

NUCLEAR REGULATORY COMMISSION

Title: Duke Energy Corporation

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

Location: (telephone conference)

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4 ATOMIC SAFETY AND LICENSING BOARD

5 (ASLB)

6 + + + + +

7 TELECONFERENCE

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9 In the Matter of : Docket Nos.
10 DUKE ENERGY CORPORATION : 50-413-OLA
11 : 50-414-OLA
12 Catawba Nuclear Station : ASLBP No.
13 Units 1 and 2 : 03-815-03-OLA
14 _____

15 Tuesday, April 6, 2004

16
17 The above-entitled matter came on for hearing,
18 pursuant to notice, at 10:00 a.m.

19
20
21 BEFORE:

22 ANN MARSHALL YOUNG, Chairperson

23 ANTHONY J. BARATTA, Administrative Law Judge

24 THOMAS S. ELLEMAN, Administrative Law Judge
25

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13 ALSO PRESENT

14 MICHAEL T. CASH, Duke Energy

15 EDWIN S. LYMAN, Ph.D., BREDL

16 STEPHEN NESBIT, Duke Energy

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

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10:12 a.m.

JUDGE YOUNG: All right, then. On the record. This is Ann Marshall Young, I'm the Chair of the Board. If the other members of the Board would introduce yourselves and then we'll go through who from the parties are on the line with us.

JUDGE ELLEMAN: This is Judge Thomas Elleman.

JUDGE BARATTA: This is Judge Anthony J. Baratta.

JUDGE YOUNG: Let's start with the staff.

MR. FERNANDEZ: Antonio Fernandez for the staff. With me I have Margaret Buck and along with us are also Katherine Marco, an attorney in OGC, and Tyson Smith, an attorney in OGC.

JUDGE YOUNG: Duke?

MR. REPKA: In Washington, this is Dave Repka, and with me is Ms. Ann Cottingham. And then on a separate line from Charlotte are Ms. Lisa Vaughn and Ms. Tamika Shafeek-Horton, both attorneys with Duke Energy. Also there is Mr. Stephen Nesbit and Mr. Michael Cash are with the Duke Energy MOx Fuel Project. And then on the third line from Charlotte is Mr. Michael McKinnon who is in the Information

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1 Technology Department at Duke Energy. He's the
2 Operations Manager for the email system.

3 JUDGE YOUNG: And for BREDL.

4 MS. CURRAN: This is Diane Curran, and Dr.
5 Edwin Lyman, our expert, is also on the line.

6 JUDGE YOUNG: All right. Thank you all.
7 We have several things to talk about today. I'll just
8 list the ones that I had on my agenda, and if we need
9 to add to those, we can do that.

10 There are a couple of things that are
11 pending in addition to the discovery issues. One is
12 Duke counsel's request that we remove certain pages of
13 the transcript from the safeguards information
14 category. And not having received any response to
15 that, I'm assuming no party has any objection. Our
16 security expert assistant, Mr. Manili, has been out of
17 town but he's back this week, and as soon as he's had
18 a chance to look at that and make sure there's no
19 problem with that, we'll be glad to do that. And I'm
20 not sure from a mechanical standpoint, I guess we
21 could just take those out and make them public. Any
22 parties have anything to say on that particular issue?

23 MR. FERNANDEZ: Your Honor, the staff has
24 no objection to Duke's request.

25 MS. CURRAN: We don't object to Duke's

1 request. This is Diane Curran.

2 JUDGE YOUNG: Okay. Then we will take
3 care of that, as I said, as soon as we make sure with
4 our security expert assistant that we're not
5 overlooking anything.

6 Also pending is Duke's motion to dismiss
7 Contention 3 to which we have responses from the staff
8 and BREDL. Now, I don't show that we ever got an
9 amended Contention 3 from BREDL; is that correct?

10 MS. CURRAN: That's correct.

11 JUDGE YOUNG: Okay. We need to deal with
12 that, and I think probably we can put that off until
13 after we have gone through the discovery issues. And
14 in addition to the objections, we have a motion for
15 protective order from Duke. Are there any other
16 things that anyone thinks we need to look at or talk
17 about today? All right.

18 Let me just ask, are there any objections
19 to the motion for a protective order?

20 MR. FERNANDEZ: No objection from the
21 staff, Your Honor.

22 MS. CURRAN: None from BREDL.

23 JUDGE YOUNG: All right. Then we'll go
24 ahead and issue that.

25 Moving now to the objections to discovery.

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1 The only objections that we received, I believe, are
2 Duke's and the staff's objection to BREDL's request.
3 Am I --

4 MS. CURRAN: That's right.

5 JUDGE YOUNG: Okay. And BREDL did not
6 file any objections to any request that were put to
7 it.

8 MS. CURRAN: This is Diane Curran. That's
9 correct.

10 JUDGE YOUNG: Okay. All right. Any
11 preference on which objections -- why don't we go
12 through the staff objections first since there are
13 fewer of those.

14 MR. REPKA: This is Dave Repka. Actually,
15 we have a preference to get our general objection B as
16 early as we can. That's the one we have Mr. McKinnon
17 on the line, and he has some other commitments, so we
18 would like to get through that at the earliest time.

19 JUDGE YOUNG: Okay. The email issue.

20 MR. REPKA: Correct.

21 JUDGE YOUNG: If there's no objection, I
22 don't have any problem with going ahead and doing that
23 one first. Why don't we -- I'm assuming that the
24 staff doesn't -- well, let just ask, what's the
25 staff's position on that?

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1 MR. FERNANDEZ: Your Honor, we don't have
2 a position. We feel that is a dispute between BREDL
3 and Duke.

4 JUDGE YOUNG: Okay. Ms. Curran, what's
5 your response?

6 MS. CURRAN: I guess I don't want to
7 impose an unreasonable burden on Duke. I guess I'd
8 like to hear more about how Duke maintains its subject
9 matter files. If I get a sense that there's a
10 systematic way of preserving documents in the topic
11 files, then maybe this isn't an issue.

12 JUDGE YOUNG: Go ahead, Mr. Repka.

13 MR. REPKA: Yes. I think that, and I'll
14 let Mr. Nesbit add to this, but I think it's, in
15 general, fair to say that the Duke MOx Project
16 Organization maintains topic files and substantial
17 files on the MOx project relevant to that project, as
18 would other organizations that supply input, internal
19 organizations to Duke Energy.

20 JUDGE YOUNG: You're talking about paper
21 files?

22 MR. REPKA: Correct. There may be
23 electronic files as well for databases or other things
24 in which documents can be retrieved from, but our view
25 is that the discovery requests are fairly

1 comprehensive, and we expect that we will supply
2 substantial information responsive to those requests
3 and substantial information that really provides the
4 basis for Duke's position in the case. So it's hard
5 for me to characterize that without having completed
6 the reviews in order to compile the answers to the
7 discovery, but perhaps the answer will become apparent
8 after the documents are produced and the
9 interrogatories are answered, and there's other
10 specific things that BREDL is interested in seeing,
11 perhaps the second round can focus on that. But I
12 think in a general sense the concept of going beyond
13 that and searching for email I think is where the
14 burden comes in without a lot of commensurate value
15 added.

16 JUDGE YOUNG: Is there any way that email
17 that's easily reachable could be provided without
18 getting into the difficulties that you described?

19 MR. REPKA: Well, I think that where email
20 has become part of a project file, that's what I would
21 consider to be -- and it's maintained in that way.
22 Now, that could be provided. I don't know how easy
23 that would be, but beyond that I don't think that
24 there's necessarily an easy way to review email and
25 eliminate duplications because every email might exist

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1 in two individuals' accounts or more.

2 MS. CURRAN: Well, let me ask you this,
3 Dave. Does Duke have a procedure for including
4 internal email, any email correspondence in a project
5 file? Is there a specific procedure for the relevant
6 email that goes in the file?

7 MR. NESBIT: Dave, you want me to jump in?

8 MR. REPKA: Yes. That would be fine, Mr.
9 Nesbit.

10 MR. NESBIT: Typically, if there's an
11 email that's pertinent, for example, say, to a
12 calculation or something like that, the Duke procedure
13 is to make a hard copy of that email and to attach it
14 to the calculation so that there is a formal record as
15 part of our out-file process that's retained there.

16 In addition, it's common practice for
17 engineers to make hard copies of email and put them in
18 local files, their own personal files, and also the
19 MOx fuel project section files when those are
20 pertinent. We will in the process of our complying
21 with discovery requests look through all those files
22 and get anything, including a hard copy of an email
23 that might be in there.

24 MS. CURRAN: Well, at this point, if that
25 is the process, then at least for this round I'm

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1 willing to see what we get, and if it becomes an
2 issue, we can raise it in the next round.

3 JUDGE YOUNG: All right. Okay. That
4 takes care of that one at this point, in any event.

5 MR. REPKA: And with that, I think Mr.
6 McKinnon can safely drop off the line.

7 MR. MCKINNON: Okay. Thank you very much.

8 MR. REPKA: Thanks, Michael.

9 JUDGE YOUNG: Thank you.

10 MR. MCKINNON: Bye-bye.

11 JUDGE YOUNG: I'm going to just take one
12 second to send an email to our law clerk who got off
13 the line so we could fit everyone on.

14 (Pause.)

15 MR. REPKA: And I would add that I
16 appreciate Ms. Curran's understanding on that
17 particular issue.

18 JUDGE YOUNG: Great. All right.

19 MS. CURRAN: You're welcome.

20 JUDGE YOUNG: Okay.

21 MS. CURRAN: You know, maybe we could --
22 since we're jumping around, would it be possible to go
23 to, let's see, Specific Interrogatory 2 on Page 5 of
24 Duke's response? If we deal with that now, then I can
25 let Dr. Lyman leave the call.

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1 JUDGE YOUNG: Well, the only thing is I'm
2 not -- I haven't gone through them and categorized
3 them in terms of which things you might want to talk
4 to Dr. Lyman about, but it's possible if there are any
5 substantive issues that we might have questions for
6 Dr. Lyman. I'm not basing that on anything specific,
7 but I would hate to lose someone and then want to ask
8 a question. Okay. Which one were you referring to?

9 MS. CURRAN: Number 2. It's on Page 5 of
10 Duke's motion.

11 JUDGE YOUNG: Oh, specific discovery. All
12 right.

13 MS. CURRAN: But if you'd like to have the
14 experts on the line, Judge Young, that's fine. I was
15 just hoping to relieve him. Because I think most of
16 the objections are legalistic other than this one.

17 JUDGE YOUNG: You may be right. Judge
18 Elleman and Judge Baratta, were there any others that
19 --

20 JUDGE ELLEMAN: Judge Young? This is
21 Judge Elleman. As you know, I've been out of touch
22 with my email and U.S. mail since last Saturday, and
23 so I have the discovery requests but I do not have the
24 responses to those.

25 JUDGE YOUNG: Oh, okay.

1 JUDGE BARATTA: I don't think there's
2 anything else.

3 JUDGE YOUNG: Okay.

4 JUDGE BARATTA: I'm sorry, that was Judge
5 Baratta, excuse me.

6 JUDGE YOUNG: Well, let's go ahead on that
7 one then. Ms. Curran, go ahead.

8 MS. CURRAN: Okay. This is Specific
9 Interrogatory 2, which should have been -- and
10 Specific Interrogatory 1-2 relates to Contention 1.
11 And the part that --

12 JUDGE YOUNG: Actually, hold on one
13 second. Judge Elleman, would it help -- I think it
14 might be helpful since you don't have the objection in
15 front of you, it might be helpful maybe for Mr. Repka
16 to give a short summary of the objection so Judge
17 Elleman will be able to have that as he's listening to
18 your response, Mr. Curran. Would that be helpful?

19 JUDGE ELLEMAN: I would appreciate that
20 very much. Thank you.

21 JUDGE YOUNG: Mr. Repka?

22 MR. REPKA: Sure. Let me try to do that.
23 The Specific Interrogatory Number 2 asks that Duke
24 identify and describe in detail, "all experimental
25 data and analysis justifying your omission of a design

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1 basis LOCA consequence analysis in the license
2 amendment application." Goes on from there. But I
3 think with respect to that request, our objection
4 really is one of the scope of the proceeding, related
5 to the scope of the proceeding. The contentions in
6 the case, as admitted, relate to the effect of any
7 differences in fuel behavior between LEU and MOx fuel;
8 in Contention 1, the LOCA analysis. Contention 2 is
9 the issue of beyond design basis severe accident
10 consequences.

11 With respect to this being an
12 interrogatory in Contention 1, what we point out in
13 our objection is that the contentions did not focus on
14 any of the analysis in the application of the dose
15 consequences related to a LOCA. To some degree, the
16 contentions focused, and we think this is where the
17 proper focus is, is on the analysis, the LOCA
18 analysis, the ECCS performance analysis required by
19 Appendix K, and it's addressed in Section 3.7 of the
20 application.

21 So to the extent that this interrogatory
22 is really going to design basis radiological dose
23 consequence analyses, that's something that did not
24 come out in the original contentions and in the basis
25 for those contentions. So I think, in a nutshell,

1 that's really our objection here, it's based upon the
2 scope of the contention.

3 JUDGE YOUNG: Okay. Ms. Curran?

4 MS. CURRAN: Well, first of all, the
5 standard here is relevance, is one of relevance, and
6 if you look at the contention, what it says is there
7 are uncertainties in aspects of MOx fuel behavior that
8 may have a significant impact on Duke's LOCA analysis
9 for the Catawba core with four plutonium MOx LTAs.
10 And in the basis of the contention, we assert there's
11 insufficient information to provide confidence that
12 the MOx LTAs will not cause coolant blockage during a
13 LOCA that could lead to unaccessible loss of core
14 coolable geometry and an uncontrolled core melt.

15 So there's a concern expressed in the
16 contention that the analysis, the LOCA analysis is
17 insufficient because it doesn't identify or address
18 all the factors that are relevant and that this could
19 affect the consequences of an accident. This is an
20 issue that we consider to be relevant to the
21 contention. The NRC does require consideration of
22 consequences in design basis accidents.

23 MR. REPKA: And I would like to reply to
24 that because, as characterized by Ms. Curran, I think
25 the contention does in fact address precisely the LOCA

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1 analysis, and we have no objection to the
2 interrogatory to the extent it relates to the LOCA
3 analysis.

4 The issue really is the way it's phrased
5 it seems to bring into question the separate analysis
6 of Part 100 Radiological Consequences, which was an
7 analysis not in any way challenged by any of the
8 contentions, and the relevant citations to that are
9 provided in our written response.

10 MS. CURRAN: I wonder if Dr. Lyman could
11 comment?

12 DR. LYMAN: This is Dr. Lyman. In my
13 view, the scope of our original and late filed
14 contentions does encompass this information because
15 there is a feeling that the text is our Contention 10.

16 JUDGE YOUNG: Let me just interrupt here.
17 It might be helpful if we focus on the admitted
18 contentions.

19 DR. LYMAN: Okay. Since the challenge is
20 really to our original -- I mean if you look at Duke's
21 challenge, it was my reading of that that was a
22 challenge to the language that we had in our original
23 contentions. I don't think there's any doubt that the
24 information we seek is within the scope of the
25 Contention 1, as reframed. So if that's what the

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1 discussion is limited to, I don't think there's any --

2 JUDGE YOUNG: Well, I guess in terms of
3 the basis --

4 DR. LYMAN: Right.

5 JUDGE YOUNG: -- there might not be a
6 problem with going into that, but I didn't want us to
7 get on the text of the original contention so much as
8 -- but if either Ms. Curran or Mr. Repka want to offer
9 any clarification before you continue with your
10 answer, I just want to make sure we're all on the same
11 page. Or Judge Elleman or Judge Baratta. We want to
12 make sure we are understanding this in the same
13 context.

14 MR. REPKA: Well, this is Dave Repka. I
15 would just say again that the admitted contentions
16 focused on the LOCA analysis and the effect that
17 asserted behavior differences between MOx and LEU fuel
18 would have on LOCA analysis. Again, that's the scope
19 of the contentions. What we object to is to the
20 extent this goes to the radiological assessment as
21 opposed to the Appendix K analysis. And then I would
22 just say if Mr. Nesbit has anything to add to what Dr.
23 Lyman said, I would welcome that.

24 MR. NESBIT: This is Steve Nesbit. I
25 would like to add that the connection between a

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1 radiological consequent of LOCA and the emergency core
2 cooling system consequences of LOCA is purely in name
3 only. There is no technical nexus between the ECCS
4 calculations, in other words, things like peak
5 cladding temperature, which is what the BREDL original
6 contentions were focused on, and the radiological
7 consequences, because the NRC requires that you assume
8 significant core damage for your radiological
9 consequence analysis even though your emergency core
10 cooling system is there to prevent significant core
11 damage. So there's technical nexus between the
12 issues, and it's not something that was brought up or
13 focused on in BREDL's original contentions.

14 MR. REPKA: And, again, we have no
15 objection to the scope with respect to the ECCS
16 analysis.

17 DR. LYMAN: Okay. This is Dr. Lyman just
18 to --

19 JUDGE YOUNG: Go ahead. Go ahead.

20 DR. LYMAN: -- respond. There isn't a
21 very close relationship between the way the contention
22 is phrased they're referring to -- unfortunately, I
23 don't have the rephrased contention in front of me --
24 but the differences between LEU and MOx, which both
25 affect the probability or the course of events during

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1 a design basis LOCA as well as the source term during
2 a design basis LOCA, which is of course a function of
3 the particular characteristics of the fuel degradation
4 during the LOCA process.

5 In particular, the question of whether or
6 not relocation occurs during the design basis LOCA,
7 the relocation could have an effect on the in-vessel,
8 early in-vessel release in the source term, and we see
9 that a key issue in understanding the difference
10 between LEU and MOx fuel behavior is the impact on the
11 source term. This comes out in the expert panel
12 report on high burn-up in MOx fuel that we cited in
13 the original contentions where there's considerable
14 expert uncertainty on certain aspects of the source
15 term, not only the severe accident source term but
16 also the parts of the source term relating only to
17 design basis accidents. And to that extent, the
18 emission of any LOCA consequence analysis in Duke's
19 submittal, therefore, fails to take into account the
20 potential impact of these differences on the Part 100
21 analysis, which we interpret to be a part of the LOCA
22 analysis.

23 JUDGE ELLEMAN: Dr. Lyman, Ms. Curran,
24 this is Judge Elleman. Do not the responses to
25 Contention 2 give you the information you're seeking?

1 MS. CURRAN: You mean Interrogatory 2?

2 JUDGE ELLEMAN: Yes.

3 DR. LYMAN: Sorry, I'm at home and I don't
4 have those documents in front of me.

5 JUDGE YOUNG: Wait. You're talking about
6 the responses to which --

7 MS. CURRAN: I'm confused about what
8 you're asking about, Judge Elleman.

9 JUDGE ELLEMAN: Contention 2 relates to
10 beyond LOCA conditions. It relates to beyond design
11 basis accidents, and so isn't that not the contention
12 yielding you the information you were looking for?

13 MS. CURRAN: So in other words, you're
14 asking is the interrogatory relevant --

15 JUDGE ELLEMAN: Relevant to that.

16 MS. CURRAN: -- to Contention 2?

17 JUDGE ELLEMAN: Yes, that's correct.

18 MS. CURRAN: Well, I think Dr. Lyman was
19 just saying it's also relevant to design basis
20 accidents.

21 JUDGE ELLEMAN: Okay. So the responses to
22 Contention 2, in your judgment, do not cover all of
23 the ground you wish it to cover.

24 MS. CURRAN: That's right.

25 JUDGE YOUNG: The responses to the

1 interrogatories on Contention 2; is that what you're
2 talking about?

3 JUDGE ELLEMAN: Yes.

4 JUDGE YOUNG: Okay.

5 MS. CURRAN: Yes. And I think that's what
6 Dr. Lyman was just trying to explain, that there's
7 also questions about consequences with a design basis
8 accident.

9 MR. NESBIT: This is Steve Nesbit from
10 Duke. If I can just add one more thing. The
11 treatment of the design basis accident LOCA dose has
12 been in front of Intervenors and the Board for months
13 and months. They've raised no objection to it. So it
14 seems improper to allow that contention to now be
15 brought.

16 JUDGE YOUNG: Okay. You're raising a
17 legal argument, and I think that really your counsel
18 needs to speak to that.

19 MR. REPKA: This is Dave Repka.

20 JUDGE YOUNG: I didn't stop you because I
21 thought you were going to speak to that from a
22 scientific point of view, but, Mr. Repka?

23 MR. REPKA: I think that the contention or
24 the interrogatory itself is based upon a faulty
25 premise. It talks about justifying the omission of a

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1 design basis LOCA consequence analysis. And to the
2 extent that that's asserting the omission of a Part
3 100 design basis radiological consequence analysis,
4 that's not an issue that has appeared in any of the
5 contentions, either the original or the admitted
6 contentions, and it's also based on a faulty premise
7 because in fact there have been radiological
8 consequence assessments included in the license
9 application and in the RAI responses. And so perhaps
10 BREDL would be best looking at what's already out
11 there and a matter of public record rather than
12 seeking a justification for an omission that doesn't
13 really exist.

14 JUDGE YOUNG: So is what you're saying
15 that with regard to at least the first sentence of
16 Specific Interrogatory Number 2 that there's no
17 relevant answer because you did include that? Is that
18 what you're saying?

19 MR. REPKA: I'm saying two things. First
20 is that to the extent it's related to radiological
21 consequences, that's beyond the scope of the admitted
22 contention, which relates to the ECCS analysis. But
23 beyond that I'm saying that in fact there is
24 information available, there, is no omission with
25 respect to the radiological consequences, and we cite

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1 to some of that in our objection. So there is no
2 omission.

3 JUDGE YOUNG: And in terms of the second
4 sentence of the interrogatory, is what you're saying
5 that that should -- the response to that would be
6 self-evident from what has already been provided? Is
7 that what you're saying?

8 MR. REPKA: Well, I would say with respect
9 to that first, to the extent it relates to
10 radiological consequences it's again raising an issue
11 that's outside the Appendix K ECCS evaluation and the
12 scope of the contention. Second, with respect to
13 whether or not it's answered by the information that
14 is included in the application of the RAI response, I
15 can't say it's self-evident, I don't know the answer
16 to that and I'm not speculating, but I think that
17 would be one place to look.

18 MS. CURRAN: This is --

19 JUDGE YOUNG: Go ahead, Ms. Curran.

20 MS. CURRAN: This is Diane Curran. I just
21 want to emphasize that this is -- the standard for
22 discovery is one of relevance. It's a different
23 question as to whether we're going to be allowed to
24 put evidence in on a subject as to whether it's
25 relevant, and it seems to me that this is a very

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1 relevant inquiry and it should be answered. And if
2 the answer is, "We've already told you, this is all we
3 have, see X," then that's an answer to discovery. But
4 it seems to me that we should get an answer to this
5 question.

6 JUDGE YOUNG: Mr. Repka, can you state
7 whether the answer would be that? I mean it sounds
8 like that's what you sort of said before. You said
9 with regard to the second part you weren't sure, but
10 is this something that can be resolved by just -- it
11 seemed to be that you were suggesting that this might
12 be resolved by a straightforward statement of what is;
13 in other words, that that would be the equivalent of
14 giving the response that Ms. Curran just mentioned.

15 MR. REPKA: I do believe we could answer
16 this interrogatory and it would be a fairly
17 straightforward answer. However, we don't want to, in
18 doing so, concede that the scope of the contention is
19 broader than what we view it as, and that's the reason
20 we've raised the objection.

21 JUDGE YOUNG: It would be helpful for me
22 at this point, Judge Baratta and Judge Elleman, to
23 have a private conversation at this point. If that
24 would be all right with you if we could all hang up,
25 I could call you both and then we could call back in,

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1 assuming we could get back in.

2 MR. FERNANDEZ: Your Honor?

3 JUDGE YOUNG: Yes.

4 MR. FERNANDEZ: Before you sign off I
5 didn't know if you wanted to get the staff's view?

6 JUDGE YOUNG: I thought you said you
7 didn't have anything to say. But if you do, go ahead.

8 MR. FERNANDEZ: The staff agrees with
9 Duke. We see the request as going beyond what's
10 currently in the contention, as admitted. The
11 contention, as admitted, and even the previous
12 contentions did not address deficiency with regard to
13 analyses performed to assess dose consequence modeling
14 as a result of LOCA or any other accident. The
15 contention that's referring by the Board does not talk
16 about those analyses. The analyses it does talk about
17 is LOCA event analyses and --

18 JUDGE YOUNG: What was the word you used,
19 LOCA what analyses?

20 MR. FERNANDEZ: Event analyses.

21 JUDGE YOUNG: Event.

22 MR. FERNANDEZ: EVA analyses. These are
23 all accident analyses, not dose modeling or dose
24 consequence analyses. This is two very different
25 things, and the adequacy of what Duke provided the

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1 staff with regard to dose consequence has never been
2 challenged. So to seek discovery on that matter would
3 be trying to seek discovery on a matter that's outside
4 the scope of the litigation and would not reasonably
5 lead to any evidence admissible during the hearing
6 because the issue is not within the scope of the
7 hearing that's currently presented because of the
8 contentions are they way they are, as admitted.

9 So the staff's position is that the
10 discovery request, particularly Number 2, Specific
11 Interrogatory Number 2, should probably be stricken as
12 far as it requests information that's outside the
13 scope of the proceeding.

14 MS. CURRAN: Judge Young, this is Diane
15 Curran. I fail to see how it's possible to make an
16 unequivocal statement that this discovery question
17 won't lead to any -- to the discovery of any
18 admissible evidence when the focus of the contention
19 is the behavior of MOx fuel, which of course include
20 consequences of its behavior. So I mean we're talking
21 about relevance here.

22 JUDGE YOUNG: Judge Baratta and Judge
23 Elleman, would it be all right with you all if we got
24 off and I called you separately and then we came back
25 on?

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1 JUDGE BARATTA: That's fine.

2 JUDGE ELLEMAN: That's fine.

3 JUDGE YOUNG: Okay. Then we're going to
4 hang up and call back in a few minutes if everyone
5 could just hold on for a minute. Thank you.

6 (Whereupon, the foregoing matter went off
7 the record at 10:45 a.m. and went back on
8 the record at 11:02 a.m.)

9 JUDGE YOUNG: All right. Just without --
10 we're listening to all your arguments and we're going
11 to take them under advisement and make a ruling as
12 quickly as possible, but just to sort of see if we can
13 get a little bit of a clarification on this, I'm going
14 to first sort of ask a general question and then Judge
15 Baratta and Judge Elleman may have more specific
16 technical and scientific questions for Dr. Lyman and
17 Duke's people and the staff possibly.

18 Assuming that whether it's in 1 or 2 that
19 if a LOCA led to a core destructive accident and there
20 was a release, that that would be relevant under 1 or
21 2, I'm not completely clear on Duke's argument and it
22 would be helpful to get Dr. Lyman to speak to it from
23 that perspective as well for me. Judge Elleman and
24 Judge Baratta, did you want to add anything at this
25 point?

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1 JUDGE ELLEMAN: Go ahead, Judge Young. We
2 can maybe ask questions later.

3 JUDGE YOUNG: Okay. Go ahead then. Dr.
4 Lyman, do you want to speak to that first since you
5 were talking, and then Duke may have something to say
6 to it as well.

7 DR. LYMAN: I'm sorry, could you restate
8 the question, please?

9 JUDGE YOUNG: Assuming that what we were
10 looking at in Contentions 1 and 2 as we reframed them,
11 and I can read them to you if you want. Let me just
12 read them to you. Contention 1, reframed, "The LAR is
13 inadequate because Duke has failed to account for
14 differences in MOx and LEU fuel behavior, parentheses,
15 both known differences and recent information on
16 possible differences, and for the impact of such
17 differences on LOCAs and on the DBA analysis for
18 Catawba."

19 The second contention was, "The LAR is
20 inadequate because Duke has, a, failed to account for
21 the impact of differences in MOx and LEU fuel
22 behavior, parentheses, both known differences and
23 recent information on possible differences, on the
24 potential for releases from Catawba in the event of a
25 core destructive accident, and, b, failed to quantify

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1 to the maximum extent practicable environmental impact
2 factors relating to the use of the MOx LTAs at
3 Catawba, as required by NEPA."

4 Assuming that the consequences of a core
5 destructive accident -- if a LOCA led to a core
6 destructive accident, that the consequences would come
7 into what you're asking for, could you speak to that
8 in the framework of the two reframed contentions I
9 just read to you?

10 DR. LYMAN: I'll try. I do --

11 JUDGE YOUNG: And it sort of gets to what
12 Judge Elleman had asked before also.

13 DR. LYMAN: Yes. No, it certainly is true
14 that we in our interrogatories for 2 we also asked for
15 specific information related to all the assumptions
16 for the consequence analysis of severe accident using
17 MOx fuel. And, certainly, if that were replied to in
18 full, that would contain some of the information that
19 we requested in the Specific Interrogatory Number 2
20 for Contention 1, except it wouldn't directly address
21 specific issues going to the consequence analysis for
22 LOCAs that are required for design basis accidents,
23 but we would probably be able to back out that
24 information. We're not as specific in the request for
25 Contention 2, so it's -- we believe that that language

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1 would encompass what we asked for in Contention 1 but
2 because it's not as specific we may not get it, at
3 least in the first round.

4 JUDGE YOUNG: At this point, I'd like to
5 ask one more question and direct it to Duke and then
6 Judge Baratta and Judge Elleman may be able to clarify
7 this more. Mr. Repka, I'll just ask you and then if
8 you need to refer this, assuming that this
9 information, that the consequences if there were core
10 destructive accident arising out of a LOCA, assuming
11 that that would come in under 1 or 2, does your
12 objection go to it across the board or is this more --
13 I mean can we sort of cut to the chase, I guess is
14 what I'm talking about? Is there something that I'm
15 missing in terms of why this -- is your argument that
16 the contentions, as admitted, should not be construed
17 to allow for any consequences arising from, for
18 example, a core destructive accident that was the
19 result of a LOCA?

20 MR. REPKA: Here's what I think we're
21 saying. This Interrogatory Number 2 refers to, and
22 I'll quote, "a design basis LOCA consequence
23 analysis," okay? So that's -- when we read that, we
24 read that as a term of art. That's a design basis
25 LOCA analysis, which is a particular kind of analysis

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1 under Part 100. That's the type of analysis we don't
2 believe is in play, has ever been put in play in
3 either Contention 1 or 2.

4 In Contention 2, which is the severe
5 accident -- or at least we read it as a severe
6 accident consequence contention, perhaps among other
7 things. That's really a separate kind of risk
8 analysis is the way I believe the Duke has approached
9 that and views it, which is something different from
10 what this interrogatory refers to, which is a design
11 basis LOCA consequence analysis. So I think in
12 Contention 2 we would say we're not getting in that
13 contention to this particular design basis LOCA Part
14 100 analysis.

15 JUDGE YOUNG: Earlier you said that you
16 could give a fairly straightforward answer to that but
17 that you didn't want to sort of give up your objection
18 to arguing the relevance of either ECCS or, am I'm
19 forgetting the other term. Given what I've said, can
20 you provide your straightforward response, and can we
21 sort of get to the information that we're talking
22 about in a straightforward way without sort of setting
23 everything up on highly procedural technical kinds of
24 issues?

25 MR. REPKA: Well, I think we can give a

1 straightforward answer to the question because it's
2 based on the premise of an omission of this Part 100
3 consequence analysis that in fact has been done. But
4 our point then would be, and I don't view it as a
5 procedural point at all, is that we're really -- just
6 in this discussion we've talked about three different
7 analyses: The Appendix K ECCS analysis, the design
8 basis Part 100 LOCA analysis, and the third thing
9 being the severe accident risk analysis. And our
10 position is, and I wouldn't want to concede it in
11 giving the straightforward answer, is that the first
12 and the third of those are within the scope of the
13 contention but the second is not, the Part 100
14 radiological consequence analysis. So perhaps we just
15 say that in answering the question, I don't know, if
16 the Board disinclined to rule on us both with the
17 contention today. But I think there is an issue there
18 with respect to the scope of both contentions that's
19 legitimate.

20 MS. CURRAN: Judge Young?

21 JUDGE YOUNG: Go ahead, Ms. Curran.

22 MS. CURRAN: This is Diane Curran. I just
23 want to add one more time, I think there will be an
24 appropriate time when we're submitting evidence for
25 Duke to object to evidence based on an argument that

1 relates solely to the scope of the contention. The
2 standard for discovery is broader. It's premature to
3 say -- and I'm not conceding it, I'm just saying it's
4 too early to be making this argument. The question
5 here is one of relevance. This issue is -- I've
6 explained the relevance of the question and at the
7 discovery point that's the question. The question is
8 not what is going to be the permissible scope of
9 testimony in the hearing, which is I think what Mr.
10 Repka is talking about.

11 JUDGE YOUNG: Well, you're right. You're
12 right on the scope of discovery that it's not grounds
13 for objection if a question's reasonably calculated to
14 lead to the discovery of admissible evidence. And
15 we're aware of that. As I said, we're going to take
16 this under advisement, but before we move on from it,
17 Judge Elleman and Judge Baratta, do you have any
18 questions for Dr. Lyman or Duke? Actually, before
19 that, Dr. Lyman, in view of our discussion and the
20 question I asked earlier, did you want to add anything
21 first?

22 DR. LYMAN: Unless you didn't understand
23 my response, to --

24 JUDGE YOUNG: I think I did, but go ahead.
25 You don't need to repeat what you said before.

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1 DR. LYMAN: Right. As far as the standard
2 of reasonably calculated to lead to admissible
3 evidence, obviously any information about how Duke
4 considered uncertainties in conducting its source term
5 analysis would provide us with information on how they
6 took into account uncertainties with regard to the
7 entire development or progression of the design basis
8 LOCA. So I think in that context, I think it not only
9 strengthens our argument. Thank you.

10 JUDGE YOUNG: Judge Elleman?

11 JUDGE ELLEMAN: Yes. This is Judge
12 Elleman. Dr. Lyman, help me out here a little bit.
13 If Contention 1 is confined to a LOCA analysis and a
14 LOCA analysis deals, does it not, with reaching a
15 specific set of fuel conditions and examining the
16 circumstances that bring you to those set of fuel
17 conditions. For that analysis, you do not need a
18 source term, do you?

19 DR. LYMAN: Well, again, we see LOCA
20 analysis that is a term that, in my view, encompasses
21 both analysis of the progression and the compliance
22 with the regulatory criteria for LOCA as well as a
23 consequence analysis associated with LOCA that, in my
24 view, is encompassed by the term LOCA analysis. And
25 the two are integrally related, as I discussed,

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1 especially the issues that we have raised associated
2 with uncertainties as to whether regulatory source
3 terms are appropriate for MOx fuel.

4 JUDGE ELLEMAN: Okay. Now, so you're
5 saying, I believe, our wording of Contention 1, which
6 is stated in terms of a LOCA analysis, you're saying
7 that to you that implies going beyond that to also do
8 a consequence analysis and a dose analysis to the
9 public and that that is implied implicitly in the
10 statement of Contention 1?

11 DR. LYMAN: Yes. I mean I don't see that
12 as going beyond what it says in Contention 1 in my
13 reading, because I don't see on technical grounds how
14 those two aspects are distinct. In particular, the
15 timing of various radionuclide releases, which of
16 course is --

17 JUDGE ELLEMAN: Okay. Our wording in
18 Contention 1, confining it to the LOCA analysis,
19 derived from the original contentions that were
20 presented, and I guess what I'm hearing you say is
21 that when you used the word, "LOCA analysis," in the
22 contentions, you were thinking in terms of going
23 beyond that to include what we call Level 3 PRA
24 analyses and consequence analysis to the public. Is
25 that the case?

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1 DR. LYMAN: No, no, no. No, that's not
2 what we're talking about. We're talking about design
3 basis accidents here, so there's no issue of PRA
4 deterministic analysis.

5 JUDGE ELLEMAN: Okay.

6 DR. LYMAN: It's only a matter of whether
7 the technical uncertainties in the performance of MOX
8 fuel during design basis LOCA those can have an impact
9 both on the accident progression and the timing of the
10 various phases of fuel degradation during design basis
11 LOCA and therefore also have an impact on the timing
12 and the magnitude of releases from core to
13 containment.

14 JUDGE BARATTA: This is Judge Baratta
15 here. I just wanted to put it in terms of -- the
16 question in terms of the regulations to make sure that
17 I understand what Dr. Lyman is saying. So in terms of
18 the way that you define LOCA analysis, you would
19 include the Appendix K LOCA analysis as well as the
20 off-site consequences that are called out in Part 100?

21 DR. LYMAN: That's correct.

22 JUDGE ELLEMAN: Okay. This is Dr. Elleman
23 again. Getting back to the need for a source term,
24 the need for the source term derives, does it not, to
25 a need for determining doses to a populus?

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1 DR. LYMAN: Yes.

2 JUDGE ELLEMAN: The source term plays no
3 role at all in the evolution of the accident per se,
4 it's only the consequences of that accident that it's
5 relevant.

6 DR. LYMAN: Well, I mean the source term
7 is required for consequence analysis.

8 JUDGE ELLEMAN: Yes.

9 DR. LYMAN: But the source term is, just
10 to repeat myself, we see the concept of a LOCA
11 analysis as having -- once you have to demonstrate
12 that -- the license is required to demonstrate that a
13 LOCA can be terminated at the design basis stage and
14 also that the dose consequences of the releases that
15 occur during the design basis LOCA are acceptable.
16 And those are two aspects I see as both encompassed by
17 the concept of a LOCA analysis.

18 JUDGE YOUNG: I'd like to just get some
19 clarification on something from my side, the lawyer,
20 non-scientist side, and that is, Dr. Lyman, when
21 you're talking about LOCA analysis, and if you can
22 recall how I read the two admitted contentions to you,
23 is there in your view anything -- if the second
24 contention includes consequence or releases --
25 potential for releases in the event of a core

1 destructive accident and quantifying to the maximum
2 extent practicable environmental impact factors, does
3 that -- if you -- is there anything left -- are you
4 saying there's anything left out of that that has to
5 be included in one or -- what am I trying to say? The
6 way we framed Contention 1 and Contention 2 is this
7 primarily an issue of where the consequences come
8 under 1 or 2? Is there something that I'm missing in
9 terms of what you're saying?

10 DR. LYMAN: No. I don't think it -- let
11 me explain the distinction.

12 JUDGE YOUNG: Okay.

13 DR. LYMAN: Certainly, in Contention 2 if
14 we got a full and complete response to our discovery
15 requests concerning the beyond design basis
16 consequence analysis, that would include the
17 information in Contention 1, but we do know that Duke
18 hasn't specifically done a beyond design basis
19 consequence analysis for MOx. They just refer to the
20 Department of Energy's analysis from the EIS. So we
21 know that we're not going to get -- unless there's
22 information Duke has that they didn't supply in their
23 submittal, we can't expect that we're going to get a
24 detailed discussion, but we do know that they did to
25 that analysis for the design basis portion.

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1 JUDGE YOUNG: But it could -- just to
2 interrupt to see if I can understand, what you're
3 asking for could come in either category is what you
4 are saying, and you don't expect that you're going to
5 get it in the category of information described in
6 Contention 2, so since you think it was done in the
7 design basis analysis, you're asking for it under 1.

8 DR. LYMAN: That's right.

9 JUDGE YOUNG: But, basically, the
10 information would be the same sort of information.

11 DR. LYMAN: Well, yes, if we got a
12 complete response to the second set of
13 interrogatories.

14 JUDGE YOUNG: Could you just help me
15 understand here your position with regard to Duke's
16 argument, as I understand it, that they interpret
17 Contention 2 to be limited to risk analysis and 1 --
18 and if I'm misstating this, please correct me, Mr.
19 Repka -- to be limited to more of a deterministic
20 analysis. Did I understand that right before?

21 MR. REPKA: This is Dave Repka.
22 Contention 1 would be limited to a deterministic LOCA
23 analysis, the ECCS analysis. That's what the basis
24 for the contention was all about.

25 JUDGE YOUNG: But you did say that you

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1 viewed Contention 2 as being limited to the risk --
2 more risk analysis.

3 MR. REPKA: It's a severe accident beyond
4 design basis contention risk analysis. That's
5 correct. That's how we read it if you read the term,
6 "core disruptive accident," as beyond design basis.

7 JUDGE YOUNG: Okay. Dr. Lyman, do you
8 want to --

9 JUDGE BARATTA: I'd like to interject
10 something here, if I may. In terms of what you just
11 said, Mr. Repka, if you look at Part 50.34 --

12 COURT REPORTER: This is the court
13 reporter, who's speaking?

14 JUDGE BARATTA: I'm sorry, Judge Baratta,
15 excuse me.

16 COURT REPORTER: Thank you.

17 JUDGE BARATTA: And I believe that that
18 uses a term very similar to that where it says in
19 Footnote 6 --

20 JUDGE YOUNG: Tell me the number again,
21 Judge Baratta.

22 JUDGE BARATTA: Okay, 50.34.

23 JUDGE YOUNG: Footnote 6, okay.

24 JUDGE BARATTA: Okay. And it refers to
25 substantial meltdown of the core, which is obviously

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1 a core disruptive accident, and requires, of course,
2 then that the applicant show that certain dose limits
3 are achieved, et cetera, and that's up in
4 50.34(a)(ii), I believe it is. Could you comment on
5 that, Mr. Repka?

6 MR. REPKA: I think, and I'll let Mr.
7 Nesbit correct me if I'm wrong, but you're referring
8 to 50.24(a)(ii)(D), I believe. But I think that that
9 then references the analysis that would show that the
10 site characteristics of Part 100 are complied with,
11 and that's a reference to the design basis Part 100
12 deterministic does consequences assessment that we're
13 talking about under Contention 1.

14 JUDGE YOUNG: Excuse me, did you say
15 50.34(a)(ii)(D)? I don't find an (a)(ii)(D).

16 MR. REPKA: Fifty thirty-four (a) --
17 (a)(1), I'm sorry 1, arabic 1, two, which is two
18 little Is, and then --

19 JUDGE YOUNG: And then capital D?

20 MR. REPKA: Correct.

21 JUDGE YOUNG: Okay. Gotcha. And then
22 Footnote 6 also if you could speak to that.

23 MR. REPKA: Right.

24 JUDGE YOUNG: Okay.

25 MR. REPKA: And our point is that's a

1 reference to the Part 100 design basis dose
2 consequence assessment that was provided in the
3 application and has been provided in the REI response
4 but was never the basis for any of the original BREDL
5 contentions. That's our point is that that particular
6 analysis has never been in dispute.

7 DR. LYMAN: This is Dr. Lyman. Can I just
8 clarify that we don't see the way core disruptive
9 accident was used in your contentions. We did not
10 interpret that to mean the damage to the core in the
11 design basis LOCA. I just want to clarify that.

12 JUDGE YOUNG: So you interpreted that to
13 be included in impact with such differences on LOCAs;
14 is that what you're saying?

15 DR. LYMAN: No, that the core disruptive
16 accident is in the Contention 2 and that that we
17 interpret to mean something other than a design basis
18 -- something worse than design basis LOCA, which is
19 Contention 1.

20 MR. REPKA: Which is how we're reading it.

21 DR. LYMAN: Right. And so the language in
22 50.34 we would not consider that to be the core
23 disruptive accident in that way that you've
24 characterized it in the contentions.

25 JUDGE YOUNG: So the confusion comes in

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1 the word, "core disruptive accident?"

2 DR. LYMAN: Right, although in a design
3 basis LOCA the core can experience substantial
4 meltdown if it's still terminated in the vessel, and
5 I think that's --

6 MR. NESBIT: If I could clarify something,
7 please. This is Steve Nesbit. The core does not
8 experience substantial meltdown in a design basis
9 LOCA.

10 JUDGE ELLEMAN: Mr. Nesbit, this is Judge
11 Elleman. When you perform a LOCA analysis, does the
12 result of that LOCA analysis say anything at all about
13 fission products released into the reactor vessel or
14 containment, the amounts of those fission products,
15 anything that relates to a damaged fuel?

16 MR. NESBIT: No, sir.

17 JUDGE ELLEMAN: That was my understanding.
18 It's strictly limited to reaching a particular set of
19 conditions, isn't it, a particular fuel temperature.

20 MR. NESBIT: The criteria that are
21 outlined in 50.46.

22 JUDGE ELLEMAN: Yes. Okay. Thank you,
23 sir.

24 DR. LYMAN: This is Dr. Lyman. But the
25 premise for the Part 100 release is a LOCA leading to

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1 a substantial meltdown in the core if it's still
2 terminated. So the Appendix K and the 50.46
3 requirements may be more restrictive than what would
4 lead to that source term, but that source term is
5 still considered part of the design basis LOCA
6 analysis.

7 JUDGE YOUNG: Anything further on this?
8 I guess my impression at this point is that there does
9 appear to be some confusion about what was intended by
10 certain words in the contention and that the issue
11 that's sort of being talked about now is consequence
12 analysis for LOCAs and where that would fall, whether
13 in Contention 1 or Contention 2 or, as I think Duke is
14 arguing, neither.

15 MR. REPKA: That's correct.

16 JUDGE YOUNG: And then the specific
17 question that we're talking about is whether the
18 Interrogatory Number 2 should be responded to and then
19 Dr. Lyman also talked about another interrogatory
20 relating to Contention 2 and having a concern that a
21 complete answer would be provided with regard to that.
22 Am I leaving out anything in terms of just a sort of
23 summary of what the issues are around this one and/or
24 does anyone have anything further to say on this one
25 before we move on? And Judge Elleman, Judge Baratta,

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1 do you want to ask anymore questions on it?

2 JUDGE BARATTA: Well, yes. I do want to
3 ask -- looking at Contention 2, I'm going to ask this
4 of Duke, the admitted contention reads, "The LAR is
5 inadequate because Duke has, a," and it continues on,
6 "on potential releases from Catawba in the event of a
7 core disruptive accident." How do you interpret as
8 pertaining to a beyond design basis accident as
9 opposed to any accident which the core is disrupted
10 regardless of whether or not it's contained in-vessel
11 or it's not contained?

12 MR. REPKA: Core disruptive accident is a
13 term that we were not familiar with, and so we could
14 only interpret it in light of the original BREDL
15 contentions, and based upon those contentions and the
16 bases for them, we interpret the term as referring to
17 something different than a design basis LOCA as being
18 a severe accident consequences. You could certainly
19 define that term to include a design basis LOCA
20 analysis and the radiological consequences, but we
21 don't think it would be appropriate to do that,
22 because that was not raised in any of the original
23 contentions.

24 JUDGE YOUNG: Does BREDL want to speak to
25 that? Ms. Curran?

1 MS. CURRAN: I will ask if Dr. Lyman has
2 any.

3 DR. LYMAN: This is Dr. Lyman. No, I do
4 agree with Mr. Repka's understanding of a distinction
5 between Contentions 1 and 2. Just by the context we
6 assumed that Contention 2 did refer back to our
7 original contentions involving the environmental
8 assessment and a risk analysis which refers to beyond
9 design basis accidents. So that was our
10 understanding.

11 JUDGE YOUNG: What's your response to his
12 argument that you did not raise the issue that would
13 under such an understanding be left out of the word
14 core disruptive accident, namely anything -- any
15 accident in which the core is disrupted, including
16 LOCAs or design basis accidents?

17 DR. LYMAN: Well, again, from the context
18 of the way the contentions were structured, we assumed
19 that what you meant by core disruptive accident was
20 something including --

21 JUDGE YOUNG: No, excuse me. I'm not
22 asking you to interpret the contentions at this point.
23 I'm asking you -- Duke is saying that they understood
24 our Contention 2 the same way you did.

25 DR. LYMAN: Right.

1 JUDGE YOUNG: But they're saying that they
2 did not understand Contention 1 --

3 DR. LYMAN: Right.

4 JUDGE YOUNG: -- to include consequences,
5 and they're saying that you did not include in any of
6 your contentions that led to our consolidation and
7 reframing into Contention 1 and 2 any discussion of
8 consequences other than severe accident beyond design
9 basis.

10 DR. LYMAN: Yes, but I think I'd point out
11 at the beginning that in our Contention 10 we did
12 generally refer to significant differences in LEU and
13 MOx fuel behavior that was not specific to probability
14 or accident progression of a LOCA as opposed to
15 release fractions. We think both of those refer to
16 significant differences in fuel behavior.

17 MS. CURRAN: This is Diane Curran. I just
18 want to emphasize again the standard of relevance.
19 The standard is not what evidence will we be allowed
20 to present at the hearing but will this be an answer
21 to this question lead to relevant evidence and the
22 concern of the contention is the behavior of the fuel.
23 So it seems to me that it's very relevant.

24 JUDGE YOUNG: Judge Baratta, I interrupted
25 you before to get clarification from Dr. Lyman. Did

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1 you want to follow up on what you were asking before?

2 JUDGE BARATTA: The only other point that
3 -- this is Judge Baratta. The only other point that
4 I wanted to ask is that in Part 50.34 again it does
5 not specify the accident that necessarily would result
6 in that meltdown. It just refers to, I think,
7 accidents in general. Am I misinterpreting that, Mr.
8 Repka?

9 MR. REPKA: I don't know the answer to
10 that. Mr. Nesbit, do you know the answer?

11 MR. NESBIT: We haven't studied that
12 thoroughly as of today, but it is considered to be
13 kind of a generic term. In other words, when you talk
14 about the LOCA dose, you're really talking about just
15 the generic dose from something that results in
16 significant core melt. I mean it's really meant to be
17 an encompassing source term, and that's why I said
18 earlier that the nexus between the LOCA analysis that
19 we do routinely and the dose analysis is just the name
20 only, and even that name is not necessarily
21 appropriate there.

22 DR. LYMAN: This is Dr. Lyman. Yes, I
23 mean it could be any initiator that ends up with a
24 core melt sequence that's terminated in-vessel, so it
25 doesn't necessarily have to be a LOCA. It could be

1 another initiator.

2 JUDGE BARATTA: Okay. Thank you. I just
3 wanted to make sure that that was -- we were, more or
4 less, all in agreement on that. That's all I have.

5 JUDGE YOUNG: In light of what has just
6 been said, Mr. Repka, assuming that either the words,
7 "core disruptive accident," or the open-endedness of
8 impact of such differences on LOCA and the design
9 basis analysis for Catawba encompasses what is
10 described in Footnote 6 and 50.34(a)(i)(B), what does
11 that do to what you were saying earlier? It sounds as
12 though this encompasses the thing that you were saying
13 should not be included. Am I misunderstanding
14 something?

15 MR. REPKA: My point is that that's
16 reference to the consequence analysis to meet Part 100
17 that Mr. Nesbit was just talking about that's separate
18 from the LOCA analysis. And our point is that, yes,
19 that analysis exists, but, no, that's never been part
20 of the original contentions.

21 JUDGE YOUNG: Okay. And do you want to
22 speak specifically to Dr. Lyman's description of their
23 original Contention 1 and also Ms. Curran's argument
24 about the purpose of discovery?

25 MR. REPKA: Well, I think with respect to

1 the purpose of discovery there still is a general
2 relevancy, and that doesn't get around the scope of
3 the contention. So the definition of the contention
4 remains an important issue. And, no, I don't have
5 anything more to say beyond that.

6 JUDGE YOUNG: Okay.

7 MR. NESBIT: Judge Young, this is Steve
8 Nesbit. Could I just add in that their original
9 contention did refer specifically to things like peak
10 cladding temperature and core coolability, which are
11 criteria under 50.46, but it did not say anything
12 about dose.

13 MR. REPKA: Which is the Part 100
14 analysis.

15 MR. NESBIT: Right.

16 DR. LYMAN: This is Dr. Lyman. But I was
17 also referring to late-filed Contention 10 as well.

18 MR. NESBIT: That's what I was referring
19 to as well.

20 DR. LYMAN: No.

21 MR. REPKA: I think the issue in
22 Contention 10 was still the same, which is was there
23 anything in the IRSN data with respect to fuel
24 relocation at LOCA temperatures that would affect an
25 Appendix K LOCA analysis. I think that's the issue

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1 there.

2 MR. NESBIT: I can quote from their sum-up
3 in Contention 10 that says, "Because these unknowns
4 regarding the behavior of MOx fuel during a LOCA, Duke
5 lacks the factual basis for assuring that the existing
6 emergency core cooling systems at Catawba will meet
7 the acceptance criteria in 10 CFR 50.46." That pretty
8 much sums it up right there.

9 MR. REPKA: And it does reference the 3.7
10 LOCA analysis, ECCS analysis.

11 DR. LYMAN: That's the basis statement.
12 Maybe our basis statement was not fully developed but
13 the contention itself refers to all differences
14 significant fuel behavior.

15 JUDGE YOUNG: So I think we're talking
16 about some use of language in the original contentions
17 and in the reframed contentions that we need to look
18 at when we take this under advisement. Before we move
19 on any further questions, Judge Baratta, Judge
20 Elleman?

21 JUDGE ELLEMAN: I have none.

22 JUDGE BARATTA: This is Judge Baratta. I
23 have none.

24 JUDGE YOUNG: All right. Then let's move
25 on to the rest of Duke's objections. We've talked

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1 about the email. Ms. Curran, do you have any response
2 under the attorney work product privilege and so
3 forth?

4 MS. CURRAN: Yes. Just before we talk
5 about that, I think I'd like to let Dr. Lyman hang up.
6 Ed, will you be working at home today?

7 DR. LYMAN: Yes, I will.

8 MS. CURRAN: So if we need him, we can
9 call you if we need you?

10 DR. LYMAN: Yes.

11 MS. CURRAN: Is that all right, Judge
12 Young?

13 JUDGE YOUNG: Sure, that's fine.

14 MS. CURRAN: Okay.

15 DR. LYMAN: Call my --

16 MS. CURRAN: Your cell phone?

17 DR. LYMAN: Yes.

18 MS. CURRAN: Okay.

19 DR. LYMAN: Thank you.

20 MS. CURRAN: Thanks.

21 JUDGE YOUNG: Thank you.

22 MS. CURRAN: Yes, as far as attorney-
23 client privilege goes, that's fine. I'd just like to
24 -- if there's something relevant that's identified --
25 if there's a relevant document, could it be identified

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1 for us and explain that privilege applies.

2 JUDGE YOUNG: Mr. Repka, do you have any
3 objections to that?

4 MR. REPKA: Yes. We raised this objection
5 without knowing yet what the universe of documents are
6 that is potentially subject to this objection, and we
7 raised it because we didn't want to -- we were mindful
8 of the Board's admonition that we get all objections
9 out there. So at this point, I don't know what the
10 scope of documents might be. I would say as a general
11 proposition, certainly that would be the procedure to
12 identify documents subject to the privilege. I have
13 no idea if that's a large universe and whether that
14 creates a problem, but as a general proposition I
15 would be in agreement with that.

16 JUDGE YOUNG: Okay. Well, do that, and if
17 there's any problem with doing that, then that can be
18 raised at a further conference or in between if
19 necessary. So anything more on that issue?

20 MS. CURRAN: No.

21 JUDGE YOUNG: Okay. All right. Then
22 moving on to, let's see --

23 MS. CURRAN: Oh, there was one more I
24 think that Duke had.

25 JUDGE YOUNG: Under a general document

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1 production request Number 2, vague, overbroad and
2 unduly burdensome.

3 MR. REPKA: This particular objection, and
4 just to summarize it again for Judge Elleman, was the
5 document request is essentially for anything in your
6 possession that may be relevant, and I think that
7 that's precisely the kind of broad request for all
8 documents potentially relevant. It's the kind of
9 request that's disfavored by the Commission's
10 precedence on discovery, notwithstanding the broad
11 discovery provisions of 2.740.

12 I think that our point on this is we will
13 be responding in detail to all of the other
14 interrogatory document requests, and we're just very
15 wary of a document request that goes somehow beyond
16 that, and we don't know the universe, we have no way
17 to put bounds on it, we have no way to interpret what
18 BREDL might consider to be relevant to its
19 contentions. So from that standpoint, we would object
20 to this request in deference to all of the other
21 requests that we will be responding to. And, again,
22 I would say if there are further specific requests
23 that BREDL wants to make in the second round, I think
24 that we would be receptive to entertaining that at
25 that time.

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1 JUDGE YOUNG: Ms. Curran, does this
2 encompass anything that's not encompassed in your
3 other interrogatories?

4 MS. CURRAN: The purpose of asking for
5 relevant documents, and it's important I think in this
6 particular case, is that obviously there's some
7 disagreement about the significance of certain issues
8 that are raised in the contentions, and that what we
9 want is if Duke has information -- we're not just
10 looking for what Duke's going to rely on in its
11 testimony, we're looking for if Duke has considered
12 various -- there's been research done, for instance,
13 on M5 cladding. Well, if there's something that they
14 disagree with, we'd still like to see what it says.

15 So in terms of -- we're not looking for
16 anything that is conceivably relevant, tangentially
17 relevant, we're looking for --

18 JUDGE YOUNG: Let me just back up for a
19 second.

20 MS. CURRAN: Yes.

21 JUDGE YOUNG: What I was trying to get at
22 was just simply do you construe the rest of your
23 interrogatories as covering all of the contentions?

24 MS. CURRAN: Yes.

25 JUDGE YOUNG: Okay. And, obviously, we

1 have now sort of fleshed out or brought to the surface
2 one of area of lack of clarity and complete agreement
3 on the meaning of a certain thing. Apart from that,
4 do you see any other areas of possible lack of clarity
5 that could result in anything being left out?

6 MS. CURRAN: Yes. There's specific
7 interrogatories or document production requests and
8 then these are general ones that we're looking for
9 what -- Duke is in a position to research these issue,
10 that when they do a safety analysis they look at what
11 the relevant issues are. And so we think it's
12 appropriate to ask what they've looked at. Mr. Repka
13 was saying that Duke keeps topic files. Well, if the
14 topic file is within the contention, has Duke got
15 information on this topic? And it is broader than
16 what we're going to get in answer to the specific
17 requests.

18 MR. REPKA: Request Number 1 is, "all
19 documents in possession, custody or control that are
20 identified, referred to or used in any way in
21 responding to all of the general interrogatories and
22 following interrogatories." So we have no objection
23 to that. We'll respond to that. Request Number 3 is,
24 "all documents including expert opinions, work papers,
25 affidavits and other materials used to render such

1 opinions, supporting or otherwise, related to
2 testimony or evidence that you intend to use in the
3 hearing." Relating to the testimony or evidence that
4 you intend to use, we'll respond to that. We won't x
5 as stated in our other objection, we have no interest
6 in researching the open literature for BREDL, but we
7 will provide the information that relates to our
8 testimony, relates to our responses to the
9 interrogatories and response to the other requests.
10 BREDL will have substantial information in front of it
11 as to why Duke Energy is reaching the conclusions that
12 it's reaching, and I have no doubt about that. But I
13 just think that the general interrogatory prefaced
14 with all documents in an attempt to catch all is just
15 overbroad and undefined.

16 JUDGE YOUNG: Mr. Repka, let me ask you a
17 question. If the Request Number 2 were read to be,
18 "all documents relevant to," and then the Contention
19 Number 1 were spelled out and Contention Number 2 were
20 spelled out and Contention Number 3 were spelled out,
21 would that be something that you would find to be more
22 manageable?

23 MR. REPKA: What do you mean spelled out?

24 JUDGE YOUNG: I mean insert the words from
25 Contention Number 1 and then insert the words from

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1 Contention Number 2 and then insert the words from
2 Contention Number 3.

3 MR. REPKA: Well, I don't think that
4 really changes anything, because we'll, in effect,
5 already do that with respect to Request Number 1 and
6 Request Number 3. We're going to provide the
7 information that supports the interrogatories, we're
8 going to provide the information --

9 JUDGE YOUNG: Right, but what I'm getting
10 at is if you know of something, if you know of
11 something that you don't specifically provide in
12 response to any of the other interrogatories and it is
13 something that you would consider to be relevant to
14 Contention 1, do you have any objection to providing
15 it?

16 MR. REPKA: No, but I think it will be
17 captured in response to either 1 or 3.

18 JUDGE YOUNG: Okay.

19 MS. CURRAN: Well, Judge Young, I just
20 don't think that 1 or 3 is asking Duke to provide
21 information that might be critical of Duke's position,
22 and I --

23 JUDGE YOUNG: Okay.

24 MS. CURRAN: -- would assume that Duke
25 might have collected that kind of information, because

1 they do -- I'm sure they do some kind of a survey of
2 what the existing knowledge is about a topic before
3 they write it up.

4 JUDGE YOUNG: All right. Any other
5 argument on this one? Questions?

6 MS. CURRAN: Not from me.

7 JUDGE YOUNG: Then let's move on. Let's
8 see, the next one would be --

9 MS. CURRAN: I think it's Duke's objection
10 to --

11 JUDGE YOUNG: Publicly available
12 information?

13 MS. CURRAN: Yes. And I think I heard Mr.
14 Repka say earlier that we were expecting Duke to do a
15 search of the literature. That's not what we're
16 asking for. We're asking Duke to identify documents
17 that it has, and if these are publicly available
18 reports, it's sufficient to just identify them. They
19 don't need to copy them for us.

20 JUDGE YOUNG: Do you have any problem with
21 that, Mr. Repka?

22 MR. REPKA: No. Again, if it's in our
23 possession and custody and we would consider it
24 responsive, we won't do new searches but we would just
25 make it publicly available.

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1 JUDGE YOUNG: If you have it.

2 MR. REPKA: If it's publicly available, we
3 would just reference it, that's correct.

4 JUDGE YOUNG: Right. Right. If you have
5 it and you know about it already and you're using it
6 or whatever, you'll identify it and then it would be
7 up to BREDL to get a copy of it, but you don't have
8 any problem with making reference to those that you do
9 have.

10 MR. REPKA: That's correct.

11 JUDGE YOUNG: Okay. Then moving on to
12 Number 3. And it might be good to hold off on that
13 one until we get on to the issue of the motion to
14 dismiss 3 because some of the issues are related
15 there. If there's no objection to that, let's set
16 that aside for a moment. And then the staff's
17 objections. And the staff hasn't said anything. Mr.
18 Fernandez, you said something earlier -- I'm assuming
19 that by your silence you didn't have anything to add
20 to any of the other discussion we've had up to this
21 point?

22 MR. FERNANDEZ: That's correct, Your
23 Honor.

24 JUDGE YOUNG: Okay. Then let's go to the
25 staff's objections. One thing I would note that on

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1 the first page of your objections you say, "The
2 preliminary matter that while some of BREDL's
3 discovery requests may not be objectionable in
4 themselves, specific documents that the staff compiled
5 in response to BREDL's request may be exempt from
6 disclosure under principles of discovery applicable in
7 this proceeding." I guess I'm wondering a little bit
8 what you meant by that in view of I think our
9 discussion earlier that this would be a time to bring
10 out any objections and not to save them up for later.

11 MR. FERNANDEZ: Your Honor, this is
12 similar to what Duke had raised before, and so we've
13 actually assembled our responses to the
14 interrogatories under request for production. We're
15 not going to be able to identify what privileges may
16 attach to certain documents or certain communications,
17 so --

18 JUDGE YOUNG: So in other words, this
19 refers to attorney-client privilege, work product
20 privilege; is that what you're saying?

21 MR. FERNANDEZ: Yes, among others.

22 JUDGE YOUNG: Which others?

23 MR. FERNANDEZ: As we identified in our
24 response, the staff -- the discovery process kind of
25 serves the same exemptions available to it under FOIA

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1 to avoid release or a particular document.

2 JUDGE YOUNG: Now, what are you referring
3 to now, which part of your --

4 MR. FERNANDEZ: In objection to
5 Interrogatory Number 1, the staff asserted its
6 deliberative process privilege.

7 JUDGE YOUNG: Right. But what I'm trying
8 to get at is apart from what's contained in your
9 specific objection, do you mean to encompass in this
10 rather general statement on the first page? If you're
11 talking about the privilege, as Duke did, then we can
12 deal with that by just suggesting that you approach it
13 in the same way that we discussed with Duke, that you
14 would identify the document and at that point assert
15 the privilege.

16 MR. FERNANDEZ: That's what we intend to
17 do, Your Honor.

18 JUDGE YOUNG: Okay. So apart from that
19 and apart from the attorney-client or work product
20 privilege, the items listed in Duke's, I think it was
21 the first objection, and apart from those specified in
22 your specific objection, you don't intend for this
23 general statement on the first page to encompass
24 anything else.

25 MR. FERNANDEZ: That's not correct, Your

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1 Honor. The staff has available to itself a whole
2 series of privileges which match up with the
3 exemptions under the FOIA statute.

4 JUDGE YOUNG: But that's already addressed
5 in one of your objections, right?

6 MR. FERNANDEZ: To the extent that the
7 specific interrogatory asks for that information,
8 that's correct. Without seeing the documents that are
9 being generated right now, that are being gathered in
10 response to the request for production, I can't
11 specifically say which one of those privileges may be
12 triggered at this point in time.

13 JUDGE YOUNG: Okay. Well, in the future,
14 we really want to try to get out the objections in
15 time for these conferences so that we can avoid having
16 to hold additional conferences. That was part of the
17 whole plan here.

18 MR. FERNANDEZ: Well, Your Honor, it's
19 impossible for the staff to tell you right now what
20 privileges it may assert when it hasn't even seen the
21 documents yet.

22 JUDGE YOUNG: All right. As I said, I
23 think we all agreed earlier what we're trying to do
24 here is to move things along, and we're asking each
25 party to familiarize itself with its case enough so

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1 that you can make your objections at this point. If
2 there are any particular -- I would encourage the
3 staff to follow Duke's example in its -- let me find
4 Duke's document here. In any event, I think that you
5 know what I'm talking about, Duke's first objection
6 listing the various privileges.

7 Be specific, because what we want to
8 avoid, and the whole purpose of taking all the time
9 that we took last time to set up this schedule and
10 take into account all of the parties' needs and
11 desires and attempts to compromise is to flesh out all
12 these things in advance so that something doesn't come
13 up later that we don't have a chance to talk about
14 here. So we're not going to feel real favorable if
15 something completely new pops up that you have not in
16 some way identified at this point.

17 In the future -- we have several other
18 times set up to talk -- in the future, be prepared, be
19 familiar enough with your case that you will be able
20 to say, as Duke did in its objections -- here it is --
21 the General Objection 1A, and if you want to add
22 anything else in there, add anything else. But what
23 we're trying to avoid is surprises down that line.

24 With that said, also as we discussed
25 earlier with Duke, I think -- and Duke agreed and I'm

1 going to suggest the staff do the same -- if there are
2 documents that you're objecting to providing, identify
3 the documents and then identify whatever privilege
4 you're asserting, all right?

5 MR. FERNANDEZ: That has been our intent
6 all along, Your Honor.

7 MS. CURRAN: Judge Young?

8 JUDGE YOUNG: Yes.

9 MS. CURRAN: This is Diane Curran. It
10 seems to me that from my standpoint, I haven't had the
11 time to identify all of the specific documents that
12 would be responsive to the NRC's and Duke's request.

13 And I was assuming that, and maybe that
14 was wrong, but the kinds of objections that I should
15 be asserting right now would be kind of general
16 objections that could be made without seeing those
17 specific documents.

18 For instance, attorney/client privilege.
19 And I was looking at the case that the NRC Staff cited
20 right at the -

21 JUDGE YOUNG: On the deliberative process?

22 MS. CURRAN: Yes. And it says here that
23 the deliberative process is qualified and not absent
24 mood, and that there is a balancing -

25 JUDGE YOUNG: Where are you reading from

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1 now?

2 MS. CURRAN: I'm reading from Page 198 of
3 the decision.

4 JUDGE YOUNG: Okay, all right.

5 MS. CURRAN: And, that the government
6 agency has the burden of showing that privilege should
7 be invoked. It seems to me, I mean we were required
8 to file objections just a couple of days after getting
9 these requests that it just, it probably isn't
10 feasible to provide that kind of information until
11 you've had a chance to identify all the documents.

12 JUDGE YOUNG: Is this something -

13 MS. CURRAN: At any rate, it seems to me
14 that this is, it was difficult to deal with this
15 objection because it was so abstract, right? And you
16 don't know anything about it.

17 JUDGE YOUNG: Is this something that would
18 suggest that we need to change the objection deadlines
19 and the dates for conferences?

20 I mean, the whole purpose of setting up
21 this scheduled is to try to arrange it to accommodate
22 all parties'
23 needs, and at the same time, facilitate moving things
24 along and getting responses back more quickly.

25 So, if that's something that needs to be

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1 changed, we can talk about that.

2 MS. CURRAN: I have a suggestion for that.

3 JUDGE YOUNG: Go ahead.

4 MS. CURRAN: It seems to me that this
5 process works for certain kinds of objections. For
6 general objections, it was fine. The ones that, there
7 are certain ones that can be dealt with right off the
8 bat.

9 If somebody says this isn't relevant. If
10 somebody has an objection to the nature of the
11 question, that can be dealt with really quickly.

12 And the problem is if privileges are
13 asserted with respect to this document.

14 JUDGE YOUNG: Information that you
15 subsequently find.

16 MS. CURRAN: Yes, then it takes a little
17 time to figure that out. So, I don't think you have
18 to throw the baby out with the bath water, it's just
19 that it's come up now that there are certain kinds of
20 things where you need a little time to evaluate and
21 determine whether to assert a privilege.

22 JUDGE YOUNG: Okay, let me ask you this.
23 And this is for all of you. Will the deadlines that
24 we set for Motions to Compel, allow any of these types
25 of remaining privilege and related objections be dealt

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1 with in that context?

2 MR. REPKA: Your Honor, this is Dave Repka.
3 I think that it would. I think with the understanding
4 that the privileges can be asserted, as we have here,
5 as general assertions and then the documents
6 identified later.

7 To the extent that there is some dispute
8 over the applicability of privilege, I think it would
9 be handled in that context.

10 JUDGE YOUNG: Any objection to doing it in
11 that way?

12 MS. CURRAN: No.

13 JUDGE YOUNG: Okay. Well then we can keep
14 our same schedule, then that's good. All right, then
15 let's go on to the Staff's objections. I'll get that
16 back in front of me.

17 MS. CURRAN: This is Diane Curran.

18 JUDGE YOUNG: Go ahead.

19 MS. CURRAN: In response to Objection A,
20 the Staff's response is acceptable to us. If the
21 Staff would identify publicly available documents,
22 that would be fine.

23 With respect to -

24 JUDGE YOUNG: Do you have any problem with
25 that, Mr. Fernandez? In other words, if they are

1 publicly available, you just give the title and
2 reference and location and you don't have to provide
3 the whole document.

4 MR. FERNANDEZ: Yes, that's all we intend
5 to do, Your Honor.

6 JUDGE YOUNG: Okay.

7 MR. FERNANDEZ: And for documents contained
8 in ADAMS, we will provide the official number.

9 JUDGE YOUNG: Okay, great. So that takes
10 care of the first one. Go ahead.

11 MS. CURRAN: Okay. And then the second, I
12 guess there's two pieces to the second objection, and
13 the first one we just talked about with the
14 deliberative privilege.

15 That's something that needs to be
16 addressed with respect to the specific document. So
17 it seems premature at this point. You can't really
18 address that privilege in the abstract.

19 And then -

20 JUDGE YOUNG: Let me just ask, with regard
21 to things that are not documents, in other words,
22 names of people describing, say verbal. Are you
23 asking for a description of differing information or
24 opinions in anything other than document form?

25 I mean it's open ended and so, and I want

1 to just try to get this, get everybody on the same
2 page as much as possible, on this. Because obviously,
3 Mr. Fernandez, I doubt that you object to providing,
4 to identifying any document.

5 And then stating that the document would
6 be subject to the deliberative process privilege which
7 could then be brought up under the plan we just talked
8 about, in a Motion to Compel.

9 Is there anything else there, and I'm
10 asking Ms. Curran and Mr. Fernandez. Well, first of
11 all, Mr. Fernandez, you don't have any problem with
12 identifying the document and asserting the privilege
13 with regard to specific documents, right?

14 MR. FERNANDEZ: Not at this point, Your
15 Honor, that's correct. We do not, Your Honor.

16 JUDGE YOUNG: Okay. Now, with regard to
17 anything that would not be a document. Ms. Curran,
18 you asked for the names of people and then, let's see.

19 MS. CURRAN: Well, first was asked for
20 names of people who were consulted or supplied
21 information. And then we asked if they have an
22 opinion that's different, please describe in detail
23 the differing opinion.

24 So, whether or not there's a document that
25 describes, it, we would, this is a request for the

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1 staff to describe it.

2 So, it is an Interrogatory. If there's no
3 piece of paper that already exists, then the Staff
4 needs to explain what's the difference. And this gets
5 to, I think, the, well we've sort of dealt with a
6 deliberative privilege issue, and then they also have
7 an objection that relates to -

8 JUDGE YOUNG: The Rule 2.740(b)(3)?

9 MS. CURRAN: Yes, well, the thing is, we're
10 not necessarily asking why the differing opinion is
11 not the position of the Agency. We're just asking for
12 identification of the differing opinion. So, I don't
13 think that really applies.

14 JUDGE YOUNG: I guess the main thing that
15 I'm wanting to get clarity on and hear any views on,
16 is how this would be done.

17 With a document you can identify the
18 document and assert the privilege. Mr. Fernandez, if
19 there are any people that you are aware of, or
20 information that's not in documentary form, can you
21 respond in such a way that indicates, well, let me
22 hear a suggestion from either one of you on how that
23 might be accomplished.

24 MS. CURRAN: Well, it seems to me that,
25 this is Diane Curran. When you ask an Interrogatory

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1 and if the Staff consults several people and they
2 would give different answers to the Interrogatories,
3 you just supply the differing answers.

4 JUDGE YOUNG: What I'm trying to get to is
5 if the Staff, if the Staff does not want to provide
6 the differing answers on the basis of the deliberate
7 process privilege -

8 MS. CURRAN: Oh, well then you -

9 JUDGE YOUNG: - what would the Staff do to
10 identify, since you don't have a document. And since
11 they don't want to identify the person. I guess what
12 I'm trying to get to, and Mr. Fernandez, if you have
13 any ideas, I'd like to hear them.

14 What I'm trying to get to is some way for
15 the Staff to say there may be, or there are persons
16 whom we object to identify and who's information we
17 object to providing because of the deliberative
18 process privilege.

19 And then, presumably, that would prompt a
20 Motion to Compel, and then we'd get into a discussion
21 about more specifics of it.

22 MS. CURRAN: Your Honor, I see what you're
23 saying.

24 JUDGE YOUNG: Mr. Fernandez, do you, what's
25 your view on that? What's your suggestion on how that

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1 be approached?

2 MR. FERNANDEZ: We don't have a suggestion,
3 Your Honor.

4 JUDGE YOUNG: Is there some way that you
5 can, if there is such information out there, or there
6 are such people out there, you can, in your response,
7 somehow indicate that and indicate that at the same
8 time, if you want to raise the deliberative process or
9 other privilege, you're raising a privilege with
10 regard to it.

11 In other words, so that there will be some
12 indication as there would be with documents. Do you
13 understand what I'm trying to get to?

14 MR. FERNANDEZ: No. The way I understand
15 you right now, Judge, is basically we will disclose
16 the information but say that we object to disclosing
17 it because of the privilege?

18 JUDGE YOUNG: What I'm saying is, rather
19 than not disclose anything at all and not object, is
20 there some way that you could indicate that there is
21 information, without disclosing what it is, but state
22 that the reason that you're not disclosing what it is,
23 is because of this or that privilege.

24 In other words, if an Interrogatory, if
25 the Interrogatory says identify, let's see, if the

1 opinions of anyone who is consulted has a differing
2 opinion, please describe in detail the differing
3 information or opinion, and indicate why differing
4 information is not your official position.

5 Ms. Curran, let me, before we go on with
6 Mr. Fernandez, would you agree that the last part, why
7 such differing information or opinions are not your
8 official position, would come under 2.740(b)(3)?

9 MS. CURRAN: Yes, so we can drop that part.

10 JUDGE YOUNG: Okay, so we're going to drop
11 the part starting with and indicate why such differing
12 information or opinions are not your official position
13 as expressed in your written answer to the request.

14 What would remain is stating the name and
15 so forth of each person consulted. And then for each
16 Interrogatory request for admission, request for
17 production, each person who was consulted and who
18 supplied the information.

19 And if the information or opinions of
20 anyone who was consulted, and this is where it would
21 come in. In connection with your response or request
22 to an Interrogatory or request for admission differs
23 from your written answer, please describe in detail
24 the differing information or opinion.

25 At that point, Mr. Fernandez, if there

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1 were any such information, what I was trying to get at
2 is whether, as there would be with a document, you'd
3 say, well there is such a document but we've refused
4 to provide it on the basis of the deliberative process
5 privilege or attorney work product or whatever.

6 Is there any way to describe, to indicate
7 that there may be some differing opinions, but that
8 you're not going to provide them, based on whatever
9 privilege you're asserting?

10 MR. FERNANDEZ: Your Honor, I, two-part
11 answer. The first part is given what you've stated,
12 I think we wouldn't have any problem trying to get
13 what you just described, the process you just
14 described. The Staff would endeavor to do what you
15 just described.

16 JUDGE YOUNG: Okay, in other words, don't
17 just be silent, suggesting that there is no such
18 information. If you know there is such information,
19 then you would have a responsibility to assert,
20 indicate something to that affect without telling what
21 it is and assert the privilege.

22 MR. FERNANDEZ: Can I, I would like to get
23 now to the second part of answer, however. Which is,
24 you know, for us to, for us to say, for us to, at that
25 stage of the discovery process, to then assert the

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1 privilege would, in that sense, disclose that there
2 are differing views and completely, you know, do away
3 with the privilege as it exists.

4 I think, as an initial matter, we should
5 address whether it is acceptable to ask the question
6 in the first instance. And whether the privilege
7 would allow for that question be a sound question
8 within the scope of discovery.

9 And if the Board rules against the Staff
10 on that particular issue, then we would comply with
11 the process which you articulated before, of
12 identifying whatever. But -

13 JUDGE YOUNG: Let me, let me, let me ask,
14 let me ask you to look at the language on Page 198,
15 because I had looked at this also, before. And the
16 last paragraph -

17 MR. FERNANDEZ: Your Honor, I'm sorry, I
18 think the copy that I have of the, are we talking
19 about the Vogtle Decision?

20 JUDGE YOUNG: It's the one you cited, let's
21 see.

22 MR. FERNANDEZ: I think it's Vogtle.

23 JUDGE YOUNG: Yes, it is.

24 MR. FERNANDEZ: I don't have page numbers
25 on it right now, so you, if you'd just tell me at

1 least what section of the decision -

2 JUDGE YOUNG: It's the very last paragraph
3 in Section V, Discovery Rule.

4 MR. FERNANDEZ: Okay.

5 JUDGE YOUNG: In a litigation context, it
6 begins. In other words, it's qualified, not absolute,
7 that the Government's interest in confidentiality is
8 balanced against the litigant's need for the
9 information.

10 The NRC Staff bears the initial burden of
11 showing that the privilege should be invoked. And
12 once the applicability of the privilege has been
13 established, the litigants need for the information
14 must demonstrate an overriding need for the material.

15 Without any identification whatsoever, of
16 whatever it is you're asserting the privilege for, it
17 would seem that we couldn't get into that balance.
18 And since the Commission has said that the Staff bears
19 the initial burden, I guess I'm wondering how you, how
20 you fit your argument that basically the questions
21 should not even be allowed to be asked, with that
22 language there that puts the burden on you.

23 MR. FERNANDEZ: Well, we would argue that
24 we've met our burden by raising the issue, and as we
25 stated in Pages 2 and 3 of our objections, we've met

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1 our burden by articulating the reasons why we believe
2 that this Interrogatory would invade the purview of
3 the deliberative process privilege.

4 JUDGE YOUNG: Generally, issues of
5 privilege are addressed in the context of something
6 comparable to saying we, there are X documents, but
7 we're not going to provide them because they represent
8 attorney work product, for example.

9 Without, but what you seem to be asking us
10 to do, is just say from the outset, that the question
11 may not even be asked. And that seems, I'm not sure
12 how that balances with what the Commission has said
13 here.

14 You seem to be taking a rather, strongly
15 to one side view of how this balancing should be
16 accomplished. Hello.

17 Hello, Mr. Fernandez?

18 MR. FERNANDEZ: Yes, Your Honor, hello.

19 JUDGE YOUNG: I think the last thing I was
20 saying was sort of asking you to respond to the
21 situation that you seem to be proposing, respond to my
22 concerns about that.

23 MR. FERNANDEZ: Well, I think that the
24 balancing here weighs in favor of protecting the
25 Staff's deliberative process and the Staff's frank

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1 discussion of issues into allowing an Intervener to
2 ask whether there have been disagreements that violate
3 the whole purpose of having that privilege.

4 MS. CURRAN: But that argument, this is
5 Diane Curran, suggests there is a general privilege
6 that just exists and anytime the Staff is
7 deliberating, the information is privileged.

8 And that, that's really not consistent
9 with our case. Are we all on the line?

10 JUDGE YOUNG: Yes, we are.

11 MR. FERNANDEZ: Your Honor, I -

12 JUDGE YOUNG: I assume we are. Judge
13 Baratta, Judge Elleman, you are?

14 JUDGE BARATTA: Yes.

15 JUDGE ELLEMAN: Yes, we're here.

16 JUDGE YOUNG: Mr. Repka, you are still?

17 MR. REPKA: We are.

18 JUDGE YOUNG: Okay, great, thank you.

19 MR. FERNANDEZ: Although I think we
20 disagree on the reading of the case, first of all we
21 haven't heard any, any articulation of what the
22 interest weighing against violating the Staff's
23 privilege are.

24 And furthermore, the privilege does exist.
25 I mean it does exist as a general principle. And when

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1 the Staff is deliberating and talking to each other or
2 preparing draft documents that are not final agency
3 petitions, ordinarily those, those type of documents
4 are not discoverable, because they are part of the
5 Staff's deliberative process.

6 JUDGE YOUNG: But the Commission does say
7 here, that it qualifies and that it has to be balanced
8 against the litigant's need for the information.

9 So basically, what you're saying is that
10 you are arguing that the privilege, you should be
11 allowed to invoke the privilege so as to not respond
12 to whether or not there are anyone, any persons who
13 have differing views or opinions on a given subject.
14 Am I understanding you right?

15 MR. FERNANDEZ: Well, yes, Your Honor. And
16 so far we haven't really identified how any of this
17 information would be relevant to the Intervener's
18 case.

19 They haven't articulated any interest that
20 would balance against violating the Staff's privilege.

21 JUDGE YOUNG: Well, against not allowing it
22 in this case. Ms. Curran, do you want to respond to
23 that?

24 MS. CURRAN: Well, we don't even know if,
25 say, documents exist. So what would be talking about?

1 JUDGE YOUNG: Well, let's move on beyond
2 documents. Mr. Fernandez, I think you've agreed, that
3 if there are any documents, that you will identify the
4 documents.

5 MS. CURRAN: Or the opinion?

6 JUDGE YOUNG: Well, hold on. Mr.
7 Fernandez, I think you have already agreed that if
8 there are documents, you will identify, you will
9 indicate that there are documents, but that you are
10 asserting the deliberative process privilege for any
11 other, with regard to those, correct?

12 MR. FERNANDEZ: That is correct.

13 JUDGE YOUNG: So what we're talking about
14 here, is not documents.

15 MS. CURRAN: Right.

16 JUDGE YOUNG: But, the possibility that
17 there might be any, any people on the Staff, any
18 person or persons on the Staff, who would have a
19 differing opinion or information in response to a
20 given Interrogatory.

21 MS. CURRAN: Right, and I'm sorry, I
22 misspoke, but it would, it's the same issue if no
23 dispute, if no differing opinion has been identified,
24 then we're arguing in the abstract.

25 And this is obviously something where you

1 look at the individual case and figure out if there's,
2 if there's a need for the information.

3 How could we, how could we address the
4 issue, it hasn't, it hasn't even -

5 JUDGE YOUNG: Okay, let me suggest
6 something. I would like, myself, to know whether
7 there is any case law that goes into more detail on
8 this deliberative process privilege in the context of
9 question about opinions of Agency Staff.

10 Any Agency Staff who might have a
11 differing view? In other words, this type of
12 situation that we're talking about here. So, Staff,
13 when you give your responses, could you provide that,
14 any such case law, and then if there are any Motions
15 to Compel, BREDL, would you provide case law that you
16 find?

17 MS. CURRAN: Yes.

18 MR. FERNANDEZ: Yes, Your Honor.

19 JUDGE YOUNG: Okay, all right. Anything
20 else -

21 MS. CURRAN: But are we, have we clarified
22 that the Staff is going to, if there are differing
23 opinions in the Staff, when it comes to answering
24 these Interrogatories, that's going to be identified
25 by the Staff? Because I'm not sure we've reached that

1 point.

2 JUDGE YOUNG: Mr. Fernandez, you're arguing
3 that you should not have to say, for example, there is
4 someone on Staff who disagrees with the answer to this
5 Interrogatory, but we object to providing the name of
6 that person, or the substance of that person's
7 opinion, under the deliberative process privilege,
8 correct?

9 MR. FERNANDEZ: That's correct, Your Honor.

10 JUDGE YOUNG: Okay, if you intend to, if
11 that's what, if there are any questions that would
12 cause you to need, to assert that argument, I want you
13 to, for yourself, hold your responses in such a way
14 that you could provide them.

15 And provide any case law to support you're
16 not responding to the questions. Am I making sense
17 here? In other words, I'm not going to require you,
18 I don't think, well, you're saying that you shouldn't
19 have to answer at all. Because to answer that there
20 might be someone with a differing opinion, would
21 violate, in your words, the privilege. Right?

22 MR. FERNANDEZ: That's correct, Your Honor.

23 JUDGE YOUNG: Okay, so without requiring
24 you to do that at this point, prior to having gotten
25 further research on this and further argument on this,

1 what I'm saying is that if there are any questions
2 that, unbeknownst to the rest of us, you are raising
3 that argument about, or that you would raise that
4 argument about, at some point in your responses
5 include a document providing case law on that.

6 And indicating that, although you're not
7 specifying which question it applies to, you're
8 raising that argument and providing the following
9 briefing in favor of your position.

10 That sort of keeps things open and in
11 effect results in our taking the issue under
12 advisement until we have had more briefings.

13 Then, Ms. Curran, if we rule in your
14 favor, the Staff would have to go back and would be
15 immediately able to provide the information, because
16 they would have kept it available for such provisions,
17 in the event that we rule against them. Does that
18 make sense to everyone?

19 MS. CURRAN: Judge Young, this is Diane
20 Curran. I guess I want to make sure I understand that
21 if there is a differing opinion among the Staff, in
22 responding to our Interrogatories, then without
23 identifying the specific Interrogatory that's
24 involved, the Staff is being required by the Board to
25 invoke the privilege and to send with citations to

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1 case law. Do I understand that right?

2 JUDGE YOUNG: But without regard to any
3 specific Interrogatory's response.

4 MS. CURRAN: Right.

5 JUDGE YOUNG: That's what I'm suggesting as
6 a means of sort of maintaining the status quo and
7 allowing there to be a little bit further briefing on
8 this, before we move forward.

9 We could, alternatively, take it under
10 advisement and if, in our consultations and our own
11 research, we come to a different result, we can
12 certainly provide that in a written order.

13 But that might be one possible way that,
14 unless we say something differently, we could proceed
15 and not slow down the process. So, subject to the
16 Board deciding one way or the other, definitely,
17 that's sort of an interim approach that it seems like
18 it might be good to take, allow everyone to move
19 forward without holding this up at this point.

20 MS. CURRAN: Judge, this is Diane Curran.
21 I'd just like to request that you put that in writing
22 to the parties in an order. Just so that everyone is
23 really clear as to what's being required.

24 JUDGE YOUNG: We're going to issue an
25 order.

1 MS. CURRAN: Okay.

2 JUDGE YOUNG: And we'll either say that or
3 whatever else we decide, if that's it. If the Board
4 decides something different, that's something that we
5 might do.

6 I don't want to go off the record right
7 now, because we don't have a whole lot of time left
8 before I'm going to have to request more time if we
9 don't finish up.

10 And we still need to argue on this Motion
11 to Dismiss Contention 3. Judge Baratta and Judge
12 Elleman, is that okay with you, to proceed in that
13 fashion and then we can talk later and change that if
14 we need to?

15 JUDGE ELLEMAN: I would appreciate the
16 opportunity for us to discuss it later, yes.

17 JUDGE BARATTA: Yes, same here.

18 JUDGE YOUNG: Yes, okay. Just as a measure
19 of trying to have everyone on the same page,
20 understanding sort of where we are. Anything else on
21 that?

22 MR. FERNANDEZ: Nothing from the Staff,
23 Your Honor.

24 JUDGE YOUNG: Judge Elleman and Judge
25 Baratta, do you have any questions that you want to

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1 ask on that one?

2 JUDGE BARATTA: This is Judge Baratta, I
3 have none at this time.

4 JUDGE YOUNG: Judge Elleman?

5 JUDGE ELLEMAN: I think I'm going to
6 reserve my questions for the discussion among the
7 three of us. Thank you.

8 JUDGE YOUNG: Okay. Anything, and I heard
9 no further argument from BREDL or the Staff. Duke,
10 have you had any thoughts that you want to share with
11 us on any of the Staff objections?

12 MR. REPKA: No.

13 JUDGE YOUNG: Okay. Any, and I think we've
14 covered all of them, right?

15 MS. CURRAN: I think so.

16 JUDGE YOUNG: Okay. Now, then moving on to
17 the Motion to Dismiss Contention 3. I have a few
18 questions. I'm sorry, I lent out my documents and
19 they came back in a different order. So I'm having to
20 find, trying to find BREDL.

21 Excuse me for a moment. I'm going to need
22 to see if, Susan Lynn, are you on the line?

23 (No response.)

24 JUDGE YOUNG: I'm going to have to get
25 BREDL's response back from her. Pardon me, I'll be

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1 right back.

2 (Long silence.)

3 JUDGE YOUNG: I'm going to have to
4 apologize. I have not been able to locate this, so
5 I'm going to have to print out another copy. Can you
6 give me quickly the day that you e-mailed that?

7 MS. CURRAN: The response?

8 JUDGE YOUNG: Right, to -

9 MR. FERNANDEZ: March 25th, Your Honor.

10 JUDGE YOUNG: March 25th? Okay. All
11 right, let's see. All right, can someone, we had put
12 aside one objection earlier.

13 MR. REPKA: It's Duke's objection to
14 Request Number 3-1.

15 JUDGE YOUNG: Right. Okay. I have a
16 couple of questions. Judge Elleman and Judge Baratta,
17 do you have any? Do you want to go ahead or do you
18 want me to go ahead with mine?

19 I thought it might be helpful to let them
20 know some of our concerns without cutting off the
21 parties' argument.

22 JUDGE ELLEMAN: Judge Young, I thought you
23 were preparing to discuss Contention 3 Dismissal.

24 JUDGE YOUNG: Right.

25 JUDGE ELLEMAN: But that's not correct, is

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1 that right?

2 JUDGE YOUNG: No, that is correct.

3 JUDGE ELLEMAN: That is correct?

4 JUDGE YOUNG: Right. And I had a couple of
5 questions, just to sort of ask the parties to focus on
6 in their argument. And I wondered if you had any that
7 you wanted to ask before we heard from them on that.

8 JUDGE ELLEMAN: I do not. This is Thomas
9 Elleman.

10 JUDGE BARATTA: I do not. This is Judge
11 Baratta.

12 JUDGE YOUNG: Okay, well, here are two
13 questions I have. One goes to Duke and one goes to
14 BREDL. With regard to BREDL, I guess my question to
15 you is why didn't you file an amended Contention 3,
16 raising some of the issues that you raised in your
17 response to the Motion to Dismiss Contention 3?

18 That's one that I'd like for you to
19 address. And then for Duke, I guess the question I
20 have, the main question is you, in your argument that
21 BREDL should not be able to get into the batch use
22 issue.

23 Let me back up. Your argument that the
24 Catawba reactor is similar to, and designed for the
25 European reactors and your argument is based on the 15

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1 by 15 lattice, as opposed to the 17 by 17.

2 Sort of substantive arguments on the
3 relative merits of the two plants as a place to use
4 the fuel. But another argument that you offered is
5 that a reason, and I'm referring not only to your
6 motion but also to your RAI responses, obviously.

7 Another response is that the reason Oconee
8 would not be a good place to do the retest assemblies,
9 is because Oconee is not the place that has been
10 proposed or selected for the use of that quantity.

11 And in a sense, that gets into sort of a
12 circular kind of almost catch-22 kind of situation.
13 Because once the process gets to the stage, if it
14 does, of batch quantity use, the proposed license
15 amendment to allow batch quantity use, the response on
16 alternatives could easily be something like that the
17 lead testing was done in Catawba, for example, and
18 therefore it makes no sense to do the batch use in a
19 different plant, a different type of plant.

20 And that's really the concern that I'd
21 like to ask you to address. I just found it, the
22 response. It was re-stapled onto the back of this.

23 Anyway, I think the two questions are
24 clear. If not, say so, and then we can move forward
25 to hearing from Duke on the motion and then BREDL on

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1 the response.

2 MS. CURRAN: All right, shall I go first?

3 JUDGE YOUNG: If you want to go first. Mr.
4 Repka, do you have any preference?

5 MR. REPKA: No.

6 JUDGE YOUNG: Okay, go ahead, Ms. Curran.

7 MS. CURRAN: It's very simple. The reason
8 we didn't amend the Contention was because we had,
9 there was nothing that we had to say in addition to
10 what we'd already said.

11 JUDGE YOUNG: Well, what about what you
12 said in your opposition to the Motion to Dismiss
13 Contention 3?

14 MS. CURRAN: Well, that doesn't change the
15 Contention. The Contention is still that Oconee
16 hasn't been properly considered. And the RAI didn't
17 properly consider it. So, what would we say?

18 JUDGE YOUNG: Well, let me -

19 MS. CURRAN: The RAI didn't consider this
20 is a viable alternative for use of MOX fuel.

21 JUDGE YOUNG: Here's the argument that I
22 want you to address. The Commission has, in its case
23 law, I believe it was in the Duke case, the Duke's
24 license renewal case, and there may be others.

25 It talked about the contention of

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1 omissions concept. And when there is a contention of
2 omission, it indicated that, something to the effect
3 of that parties, an Applicant can provide something
4 that would render moot a contention of omission, by
5 providing something. Whatever that something is.

6 And then if there is some assertion that
7 the something that has been provided is inadequate,
8 that that should be argued, that should be provided in
9 an amended contention.

10 And the argument that I'm, I'm
11 understanding Duke to be making, is to that affect.
12 That's the original contention on alternatives was a
13 contention of omission. And, on Page 4 of Duke's
14 motion.

15 MS. CURRAN: Okay.

16 JUDGE YOUNG: And where the contention
17 alleges the omission, if information is later
18 supplied, then that moves us to the stage of having an
19 amended contention.

20 And the context in which I would like you
21 to address it, is the idea of a brief discussion, and
22 that you would challenge the adequacy of that
23 discussion in an amended contention.

24 MS. CURRAN: Okay, I understand what you're
25 asking. If you go back to Contention 5, it says the

1 environmental report is deficient because it fails to
2 consider alternative nuclear power plants for testing
3 and batch MOX fuel use, other than Catawba and
4 McGuire.

5 And that's still true. There's no where
6 that Duke has considered alternative nuclear power
7 plants for testing and batch MOX fuel use. Now, it
8 maybe that this -

9 JUDGE YOUNG: Okay, okay.

10 MS. CURRAN: - RAI response considers an
11 alternative place for testing, but that's not what
12 it's about. That's not what the contention is about.

13 JUDGE YOUNG: Okay. So let -

14 MS. CURRAN: So we're content to rest on -

15 JUDGE YOUNG: - me see if I can, let me
16 see if I can understand you now?

17 MS. CURRAN: Okay.

18 JUDGE YOUNG: I think you've clarified
19 something.

20 What you're saying is that the, Duke's motion may be,
21 I don't know if you're saying this, but Duke's motion
22 may be moot with regard to testing, but it doesn't
23 provide any information on batch use, which was part
24 of the original contention.

25 Now, I'm just looked to see what, well,

1 but you see, the Contention 3, that we admitted,
2 doesn't refer to batch use.

3 MS. CURRAN: See, the way I look at this is
4 testing and batch use kind of go together. That, and
5 the way the Board admitted the contention, they used
6 the word testing, but the background of that is that
7 these things go together.

8 That if you're looking at alternatives for
9 testing, they have to be alternatives for testing and
10 batch use, otherwise it doesn't make any sense.

11 Otherwise, the alternative is always going
12 to be the same plant where you're going to use it.

13 JUDGE YOUNG: I understand the argument
14 you're making, and that's what I was asking Duke to
15 address, and I'll expect to hear from them on.

16 I guess, still my question to you, looking
17 back at, I'll look at your contention and I'll look at
18 the one we admitted. It seems like it would have been
19 a relatively easy thing to do, to file an amended
20 contention saying the same thing you're saying, in
21 this motion to dismiss.

22 That it's inadequate because it does not
23 address batch use and that they're interrelated and
24 so forth like you're arguing now. And you didn't do
25 that.

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1 So, I'm wondering, you know, that would
2 put you in a very different procedural posture with
3 regard to the Commission's Contention of Omission new
4 doctrine.

5 MS. CURRAN: Well, I think I've said
6 everything I have to say. I don't think that it's
7 necessary to amend a contention if what you say in the
8 contention hasn't changed. And it hasn't changed.

9 JUDGE YOUNG: Well, but, approach it from
10 this standpoint. Approach it from the standpoint of
11 what was admitted was the reframed contention. And
12 it did not, it did not refer to batch use, it referred
13 to the lead test assembly only.

14 MS. CURRAN: But, to make any sense, there
15 has to be some implicit reference to batch use, that's
16 the way I understood the contention that there, that
17 while the contention may, and I'm just looking for -

18 JUDGE YOUNG: Was there any particular
19 reason why you refrained from doing an amended
20 contention? Wouldn't it have covered your bases
21 better if you had done both a response and also an
22 amended contention?

23 MS. CURRAN: No. Because when one, when
24 one does an amended contention, there's an implicit
25 concession that there's something wrong with the

1 contention that you've already got.

2 And I didn't have anything to question
3 about the contention that we'd already had. And when
4 one does -

5 JUDGE YOUNG: When you say, when you're
6 talking, excuse me, excuse me, excuse me.

7 MS. CURRAN: Okay.

8 JUDGE YOUNG: When you're talking about the
9 contention that you already had, what are you talking
10 about? Your contention or the admitted contention?

11 MS. CURRAN: Both.

12 JUDGE YOUNG: Well, but the admitted
13 contention is limited to the lead test assemblies.

14 MS. CURRAN: Right. But, there's got to
15 be, I think, that, my understanding of the contention
16 was that, the question right now, okay, the question
17 before the Board right now is should this permit be
18 granted to use lead test assemblies at Catawba?

19 And there's a NEPA question that in order
20 to, and so the environmental report looks at should we
21 use LTAs at Catawba? But related to that, is the
22 question of whether Catawba is the right place to do
23 all of the MOX fuel use?

24 And that's, if the Board didn't mean to
25 admit the contention for that purpose, amending it, I

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1 don't have any grounds to come in and seek an
2 amendment to say, to say things have changed.

3 That now you should be considering batch
4 use. We said that at the beginning. You can't, if
5 the Board didn't mean to look at batch use, in this
6 contention, then, then maybe what we need is a ruling
7 from the Board clarifying that and then we would
8 appeal that at the end of the case. If the Board
9 meant to, I think anything about this RAI changed that
10 problem.

11 If that's a problem for us, nothing about
12 the RAI changed that. That's a different problem than
13 whether a contention ought to be amended.

14 JUDGE BARATTA: This is Judge Baratta. May
15 I interject something here, Ms. Curran?

16 MS. CURRAN: Yes, sure, please.

17 JUDGE BARATTA: Judge Young?

18 JUDGE YOUNG: Oh, sure, go ahead.

19 JUDGE BARATTA: Does the admitted
20 contention, Contention 3, mention batch use?

21 MS. CURRAN: No, it doesn't.

22 JUDGE BARATTA: Okay, that's something I
23 want to, make sure that we're all in agreement.

24 MS. CURRAN: And isn't it the intention of
25 the Board that we're only allowed to look at testing,

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1 alternatives for testing, and that batch uses are
2 relevant, then we really have no interest in pursuing
3 the contention.

4 And we can all stipulate to that and we'll
5 file an appeal at the end of the case.

6 JUDGE YOUNG: I think what I'm trying to
7 get you to look, to respond to, is really something
8 much simpler. Your argument that you can't consider
9 one without considering the other, in effect, makes
10 sense, as indicated in my question that I want Duke to
11 answer. The question is the Commission has this
12 Doctrine of Contention of Omission, and what I'm
13 trying to get you to respond to is the procedural
14 aspect of a Contention of Omission.

15 And to the idea that, more or less,
16 anything, even if minimal, provided to respond or in
17 an RAI response, that addresses a Contention of
18 Omission, renders the Contention of Omission moot
19 because there is now something there which is to be
20 challenged, which is to challenged in an amended
21 contention, challenging the adequacy of it.

22 MS. CURRAN: Okay.

23 JUDGE YOUNG: In which, in other words, you
24 could have filed an amended contention saying it's
25 inadequate because it doesn't address batch use and it

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1 doesn't make sense to consider one without the other.

2 MS. CURRAN: Okay.

3 JUDGE YOUNG: It's a purely procedural
4 question.

5 MS. CURRAN: I understand what you're
6 saying, Judge Young, and let me just say this, okay?
7 When you just said, you just used the phrase is there
8 something there.

9 It continues to be our position that
10 there's nothing there, in the sense that there is no
11 discussion of batch fuel use at Oconee. Nothing,
12 there's nothing there.

13 They talk about testing, well that's
14 really not, testing is kind of like the tail on the
15 dog. The dog is batch use and testing is basically
16 irrelevant. We could have filed a contention, I
17 suppose, that said this RAI response is irrelevant,
18 the contention remains the same. They haven't
19 adjusted it.

20 JUDGE YOUNG: Well, let me ask you
21 something. The argument that Duke makes, or the
22 response to the RAI in which they distinguish, I think
23 they refer to it in their Motion to Dismiss.

24 They talk about the feasibility of Oconee
25 and the fact that the assembly lattice or type of

1 assembly and the type of plant that, where MOX has
2 been used in Europe, is similar to the Catawba plant
3 and fuel assemblies there, and not to Oconee. And
4 therefore, it's not feasible to use Oconee. And also,
5 I think they argue that if something is not feasible,
6 then an Applicant should not be required to get into
7 comparable safety or safety comparisons.

8 So, that is something that Duke has
9 provided that is more than nothing. It's something,
10 and it makes sense. The issue, as it relates to batch
11 use, has some issues with it as we've talked about.

12 You know, I don't know whether it, it
13 would have put you in a much better spot had you
14 raised this same kinds of arguments in an amended
15 contention as you raise here. Or had you done both,
16 for example.

17 MS. CURRAN: Well, I read the, I read the
18 response and it seemed to me that what Duke was
19 answering, and actually the question is quite
20 specific. Please provide an assessment that evaluates
21 McGuire and also Oconee as alternative facilities for
22 the irradiation of the MOX lead test assembly.

23 And then the whole answer basically
24 presumes that Catawba is going to be the plant where
25 the assemblies are used in batch form. That was how

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1 I read this response. If the Board believes I've
2 read it wrong, then I will accept the Board's ruling.

3 JUDGE YOUNG: Well, look at the response to
4 Question 1 on Page 1 of the RAI response. The first
5 paragraph that continues on to the top of Page 2, and
6 second paragraph on Page 2, both deal with the
7 feasibility issue.

8 MS. CURRAN: Of using MOX fuel lead test
9 assemblies. It uses that right in the first sentence.

10 JUDGE YOUNG: But, I mean the principle
11 applies to both, don't you think?

12 MS. CURRAN: Well, I don't think that, I
13 don't think I need to read things into this RAI
14 response that aren't being said. This RAI response is
15 explicitly addressed to the use of MOX fuel lead
16 assemblies.

17 And it doesn't seem to be, to me to be
18 BREDL's responsibility to infer information from this
19 that isn't here, it's not presented.

20 MR. FERNANDEZ: Your Honor, this is Antonio
21 Fernandez from the Staff, just a brief question. We
22 have some members of the Staff with us that we want to
23 excuse. Are we just going to continue talking about
24 Contention 3, for the rest of the teleconference?

25 JUDGE YOUNG: Are there any other issues

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1 that anyone thinks we should talk about? I think this
2 is the last one we were just going to finish up with
3 this.

4 And the, that, the question, let's see,
5 Duke's objection to one of the questions. I don't
6 have a big enough desk here to keep everything in
7 front of me. To Request Number 3-1, any and all
8 documents evaluating the suitability of the Oconee
9 Nuclear Power Plant for batch use of plutonium MOX
10 fuel.

11 Unless there's anything that they want to
12 say on that, or that you want them to say on that, I
13 don't see any problem.

14 (No response.)

15 JUDGE YOUNG: Okay, Ms. Curran, anything
16 else on this one?

17 MS. CURRAN: Yes, I just, you know, to go
18 back to your example, under response to Question 1, in
19 the first paragraph there that goes from Page 1 onto
20 Page 2. The last sentence in that paragraph it says
21 McGuire and Catawba are the facilities that have been
22 proposed to and accepted by the U.S. Department of
23 Energy for the larger scale irradiation of the MOX
24 fuel.

25 So that's, now that's basically saying

1 we've already picked Catawba and McGuire. All this
2 other information is just to tell you why it doesn't
3 make sense to test the assemblies at Oconee.

4 JUDGE YOUNG: But take that -

5 MS. CURRAN: And that's the same thing -

6 JUDGE YOUNG: Take that part out and
7 address the merits of the feasibility argument in
8 terms of the similarity to the European reactors and
9 the fuel design lattice. I mean that's a different
10 kind of argument.

11 And the argument as to the, which ones are
12 proposed for batch use, is the question that I have
13 for Duke. So, I mean, obviously I see the issue that
14 you're raising.

15 MS. CURRAN: Okay, I'm going to the next
16 paragraph, the first full paragraph on two. It says
17 McGuire and Catawba share the same fuel assembly
18 design. By contrast, Oconee has a different fuel
19 assembly design.

20 Okay, so all they're saying is if we're
21 going to use the fuel in batch form, in batch
22 quantities at McGuire and Catawba, why should we test
23 it in a reactor with different characteristics?

24 That's what I read that paragraph to say.

25 JUDGE YOUNG: Well, let's assume that what

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1 the argument is, let's assume, let's take it as being
2 the following. All the MOX fuel that's been used in
3 Europe, has been used in a certain type of plant and
4 has been used in the 17 by 17 fuel assembly.

5 MS. CURRAN: Judge Young, where does it, I
6 don't see anywhere in this letter that it says that.
7 Does that say that somewhere in this letter?

8 JUDGE YOUNG: I may be reading that into it
9 based on earlier discussions. If I'm wrong, then, I
10 maybe wrong.

11 MR. NESBIT: Your Honor, this is Steve
12 Nesbit with Duke.

13 JUDGE YOUNG: Yes.

14 MR. NESBIT: That is not what we said and
15 it is not true that all fuel, MOX fuel has been used
16 in Europe has been used with 17 by 17 fuel.

17 JUDGE YOUNG: Okay, thank you for
18 clarifying that. Okay, I stand corrected. Okay, so
19 it's the, all right, go ahead, then, I stand corrected
20 on that. Go ahead with your argument.

21 MS. CURRAN: Well, again, the rest of this
22 Section 1, simply addresses why Ocone isn't a
23 practical alternative for a MOX fuel lead assembly
24 program. And that, to us, that's neither here nor
25 there. It doesn't answer the consent of the

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1 contention at all.

2 So, we're prepared to stand on the grounds
3 where we are.

4 JUDGE YOUNG: So, basically what you're
5 saying is that everything except the reference to
6 McGuire and Catawba being very similar in design to
7 the European reactor?

8 MS. CURRAN: Wait, that, I still don't know
9 where it says that.

10 JUDGE YOUNG: At the bottom of Page 1,
11 going on to the top of Page 2.

12 MS. CURRAN: Oh, okay.

13 JUDGE YOUNG: What you're saying is apart
14 from that, the rest of the responses are making a
15 comparison between Catawba and Oconee with regard to
16 the fuel assembly lattices and so forth.

17 MS. CURRAN: And actually that sentence
18 doesn't say anything about Oconee, you know. It just
19 says we think that McGuire and Catawba are a great
20 choice for batch fuel. It doesn't make a comparison
21 to Oconee.

22 So, you know, it seems to me that we're
23 entitled to rely on what the document says and not
24 read things into it.

25 JUDGE YOUNG: Okay, I understand what

1 you're saying now, I think. Judge Baratta, Judge
2 Elleman, do you have any questions for Ms. Curran?

3 JUDGE ELLEMAN: I do not, this is Judge
4 Elleman.

5 JUDGE BARATTA: I do not, this is Judge
6 Baratta.

7 JUDGE YOUNG: Ms. Curran, do you have
8 anything else?

9 MS. CURRAN: No, I don't.

10 JUDGE YOUNG: Okay, Mr. Repka?

11 MR. REPKA: Yes, Your Honor. I want to
12 make three points, and the last one will address your
13 question about the relative order of addressing the
14 issues.

15 First, I think that, the first point is I
16 think it's pretty clear from the discussion and the
17 response to the Motion to Dismiss since today, that
18 Ms. Curran's only point is with respect to the use of
19 Oconee for batch MOX use.

20 And with respect to that point, I just
21 want to state our agreement and I think everybody
22 recognizes that the admitted contention as it states
23 in Contention 3, is limited to the issue of Oconee as
24 an alternative for MOX lead assembly.

25 So, any argument with respect to the batch

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1 use alternative, is beyond the scope of the admitted
2 contention.

3 JUDGE YOUNG: But getting to the question
4 that I asked you, and I know you're going to get to
5 it, but the issue would not be what the contention
6 said, but what would be relevant to it and what should
7 be considered in regard to it.

8 So, in other words, even though all that's
9 before us now is whether, is whether Catawba or Oconee
10 are more suited for the lead test assembly.

11 I think what BREDL is arguing is that you
12 can't, you can't separate out the batch use from your
13 analysis of the question of which is better for the
14 lead test assemblies by just referring to, by just
15 saying that the reason not to use Oconee for the lead
16 test assembly is because Oconee is not the one that's
17 going to be used for batch assemblies.

18 Because then that really does sort of
19 foreclose and consideration of the issue of
20 alternative, of the overall, of either part of the
21 picture.

22 MR. REPKA: I think the answer to that
23 question is, with respect to the lead assembly
24 application, you have to look at the scope of
25 alternatives as required by NEPA for this particular

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1 application.

2 And that's what we addressed in our Motion
3 to Dismiss, that the NEPA case law requires the
4 alternatives be defined by the purpose of the proposal
5 at issue, and the feasibility of other alternatives to
6 achieve that purpose.

7 And that's precisely what's been
8 addressed. Now the concern, I think, that you, Judge
9 Young, have raised in your argument that that's
10 circular, I don't think is correct.

11 I think in what BREDL is doing here,
12 again, is what it's done in other NEPA contentions
13 which is to try to put all of the issues of the MOX
14 fuel program into the context of this one narrow
15 approval.

16 JUDGE YOUNG: What I'm trying, what I'm
17 trying to do, and I want you to understand what I'm
18 saying here. What I'm doing here is I'm taking
19 BREDL's opposition and the argument that they make,
20 and I'm looking back at your RAI responses.

21 And I'm realizing, well, BREDL has a point
22 here. If you don't, if you, if you, if you use the
23 argument that it's already been decided where the
24 batch use is going to be, and therefore it's not
25 appropriate to do the lead testing assembly anywhere

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1 else, then there would be no point at which
2 alternatives would be, once you got to the batch use,
3 the reason for not, at least one reason for not
4 considering the Oconee alternative would be, well
5 that's not where the lead testing was done.

6 And so, I think what I'm trying to point
7 out to you is to that extent I think BREDL's argument
8 about the relevance of batch use at this stage, with
9 regard to your RAI response, has some coherence.

10 MR. REPKA: Well, I disagree with that
11 extremely, strongly. And here's why. The issue of,
12 the argument, the specific argument that it will be
13 foreclosed by the argument that the lead assemblies
14 were there, that's entirely speculative.

15 We don't know what the arguments would be
16 in an alternative -

17 JUDGE YOUNG: But can you imagine not
18 making that argument?

19 MR. REPKA: Well, let me back up again and
20 say that one, in many respects the argument is too
21 late, in other respects the argument is premature.

22 The premise here is that there has been on
23 environmental work done to date with respect to the
24 MOX Program. And, of course, the Department of Energy
25 has done a tremendous amount of work, including

1 alternatives, that led to the contract selection that
2 involves McGuire and Catawba as the mission reactors.

3 So the Department of Energy has made that
4 selection and has done the environmental work to
5 support that, including those alternatives.

6 JUDGE YOUNG: Well, what does that do -

7 MR. REPKA: So now we -

8 JUDGE YOUNG: Hold on. What does that do
9 to do the NRC's role in doing its environmental
10 assessment or impact statement in terms of
11 alternatives? And at this stage, Oconee, which the
12 Staff agreed with, Oconee is the valid alternative to
13 consider.

14 And so, you know, if it gets to the batch
15 stage, a licensed amendment application regarding
16 batch, proposed batch use, the NRC would likewise have
17 a role in looking at the environmental impact and
18 doing an environmental assessment or impact statement.

19 And part of that involves looking at
20 alternatives. So, whatever has happened up to this
21 point, there is that role of the NRC and it does sound
22 like the practical affect of what you're arguing. And
23 I'd really like for you to sort of zero in on that and
24 actually address it.

25 The practical impact would seem to be that

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1 there would be no way to actually look at the
2 alternative of Ocone if you're making the argument at
3 this point that you can only look at the lead test
4 assemblies and that the batch use isn't even relevant
5 to that consideration.

6 MR. REPKA: What the NRC will do at the
7 batch stage is exactly the same as what they'll do at
8 this stage, the lead assembly stage.

9 They'll look at the scope of alternatives,
10 consistent with the case law. Which means the scope
11 of alternatives that would serve the purpose of the
12 application at that time. And number two, are
13 reasonable, are feasible or reasonably achievable.

14 So the NRC will look in the batch phase at
15 the lay of the land and the work that has been done.
16 And if in fact the Department of Energy has already
17 limited the universe, that will be a fact that the NRC
18 not only will consider, they must consider -

19 JUDGE YOUNG: But you're saying that that's
20 already happened. And so in effect what you're saying
21 is that the consideration of alternatives is pretty
22 much just a formality. That it's a foregone
23 conclusion.

24 MR. REPKA: Well, in many cases, in all
25 cases addressing the scope of alternatives, including

1 the cases we've cited in our brief, the existence of
2 other approvals and other actions are very, and other
3 agencies that are involved, would be very relevant
4 considerations to defining what's feasible, what's a
5 reasonable alternative.

6 So the fact that the Department of Energy
7 has made a selection, will be something that's very
8 relevant to the scope of alternatives.

9 JUDGE YOUNG: But it's determinative under
10 your analysis, pretty much, isn't it?

11 MR. REPKA: Well, and if it is or is not is
12 irrelevant. If it is determinative then so be it.
13 That would be completely consistent with the NEPA case
14 law.

15 But I think that in many respects we're
16 getting out in front of, you know, we're here talking
17 about a lead assembly application, and a lead assembly
18 application is simply to support a prospective batch
19 use at two very specific plants.

20 If it turns out that when -

21 JUDGE YOUNG: McGuire and Catawba you mean.

22 MR. REPKA: Yes, the batch or the lead
23 assemblies would support a batch application at two
24 specific plants, McGuire or Catawba. And if in fact
25 it turns out in the NEPA review of the technical

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1 review, that those plants are not suitable, for any
2 particular reason still to be determined, then the
3 Department of Energy is back to square one.

4 So that doesn't, that doesn't negate the
5 fact of the review down the road, nor does it mean
6 that the review at this stage has to be expanded. The
7 review at this stage needs to meet the NEPA limits of
8 what an alternative analysis are at this stage.

9 And quite frankly, there are many, many
10 NEPA evaluations where the scope of alternatives is
11 very narrow. It might include the proposed action and
12 no action alternative as the only alternatives.

13 In this case, for the lead assembly at
14 least, the NRC Staff has asked the question about
15 Oconee, and it's been answered in the context of the
16 lead assembly. That is not an atypical NEPA
17 evaluation.

18 So we don't, under NEPA, ignore the real
19 world, and the real world includes the fact that the
20 Department of Energy has done environmental work and
21 made a selection.

22 JUDGE BARATTA: I have a question, if I
23 may?

24 JUDGE YOUNG: Oh, go ahead, please, go
25 ahead.

1 JUDGE BARATTA: Are you in the midst, do
2 you want to continue with your, because I can hold it
3 to the end if you're not.

4 JUDGE YOUNG: Why don't you go ahead and
5 ask it. I think we need to go ahead and get the
6 questions out. Sure.

7 JUDGE BARATTA: Okay, has, have lead test
8 assemblies, MOX lead test assemblies, ever been tested
9 in a U.S. reactor before?

10 MR. REPKA: Mr. Nesbit can probably help me
11 with that. There was an approval granted for
12 assemblies at Ginna. And whether or not it was ever
13 actually used, I can't answer off the top of my head.

14 MR. NESBIT: This is Steve Nesbit. There's
15 been five MOX lead test assembly programs in United
16 States reactors: Ginna, San Onofre, Quad Cities,
17 Dresden and, now the fifth one is escaping me.

18 JUDGE BARATTA: Oyster Creek, could it be.

19 MR. NESBIT: It wasn't Oyster Creek.

20 JUDGE BARATTA: Okay, were the lead test
21 assemblies actually installed in any of those?

22 MR. NESBIT: Yes, at all of them. Big Rock
23 Point was the fifth, that's right.

24 JUDGE BARATTA: Okay. And were, was there
25 any subsequent batch use at any of those?

1 MR. NESBIT: Not in the United States. I
2 will amend that. Big Rock Point actually was an
3 interesting program in that they loaded quite a few
4 MOX assemblies, but it's kind of off point because
5 it's a very small reactor and it's a BWR.

6 JUDGE BARATTA: Right, okay. All right,
7 that's all I have, Your Honor, thank you.

8 MR. REPKA: Actually, if I could respond to
9 that too, because I think that line of questioning is
10 helpful.

11 RECORDED VOICE: Your conference is
12 scheduled to end in 15 minutes.

13 JUDGE YOUNG: Hold on one second, I'm going
14 to go see if I can extend this just a little bit
15 longer, so we can finish up on this. I want to hear
16 from the Staff, too, on it, after Duke finishes.

17 It shouldn't take much more than 15
18 minutes, but just to make sure, hold on.

19 (Long silence.)

20 JUDGE YOUNG: Okay, sorry, go ahead.

21 MR. REPKA: Yes, I just wanted to follow up
22 on Judge Baratta's point because it jogs my
23 recollection that we made a point about the earlier
24 applications in the context previously in this case of
25 dealing with NEPA's segmentation arguments, which is

1 a little bit of what I believe, I theme I hear
2 underlying Judge Young's questions. And I think that
3 -

4 JUDGE YOUNG: Well no, don't, don't assume
5 anything more than what I'm saying in terms of the
6 impact of your argument and BREDL.

7 I can see how you would, I can see how you
8 would possible go there, but I'm not intending that
9 you go there.

10 MR. REPKA: My point would be that the
11 factual history just highlights the speculative nature
12 of jumping ahead to the batch complication at this
13 time.

14 And I think that's something the
15 Commission has highlighted in its prior rulings on any
16 possible linkage between lead assemblies and batch.

17 JUDGE YOUNG: Would it be possible to,
18 would it be possible to do a batch assembly in Oconee,
19 just for sake of argument that the Oconee alternatives
20 were raised at the level of the batch use?

21 Would it be possible to do batch use at
22 Oconee based on the lead test assemblies at Catawba?

23

24 MR. REPKA: I doubt that that would ever be
25 proposed, for many reasons, but I just cannot see that

1 as being a realistic hypothetical.

2 MR. NESBIT: Dave, this is Mr. Nesbit. I
3 believe we addressed that in the RAI response, if I'm
4 not mistaken. I don't have it in front of me.

5 JUDGE BARATTA: Okay, does anybody, could
6 they summarize it? This is Judge Baratta.

7 JUDGE YOUNG: Let's see.

8 MR. REPKA: Reading from the RAI response
9 on Page 2, it says the differences between McGuire,
10 Catawba and Oconee, while not extreme, are great
11 enough that MOX fuel lead assembly used at Oconee
12 would not be considered prototypical.

13 For those same reasons, Duke considers it
14 likely that the NRC would not consider a MOX fuel lead
15 assembly program at Oconee to be sufficient for NRC to
16 authorize use at McGuire and Catawba.

17 I think that's probably what -

18 MR. NESBIT: That's what I was talking
19 about, Dave. It wasn't exactly, you know, in
20 response.

21 JUDGE YOUNG: I was thinking of the
22 opposite of that. Whether, if the lead test assembly
23 proposal is approved for Catawba and you were
24 subsequently to request a license amendment to allow
25 you to do batch use at Catawba, and the issue of the

1 Oconee alternative were raised at that point, would
2 the same argument or the same principle of using the
3 Catawba as a prototype for batch use in Oconee would
4 not be appropriate.

5 MR. NESBIT: This is Mr. Nesbit. I think
6 that the, that we would not, we would expect to do a
7 lead test assembly program at Oconee before we
8 deployed the fuel there, absent any experience with
9 batch use elsewhere in the United States.

10 JUDGE YOUNG: I guess that gets, Mr. Repka,
11 that gets to the sort of issue of the catch-22
12 situation that I was at, trying to get you to address.

13 MR. REPKA: No, I think that actually takes
14 you out of any potential for that, because the idea is
15 if you were to do batch use at Oconee, in your
16 hypothetical, DOE and Duke would be back at square one
17 with trying to get a lead assembly application
18 approved for Oconee.

19 JUDGE YOUNG: But if there were an
20 application to do batch use at Catawba, one of the
21 reasons for not considering Oconee as an alternative,
22 would be that there had not been any lead testing
23 there.

24 MR. REPKA: Well, that could be one reason,
25 but there would be many other reasons as well.

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1 JUDGE YOUNG: Right, but that's the reason
2 that I would -

3 MR. REPKA: All of which would just add up
4 to be entirely consistent with NEPA that you would
5 only look at that stage at feasible alternatives.

6 JUDGE YOUNG: Are you, are you saying that
7 once, if this program gets to the stage of you're
8 submitting an application for batch use, that you
9 would not object to there being a consideration of
10 Oconee as an alternative that would not be foreclosed
11 by the fact that the lead test assembly, that the lead
12 testing had been done at Catawba?

13 MR. REPKA: I think the alternative of
14 Oconee could be looked at, at that time, in a way
15 similar to the way it's looked at here. Which is a
16 brief discussion to determine whether it would serve
17 the objectives of the application and whether it would
18 be a feasible alternative consistent with NEPA case
19 law.

20 JUDGE YOUNG: Apart from the fact that the
21 lead testing had been done at Catawba?

22 MR. REPKA: Yes, I don't want to say that
23 wouldn't be a reason, but I would be, but there would
24 be many other reasons as well, I'm quite sure.

25 JUDGE YOUNG: Okay, anything further from

1 you on that one? I think you've answered some of our
2 questions. Did you have anything further you wanted
3 to add to your argument?

4 MR. REPKA: No.

5 JUDGE YOUNG: I'd like to hear from Mr.
6 Fernandez. Do you have anything that, in our argument
7 on the contention, you indicated that you agreed that
8 Oconee was an appropriate alternative to consider.

9 And that was part of the basis for
10 admitting this contention. What's your, what's the
11 Staff's view on these issues that we've been
12 discussing here, without having to repeat them all?

13 MR. FERNANDEZ: The Staff's view is that
14 Duke has met the Staff's needs so that it could
15 prepare an adequate environmental document.

16 The deficiency or missing piece of
17 information has been provided to the Staff. Any
18 alleged deficiency in their ER, given what's under
19 contention, has been cured by what has been submitted.

20
21 And, as Duke articulated in their motion,
22 we believe that the contention was one of the
23 omissions. The omission has been cured. No
24 subsequent amended contention has been filed.

25 Therefore, this contention must be the

1 same. Additionally, we would like to add that with
2 regard to the questioning about what the NRC's
3 discretion would be in reviewing the Department of
4 Energy's selection of Catawba and/or McGuire reactors
5 to irradiate batch quantities of MOX fuel, although as
6 Mr. Repka stated, we would take that into
7 consideration.

8 Under NEPA the NRC is required to consider
9 all reasonable alternatives to the proposal, even if
10 those alternatives are not within its jurisdiction.

11 So, although we, our identification of
12 alternatives will be guided by the purpose and need as
13 identified by the Applicant, we do have an independent
14 duty, under the statute, to identify all reasonable
15 alternatives.

16 Whether those meet up with what the
17 Applicant's have identified or what the DOE has
18 identified, that's not an issue. So that's in forming
19 our decision, but it's not determinative of the scope
20 of the Agency's review.

21 JUDGE YOUNG: Okay, and this was my
22 understanding. I guess on the issue that BREDL has
23 raised about the relevance of the batch use or the
24 assumption of batch use only being carried out at
25 Catawba and the possibility of, the practical

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1 possibility of considering Oconee as an alternative
2 for batch use, at that stage, if that stage is
3 reached.

4 Do you, how would you view the argument
5 that Oconee is not a good alternative for batch use
6 because the lead testing was done at Catawba, which is
7 sort of the impact of what BREDL is arguing here and
8 sort of the little circle that gets created there?

9 MR. FERNANDEZ: Well, Your Honor, the fact
10 of the matter is I think this circle has been created
11 because BREDL Counsel is not fessing up to the
12 admitted contention merely -

13 JUDGE YOUNG: Well, what I'm trying to get
14 you to address is the issue of if there is, down the
15 line, a licensed amendment application to approve
16 batch use at Catawba, and there is a contention
17 submitted that says the application doesn't consider
18 alternatives and Oconee should be considered as an
19 alternative.

20 And a response to that is Oconee is not
21 appropriate because no lead testing was done at Oconee
22 and the lead testing was done at a different kind of
23 plant, does that foreclose consideration of Oconee as
24 a practical matter as an alternative?

25 MR. FERNANDEZ: At that stage, at the

1 batch, at the batch stage, Your Honor?

2 JUDGE YOUNG: Yes.

3 MR. FERNANDEZ: Well, I, we don't have
4 enough information to answer that question. We would
5 have to look at what the purpose and need of the
6 action is at the time.

7 JUDGE YOUNG: I'm asking you to consider
8 that hypothetical, though.

9 MR. FERNANDEZ: But, I don't have enough
10 information. I mean I would have to know what the
11 purpose and need is for the proposal in order to
12 identify what the reasonable alternatives to it are.

13 JUDGE YOUNG: You can't imagine the
14 argument being raised that Oconee is not a viable
15 alternative because no lead testing has been done
16 there, but that the lead testing had been done at a
17 different kind of plant?

18 MR. FERNANDEZ: Oh, I can imagine that,
19 Your Honor. I don't, I can't assess whether that
20 would be a valid argument or not, because I don't know
21 what the purpose and need of the project is.

22 Unless you know what the purpose and need
23 of the project is, you can't determine what the
24 reasonable alternatives to the proposal are.

25 JUDGE YOUNG: Well, aren't the, aren't the

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1 parameters and the purposes of the program pretty well
2 laid out already at this point, as described in Duke's
3 application in referring to the Treaty and the DOE and
4 the Joint DCS proposal?

5 There have been numerous references to
6 that in the application and I think we summarized some
7 of those from Duke's application in our ruling on the
8 contention.

9 MR. FERNANDEZ: I don't think the Staff, at
10 this point, would be willing to comment until it saw
11 what the purpose and need as identified in that
12 particular proposal would be.

13 JUDGE YOUNG: Anything further on this?
14 Ms. Curran, did you have anything further you wanted
15 to say?

16 MS. CURRAN: I think I've made all the
17 points I need to.

18 JUDGE YOUNG: And other questions, Judge
19 Baratta, Judge Elleman?

20 JUDGE ELLEMAN: I have none, this is Judge
21 Elleman.

22 JUDGE BARATTA: I have none, Judge Baratta.

23 JUDGE YOUNG: Anything further from the
24 parties?

25 MR. FERNANDEZ: Not from the Staff, Your

1 Honor.

2 MR. NESBIT: Not from Duke.

3 JUDGE YOUNG: Okay, well thank you all.
4 We've covered several things today, and we will try to
5 get an order out on the discovery ruling as quickly as
6 possible.

7 MR. FERNANDEZ: Your Honor?

8 JUDGE YOUNG: Yes.

9 MR. FERNANDEZ: I just wanted to inform the
10 Board and the parties that the Staff issued a Safety
11 Evaluation today. The Safety Evaluation does not
12 cover the security portion of the application,
13 however.

14 That's going to be supplemented at a later
15 date. But we will be providing the parties and the
16 Board with copies of the Safety Evaluation today.

17 JUDGE YOUNG: Thank you. All right, now,
18 as I was saying, thereafter, we will be ruling on the
19 Motion to Dismiss Contention 3. And I guess you can
20 hold off on your discovery on that until we've ruled
21 on that.

22 And as soon as we've had a chance to talk
23 with our security expert, Mr. Manili, we will address
24 the issue of the making public of certain pages of the
25 transcript, in the transcript, and we hope to get out

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our rulings on the security contentions in the near future. Anything further from the parties?

MS. CURRAN: No, not from me.

MR. REPKA: No.

MR. FERNANDEZ: No.

JUDGE YOUNG: Thank you all. I guess we can go off the record at this point, and the Court Reporter might have questions.

(Whereupon, the foregoing matter was concluded at 1:30 p.m.)

CERTIFICATE

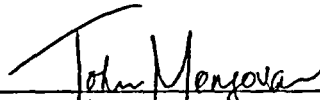
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Duke Energy Corporation

Docket Number: 50-413/414-OLA

Location: Teleconference

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



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