evaluate what

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1 constitutes undue risk to the common defense and
2 security. That concept has changed, and the
3 Commission has said it over and over again in public
4 pronouncements, the concept has changed as a result of
5 9/11. And if we're going to make -- there is an
6 attempt here by the staff and by Duke to pretend that
7 9/11 never happened and is not applicable to this
8 particular license application, and that can't be kept
9 out.

10 CHAIR YOUNG: If we were to say that you
11 should start by making specific criticism about
12 measures that Duke proposes, practical concrete
13 criticism relating to the way the material is going to
14 be packaged, if you will, and where it's going to be
15 kept and so forth, and what kind of equipment would be
16 required to remove it, and how heavy it is, and so
17 forth, if you were to start by making specific
18 criticisms in any contentions you submitted to Duke's
19 proposed measures, and then an argument were made that
20 your criticisms were not valid because they were not
21 in compliance with requirements for Category I
22 facilities, and then if that occurred you were then
23 permitted to see the Category I standards and address
24 contentions to that response, where would the
25 unfairness lie? Where would any unfairness lie, if

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1 any?

2 MS. CURRAN: I guess my first question is
3 why if later we were found to have a need to know, why
4 wouldn't we have a need to know now? The need to know
5 would be because we guessed wrong?

6 CHAIR YOUNG: Well, let me put it to you
7 this way. If we are all trying to be as conscious as
8 possible of keeping the type of information that
9 hostile forces might misuse, keeping all that
10 information as close as possible, and keeping in mind
11 that neither you nor, as I understand it, Duke has
12 that information now, it might be argued that there's
13 a value in starting with the practical issues, and
14 then if the type of defense, if you will, that you are
15 proposing of someone coming back and saying "Well, you
16 guessed wrong, it doesn't match the standards", and
17 then you were permitted to reply to that type of
18 response through access to the standards, then the
19 interest in minimizing exposure would be protected,
20 and it would be in light of the very practical ability
21 of anyone to challenge the concrete specific practical
22 measures that we do know.

23 MS. CURRAN: Okay. You know, I think you
24 get to the same place whichever way you go because
25 supposing we guess right, then there will be some kind

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1 of admission from the other side, from the staff, that
2 we've guessed right, in which case we will have
3 deduced what the standard is and we can say to
4 ourselves, "Well, we know it".

5 MR. FERNANDEZ: Well, the response would
6 be classified and they couldn't even see the response.

7 MS. CURRAN: Well, yes, I guess there's
8 another question, would we be allowed to see the NRC
9 staff's response because --

10 CHAIR YOUNG: Let's assume you would.

11 MS. CURRAN: Then we'd get to a place
12 where we effectively had the information, if someone
13 would confirm to us --

14 CHAIR YOUNG: Really, what I'm asking you
15 to address is any practical reasons why proceeding in
16 the manner that I'm talking about would not work.

17 MS. CURRAN: Yes, it is incredibly
18 cumbersome, and we'd get to the same place anyway. I
19 think when you make a need to know determination,
20 there has to be a certain amount of consideration of
21 the -- you're balancing -- if you're going to
22 recognize that the Intervenor has a right to a hearing
23 on the adequacy of the license application, and you're
24 going to evaluate the need to know in light of the
25 need to go forward with some kind of a hearing, then

1 kind of spending huge amounts of time knocking around
2 in the dark doesn't seem to balance out. And in the
3 end we may deduce what is being kept from us anyway.

4 I guess I wonder what is the point of
5 getting a security clearance, what's the point of
6 signing a nondisclosure agreement -- I mean, who gets
7 to do this, the Nuclear Energy Institute? Why doesn't
8 BREDL get to do it? What is wrong with applying this
9 process that's been in existence for some years now
10 where if someone applies for a security clearance,
11 they are investigated, they sign an agreement that
12 they won't disclose information, and then -- the staff
13 hasn't indicated that there's any circumstances under
14 which we might be allowed to see this information.

15 CHAIR YOUNG: I think I'm going to ask you
16 at this point to try to wrap up in the next few
17 minutes and just point out two things.

18 Is this someone -- is he on the list? If
19 he's not on the list --

20 MR. MARTIN: I'm on the list, the guard
21 just admitted me.

22 CHAIR YOUNG: You are?

23 MR. MARTIN: Bob Martin.

24 CHAIR YOUNG: Thank you. I want to let
25 you finish your argument, but I do want to ask you to

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1 just touch on a couple of things. You talk about
2 guessing in the dark, and I want you to have full
3 opportunity to address the issue of applying Dr.
4 Lyman's expertise to very practical measures that
5 we're all aware of. And, two, I want to just remind
6 you that today we're here to talk about the classified
7 information and not the safeguards information that
8 your arguments about NEI and so forth apply to, which
9 is a totally separate issue. To my knowledge, nothing
10 like that has been provided with regard to the
11 classified information. And the reason I'm
12 emphasizing this practical aspect is because I want
13 you to have full opportunity to address it. So, if
14 you could wrap up in the next five minutes.

15 MS. CURRAN: I just want to point out that
16 Duke, Cogema, Stone & Webster got a security clearance
17 even though -- they received the design basis threat
18 guidance for NFS and BWXT even though the staff has
19 told DCS that the revised Category I guidance isn't
20 going to be applied in the licensing proceeding.

21 CHAIR YOUNG: We don't have that situation
22 here, I don't think. And, again, I appreciate what
23 your arguments are, but we really are talking about
24 need to know at this point, so let's try to keep on
25 focus.

1 MS. CURRAN: In our view, it is very
2 fundamental, the need to know the standards against
3 which this application is to be judged. In our view,
4 it would be arbitrary and capricious for the NRC to
5 require us to guess at what those standards are. It
6 would be extremely inefficient. It would be
7 inefficient for BREDL. It would be inefficient for
8 all of the other parties, and not just inefficient,
9 but would it lead to the right result. Any result of
10 such a process would always be guesswork, and there's
11 a certain amount of accountability that this Agency
12 has to have. And by requiring us to go through a
13 proceeding in which the proceeding never gets any
14 better than guesswork is not fair, or if, ultimately,
15 as you suggested a hypothetical, down the road it
16 might be found that the guesswork procedure didn't
17 work and we'd have to get the security clearance
18 anyway, the need to know determination anyway, what
19 I'm urging on you now is that that's very likely to
20 happen because it is very difficult to guess because
21 the Union of Concerned Scientists, despite being a
22 very expert organization, does not have the resources
23 of the NRC staff, has not spent the last two years re-
24 evaluating the NRC security program and a design basis
25 threat, and is not going to be able to approximate

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1 what the NRC has done.

2 And, finally, in order for us to address
3 the standard for an exemption as what would be an
4 undue risk to the common defense and security, that
5 the most relevant information as to whether that
6 standard is met is what the NRC itself considers to be
7 undue risk. If we don't know that, then we don't have
8 the most important, most relevant information in the
9 case.

10 CHAIR YOUNG: One last question. If you
11 had that information, if you had the Category I orders
12 and what they said about Category I requirements after
13 9/11, if you had those, and you had the safeguards
14 information about the enhancements for power plants
15 post 9/11, and you have the information about what
16 Duke is proposing, what would you do with it in terms
17 of the kind of argument you would make that --
18 wouldn't you, in that circumstance, also be required
19 to address, practically speaking, how Duke's measures
20 should be X, Y or Z point along the range between the
21 power plant requirements and the Category I
22 requirements? In other words, I would assume that you
23 would make more of an argument than just saying Duke
24 should be held to the Category I requirements. You
25 would say why and you would go into the practical

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1 specifics, right?

2 So, my question is, what would you do if
3 you had those materials that would be that much
4 different than what you would do if you were
5 challenging the specific requirements or the specific
6 measures that you do know in terms of addressing what
7 is safe?

8 MS. CURRAN: Well, for one thing, I'm not
9 sure that we would accept that an exemption was
10 appropriate. The first thing we'd do is look at what
11 the Category I design basis threat is and evaluate the
12 reasons that Duke and the NRC staff have proposed to
13 exempt Duke, and determine whether that's appropriate
14 in light of what we now know about the design basis
15 threat. So that would be the first thing that we'd
16 look at.

17 JUDGE BARATTA: I wanted to ask you a
18 question with respect to some of those proposed
19 exemptions. There are some, or there is a rationale
20 that was laid out in the submittal which you do have -
21 - I apologize for getting that confused with the
22 security plan itself before -- and it would seem at
23 least a technical analysis whether or not the required
24 measures that are in the publicly available document
25 and what Duke has proposed as an equivalent are equal

1 -- looking at it from a strictly what I'll call
2 technical standpoint. Is that not possible, or am I
3 missing something?

4 DR. LYMAN: Well, one, it's not possible
5 because as far as the lower standard, the safeguards
6 information would have to be upgraded design basis
7 threat for power reactors. We don't have that. So,
8 comparing it to what's on the books is relevant, but
9 with regard to the higher standard, again, Category I,
10 when Duke receives this material it will be a Category
11 I facility, it will contain or store and use Category
12 I quantities of plutonium. That means that they are
13 obligated to protect against the design basis threat
14 procedure for special nuclear material, and that is
15 still what the standard is going to be.

16 We maintain that the same -- the de facto
17 change in the design basis threat for the Category I
18 fuel cycle facilities should also apply. We don't
19 know what they are, but there's no logical basis --
20 there's no basis in the NRC regulations for
21 distinguishing between the fuel cycle facility and
22 Catawba once it stores Category I quantities of
23 material. It's true that if the staff's position that
24 there need not be any upgrade -- let's say that the
25 exemption wasn't granted -- that Duke could still only

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1 conform to pre-9/11 standards for Category I
2 facilities, that was the position, then I agree with
3 you, but that would be presupposing the outcome of the
4 proceeding.

5 JUDGE ELLEMAN: Did you really say that
6 you see no difference between a Category I fuel
7 fabrication facility and what Duke is doing in terms
8 of security?

9 DR. LYMAN: I'm saying there's no basis in
10 the regulations for establishing that difference.

11 JUDGE ELLEMAN: But in the actuality of a
12 security risk, would you see a clear distinction
13 between those two facilities?

14 DR. LYMAN: Well, that would be my
15 speculation. It's simply not in the regulations.
16 They are free to petition for a rulemaking, I would
17 think, if they think that there is a basis, but that's
18 something that's simply not -- it's not appropriate
19 even to discuss. It's not a distinction in the
20 regulation.

21 If you want my personal opinion, which I
22 don't think is relevant, but I do not see a practical
23 difference based on international judgments, the
24 International Atomic Energy Agency does not
25 distinguish between separated plutonium and fabricated

1 MOX fuel with respect to the conversion time, which
2 would be the time it would take an adversary to
3 convert that material to a nuclear weapon -- those
4 are both regarded as direct-use materials, according
5 to the International Atomic Energy Agency, and I stand
6 by that judgment.

7 CHAIR YOUNG: You're saying that the IAEA
8 standards would be the same for plants that use MOX
9 fuel and fabrication facilities, even taking into
10 consideration the weight, cumbersomeness, and so
11 forth, issues that have been raised before us?

12 DR. LYMAN: I'm saying yes, with regard to
13 IAEA safeguards, which isn't the subject of this
14 exemption because we're not talking about Part 74
15 here, or Part 75 for that matter, but IAEA does not
16 distinguish in its safeguards application between MOX
17 fuel, unirradiated MOX fuel and plutonium. Safeguards
18 inspections are conducted once a month whether it's
19 plutonium oxide in cans or if it's fuel assemblies.
20 With regard to physical protection, the IAEA, the
21 International Convention on Physical Protection which
22 the U.S. is a party to, utilizes category definitions
23 identical to NRC regulations, which do not distinguish
24 between material form plutonium and so does INF CIRC
25 225, Rev 4, which is IAEA's recommendations for --

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1 CHAIR YOUNG: Say that over again?

2 DR. LYMAN: I'm sorry -- I-N-F C-I-R-C

3 225, Rev 4.

4 CHAIR YOUNG: And that, again, takes into
5 account -- that includes plants that have MOX fuel
6 assemblies?

7 DR. LYMAN: Yes. There's no distinction
8 in the IAEA physical protection recommendations
9 depending on the material form of plutonium. It's a
10 Category I quantity. It's a Category I quantity
11 whether it's in a MOX fuel assembly or not.

12 JUDGE BARATTA: You mentioned that they
13 don't make any distinction in the conversion of a MOX
14 fuel assembly into a weapon versus conversion of
15 material from a fuel enrichment facility. Did I hear
16 you correctly?

17 DR. LYMAN: As a practical matter, no. I
18 think it's -- that sets the basis for safeguards
19 inspections as what they consider the conversion time
20 to be, and the rate of inspections is the same for
21 fresh MOX fuel as it is for plutonium oxide.

22 CHAIR YOUNG: Anymore questions?

23 JUDGE BARATTA: No.

24 JUDGE ELLEMAN: No.

25 CHAIR YOUNG: Thank you for taking all

[REDACTED]

1 this time to answer all our questions. I know for me
2 it helps me get a better understanding, and that goes
3 for all of you. Anything further from BREDL?

4 MS. CURRAN: No. We'd like to ask for a
5 short break.

6 CHAIR YOUNG: Okay. Can everyone just
7 stay out in the lobby area, or if you need to go
8 anywhere else, we need to arrange for an escort. Does
9 anyone need to go anywhere else besides the lobby
10 area?

11 (No response.)

12 Okay. Be back in ten minutes.

13 (Whereupon, a short recess was taken.)

14 CHAIR YOUNG: All right, everyone ready?
15 I think it's your turn, Mr. Repka, or Mr. Wetterhahn,
16 whichever one.

17 MR. REPKA: It will be me. Thank you. I
18 think our position is already stated as a matter of
19 record in the written responses, and I don't want to
20 repeat all of that again. What I want to do is hit a
21 few of the high points to make sure that the Board
22 understands what our position is, and respond to any
23 questions. And, second, I would like to address some
24 of the things that I've heard here this morning
25 already.

1 The issue before us is one of need to know
2 with respect to, as we understand it, only two
3 specific classified documents, the orders issued to
4 NFS and BWXT. There are no other documents is the way
5 we understand it.

6 First, the need to know is -- I just want
7 to be very clear -- is a completely separate
8 prerequisite to access from the clearance, and just
9 because there's clearance does not give need to know.
10 They are two very distinct prerequisites, and I think
11 that sometimes we've heard arguments that amount to
12 "because we have clearance, we're entitled", and
13 that's simply not true.

14 The second thing I want to respond to at
15 the top is at the beginning of Ms. Curran's argument,
16 Judge Young, you asked Ms. Curran to address the
17 question of Duke's reliance on the information being
18 sought, which was the basis for the earlier decision
19 with respect to safeguards information. While we
20 disagree with that decision, it in any event is a line
21 of logic that is not applicable here because Duke
22 clearly did not rely upon the information in the two
23 orders. Duke does not have access to that information
24 and does not know the contents of it. While Mr.
25 Nesbit has an "L" clearance, he is not familiar with

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the contents of those documents, and they were not the basis for the exemption request.

I think, fundamentally, what I've heard this morning and throughout has been a characterization of these documents as the "standards", and I think that terminology has been used extremely loosely and I think, to be very clear, is the two orders to NFS and BWXT are not the standards. As a matter of law, the standards that apply in this situation to the MOX fuel assemblies are the standards of Part 73, which is a public document, and those requirements do not differentiate between a Part 50 facility and a fuel fabrication facility, as a matter of law, and that's precisely the reason that Duke is asking for an exemption, and it is the basis for the exemption that is the subject of the hearing and would be the subject of contentions. Ultimately, that's a factual issue and I want to come back to that.

CHAIR YOUNG: Back up and say what you said again. You said certain standards do not differentiate between Part 50 and Category I?

MR. REPKA: The regulations in Part 73 do not differentiate between -- let me say it a different way -- based upon the form of the material, that it's

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[REDACTED]

1 at a fuel fabrication facility versus being in a fuel
2 assembly. That's why the regulations, absent the
3 exemption, would apply. And it's the basis for the
4 exemption that is the subject of this proceeding. So,
5 all of Dr. Lyman's references to what the IAEA
6 standards may do are really irrelevant because the
7 fact of the matter is, without conceding that anything
8 that he says is true there, the reality is the legal
9 standards that apply here are the standards in the
10 regulations Part 73, they are not the requirements
11 issued to NFS and BWXT. As a matter of administrative
12 law, the generic rules apply absent an exemption,
13 which is the process Duke is following, or a specific
14 order imposing some additional standards on this
15 particular reactor or this particular application.
16 There is no order applying any additional requirements
17 right now.

18 If the Petitioners wanted some additional
19 requirements beyond those in the regulations that Duke
20 is applying for an exemption from, it would need a
21 basis for that and it would need to follow the process
22 to have that imposed on Duke, just as Duke is
23 following the required process to get an exemption,
24 and that process would be a waiver of the regulations,
25 for example, under 10 CFR 2.75(a), all of which is to

[REDACTED]

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say the standard in this case is not these two documents, and the repeated assertions that these two documents are the standards is simply not correct, as a matter of basic administrative law.

CHAIR YOUNG: Let me interrupt you there, and I think we understand at this point where our limits are in terms of talking about those two orders. But at the last argument when we were talking about the safeguards orders -- I know some arguments to the effect that you're making right now have been raised on appeal with regard to those orders as well -- but at the last argument when we were discussing those orders as, in effect, implicitly setting raised standards in the wake of 9/11, the argument that you're making now was not made and, as a practical matter, I believe that the discussion among all present more or less implicitly accepted that the safeguards orders, along with the guidance that went with it, effectively and practically raised the standards for power plants after 9/11.

So, to the degree that your argument today is changing that sort of implicit understanding, which I think everyone's argument -- no argument to the effect that you're making today was made then. And what I want you to address is are you saying something

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different should apply now, or are you saying you should have made that argument then and it applies across-the-board now, because obviously everyone can understand the difference between a regulation and an individual order, but I think last time when we were talking about -- and I think we all know about several situations where a lot of facilities have been issued orders that are -- I won't say the same -- but that do, in effect, raise standards after 9/11, there's a sort of practical reality that we're all aware of.

MR. REPKA: It is a different argument now because the context is different. Before we were looking at safeguards information which included specific orders issued to Part 50 facilities including Catawba, so those specific orders do apply to a Part 50 facility. You have to go on from there to address the separate question of whether or not that creates a need to know, but that is a separate issue.

The context today is two orders issued to Category I facilities, two fuel fabrication facilities, fuel cycle facilities, there is no order issued to Part 50 facilities, there is no order that applies to Catawba.

So, what we're dealing with right now is the regulations that would -- the generic regulations

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1 that are established by rule that would apply absent
2 an exemption. And that's the issue that we're here
3 talking about, is the exemption from the public
4 generic requirements. Does that explain --

5 CHAIR YOUNG: I understand what you're
6 saying and I won't go down the same road we went down
7 earlier because enough has probably been said on that.

8 MR. REPKA: Now, turning to the specific
9 exemption request, this is the point I made earlier.
10 The issue and the subject for proposed contentions is
11 should the generic rules apply to Catawba under the
12 circumstances, and certainly the very basis for the
13 exemption in the security plan submittal is Duke's
14 belief that there is no reason to apply all of the
15 requirements in Part 73 because of the very different
16 circumstances, that's inherent. And the exemption
17 concept is that compliance with all the particular
18 regulations that might otherwise apply is not
19 necessary to serve the purpose of the rule. So, an
20 exemption is the avenue.

21 Now, subject of contentions should be why
22 is that exemption not warranted? That's a factual
23 issue. And certainly a Petitioner with expertise,
24 could look at the security plan submittal, look at the
25 regulations, and determine why they think the

enhancements that are being made are insufficient under the circumstances.

I think, in effect, the Petitioners are hiding behind the regulatory overlay. They are hiding behind what regulations might apply, what are the design basis threat either for Part 50 facilities or for Category I facilities, but in reality what they are doing is avoiding the real question, which is is there any specific vulnerability? Is there any plausible scenario that they view as plausible, in which there could be theft or diversion of this material?

I think that gets to another issue here which is Dr. Lyman -- I may try to use his words -- he characterizes the security plan submittal as being an incremental solution to a major change in the threat. The threat is different, it is theft and diversion as opposed to sabotage at a Part 50 facility.

I think the security plan submittal directly addresses the fact and acknowledges the fact that theft and diversion is a threat applicable to Category I facilities that is not necessarily applicable to a Part 50 facility, and it is the very purpose of the security plan submittal to show why and how the potential for theft and diversion is

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1 addressed. And, again, if the Petitioners believe
2 that there is some way, some credible way in which
3 theft or diversion of this material could occur,
4 that's the subject of a contention.

5 Ms. Curran repeatedly talks about shooting
6 in the dark. It is not at all shooting in the dark,
7 it is shooting at the application that is before us.
8 They have access to the information. Shoot at the
9 application. Ms. Curran characterizes that concept as
10 going against the grain of years of Commission
11 jurisprudence, and I disagree with that completely.
12 The constant theme of Commission jurisprudence is that
13 the focus of a hearing is on the application and, in
14 effect, that's exactly what they have here. They have
15 the application. If there's a problem with it, let's
16 deal with that problem in a hearing.

17 At several points to try to support her
18 point, Ms. Curran referred to the memorandum that the
19 NRC staff has put together from Mr. Shea to Mr. Tracy
20 on his review plan for evaluating the physical
21 security protection measures needed for MOX fuel in
22 commercial reactors, and raised a number of specific
23 quotations and references within that document that I
24 want to refer to.

25 First, on page 2, in the second paragraph,

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1 she highlighted the requirement for an exemption that
2 states that "exemptions will be granted only if they
3 are authorized by law and will not constitute an undue
4 risk to the common defense and security". That
5 standard doesn't support her position on need to know.
6 In fact, it raises exactly the point here. If they
7 have a contention that says that they believe that the
8 proposal that's made would pose undue risk to common
9 defense and security, let's hear that. That's a
10 factual issue based upon a review of the application
11 and their expertise. That does not create a need to
12 know with respect to the two documents that we're
13 arguing about today.

14 The next thing on page 2, further down on
15 the page, she refers to the staff's conclusion that
16 the staff's assessment that the material is not
17 attractive to potential adversaries from a
18 proliferation standpoint, that also does not support
19 a need to know with respect to these two orders.
20 That's a conclusion based on the physical properties
21 of the material, not on any particular threat either
22 from a theft and diversion standpoint or a sabotage
23 standpoint. As an example, I think it seems clear
24 from the context that the staff is alluding to the
25 fact that in these MOX fuel assemblies it's a mix of

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[REDACTED]

1 plutonium and uranium oxide that needs to be separated
2 by a chemical process, all of which, as a result of
3 its physical properties, make it unattractive to a
4 terrorist that would seek to steal it.

5 Further on in that document, on page 4,
6 Ms. Curran cites the language at the bottom of the
7 second paragraph that says, "However, despite the low
8 attractiveness of this material, supplemental measures
9 are deemed necessary for the MOX fuel assemblies
10 because safeguards to prevent theft or diversion are
11 not currently explicitly required". That doesn't
12 support the need to know with respect to these
13 particular two documents. That simply states a fact,
14 and the security submittal that Duke has made
15 specifically acknowledged that and illustrates and
16 points out exactly the additional measures that will
17 be taken, and explains why under the circumstances the
18 form and nature of this particular fuel, that those
19 are reasonable. So, if there is a challenge to that,
20 let's hear the challenge.

21 And, finally, further on down that page,
22 the last sentence before the heading "Review
23 criteria", it states "The additional safeguards
24 measures should provide an overall acceptable level of
25 safeguard system performance for MOX fuel assemblies

[REDACTED]

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[REDACTED]

1 to prevent theft, diversion and radiological
2 sabotage". And Ms. Curran asked the question how are
3 we to determine what that is, what's the standard?
4 Well, the standard is the Part 73 standard. The
5 standard is the exemption standard, and how are we to
6 determine whether that's met? It's through their
7 review of the security plan submittal and their
8 expertise, that's the nature of a contention. Again,
9 that doesn't provide a need to know with respect to
10 specific orders issued to two facilities that are
11 really nothing like Catawba.

12 I think that's really the crux of the
13 issue here under the exemption raised. The issue is
14 not whether the standards that were applied to NFS and
15 BWXT should be applied, the issue here is whether or
16 not the threshold issue before you even get close to
17 that issue is whether Catawba, as a Part 50 licensed
18 facility, is anything like those particular fuel
19 fabrication facilities, and if there is an argument --
20 Duke has certainly explained why it believes it's not
21 -- again, if there is an argument that it is, that's
22 the basis for a contention, and that should be
23 provided. You don't need the two particular orders in
24 which to articulate your theory. Unless there are any
25 questions, I have nothing further.

[REDACTED]

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1 CHAIR YOUNG: Thank you.

2 JUDGE ELLEMAN: Mr. Repka, I believe you
3 said early in your remarks that in formulating your
4 exemptions you did not need to have access to any of
5 the documents that Ms. Curran is seeking to acquire.

6 MR. REPKA: That's correct, the two orders
7 that are the subject today.

8 JUDGE ELLEMAN: And so that is equivalent
9 to saying that in formulating the exemptions you
10 regarded as appropriate and safe, you did not need to
11 know the design basis threat for either a Category I
12 facility or for a reactor, or make reference to that
13 in any way in deciding whether your exemptions were
14 satisfactory?

15 MR. REPKA: Well, we know the design basis
16 threat for a Category I facility as articulated in the
17 regulations in Part 73. We did not need or have
18 access to any additional enhancements that may have
19 been applied to NFS and BWXT under the unique
20 circumstances of those two cases.

21 JUDGE ELLEMAN: You quoted from the
22 document Ms. Curran quoted from, which is an
23 attachment, I think, to your submission also, the
24 design plan for the review --

25 MR. REPKA: I believe we attached it to a

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1 Commission filing.

2 JUDGE ELLEMAN: Does Duke Power take the
3 position that the possession of four unirradiated MOX
4 fuel assemblies is not attractive to potential
5 adversaries from a proliferation standpoint?

6 MR. REPKA: We certainly agree that it's
7 relatively less attractive than other forms of
8 plutonium at other facilities such as fuel fabrication
9 facilities. Beyond that, it's Duke's position that
10 the measures that would be taken and that are
11 described in the security plan submittal are
12 sufficient and adequate in light of the relative
13 attractiveness.

14 JUDGE ELLEMAN: I think we would agree
15 they are less attractive, but the paper says "not
16 attractive", and I guess I didn't hear you speak to
17 that. Do you think they are not attractive to an
18 adversary?

19 MR. REPKA: I don't know that we can say
20 that in absolute terms nor do I think we need to say
21 that. Certainly, it's relatively less attractive than
22 other Category I facilities.

23 JUDGE ELLEMAN: But you may not agree with
24 everything that's in this attached document, and based
25 on that one example --

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1 MR. REPKA: I think we are in general
2 agreement. I think maybe that one example may be a
3 nuance but, again, I don't think philosophically
4 there's a major disagreement there.

5 CHAIR YOUNG: Thank you.

6 MR. FERNANDEZ: Briefly, because the
7 Applicant has pretty much addressed everything the
8 staff wanted to address, we wanted to address some
9 points that Ms. Curran raised in her presentation, the
10 first of which was that the availability of the
11 applicable legal standards in this proceeding. As the
12 staff stated at the previous prehearing conference on
13 this issue with regard to the other documents, the
14 applicable legal standards in this proceeding are all
15 publicly available. They are codified in the Code of
16 Federal Regulations, and they are contained in Part 11
17 and Part 73 of the regulations.

18 The legal standards which Duke is seeking
19 relief from are codified at 73.45 and 73.46 and 11.15
20 and 11.11. And in order to evaluate whether relief
21 from those requirements should be granted in this
22 case, there are specific provisions for the evaluation
23 of that request in 11.9 and 73.5. Those are the legal
24 standards that we are talking about in this case, and
25 those are the standards that are relevant and

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[REDACTED]

1 appropriate to be considered in this proceeding.

2 With regard to the documents that we're
3 talking about today, those are two orders that were
4 issued to two specific licensees to address the
5 physical security of those two facilities. Those two
6 facilities are not the subject of this proceeding, and
7 the Commission, when it issued those orders, did not
8 in any way change the prospective applicability of the
9 regulations codified in Part 11 and Part 73, it merely
10 added to the requirements to those two facilities, not
11 to any other facility besides the ones that are within
12 the scope of those orders.

13 So, that is why the staff has determined
14 that BREDL has no need to know sufficient to make
15 these documents available to them. We believe, as
16 long-standing Commission precedence, that actually
17 most of us in this room are very familiar with as
18 recently as in the license renewal proceeding for
19 Catawba McGuire, the Commission has made it very clear
20 that one needs to rely on the applicant's application
21 in order to form their contentions, and it would seem
22 at the very least illogical that the documents that
23 the licensee themselves did not have available to them
24 and did not rely on in preparing their application
25 would, at this stage or any stage of the proceeding,

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1 be relevant to assessing that particular application.
2 So, not only are the legal standards
3 publicly available and precedent would oblige the
4 Board and the parties to deal with those precedents as
5 they apply to the application, but also we've heard a
6 lot of argument on the need to know determination the
7 Board is trying to make as a course in this
8 proceeding. It seems like at least BREDL is trying to
9 confuse the issues of trustworthiness and need to
10 know. In order to have access to national security
11 information, in this case classified as Confidential,
12 the individual that is seeking that information not
13 only has to prove that they are trustworthy and they
14 are an individual that can be trusted with that
15 information -- and BREDL has done so, they have an "L"
16 level clearance granted by the NRC to Ms. Curran and
17 Dr. Lyman -- but one cannot divorce that
18 trustworthiness review from another requirement, which
19 is that they have a need to know the information.
20 Just saying that they have a clearance and that they
21 want the information is not enough.

22 I have an "L" level clearance as well, and
23 there are many documents in my office that I do not
24 have access to, and the reason for that is that I
25 don't have the need to know that information, and

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1 until such a time as I, in the course of my business,
2 would identify such a need to know, I should not have
3 access to that information. And simply to say that it
4 is unfair or that the information may or may not be
5 relevant is not sufficient to meet the need to know
6 standard. And I think that's very important in this
7 case because we've heard a lot about how we're
8 treating BREDL unfairly. They have this "L"
9 clearance, what is it good for? Well, what the "L"
10 level clearance basically says is that Mr. Lyman and
11 Ms. Curran can be trusted with information that they
12 have a need to know. However, the staff has
13 determined that in this case, they have not identified
14 that need.

15 And that brings me to the last point I
16 wanted to make. Judge Young asked several questions
17 of BREDL that particularly highlight why BREDL doesn't
18 need access to this information. I believe the Board
19 asked why BREDL couldn't propose alternative measures
20 to those that Duke had proposed in their submittal,
21 and why BREDL couldn't advance arguments that
22 challenged what's actually in the submittal, and I
23 don't think we really heard a good answer on that
24 issue from BREDL. And BREDL today, on presentations
25 by Dr. Lyman, has stated several concerns that it has

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1 about the submittal, but has never actually put down
2 as a contention, and they seemed like they were
3 relevant concerns.

4 So, I think to argue that these two
5 documents are necessary in order for them to identify
6 what inadequacies they see with the Licensee's
7 submittal is simply just not true. We saw them and we
8 heard them here today make arguments that sounded like
9 contentions, so if they can do it today, why couldn't
10 they do it when they are writing their contentions?
11 It just doesn't follow that they need access to these
12 documents when today they clearly proved that they can
13 analyze the submittal and apply the standard when they
14 refer to what was in the staff standard review plan.

15 Unless the Board has any further
16 questions, I don't think the staff has anything else
17 to add.

18 CHAIR YOUNG: Thank you.

19 JUDGE ELLEMAN: Mr. Fernandez, I have
20 questions relating to the process that the NRC and the
21 staff go through in evaluating the exemption request
22 that Duke has submitted, and I'll tell you where I'm
23 heading. I'm heading toward your statement that only
24 publicly available information is used in the
25 evaluation and decision process here.

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[REDACTED]

1 I regret that I wasn't present at the last
2 hearing, I had other obligations, and so if I'm
3 replowing ground that came up the last time, I hope
4 you will bear with me and I offer my apology for that.

5 BREDL used in their submission a way of
6 looking at the security issues that I found
7 attractive, and I'm going to borrow from them. What
8 they, in effect, said is that for Category I
9 facilities, reprocessing facilities, fuel fabrication
10 facilities, you have a clear presence of diversionary
11 potential. And so you have a security regime here in
12 which NRC has developed a series of procedures to
13 ensure that the material is handled safely.

14 Now, when I look at those procedures, the
15 procedures are prescriptive -- that is, they say "if
16 you do this, and if you have this equipment, and if
17 you have these forces, then you will be in a state
18 where reasonable people believe you will be able to
19 accommodate the design basis threat", and the Category
20 I concern represents a security datapoint off here to
21 the side. Okay.

22 Now, in addition to that, you have
23 reactors. And in reactors, the plutonium is much more
24 difficult to get at, there are high radiation fields,
25 and so you have a different set of procedures to reach

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1 a different design basis threat. But, again,
2 reasonable people have inferred that if you follow
3 these different prescriptive procedures, you will be
4 okay in accommodating the design basis threat for this
5 circumstance.

6 Now, from my perspective, you seem to be
7 in a different circumstance with respect to Duke's
8 exemptions. You seem to me to use a medical analogy
9 a little like the person who has a prescription for
10 the common cold and has a prescription for pneumonia,
11 but you've got the flu, and you've got to figure out
12 how to work with those two different prescriptions to
13 accommodate your flu.

14 Now, it appears to me the way you do this
15 is you develop requests for additional information
16 from Duke. Duke responds to these requests to you.
17 Now, incidentally, if safeguards material was not
18 involved here, all of these RAIs would be publicly
19 available, wouldn't they?

20 MR. FERNANDEZ: If the safeguards did not
21 relate to the security of the facility specifically,
22 they would not be protected, that's correct.

23 JUDGE ELLEMAN: They would not be
24 protected. And any member of the general public could
25 gain access to them, couldn't they?

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1 MR. FERNANDEZ: That's what the staff
2 normally does.

3 JUDGE ELLEMAN: Is it equally true that if
4 security were not an issue here, that public access to
5 your meetings with Duke would also be granted, and
6 that they could listen to what goes on in those
7 meetings?

8 MR. FERNANDEZ: Under the open-meeting
9 policy promulgated by the Commission, the staff would
10 ordinarily make those meetings open, yes.

11 JUDGE ELLEMAN: So they would be open.
12 So, it is security that is the sole limiting factor
13 here that is preventing BREDL from gaining access to
14 the information they seek.

15 MR. FERNANDEZ: Yes.

16 JUDGE ELLEMAN: Okay. Now, as you are
17 sitting down to evaluate Duke's submissions and your
18 positions, you no longer can directly use the two
19 extreme datapoints that are available to you --
20 namely, the Category I datapoint and the reactor
21 datapoint -- you can't use those as they are because
22 you are in a different circumstance, you are in a
23 different position, you are in between those two
24 conditions. So, do you not have to look at a design
25 base threat that is going to apply for the

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1 circumstance you are evaluating, and look at Duke's
2 request for exemption, and make a determination
3 whether those things are reasonable in light of what
4 is an appropriate design basis threat?

5 MR. FERNANDEZ: I think you are correct,
6 and if this were a perfect world, there would be a
7 codification of the regulations of that design basis
8 threat which you talk about specific for a reactor
9 Part 50 facility which had Category I material that
10 was not high-level waste, that was not self-
11 protecting. But in this case, what we have is 73.55,
12 which is the design basis threat for Part 50
13 licensees, and 7.45 and 46, which are the design basis
14 threat for theft at Category I facilities. These are
15 the two datapoints which you are talking about. And
16 the reason why we're somewhere in the middle and Duke
17 is seeking an exemption is precisely because of a
18 recognition of what you just mentioned, that it's not
19 official -- it's something in between, and that's why
20 in Duke's opinion, they have represented to the staff,
21 they should not be asked to protect a facility to the
22 level required by 73.45 and 46, but they also
23 recognize in their exemption request, saying that they
24 are going to implement some additional measures, they
25 also recognize that something different needs to be

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1 done to handle this material when it is fresh onsite.
2 But the regulations, as they stand today, don't
3 specifically address that situation, which is why
4 they've requested an exemption from the regulations
5 and provided what they believe is a reasonable way of
6 accommodating the situation.

7 And just one last thought, in assessing
8 their proposal, what the staff is going to look at is
9 what does 73.45 and 46 say, which is the regulation
10 that would be triggered, and the standard that is in
11 Part 73 with regard to granting of an exemption, and
12 that's what the staff will be guided by in making
13 their review of these additional measures that they
14 are proposing and the exemptions they've requested.

15 JUDGE ELLEMAN: Okay. You guys are
16 sitting in a room. You have received what Duke has
17 sent out. You have to now decide whether what they
18 want to do is reasonable or not. Don't you have to
19 look at the Category I design basis threat and gauge
20 against that standard whether what Duke wants to do is
21 a satisfactory and appropriate set of actions in order
22 to give you a comfortable feeling that --

23 MR. FERNANDEZ: Yes, Your Honor.

24 JUDGE ELLEMAN: All right. And you do
25 that with the Category I threat, or do you do it with

1 the reactor threat, or do you merge them in some way?

2 MR. FERNANDEZ: With the threat as in
3 73.45 and 46, which is what applies to this facility,
4 we would look at that and we would try and see if they
5 meet the requirements in Part 73 for receiving
6 exemption from that threat as defined in the
7 regulation.

8 JUDGE ELLEMAN: This is the Category I
9 threat?

10 MR. FERNANDEZ: Yes.

11 MR. REPKA: Judge Elleman, could I just
12 clarify the record here? I think there may be a point
13 of confusion when you talk about the Category I design
14 basis threat because the way we understand it, the
15 only Category I design basis threat there is is what's
16 in the regulation, in Part 73. So there is no other
17 generic Category I design basis threat. There are
18 these two orders that apply to two specific facilities
19 that are clearly not reactor facilities, but there is
20 no other generic design basis threat document, and I
21 think that's the position the staff has taken
22 repeatedly throughout.

23 JUDGE ELLEMAN: Mr. Fernandez, I'm sorry
24 you were talking, did you hear what Mr. Repka said?

25 MR. FERNANDEZ: No, I did not.

1 JUDGE ELLEMAN: Would you mind repeating
2 that?

3 MR. REPKA: I'll try to say that more
4 briefly. What I said is that our understanding is
5 that there is no other generic Category I design basis
6 threat document other than what's in the regulation.

7 MR. FERNANDEZ: That's correct.

8 MS. CURRAN: Well, if Mr. Repka is going
9 to jump in, would it be all right if I did? It is our
10 understanding that what's in the regulations isn't
11 everything. There is design basis threat guidance
12 which has, for example, the number of intruders -- and
13 I'm talking about pre-9/11, I'm not talking about
14 post-9/11 --

15 CHAIR YOUNG: You're talking about, for
16 example, the 73.1(a)(2), theft or diversion of formula
17 quantities of strategic special nuclear material, a
18 determined violent external assault/attack by stealth
19 or deceptive actions by a small group without defining
20 what "small" means, that's what you're talking about?

21 MS. CURRAN: Right. Our understanding is
22 that this classified guidance describes what a "small
23 group" is, or what the NRC would assume it to be, as
24 well as some other information. That is one of the
25 pieces of information that we requested in our motion.

1 I think Mr. Repka said earlier we only asked for the
2 two orders. We also asked for the pre-9/11 design
3 basis threat guidance.

4 MR. REPKA: But unless I'm missing
5 something, Ms. Curran has said that before, and the
6 staff has said there is no such animal.

7 JUDGE ELLEMAN: Mr. Fernandez, do you want
8 to repeat your assurance that what Ms. Curran just
9 said does not exist?

10 MR. FERNANDEZ: And, in fact, it couldn't
11 exist because the Commission does not have the
12 authority to promulgate secret rules, for example. So
13 it would be required to have in the regulations any
14 legal requirement that it seeks to apply, only it's
15 going to apply it by order, and there is no such order
16 applicable in this case.

17 CHAIR YOUNG: To follow up on Judge
18 Elleman's question, when you're evaluating the request
19 for exemption in Duke's proposal, when Judge Elleman
20 said you would have in mind the design basis threat
21 for Category I, among other things, and you said yes,
22 and then you clarified that you meant what was in the
23 regulations.

24 MR. FERNANDEZ: Well, that is the Category
25 I DBT.

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1 CHAIR YOUNG: And where the regulations
2 leave certain things open, such as what is a small
3 group, and if there is any other guidance out there
4 defining what "small group" is for various Category I
5 facilities, you'd also have that knowledge in mind, or
6 the staff would have that knowledge in mind when they
7 were making that evaluation, would they not?

8 MR. FERNANDEZ: I'm assuming that the
9 experts that review the application will have in mind
10 all the documents that their expertise has garnered
11 them throughout the years.

12 CHAIR YOUNG: Of that sort.

13 MR. FERNANDEZ: Of that sort, yes. The
14 same way that I would expect, nonetheless, that an
15 expert working for BREDL would have some knowledge of
16 what they deem to be an appropriate number to
17 constitute a small group, and should articulate it so
18 in their contentions.

19 MS. CURRAN: Excuse me, Judge Young, could
20 I just make one more comment on this? I think at the
21 last oral argument I passed out a letter dated March
22 13, 2000, from Michael F. Weber of the NRC, to Duke
23 Engineering Services, Inc. This had to do with the
24 construction authorization request for the MOX
25 fabrication facility. And the letter is actually to

1 Mr. Peter Hastings, who is an official with DCS. The
2 letter says, "Dear Mr. Hastings: Enclosed are the
3 U.S. Nuclear Regulatory Commission's guidance
4 documents for the design basis threat for theft or
5 diversion and the DBT for radiological sabotage to be
6 used in the design of the mixed oxide fuel fabrication
7 facility with respect to safeguards and security".

8 And then on the Enclosure line it says,
9 "No. 1" -- and these are in capital letters, titles of
10 documents -- "Design Basis Threat For Theft or
11 Diversion Guidance (confidential); 2) Design Basis
12 Threat For Radiological Sabotage Guidance
13 (confidential)". So this MOX fabrication facility is
14 going to be the facility that produces this plutonium
15 fuel. This is subject to the Category I security
16 requirements, and this letter from Mr. Weber to DCS is
17 saying there are two guidance documents, confidential
18 guidance documents that relate to implementation of
19 the NRC security regulations. So, I don't understand,
20 if there is no such guidance, what is Mr. Weber
21 talking about? What did he send to DCS?

22 CHAIR YOUNG: I don't want to cut you off,
23 but one thing occurs to me right now. There were two
24 documents. This was one, and there was another at the
25 last proceeding that you just reminded me, I believe

1 you had asked to have them attached to the transcript.
2 I don't think that happened, so if you want to do
3 that, you might want to provide new copies so that
4 they can be attached to this transcript.

5 MS. CURRAN: Okay. I don't remember
6 offhand what the other one was, but I'll try to
7 reconstruct and do that.

8 CHAIR YOUNG: Okay. That just occurred to
9 me. If I could follow up with Mr. Fernandez, first,
10 you had answered before that, yes, the staff would
11 have in mind what a small group was -- in other words,
12 more information than is available publicly in the
13 regulations -- and then you said that you would expect
14 that BREDL would have in mind their own number.

15 MR. FERNANDEZ: That is correct.

16 CHAIR YOUNG: Putting aside for a moment
17 the issue of this letter, which I would like you to
18 respond to, the point that Judge Elleman made -- and
19 maybe I should just turn it over to him because he
20 stated it much more eloquently than I -- but having
21 the two datapoints at either end in the mind of an
22 evaluator is obviously information that -- well, given
23 that the NRC staff would have it in mind, it's very
24 valuable information to have in order to do any
25 complete and intelligent evaluation of a proposal that

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1 Duke should be allowed to fall somewhere below the
2 high datapoint, wouldn't you agree?

3 MR. FERNANDEZ: I would agree with that
4 statement, however, valuable is not the standard we
5 are talking about here. It would be very nice if Ms.
6 Curran could get everything she wanted, that she
7 requested, but that is simply not the case here.
8 We've determined that they don't have the need to know
9 for this information simply because, as they've
10 articulated it, they believe that these are legal
11 standards applicable in this proceeding, and in order
12 to assess the sufficiency of the Licensee's submittal
13 they need to know those standards, and those standards
14 simply do not apply here so, therefore, they have no
15 need to know.

16 CHAIR YOUNG: But words like "valuable"
17 and "meaningful" are in somewhat the same universe
18 when you are looking at need. It is not a strictly
19 legal interpretation. When you're looking at need,
20 you're looking at the circumstances, what would be
21 valuable, what would be meaningful, what might be
22 necessary in order to make a meaningful evaluation.

23 MR. FERNANDEZ: I disagree, Your Honor, I
24 think valuable and necessary are very different. So
25 I'll just leave it at that.

1 JUDGE ELLEMAN: Let me come at it from a
2 little different perspective. In making the decision
3 that the Duke exemption requests are fair and
4 appropriate, would not your reviewing staff have to be
5 cognizant of the guidance documents that Ms. Curran
6 has cited in order to compare what is being done
7 against that redefined standard and re-explained
8 standard?

9 MR. FERNANDEZ: The staff may be aware of
10 all the documents that Ms. Curran requested, although
11 I probably, not likely, since the lead reviewers just
12 joined the Agency from DOE -- but if the Board -- and
13 I hate to do this because -- the letter that we sent
14 the Board enclosed exactly what the staff is going to
15 do when they receive and they review this application,
16 and if you read that carefully you will see that what
17 they are going to do is not go and read the orders
18 that were issued to NFS and BWXT and find out how this
19 meets those orders that don't apply to Duke --

20 CHAIR YOUNG: But they don't have to, they
21 know that, right?

22 MR. FERNANDEZ: They know what?

23 CHAIR YOUNG: They know what's in them?

24 MR. FERNANDEZ: I don't know if they know
25 that or not, I don't know if they have a sufficient

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1 need to know what's in the classified orders.' I
2 personally don't know if those reviewers would
3 actually know the specific contents of the order. So
4 I can't answer that.

5 CHAIR YOUNG: Would they know the design
6 basis guidance documents that are referenced in this
7 letter -- and, also, while we're on that, how do these
8 relate to any regulatory guidance associated with the
9 revised DBT for Category I facilities, because it's
10 revised and this is unrevised, is that what you're
11 saying?

12 MR. FERNANDEZ: I don't know what those
13 documents are referred to in that letter, I have
14 absolutely no idea, so I can't really answer the
15 question that you're asking because as far as I know,
16 any document called that exists.

17 CHAIR YOUNG: Is Michael Weber a person?

18 MR. FERNANDEZ: Yes. He is the Deputy
19 Director of --

20 CHAIR YOUNG: Presumably he would know
21 what they are.

22 MR. FERNANDEZ: He is not here, though.

23 CHAIR YOUNG: But he would know about
24 guidance documents for design basis threat for theft
25 or diversion.

1 MR. FERNANDEZ: I don't know what they
2 are, I don't know what else I can say.

3 MR. REPKA: I would add to that that even
4 assuming something exists, it's described as
5 documentation related to the specific MOX fuel fab
6 facility, so by its terms, it's not necessarily
7 generic. It's apparently something to do with a fuel
8 fab facility which, again, is not a Part 50 power
9 reactor.

10 MS. CURRAN: I don't get that out of this
11 at all.

12 MR. REPKA: It says it right here, in the
13 text it says "guidance documents for the design basis
14 threat for theft or diversion and a DBT for
15 radiological sabotage to be used in the design of the
16 mixed oxide fuel fab facility".

17 MS. CURRAN: Right, to be used, and then
18 if you look down on the enclosure line, the titles of
19 the documents don't say these are for the MOX facility
20 -- and believe me, they've created a lot of specific
21 standards for that MOX facility because it is a total
22 anomaly.

23 MR. REPKA: Well, this would be another
24 specific standard perhaps, but we're speculating.

25 MS. CURRAN: And it states in each case

1 this is what it is for. Well, at any rate, it's kind
2 of hard to believe -- I mean, you look at almost any
3 safety regulation of the NRC, and there's a guidance
4 document explaining the details of what the NRC
5 intends in terms of carrying out the standard. It
6 would be kind of surprising if there were not a
7 corresponding guidance document for the security
8 requirements.

9 JUDGE ELLEMAN: I guess I would ask Mr.
10 Fernandez that in making the decision on the Duke
11 exemption request, would you not expect the people
12 making those decisions to be fully knowledgeable of
13 all guidance documents related to the design basis
14 threat for Category I facilities?

15 MR. FERNANDEZ: Yes. If there were such
16 documents, yes, I would expect them to be familiar
17 with them.

18 JUDGE ELLEMAN: Fully knowledgeable of it,
19 and utilize that information in making the exemption
20 decision.

21 MR. FERNANDEZ: Well, as to how they
22 exercise their professional judgment, I don't know
23 what information they would use. And, of course, that
24 would be subject to cross-examination if there were a
25 hearing -- I mean, if such findings were made and

1 contentions were admitted. no this issues, I would
2 assume that the opposing party would have the right to
3 question them and request discovery, issue subpoenas
4 and get whatever documents they may need.

5 CHAIR YOUNG: Before we move on to another
6 issue, I just want to ask a couple questions to follow
7 up on that. Let's assume for a moment that BREDL
8 drafted contentions based on Duke's submittal, and the
9 sort of baseline design basis information and other
10 information that we addressed in the January 29th
11 order. Well, I guess several questions. One, if
12 there were response to the contention that the
13 contention is outside the standard set for Category I
14 facilities, for example, would you agree -- or
15 anything in that nature -- I'm trying to be careful in
16 the words I'm using, but I want you to understand that
17 I'm using those words very broadly -- if any argument
18 were made of that nature -- and you may want to
19 address whether any argument would be made of that
20 nature, but if it were, would you agree that at that
21 point any documents on which such an argument would be
22 based would be needed by BREDL so that they could do
23 an amended contention?

24 MR. FERNANDEZ: Let me see if I have the
25 question correct. You are asking if the staff

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1 responded to their proposed security contentions with
2 the argument that the contention you raise is not good
3 because your argument is outside the scope of the
4 regulations or outside the scope of the requirements
5 for Category I facilities --

6 CHAIR YOUNG: Ms. Curran phrased it "if
7 they guessed wrong", and then the argument were put
8 back to them "Well, that's not even required for a
9 Category I facility, so it doesn't make any sense to
10 allow it as a contention".

11 MR. FERNANDEZ: I don't know the answer to
12 that question. I don't know what the staff would say
13 with regard to need to know at that point in time, if
14 that would have been sufficient to satisfy the staff
15 that Petitioners have demonstrated a sufficient need
16 to know.

17 CHAIR YOUNG: Could you see making that
18 argument? Go ahead.

19 MR. FERNANDEZ: I would say one thing,
20 though. The staff's argument all along has been that
21 that situation would be an impossibility because the
22 staff has always maintained that all the standards
23 that we would be judging this application by are in
24 the regulations. So it would be impossible for us to
25 say there's some other thing that you don't know about

1 that would prevent you from asserting such an issue.

2 CHAIR YOUNG: Well, the one example that
3 we pointed to being the small group, and I think from
4 the beginning BREDL has talked about numbers of
5 intruders, so that information is not there, and
6 that's the sort of information that is in the
7 knowledge in the heads of the people who are going to
8 be doing the evaluations. And if BREDL came in with
9 a contention saying that you need to be able to
10 protect against X-number of intruders and the response
11 were, well, that's absurd because it's way more than
12 is in any design basis threat --

13 MR. FERNANDEZ: The way you phrase the
14 question so far, I don't see -- I mean, assuming
15 there's a basis and all the other 2.714 requirements
16 are met -- I don't see how the staff, without getting
17 to the merits of the contention and stating why it
18 believes that the numbers should be different, that
19 the contention would be inadmissible because --

20 CHAIR YOUNG: So you wouldn't make that
21 argument.

22 MR. FERNANDEZ: The way you have styled it
23 right now, I don't think so.

24 CHAIR YOUNG: And then if we did get to a
25 hearing on that issue and that argument were made on

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1 the merits, would that be a point at which you would
2 say at that point there's a need to know in order to
3 respond to that kind of argument?

4 MR. FERNANDEZ: Give me a moment because
5 I am not sure.

6 (Whereupon, staff conferred off the
7 record.)

8 MR. FERNANDEZ: Your Honor, that may be a
9 possibility, but we wouldn't know until we actually
10 saw the contention itself. So it's hard to know what
11 -- we're trying to be as accommodating as possible in
12 resolving the hypothetical, but I think need to know
13 is one of those issues where you actually need to see
14 the physical document to know what you are talking
15 about.

16 CHAIR YOUNG: I guess what I'm getting at
17 is at any point at which the staff would rely on
18 information that's not in the regulation -- and by
19 reading the regulation we see that there's some
20 information that's not there because "small" is not a
21 discrete number -- at any point that the staff would
22 rely on any such information, at that point -- it
23 sounds as though you're agreeing that at that point
24 there would be a need to know that information.

25 MR. FERNANDEZ: One second.

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[REDACTED]

1 (Whereupon, staff conferred off the
2 record.)

3 MR. FERNANDEZ: I think given that we
4 haven't seen the specific contention, it would be hard
5 for us to commit to giving documents which we really
6 don't know what we're talking about, but it is a
7 possibility, but we're in the area of security which
8 it's very important that we behave in the utmost --
9 very responsibly, and I think that for me to make a
10 commitment right now that we will make documents
11 available at a future date would be irresponsible.
12 So, I think it's a possibility, but I think we need to
13 actually see the documents.

14 I will say one thing, that, yes, BREDL
15 could challenge the staff's number, whatever it may
16 be, the same as Duke could. I mean, this is the
17 nature of having performance-based regulations. I
18 mean, the Commission has laid out what the performance
19 goal is, and the Licensees and the Petitioners in this
20 case will have different ways of meeting that
21 particular goal, and there is room for argument there
22 between the Licensee and the staff and between the
23 Petitioners and the staff.

24 JUDGE BARATTA: I'd like to pick up a
25 little bit on this, or take a slightly different tact

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1 in terms of questioning, and it goes back to a
2 question I asked very early on as to whether or not,
3 in reality, we're going to wind up working this
4 problem backwards anyway because I think there appears
5 to be some consensus that this is not the same
6 situation as a power reactor, and probably not the
7 same situation as a fuel fabrication, so it is
8 somewhere in between. Whether it's closer to one or
9 the other, of course, is debatable. And assuming --
10 this may or may not be a valid assumption -- that our
11 order of the 29th stands, let's just assume that so we
12 have a starting point -- then does the staff feel it
13 would be possible to, as was suggested earlier, work
14 the problem backwards by saying, okay, in order to
15 steal this material, you'd need this, this and this,
16 because of the weight, characteristics, et cetera, and
17 then play that against the information that would
18 become available, or is available currently to BREDL.
19 What is your reaction to that?

20 MR. FERNANDEZ: Well, not only is that
21 possible, but it's what the Commission precedent would
22 require of the Petitioners in this case. They would
23 be required to look at the application and state their
24 concerns based on what's on the application. So, on
25 the application they have the weight -- I mean, they

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1 have the characteristics of the assembly, for example,
2 and one would assume that their experts would take
3 this information into consideration and, using their
4 expertise, assess the adequacy of the measures that
5 the Licensee has proposed in comparison to the
6 standard laid out in the regulations. Not only is it
7 possible -- I want to make that point very clear --
8 it's what's required by the Commission.

9 JUDGE BARATTA: Okay. Let me ask now a
10 slightly different question, which is -- I looked at
11 the review plan that was mentioned earlier, was
12 provided earlier, and I have a question as to the --
13 as has been said, there is no additional guidance on
14 design basis threat for this type of facility. Would
15 the staff not use that type of an approach to develop
16 a scenario to evaluate Duke's submittal?

17 MR. FERNANDEZ: Would use what type of
18 approach?

19 JUDGE BARATTA: Determine -- looking at
20 the form, weight, characteristics of the specific
21 assemblies, and then determining what type of force
22 would be needed to steal and divert the material.

23 MR. FERNANDEZ: One moment.

24 (Whereupon, staff conferred off the
25 record.)

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1 MR. FERNANDEZ: I assume yes, that is the
2 way the staff would conduct a review.

3 JUDGE BARATTA: Thank you.

4 CHAIR YOUNG: I have one more question.
5 Something you said a few minutes ago reminded me that
6 I had meant to ask it earlier. Several times today
7 you've talked about what the precedent is and what the
8 standard practice is with regard to what Petitioners
9 need to do when putting together contentions. They
10 need to rely on the application. But, in addition,
11 there's case law that talks about relying on publicly
12 available information. And in this proceeding, were
13 it not for the fact that for security reasons certain
14 things have been designated as being safeguards or
15 classified information, that type of information would
16 be in the universe of publicly available information.
17 And I think you've also -- maybe this is related to
18 something that you've argued elsewhere -- I think
19 you've drawn a distinction between Petitioners who are
20 drafting contentions and Petitioners who already have
21 at least one contention admitted, and in this case I
22 believe that both Duke and the staff agreed that BREDL
23 has standing, and I think the staff agrees that at
24 least one contention is admissible.

25 So I guess I'm left wondering about some

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[REDACTED]

1 of the distinctions that you're drawing and whether
2 what they all come down to really is that a lot of
3 this information is information that they would have
4 access to normally and that would normally be used in
5 crafting contentions, and that the only reason they
6 don't have access to it at this point is because of
7 the security reasons.

8 So, looking at a need to know
9 determination in that context, adding overlays of
10 suggesting that there is somehow some additional legal
11 requirements besides simple need to know things that
12 would otherwise be publicly available and that they
13 would have a responsibility to look for seems like
14 you're carrying that a little bit far there. Could
15 you speak to that?

16 MR. FERNANDEZ: I think to say just
17 because these are not publicly available misses the
18 mark, and the reason for that is that this information
19 is very critical to the security of this facility with
20 regard to the orders that we talked about in the
21 previous hearing.

22 CHAIR YOUNG: Right, and I don't want you
23 to think that I'm disputing that. I think everyone
24 here agrees with that, and that that's a serious
25 consideration that everyone here is taking into

[REDACTED]

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1 account. But what I'm trying to get you to address is
2 but for that, they would be publicly available and
3 they would be something that Petitioners would not
4 only be expected to look at, you would probably argue
5 that they had an obligation to look at it.

6 MR. FERNANDEZ: I would be very surprised
7 that confidential information would be publicly
8 available.

9 CHAIR YOUNG: No, no. What I'm saying,
10 Mr. Fernandez, what I'm saying is were it not
11 confidential, were it not protected, that's the
12 distinction I'm drawing. So, given that --

13 MR. FERNANDEZ: But I think your
14 distinction creates a fantasy that doesn't exist here.
15 These documents are safeguards and are confidential
16 and are not publicly available, and they are not the
17 sort of documents that are covered by the obligations
18 to examine the public record. So, these are different
19 documents.

20 CHAIR YOUNG: Let me see if I can rephrase
21 my question because I don't think you're understanding
22 my question. What I'm saying is this, the only reason
23 these documents are not publicly available is because
24 for security reasons, good security reasons, they've
25 been declared safeguards or classified, and no one is

1 arguing that those designations are not appropriate,
2 or that the reasons for them, that the reasons for
3 keeping security-related information protected are
4 very good reasons, but that is the reason, the need to
5 protect them for security purposes, that is the reason
6 that they are not publicly available.

7 The need to know with regard to them is
8 not related to anything having to do with a precedent
9 on what petitioners are required to do with regard to
10 drafting contentions. The only thing that keeps them
11 from this information is the security nature of the
12 information. And given that they have clearances, the
13 only thing that keeps them from the information is the
14 need to know. And so it all sort of devolves down to
15 a question of need to know, which is sort a practical
16 factual inquiry. That's what I'm trying to get you to
17 address.

18 MR. FERNANDEZ: I agree with you that the
19 need to know determination is a basic factual inquiry
20 that the Board needs to make. I disagree, however,
21 that the precedent is not relevant to that
22 determination, and the reason for that is that the
23 Petitioners in this case have stated that they need
24 this information in order to frame contentions. The
25 Commission has stated that the necessary information

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[REDACTED]

1 to a Petitioner that seeks to become a party, the
2 information that's necessary for them and they are
3 obligated to revise, is the information that is
4 publicly available information, information on the
5 record of the facility, and information in the
6 Licensee's submittal. This information is not covered
7 by information that the Commission has already
8 determined is necessary for a party to prosecute their
9 case. Therefore, it is very relevant in this case
10 that we consider the Commission's prior precedent in
11 establishing what is necessary for a Petitioner to
12 review in order to frame contentions.

13 CHAIR YOUNG: I think you're right, Mr.
14 Fernandez, but I still think we're going in circles
15 sort of because the point I'm trying to make is the
16 Commission's precedent referring to publicly available
17 information, that makes the salient issue what
18 constitutes publicly available information, and what
19 would it be if there were no security considerations,
20 and all of this information rises or falls, is
21 publicly available or not for security reasons alone,
22 not to minimize those reasons, they are very important
23 reasons, but that is the reason -- security is the
24 reason that they are not publicly available. If
25 security were not involved, they would be publicly

[REDACTED]

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1 available. So, the only question is need to know.

2 MR. FERNANDEZ: I agree.

3 CHAIR YOUNG: Okay. Good. That's what I
4 thought, and I wanted to make sure we got off that
5 circular kind of thing. Thank you. Any other
6 questions for the staff? Did you have anything
7 further to say?

8 MR. FERNANDEZ: No.

9 CHAIR YOUNG: Anything further from any of
10 you before we conclude for today? Ms. Curran?

11 MS. CURRAN: I just have a couple of
12 points.

13 MR. REPKA: Then I would make a couple as
14 well, if she is going to.

15 MS. CURRAN: I just want to refer the
16 Board to a case that's cited on page 13 of our brief
17 to the Commission, Philadelphia Electric Company. It
18 has to do with the Limerick Generating Station, ALAB
19 809 29-1605 from 1985.

20 CHAIR YOUNG: I'm sorry, I was looking for
21 the wrong document. Tell me again.

22 MS. CURRAN: This one is the February 6th
23 brief to the Commission.

24 CHAIR YOUNG: February 6th, page what?

25 MS. CURRAN: Page 13. I think that case is

1 relevant because it says that an applicant for an
2 exemption needs to identify the particular respects in
3 which the applicant is unable to comply with the
4 regulatory requirements from which it seeks an
5 exemption. I think that case is important because it
6 basically is stating the applicant has to identify the
7 requirement that's applicable and then explain why
8 that in this particular situation it's not appropriate
9 to apply it. So, there's two elements there, the
10 requirement and the reason for not complying with it.
11 And we have some statements about why Duke shouldn't
12 have to comply, but we don't have all the information
13 we need about what the requirements are, and we are
14 talking about both the pre-9/11 and the post-9/11
15 standard, which they raise somewhat different issues.

16 CHAIR YOUNG: Does that case say that
17 every contention has to cite the regulatory
18 requirements?

19 MS. CURRAN: It doesn't talk about
20 contentions, it talks about the standard for an
21 exemption, as I recall. I'm basically saying what's
22 sauce for the goose is sauce for the gander. If the
23 applicant has to address these things, then we also
24 must address these things and want to evaluate these
25 things.

1 JUDGE BARATTA: Could I ask what your
2 point is there because it seems I heard that Duke said
3 that, okay, they did that because the applicable
4 regulations that they only have access to are the ones
5 that are in the public --

6 MS. CURRAN: But there are -- okay.
7 Here's my next point, which is there are objective
8 standards here, and it may be the case that Duke
9 didn't address them all. It may be the case that the
10 NRC staff didn't address them all. The NRC staff
11 obviously thinks some standards are irrelevant or
12 maybe they don't exist, but the point is you have the
13 authority, you have the responsibility to determine
14 what is the objective standard and whether it is met,
15 and that is apart from what the staff does or what
16 Duke does. These are objective requirements. These
17 are safety and security standards that must be met.

18 And it also gets back to a question you
19 asked, Judge Young, you were kind of, I think,
20 exploring with NRC staff counsel, what if we tried
21 this approach of having BREDL formulate some
22 contentions and what would happen if we got to the
23 hearing and we found -- if the staff were to rely on
24 some guidance document or standard that's not publicly
25 available, at that point you have to concede a need to

1 know. That's true. That's true, but it's not the
2 whole story. This case doesn't rise or fall on what
3 Duke decides to do or what the staff decides to do.
4 It rises or falls on whether the application meets the
5 standard. That's really a different question.

6 So, if Duke says, "Well, we didn't care
7 about the confidential part, or we didn't know that
8 there was a confidential guidance document that gave
9 information about the size of the threat, the number
10 of intruders", that's not the end of the inquiry. The
11 inquiry is is that relevant, and we think it is.

12 CHAIR YOUNG: You're saying we would need
13 to know that.

14 MS. CURRAN: You would need to know that
15 to make your decision, and we need to be able to
16 submit a contention to you. We need the resources to
17 be able to plead contentions that explain why we don't
18 think the application meets the standard. And it
19 can't be governed, it can't be driven by whatever Duke
20 or the NRC thinks is relevant. That is really for you
21 to decide. And we have given examples of ways in
22 which we think this confidential information is
23 implicitly relied on, if not explicitly, or it has to
24 be relevant because in order to judge what's being
25 proffered here, you have to know. Those examples are

in our motion, and also Dr. Lyman gave some in the oral argument at page -- I just direct you to page 873 of that transcript -- and I won't go into it in detail here, but the issue of whether Duke should be exempted from a requirement for force-on-force testing because its security plan for the nuclear plan should be adequate. Well, in order to judge whether that's okay, whether that should be allowed, one has to know what the design basis threat is for a Category I facility to know whether the security force is adequate and whether you ought to have force-on-force testing. And you can make that determination that you need to know, whether or not the staff and Duke say that they think it's relevant.

I had one more thing that I would like to ask for today, and that is it's certainly frustrating for us that this proceeding is confidential because there's some things that are said here that seem to us to be generic statements --

CHAIR YOUNG: Actually, let me interrupt you there. One of the things I want to do here -- and I'll just give this signal now so people can be thinking about it. One of the things I wanted to do before we left here was to ask Mr. Manili and anybody else from security, and any of the parties, to address

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1 what classification this session, the transcript of
2 this session should be, because I remember in talking
3 to Mr. Stapleton about the last one, I think he
4 indicated to me that it really would not be
5 safeguards. Then we talked about the fact that we did
6 quote from Duke's submittal which was safeguards,
7 which was why when I put the classification on the
8 front of the January 21st transcript, I indicated that
9 it was based on Duke's submittal, not on discussion of
10 any other safeguards information. And so I was going
11 to want to get guidance from the security people and
12 from anybody who wants to speak to it so that before
13 the Court Reporter goes, if possible, we can tell her
14 what to write on it, because I think we're all agreed
15 that it's not going to be classified at this point
16 because we stayed away from that. We haven't asked
17 people who don't have clearance for it to leave. The
18 question would be whether it's safeguards or not.

19 We did not get into quoting from the
20 submittal this time like we did last time when we were
21 talking about various statements in it where Duke
22 relied on things, but that is something --

23 MS. CURRAN: I think I just did.

24 CHAIR YOUNG: Well, anyway, that's
25 something that I was going to ask to have our security

1 people --

2 MR. FERNANDEZ: Can we address that right
3 now, Your Honor? We can address that briefly.

4 CHAIR YOUNG: Sure, if you want to.

5 MR. FERNANDEZ: We don't believe you've
6 covered any safeguards information, however, the Board
7 order -- this is something we want to address at a
8 later time -- the definition of "protected
9 information" as broader than safeguards information,
10 and I think just now Ms. Curran, and maybe even
11 earlier when we talked about access, we referred to
12 specific statements in the submittal. So, although
13 the staff doesn't believe that we covered safeguards,
14 it may need to be protected under the order as
15 "Protected Information".

16 CHAIR YOUNG: So is there a designation
17 from our security people, we could put -- instead of
18 putting "Safeguards", put "Protected"?

19 JUDGE BARATTA: Could we talk about it?

20 CHAIR YOUNG: Yes.

21 (Whereupon, the Board conferred off the
22 record.)

23 CHAIR YOUNG: What Judge Baratta was just
24 saying was that in his experience you would assume
25 that it's the higher level and then downgrade after

you've looked at it.

MR. FERNANDEZ: That's correct.

CHAIR YOUNG: The only problem with that, I guess, is once we get a paper transcript -- we need to tell the Court Reporter what to put on it at the outset, so if there is a designation at the outset that everyone agrees with, we can have her put that or, otherwise, I think probably we can agree it's not classified. Safeguards would be the highest level.

This is a practical thing that if we can address it, we can address it. If we can't and it gets downgraded, then we would just have new copies made, which involves more cost obviously, but anyone who wants to speak to it is free to, it's a practical consideration. That seems like what you were getting into.

MR. FERNANDEZ: Your Honor, we wouldn't have an objection if you marked it as "Safeguards" to begin with, and then upon subsequent review, if the Board's security expert or staff believes that it should be downgraded to just "Protected Information", we wouldn't have a problem with that.

CHAIR YOUNG: Mr. Manili?

MR. MANILI: I would agree with that. I do not believe that anything that has been stated

1 today covers safeguards information, but for the
2 purpose of this hearing I would agree with the staff
3 that it might be prudent to go ahead with "Safeguards"
4 and then possibly downgrade it.

5 MR. REPKA: Duke agrees with that
6 approach. We would prefer to review it as
7 "Safeguards" first, and downgrade later.

8 CHAIR YOUNG: Can everyone address -- can
9 we just say at the outset that we'd like input from
10 all of you on that. I don't know what the contract
11 provides in terms of extra copies, but there's
12 obviously a difference in how the pages are marked and
13 how it's treated. Anyway, that's what I think you
14 were leading to.

15 MS. CURRAN: That way of proceeding seems
16 fine with BREDL, as long as we have an understanding
17 that it will be reviewed for downgrading or possible
18 downgrading. I would also like to request -- there's
19 two sentences that I would like to state and get
20 agreement from the Board and the parties that these
21 assertions don't contain protected or safeguards or
22 any kind of confidential information because I want to
23 be able to communicate these two points to my client.

24 CHAIR YOUNG: Go ahead, what are they?

25 MS. CURRAN: The first is that today Duke

1 Power stated that its security plan for handling
2 plutonium fuel test assemblies does not address any
3 post-9/11 standards for security of plutonium, and
4 Duke does not even know what they are. Is that
5 correct?

6 MR. REPKA: No, that is not what we said.
7 That is not correct.

8 MS. CURRAN: Well, is it a safeguards
9 protected statement, whether or not we agree about
10 whether it's correct?

11 CHAIR YOUNG: I was writing and I didn't
12 catch every single thing you said. I know that there
13 was some reference that may be may have been similar
14 to --

15 MR. FERNANDEZ: Can you please read it
16 again for the staff's purposes, please?

17 CHAIR YOUNG: Go ahead.

18 MS. CURRAN: Duke Power had stated today
19 that its security plan for handling plutonium test
20 assemblies does not address any post-9/11 Category I
21 standards, and Duke does not even know what they are.

22 MR. FERNANDEZ: Your Honor, the staff --
23 although we don't believe that's a true statement, we
24 don't think it's SGI.

25 MS. CURRAN: Okay. The other statement is

1 that the NRC staff also said that it would review
2 Duke's application without reference to any of the
3 post-9/11 security upgrades that have been imposed on
4 other facilities that handle special nuclear material.

5 MR. FERNANDEZ: Again, although the
6 statement is not accurate, it's not SGI.

7 CHAIR YOUNG: Mr. Manili, do you have
8 anything you want to add?

9 MR. MANILI: No, I do not.

10 CHAIR YOUNG: All right. Thank you.

11 MR. REPKA: I did want to make a couple of
12 comments at the appropriate point.

13 CHAIR YOUNG: You're going to. I'm not
14 going to cut you off. I was just going to say, after
15 we finish -- and probably we can just go off the
16 record to do this, but after we finish we probably do
17 need to deal with some logistical questions about
18 transcripts and how to handle them because I know at
19 some point I'm going to be called upon to sign my name
20 and say whether it is or is not, and I want to make
21 sure that I have all appropriate input. But then
22 there's the sort of circular quandary of you can't
23 have copies until I sign off on them. So, we can talk
24 about that after we conclude, off the record, unless
25 anybody wants that to be on the record, or if we need

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1 it to be on the record we can ask the Court Reporter
2 to go back on the record.

3 But leaving that aside for now, did you
4 have anything else you wanted to say?

5 MS. CURRAN: No.

6 CHAIR YOUNG: Mr. Repka?

7 MR. REPKA: First, a response to that
8 statement that BREDL just read about it's
9 characterization of Duke's position today. It is our
10 position -- I want the record to be very clear that
11 that is a mischaracterization of our position.

12 Our position is that there are two
13 specific Category I orders issued to two specific
14 facilities that Duke has not seen. Those facilities
15 are very different from Catawba, and those orders
16 don't apply to Catawba and relate to facilities that
17 are very different. So, that's what I believe we said
18 here today, and I think the characterization is a
19 distortion.

20 With respect to the citation that Ms.
21 Curran just read -- I believe it was a Limerick case -
22 - in terms of the requirement that an exemption
23 identify the requirements from which it would be
24 granted. I just want to confirm that we do agree with
25 Judge Baratta's point, the requirements that apply are

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the requirements in 10 CFR Part 73. Those are clearly identified in the exemption request in several different formats, and that's what the exemption goes to.

I think there's a lot of speculation as to some other requirements that may or may not exist. First, I just reiterate that the two orders issued to those two facilities are plant-specific orders, and therefore they do not apply to all Category I facilities and they do not apply by their terms to Catawba. So no exemption with respect to those orders is required.

The second thing is their speculation as to what staff guidance documents may or may not exist. We reiterate that what we've heard all along is that there are no such documents, but beyond that, even if there were, those are not requirements. Staff guidance documents are not requirements. The operative requirements are those in the publicly available regulations.

Now, beyond that, there was some discussion during Mr. Fernandez' presentation regarding the design basis threat, particularly the threat with respect to theft and diversion, that's the requirements in Part 73. The design basis threat for

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1 theft and diversion is not one of the requirements
2 from which Duke is seeking an exemption, I want that
3 to be very clear. Duke's basis for its conclusion
4 that it meets the requirements for a Category I
5 facility with respect to design basis threat of theft
6 and diversion is well articulated in the security plan
7 submittal, and includes the fact, among others, that
8 the facility is protected against the design basis
9 threat for radiological sabotage for Part 50
10 facilities, the import of that being that the
11 radiological sabotage design basis threat prevents and
12 assures that outsiders can't get in. So, I just want
13 that to be very clear. But with respect to theft and
14 diversion, the issue then becomes one of, in terms of
15 the regulation, whether or not there could be theft or
16 diversion by a small group with certain attributes
17 that are then explained in the regulation. Our
18 position is that's the requirement, there is no other.
19 If BREDL thinks that there is some small group that
20 could divert these fuel assemblies, that should be the
21 contention. And if they have an interpretation as to
22 what a small group is, that should be their
23 contention. And whether or not the staff has a
24 guidance document that further defines that, the
25 requirement is clear -- a small group -- and they need

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1 to address that requirement.

2 And the last thing I'll say is in the
3 context of -- and I think all of that goes directly to
4 what is at issue here, which is need to know, and
5 there is no need to know with respect to any of these
6 other documents that we've talked about here today in
7 order for BREDL to tell us how a small group of people
8 is going to divert this material. That's what the
9 contention has to be about.

10 Now, finally, there was some discussion of
11 what the Commission precedent may mean with respect to
12 reviewing the publicly available documentation on
13 which to frame contentions, and I would just offer
14 that publicly available means just that, publicly
15 available.

16 CHAIR YOUNG: Anything else?

17 MR. FERNANDEZ: We have nothing to add.

18 MS. CURRAN: I just have one or two small
19 points. I think Mr. Repka said the gist of his
20 argument was that these guidance documents for the
21 Category I design basis threat, the ones that were
22 referred to in Michael Weber's letter, are essentially
23 irrelevant, that since they are not regulation, that
24 we should be required to submit a contention that's
25 just based on the regulation, and I'd be glad to brief

1 this to the Licensing Board. The staff guidance is
2 highly relevant to the question of how the regulations
3 are interpreted. The case law is that generally the
4 staff guidance is reliable in terms of how is this
5 regulation to be applied. And if somebody wants to
6 come in and propose something different, they have to
7 show why. They can do it. The guidance is not a
8 binding regulation. But there's a general presumption
9 that it's the staff's considered judgment as to how
10 the regulation should be applied, and then if one
11 wants to deviate from the guidance, one should explain
12 why.

13 CHAIR YOUNG: I think there is case law
14 that it is persuasive. If that's the only thing that
15 you are wanting to brief, there's probably not any
16 need for that because we're familiar with that case
17 law.

18 JUDGE BARATTA: Isn't it also true that
19 those guides are in a particular situation or dealing
20 with a particular type of situation or event? In other
21 words, those guides may not be generic and they deal
22 with a specific situation?

23 MS. CURRAN: You mean a specific type of
24 facility or --

25 JUDGE BARATTA: The reg guides -- I mean,

1 there's thousands reg guides, literally thousands.

2 MS. CURRAN: Right. They're all
3 different, and my experience of them is they tend to
4 spell out in more detail what's expected in order to
5 comply with the regulations. And the ones I've looked
6 at are generally generic, although they can be
7 different for different types of facilities sometimes
8 --

9 JUDGE BARATTA: They can be specific.

10 MS. CURRAN: -- but I think you'd have to
11 look at it. You can't really make a generalization,
12 I don't think, without seeing it.

13 JUDGE BARATTA: Okay. Thank you.

14 CHAIR YOUNG: Usually probably each one
15 would define what it relates to, I would expect.

16 MS. CURRAN: I just really wanted to make
17 a point of clarification. I think Mr. Repka said that
18 Duke was not seeking an exemption from the design
19 basis threat for theft or diversion, but then he said
20 we meet the design basis threat for protection against
21 radiological sabotage, which is not the design basis
22 threat for theft or diversion. I think it's an issue
23 in this proceeding whether Duke meets the design basis
24 threat for theft or diversion and whether it should be
25 exempted from it.

1 CHAIR YOUNG: Okay. Before closing and
2 talking about the transcript -- and I'm thinking of
3 some way to approach that -- but, separately --

4 MS. CURRAN: Judge Young, could I just --
5 I just wanted to follow up on that, what I was just
6 saying. I think Mr. Repka said that the plant is
7 protected against intrusion by outsiders, and I think
8 he was referring to intrusion for purposes of
9 sabotage, and I just wanted to state again that -- he
10 said no outsiders can get in, and I think this is a
11 function of the number of outsiders, whether you can
12 make that determination whether your design is
13 adequate to protect against the number of outsiders.
14 It just gets back to the question of needing to know
15 what that is. Thanks.

16 CHAIR YOUNG: Okay. I was just actually
17 going to say that Judge Elleman and I have conferred
18 with Mr. Manili, and we've looked at the two documents
19 in question, and we may confer further with him as to
20 any significance they might have with regard to our
21 decision. I'm not sure that there's anything more we
22 need to do at this point here.

23 If there's nothing further on any of the
24 arguments, I think we can conclude for today and go
25 off the record.

1 MR. REPKA: Judge Young, before we do
2 that, can we discuss briefly the question of
3 anticipated schedule, or where we might be going in
4 terms of the various issues in the case? Last time we
5 talked about some perspective hearing dates --

6 CHAIR YOUNG: We can. I think that the
7 situation we're in now is that we really need to hear
8 from the Commission on the two issues that are before
9 it and, once we do, then I think things move from that
10 point forward. So I think probably rather than go
11 through and talk about a series of dates, it might be
12 more useful to just plan within a few days of hearing
13 from the Commission, plan to get together on the
14 telephone and talk about those dates at that point.

15 MS. UTTAL: Judge, can I say something
16 about that? I don't believe that the Commission's
17 decisions will have any effect on the safety and
18 environmental issues and those contentions that have
19 been proffered by BREDL.

20 CHAIR YOUNG: The only effect they've had
21 on them is that every time we do something like this,
22 it takes away from our time to work on those, but they
23 are in progress and they will be issued in the near
24 future. But I don't know that it would be all that
25 profitable to talk about that in a vacuum without

1 knowing what's happening with the overall case at this
2 point.

3 MS. UTTAL: Well, I was going to offer
4 that from the staff's viewpoint, the safety and the
5 environmental issues can move forward without hearing
6 from the Commission on the security issues.

7 MR. REPKA: I agree with that, to the
8 extent there are any such issues.

9 CHAIR YOUNG: It may be that they can, and
10 in that event -- I don't recall the last time we
11 talked about the timing of that, but I think that we
12 need to get together shortly after the Commission
13 issues its ruling, and we need to get together shortly
14 after we issue our decision on the contentions. We
15 need to find out where we are at that point, and we
16 need to proceed with all deliberate speed. And I
17 don't think I have to repeat the Board's concern with
18 that, and we hope that everyone will try to do all
19 they can to avoid delay. I don't know that there's
20 any need to say anything more about that.

21 MS. CURRAN: I just wanted to make a brief
22 request that may expedite a resolution of some of
23 these security issues. I'd like to formally request
24 a determination from the staff as to whether BREDL can
25 have access to the request for additional information

1 on security issues that went out at the end of
2 January. I think I know the answer, but I'd like to
3 get it on the record so that this thing will move
4 forward a little faster.

5 MR. FERNANDEZ: Given that we just got
6 that request, I'm not going to respond to that right
7 now.

8 MS. CURRAN: You just got it?

9 MR. FERNANDEZ: I've never received a
10 request that --

11 MS. CURRAN: I mean the request for
12 additional information that the staff sent to Duke
13 regarding the security plan submittal, the one that is
14 the subject of the closed meeting. You can't say
15 today that you're not going to give us that document?

16 MR. FERNANDEZ: No, I cannot.

17 CHAIR YOUNG: One of the things that I
18 think we've said before and we'll say again, anything
19 that is going to cause -- that there's going to be a
20 dispute about, that could cause any delay, bring it to
21 our attention sooner rather than later. So, Ms.
22 Curran has just brought this to our attention. If
23 there is an RAI that's gone out -- I think that you
24 had said earlier that any written documents would be
25 provided, I think you said that as part of your

1 argument that there should not be attendance at the
2 meeting.

3 MR. FERNANDEZ: The documents are
4 safeguards information. As far as I know, we had only
5 gotten that request for attendance at the meeting
6 until now. The first time I've heard that they want
7 access to these documents is right now. When I talk
8 to the appropriate staff people, I will find out what
9 their need to know determination is, and we will
10 contact Ms. Curran as soon as possible. I'm not going
11 to do that right now.

12 CHAIR YOUNG: You requested a response
13 from the staff. Are you going to be making a request
14 to us?

15 MS. CURRAN: I'll probably go through the
16 same process I did before. Maybe I can find it in the
17 transcript of --

18 CHAIR YOUNG: I just found a place in the
19 transcript where Ms. Uttal had said that the responses
20 to the RAIs would be provided. They would be filed on
21 the docket under oath or affirmation, but there would
22 have to be a separate need to know determination --
23 there is no need to know what the RAIs are.

24 MS. CURRAN: So I guess I can infer that
25 we've had our determination?

1 CHAIR YOUNG: I guess I had assumed that
2 any RAI responses normally have the questions put with
3 the responses, so you can understand the responses.

4 MS. UTTAL: Your Honor, that's true, but
5 if the responses to the RAI contain safeguards
6 information, there would have to be a separate need to
7 know regarding those responses, and I believe that's
8 what I stated at the telephone conference, so that the
9 staff has not stated that they will be given to the
10 Petitioner at this time, and I think that that should
11 be clear from the transcript read as a whole.

12 CHAIR YOUNG: Well, you said that the
13 responses would be filed --

14 MS. UTTAL: I did not say that they would
15 be made available, I said that a separate need to know
16 determination would have to be made for each document
17 including the RAI responses, whether they are filed
18 with the Commission or not.

19 CHAIR YOUNG: Okay. I guess what we need
20 to look at here -- are we going to need to get
21 together every time something like this comes up? I
22 mean, the protective order talks about RAIs. Is the
23 staff going to refuse every single RAI where there is
24 safeguards information despite the protective order?

25 MS. UTTAL: Your Honor, we're still in a

position where we don't have any intervenors in this case, we have petitioners.

CHAIR YOUNG: I understand your point, but you've agreed that they have standing. You've agreed that they have one admissible contention. So, the distinction between a party that has been admitted as an intervenor formally and a party who clearly will be admitted, based on your agreeing to standing and your agreeing that at least one contention is admissible, seems to be elevating form over substance just a bit.

MS. UTTAL: Your Honor, because one party says that there's standing, or two parties say there's standing, that is not the final decision regarding standing, that is the Board's function. And because we have said that we believe that at least one contention is admissible does not mean that that one contention is going to get in. The decision has not been made yet, and no security contentions have been admitted at this point, nor have any security contentions been offered, any proposed contentions been offered. So the status of this proceeding is that the staff will not be giving discovery to Petitioners --

CHAIR YOUNG: I understand your point of view, I've read it. The question is this, are we

going to be getting together once or twice a week for the next several weeks, or can we deal with these questions in a more efficient manner? Is now a good time to do it? Maybe we need to take a break, but if there is obviously something already out there on the table like this that will require us to get together next week, maybe we just as well do it now.

MR. REPKA: Judge Young, I would suggest that we take this issue under advisement, and we certainly would like to speak with the staff about it, and I think we understand Ms. Curran's point of view. I think that the Commission decision may or may not shed light on this particular issue as well, so I would say let's just take it under advisement, with the goal of prompt resolution.

CHAIR YOUNG: You make a good point, and actually that does take us back to maybe we should just wait until we hear from the Commission, schedule a meeting shortly after that, and schedule a meeting shortly after our ruling on the nonsecurity-related contentions shortly after that, and if they are one and the same meeting, that's fine; if not, we'll do separate meetings, but it does make sense to hold off on the security-related issues until we hear from the Commission. Thank you.

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1 Anything more that's hanging out there
2 that we can take care of?

3 (No response.)

4 Okay. I think now we can go off the
5 record. That concludes this proceeding formally.

6 (Whereupon, there was an off the record
7 discussion.)

8 CHAIR YOUNG: Just to summarize, we've had
9 a discussion about how to approach the classification
10 of the transcript, and what we've decided to do --
11 obviously, I have the authority and the responsibility
12 to make that designation and will need to sign off on
13 that, but I want to allow the parties to give input.

14 The security people have said that they
15 don't see anything that would make the transcript
16 safeguards. Mr. Fernandez has indicated that there
17 may be protected information in the transcript. We've
18 arranged to order three copies of the transcript --
19 one for Mr. Manili and me, one for -- well, all of
20 them sent to me, and then I will allow BREDL, Ms.
21 Curran, to look at one, and the staff and their
22 security experts to look at one, and then give me
23 input on what they think the classification should be
24 so that we get the correct one made. And then Mr.
25 Wetterhahn wanted to read from 10 CFR 2.790(d).

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1 MR. WETTERHAHN: I'm responding to an
2 inquiry as to whether there existed a different class
3 of documents lower than safeguards, which would be
4 withheld from public disclosure and independent of the
5 Board's present protective order --

6 CHAIR YOUNG: Proprietary kind of
7 information, I presume.

8 MR. WETTERHAHN: Yes. 2.790 generally
9 addresses proprietary commercial information which is
10 withheld from public disclosure. It also designates
11 in subsection (d) a certain category as specifically
12 commercial and financial information. Let me read
13 that subsection onto the record.

14 "The following information shall be
15 deemed to be commercial or financial
16 information within the meaning of 9.17(a)(4) of
17 this chapter, and shall be subject to
18 disclosure only in accordance with the
19 provisions of 9.19 of this chapter:

20 (1) Correspondence and reports to or
21 from the NRC which contain information or
22 records concerning a licensee or applicant's
23 physical protection, classified matter
24 protection, or material control and accounting
25 program for special nuclear material not

[REDACTED]

1 otherwise designated as safeguards information,
2 or classified as national security information,
3 or restricted data."

4 Perhaps some of the information which we
5 discussed here would fall within that category and
6 would need to be withheld under that section.

7 CHAIR YOUNG: You're welcome to come and
8 look and give your input. I'm going to accept input
9 from whoever is there.

10 MS. UTTAL: Can we either take a small
11 break or --

12 CHAIR YOUNG: Believe me, I want one just
13 as bad as you do. We're really trying to wind down
14 here, that's my hope, anyway. Do you want to come and
15 look at it? I mean, it's up to you.

16 MR. WETTERHAHN: Yes, we will take a look
17 at it.

18 CHAIR YOUNG: Okay. Well, then we'll get
19 four copies. All right. Lovely to see you again.

20 (Whereupon, at 1:32 p.m., the above-
21 entitled proceedings were concluded.)

