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NUCLEAR REGULATORY COMMISSION

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

(ASLB)

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TELECONFERENCE

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In the Matter of: || Docket Nos. 50-413-OLA
|| 50-414-OLA
DUKE ENERGY CORPORATION ||
|| ASLBP No. 03-815-03-OLA
Catawba Nuclear Station ||
Units 1 and 2 ||



Tuesday,
April 20, 2004

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

BEFORE:

ANN MARSHALL YOUNG, Chairperson
ANTHONY J. BARATTA, Administrative Law Judge
THOMAS S. ELLEMAN, Administrative Law Judge

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APPEARANCES:

On Behalf of the Licensee:

DAVID A. REPKA, ESQ.

ANNE W. COTTINGHAM, ESQ.

MARK J. WETTERHAHN, ESQ.

of: Winston & Strawn, LLP

1400 L Street, N.W.

Washington, D.C. 20005

(202) 371-5726

(202) 371-5950 fax

AND

TAMIKA SHAFEEK-HORTON, ESQ.

Duke Energy Corporation

526 South Church Street

Charlotte, North Carolina 28202

(704) 382-8134

(704) 382-4504 fax

On Behalf of the Petitioner, Blue Ridge

Environmental Defense League:

DIANE CURRAN, ESQ.

of: Harmon, Curran, Spielberg & Eisenberg, LLP

1726 M Street, N.W., Suite 600

Washington, D.C. 20036

(202) 823-3500

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On Behalf of the Nuclear Regulatory Commission:

ANTONIO FERNANDEZ, ESQ.

MARGARET BUPP, ESQ.

SUSAN UTTAL, ESQ.

Office of General Counsel

Mail Stop O-15 D21

U.S. Nuclear Regulatory Commission

Washington, D.C. 20555-0001

(301) 451-8339

ALSO PRESENT:

MICHAEL T. CASH, Duke Energy

EDWIN S. LYMAN, Ph.D., BREDL

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

(10:04 a.m.)

JUDGE YOUNG: Okay. This is Judge Young.

And Judge Baratta and Judge Elleman, are you both on?

JUDGE BARATTA: Yes. Judge Baratta.

JUDGE ELLEMAN: Yes, Judge Elleman is here.

JUDGE YOUNG: Okay. And let's start with the Staff.

MR. FERNANDEZ: Your Honor, Antonio Fernandez for the Staff, and along with me are Susan Uttal, Margaret Bupp, and Bob Martin.

JUDGE YOUNG: All right. Then, going to BREDL?

MS. CURRAN: This is Diane Curran, representing Blue Ridge Environmental Defense League. I have arranged with our expert, Dr. Lyman, that if we need him for this call I'll get off the line and call him, but otherwise he's not planning to be on the call.

JUDGE YOUNG: I think we may want him to be on for one part of the discussion, and that would be when we discuss further clarification of our reframing of contentions 1 and 2. Judge Baratta is

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1 going to try to provide further explanation. I think
2 it would be helpful if he were probably with us for
3 that.

4 Don't you agree, Judge Baratta?

5 JUDGE BARATTA: Yes. This is Judge
6 Baratta. Yes, if he could be on for that. So we'll
7 give you a couple-minute warning, so you can try to
8 get hold of him.

9 MS. CURRAN: Okay.

10 JUDGE YOUNG: And then Duke? Mr. Repka?

11 MR. REPKA: Yes, I'm here. And with me
12 are Mr. Wetterhahn and Ms. Cottingham. Then, on a
13 separate line from Charlotte Company Counsel, Ms.
14 Shafeek-Horton. And on a separate line, I think, is
15 Mr. Cash on behalf of the Company.

16 JUDGE YOUNG: Okay. If you hear some
17 strange noises, my window is being washed as we speak.

18 All right. I have several things written
19 down for an agenda today, and I'm going to just
20 quickly go through that list and see if there are any
21 things that anyone wants to add to that, and then
22 we'll just take them one by one.

23 First, obviously, is whether there are any
24 discovery issues that we need to talk about. It looks
25 as though you are resolving those on your own, but we

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1 may want to check and make sure where we are. Then,
2 just notify you that we will be shortly issuing the
3 public pages of the transcript that Duke has requested
4 and the redacted public version of our ruling on the
5 security contentions, as soon as we finish consulting
6 with our security advisor.

7 We will also shortly be issuing, or as
8 soon as possible, be issuing a ruling on the Motion to
9 Dismiss contention 3.

10 We want to talk about the proposed -- I
11 think it's termed amended contentions and any need for
12 oral argument on that. We want to have a little
13 discussion on that.

14 Then, in connection with, and separate and
15 apart from that, we need to talk about a schedule for
16 hearing and discovery, and so forth, on the security
17 contention that we did admit, to the extent that we
18 can obviously talk about that without getting into any
19 safeguards or security issues that we shouldn't talk
20 about in this conference.

21 And that's about it -- talking about the
22 schedule generally. Are there any other issues that
23 any of you would like to add to that list?

24 MR. REPKA: For Duke Energy, we do not.

25 MR. FERNANDEZ: None for the Staff, Your

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1 Honor.

2 MS. CURRAN: BREDL doesn't have any issues
3 to add.

4 JUDGE YOUNG: Okay. The only Motion to
5 Compel I think was filed by the Staff. Am I correct
6 on that?

7 MS. UTTAL: That's correct, Your Honor.
8 This is Susan Uttal. That is correct.

9 JUDGE YOUNG: And we note that you have
10 asked that we hold that in abeyance pending receipt of
11 information from BREDL on the -- pursuant to the two
12 agreements that you reached and sent to us by e-mail.
13 Are you both on track on that? Are there any issues
14 that either of you anticipate arising that it would be
15 helpful to talk about now?

16 MS. CURRAN: This is Diane Curran. Judge
17 Young, I don't think we're going to have any issues.
18 We are working on those answers today. Ideally, we'll
19 finish them today and send them to the Staff. If we
20 can't finish them today, I'll send them first thing in
21 the morning. We may not have the signature on it yet
22 tomorrow, because Dr. Lyman is going to be at the ACRS
23 meeting all day. But the answers we'll get to the
24 Staff tomorrow morning, if not today.

25 JUDGE YOUNG: Okay. And, Ms. Uttal, is

1 that -- you're okay with that?

2 MS. UTTAL: That's acceptable. I'm also
3 working on responses for Ms. Curran, which I hope to
4 get out today.

5 JUDGE YOUNG: Okay. Great. Let us know
6 if you do have any issues, and we'll set up something
7 as soon as possible. But it sounds as if you're
8 working well together. And if we can stay on our
9 previously-set schedule, that would be fine.

10 With regard to discovery, I think that in
11 Ms. Curran's motion or request -- proposed hearing
12 schedule you had said that you wanted -- that this did
13 cover changes of certain things in our existing
14 schedule.

15 MS. CURRAN: Right.

16 JUDGE YOUNG: And quite frankly, I haven't
17 pinpointed the --

18 MS. CURRAN: Oh, okay.

19 JUDGE YOUNG: -- any change to that.
20 Could you just address that part of it?

21 MS. CURRAN: Yes.

22 JUDGE YOUNG: What was it that you wanted
23 to change?

24 MS. CURRAN: I just moved the date for
25 filing testimony by a few days. That was the only

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1 dates that change, and I proposed setting the hearing
2 date for the second week of June. So, for instance,
3 instead of testimony being due -- oh, I'm looking at
4 April here. Instead of testimony being due May 25th,
5 it would be due May 28th, and then rebuttal testimony
6 would be due on June 9th.

7 JUDGE YOUNG: Okay. So the first date
8 would be -- just looking back at the March 30 order,
9 the corrected order, the first date that you're
10 proposing to change is the prefiled written direct
11 testimony.

12 MS. CURRAN: Right. Change it from the
13 25th to the 28th.

14 JUDGE YOUNG: 28th. And the next one that
15 you're proposing changing is the rebuttal.

16 MS. CURRAN: Rebuttal. Changed from the
17 28th to June 9th.

18 JUDGE YOUNG: June 9th. And we already
19 have the date of June -- the week of June 14th set
20 aside for that hearing. And that is what we had been
21 planning on, so I don't think that presents a problem.

22 Does anyone have any objection to changing
23 the prefiled date as Ms. Curran proposes?

24 MR. REPKA: Judge Young, we do not agree
25 with the predicate for the motion to change the dates,

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1 with respect to the arguments made that the dates
2 should change because of the status of the DOE
3 program. That really -- those arguments are beside
4 the point that --

5 JUDGE YOUNG: Well, okay. The reason I'm
6 limiting the discussion right now to simply the dates
7 that we've already set is because I don't want to get
8 into argument on the merits of the arguments that are
9 made, but just simply talking about what we have
10 already set so far. And we had already set aside the
11 week of June 14th, and so all I'm asking at this point
12 is, does any party have any objection to changing the
13 prefiled written direct testimony and the prefiled
14 rebuttal testimony dates from May 25th to 28th and
15 May 28th to June 9th?

16 MR. REPKA: Well, I guess I would say,
17 then, that I object to all of the changes because
18 nothing has changed.

19 JUDGE YOUNG: Okay. But we're not getting
20 into any of the changes other than just those two. Do
21 you have any specific reason to object to those two?

22 MR. REPKA: Other than the fact that
23 nothing has changed, no. Having said that, what I
24 would say is that with respect to the May 28th date,
25 it does conflict with if there's going to be a hearing

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1 on security issues on June 1st, which was the last
2 thing we understood, that might create a bit of a
3 problem.

4 With respect to the June 9th date for
5 rebuttal testimony, I don't have any real objection to
6 extending the date for rebuttal to maybe something
7 like June 4th. I think June 9th is pushing it a
8 little close to the beginning of the hearing date on
9 the 14th in order to prepare for hearing.

10 JUDGE YOUNG: Actually, speaking for
11 myself, I think the Board might like to have the
12 prefiled a little earlier than the middle of the week
13 before --

14 MS. CURRAN: Yes, this is Diane Curran.
15 I agree with that. I think it might be better to push
16 it up a little earlier. But how about the 7th of
17 June? Just to give people enough time -- the tension
18 is between giving people enough time to prepare their
19 rebuttal and getting it into other parties' hands in
20 time to prepare for the hearing.

21 JUDGE YOUNG: But now, remember, when we
22 talked about the rebuttal, I believe that the way we
23 talked about it was that that would not be required.

24 MS. CURRAN: Well, if certain parties are
25 planning to file it, I think that everyone probably is

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1 going to feel that it's needed.

2 JUDGE YOUNG: Okay. So you're suggesting
3 the 7th. Okay. I'm just putting those dates down as
4 tentative, and we'll let you know more about that
5 later.

6 Ms. Uttal, you were about to say
7 something?

8 MS. UTTAL: Yes, because the Staff has a
9 problem with the May 28th date. One of my witnesses
10 will not be available for that week, so changing the
11 date to May 28th would impose a burden on the Staff,
12 because I would --

13 JUDGE YOUNG: Well, that's moving it
14 later.

15 MS. UTTAL: Yes, I understand. But he
16 will not be available from the 25th to the 28th, or
17 maybe the 24th to the 28th.

18 JUDGE YOUNG: But you could file it
19 earlier if you want to.

20 MS. UTTAL: I don't think we want to do
21 that from a strategic point.

22 JUDGE YOUNG: Well, you could write it
23 earlier and file it on the 28th. I mean, if you --
24 your objection -- I guess I'm not understanding your
25 objection, really.

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1 MR. FERNANDEZ: Well, our objection is
2 that we would like to keep the schedule as we've
3 believed it to be. Nothing has changed, as the
4 Licensee expressed. There is no reason --

5 JUDGE YOUNG: But I'm talking about
6 reason.

7 MR. FERNANDEZ: Well, that is the reason.
8 There is no reason to change the schedule that we
9 already agreed on, and that leave has been granted to
10 several members of the Staff and plans have been made,
11 given what the Board had ordered previously. We don't
12 see what the reason is to change it.

13 JUDGE YOUNG: Okay. We'll get into the
14 reasons. But let me try to encourage everyone to try
15 to accommodate each other, try to talk in terms of
16 real reasons other than just something -- this is the
17 way it is. And if an objection is that someone is not
18 going to be there between the 25th and the 28th, and
19 you could have made it by the 25th, and then you could
20 file it on the 28th because you don't want anyone else
21 to see it before the 28th, I'm not following that real
22 well.

23 But in any event, I've written down the
24 requested dates. Maybe we need to talk about those in
25 the context of the overall schedule. I thought that

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1 maybe we could work out the ones related to the
2 June 14th hearing on non-security-related contentions
3 by agreement, since those didn't seem to present much
4 controversy.

5 Were there any other issues? I think
6 earlier I was talking about were there any other
7 issues that any party wanted to add to the agenda?
8 Duke said no, Staff said no, and BREDL said no.
9 Right?

10 MS. CURRAN: That's right.

11 JUDGE YOUNG: Okay.

12 MR. REPKA: I guess I would ask for the
13 Board's clarification on the schedule, the Motion for
14 Reconsideration. Will the Board be looking for a
15 response to that, to address the merits, or --

16 JUDGE YOUNG: We're going to be talking
17 about the schedule. And when we talk about that, we
18 can address that. Okay?

19 All right. Let's just in order -- were
20 there any other discovery issues that any party had
21 any problem with?

22 MS. CURRAN: Not from BREDL.

23 JUDGE YOUNG: Okay. What about oral
24 argument on the amendment to security -- basically,
25 the amendment to the basis of security contention 5?

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1 One thing that Judge Baratta and Judge Elleman and I
2 were talking before we all got together, and one thing
3 that I'm not altogether clear about -- we're not
4 altogether clear about -- is the document was styled
5 amendment contention. But really what you did was
6 propose adding certain elements to the basis of
7 contention 5.

8 Normally, a contention is the statement of
9 the issues, so to speak. And the basis is the
10 information that you have at the time of filing the
11 contention to support the contention. There is
12 nothing that would preclude additional evidence that
13 would be relevant to a contention being admitted at
14 the actual hearing on the contention.

15 So given our ruling on contention 5, I'm
16 not sure -- well, I'd like to hear the parties'
17 positions on whether we need to have oral argument on
18 that, whether we need to have a ruling. I guess from
19 one standpoint you might want to get a ruling on that
20 in the event that there's an appeal of our ruling on
21 contention 5, so that there would be those additional
22 bases to consider.

23 That's the only possible thing that I can
24 think of as to why we would need to give a formal
25 ruling on additional bases for the contention.

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1 And then, I'd like to hear from all of you
2 on whether we need to have oral argument on that.
3 Let's start with Ms. Curran.

4 MS. CURRAN: Well, you know, I hadn't
5 thought about it from that perspective. But it
6 certainly makes sense that where -- well, we were
7 concerned that -- and I'm not going to discuss what
8 the contention says, obviously, but that one thing
9 that happened was that some of the information that we
10 critiqued in the contention as being inadequate to
11 support the exemption application changed.

12 So it didn't feel -- we didn't feel that
13 we could just let that go, that we needed to address
14 that because the underpinning for the contention had
15 shifted a little bit. And it seems to me that, yes,
16 the -- you have admitted a contention that says the
17 exemption requirements are not met, and that continues
18 to be our contention. It's just that our support for
19 it is -- has changed a little bit.

20 So it seems reasonable to me that the
21 Board would simply rule that the contention has been
22 admitted and that relevant information can be
23 presented at the hearing, and that this is just kind
24 of a nuance thing.

25 JUDGE YOUNG: Let me hear from the Staff

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1 and Duke on that. Do you all see any need for oral
2 argument or any specific ruling or type of ruling on
3 that at this point?

4 MR. REPKA: This is Dave Repka for Duke.
5 We do agree that procedurally there needs to be a
6 ruling, but we do not believe that there needs to be
7 any oral argument.

8 JUDGE YOUNG: And when you say
9 procedurally there needs to be a ruling, what sort of
10 ruling are you suggesting that we would make, whether
11 to accept the bases -- I mean, generally, you rule on
12 whether to accept a contention, and sometimes provide
13 some clarification on the type of evidence that might
14 be admitted on it.

15 What would your --

16 MR. REPKA: I think --

17 JUDGE YOUNG: Well, we can't get into the
18 arguments on it, but go ahead.

19 MR. REPKA: The ruling would have to
20 address the filing of the amended bases. Now, if the
21 Board's position determination is that that's
22 additional bases for an existing contention that has
23 already been admitted, so be it.

24 JUDGE YOUNG: Well, that used to be what
25 it is from -- from just the face of it.

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1 MR. REPKA: Well, I'm neither agreeing nor
2 disagreeing --

3 JUDGE YOUNG: Right.

4 MR. REPKA: -- with that. I think
5 procedurally, though, there just needs to be a ruling
6 stating where that amended contention is. So, really,
7 to establish where it is in the procedural process for
8 appeal and other reasons. But I don't --

9 JUDGE YOUNG: Do we have everyone's
10 responses on that? I think we got a response from
11 Duke. Have we gotten a response from the Staff on
12 that yet?

13 MR. FERNANDEZ: No, Your Honor.

14 JUDGE YOUNG: Do you intend to file a
15 response?

16 MR. FERNANDEZ: Yes, Your Honor. Well, we
17 are deciding that today, Your Honor.

18 JUDGE YOUNG: Okay.

19 MR. FERNANDEZ: Would now be a good time
20 for the Staff to respond to your questions, Your
21 Honor?

22 JUDGE YOUNG: Mr. Repka, were you
23 finished?

24 MR. REPKA: Oh, I'm sorry. Yes, I was.

25 JUDGE YOUNG: So I'm taking that as saying

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1 that you don't have anything to add to your written
2 filings that you would want us to hear from you on.

3 MR. REPKA: No.

4 JUDGE YOUNG: Okay.

5 MR. REPKA: We just filed yesterday, and
6 I think we stated there that we didn't think oral
7 argument was necessary.

8 JUDGE YOUNG: Okay. Go ahead, Mr.
9 Fernandez.

10 MR. FERNANDEZ: The Staff's position is an
11 agreement with the Licensee that we don't believe that
12 oral argument is necessary. This is an issue that can
13 be disposed of on the written pleadings.

14 Additionally, it would be important for
15 the Board to rule on the admissibility of these
16 additional bases into a proceeding. Contentions,
17 although, as the Board has described accurately, are
18 just a general allegation of what the disagreement is
19 between the parties. The bases serve to limit the
20 scope of the contentions, and there are specific
21 requirements in Part 2 for what constitutes a sound
22 basis.

23 The Board should examine the document
24 provided by BREDL and assure itself that the bases
25 that it has sought to add to the proceeding do meet

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1 the requirements of 2.714. And if the Staff chooses
2 to do so, it will later this week file a response to
3 that.

4 JUDGE YOUNG: Mr. Fernandez, you said
5 something a minute ago, and this is something that
6 I've heard discussed here in my office ever since I
7 started working here almost four years ago. And that
8 is, you said that you interpreted the bases as
9 limiting the scope of the contention. And I'm not
10 really sure that that's true.

11 Do you have any particular authority for
12 that? Because the way the Commission has talked about
13 bases in their various -- the statement of
14 consideration and the CLI -- I think it was 98-12 --
15 that they've talked about providing a basis that
16 provides everything of which a Petitioner is aware at
17 the time, so that your -- I'm just -- I'm surprised to
18 hear you say that the basis would limit the scope of
19 a contention.

20 The contention would define what the issue
21 is, and any evidence that would be relevant to that
22 contention would be admissible at a hearing. Are you
23 arguing anything different from that?

24 MR. FERNANDEZ: Well, first of all, I
25 don't have the reference as to juris prudence on how

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1 bases limit the scope of contentions. And if the
2 Staff is going to file something, we'll, of course,
3 provide that along with the response to the late-filed
4 contentions.

5 JUDGE YOUNG: Yes, please do, because that
6 -- that is not -- that is not consistent with my
7 understanding based on everything that I've learned or
8 heard since I've been here. But I know that from time
9 to time parties seem to speak as if that's their
10 understanding of what it is, but I've never -- I've
11 always thought that that arose out of some lack of
12 clarity or confusion.

13 So if that is what you're going to argue,
14 please do brief that in your response.

15 And when can we expect -- I believe that
16 your deadline would be -- what would it be, five days
17 from yesterday?

18 MR. FERNANDEZ: That's correct, Your
19 Honor.

20 JUDGE YOUNG: Which would make that I
21 guess Monday, correct?

22 MR. FERNANDEZ: Yes, Your Honor. That's
23 our understanding.

24 JUDGE YOUNG: Okay. So we'll hear from
25 you, then, on that. If we see the need for oral

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1 argument, I guess we'll let you know.

2 Ms. Curran, I don't know whether you spoke
3 specifically to the need for oral argument. Do you
4 have anything you'd like to say on that before we move
5 on?

6 MS. CURRAN: Well, in my view, I don't
7 think oral argument is necessary here, because the
8 issues are so similar to -- they're not identical, but
9 they're very similar to what we've already discussed
10 in the previous oral argument. So I guess I would
11 leave it to the Board.

12 If the Board has questions for any of the
13 parties about these amended contentions, yes, an oral
14 argument would be a good idea. But otherwise, I don't
15 see it as necessary.

16 JUDGE YOUNG: Okay. The only thing I
17 would suggest is that if we're going to get into some
18 new legal issues that are being raised by the Staff,
19 either in the nature of that which we've just
20 discussed or anything else, and any further filings,
21 any party wants to make any further filings on those,
22 let us know right away. Or if we want to request any
23 we'll let you know. Otherwise, we'll assume that
24 there will not be a need for oral argument on that,
25 and just get a ruling out as soon as possible.

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1 All right. And then everyone is on track
2 for a hearing on the non-security contentions the week
3 of June 14th. I don't know if we ever set that down
4 formally, but we certainly set the time aside. And I
5 think both Staff -- the Staff and BREDL didn't think
6 we could make the May date, and I think we have been
7 proceeding on the assumption that we could not meet
8 that -- the original May date that we had hoped to
9 meet.

10 And so we have reserved the -- a courtroom
11 in the courthouse down in Charlotte for that week. We
12 would plan to do the hearing Tuesday, Wednesday, and
13 Thursday. We could go into Friday if we need to, but
14 otherwise we'll -- we will -- everyone just plan to be
15 there Tuesday through Friday, and we'll hope to get
16 finished on Thursday, and we'll divide that time up
17 appropriately between all of the issues that will be
18 heard during that time.

19 Let's see. I want to get into the
20 schedule issue, which seems to be the most significant
21 one for us to talk about today. And I'm just looking
22 over my list. Does anyone else see anything apart
23 from that that we might address before we get into
24 that issue?

25 Okay. All right. Oh, actually, I think

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1 it would be good to get into the clarification issue.

2 MS. CURRAN: Would you like me to call Dr.
3 Lyman, get him on the phone?

4 JUDGE YOUNG: Yes. That might be good to
5 do that before we get into the scheduling issue. And
6 to the degree that -- it might be good to have him on
7 the phone for scheduling, because one of the things we
8 want to do is talk about availability times for all
9 parties. And I presume that you would want to include
10 his availability in that.

11 MS. CURRAN: Okay. I'll be right back.

12 JUDGE YOUNG: All right.

13 (Pause.)

14 MS. CURRAN: Hi. This is Diane Curran.

15 JUDGE YOUNG: Okay.

16 MS. CURRAN: I think Dr. Lyman will be
17 getting on the phone any minute.

18 JUDGE YOUNG: All right.

19 MR. FERNANDEZ: Your Honor, while we wait
20 on Dr. Lyman, the Staff wanted to mention that we
21 didn't receive this motion until after close of
22 business yesterday. So to the extent that the Board
23 wants the parties to address the substance of the
24 motion, the Staff is not prepared to address that
25 today, given the lateness on which it was filed

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1 yesterday.

2 JUDGE YOUNG: Actually, I don't think we
3 expected the parties to speak to that. We considered
4 that it's our responsibility to speak to that, and we
5 want to try to do that and make sure that everyone
6 gets on the same page on this, because I think there
7 has apparently been some confusion about what we
8 meant.

9 And I'm going to ask Judge Baratta in a
10 minute to get into an explanation, and also discussion
11 as need be, with the parties to make sure that we are
12 all on the same page on that, because we tried to make
13 clear in our last clarification what was intended by
14 the simple words that we used and apparently may not
15 have been successful in that.

16 Dr. Lyman, you're on?

17 DR. LYMAN: Yes, I am.

18 JUDGE YOUNG: Okay. Judge Baratta, do you
19 want to go ahead and explain? And then I think it
20 would be helpful to get the -- any of the Staff
21 experts, Dr. Lyman, and any of the people from Duke
22 involved in a discussion to make sure that we're all
23 understanding each other on what we meant by the
24 wording in those two contentions. But I think the
25 confusion seems to come in in terms of which category

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1 different persons put certain concepts.

2 Judge Baratta, can I sort of turn it over
3 to you there?

4 JUDGE BARATTA: Yes. This is Judge
5 Baratta. Yes, I wanted to try to clarify the
6 interpretations of contention 1, and then of
7 contention 2.

8 MS. UTTAL: Judge Baratta?

9 JUDGE BARATTA: Yes.

10 MS. UTTAL: This is Susan Uttal from the
11 Staff. Before you start, Judge Young just mentioned
12 the Staff -- wanted to discuss among the Staff expert.
13 Well, we don't -- because we were not prepared to
14 discuss this motion, we don't have any Staff people
15 here that are cognizant of these issues. So we're not
16 prepared to discuss it in any manner.

17 JUDGE YOUNG: Well, listen to what is said
18 today. And if there remains any confusion, then we
19 can set up another conference call. But --

20 MR. FERNANDEZ: Does the Board intend to
21 issue this subsequent clarification that we're getting
22 today in writing?

23 JUDGE YOUNG: We're not going to change
24 the wording of the contentions. What we want is for
25 everyone to understand what those words mean, and

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1 there appears to be some lack of understanding of what
2 those words mean or what they are intended to mean.

3 So there's not going to be any ruling in
4 terms of rewriting the contention. And whatever
5 assistance that we can provide to help the parties
6 understand what the contentions are intended to
7 encompass, that's what we want to do at this point.

8 JUDGE BARATTA: Okay. Contention 1, as
9 written, reads that the LAR is inadequate, because
10 Duke has failed to account for differences in MOX and
11 LEU fuel behavior, both known differences and recent
12 information on possible differences, and for the
13 impact of such differences on LOCAs and on the design
14 basis analysis for Catawba.

15 Now, in our order we tried to indicate
16 that contention 1 encompasses the calculations
17 involved in the determinations of the events up to and
18 including LOCAs and DBAs but not released. That is to
19 say, if you go to the regulations, there is Part 100,
20 which deals with the releases, and there's Part --
21 Appendix K, which deals with the LOCA analysis, and
22 then, of course, your design basis -- other design
23 basis accidents that are typically in I believe it's
24 Chapter 15 of the FSAR.

25 And the intent here was in contention 1 to

1 limit it to the types of analyses that would be
2 associated with the accident itself and not the
3 release -- in other words, not the Part 100.

4 In contention 2, there are actually two
5 parts to that. Let me read contention 2. The LAR is
6 inadequate, because Duke has: a) failed to account
7 for the impact of differences of MOX and LEU fuel
8 behavior, both known differences and recent
9 information on possible differences, on the potential
10 for releases from Catawba in the event of a core
11 disruptive accident; and b) failed to quantify to the
12 maximum extent practicable environmental impact
13 factors relating to the use of MOX LPA at Catawba as
14 required by NEPA.

15 Addressing the second part first -- that
16 is, part B -- clearly, the reference to NEPA indicates
17 that Part B refers to those types of calculations,
18 which would include beyond design basis or severe
19 accidents.

20 Part A talks about releases from core
21 disruptive accident. Core disruptive accident is used
22 as an all-encompassing term, which could include
23 melting of the core or disassembly of the core. It's
24 a more generic term that is used in the international
25 community referring to a very wide range of accidents,

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1 not simply core melts.

2 In any event, the question there refers to
3 the releases, which, going to Part 100, is also what
4 is referred to there. So in terms of contention 2,
5 and the information that's required for a Part 100
6 analysis, the intent was that would be included in the
7 first part of contention 2, not in the contention 1 as
8 proposed in the BREDL motion.

9 JUDGE YOUNG: In other words, the two
10 contentions together are intended to encompass
11 everything starting with LOCAs and design basis
12 analysis, and going through the entire process, and
13 nothing is intended to be excluded. But we included
14 all of the releases and consequences in contention 2,
15 rather than in contention 1, but it really shouldn't
16 make any difference in terms of the actual subject
17 matter coverage.

18 Is that an accurate characterization,
19 Judge Baratta?

20 JUDGE BARATTA: Yes, that is an accurate
21 characterization.

22 JUDGE YOUNG: Does anyone have any
23 questions about that at this point? Because we
24 thought we had clarified that before, and we want to
25 make sure that everyone does understand what we're

1 talking about here.

2 The words are used in their sort of plain
3 English meaning, and apparently there has been some
4 connotations connected with various words or concepts
5 that has caused confusion.

6 MR. REPKA: This is Dave Repka. That
7 explanation is consistent with our understanding of
8 the Board's order.

9 JUDGE YOUNG: There was one response that
10 caused us to wonder a little bit about that. Judge
11 Baratta, do you want to get into that or -- just to
12 sort of make sure that we're all clear?

13 JUDGE BARATTA: Could you refresh my
14 memory? I'm sorry.

15 JUDGE YOUNG: Well, and I don't have it in
16 front of me either, but there seemed --

17 JUDGE ELLEMAN: Judge Young, are you
18 talking about Mr. Nesbit's comment in the oral
19 testimony?

20 JUDGE YOUNG: No. I'm talking about one
21 of the responses that Duke had provided that seemed to
22 be accepting something, that we weren't clear on
23 whether you were intending to create an exception
24 there that -- and I don't have it in front of me. I
25 apologize.

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1 Mr. Repka, you may know what I'm talking
2 about. If not, and if you understand what was just
3 said, there may be no issue. But --

4 MR. REPKA: I don't recollect what you're
5 referring to, but certainly our understanding of the
6 Board's order, based upon our last call in which we
7 discussed this issue -- Judge Baratta's explanation is
8 consistent with the way we understood it, so that's
9 the way we approached it.

10 If we were trying to accept something, it
11 was probably for different reasons. But I don't know
12 what you're referring to specifically.

13 MR. CASH: Dave, this is Mike Cash. I
14 think what the Judge is maybe referring to is we were
15 not clear that the scope was intended to cover the
16 design basis accidents beyond LOCA alone, in that it
17 did not appear that the original contentions or
18 anything litigated up to this point had gone to other
19 DBAs other than LOCA.

20 MR. REPKA: That's correct, Mike. I think
21 it was not so much LOCA, it was core melt. And I
22 think we may have said something that we weren't
23 looking at other DBAs that were not related to core
24 melt, like fuel drop accidents and other things like
25 that that certainly weren't within the scope of the

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1 contention.

2 MR. CASH: Correct.

3 JUDGE YOUNG: Judge Baratta, do you want
4 to speak to that? Provide any further clarification?

5 JUDGE BARATTA: Okay. I think you are
6 correct that we were looking at core melt accidents as
7 opposed to the all-encompassing fuel drop and things
8 like that, based on contentions. Now, I'd have to go
9 look specifically at what you said. I'm trying to
10 find that in that discussion, but I can't seem to find
11 it at this point.

12 MR. REPKA: I don't think we were trying
13 to limit anything beyond that. I think we understood
14 that core melt, by whatever initiator, would be
15 considered.

16 JUDGE BARATTA: I believe that's correct.

17 JUDGE YOUNG: Ms. Curran and Dr. Lyman,
18 are you all clear? Are we on the same page at this
19 point? Does that help you?

20 MS. CURRAN: I'll defer to Dr. Lyman on
21 that.

22 DR. LYMAN: Yes. I'd just like to -- can
23 you hear me? There's an echo where I'm standing.

24 JUDGE YOUNG: We can hear you.

25 DR. LYMAN: Okay. Just to clarify what

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1 our thinking -- you know, we thought from a compliance
2 standpoint that it made sense to separate out design
3 basis compliance issues with issues associated with
4 beyond design basis accidents. And that's why we
5 thought putting the Part 100 analysis in the first
6 contention would have accomplished that.

7 But I'm perfectly happy with the way
8 you've broken it down and clarified it. What I might
9 suggest is that contention 2 be understood as having
10 three parts, with the third part being Part 100 or
11 design basis compliance issues and the relation of the
12 uncertainties in releases to those as distinguished
13 from those affecting any other severe accident
14 analyses, although besides the environmental impacts
15 there may not be -- well, actually, from the
16 standpoint of the risk impacts issue that we've
17 brought up, that would be distinct from the
18 environmental impact and NEPA compliance issues.

19 So I would -- I'd suggest at least
20 thinking about it in three parts and breaking out the
21 design basis compliance from the others. But I'm
22 perfectly happy with understanding the first one to
23 deal with the likelihood issues and compliance with
24 ECCS acceptance criteria, and the second having to do
25 with all issues associated with source terms and

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1 releases.

2 JUDGE YOUNG: Judge Baratta, what he was
3 just talking about basically would fall under the
4 first part of contention 2.

5 JUDGE BARATTA: Yes, I think he is just
6 further subdividing that first part into two. And how
7 -- whether you do that, I mean, that's up to you. But
8 I think it would encompass as you said.

9 DR. LYMAN: Okay. Well, that's fine with
10 me.

11 JUDGE YOUNG: Anything -- go ahead. Who
12 was that?

13 MR. CASH: This is Mike Cash again. I'm
14 a little bit troubled by what I heard in contention 2
15 as to what the interpretation of disruptive core
16 meant. I think -- and Steve is more knowledgeable in
17 this area than me, but I -- and Dave can correct me if
18 I'm wrong, but I think our interpretation of that
19 generally was that it was, in fact, in reference just
20 another term of art for a severe accident.

21 But I thought I heard the Judge describing
22 it as other events may cause disturbance in the
23 configuration or other effects on the core, and that
24 just -- I'm not sure that I understand what something
25 like that looks like or is.

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1 JUDGE BARATTA: The intent there was there
2 are -- severe accidents sometimes is used to refer to
3 not just strictly core melt but burn-through of the
4 vessel. And the intent was to try to cover a core
5 melt where it's retained in the vessel, which is more
6 like a Part 100 analysis, as well as severe accident,
7 which is beyond design basis accident.

8 That was why that term was used as opposed
9 to -- an equally -- equivalent term would have been
10 core melt and severe accidents, which I believe does
11 appear in the regulations.

12 MR. CASH: Okay.

13 JUDGE YOUNG: Any other questions or
14 comments to try to get us all on the same page there?
15 And I know that, Staff, you don't have your experts
16 with you, but do you have any questions yourselves?
17 Do we still have the Staff with us?

18 MR. FERNANDEZ: We're here, Your Honor.

19 JUDGE YOUNG: Do you have any questions
20 about this at this point?

21 MR. FERNANDEZ: No, Your Honor.

22 JUDGE YOUNG: Okay. Can we assume that
23 everyone is pretty much on the same page here? And I
24 realize that Staff doesn't have your experts, and
25 we'll assume that if there are any questions that you

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1 can let us know. And if we need to set up another
2 conference call to iron those out, we can.

3 If any of the Staff counsel or people that
4 you do have with you have anything to add so as to
5 avoid the need for that, that would be great.

6 Hearing none, I'm going to -- I think we
7 will assume that everyone is on the same page, and we
8 all understand each other there, so that we can move
9 along more efficiently on that.

10 And having addressed that, I think that
11 then the thing that remains to discuss -- to be
12 discussed today is the schedule. And I'll just say
13 this. We -- before receiving this motion, we have
14 been discussing timelines ourselves, and I'd like to
15 hear from everyone on this. I think we all want to
16 hear from all of you on this and on any scheduling
17 issues that you have.

18 We want to hear Duke's response to the
19 sort of underlying premises or arguments supporting
20 BREDL's motion. But based on what the Staff had said
21 -- Staff and BREDL had said earlier, and based on the
22 timing of our ruling on the security-related
23 contentions, which was done much more quickly than
24 would normally be done under the general rule of
25 thumb, but still was issued only last week.

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1 We don't really see how it's going to be
2 possible to do the security -- to do a hearing on the
3 security-related contentions during the first week of
4 June. We want to hear from everyone on that, and what
5 we want to do is get people's schedules and
6 availability and just sort of have a little discussion
7 about timing here.

8 We're not going to make any rulings or
9 reach any final conclusions, and we want to hear
10 anything and everything that anyone has to say on
11 that.

12 Rather than taking the proposed dates from
13 BREDL as a starting point, we really want to sort of
14 start from a clean slate. And, obviously, we
15 understand what BREDL is asking for here, but we want
16 to -- we want to talk about what is realistic and
17 reasonable from the standpoint of all parties and
18 what's doable from the standpoint of everyone's
19 schedule.

20 MS. CURRAN: Judge Young?

21 JUDGE YOUNG: Yes.

22 MS. CURRAN: This is Diane Curran. I just
23 want to make a suggestion. We really tried to get our
24 motion in as quickly as possible, and I'm sorry we
25 weren't able to file it until yesterday. I'm

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1 wondering if it would be more efficient to give the
2 other parties a chance to review and respond to this
3 and propose their own schedules in writing, so that we
4 can all have something before us to look at and
5 consider, and the Board can make an evaluation of that
6 and make a proposal.

7 I'm just concerned that we're going to
8 spin our wheels this morning, since there hasn't --
9 coming up with a schedule for an entire proceeding is
10 something that takes a little while.

11 JUDGE YOUNG: We're not going to do that.
12 We're not going to come up with a schedule today. And
13 we're not necessarily going to foreclose anyone filing
14 anything in writing. But I think it might be helpful
15 to -- generally, when people are all together in one
16 place, everyone has their calendar, it's a lot easier
17 to get everything out in terms of availability and all
18 points of view.

19 So I -- without foreclosing any further
20 filings on that, I think it would be helpful if
21 everyone could speak to scheduling issues.

22 We did get the SER from the Staff. I
23 guess one question to ask is: do you have any
24 timeline in terms of any environmental documents that
25 you might be issuing?

1 MR. FERNANDEZ: The Staff is close to
2 completing their environmental review. I would
3 anticipate that within the next two weeks their
4 environmental assessment of the license amendment
5 request will be published.

6 JUDGE YOUNG: And when you say
7 "assessment" -- am I assuming that that means you're
8 not going to be doing an EIS?

9 MR. FERNANDEZ: No, that's not what I
10 meant to say. I meant their environmental review.

11 JUDGE YOUNG: Okay.

12 MR. FERNANDEZ: Without wanting to
13 characterize what type it may take -- what --

14 JUDGE YOUNG: Okay. That's fine. That's
15 fine. I just wanted to know, because we -- that had
16 been something that had been left open earlier.

17 Okay. Would it be more helpful to go into
18 -- it might be more helpful to just get from Mr. Repka
19 -- you wanted to address the sort of underlying
20 premises in some of the arguments made by BREDL in
21 support of its motion, before we get to talking about
22 actual dates.

23 Do you want to go ahead and do that at
24 this point?

25 MR. REPKA: That would be fine. And I've

1 said this before, so I don't necessarily want to
2 repeat myself. But the premise of the motion is --
3 seems to be that the relevant date for getting the
4 approval from the NRC should be when the MOX fuel
5 assemblies would be loaded at Catawba. That has never
6 been our position.

7 As we've explained before, Duke requested
8 NRC action on the proposed license amendment by August
9 to support the Department of Energy's request. And
10 the Department of Energy's request was that we -- that
11 the NRC amendment be in hand prior to them making a
12 shipment of feed material to support fabrication of
13 the MOX fuel lead assemblies.

14 That date has not changed. The factors
15 that have been raised in BREDL's motion do not affect
16 that date. The date for shipment is ultimately
17 impacted by the schedule to close the Cadarache
18 facility, plus the consideration of the time it would
19 take to fabricate the assemblies for use at Catawba by
20 the -- in the outage scheduled to begin at Unit 1 in
21 the spring of '05.

22 So all of those -- none of those factors
23 have changed that dictate the Department of Energy's
24 schedule, that in turn dictates Duke's request that
25 the amendment be granted by August.

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1 With respect to all of the information
2 presented about delays in the MOX fuel fabrication
3 facility, again, those don't affect the shipment date.
4 And in reality, it is Department of Energy's position,
5 as communicated to Duke, that delays in a MOX fuel
6 fabrication facility actually heighten the importance
7 of the lead assembly program, so that the lead
8 assemblies can be developed -- fabricated, used at
9 Catawba, and ultimately when the fab facility is
10 licensed and constructed the program is ready to go
11 forward as expeditiously as possible to achieve the
12 important nuclear non-proliferation benefits of the
13 program as soon as possible.

14 So all of that is really just to say that
15 nothing presented in the Motion for Reconsideration of
16 the Schedule really goes to what's dictating the
17 schedule in this proceeding, which is the shipment
18 date in late summer of '04.

19 JUDGE YOUNG: Let me ask you a question.
20 With regard to that shipment date, based on what I
21 said earlier and based on our discussions among the --
22 Judge Baratta and Judge Elleman and myself -- also,
23 based on what we just heard from the Staff about the
24 environmental review document, whatever that is --
25 it's going to be issued in approximately two weeks,

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1 which would be early May.

2 It seems unrealistic at this point to
3 think that this whole proceeding could be finished by
4 the beginning of August. And so -- well, two
5 questions. One thing that BREDL said -- and I don't
6 find the specific line in front of me -- but is that
7 there's nothing that would stop DOE from shipping the
8 materials on schedule. And so that would be one thing
9 I would want you to address.

10 And then, secondly, just I guess the
11 general proposition of it being possible -- I don't
12 know whether you're saying this, but if you're saying
13 that you really do think that it's possible to finish
14 everything in this proceeding by August, given the
15 timing of the environmental review, given the fact
16 that we're right now at the point of -- we just
17 issued, a week ago, the ruling on the security
18 contention, and given the amount of time between now
19 and August and the human capability, and also taking
20 into account what I think is really a significant
21 issue of the -- our responsibility to provide a
22 meaningful opportunity for a hearing.

23 What do you have to say to that? Could
24 you speak to those two issues?

25 MR. REPKA: Let me start with the first.

1 If the NRC does not issue the amendment on the lead
2 assembly by August, I agree that that does not
3 preclude Department of Energy from shipping the feed
4 material. That is a true statement.

5 I think the Department of Energy
6 preference would be that before they ship any feed
7 material that any regulatory uncertainty related to
8 the MOX fuel lead assemblies be resolved, and NRC
9 action on the lead assembly application being the
10 paramount uncertainty in which they would like -- that
11 the Department of Energy would like to see unresolved.

12 Having said that, there is nothing to
13 preclude them from going forward in the face of
14 uncertainty. I absolutely cannot disagree with that.

15 With respect to the human possibility --
16 well, you know, I certainly don't agree that it's
17 impossible. I think that we've been -- we're in a
18 very difficult position right now. Given where we are
19 in the calendar relative to August and everything
20 that's gone before us in this proceeding, we're
21 clearly in a difficult position, and that includes
22 Duke Energy as much as the other parties in this case.

23 Is it possible? No, it's not impossible.
24 We could outline a schedule that would get us to --
25 get us to a hearing in June on security issues as

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1 well. Yes, it could be done.

2 JUDGE YOUNG: Well, let me just -- let me
3 interrupt you there. If we get the environmental
4 document in early May, how could there be discovery on
5 that and have a hearing in June and -- while also
6 having a hearing on the non-security-related
7 contentions, that would allow for any really
8 meaningful discovery and hearing on that?

9 And I guess I say that in addition to
10 taking into account the possibility of -- and I don't
11 think this is saying anything that anyone is not
12 perfectly aware of -- that late-filed contentions can
13 always be filed on environmental -- once the
14 environmental document has been issued.

15 So that's another potential problem that
16 we face here, and each one -- each issue requires a
17 certain amount of thought, work, and time on the part
18 of the parties and the Board.

19 MR. REPKA: Well, first, I'm not aware of
20 any request for discovery on the environmental
21 documents, and I'm not sure how that would relate to
22 the discovery that we've already -- are in progress
23 of, and to some degree have completed.

24 JUDGE YOUNG: But I think that -- correct
25 me if I'm wrong, I may be -- I may be misremembering

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1 this. But I think that the Staff had agreed to go
2 ahead on discovery on the safety issue, but that you
3 were holding off on the environmental issues.
4 Correct? Ms. Uttal?

5 MS. UTTAL: Yes, that's correct, Your
6 Honor.

7 JUDGE YOUNG: So that would essentially
8 start the discovery on the environmental issues with
9 the Staff in May.

10 MR. REPKA: My assumption is that if
11 that's -- if that was the understanding, then that
12 will be done to support the June hearing date on the
13 non-security issues. With respect to the possibility
14 of late-filed contentions, that is always a
15 possibility, and I can't -- I can't rule that out. I
16 think we can't be dictated coming up with a schedule
17 by things that we don't have before us.

18 JUDGE YOUNG: Right. You know, and as I
19 said, our intention is that we're going to go ahead
20 and do the hearing on at least the non-security-
21 related contentions that have been admitted and -- as
22 of this date or the near future in the June hearing.

23 But also into that mix goes the security-
24 related contentions. And I guess we're thinking that
25 we are not seeing how it, at this point, will be

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1 possible to have everything absolutely completed by
2 the beginning of August.

3 And, again, the second part of the
4 question was -- or the second question had to do with
5 how meaningful a hearing could be held given all of
6 these things that are either outstanding or remain to
7 be scheduled.

8 MR. REPKA: I think that with respect to
9 security, in the end if you look at the issues raised
10 it is a -- it is a narrow issue. And, you know, I
11 think that that issue can be resolved fairly
12 expeditiously. The precise calendar I can -- I think
13 it can be done by August. I think that ultimately the
14 Board has to decide that, but it certainly can be
15 done.

16 If the Board wanted to look at options
17 like a bifurcated proceeding with a separate licensing
18 board on security issues, that -- I suppose that could
19 always be done as well.

20 JUDGE YOUNG: Well, the other issue with
21 regard to security issues is getting into discovery on
22 security issues is going to involve some obvious need
23 to have closed hearings to talk about which -- how to
24 handle that -- protective orders.

25 I know we've issued a protective order on

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1 proprietary information, but when we get into
2 discovery on security issues there may -- you know, I
3 don't know whether the protective orders that we have
4 in place already will cover those, but certainly it
5 strikes me that discovery on the security issues is
6 going to be somewhat more cumbersome than discovery on
7 non-security issues. Would you agree with that?

8 MR. REPKA: Yes, it would. I mean, just
9 to some degree it would. There's no question of that.
10 And, you know, we can talk about the details of that
11 at some other time. But I don't disagree with that,
12 and I don't disagree that it would be a significant
13 challenge to -- to accomplish this by August.

14 But as I said earlier, the reasons for
15 that request are what they are, and I've explained
16 them, and the Licensing Board will have to decide.

17 JUDGE YOUNG: Okay. Anything else on the
18 -- and I didn't speak to the Staff, because I didn't
19 know -- I got the impression you didn't want to get
20 into the merits of this at this point.

21 But I certainly don't want to cut you out
22 from any argument, and I don't want to foreclose Ms.
23 Curran making any responses on the sort of general
24 reasons raised by BREDL in the -- in its motion, as
25 well as practical reasons for various timing issues

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1 which the Staff has raised before and which we will
2 necessarily almost get into when we start talking
3 about actual times, just to sort of get some things
4 out on the table at this point.

5 Does the Staff have anything you want to
6 say at this point?

7 MR. FERNANDEZ: We have nothing to add,
8 Your Honor, right now.

9 JUDGE YOUNG: Okay. Ms. Curran, do you,
10 on the sort of underlying premises?

11 MS. CURRAN: There was just one comment I
12 wanted to make. I think I heard Mr. Repka say a
13 couple of times that the delays in the U.S. and the
14 U.S.-Russian MOX program has nothing to do with the
15 DOE export -- the schedule for the DOE export of
16 plutonium to France.

17 Well, it's all part of a big program. So
18 that if there's a delay in one part of it, it's
19 setting back the whole thing. The DOE would not be
20 shipping this plutonium to France unless there was a
21 plan to have batch production and utilization of MOX
22 fuel in nuclear plants. So I think it is relevant.

23 There's just a number of factors, a number
24 of delays here, that need to be taken into
25 consideration in weighing the competing interests here

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1 where you -- when you're setting a schedule. That's
2 all I would add.

3 JUDGE YOUNG: Okay. Moving, then, to
4 actual dates -- and, again, this is just to try to --
5 not to foreclose anyone filing anything further in
6 terms of your own proposed schedules, but just in
7 terms of sort of getting out on the table what people
8 would have to say on when we can realistically move
9 forward.

10 And I guess maybe I'll ask the Staff to
11 start here, because you had had some concerns earlier
12 about the timing of -- that we had originally
13 suggested. And in light of the expected release of
14 the environmental document in a couple of weeks, as
15 well as your earlier concerns and any others that you
16 might have, what do you see as being a realistic
17 approach to take with regard to discovery and hearing
18 on the remaining issues in the case?

19 MS. UTTAL: Do you mean the environmental
20 issues and the security issues?

21 JUDGE YOUNG: Right. Well, and there is
22 the third contention outstanding. But I'm -- I think
23 we can deal with that to the degree necessary once
24 we've issued a ruling on that.

25 MS. UTTAL: The security -- I'm really not

1 prepared to argue scheduling. I think there is --
2 because the environmental documents are not going to
3 come out until two -- a week or two weeks from now,
4 whenever, and discovery can start when they come out
5 -- of course, there's nothing precluding the other
6 parties from doing discovery against each other on
7 those issues -- that that will necessarily somewhat
8 delay any hearing on the environmental issues. I
9 don't see how it couldn't.

10 JUDGE YOUNG: When would you see as being
11 a realistic date that you would expect that it might
12 be possible to do a hearing?

13 MS. UTTAL: Well --

14 JUDGE YOUNG: I guess what would be the
15 earliest that you would expect?

16 MS. UTTAL: Judge, I would really have to
17 look at the availability of the environmental staff
18 and the availability of counsel before I could even
19 begin to answer that question.

20 JUDGE YOUNG: Well, let me put it another
21 way. Could you speak to whether you think it's
22 possible to do a hearing -- to do discovery and do a
23 hearing and get proposed findings of fact and
24 conclusions of law and get decisions on the
25 environmental and security issues prior to the

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1 beginning of August?

2 MS. UTTAL: I suppose it's possible.

3 JUDGE YOUNG: Is it realistic?

4 MR. FERNANDEZ: Well, Your Honor, we
5 haven't really sat down with -- I mean, I think that
6 what Ms. Curran said earlier really bears to keep in
7 mind. It's difficult for us to, having just received
8 recently the schedule proposed by the Intervenor, to
9 lay out a Staff schedule.

10 JUDGE YOUNG: Right. In terms of speaking
11 to a motion that was filed last night, certainly
12 that's true. But in terms of what everybody -- what's
13 in the back of everyone's mind as we proceed forward,
14 and you get an issuance on the security contention,
15 and you know when the environmental review is coming
16 out, and everyone is thinking in the back of their
17 minds about timing issues. And so I guess I'm asking
18 you to address it from that perspective.

19 MR. FERNANDEZ: Well, the Staff's position
20 is that it would be an ambitious schedule, but the
21 Staff would want to adhere to the Department of
22 Energy's wishes of trying to complete the licensing
23 aspects of the proceeding by August.

24 JUDGE YOUNG: And how would you propose
25 that that be done?

1 MR. FERNANDEZ: And that's where we get to
2 the specifics of dates and such that the Staff is not
3 ready to address right now.

4 JUDGE YOUNG: Okay. Maybe the best thing
5 to do would be, then, to -- Duke -- Mr. Repka, you
6 haven't spoken to that specifically, but I assume --
7 maybe I'm assuming too much, but I'm assuming that
8 your position is going to be that your dates would all
9 end at the beginning of August.

10 MR. REPKA: That's correct.

11 JUDGE YOUNG: Do you want to say anything
12 further, or do you think now would be a good time --
13 and I guess I'm asking -- I need to ask Ms. Curran
14 this, too -- to basically start winding down this
15 conference and we can set a deadline for all parties
16 to -- or for Duke and the Staff to file your proposed
17 schedules.

18 MR. REPKA: I think that we could
19 certainly submit a proposed schedule. What would be
20 of interest to us as we do that is the availability of
21 the Board. And I think we talked, at least
22 hypothetically in this case before, about hearing
23 dates in July. And I recollect that that was -- there
24 were problems there. But I think --

25 JUDGE YOUNG: Well, I think if you're

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1 talking about a hearing date in July, that would
2 pretty much foreclose any argument, any proposed
3 findings of fact and conclusions of law, and it would
4 -- the likelihood of getting a decision by August, if
5 we set another hearing in July, given that the
6 timeline of the existing hearing already -- we're
7 already going to be shortening the time that we would
8 take to issue a decision based on that June hearing,
9 to get it out by early August, I think that if you're
10 talking about a hearing in July I think everyone needs
11 to recognize that the -- that the ability to have a
12 meaningful hearing and get a meaningful decision would
13 be severely handicapped. And I have my doubts on
14 whether that's possible.

15 The original dates that we had set were
16 the -- were set as more or less the latest possible
17 dates that we could do things and get the decision out
18 by early August on all of the various issues that are
19 out there.

20 So, you know, certainly anyone can propose
21 that, but given the types of issues that we're dealing
22 with, it's not reasonable to expect to have a
23 meaningful hearing and get a meaningful decision if
24 you're talking about hearing dates in July and wanting
25 to have a decision by August.

1 MR. REPKA: Well, we certainly came to
2 this call for -- on security with a schedule we could
3 propose leading to a hearing on security during the
4 week of June 1st, as we've talked about before. We
5 can state that on the record here. We can state it in
6 writing. If the Board is saying that that's not --

7 JUDGE YOUNG: No, I'm -- I was responding
8 to your talking about a hearing in July. If you want
9 to go ahead and give your proposed schedule based on
10 the June 1st week hearing, you can go ahead and do
11 that. And I do think that it -- that the parties do
12 need to get started on discovery on the security
13 contention that we've admitted.

14 And if necessary, we can hammer out, you
15 know, at least the beginnings of a schedule on that.
16 There's no reason not to start on that at this point.

17 MR. REPKA: Well --

18 MS. CURRAN: Judge Young, this is Diane
19 Curran. I think I tried to explain in the Motion for
20 a Hearing Schedule we are very occupied with discovery
21 on the admitted contentions. We have just responded
22 to a first set of discovery. We are doing
23 supplemental responses today. We have a second round
24 due on Monday.

25 Dr. Lyman has leave time scheduled for the

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1 end of April. We have got our hands full dealing with
2 contentions 1 and 2. That was part of the purpose of
3 my motion.

4 I just really -- it seems to me -- I'd
5 just like to make a suggestion here to cut down on the
6 amount of time that we are spending on the telephone
7 about this, because I think it's really difficult.
8 Duke is the party that wants a decision by August.
9 We've made a proposal.

10 Let Duke submit a proposed schedule. Let
11 the Staff submit a proposed schedule, and the Staff is
12 the party that knows what the availability is or what
13 the schedule is for the environmental document, which,
14 of course, is going to -- that's going to affect
15 everything, too.

16 And then the Board -- I'd just ask the
17 Board to look at these things and decide what is a
18 reasonable schedule, and, you know, give us time to
19 request reconsideration. But we are pretty far apart
20 on this, and we need some -- we need the Board's
21 guidance on this.

22 I am asking for a delay in the litigation
23 on the security issues, because we can't cope with all
24 this, not on this kind of an expedited schedule. And
25 I just -- I'd like to ask for the Board to make a

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1 ruling on that.

2 JUDGE YOUNG: And we're going to do that.
3 Let me ask you -- just to follow up on what we were
4 just talking about, though -- is there any reason why
5 discovery could not at least start on the security
6 contention at this point? I mean --

7 MS. CURRAN: Yes. I tried to explain
8 that. Yes, because we have our hands full.

9 JUDGE YOUNG: Well, I guess what I'm
10 trying to ask is, we know what the issues are, and
11 apart from -- and there is the cumbersomeness issue
12 and the need to deal with these -- the specific
13 security aspects, and I can see that those would
14 present a problem.

15 But from the standpoint of knowing what it
16 is that you want to ask --

17 MS. CURRAN: We have to have the time to
18 sit down and review anything -- review everything and
19 develop the questions. And I guess one thing that
20 remains really uncertain to me is I guess I'd like to
21 see -- how is this whole thing going to work? It's
22 very -- it's one thing to proceed in a really
23 expedited and almost break-neck pace. This pace is
24 literally break-neck, in my experience -- when you
25 know there's a certain end that you are going to get

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1 to, and there's a reasonable prospect that you're
2 going to get to it.

3 And I just don't see it here. That's why
4 -- I mean, I'm really begging the Board, please look
5 at what the overall schedule should be for getting
6 this case resolved, and set up a schedule for the
7 whole thing that can really work, and where you can
8 see an advance, where the pieces fit together, so that
9 we're not, you know, racing to an unknown deadline
10 here.

11 JUDGE BARATTA: May I ask a question here?
12 This is Judge Baratta.

13 MS. CURRAN: Yes.

14 JUDGE BARATTA: I don't understand what
15 you're saying. I mean, it appeared to us that we were
16 headed towards a known destination, which is to hold
17 a hearing on the non-security contentions in June, and
18 then sometime to hold a hearing on the security-
19 related contentions.

20 MS. CURRAN: But when is that? And this
21 schedule -- this schedule, as I -- I did some research
22 on this schedule and compared it to other "expedited
23 schedules." This schedule is compressed beyond what
24 the NRC does in an expedited case. Are we going to do
25 that for security, too, to the point that our ability

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1 to develop these issues is really jeopardized?

2 MR. REPKA: This is Dave Repka. Before
3 Ms. Curran cut me off, I was about to read the
4 proposed dates that we had that would lead to a
5 hearing on security the week of June 1st, which was
6 the date that we were working to.

7 Rather than take a matter of days to turn
8 around a written response, just I think the most
9 efficient thing is for us to go ahead and propose what
10 we think is the schedule that would get us to that
11 date.

12 JUDGE YOUNG: Go ahead and tell us what
13 you're proposing.

14 MR. REPKA: I'll let Mr. Wetterhahn do
15 that.

16 MR. WETTERHAHN: Yes. Interrogatories,
17 requests for admission, and document production
18 requests would be filed at the latest by Monday,
19 April 26th. Objections to requests for discovery --

20 THE COURT REPORTER: This is the Court
21 Reporter. You're going to have to get closer to the
22 phone. I'm having trouble picking up your voice.

23 MR. WETTERHAHN: Okay. I apologize. I've
24 got to move the phone. Did you catch the first date,
25 April 26th?

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1 JUDGE YOUNG: Did you get what he said
2 before, or do you need to have him repeat that, Court
3 Reporter?

4 THE COURT REPORTER: If he could start
5 from the beginning with interrogatories.

6 MR. WETTERHAHN: Okay. Requests for
7 interrogatories, admissions, and document production
8 by Monday, April 26th. Objections to requests for
9 discovery would be due by April 29th, which is a
10 Thursday. The responses to the various requests would
11 be due by Monday, May 10th, which is approximately 14
12 days, the same period as set by the Board for non-
13 security contentions.

14 Motions to compel would be due by
15 Wednesday, May 12th, and depositions would be
16 conducted during the period of May 10th through 14th.
17 There would be a single round of discovery with filing
18 of direct testimony by Monday, May 24th, rebuttal
19 testimony filed by May 31st, leading to a hearing on
20 June 1st.

21 JUDGE YOUNG: Does anyone want to speak to
22 that at this point?

23 MS. UTTAL: I just want to note that
24 May 31st is Memorial Day, so it's a federal holiday.

25 MR. WETTERHAHN: Well, in that case, the

1 rebuttal testimony would be due at the hearing on
2 June 1st.

3 MS. CURRAN: Judge Young, this is Diane
4 Curran.

5 JUDGE YOUNG: Go ahead.

6 MS. CURRAN: This schedule would be
7 completely unworkable for us. This requires us to go
8 basically parallel with the discovery and testimony
9 preparation on contentions 1 and 2, and 3 I suppose,
10 which is a significant amount of work by itself.

11 And then to add the burden of also
12 developing the security issues, there just isn't --
13 isn't even nearly enough time to do it. I can't
14 imagine how any reasonable human being could do a good
15 job in this kind of a schedule.

16 JUDGE YOUNG: I understand what you're
17 saying. And as I said, I think the Board has some
18 concerns about being able to meet the first week of
19 June that we had tentatively set earlier.

20 But I guess I would have one question, and
21 that is, given that you're familiar with the issues
22 that you've raised in your contentions, I would
23 presume that you would have a fairly good idea of the
24 types of questions that you would want to ask on the
25 -- on contention 5.

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1 MS. CURRAN: Well, I don't know if that's
2 so now. I -- that seems reasonable. The other big
3 problem is answering questions. That takes a lot of
4 time. But also, figuring out what you want to know to
5 prepare your testimony, that takes time. It all takes
6 some time.

7 JUDGE YOUNG: You're right. You're right.
8 You're right. But in terms of the issue that I just
9 raised -- excuse me. Who was that?

10 JUDGE BARATTA: This is Judge Baratta.

11 JUDGE YOUNG: Go ahead.

12 JUDGE BARATTA: Go ahead. Finish your
13 thought, and then I have a question.

14 JUDGE YOUNG: No, no. I'm finished. Go
15 ahead.

16 JUDGE BARATTA: Well, Ms. Curran, I guess
17 I'm a little confused, because had we not had the
18 delay associated with the problem of getting the
19 original protective order out, I mean, we would, in
20 principle, be having both -- discovery on both of
21 these issues going in parallel at this time. So I
22 don't understand your argument with regards to that.

23 MS. CURRAN: Well, my argument -- it comes
24 out of two things. First of all, the Board took
25 longer than we expected to issue its decision on the

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1 security contentions. And so we're at the point the
2 decision -- I can't remember, I guess it was
3 March 15th that it came out. That was --

4 JUDGE YOUNG: April 15th.

5 MS. CURRAN: April 15th when we're a ways
6 into discovery.

7 JUDGE YOUNG: April -- let's see -- 12th.

8 MS. CURRAN: April 12th. But the other
9 thing is we've now lived with this schedule for a few
10 weeks, and it has been very, very difficult for us to
11 meet it. And we're certainly willing to try to, for
12 the issues that you have set a schedule for now,
13 contentions 1 and 2 and 3, we're willing to try to
14 meet that schedule.

15 But based on our experience of the first
16 round of discovery, this is barely enough time for us
17 to keep up with these issues. And we probably would
18 have come to you and said, "We can't do all of this in
19 these short timeframes."

20 JUDGE YOUNG: They are very short
21 timeframes, and -- and I think that we are certainly
22 going to be looking at whether it's possible to meet
23 the August deadline. And as a Fed, I think that we
24 have our doubts given the realities of the situation.

25 However, I would encourage you, given that

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1 it is your contention -- the security contention, it
2 is your contention to be thinking about and jotting
3 down the questions that you want to ask, and then, you
4 know, to -- I would presume that, as I said before,
5 you would have a sort of model that you could use as
6 a -- to plug those into in terms of interrogatories
7 and requests for documents.

8 One of the things that I think that needs
9 to be on any schedule with regard to the security
10 contention is time for us to meet to address the
11 various issues that we need to address in terms of the
12 practicalities, the need for any further discussion of
13 how this is going to be achieved, or whether you've
14 pretty much gotten that down.

15 In any event, I think that we're going to
16 need to put into the schedule times for us to get
17 together -- and it'll have to be in closed hearing.
18 I don't see any other way to do it. It'll have to be
19 here.

20 That's one thing that, Mr. Wetterhahn, you
21 did not include in your schedule was time for us to
22 meet here in closed hearing, which involves a little
23 bit more preparation, obviously, than is necessary
24 with these telephone conferences, which are fairly
25 easily set up, you know, fairly quickly -- absent

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1 problems getting all the phone lines we need.

2 DR. LYMAN: This is Dr. Lyman. May I make
3 a comment?

4 JUDGE YOUNG: Go ahead.

5 DR. LYMAN: On the issue of the time
6 period for discovery, for responses to the first set,
7 I think it's likely that we're going to be asking for
8 documents that are safeguards information.

9 JUDGE YOUNG: Right.

10 DR. LYMAN: And perhaps even classified
11 information again. And there's going to have to be
12 Staff's need-to-know determinations on each one of
13 those requests.

14 JUDGE YOUNG: Right.

15 DR. LYMAN: And judging from experience,
16 that isn't something that is going to happen
17 overnight. So I think having the same response time
18 for the security contentions as for the safety
19 contentions is unrealistic.

20 JUDGE YOUNG: I'd like to ask all the
21 parties to -- and I don't think I hear -- I don't
22 think I see on your proposed schedule, Ms. Curran,
23 either time to meet to discuss these issues. I'd like
24 to hear from all the parties on times for us to get
25 together to talk about those things.

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1 And then meanwhile, as I said before, I
2 think it would be very helpful to go ahead and start
3 putting together your discovery requests on the
4 security issues. And once we get your proposed
5 schedules, we'll try to get a final schedule out as
6 soon as possible, or -- well, I guess that's probably
7 best. I was going to say or we could talk again about
8 it to make sure that we iron out any glitches before
9 we get started to avoid any need for any motions for
10 reconsideration on that.

11 MS. CURRAN: Judge Young, is there some
12 way that we can get information on availability? If
13 you propose certain dates, that we can e-mail that to
14 you so that --

15 JUDGE YOUNG: Well, you could. But it
16 might be helpful to even include that at this point.
17 In other words, let's set a short -- a short deadline,
18 a day or two, to get back to us with your proposed
19 schedules, adding in and including time for closed
20 hearing sessions.

21 And, you see, another issue that we have
22 to deal with as a practical matter on that is that
23 Judge Elleman has to come up from North Carolina every
24 time we do one of those. So that's one thing that
25 people need to take into account.

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1 We do -- as Dr. Lyman said, we do need to
2 take into account the time for need-to-know
3 determinations to be made by the Staff, and then for
4 any appeals of those.

5 I don't know whether any party is planning
6 to file an appeal of the -- our ruling on the security
7 contention 5, and, you know, we don't know when we'll
8 be getting anything from the Commission on 1. But
9 those are all things that will ultimately play in,
10 which you don't need to take account of in your
11 schedule, but certainly if you -- you know that
12 something is going to have an effect, you might
13 mention that.

14 In addition to your schedule, put your own
15 time availability issues over the next several months,
16 and we'll take all of those into account.

17 Any questions? Anything I've left out?
18 Judge Baratta? Judge Elleman? Can you think of
19 anything that we were going to talk about that I
20 haven't mentioned, or that we didn't think of that
21 you're thinking of at this point we should --

22 JUDGE ELLEMAN: This is Judge Elleman. I
23 think you've covered it all.

24 MR. FERNANDEZ: Your Honor, I have a --
25 the Staff has a question. You just talked about

1 availability. Did you mean just to us for counsel
2 availability or --

3 JUDGE YOUNG: No, everyone. I mean,
4 anyone that is going to make a difference. It doesn't
5 do a whole lot of good to just give counsel
6 availability if later on finding out that witness
7 availability would -- would change things. So, I
8 mean, anyone that's going to make a difference in the
9 practicalities of the situation. You know, and some
10 things can be changed and some things can't. But tell
11 us everything you have.

12 How soon can you all get that to us? Is
13 tomorrow too early?

14 MR. FERNANDEZ: Yes, Your Honor.

15 MS. UTTAL: We have the ACRS meeting all
16 day tomorrow.

17 JUDGE YOUNG: Let's see.

18 MS. UTTAL: And I was trying to respond to
19 Ms. Curran's additional discovery request.

20 JUDGE YOUNG: Okay. How soon can you be
21 ready? The Staff, just speaking to you first.

22 MS. UTTAL: Maybe by close of business
23 Thursday or by the end of the day on Thursday.

24 JUDGE YOUNG: Thursday, April 22nd?

25 MS. UTTAL: We'll try.

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1 JUDGE YOUNG: Can everyone else get your
2 proposed schedules to us by then, along with
3 availability? And to the extent that you haven't
4 already -- well, why don't you just -- everyone submit
5 new schedules, including in there time for hearings or
6 closed sessions to address discovery issues relating
7 to security. And also, since we now know about the
8 environmental report, the schedule relating to that.

9 MR. REPKA: We can do that by Thursday.

10 MS. CURRAN: Yes, we will, too.

11 JUDGE YOUNG: Okay, great. Thank you.

12 I will try to get an order out setting
13 that deadline. But we all know it, so even if I don't
14 get one out I'll expect to -- we will all expect to
15 hear from you on that by the close of -- or by the end
16 of the day on Thursday, April 22nd.

17 All right. Anything else?

18 MS. CURRAN: No.

19 JUDGE YOUNG: Okay. Thank you all very
20 much. That would conclude this session.

21 (Whereupon, at 11:39 a.m., the
22 proceedings in the foregoing matter were
23 concluded.)

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-OLA;

ASLBP No. 03-815-03-OLA

Location: telephone conference

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



John Mongoven
Official Reporter
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