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UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
 ATOMIC SAFETY AND LICENSING BOARD

+ + + + +

BEFORE ADMINISTRATIVE JUDGES:

G. PAUL BOLLWERK, III, CHAIRMAN
 DR. PAUL B. ABRAMSON
 DR. ANTHONY J. BARATTA

+ + + + +

)	
In the Matter of:	)	Docket No. 52-007-
	)	ESP
EXELON GENERATION COMPANY, LLC)	
(Early Site Permit for Clinton	)	ASLBP No. 04-821-
ESP Site)	)	01-ESP
)	

)	
In the Matter of:	)	Docket No. 52-008-
	)	ESP
DOMINION NUCLEAR NORTH ANNA, LLC)	
(Early Site Permit for North	)	ASLBP No. 04-822-
Anna ESP Site)	)	02-ESP
)	

)	
In the Matter of:	)	Docket No. 52-009-
	)	ESP
SYSTEM ENERGY RESOURCES, INC.)	
(Early Site Permit for Grand	)	ASLBP No. 04-823-
Gulf ESP Site)	)	03-ESP
)	

Tuesday,
 June 22, 2004

The Initial Prehearing Conference in the above-entitled matters convened at 9:30 a.m., in the Auditorium of Two White Flint North, 11555 Rockville Pike, Rockville, Maryland.

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(9:28 a.m.)

1
2
3 CHAIRMAN BOLLWERK: Good morning,
4 everyone. We're here this morning for the
5 continuation of the oral argument, oral presentation
6 regarding admissibility of contentions for three site
7 permit cases that are pending: one for the North Anna
8 site in Virginia, the Clinton site in Illinois, and
9 the Grand Gulf site in Mississippi.

10 I would mention again that while the
11 proceeding is in session, all cell phones should be
12 turned off or placed on vibrate. Any cell phone
13 conversations should be conducted outside of the
14 hearing room. That obviously applies through the
15 duration of what we are going to be doing.

16 This morning we have four contentions that
17 we are yet to hear argument on, the first one dealing
18 with the impacts on Lake Anna. That's contention
19 EC-3.3 dealing with the North Anna site. Also,
20 alternative, the second one, alternatives for cooling
21 units 3 and 4, that's a North Anna contention as well.
22 Environmental contention is 3.3.4.

23 We then have -- I guess I said four. I
24 think we have five contentions, actually: adverse
25 impacts on minority and low-income community. Those

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1 are a 'Grand Gulf contention, EC-3.1. Emergency
2 planning deficiencies, that also is a Grand Gulf
3 contention. And then, finally, the Illinois State
4 moratorium contention, miscellaneous for Clinton, 5.1.

5 At this point, let me just stop and see if
6 there is anything preliminarily that any of the
7 parties have in terms of administrative or other
8 matters.

9 MS. CURRAN: Yes, Judge Bollwerk, I do.
10 We have some visitors from Mississippi who have driven
11 up today.

12 CHAIRMAN BOLLWERK: All right.

13 MS. CURRAN: Gilbert Buck and Harris Neal.
14 I think it's Mr. Neal who has brought either his
15 daughter or his niece, who is a high school student
16 and doesn't have a photo ID. And they have been
17 stopped at the front door. I wonder if there is
18 anything that can be done. I don't think she is old
19 enough to have a photo ID.

20 CHAIRMAN BOLLWERK: All right. Is there
21 someone here who can see what you can do there at the
22 front desk? Is that the problem? Okay. If you would
23 go up there and see if there is anything that you can
24 do in terms of the lack of a photo ID.

25 How old is she again? I'm sorry. She's

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1 a high school student. So she possibly --

2 MS. CURRAN: I think she is a high school
3 student.

4 CHAIRMAN BOLLWERK: Okay. We will have
5 our administrative person go up there and see what we
6 can do. I certainly don't have objection to her
7 coming down here, but we have to comply with whatever
8 the security department says.

9 MS. CURRAN: I appreciate that. Hopefully
10 by the time it gets to that issue --

11 CHAIRMAN BOLLWERK: It will take a little
12 time.

13 MS. CURRAN: I also wanted to request an
14 opportunity to correct a typographical error in our
15 reply on the waste competency sheet because it's a
16 citation to a significant portion of a Federal
17 Register notice.

18 Of course, there are three identical
19 replies. So I will just give you the one reply on the
20 North Anna case.

21 CHAIRMAN BOLLWERK: Okay.

22 MS. CURRAN: It appears on that copy as
23 page 14, going over to page 15, a citation to the 1984
24 rulemaking. We cite 49 Federal Register at 36679. It
25 should be 34679.

1 CHAIRMAN BOLLWERK: All right. Anything
2 further?

3 MS. CURRAN: And I would like to introduce
4 Barry Sullivan, who is sitting next to me. He is the
5 petitioner's expert on the North Anna water issues.

6 CHAIRMAN BOLLWERK: Good afternoon.
7 Welcome. Thank you for coming.

8 All right. Anything further?

9 (No response.)

10 CHAIRMAN BOLLWERK: All right. Anything
11 that other participants have? I'm sorry? Is there
12 something over here? No?

13 MS. POOLE: Before we begin the discussion
14 of our contentions, the staff of the licensee would
15 like to make a short statement. Partly in
16 consideration of the response to filings, the staff
17 has changed its positions on some of the matters in
18 that issue and wanted to set that out to the extent
19 that it will change the nature of the question in
20 raising the issues.

21 CHAIRMAN BOLLWERK: Okay. Before you do
22 that, let's deal with one other matter, sort of
23 preliminary to that. Judge Baratta had some questions
24 that he wanted to pose, I guess, to one of the
25 parties. Judge, go ahead and do that now.

1 JUDGE BARATTA: I apologize for not
2 thinking of these yesterday, but I had a couple of
3 questions with respect to the plant parameter envelope
4 and the findings from the test bores that were done.
5 I would actually like to pose it of the three
6 applicants and give, of course, the petitioners an
7 opportunity to respond as well.

8 Yesterday I believe I heard all three of
9 the applicants say that they had done test borings
10 down to bearing depths of 140 to 170 feet. But there
11 was no statement as to what was the significance of
12 those test borings or what the assessment of the
13 findings was.

14 I was curious to find out, what, in fact,
15 did you find? In other words, do the test borings
16 support a plant parameter envelope that included the
17 -- I think it's the MHTGR and the PBMR, which both
18 have significant structures underground. In fact, one
19 is I believe completely underground. The other one is
20 partially underground.

21 Barry, would you like to comment on that?

22 MS. SUTTON: I will ask Mr. Zenke to
23 respond to your question, Judge.

24 MR. ZENKE: From our seismic experts, it's
25 not a simple answer. What they told us is that there

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1 isn't any one number that we would then compare it to
2 with a design that when we got to the point of picking
3 a design, that we would from the borings, they have
4 been able to map what the various soil types are. And
5 then at various elevations on the structure, they
6 would have to do analysis to see whether there was
7 anything that needed to be done extra with the
8 structure we work with, that kind of soil mapping.

9 At the original Grand Gulf, for instance,
10 one of the things that had to be done during that
11 process is we would bring in a special kind of dirt
12 and make sure that they announced that it works from
13 the soil mapping from the borings to the structure
14 design characteristics.

15 Another thing that would get considered
16 during that analysis that gets done at coal is the
17 excavation methods that get done, which you determine
18 then from the soil magnates.

19 So it's not a real no go. It's basically
20 you had this characteristic of the soil or in some
21 cases the rock. Then you have to do analysis to
22 figure out once you are combining that with a facility
23 to determine are there things that need to be done to
24 be considered.

25 JUDGE BARATTA: I take it, then, that this

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1 point is nothing that would preclude those designs.
2 I think they're under the PP envelope, aren't they?

3 MR. ZENKE: Yes. Right now we haven't
4 found anything that would preclude, but we know that
5 the process isn't done.

6 JUDGE BARATTA: Right.

7 MR. ZENKE: Additionally, the reg guides
8 require that once you locate the exact location of
9 where a structure would go, you have to take
10 additional borings. And then the reg guides also say
11 that it would be a condition of the license to say
12 even once you have the license and continue
13 excavating, you will continue to evaluate the
14 conditions of the material being excavated. So it's
15 kind of at the beginning of a process that will
16 continue.

17 MR. LEWIS: The borings show that the
18 materials in the depths that would accommodate the GE
19 reactor and the pebble bed reactor are appropriate for
20 foundations at those depths. They are shown that
21 there are bedrocks at those depths and, in fact, it
22 gets more massive and stronger degrees, though.

23 There is a need for further borings. Once
24 the exact footprint is chosen and exactly what
25 reactor, at this point, the borings do indicate that

1 SEIS would accommodate all of the reactors in the PP
2 envelope.

3 MR. FRANZ: Exelon did boring down to
4 bedrock at around 325 people surface. We showed that
5 we could place our base satisfactorily at around 143
6 below surface.

7 JUDGE ABRAMSON: Let me follow this up.
8 This could be oversimplistic, as it was put yesterday.
9 Is it accurate to say that having now developed some
10 profile of what it is, as you strike construction, you
11 would modify our plant design to make sure that it
12 accommodated whatever you found below the surface?

13 MR. ZENKE: The first thing to be done is
14 you would examine the design characteristics of what
15 has been certified. Ideally, there would not have to
16 be any modification to the exact design. Part of the
17 DCD includes instructions on excavation.

18 So, I mean, the first step for the goal is
19 to compare it. And then if there is a need to do
20 modification, then it is something that is subject to
21 mitigation.

22 MR. LEWIS: I am not aware that there will
23 be any need to modify designs. What I was thinking
24 about the confirmatory surveys is we have done an
25 excavation over a fairly large area that covers a lot

1 of different designs that make up the PPE.

2 When you choose your specific design to
3 come up at your specific footprints and your footings
4 are going to be in a specific location, then you put
5 the confirmatory borings in those precise locations to
6 confirm what we believe is the case, what the
7 geological explorations indicate at this point in
8 time.

9 JUDGE ABRAMSON: My question really was if
10 you find that it doesn't fit the PPE, it doesn't
11 prevent you from using that plant. It just means you
12 modify the plant design accordingly and go through
13 whatever you have to go through for a process to do
14 that modification. Is that accurate?

15 MR. LEWIS: I am not sure whether you
16 would modify the plant design. I think what you would
17 have to do is you would be outside of the PP envelope
18 in some degree. And that issue would be addressed in
19 the COL application. I don't know what --

20 JUDGE ABRAMSON: Modification of
21 structure, whatever you had to do, right? It would
22 not prevent use of my plant. That's my only question.

23 MR. LEWIS: Then it would an open issue.

24 MR. FRANZ: At Exelon, we have recently
25 two designs that could be located below grade, and our

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1 design could be located low grade. We don't see any
2 need for modification of those designs to accommodate
3 the plant.

4 JUDGE ABRAMSON: All right.

5 CHAIRMAN BOLLWERK: Let me mention this.
6 I should have mentioned it earlier. This discussion
7 that we have just been having relates to contention --
8 in fact, there are three contentions dealing with the
9 site suitability for below-grade placement of reactor
10 containment, which was Clinton SSA-2.2; North Anna
11 SSA; -- it's a site safety analysis, 2.2 -- and Grand
12 Gulf SSA-2.2.

13 Let me just see. Let's try the staff
14 first and then go to Ms. Curran. Anything the staff
15 wants to say about any of the discussion that just
16 occurred?

17 MS. HODGDON: We have nothing to add to
18 it.

19 CHAIRMAN BOLLWERK: Then let me turn to
20 Ms. Curran.

21 MS. CURRAN: Well, first of all, of
22 course, what we based our contention on was the
23 information in the applications. And to the extent
24 that the letters here are amending the applications,
25 I think the board needs to go back and look at what

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1 the application says.

2 What I heard this morning I think was that
3 there have been tests done to basically locate the
4 bedrock and determine whether the site is stable for
5 purposes of building a below-grade containment. I
6 don't know if that's the only issue that would be
7 relevant.

8 We are simply relying on the regulation,
9 10 CFR 100.21(f), which requires an evaluation of the
10 site suitability for purposes of security measures.
11 Of course, our thesis is that below-grade construction
12 of containment is a security measure that should be
13 considered.

14 At this point, we can't list all of the
15 factors that would be relevant to below-grade
16 placement of the facility. In reviewing the three
17 applications, I did not see any specific discussion in
18 these tests of the applications except for a very
19 limited amount of tests in the Clinton application as
20 to the site suitability for below-grade placement of
21 the reactor. And that's what we're doing.

22 CHAIRMAN BOLLWERK: All right. Any other
23 questions from the board at this point?

24 (No response.)

25 CHAIRMAN BOLLWERK: Thank you very much.

1 Let's go ahead, then, and move on to the
2 contention on Lake Anna impacts. Now let me turn to
3 the staff and let you finish up what you were going to
4 say before.

5 MS. POOLE: Thank you, Your Honor.

6 As stated, upon consideration of the
7 response to filings, the staff has revised its
8 position on three aspects of each of the three
9 contentions relating to water defense.

10 Proposed contention 3.3.1 consists of
11 three parts. Specifically, petitioners challenge the
12 adequacy of the environmental report to address water
13 supplies for proposed units 3 and 4; second,
14 Dominion's asserted failure to identify a
15 supplementary external water source for unit 4; and,
16 third, the impact of traditional unit or units on
17 river flows downstream of the North Anna dam.

18 Upon review of the petitioner's June 9th
19 reply, the NRC staff is persuaded that the subsection
20 of proposed contention 3.3.1 pertaining to adequacy of
21 the applicant's environmental report for ER to address
22 the impacts on flow of the North Anna River resulting
23 from the operation of proposed unit 3 only, not unit
24 4, meets the requirements of 10 CFR section 2.309(c)
25 for admissible contention.

1 Proposed contention 3.3.2 relates to
2 impacts on fish and other acquired life in Lake Anna
3 industry with the lake. This proposed contention also
4 consists of three parts. First, the ER does not
5 adequately consider the impact of proposed reactors on
6 increased water temperament, impingement, entrainment,
7 and downstream flow rates.

8 Second, the ER does not address conflicts
9 between Dominion's proposals for water use and the
10 requirements of the Clean Water Act. And, third, the
11 ER does not address the cumulative impacts of the
12 proposed units on the applied systems in Lake Anna and
13 the river.

14 In basis B of this contention pertaining
15 to thermal impacts of proposed unit 3 and 4, resulting
16 in increased temperature in Lake Anna, petitioners
17 argue that Dominion's environmental report fails to
18 adequately assess the increased impacts of additional
19 reactors on the health of fisheries in Lake Anna and
20 downstream in the North Anna River, with the addition
21 of one or two units.

22 Upon review of the petitioner's June 9th
23 reply, the NRC staff is persuaded that the portion of
24 this proposed contention is admissible as to the
25 limited issue of whether the ER has adequately

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1 characterized the impacts of the proposed operation of
2 a single additional unit on the striped bass
3 population in Lake Anna.

4 I should emphasize that we do not oppose
5 only a limited slice of this contention as to striped
6 bass only. We do not agree that the scope of this
7 contention should include thermal impacts upon all
8 fish and aquatic life in the lake and downstream.

9 Finally, proposed contention 3.3.3 relates
10 to impacts on water from classified uses of Lake Anna.
11 A portion of this proposed contention argues that
12 Dominion's ER is insufficient because it fails to
13 adequately consider the impacts of reduced water
14 levels in Lake Anna on recreation.

15 Upon review of the petitioner's reply, the
16 NRC staff is persuaded that the petitioners have
17 raised a genuine dispute as to the limited issue of
18 whether the ER has adequately addressed the impacts of
19 reduced lake levels on lake recreation; e.g., impacts
20 on access to boat ramps during drought years. I
21 should note that we do not agree that a portion of
22 this proposed contention is admissible as to impacts
23 on local economic conditions.

24 That is all I will say until our turn
25 comes.

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1 CHAIRMAN BOLLWERK: If I can summarize,
2 then, -- and correct me if I am wrong here -- with
3 respect to the first contention, 3.3.1, you have now
4 determined that you don't oppose the -- is it the
5 third part of that contention?

6 MS. POOLE: That's correct, related to
7 impacts on flow downstream.

8 CHAIRMAN BOLLWERK: With respect only to
9 unit 3?

10 MS. POOLE: That's correct.

11 CHAIRMAN BOLLWERK: Okay. So it's the
12 third part. And with respect to the second
13 contention, 3.3.2, the first subpart, dealing with
14 water temperature, the striped bass only you now are
15 --

16 MS. POOLE: That's correct.

17 CHAIRMAN BOLLWERK: And then I guess the
18 third contention, 3.3.3, public uses, recreation,
19 dealing with reduced levels and boat ramp access in
20 drought years?

21 MS. POOLE: That's correct. In our answer
22 with respect to that last contention, we addressed it
23 -- we considered the providence of the complaint to be
24 a Clean Water Act complaint, but upon review of the
25 respondent's filings, we were convinced that there was

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1 an environmental report to that.

2 CHAIRMAN BOLLWERK: Any questions at this
3 point before we go forward?

4 (No response.)

5 CHAIRMAN BOLLWERK: All right. Why don't
6 we, then, turn to Ms. Curran? You're going to be
7 arguing this one, I take it?

8 MS. CURRAN: Yes, I am.

9 CHAIRMAN BOLLWERK: What about the
10 breakdown on time?

11 MS. CURRAN: Ten and ten, please.

12 CHAIRMAN BOLLWERK: All right.

13 MS. CURRAN: If I may approach the board?

14 CHAIRMAN BOLLWERK: Sure.

15 MS. CURRAN: Last night we made some
16 copies of a map that Mr. Sullivan brought at the dock
17 at Lake Anna that I think is a better picture than you
18 will see and like a fabrication of what Lake Anna
19 looks like.

20 CHAIRMAN BOLLWERK: Have other parties
21 seen this map?

22 MS. CURRAN: Yes. You all have copies.
23 This is just for the convenience of the board. This
24 isn't an exhibit to our contention. It's so that you
25 can see a little more clearly the lake and, in

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1 particular, although this isn't directly raised by our
2 contention, I think it helps to see -- first of all,
3 this is not a complete map of the lake. The lake is
4 actually much bigger. And it goes out to the
5 northwest.

6 CHAIRMAN BOLLWERK: There's going to be a
7 conversation here in a second, but let her go ahead
8 and finish the description of that document.

9 MS. CURRAN: The purpose of this is to
10 show that in the lake that is near the nuclear plant,
11 there are actually two cordons of the lake. The
12 southern side of the lake you will see divided by the
13 rest of the lake by a couple of dikes. There are
14 three dikes. There is something called the waste heat
15 treatment facility that is actually fed by a number of
16 strains, tributaries, but it is separated from the
17 rest of the lake.

18 And the intake from Lake Anna is near the
19 plant. The plant itself discharges water into this
20 waste heat treatment facility. And the water -- these
21 various so-called -- I think they're called lagoons,
22 which are various tributaries of Lake Anna, are
23 connected by canals. So the water in all these
24 tributaries is connected. And the water eventually is
25 discharged way over on the right-hand side of the map,

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1 at the farthest dike to the east, into the main
2 portion of Lake Anna.

3 I find that very helpful to see that so
4 that you can understand the relationship between this.
5 The waste heat treatment facility is quite a large
6 portion of the lake that is separated from the rest of
7 the lake.

8 The impacts that we are talking about in
9 our contentions related to the main portion of the
10 lake, which is on the north side of these dikes.

11 CHAIRMAN BOLLWERK: Let me see what is out
12 there and see what the discussion is, then.

13 MR. LEWIS: I have no objection to using
14 this as a visual aid. I just wanted to make sure the
15 clarification was given that this is not the entire
16 lake or the entire zoning.

17 CHAIRMAN BOLLWERK: I think,
18 notwithstanding your preference not to make it one of
19 the -- I am going to go ahead and put it as part of
20 the docket in this case. I'm very uncomfortable with
21 having something that everyone is looking at and
22 talking about and not having it available for the
23 public.

24 So I don't know what the code will be to
25 add it, but that will be their problem, not mine.

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1 MS. CURRAN: Should we provide a copy of
2 this to the court reporter, then?

3 CHAIRMAN BOLLWERK: No. I'll go ahead and
4 just put it in as a separate submission to the Office
5 of the Secretary and just have it incorporated
6 directly into the record. I don't want it put into
7 the transcript.

8 MS. CURRAN: Okay. With the limited time
9 that I have, I just want to make a couple of points
10 regarding the contentions in general. And then we can
11 hear what the other parties have to say.

12 First of all, the declaration of Barry
13 Sullivan is similar in structure to the declaration of
14 David Lockbaum, which was filed in the court in our
15 reactor interaction contention. We would make the
16 same argument here with respect to Mr. Sullivan's
17 declaration that he is responsible for the contention.

18 The contention represents his thinking of
19 the facts on which he relies and facts within his
20 knowledge. And we think that it wasn't necessary for
21 us to have repeated everything that he said in the
22 contention in his declaration.

23 But even if you were to find that the
24 manner in which Mr. Sullivan's declaration was
25 prepared isn't sufficient, that it was necessary for

1 him to have in his declaration stated every fact and
2 every opinion on which the petitioners are relying, I
3 think it is important to note here that this
4 contention can stand on its own, even without Mr.
5 Sullivan's declaration, because it is thoroughly
6 documented with references to correspondence by state
7 and federal regulators regarding their concerns about
8 the environmental impacts of the proposed project on
9 Lake Anna and also historical impacts that have a
10 relationship.

11 I would also like to clarify that in the
12 contentions that we have raised, we really don't have
13 a factual dispute with Dominion about the nature of
14 the impacts to Lake Anna of the proposed new reactors.
15 And we are talking about unit 3 here.

16 Dominion has essentially said we are not
17 going to be relying on Lake Anna at all for cooling
18 water for unit 4. So the only impacts at issue here
19 are impacts of unit 3. As a matter of fact, when the
20 Virginia Department of Environmental Quality was
21 looking at this issue, they assumed that there would
22 only be a unit 3 because Dominion did not provide
23 enough information about cooling from unit 4. So the
24 contentions do focus on unit 3.

25 At any rate, what our dispute centers on

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1 here is not so much the factual information that is
2 presented about the impacts but Dominion's
3 characterization of those impacts.

4 For the same factual conditions, Dominion
5 asserts that the impacts are insignificant, impacts
6 that we think are significant. There are two reasons
7 why this difference between us is important. One is
8 that Dominion does not evaluate the impacts in any
9 detail because they do consider them to be
10 insignificant.

11 And the other is that Dominion does not
12 evaluate alternative means for cooling unit 3 in any
13 detail because, again, it considers these impacts to
14 be insignificant and, therefore, not worthy of serious
15 pursuit of alternatives. And what the petitioners are
16 very anxious to see happen here is a very thorough
17 consideration of alternatives for minimizing the
18 impacts on Lake Anna.

19 Lake Anna is already a heavily impacted
20 lake by virtue of the presence of units 1 and 2 of the
21 North Anna nuclear power plant. And petitioners are
22 very concerned about the cumulative impacts of adding
23 an additional reactor with: a) the amount of water
24 that would be taken out of the lake to cool the plant;
25 and b) the thermal impacts on the fishery in the lake.

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1 An issue has come up here regarding the
2 significance of Clean Water Act compliance by
3 Dominion. There are a number of instances in which we
4 discuss Dominion's lack of compliance with various
5 requirements of the Clean Water Act.

6 We do not intend by these assertions to
7 mitigate directly Dominion's compliance with the Clean
8 Water Act here. The purpose of these discussions is
9 to, first of all, invoke 10 CFR 51.10(c), which is an
10 NRC regulation that requires an applicant to discuss
11 the status of compliance with various state and local
12 laws, environmental laws, but b) the purpose of that
13 being, we believe, to identify issues of potentially
14 significant impact that may otherwise be overlooked,
15 that if there is a violation of environmental statute
16 that doesn't relate to radiological impacts, such as
17 the Clean Water Act or the Clean Air Act, then that is
18 an indication that there are significant impacts that
19 are being overlooked. That is the purpose of citing
20 these Clean Water Act violations.

21 Finally, there has been argument. We
22 raised several issues relating to the cumulative
23 impacts of these proposed facilities on the proposed
24 unit 3 with respect to the dam that is already there.

25 The argument has been made that any issues

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1 we raise where the impacts are either caused or
2 exacerbated by the dam can't be mitigated here because
3 the dam is preexisting, that it was already built,
4 that it is not going to be built as a result of unit
5 3, so that is outside the scope of the proceeding. We
6 disagree with that.

7 First of all, the existence of the dam is
8 relevant for purposes of considering cumulative
9 impacts. The dam has caused environmental impacts.
10 In our view, unit 3 would exacerbate those impacts.
11 And so it is relevant to consider the existing impacts
12 from the dam.

13 And, in addition, the dam is only there
14 because of the nuclear plant. So that it becomes
15 relevant as to whether the existence of the dam should
16 be perpetuated to serve the proposed new unit because
17 its only purpose is to serve the nuclear plants. And
18 if the existing units are closed down at some point in
19 the future, the dam will lose its purpose.

20 That is all I have at the moment.

21 CHAIRMAN BOLLWERK: Are there any board
22 questions?

23 JUDGE ABRAMSON: Counsel, can you help me
24 understand what it is your concern in the dam is? You
25 talk about the dam, and it's there for the plant. In

1 your view, the addition of the additional plants, does
2 that have any effect upon the water or the dam besides
3 the possibility of extending the need for the dam
4 beyond the current license expiration date of the
5 existing units?

6 MS. CURRAN: First of all, the existence
7 of the dam limits the range of the fish as to where
8 they can move. Fish that are trying to come up cannot
9 get past the dam.

10 JUDGE ABRAMSON: Is that impacted by the
11 additional unit by other than the possibility of
12 extending the need for it beyond the existing
13 licenses?

14 MS. CURRAN: Well, the additional unit
15 would represent a cumulative impact on top of that
16 impact. The new unit would compound final impacts
17 with --

18 JUDGE ABRAMSON: But just the dam. Let's
19 just focus on the dam.

20 MS. CURRAN: But you can't really separate
21 them because you have to look at the overall system.
22 Say, for instance, you are looking at fish. The fish
23 are already impacted by the dam. And then you are
24 adding to that the cumulative impacts of thermal water
25 flow on those fish.

1 And so you have to -- what NEPA requires
2 is that you look at the situation that you're given.
3 The stress is on the fish population that already
4 exists. And then you add to that the additional
5 stress that is going to be caused by the new
6 operation.

7 So if it is one of the -- it is an
8 existing impact that has to be -- the dam and what it
9 does to the fish is an existing impact that needs to
10 be looked at in conjunction with the additional
11 impacts of unit 3, which would be primarily thermal
12 and water flow.

13 JUDGE BARATTA: I'm a little confused here
14 because in one place, I recall you discussed the
15 impact of lower water levels on property values. And
16 it would seem that this is not a natural lake and that
17 if the dam weren't there, the water level of the lake
18 would really be low, would return to whatever the body
19 of water was that runs through there.

20 So I'm confused here as to what -- you're
21 taking issue, on the one hand, with the dam, but then
22 you're saying that if it wasn't for the dam --

23 MS. CURRAN: I don't think we're taking
24 issue with the dam so much as arguing that issues
25 related to the dam, impacts of the dam, are not

1 outside the scope of this contention because it is not
2 appropriate to just say the dam was there before.

3 So any impacts that are due to the dam are
4 not within the scope of this proceeding. It is not an
5 argument of the petitioners that the dam should be
6 remote, but we are arguing that the impacts of the dam
7 that are preexisting need to be looked at in
8 conjunction with the impacts of unit 3.

9 JUDGE BARATTA: Are you saying that with
10 respect to an incremental change or --

11 MS. CURRAN: Yes.

12 JUDGE BARATTA: So, in other words, you --

13 MS. CURRAN: Well, the cumulative change.
14 For instance, to take the most extreme case, if unit
15 3 is the straw that breaks the camel's back and
16 destroys the fishery -- I'm not saying that it will,
17 I'm giving you an extreme case -- then the incremental
18 effect might be, even if it were small, the cumulative
19 effect would be disastrous. So we would be -- what we
20 think ought to be a battle weight is the cumulative
21 effect.

22 Here is a fishery that is already
23 stressed. How much more can you do to this before you
24 cause it to collapse?

25 JUDGE BARATTA: Okay. I think I

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1 understand now what you're getting at. Thank you.

2 CHAIRMAN BOLLWERK: Just a question in
3 terms of the Clean Water Act. When you say that under
4 51.10(c) that there needs to be a listing of whatever
5 statutes, whether federal or state, I suppose, that
6 the applicant has to comply with as well as the status
7 of complied, so that simply means that all they have
8 to do is list what governmental bodies they have to
9 apply to for permits?

10 When you say "status," there are two
11 questions. One is simply we need to obtain the
12 following permits under the following acts. Is that
13 sufficient to comply with that NEPA requirement that's
14 in the regulation?

15 MS. CURRAN: Well, I believe the
16 regulation requires discussion of the status of
17 compliance with other -- with state and local laws.
18 I'm not sure I cited the right regulation to you, and
19 I will find the correct one.

20 Okay. It's 51.45(d). I'm sorry. I gave
21 you an incorrect citation. That requires -- the
22 heading of this section is "Status of Compliance."
23 And it says, "The environmental report should list all
24 federal permits, licenses, approvals, and other
25 entitlements, which must be obtained in connection

1 with the proposed action and shall describe the status
2 of compliance with these requirements." And it goes
3 on to talk about local requirements.

4 So it's not just a listing of what permits
5 have to be obtained, but it's a listing of the status
6 of compliance. And this is I think the appropriate
7 place for petitioners to argue that Dominion doesn't
8 comply with certain aspects of the Clean Water Act or
9 perhaps there hasn't been a determination of
10 compliance yet.

11 JUDGE ABRAMSON: Counselor, how do you
12 read this to say that they have to comply? It sounded
13 to me like this regulation requires a discussion of
14 the status of compliance.

15 MS. CURRAN: Right. I agree with you.
16 That's what it requires. But what we would argue is
17 if they don't comply, they need to say so. And we
18 think that they -- in some respects, they don't comply
19 and that that needs to be addressed.

20 JUDGE ABRAMSON: By this board? Their
21 compliance with a NEPA statute or some other EPA
22 statute needs to be addressed by this board or does
23 this board only have to address whether or not they
24 discuss the status?

25 CHAIRMAN BOLLWERK: My recollection is

1 this came up in Private Fuel as well. And what it
2 eventually ended up with is a listing of all of the
3 different statutes that the applicant had to comply
4 with.

5 One of the problems here is Dominion is
6 not going to know if they are in compliance until they
7 apply to whatever Virginia bodies they need to obtain
8 or federal bodies they need to obtain the authority
9 with. I'm not sure what else they do other than list
10 that at this point, but I could be wrong.

11 MS. CURRAN: We believe that the extent of
12 Dominion's compliance with these requirements is an
13 indicator of significant impacts or the noncompliance.
14 If Dominion is out of compliance with these
15 requirements, it is an indicator of significant
16 impacts. And that is something that the board can
17 consider.

18 CHAIRMAN BOLLWERK: But then you are
19 asking us to do what in theory we are not supposed to
20 do, which is determine whether Dominion does or
21 doesn't comply with these statutes. I mean, that's up
22 to, for instance, the State of Virginia or the EPA or
23 whoever else is involved.

24 You are kind of -- it sounds to me like --
25 and I am already trying to shoehorn this argument into

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1 the back door somehow. I guess I'm --

2 MS. CURRAN: Well, for purposes of
3 admissibility on this contention, have we raised a
4 dispute with the applicant as to whether there are
5 significant impacts here or not? It seems to me that
6 it is legitimate to introduce that information for
7 that purpose, at the very least.

8 JUDGE ABRAMSON: I'm getting confused
9 again. Are you arguing that there is an omission from
10 the application from the ER that they had not
11 adequately discussed these or are you arguing that
12 they are not in compliance with other statutes?

13 MS. CURRAN: We're arguing that Dominion
14 has not adequately addressed the significance of the
15 impacts of the proposed --

16 JUDGE ABRAMSON: What is the authority for
17 this board to require that?

18 MS. CURRAN: To require?

19 JUDGE ABRAMSON: That they adequately
20 address the impacts.

21 MS. CURRAN: NEPA, the National
22 Environmental Policy Act, that would require --

23 JUDGE ABRAMSON: Is it a NEPA alternatives
24 requirement?

25 MS. CURRAN: This is a NEPA requirement to

1 address significant impacts, to discuss significant
2 impacts in an environmental impact statement or an
3 environmental report.

4 Our contention is that Duke erroneously
5 characterizes these impacts as insignificant and that
6 to -- I'm sorry -- Dominion and that the ER should
7 consider their submitting this. And it becomes
8 important in the consideration of alternatives.

9 I think it's a bit immature to get there
10 yet, but what we need to do in the first instance is
11 to establish that impact as significant. And then it
12 becomes incumbent upon the applicant to provide a
13 thorough discussion of alternatives.

14 JUDGE BARATTA: Your dispute, then, is
15 really the statement by Dominion that these impacts
16 are insignificant?

17 MS. CURRAN: Yes.

18 JUDGE BARATTA: And can you point to in
19 your bases what led you to that belief?

20 JUDGE ABRAMSON: What's the technical
21 foundation for the argument that they are or are not
22 significant?

23 MS. CURRAN: We rely on the opinions
24 expressed in the correspondence from the Virginia
25 Department of Environmental Quality. We rely on Mr.

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1 Sullivan's opinion.

2 We rely on the significance of the factual
3 information that is provided in the application. I
4 think there's qualitative statements. The DEQ
5 describes the proposal as being significant in terms
6 -- very unusual in terms of the amount of water, for
7 instance, that Dominion proposes to take out of this
8 system, that this is an unusual proposal, very
9 unusual, first of a kind in the state. I think that's
10 quoted in our contention.

11 So, actually, we rely on the
12 characterizations of the proposal by the Virginia
13 Department of Environmental Quality.

14 CHAIRMAN BOLLWERK: Are there any other
15 board questions at this point?

16 (No response.)

17 CHAIRMAN BOLLWERK: All right. Let's go
18 ahead and move on, then, to Dominion and then the
19 staff.

20 MR. LEWIS: Thank you.

21 I am going to address the contentions,
22 some contentions, in order because it provides perhaps
23 the best framework. I will start with contention
24 3.3.1.

25 I really just want to point out this

1 contention, there is almost nothing left of it other
2 than the assertions that are redundant of the other
3 subparts, 3.3.2 or 3.3.3.

4 The contention originally was that it
5 really was focused on the lack of identified external
6 source for unit 4. And Ms. Curran's point now is no
7 longer even an issue.

8 So the only issue that now remains in
9 contention 3.3.1 is an assertion that the lake is an
10 adequate source for unit 3 because there may be
11 impacts on river flow downstream or impacts on lake
12 level. Impacts on river flow downstream is the basis
13 C of contention 3.3.2. And the impacts on lake level
14 are the subject of contention 3.3.3, basis A. I think
15 3.3.1 is now entirely redundant.

16 With respect to impacts of reduced flow
17 downstream, this is an issue where there really is no
18 basis establishing a genuine dispute on a material
19 issue. There is no dispute with the water balance
20 analysis or the projected frequencies of low flow
21 conditions that we have provided in our environmental
22 report.

23 There is no dedication of any specific
24 impact that has been ignored. There is no showing
25 that there will be any unacceptable or adverse impact

1 downstream. There is no showing that any species will
2 be impacted. There is no identification of any
3 species that will be impacted downstream by low flow
4 conditions.

5 There is no showing that any user will be
6 impacted. There is no showing that any impact have
7 resulted from low flow stream in the past.
8 Petitioners may characterize this as a contention of
9 omission. I think that is a favorite phrase of
10 theirs.

11 To say that there needs to be some more
12 description is not enough to get a contention here
13 because you can always say you haven't evaluated the
14 impact of the leaves on the trees. That is an
15 omission. That can't be enough to get you here. You
16 have to show that there is some indication that there
17 really is an impact that may be material.

18 There is data out there. There are
19 monitored reports that is available from the DEQ.
20 There is certainly other information they could have
21 gotten. They could have identified if there is a
22 sensitive species down river, looked at and monitored
23 reports. They have done nothing. They simply said,
24 "You have to look it up." And that is not a basis for
25 contention.

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1 There is one new assertion in contention
2 3.3.1. They asserted that there is no analysis of
3 impacts of low lake levels, fish and other plant life
4 in the lake. I would submit that this was not part of
5 the original contention 3.3.1 and it was improper to
6 raise this in the reply.

7 But, again, there is no showing that any
8 species could be affected by low lake levels, any
9 species in the lake. There is no explanation of how
10 any species in the lake could be affected by low lake
11 levels. And there is no showing that any species has
12 ever been affected in the past by the lake levels,
13 including the historical low lake levels that occurred
14 during the recent drought.

15 I'm going to go down to contention 3.3.2.
16 And I'm going to pick up on the low lake level aspect
17 of that contention before I move to thermal impacts
18 just because it follows. In the discussion of -- not
19 the low lake levels; low river flows -- there is an
20 allegation that the petitioners make that spring
21 swelling may be impacted.

22 Again, I would submit that they failed
23 completely to find any basis for this assertion. What
24 the environmental report shows is that the flow
25 reduction occurs in the fall, not in the spring, when

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1 spotting occurs.

2 But, again, there has been absolutely no
3 showing that low flows are going to have any impact on
4 spring swelling, including during the drought. And
5 there is no discussion, no identification, no showing
6 whatever that there is any species down river that
7 would likely be affected. And without that level of
8 support and specificity, they have failed to establish
9 anything in dispute on a material issue.

10 Let me turn to thermal impacts.
11 Petitioners' contention originally alleged that
12 thermal impacts of striped bass would violate the
13 Clean Water Act. Now they admit that such impacts do
14 not violate the Clean Water Act. That's in the reply
15 on page 27.

16 The contention originally asserted that
17 Dominion had not adequately assessed these impacts.
18 And now they admit the central dispute does not
19 over-impact. That's the reply at 28.

20 I have heard Ms. Curran say a couple of
21 times that today they really have no factual dispute.
22 It seems to me this contention is very much like the
23 striped bass. It's a slippery fish.

24 I think what the petitioners are doing is
25 they are quibbling about adjectives. They don't

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1 dispute any of the projections it impacts, the
2 magnitude of those impacts, the factual assertions.
3 They just simply say, "We don't like the adjectives
4 that describe those impact." That is not a material
5 dispute.

6 Let me talk quickly about the undisputed
7 facts in this proceeding with respect to the striped
8 bass. The environmental report indicates the striped
9 bass is a non-native cold water species that is not
10 normally found nationally in lake-side visits.

11 It is a fish that until it is artificially
12 stocked in reservoirs occurred at estuaries and only
13 came into broad, wide rivers for stocking. But it has
14 been stocked in Lake Anna for recreational purposes
15 for fishing.

16 You can't spawn. The creeks that run into
17 the lake are not wide enough to support spawning runs.
18 So the only reason that fish is there is because every
19 year the Virginia Department of Game and Inland
20 Fisheries stocks the lake with 100 to 200 thousand
21 fingerlings for recreational fishing.

22 As a cold water species, the striped bass
23 is averse to hot lakes. And during the summer, the
24 environmental report indicates that the striped bass
25 will avoid warmer portions of the lake and move in the

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1 middle and upper portions of the lake. And during
2 those periods, it may show decline and loss of weight,
3 but after the summer temperatures, it recovers.

4 This fish has been stocked since 1975.
5 And the environmental report indicates that there have
6 been no die-offs of the striped bass into that period,
7 even during severe conditions of the recent drought,
8 in the mid and upper lake habitat as those are made
9 viable.

10 We have not said that the impact on this
11 species is insignificant. We have said it is
12 moderate. I am not aware of a single reference in the
13 environmental report where we say that the impact of
14 thermal levels on the striped bass is insignificant.
15 We say it is moderate, meaning small and meaning that
16 mitigation may need to be considered.

17 So what are the adjectives that
18 petitioners are quibbling about? We have a general
19 statement that the lake includes well-balanced,
20 healthy populations of fish. And then we have a
21 specific discussion of a lot of species, including the
22 striped bass, where we point out the undisputed facts
23 that I have just given you. Is that a material issue?
24 I think the answer is obviously not.

25 They refer to a comment by one of the

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1 Virginia agencies that it might be a dramatic impact
2 on the striped bass. But when you look at that
3 letter, what is the dramatic impact? The dramatic
4 impact is a reduction of the limited habitat.

5 What does the environmental report say?
6 That to begin to increase thermal load from the unit
7 may force the striped bass up into the middle and
8 upper regions of the lake. Again, there is no factual
9 dispute. This impact is moderate.

10 There is one statement in a comment letter
11 that says, "Perhaps the species would be jeopardized."
12 That is worth no more than the words. It is possible.
13 Anything is possible. But that does not approve the
14 sort of firm foundation, the firm basis to establish
15 a dispute with the facts.

16 The facts that are in the environmental
17 report are that the mid and upper level lakes would
18 remain a viable habitat and that petitioners have
19 stated they don't dispute those facts.

20 There was some discussion by Ms. Curran
21 about impacts that relate to the mesh and the
22 cumulative impacts and whether you have to consider
23 that impacts on the dam are caused by the new units.
24 I would like to provide two responses to that
25 assertion.

1 First of all, if that is there in those
2 for the new units, it serves a hydroelectric station
3 that is coming down. It supports the lake community
4 now. I think it is very speculative to assume it
5 would be removed, even if necessary for units 1 and 2
6 to cease operation.

7 Units 1 and 2 have just had their licenses
8 renewed. So they're going to operate for another 40
9 years. And you're talking about something that is
10 very far into the future. I think it is a very
11 tenuous relationship. I think it is too tenuous to
12 support that impact that would cause everybody with
13 the new units.

14 More importantly perhaps, this issue was
15 raised in the context of an allegation that we need to
16 consider a passage for fish past the dam. That was
17 the allegation.

18 We have responded in our answer that this
19 comment was looked at for the existing units in the
20 environmental impact statement for license renewal.
21 And the NRC specifically found that there was no
22 evidence of laboratory fish in the vicinity of the
23 dam.

24 So there is no basis to assert that there
25 should be in that passage. If the petitioners want to

1 establish that as a pure issue in this proceeding, at
2 a very minimum, they should show that there is some
3 species that might benefit from it.

4 That information is entirely lacking. It
5 is entirely absent from their allegations. And,
6 therefore, in addition to being outside the scope and
7 being unrelated to units 3 and 4, it is clearly
8 without any factual basis whatsoever.

9 Finally, for contention 3.3.3, the
10 allegation that the impacts of lake level on
11 recreational use are not adequately addressed, again,
12 there really is no factual dispute here that
13 establishes a material issue.

14 The environmental report indicates that
15 the frequency of different weight levels, though
16 petitioners refer to a Virginia Department of
17 Environmental Quality letter that stated that when
18 lake levels drop below 245 feet, some low ramps could
19 not support launches during the recent drought, the
20 environmental report indicates that that lake level,
21 the frequency of that lake level with an additional
22 unit would occur less than three percent of the time.
23 And it would occur in the fall. Those are undisputed
24 facts.

25 It's very hard to understand, then, why

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1 this is a material issue in this proceeding, why this
2 issue would make a difference in the outcome of this
3 proceeding. There really is no reason why ramps
4 couldn't be extended if they became inconvenient.

5 There is no indication that any
6 significant impact has been ignored. There simply is
7 no material dispute here. It's a very minor comment.

8 I have bounced around. I apologize. I
9 need to go back to contention 3.3.2 on entrainment of
10 impinged fish. It hasn't been discussed a lot, but it
11 is still one of their allegations.

12 CHAIRMAN BOLLWERK: You're just about at
13 the end of your time.

14 MR. LEWIS: Very quickly. The reply again
15 and now I believe typically focuses a lot on the
16 striped bass. The striped bass makes up less than one
17 percent of the fish that are impinged. What the
18 environmental report shows -- and it's undisputed --
19 is that the projected number of striped bass that will
20 be impinged with unit 3 are 4,394 fish compared with
21 100 to 200 thousand fish that are stocked annually.

22 Petitioners provide absolutely no
23 indication, no basis, no expert opinion, no document,
24 no source anywhere showing that the effects of
25 entrainment and impingement on any species and

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1 particularly on the striped bass would have any impact
2 on the viability of any of those species.

3 CHAIRMAN BOLLWERK: All right. Any board
4 questions?

5 I guess what I understand Ms. Curran is
6 saying about the question of the Clean Water Act
7 compliance is that, notwithstanding the requirement to
8 list what permits you have to obtain, that in this
9 instance and in some instances, in fact, when you
10 apply or put your application in, you may be some time
11 away from obtaining those particular permits, but you,
12 nonetheless, have to list where you have to go to get
13 them and what is required.

14 Here there is a history apparently with
15 the Virginia state authorities, at a minimum, that
16 doesn't look very good in terms of at least some of
17 the letters they have produced and sort of where there
18 is smoke, there may be fire and isn't that enough to
19 get a contention in, at least in terms of the way that
20 Dominion has characterized some of these impacts?

21 MR. LEWIS: I think you have two issues.
22 One is do the letters provide enough of a basis? I
23 would submit they do not. The letters were comments
24 that the state was in the process of developing under
25 a short time table for looking at a Coastal Zone

1 Management Act certification.

2 We withdrew the certification at the
3 state's request because they wanted to state we should
4 have the draft environmental impact statement before
5 them when they made their certification.

6 Under the Coastal Zone Management Act,
7 there was a six-month flock that would have been
8 inconsistent with that wish. So we voluntarily agreed
9 that we would withdraw the certification and submit it
10 later so that their six-month period for looking at
11 the certification would overlap with their period for
12 commenting on the draft EIS.

13 As a result, they gave us some comments
14 that they were in the point or process of developing
15 in whatever stage they were at. I think a lot of
16 these comments would have gone away. A lot of these
17 comments were, I would submit, for general questions,
18 perhaps initial reactions, but not statements that
19 disputed the facts in the environmental report and,
20 therefore, not statements that provided a sufficient
21 basis on the specific intentions we have here.

22 With respect to the issue of permitting,
23 we are again asking about the requirement in 51.45(d)
24 of what does it mean to list permits and is that an
25 issue in this case, is that your question?

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1 CHAIRMAN BOLLWERK: Well, how does it have
2 any relationship to impingement? Maybe I'm misreading
3 it.

4 MR. LEWIS: I think that the requirements
5 of permits means exactly what it says, that you list
6 the permits that you need and you indicate what the
7 present compliance is, which is we have applied for
8 these permits or we have not yet demonstrated
9 compliance.

10 What is necessarily in the environmental
11 impact statement is to bound the environmental impacts
12 in order to have a determination which is slightly
13 suitable is not appropriate at this point to be trying
14 to determine what are the permitting requirements that
15 the agency has made that pose 5 years into the future
16 or 20 years in the future.

17 When we go in for an actual permit
18 application to build intake structure, we will have to
19 provide a design. And we will have to obtain a 316(b)
20 determination. We will have to show that it
21 constitutes the best technology available. And the
22 state will pass on this.

23 We are not going to get the permit unless
24 they determine it will comply. And they will have to
25 determine at that point what are the design features

1 that are necessary, what is the screen size, what is
2 the mesh size, where is intake located. Those are all
3 issues that are exclusive qualities of the statement
4 of the Clean Water Act.

5 We have addressed alternatives. And, by
6 the way, petitioners have stated that they withdraw
7 the portion of the contention that alleged that we
8 have not adequately considered alternatives to the
9 cool water system. That is in contention 3.3.4.

10 And they have said that they have
11 withdrawn that portion. They virtually misstated.
12 They said we haven't analyzed it. We have addressed
13 the mitigation alternatives as possible.

14 The actual choice, though, what will be
15 chosen and how will we comply with the Clean Water Act
16 requirements is a matter that will be decided by the
17 state. And I think it would be infringing upon the
18 state as appropriate authority to establish what is
19 the mitigation measure that is going to be required.

20 I don't think you have to because I think
21 in order to determine the site suitability, all you
22 need to do is look at the bounding impacts. And if
23 you have the impacts and you have the different types
24 of mitigation alternatives that could be used, could
25 be imposed by the state, then you have done enough to

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1 determine whether this site is suitable.

2 You don't have to take it further and say,
3 "The Clean Water Act demands that you do this specific
4 mitigation measure, that you put the intake here, that
5 you limit the thermal impact of this amount, that you
6 dig another channel in the waste heat treatment
7 facility." All of those issues that belong before the
8 state will be looked at by the state in due course.

9 CHAIRMAN BOLLWERK: Again, I think her
10 concern is that given these concerns that have been
11 raised by the state, isn't there some question, at
12 least in terms of the mission of the contention, to
13 say, "Well, the use of the word 'moderate' is not
14 sufficient. It should be something else"?

15 MR. LEWIS: I think "moderate" is
16 appropriate given the undisputed facts in the
17 application. The undisputed facts are even during
18 severe conditions in the past and we have just added
19 very severe conditions from 1998 to 2001 or 2002,
20 where we had sustained very high temperature, there
21 were no droughts of striped bass during that period.
22 And there was no elimination of the habitat in the mid
23 and upper lake. Those are the undisputed facts.

24 We think if you add unit 3, you're not
25 going to see anything different. We have called the

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1 impact "moderate." It may push the fish up into the
2 middle and upper part of the lake or often. You have
3 indicated that die-offs are possible, but given the
4 undisputed facts in the application, moderate is a
5 fair characterization. It's not small. It doesn't
6 mean one that doesn't have to be mitigated. Moderate
7 is what mitigation should be considered at the
8 appropriate time.

9 So what is the material dispute on the
10 genuine issue? The standard for admission of
11 contentions is a genuine dispute on a material issue
12 of fact or law. I mean, I think there has to be a
13 material issue of fact. There has to be a dispute of
14 facts.

15 In the first instance here, it's
16 remarkable. There is no dispute on any facts. We are
17 talking about our adjectives versus their adjectives.
18 I just hope it doesn't rise into a contention.

19 CHAIRMAN BOLLWERK: Although, again, in
20 the NEPA context, the description of these things,
21 given that NEPA is a statute intended to get
22 information out to make sure that things were
23 described properly, doesn't it have some significance?

24 MR. LEWIS: Let me take, for example,
25 impingement. We took an exact projected number of

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1 fish entrained. And we compared the striped bass with
2 the number of fish that are stocked.

3 With respect to other species, we compared
4 it with the reproductive capability of a single fish.
5 With respect to all of the other fishes, all of the
6 other species, there are six fish that make up 99
7 percent of the fish that are entrained. And so we
8 provide the data on those 6 species because they make
9 up 99 percent of the fish in that area entrained.

10 We have shown that the loss of fish, each
11 one of those species, is less than the reproductive
12 potential of a single fish in each of those species.
13 Those are undisputed facts. Petitioners can say all
14 of those great numbers, but we have provided our tests
15 and made our projections that aren't disputed.

16 CHAIRMAN BOLLWERK: Do we have any other
17 questions from board members at this point? Yes?

18 JUDGE ABRAMSON: Just a quick follow-up,
19 counselor. You have given us a numerical estimate on
20 the entrainment, 4,000-odd striped bass on an annual
21 basis. Would that be incremental?

22 MR. LEWIS: No. That's the total for
23 existing units and the unit 3.

24 JUDGE ABRAMSON: Total. And so what would
25 be incremental change? Do you have a number?

1 MR. LEWIS: It's approximately 2,000.
2 It's approximately 2,000 impingement now, I
3 understand, and approximately an additional 2,000.

4 JUDGE BARATTA: In your report, do you
5 have an estimate of the actual area that would be by
6 which the habitat would be reduced?

7 MR. LEWIS: A percentage of the lake?

8 JUDGE ABRAMSON: Yes, or a surface area or
9 any kind of number what this thermal effect would do
10 to reduce the habitat.

11 MR. LEWIS: Let me say first that the
12 habitat production is seasonal. It's during peak
13 periods of temperature, of fish foods, the mid and
14 upper-level lake, and then they recover in the fall
15 and move that down. So it's not a projected permanent
16 loss of habitat.

17 I don't believe we have another percentage
18 estimate of what percentage of the lake they leave.
19 As you can see, this star's point on the map that the
20 petitioners have given is very close to the end of the
21 lake.

22 JUDGE BARATTA: If you don't have an
23 estimate, I mean, clearly that's the high stress time
24 for the striped bass population. And if you don't
25 have an estimate of the reduction of the habitat

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1 during the high stress time, what led you, then, to
2 the conclusion that the impact is moderate, as opposed
3 to severe?

4 MR. LEWIS: Because we have conducted many
5 years of monitoring. We have seen the impact on the
6 striped bass in prior periods, including the impact
7 during the recent severe drought. We have observed
8 the movement to the mid and upper portions of the lake
9 and the effect on the striped bass in summer months.
10 And you have seen the tendency for the striped bass to
11 recover and to return to the full lake, when the
12 temperatures drop later in the year.

13 JUDGE BARATTA: Do you have an estimate of
14 what the habitat is now for the existing conditions
15 during the summer months?

16 MR. LEWIS: Only that in the summer
17 months, the striped bass had moved to the mid and
18 upper portions of the lake. I think there is a
19 discussion in the environmental report that describes
20 what we mean by the low portion of the lake and the
21 middle and upper portions of the lake. I am just not
22 prepared with the specific citations of where that is
23 described.

24 What we say is that they leave the lower
25 portions of the lake and they move to the middle

1 portions of the lake. And I believe there is a
2 description of what those areas mean, but I don't
3 think we have counted them and recited them in acreage
4 or --

5 JUDGE ABRAMSON: Is it accurate to say
6 that they are seeking a certain water temperature or
7 water temperature less than a certain number? Is that
8 what is going on?

9 MR. LEWIS: I don't think so. I don't
10 think at this point there is any assertion that there
11 has to be a specific thermal discharge limit.

12 JUDGE ABRAMSON: Now, I wasn't saying you
13 got it. With the striped bass migration, they're a
14 cool weather fish. They're looking for cooler water.
15 Is that --

16 MR. LEWIS: That's correct. They're
17 natural environment is estuaries and not lakes and
18 rivers and those waters. This is their natural
19 environment. They are sensitive. And they do avoid
20 the warm portion of the lake when the temperature gets
21 the temperature that they prefer.

22 I understand that there is a figure in the
23 environmental report section 2.3 that defines the
24 lower, middle, and upper sections of the lake.

25 JUDGE ABRAMSON: Did I understand

1 correctly that the state stocks this annually, 100 to
2 200 thousand fish? And I assume that that has
3 maintained some sort of equilibrium on the population?
4 What they stocked is enough to replenish what is lost?
5 Is that your understanding?

6 MR. LEWIS: That is correct.

7 JUDGE BARATTA: Now, presumably when you
8 say there has been no evidence of fish kills and such,
9 do you base that on observation of whether or not
10 there are any dead fish floating around? But what
11 about with respect to the impact on their weight? Do
12 you have a monitoring program that has historical data
13 on that?

14 MR. LEWIS: We do have a monitoring
15 program. Our environmental report does indicate that
16 during the summer months with the striped bass subject
17 to habitat restrictions because of the temperature
18 weight, that they do lose weight and show some
19 decline. The environmental report shows that they
20 tend to recover after that season.

21 JUDGE ABRAMSON: Let's come in another
22 door here. Have you tried to estimate the thermal
23 effect on the lake? Have you done some sort of
24 thermal maps that would indicate what the effect of
25 the third unit would be on the thermal map for the

1 lakes or did you estimate what the --

2 MR. LEWIS: The environmental report
3 describes the increase in temperatures that would be
4 expected in the lake. It's in environmental report
5 section 5.3.

6 JUDGE ABRAMSON: That is the thermal
7 effects? It would show maps and such of what the
8 effect is?

9 MR. LEWIS: Yes.

10 JUDGE ABRAMSON: So if one knew what
11 temperature these fish were seeking, and I suppose not
12 being a fish, we're not likely to, but if one knew,
13 one could take those maps and see what effect it might
14 have on --

15 MR. LEWIS: One does know, in fact. Our
16 description of the striped bass particularly cites the
17 studies that indicate what is their thermal
18 sensitivity and what temperatures can they tolerate
19 and what temperatures do they avoid. And so our
20 discussion of striped bass can take that very
21 information.

22 JUDGE ABRAMSON: Therefore, putting that
23 in combination with thermal maps, which indicate the
24 change in temperatures, should enable somebody to
25 determine what reduction there would be in the

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1 habitat?

2 MR. LEWIS: I would think so.

3 JUDGE BARATTA: But that wasn't done in
4 terms of making the statement that the impact would be
5 moderate. Is that correct?

6 MR. LEWIS: I think that the preparers of
7 the environmental report used the only data they have,
8 including the projections of what the temperatures
9 were, their knowledge of the thermal sensitivity of
10 the species, their knowledge of what the lake
11 temperatures have been in the past, and what would be
12 the impact on the species. And they concluded that
13 there would be likely some exacerbation of the fact
14 that the thermal bass leaving the lower level during
15 peak temperatures, that it would recover that habitat
16 in the cooler waters.

17 JUDGE ABRAMSON: I haven't done these
18 particular kinds of thermal hydraulic calculations,
19 but I assume that doing a calculation to estimate the
20 additional effect of this unit on the temperature
21 profiles in the lake is a fairly complicated
22 calculation, which involves not just the temperature
23 of the effluent from the plant but also the rain and
24 all of the other environmental impacts.

25 MR. LEWIS: I agree. I don't think it's

1 a back of the envelope calculation. I think it also
2 depends on currents and things like that.

3 CHAIRMAN BOLLWERK: Any other board
4 questions at this point? No?

5 (No response.)

6 CHAIRMAN BOLLWERK: All right. Let's turn
7 to the staff, then. Thank you, sir.

8 MS. POOLE: Thank you, Your Honor. We
9 won't repeat any points that are in our paper. We
10 will just make a few points that came up in the
11 discussion today.

12 First, with respect to the Clean Water
13 Act, Ms. Curran indicated that she doesn't want to
14 mitigate the Clean Water Act in this kind of setting.
15 We certainly agree that that is not the jurisdiction
16 of the NRC. Such compliance would be the jurisdiction
17 of the Environmental Protection Agency for us here as
18 delegated to the Commonwealth of Virginia.

19 The NRC is barred by statute from making
20 such substantive determinations with the
21 implementation of section 5.11(c)(2) of the Clean
22 Water Act of 1972.

23 I also want to say that as stated in 10
24 CFR section 51.71(d), compliance with the Clean Water
25 Act is not a substitute for and, thus, not a

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1 requirement for the NRC to raise all of the
2 environmental impacts of the proposed actions,
3 including the degradation, if any, of water quality,
4 and consider alternatives that are available to reduce
5 the adverse effects.

6 I thought I understood from Judge Bollwerk
7 that there had been a question as to what happens in
8 a situation where, as here, Clean Water Act permits
9 will not be obtained in association with the requested
10 action. The regulations speak to this possibility.

11 Section 51.71(d) requires that the
12 environmental impact of the proposed action be
13 considered with respect to the appropriate Clean Water
14 Act matters. And I quote, "Irrespective of whether a
15 certification or license from the appropriate
16 authority has been obtained."

17 Footnote 3 to that section states that "If
18 environmental assessment of aquatic impact from plant
19 discharge is available to the permitting authority,
20 the NRC will consider that assessment in the
21 determination of evaluating impacts." And that has
22 been done in the past in practice.

23 When no such assessment is available, that
24 section, that footnote requires that the NRC will
25 establish on its own or in conjunction with the

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1 permitting authority and other agencies having met all
2 the expertise, the magnitude of potential impacts and
3 describing the overall cost-benefit balance.

4 So while we do agree that section 51.45(d)
5 requires no real listing of compliance, that does not
6 mean that, whereas, here, the state permits were not
7 obtained as yet does not mean the impacts will not be
8 considered by the agency.

9 Secondly, with respect to the dam, it's
10 the staff's position that the petitioners have not
11 established a causal connection between impacts of the
12 dam in the proposed action.

13 It's also true that the dam has
14 independent utility. It's used for flood control at
15 this lake; recreation, of course; and also, as
16 discussed in the applicant's environmental report at
17 section 2.4.2.1, the dam and the lake mitigated acid
18 flow from a contrary creek. So we don't propose that
19 as a basis for an argument that the dam has no other
20 use.

21 In addition, we would emphasize that the
22 impacts from the dam, as established now, are baseline
23 impacts that will be considered by the staff in
24 determining cumulative impacts from the proposed
25 action.

1 Thirdly, the staff wishes to clarify a
2 point we made that the applicant's argument on
3 contention 3.3.3. We stated that the staff does not
4 object to admission of that portion of contention
5 3.3.3 related to other ER failed to adequately the
6 impact of reduced lake levels on water-based
7 recreational uses of Lake Anna and/or homeowners who
8 live around the lake.

9 The staff's withdrawing of this objection
10 in this respect was based on the view that
11 petitioners' argument need not be viewed exclusively
12 as an assertion that permitting use of public waters
13 conflicts with the Clean Water Act and associated
14 state law. I would refer you to page 42 of the
15 petition.

16 However, this asking you that some unfair
17 approach be included with the alleged violation of the
18 Clean Water Act and associated state water laws is
19 inextricably bound to the contention on a whole on
20 this subject. This would render the contention
21 inadmissible since, of course, alleged violations of
22 the Clean Water Act and associated state laws cannot
23 be the basis for an admissible contention in this
24 proceeding.

25 The concern about admitting a contention

1 based on an assertion of the Clean Water Act was
2 proposed by petitioners' statement at the onset. The
3 record will reflect that the petitioners proposed the
4 argument that the state lift this contention. They do
5 not direct the alleged violation of the Clean Water
6 Act and related state laws.

7 To the extent the contention is alleging
8 a violation of the Clean Water Act and related
9 statutes, whether the allegation is direct or indirect
10 cannot the basis for an admissible decision.
11 Therefore, the staff's change of position that we no
12 longer object to this aspect of the contention should
13 not be understood to suggest that the board could not
14 otherwise rule.

15 That's all we have. Thank you.

16 CHAIRMAN BOLLWERK: Any questions?

17 (No response.)

18 CHAIRMAN BOLLWERK: All right. Let me
19 turn back to Ms. Curran, then.

20 MS. CURRAN: Well, I would like to
21 emphasize that the contention does not amount to a
22 quibble about adjectives. Adjectives are central to
23 questions of whether the National Environmental Policy
24 Act has been complied with. I think Judge Bollwerk
25 made a comment on that word "moderate" versus

1 "significant." It can have a legal significance.

2 Essentially, we believe that Dominion has
3 portrayed the impacts of unit 3 on Lake Anna, thermal
4 impacts on fish, water quality impacts on fish, water
5 flow impacts on recreation on fish. Dominion has
6 portrayed them all as insignificant for purposes of
7 NEPA. And this has legal significance because it
8 affects the degree to which Dominion considers
9 alternatives for mitigating or avoiding those impacts.
10 It also affects the degree to which the environmental
11 report is in front of you.

12 Just as an ordinary person reading the
13 environmental report, I found it frustrating that a
14 great deal of factual information was presented
15 without -- and then very brief statements of impacts
16 were insignificant or moderate, whatever the word was
17 used, without any real discussion of what does this
18 mean. What does this mean for the overall health of
19 this lake, for the impacts on recreation?

20 Just providing a lot of factual
21 information about analyzing it without making a fair
22 assessment of the impacts doesn't give the public and
23 state and federal regulators much of the tools for
24 evaluating the significance of the impacts or how
25 important it is to consider alternatives.

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1 And that, after all, is the purpose of an
2 environmental impact statement: to inform the NRC,
3 the members of the public, and the state and local
4 regulators of what are the impacts of the activity,
5 what are their significance, what is the significance
6 of the impacts and what should be done to mitigate
7 those impacts. That's the concern of these
8 contentions.

9 I think it is important to note that the
10 state was about to deny certification of compliance
11 with the Coastal Zone Act management policies when
12 Dominion withdrew its application on that
13 certification.

14 You can see that on page 7 of exhibit
15 3.3-4, which is a letter from Ellie Irons to Pamela
16 Farragut, at the top of page 7, Ms. Irons said, "Under
17 the present circumstance, DEQ's Office of Wetlands and
18 Water Protection could not agree to the certification
19 that the project would be in compliance with
20 enforceable policies of Virginia coastal resources
21 management program because the office does not have
22 the information necessary to allow such concurrence."

23 There are also numerous comments in the
24 correspondence that is attached to this, these
25 contentions, in which state regulatory officials

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1 express concern that Dominion had not addressed the
2 significance of the impacts.

3 In particular, I direct your attention to
4 exhibit 3.3-5, which is a letter from Gary Martell
5 from the Department of Game and Inland Fisheries to
6 Ellie Irons at page 3. Mr. Martell says that it is
7 likely that even a small increase in reservoir water
8 temperature would have a dramatic effect, further
9 reducing our already amended habitat and perhaps
10 jeopardizing the entire striped bass fishery.

11 Now, that is a weighty impact. That is a
12 significant impact that Dominion may disagree that
13 that is a potential impact, but certainly we have
14 raised a material issue as to whether such significant
15 impacts could occur and whether they need to be
16 addressed more seriously in this environmental report.

17 With respect to the environmental impacts
18 of the dam, I would like to address, call your
19 attention to exhibit 3.3-5, a January 27th letter from
20 the Department of Game and Inland Fisheries to Ellie
21 Irons.

22 In this letter, there is an evaluation of
23 current conditions as a result of the dam, starting at
24 the bottom of page 2, going over onto page 3. The
25 author of the letter, Gary Martell, says, "Current

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1 minimum releases would be weighted in the poor to
2 degraded range of resource protection." And what
3 we're concerned about is the cumulative effects of
4 additional reductions in water flow over this dam.

5 It is legitimate to look at cumulative
6 impacts. I think I heard Ms. Poole say that the
7 impacts of the dam are looked at as baseline impacts.
8 I think it is important to clarify that one doesn't
9 assume that those impacts are acceptable. One takes
10 them into consideration and looks at whether
11 additional impacts would add up to a situation that
12 would be even worse that needs to be addressed.

13 I think I heard Mr. Lewis say that
14 eventually the mitigation alternatives for adding
15 unit 3 would be addressed by the state regulatory
16 agencies and that they would be the ones responsible
17 for choosing what mitigation alternatives are
18 undertaken.

19 Now, certainly it may be true that the
20 state will impose various mitigation alternatives, but
21 I think it is important to bear in mind that NEPA
22 requires an adequate discussion of those alternatives,
23 regardless of what the state alternately does.

24 One can't assume that the state is going
25 to undertake that function and, therefore, it's not

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1 that important for the environmental report to
2 undertake a thorough consideration of alternatives.

3 I also wanted to make a point about the
4 issue of impingement. I think we do have somewhat of
5 a factual dispute here in the sense that although we
6 don't dispute Dominion's numbers regarding the total
7 number of fish that are impinged, we did point out --
8 and we were relying here on a comment made by one of
9 the state regulators -- that Dominion does not address
10 the size and the age of the fish that are impinged.
11 And this is an important consideration in terms of the
12 environmental impact on the fishery. It's not just
13 the total quantity of the fish. It's the size and the
14 age of the fish that matter.

15 I also want to address the issue of
16 periods of low flow. I think Mr. Lewis said that
17 those periods add up to an insignificant amount of
18 time during the year. A couple of points about it
19 first there. They're perennial. They happen every
20 year. They are exacerbated by the additional
21 withdrawals for unit 3. And in periods of drought,
22 they may be exacerbated even further.

23 One also has to look at it's not just a
24 question of, well, this is a small part of the year.
25 It is a part of the year when the resource is used

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1 most heavily in the summer and the fall. And spring
2 is not such an issue, but it's summer and fall that
3 are periods when the resource is heavily used so that
4 the period of time when a resource is adversely
5 impacted, one has to look at that period of time from
6 a perspective of when is this resource most heavily
7 used.

8 Okay. And in support of that, I would
9 like to refer you again to exhibit 3.3-5, the letter,
10 January 27th letter, from Mr. Martell to Ellie Irons,
11 where on page 2, Mr. Martell says, "Water withdrawal
12 increases are also likely to result in lower lake
13 levels during summer and fall months due to increased
14 power plant demand and evaporation." And he goes on
15 to talk about the recreational use of the lake.

16 CHAIRMAN BOLLWERK: Rebuttal time is just
17 about up.

18 MS. CURRAN: I don't have anything
19 further.

20 CHAIRMAN BOLLWERK: Any questions from
21 other board members?

22 (No response.)

23 CHAIRMAN BOLLWERK: All right. Anything
24 further from any of the parties, then?

25 MR. LEWIS: May I respond?

1 CHAIRMAN BOLLWERK: Briefly, but, again,
2 Ms. Curran gets the last word.

3 MR. LEWIS: Yes, sir. Ms. Curran pointed
4 out that there was an assertion that we hadn't
5 indicated the size and distribution of the fish that
6 were entrained. They hadn't explained why that makes
7 a -- they assert it makes a difference, but they
8 haven't offered a basis or any expert opinion or
9 source or document or fact that shows that is the
10 case.

11 As I previously pointed out, we have shown
12 that the number of fish for each of the fish in the
13 impinged fish is less than the reproductive capability
14 of a single fish in these species. I think it is
15 incumbent upon them to say why does it make a
16 difference given that fact, given that undisputed
17 fact.

18 They also say with respect to low flow
19 conditions that occur in the fall, that that's when
20 the resource is used the most. I assume they are
21 talking about downstream flows, but they don't
22 indicate what is the use of this impact. They don't
23 identify a single downstream use or single species
24 downstream that is impacted. This is unsupported and
25 totally inadmissible.

1 CHAIRMAN BOLLWERK: All right. Thank you.

2 Ms. Curran?

3 MS. CURRAN: Well, in terms of the
4 important of size and age distribution of impinged
5 fish, I refer you to page 30 of our reply, where we
6 state that Dominion has ignored petitioners' statement
7 at page 36. That information regarding the size and
8 age distributions of the impinged fish is important
9 because these distributions affect the structure and
10 viability of a population.

11 CHAIRMAN BOLLWERK: Nothing further?

12 MS. CURRAN: No.

13 CHAIRMAN BOLLWERK: All right. Thank you.

14 At this point let's go ahead and take a
15 step.

16 MS. POOLE: I have one comment to make at
17 this time.

18 CHAIRMAN BOLLWERK: All right.

19 MS. POOLE: And that is that with respect
20 to the coastal zone management consistency
21 determination, Ms. Curran said that the state was
22 prepared to deny the certification. It's our
23 understanding that the state and Dominion -- we can't
24 speak for the state, obviously. But it's our
25 understanding the state and Dominion mutually agreed

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1 to withdraw their request because there was not enough
2 data. Accordingly, they were going to wait for the
3 draft environmental impact statement.

4 CHAIRMAN BOLLWERK: The draft
5 environmental impact statement for?

6 MS. POOLE: The ESP.

7 CHAIRMAN BOLLWERK: ESP. Right. Okay.
8 Which the staff is preparing?

9 MS. POOLE: Correct.

10 CHAIRMAN BOLLWERK: All right.

11 MS. CURRAN: I'll just rest on the entire
12 letter that I read to you earlier.

13 CHAIRMAN BOLLWERK: All right. Anything
14 further, then?

15 (No response.)

16 CHAIRMAN BOLLWERK: At this point, then,
17 let's go ahead and take a break. We will take about
18 ten minutes. At 25 after, we will get started again
19 with the next contention. Thank you.

20 (Whereupon, the foregoing matter went off
21 the record at 11:23 a.m. and went back on
22 the record at 11:24 a.m.)

23 CHAIRMAN BOLLWERK: All right. Why don't
24 we go ahead and get started then on the next
25 contention. This one deals with alternatives for

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1 cooling units 3 and 4, is also a North Anna
2 contention, 3.3.4. And, Ms. Curran, I guess I'll just
3 mention as we did yesterday, we'll probably take our
4 lunch break after we're done with this one, so that's
5 where we're headed in terms of scheduling. But what
6 about your time allocation?

7 MS. CURRAN: Ten and ten.

8 CHAIRMAN BOLLWERK: All right.

9 MS. CURRAN: This contention originally
10 charged that Dominion had not considered a range of
11 alternatives for cooling units 3 and 4, including
12 action alternatives and no action alternatives. And
13 Dominion pointed out a discussion of which we were not
14 aware of action alternatives, so the contention has
15 been reduced now to the question of whether Dominion
16 has considered the non-action alternative.

17 CHAIRMAN BOLLWERK: That's all that's left
18 of this contention.

19 MS. CURRAN: Right. I think the no action
20 alternative in our reply that we have incorrectly
21 characterized it as including no action, not using
22 North Lake Anna as a source of cooling water. And I
23 think that's wrong, we considered that. The only no
24 action alternative that is under consideration here,
25 the focus of this contention, is not building units 3

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1 and 4. And Dominion argues that the no action
2 alternative needn't be considered under 10 CFR
3 52.17(a)(2), which states that the NRC doesn't need to
4 consider the need for power or alternative energy
5 sources at the ESP stage, or that that was a facility.
6 And I interpret that to mean that the no action
7 alternative doesn't need to be considered here.

8 I think the context of the no action
9 alternative consideration here would be in the context
10 of avoiding adverse impacts. We've just spent the
11 last hour and a half discussing potential adverse
12 impacts of using Lake Anna to cool unit 3, and so a no
13 action alternative would be a way to avoid those
14 impacts. So it is not essentially an issue about need
15 for power or the benefits of the reactor.

16 This is an area where as I have many times
17 in this ESP proceeding, I find that the limitations on
18 NEPA consideration in ESP proceeding have strange
19 results. There's no closed action here other than to
20 set aside a site for a nuclear plant, and apparently
21 for purposes to have some kind of discussion about the
22 impacts that will last for possibly 20 years, so that
23 when an action is ultimately proposed, there will be
24 less issues that need to be addressed in an
25 environmental impact statement.

1 It doesn't seem like the best way to do an
2 EIS to have compartmentalized discussion of some
3 issues that might relate to other issues, but you
4 don't discuss those because the Commission has a rule
5 saying we're not going to talk about those now. In
6 our view, if the Commission were to postpone this
7 discussion until construction permit stage, that might
8 make more sense.

9 On the other hand, if the Board finds that
10 the no action alternative should be considered now
11 under these circumstances that we're raising it to
12 ensure that the issue is not foreclosed from us later
13 on down the road.

14 CHAIRMAN BOLLWERK: Okay.

15 MS. CURRAN: I don't have anything more.

16 CHAIRMAN BOLLWERK: Any questions from
17 either of the Board Members at this point? All right.
18 Let's turn to the Applicant then.

19 MR. LEWIS: The Commission has stated that
20 the proposed action of issuing an ESP is not the same
21 as the proposed action of building a plant, and we've
22 cited the proposed rule when the Commission provided
23 that clarification. Similarly, the no action
24 alternative is different in the context of ESP
25 proposal to build. No action in the context of an

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1 early site permit means not granting the early site
2 permit. Does that mean it means that you avoid no
3 significant impacts, not only significant impacts of
4 issuing ESP, and you gain none of the intended
5 benefits of getting an ESP, which is early resolution
6 of siting issues. So while you can say well you can
7 put a sentence into the final report indicating that,
8 that's really not a material issue. It has absolutely
9 no bearing on the suitability of the site, and has no
10 bearing on the outcome of the proceeding.

11 With respect to no action once an
12 application for a construction permit and operating
13 license have issued, at that point there is a proposal
14 to build, and no action in that context is not
15 building. As petitioners are suggesting, you should
16 say that now. You should put a line in saying if you
17 don't build, you have none of the impacts. Again,
18 that's material, if you don't build, you have none of
19 the impacts, and that's affecting the outcome of the
20 proceeding. It doesn't have anything to do with the
21 suitability of the site.

22 A meaningful analysis of no action is
23 going to look at does that make sense? Do you need
24 the plant? Are there other ways you should build it?
25 And so if you're going to have a meaningful discussion

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1 of no action, you're going to necessarily get into is
2 the power needed, and are there alternative ways of
3 providing that power.

4 The Commission has clearly and
5 unambiguously said you don't have to look at benefits,
6 you don't have to look at need for power. And that
7 proposed rule that we cite, it also indicated that you
8 don't have to look around for energy sources at the
9 ESP stage. And it follows as a pure matter of logic
10 that you do not need to consider Petitioner's no
11 action alternative, do not build alternative at this
12 stage.

13 CHAIRMAN BOLLWERK: Okay. Anything
14 further? Any question from either of the Board
15 Members at this point? All right. Turn to Staff
16 then.

17 MS. POOLE: Thank you. As stated in our
18 papers, the Staff is of the view that this portion of
19 the contention is admissible. The no action
20 alternative should be addressed, and that said, our
21 discussion of no action alternative as is stated here,
22 need not consider an assessment of benefits; for
23 example, the proposed action pursuant to 10 CFR 52.18
24 and 52.21.

25 Similarly, the Commission has made clear

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1 that the ESP Applicant need not include an assessment
2 or discussion of alternative energy sources. That
3 discussion can be deferred until the construction
4 permit or COL stage.

5 It is our view that the no action
6 alternative discussion would consist of two parts.
7 First, the no action alternative would include a
8 scenario in which the NRC would not issue the ESP.
9 There are no environmental impacts associated with not
10 issuing the ESP except those associated with site
11 preparation work allowed pursuant to 10 CFR
12 50.10(e) (1) that would be avoided.

13 I would note that in that case, site
14 redress would not necessary in the event the NRC
15 declined to issue a construction or COL. Second,
16 given the Commission's directive in Section
17 52.18(a) (2) that the EIR address the environmental
18 effects of construction and operation, the alternative
19 no action here encompasses no construction and
20 operation of such a reactor. The impacts predicted in
21 the environmental report would then not occur.

22 In addition, the early resolution of the
23 environmental impacts of construction and operation of
24 reactors that fall within the site parameters, those
25 issues would not -- those benefits would not end the

1 deal. That is all we have.

2 CHAIRMAN BOLLWERK: I take it there hasn't
3 been any request here to develop the site at all in
4 terms of North Anna prior to -- there is no site
5 redress we're talking about here.

6 MR. LEWIS: Yes, there is. Our
7 application includes a site redress plan that would
8 allow us to perform certain limited work activities
9 once we get the ESP. However, the NRC regulations
10 only us to understate such activities if the NRC staff
11 concludes that they're environmentally insignificant
12 in their EIS based on our site redress plan. So with
13 respect to limited work, there is no significant
14 environmental impacts by definition if we do not
15 conduct any activities unless the Staff first approves
16 based on our site redress plan that the activities
17 would be permissible and, therefore, environmentally
18 insignificant.

19 CHAIRMAN BOLLWERK: Is that different for
20 the new applications in terms of what's being
21 proposed?

22 MR. FRANTZ: Exelon also has a site
23 redress plan.

24 MS. SUTTON: We do not have a site
25 redress.

1 CHAIRMAN BOLLWERK: Okay. I was confusing
2 them. I apologize. All right. Any other questions
3 from the Board at this point? All right. Let me turn
4 to Ms. Curran. I take it, obviously, since the Staff
5 believes there needs to be discussion of no action
6 alternative that there will be one in the draft
7 environmental impact statement.

8 MS. POOLE: That's correct.

9 JUDGE ABRAMSON: And with just those two
10 points that you've mentioned?

11 MS. POOLE: I believe that's correct, yes.

12 CHAIRMAN BOLLWERK: All right. And in
13 terms of your rebuttal, if you have anything to say
14 about what the Staff has indicated is necessary in
15 terms of your contention, can you elucidate that, as
16 well, or give us some idea of whether you think that's
17 adequate or not.

18 MS. CURRAN: I'm sorry. I didn't
19 understand the question.

20 CHAIRMAN BOLLWERK: In terms of what the
21 Staff has said they're going to put into the DEIS, in
22 terms of what you want in this contention, can you
23 tell us whether you consider that adequate, or is that
24 not what aiming at?

25 MS. CURRAN: Could I ask Ms. Poole just to

1 repeat what's going in the DEIS?

2 MS. POOLE: The no action alternative
3 would consist of a discussion --

4 CHAIRMAN BOLLWERK: Not too quickly, okay.

5 MS. POOLE: I'm sorry. Would consist of
6 two parts. First, the no action alternative would
7 include a scenario in which the ESP is not issued. In
8 such a case, there would be no environmental impacts
9 associated with not issuing the ESP, Staff feels
10 associated with site preparation.

11 Second, the no action alternative would
12 indicate that it encompasses no construction and
13 operation of a reactor facility. The impacts,
14 therefore, that were predicted in the environmental
15 impact statement would then not occur.

16 MS. CURRAN: I have a question.

17 CHAIRMAN BOLLWERK: All right. Normally
18 we don't have the parties question each other. If you
19 want to go and pose your question to the Board and Ms.
20 Poole can answer it, we'll then do that.

21 MS. CURRAN: Will the draft EIS, DEIS
22 weigh alternatives? Will it weigh the various action
23 alternatives against the no action alternatives?

24 MS. POOLE: Let me confer for a moment, if
25 I may.

1 JUDGE ABRAMSON: Let me ask counsel what
2 provisions of what regulation require that they be
3 weighed?

4 MS. CURRAN: NEPA is just the general
5 requirement for an environmental impact statement, and
6 I think it's in 10 CFR - I'll find the section - but
7 the basic requirements for an environmental impact
8 statement is first, one discusses the impacts. And
9 the one evaluates alternatives and ways considering
10 their costs and benefits. That's real standard for an
11 environmental impact statement. And I'm sort of --
12 again, I find this process confusing because if the
13 NRC has carved out in its regulations an ordinary part
14 of an environmental impact statement that's not going
15 to be included, which is, for instance, the need for
16 power and the benefits of alternatives, then it raises
17 a question in my mind what is being analyzed, and what
18 is conclusively decided in this environmental impact
19 statement, and that becomes important.

20 For instance, if all the environmental
21 impact statement has in it is a statement that if we
22 implement the no action alternative there is no
23 impacts. Then I guess it's postponed until another
24 day, evaluating the costs and benefits of going
25 forward with a preferred alternative or some other

1 alternative. But if the EIS is going to come out that
2 its ESP is going to weigh the alternatives, then it
3 seems to me we've got a problem.

4 JUDGE ABRAMSON: Let me repeat this. Can
5 we go back to a portion of our regulations that talk
6 about what is required and show me where it is you're
7 referring to, please?

8 MS. CURRAN: Sure. It would be the
9 section on draft environmental impact statements. I
10 think it's 10 CFR 51.70.

11 JUDGE ABRAMSON: Okay, or 71.

12 MS. CURRAN: Contents, yes, 51.71.
13 Analysis, it's probably in Section D. It says, "The
14 draft environmental impact statement will include a
15 preliminary analysis that considers and weighs the
16 environmental effects of the proposed action. The
17 environmental impacts of alternatives to the proposed
18 action and alternatives available for reducing or
19 avoiding adverse environmental impacts."

20 Then it goes on to say, "Except for
21 supplemental environmental impact statements for the
22 operating license renewal stage, draft environmental
23 impact statements should also include consideration of
24 the economic, technical, and other benefits and costs
25 of the proposed action and alternatives, and indicate

1 whether the interests and considerations of federal
2 policy, including factors not related to environmental
3 law, if applicable, are relevant to the consideration
4 of environmental effects of the proposed action."

5 JUDGE ABRAMSON: And so your question to
6 the Staff is are they going to comply with that?

7 MS. CURRAN: Yes.

8 JUDGE ABRAMSON: Okay. All right,
9 simplify this. Can the Staff tell us whether they
10 intend to comply with that section or not?

11 MS. POOLE: We intend to comply with that
12 section, absolutely; except as --

13 JUDGE ABRAMSON: The devil will be in the
14 details, however.

15 MS. POOLE: We do intend to comply with
16 that section, except as included by Preference 2,
17 which states that the need for power and alternative
18 energy sources need not be discussed at this stage.

19 CHAIRMAN BOLLWERK: All right. Which I
20 think was raised in another contention. We talked
21 about that yesterday.

22 MS. CURRAN: Well, I think what I -- I was
23 answering a question as to whether what the Staff is
24 planning to do would satisfy us. I think that was the
25 question.

1 JUDGE ABRAMSON: Yes.

2 MS. CURRAN: And I think the answer is
3 maybe, but I'm worried.

4 JUDGE ABRAMSON: All right.

5 MS. CURRAN: And it has to do with the
6 global structure of the way the NRC as an agency is
7 dealing with these environmental impact statements, so
8 I don't really --

9 JUDGE ABRAMSON: But there's no authority
10 beyond this for requesting anything, is there, or am
11 I missing something? This is the authority for the
12 Staff to do whatever they have to do.

13 MS. CURRAN: Yes, that's right.

14 CHAIRMAN BOLLWERK: All right.

15 JUDGE ABRAMSON: Can I follow this up --

16 CHAIRMAN BOLLWERK: Sure.

17 JUDGE ABRAMSON: Let me just follow this
18 up for one second. It started with a contention that
19 Dominion had not included certain things in its ER.
20 The Staff intends to address them in the EIS, so
21 you've got a contention of the mission as I see it.
22 Will you be - what's the right word? Will the Staff's
23 compliance with the requirements of 51.71 satisfy the
24 omission?

25 MS. CURRAN: Well, from my perspective,

1 what we are concerned about is we want to plead a
2 timely contention, and we are obligated by the NRC's
3 admissibility criteria to address the environmental
4 report. We have to do that, so you might decide that
5 this is a non-issue because the Staff has decided to
6 address it, but we're not in that position. We are
7 obligated under the regulations to identify a defect
8 in the environmental report.

9 JUDGE ABRAMSON: I understand.

10 CHAIRMAN BOLLWERK: All right. And again,
11 if the -- argument it's not in the ER, if it needs to
12 be in the ER, it has to be in the ER, so that's where
13 we're at right now.

14 JUDGE ABRAMSON: Right.

15 CHAIRMAN BOLLWERK: All right. Anyone
16 else want to say -- you can have more, if you have
17 anything else you want to say in rebuttal at this
18 point.

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

20 CHAIRMAN BOLLWERK: Mr. Lewis.

21 MR. LEWIS: I think the discussion of
22 weighing the impacts, weighing the no action
23 alternative speaks volumes. How do you weigh no
24 action alternatives unless you consider need for power
25 and alternative energy sources? You have to decide

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1 that's the one you should choose or not choose. It's
2 inextricably tied with the need for power and
3 alternative energy sources, which is why we did not
4 address it. If there is no need to weigh it, then
5 it's just immaterial. You could have a sentence, we
6 could add a sentence later on that says okay, if we
7 don't do anything these impacts won't occur. That's
8 absolutely immaterial. It just adds nothing to the
9 analysis, has no effect on the outcome of the
10 proceeding, and this contention just is not a material
11 issue, one that could affect the outcome of this
12 proceeding.

13 MS. CURRAN: But I think the next
14 question, I've already commented on, why are we here?
15 Why are we doing this? Because if we're not going to
16 weigh the alternatives why are we now cementing
17 discussions of the impacts? If we're not going to do
18 the whole analysis, is the purpose of this just to
19 make findings and then put those in place so that
20 later on some other party who comes along and wants to
21 challenge a construction permit application at the
22 juncture where that becomes an actual proposed action
23 can be told well, we've already evaluated the impacts
24 10 years ago. Where were you?

25 I think it's incumbent upon us to raise

1 that question in a legal context, but I think that's
2 the fundamental question that is raised by this whole
3 proceeding, is why are we having a NEPA analysis now
4 when there's no actual action pending, and when we are
5 foreclosed from the real NEPA inquiry, which is what
6 are the costs and benefits of the alternatives, and
7 which is the preferred one.

8 MR. LEWIS: Can I just add something I
9 think is a very easy answer to it?

10 CHAIRMAN BOLLWERK: Right.

11 MR. LEWIS: We're going to look at site
12 suitability; therefore, we're looking at a lot of
13 issues that have to do with what are the impacts, is
14 the site suitable. The issue about should you not
15 build doesn't relate to site suitability, it relates
16 to we build, you build a new plant and that's the COL
17 issue about the ESP.

18 MS. CURRAN: And I'd like to respond to
19 that too.

20 CHAIRMAN BOLLWERK: All right. Let me
21 just see if the Staff has anything to say about any of
22 this before we --

23 MS. POOLE: No, we have nothing to add at
24 the moment.

25 CHAIRMAN BOLLWERK: All right.

1 MS. CURRAN: Because I fell into that trap
2 before, and I think it was a trap. This NEPA review
3 is not just about site suitability. The Atomic Energy
4 Act review is about site suitability. It's about Part
5 52 and Part 100, but the environmental impact
6 statement here isn't limited to site suitability.
7 There's nothing you can find in Part 51 that says
8 that, or Part 52, I don't think. This is some kind of
9 preliminary environmental impact statement for
10 construction and operation of a nuclear power plant,
11 and the information happens to be incomplete, but the
12 scope of issues to be addressed isn't limited to site
13 suitability. I don't think you can find support for
14 that.

15 JUDGE ABRAMSON: It seems to me what
16 Petitioners are after is to make sure that the door
17 isn't closed on them at some later juncture to
18 challenge environmental impacts which are not
19 addressed at this stage, so that we can focus here on
20 what specific aspects of environmental impact are
21 realistic to address when we're looking at this early
22 site permit. Is that fair? And what we want to do is
23 tie down what can be tied down, and leave open what
24 cannot be tied down.

25 MS. CURRAN: Yes. There is another

1 question too, that I don't think it's in the purview
2 of this Court to answer, but whether it's appropriate
3 or fair to do that.

4 JUDGE ABRAMSON: Shall I run for Congress?

5 MS. CURRAN: Yes.

6 CHAIRMAN BOLLWERK: All right. Anything
7 any of the parties want to say further about this
8 contention? Do you have any comments that you want to
9 make on what Ms. Curran has talked about in terms of
10 the process?

11 MS. POOLE: No, we don't.

12 CHAIRMAN BOLLWERK: All right. Anything
13 further, Mr. Lewis?

14 MR. LEWIS: Nothing further.

15 CHAIRMAN BOLLWERK: Ms. Curran, anything
16 further?

17 MS. CURRAN: Yes, just one more comment.

18 CHAIRMAN BOLLWERK: All right.

19 MS. CURRAN: Just getting back to the
20 scope of the NEPA inquiry, I think if you look you'll
21 see that ESP is, in fact, a partial construction
22 permit. This is a construction permit for purposes of
23 NEPA. That's all I have.

24 CHAIRMAN BOLLWERK: All right Anything
25 further from anyone? All right. At this point then,

1 any Board questions? All right. At this point, we'll
2 go ahead and take our break for lunch. Why don't we
3 come back at 1:00 and we'll reconvene. Again, as was
4 the case yesterday, if you have a badge with a red V
5 on it you can use the elevator in the back, go on up
6 to the first floor. The cafeteria is over in this
7 direction. As long as you're between the elevator and
8 the cafeteria, you shouldn't have any problem with the
9 guards. If you wander further than that, you may be
10 encountering one of them. And we should try to
11 reconvene at 1:00.

12 MR. LEWIS: Judge Bollwerk.

13 CHAIRMAN BOLLWERK: Yes.

14 MR. LEWIS: At this point, we finished all
15 Dominion's contentions?

16 CHAIRMAN BOLLWERK: As far as I'm aware,
17 yes.

18 MR. LEWIS: Do you know how you discuss --

19 CHAIRMAN BOLLWERK: I will at the end, but
20 I don't want to -- I need to hold those until the end,
21 obviously.

22 MR. LEWIS: I didn't know if --

23 CHAIRMAN BOLLWERK: If you want to take a
24 break for an hour between 1 and 2, you can certainly
25 do that. But just basically in terms of the

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1 contentions, unless something came up, the question
2 like I proposed to them about site remediation, that
3 would be -- let's then begin at 1:00, and we'll see
4 you then. Thank you.

5 (Whereupon, the proceedings in the above-
6 entitled matter went off the record at 11:53 a.m. and
7 went back on the record at 1:00 p.m.)

8 CHAIRMAN BOLLWERK: All right. Let's go
9 on the record, please. We're back after a lunch break
10 to hear argument on the next contention, deals with
11 adverse impacts on minority and low income community.
12 This is a Grand Gulf contention, environmental
13 contention 3.1. Ms. Curran, are you going to be
14 arguing this one?

15 MS. CURRAN: Yes, I am.

16 CHAIRMAN BOLLWERK: All right. And what's
17 your -- ten and ten again?

18 MS. CURRAN: Ten-ten.

19 CHAIRMAN BOLLWERK: All right.

20 MS. CURRAN: Before I begin, I would like
21 to introduce the Board to two representatives of the
22 NAACP who have come up here from Mississippi, have
23 driven a 16 hour drive to be here, and that is Wilbur
24 Ross, Ellis Neall, and also with them is Mr. Neall's
25 daughter, Erica Rainey.

1 CHAIRMAN BOLLWERK: She obviously didn't
2 make it in. Right.

3 MS. CURRAN: Yes. I'm sorry. Thanks to
4 Ms. Olaff she was able to come in.

5 CHAIRMAN BOLLWERK: Thank you for coming
6 all the way up here to join us.

7 MS. CURRAN: In this contention,
8 Petitioners assert that the environmental report
9 submitted by SERI in support of its early site permit
10 application does not comply with the National
11 Environmental Policy Act because it does not
12 adequately consider the adverse and disparate
13 environmental impacts of the proposed nuclear
14 facilities on a predominantly African American and low
15 income community of Clayborn County.

16 We have submitted a contention. We've
17 also submitted a written reply to the arguments made
18 by SERI and the NRC Staff. I'm not going to go over
19 those arguments in detail. I would just like to spend
20 these 10 minutes going over some of the most important
21 points.

22 First of all, I think there's been an
23 argument that we do not -- we have not alleged or
24 demonstrated that the impacts of concern to us are
25 disproportionately high in adverse impacts as the

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1 words that are used in Private Fuel Storage, CLI02-20.
2 I think it goes without saying that the impacts of a
3 nuclear power plant on a surrounding community are
4 significant because of the potential for a severe
5 accident. This potential is acknowledged in the NRC's
6 emergency planning regulations.

7 The NRC goes to great lengths to require
8 utilities, licensees, and local communities to be
9 prepared for these types of accidents. And this is
10 the major concern of this contention, that this
11 community, because of its unique circumstances, is not
12 in a position comparable to other communities to
13 respond to such an accident. And this is where the
14 disproportionately high and adverse impacts arise
15 from.

16 There's also been an argument that the
17 appropriate area of impact to be looked at is the 50
18 mile radius around the plant. And I think we all have
19 different interpretations of the NRC's guidance for
20 compliance with NEPA with respect to environmental
21 justice, but each case -- I think the guidance does
22 say that each case needs to be viewed on its own
23 merits.

24 Here our concern relates fundamentally to
25 emergency planning and preparedness for a severe

1 accident. It also relates to the fact that the
2 community that lies closest to this nuclear plant is
3 the community that is right within the 10 mile EPZ,
4 which happens to be approximately 85 percent minority.
5 By virtue of their location extremely close to the
6 plant, this community stands to be disproportionately
7 affected by the impacts of the operation of a new
8 reactor in Grand Gulf, in relation to other people who
9 live within 50 miles, and also in relation to other
10 communities who live near other nuclear power plants,
11 which may not be (a) either high in minority
12 representation or poverty; and also, which are likely
13 to have much greater resources for responding to a
14 radiological emergency.

15 These are the peculiar circumstances, and
16 I'm using the words of the LES case, the Commission's
17 decision in that case that define this community, and
18 that have to be taken into account in looking at
19 whether there are significantly high and adverse
20 disproportionate impacts.

21 An argument has also been made that the
22 information that we've provided about the
23 discriminatory effect of the Mississippi Tax Code is
24 outside the scope of this proceeding, because the NRC
25 doesn't -- has stated that it does not have the

1 expertise to evaluate issues related to
2 discrimination.

3 I think it's important to recognize that
4 what we're -- the purpose for which we introduce the
5 information about the Mississippi Tax Code is to show
6 what the condition is of this community, the condition
7 that a new reactor would come into. It is not to
8 assert that discrimination is involved in a proposed
9 siting of this reactor. It is to say that because of
10 discrimination in the past, this community is in a
11 uniquely vulnerable situation, a disadvantaged
12 situation because of its lack of resources to respond
13 to a radiological emergency.

14 If you looked at virtually any other
15 community that's nearby a nuclear power plant, there
16 is a significant amount of tax revenue flowing from
17 that nuclear power plant to the community and
18 immediate vicinity. And whether or not -- I don't
19 believe it's necessary for the Licensing Board to
20 inquire into whether or not the Mississippi Tax Code
21 is discriminatory. It is simply necessary to
22 recognize that this tax code has had the effect of
23 drastically limiting the amount of resources that are
24 available to the country government to respond in an
25 emergency. And we have attached declarations from

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1 various officials at the county government showing
2 that the fire department, the police department, the
3 hospital department are literally in distress in terms
4 of the adequacy of their facilities to respond to such
5 an accident.

6 Another argument has made one of our --
7 one of the aspects of our contention is that the
8 benefits of this proposed plan are not going to flow
9 in an equitable manner to the community that lies
10 right next to it, to the minority community, because
11 most of the jobs will go elsewhere. And we're basing
12 this on the historical experience of this community
13 with the existing plan.

14 Now it is true that in the PFS case, the
15 Commission ruled that it would not consider economic
16 benefits in the context of an environmental justice
17 case, but I think it's important to recognize that in
18 that case, the Commission noted that the entire case
19 was focused on a question of economic benefit. And
20 here, I think this case is distinct in the sense that
21 our major concern is with the disproportionate adverse
22 impact on the safety and health of this community and
23 on their environment due to the risk of a severe
24 accident.

25 And the question of the disparate economic

1 benefits does come into the picture, but there is a
2 primary significant adverse physical impact that we're
3 talking about. And I think in that way this case is
4 distinct from PFS.

5 I also think that in an environmental
6 impact statement, it is required that the benefits be
7 evaluated, so it is necessary to look behind SERI's
8 assertions which they do make in the environment
9 report regarding the number of jobs that would go to
10 the community, so it is important to address whether
11 that information is accurate when it's going to be
12 weighed in the cost benefit analysis.

13 Finally, I'd like to point out a piece of
14 correspondence that came out after our initial
15 contentions were filed, a piece of correspondence from
16 the NRC Staff that in our view, supports the substance
17 of our concerns. And this letter was cited in our
18 reply, but I'd just like to go over some of the
19 contents of the letter.

20 It's a letter from James H. Wilson, Senior
21 Project Manager for License Renewal and Environmental
22 Impacts, Division of Regulatory Improvement Programs,
23 Office of Nuclear Reactor Regulation to William A.
24 Eaton, Vice President of SERI. The letter is dated
25 May 19th, 2004, and it is a request for additional

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1 information.

2 This request for additional information
3 touches on all the fundamental elements of our
4 contention. For instance, at page 11, in Question
5 E4.4-3, the Staff asks for information about the
6 distribution of Mississippi's in lieu tax dollars
7 collected on the Mississippi statute that is at issue
8 in the contention. At page 14, in Question E5.8-2,
9 the Staff asks SERI to provide the basis for the
10 assumption in the ER that 50 percent of the plant
11 workforce in a nuclear plant at the Grand Gulf site
12 would come from the 50 miles surrounding Grand Gulf.
13 At page 16, the NRC asks a number of questions about
14 SERI's severe accident analysis, which is one of the
15 subjects of the contention that the environmental
16 report does not provide adequate consideration of the
17 impacts of severe accidents on this minority
18 community. At page 18, the Staff asks a number of
19 questions about the comparison of the Grand Gulf site
20 with other sites, which is one of the concerns of our
21 contention, which is that the environmental justice
22 considerations were not included in the comparison of
23 sites, such that it doesn't inform -- the
24 environmental justice considerations do not inform the
25 consideration of alternative sites.

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1 And several of these questions relate to
2 environmental justice issues. For instance, there's
3 a question, E9.0-5 that asks to provide tables showing
4 local taxes paid to each local jurisdiction, and the
5 proportion of these taxes are of local government's
6 budgets at River Bend, Fitzpatrick and Folcrum.

7 And finally, I'd like to make a comment
8 about our reliance on the declaration of Dr. Robert
9 Bollard, which is attached to the contention. This is
10 a very similar issue to the issues we discussed with
11 respect to the declaration of David Lockbaum, and the
12 declaration of Barry Solkin in support of our other
13 contentions.

14 I would say this situation is comparable
15 to the situation concerning the declaration of Barry
16 Solkin. We do rely on Dr. Bollard's expertise for our
17 evaluation of the environmental impacts with respect
18 to environmental justice of the proposed facilities,
19 but except with respect to the issue of the effect on
20 property values, the rest of the contention is
21 supported by other documentation, in addition to Dr.
22 Bollard's declaration. So that while we believe that
23 the declaration is adequate for all the reasons that
24 we've already discussed with respect to Mr. Lockbaum's
25 declaration, if the Board were to find that Dr.

1 Bollard's declaration is not sufficiently detailed, we
2 believe that the contention stands on its own because
3 it is thoroughly documented. And that's all I have
4 for the moment.

5 CHAIRMAN BOLLWERK: Anything from the two
6 board members at this point?

7 JUDGE ABRAMSON: Just a quick question,
8 counselor. Do I understand then that the principal
9 problem arising from this is economics, that this
10 local community just does not have the economics to
11 deal with emergency planning, and evacuation, and that
12 sort of thing?

13 MS. CURRAN: Well, it certainly is one of
14 the most important problems with this. I think all of
15 the subparts of the contention raise different issues
16 that are of importance. Certainly, the one that --
17 well, the two that I would say have the greatest
18 significance because they involve the most potential
19 harm to people living around the plant are the subpart
20 of the contention that asserts that the discussion of
21 accident impacts is insufficient, and also the
22 assertion that the environmental report has failed to
23 address the vulnerability of this community as a
24 result of its lack of economic resources to respond to
25 an accident.

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1 JUDGE ABRAMSON: So if -- I'm leaping one
2 step ahead. If there were a way to - forgetting about
3 the details or going through what's in the ER - if
4 there were a way to make sure that the economic
5 situation was dealt with, that would address this
6 problem adequately?

7 MS. CURRAN: Well, if this community were
8 on an equal -- okay. From a tax perspective, if this
9 community were on an equal footing with any other
10 community that's likely to be host to a nuclear power
11 plant, it would certainly diminish the potency of our
12 concern, but it, nevertheless, remains true that this
13 community is isolated and has a relatively high
14 poverty rate, so that would have to be taken into
15 consideration, as well. But it certainly would have
16 a significant effect.

17 JUDGE ABRAMSON: But if the issue we're
18 really dealing with, the underlying issue that we're
19 dealing with is the inability of this community to
20 deal with accident situations in terms of an emergency
21 and other, perhaps there's another way to deal with
22 that than just focusing on this. I don't know. I'm
23 just asking whether that would sufficiently address
24 this problem for you. If there were a way to get,
25 say, emergency evacuation procedures and whatever the

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1 right words are, facilities in place to adequately
2 deal with the potential accident issues for that
3 community, would that handle this issue? Or is there
4 something else I'm missing from your argument?

5 MS. CURRAN: On that particular issue,
6 probably it would.

7 JUDGE ABRAMSON: Thank you. I know that
8 that's not where you're going with the argument.

9 MS. CURRAN: Yes.

10 JUDGE ABRAMSON: But it's a question, is
11 there a simple solution or a straightforward solution.

12 MS. CURRAN: Probably is.

13 CHAIRMAN BOLLWERK: Any questions? I
14 think you've made this clear but just so I'm clear in
15 my mind. I mean, the classic environmental justice
16 issue or contention is one that would say that because
17 of a minority or financial status, this facility,
18 which has certain impacts, is going to be coming into
19 an area that already has a number of other facilities
20 that have been located here because of that reason.
21 And, therefore, those are the types of additional
22 undue burdens that are being placed upon them. Or
23 alternatively, that because of something that relates
24 to the healthcare or the physical -- how do I want to
25 put this? The health impacts on the particular

1 minority or economically challenged folks, because of
2 their status, those are the typical environmental
3 justice contentions. This is something different.

4 MS. CURRAN: It has a different factor in
5 it. The unusual element here I would say is the
6 effect of the Mississippi Tax Code, and I think it's
7 somewhat analogous to a situation where say you have
8 a community where there's already a number of other
9 hazardous facilities, and then you're proposing to put
10 in another one, and you're talking about cumulative
11 effects. Here the situation is it's not a hazardous
12 facility, but it's a situation where one would
13 ordinarily expect that if a community is close to a
14 nuclear power plant, that there's a certain amount of
15 revenue flowing to the community from the plant so
16 that it can buy the fire trucks, and the police cars,
17 and equip the emergency room, et cetera. And that
18 hasn't happened here, so that is akin to the situation
19 where the characteristics of the facility, of the
20 community - excuse me - include that it's got some
21 other facility in it that's hazardous.

22 I guess what it amounts to is the
23 community is handicapped in some way, or has
24 additional stress on it in some way that makes the
25 impact of this proposal, this proposed facility

1 disproportionately higher on this community than it
2 might be on another community similarly situated in
3 other respects.

4 CHAIRMAN BOLLWERK: I think you're not
5 arguing that the radiological impacts could flow from
6 the location of additional facilities there has any
7 different impact on the individuals there because of
8 their minority or financial status than it would on
9 anyone else in that area in terms of the --

10 MS. CURRAN: No, except that because the
11 entire emergency planning zone is pretty much a
12 minority community, just by virtue of their proximity
13 to the plant, they are first in line. They do
14 experience disproportionately high and adverse impacts
15 if there's an accident.

16 CHAIRMAN BOLLWERK: All right. But again
17 that would be, just to go -- be true of the folks that
18 happen to live around North Anna because of the lake.
19 I mean, they're the first ones in line too, and
20 there's no argument about their minority and/or
21 financial status.

22 MS. CURRAN: Right.

23 CHAIRMAN BOLLWERK: All right. Any other
24 questions? All right. Let's turn then to the
25 Applicant.

1 MS. SUTTON: I'm going to address the
2 various bases that Ms. Curran has raised both in her
3 reply and today. Let me start at the top. The bases
4 proffered by Petitioners do not support admission of
5 the proposed contention. The relevant Executive
6 Order, which is 12898 seeks consideration of
7 environmental justice implications only when the
8 disparate environmental impacts are high and adverse.

9 Here the environmental report found that
10 while there are substantial minority populations and
11 a few localized low income populations in the region
12 of the Grand Gulf site, there are no significant
13 adverse effects from facility operation that would
14 disproportionately affect these populations.

15 Nowhere do Petitioners allege that the
16 environmental impact from the proposed reactor or
17 reactors will have a significant and disproportionate
18 impact on the minority or low-income population
19 relative to the general population, and that gets to
20 the question you just raised, Judge Bollwerk,
21 regarding the location of the minority and low-income
22 populations, vis a vis the general population who
23 reside in the same vicinity.

24 Whereas, here there is no significant
25 impact as a result of the proposed action, there is no

1 genuine dispute implicating environmental justice
2 considerations and NEPA. An EJ contention must do
3 more than demonstrate the existence of a minority or
4 low-income population. We don't take issue with the
5 Petitioners that these populations are in the vicinity
6 of the site.

7 Contrary to Petitioners reply and the
8 argument just made, a minority or low-income
9 population is not unique simply by virtue of its
10 existence and its location. There must be a
11 significant and disproportionate environmental impact
12 on that minority or low-income population.
13 Petitioners must demonstrate that there is some
14 significant impact that was not identified, or whose
15 impact on that community was inadequately considered.

16 To be inadequately considered, there would
17 need to be some factor unique or peculiar to that
18 community that results in a different or
19 disproportionate impact, and that's what we are
20 lacking. We haven't seen what that unique or peculiar
21 characteristic is.

22 Here the contention, the reply, and the
23 argument today do not provide a basis to conclude that
24 there is such a unique factor and, therefore, the
25 proposed contention fails to satisfy the requirements

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1 of 10 CFR 2.309F(1)VI.

2 Now let me turn to the bases that have
3 been addressed. First, with respect to Basis C, which
4 is the claim that SERI had distorted the minority or
5 low income representations - SERI's identification of
6 minority and low income populations does not present
7 a distorted picture of these populations within the
8 selected geographic region or impact area. The
9 environmental report openly acknowledges that the
10 community surrounding the Grand Gulf site is located
11 in a rural, economically isolated region of
12 Mississippi, and I'll point to Section 2.5-3 of the
13 environmental report.

14 Furthermore, the NRC uses a 50 mile radius
15 in identifying the relevant geographic areas for which
16 it seeks to obtain demographic information. In its
17 application, SERI defined the geographic region as the
18 area located within a 50 mile radius of the Grand Gulf
19 site. And as I mentioned, SERI identified minority
20 and low income population segments within this
21 geographic area.

22 In their reply at footnote 2, Petitioners
23 misunderstand and mischaracterize a series of
24 arguments in its answer on page 23. SERI's point then
25 and now is that the contention never shows how the

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1 existence of a minority community is meaningful given
2 the scope of the environmental justice review; that
3 is, the contention does not show any unique or
4 peculiar impact.

5 The reply also argues on page 10 that the
6 adverse impacts are significant and disparate in
7 relation to the general population around the plant,
8 and in relation to the general population around other
9 plants, but the contention never says how this is so.
10 The crux of the argument is that the population exists
11 and, therefore, it is impacted, but this is not
12 sufficient for environmental justice or to admit the
13 contention in this proceeding.

14 Basis D, which goes to the severe accident
15 risk, which Petitioners claim is unique in this case.
16 It just doesn't demonstrate, the Petitioners have not
17 demonstrated that there is a peculiar impact on the
18 minority or low income populations. They have not
19 demonstrated how minorities living in the locations
20 identified would be impacted differently from an
21 average or nominal resident in that location. The
22 reply only raises the resources issues, which I'll get
23 to in a minute regarding emergency preparedness.

24 With respect to the application, and again
25 I'm pointing to Section 7.2 of the environmental

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1 report, SERI has set forth a detailed evaluation of
2 the environmental impacts and off-site costs of severe
3 accidents, and the contention just overlooks this. It
4 doesn't challenge that information. Again,
5 Petitioners have simply failed to identify any factors
6 that are unique or peculiar to the identified low
7 income and minority populations from a severe accident
8 standpoint.

9 The next basis proffered by Petitioners,
10 Basis E, deals with emergency planning. As a
11 threshold matter, just because SERI received an RAI
12 which was mentioned here today, and discussed in some
13 depth, related to emergency planning does not make
14 this contention admissible. And in this regard, the
15 Commission has directly addressed this issue in CLI
16 99-11. This is an Oconee decision. In part it states
17 that, "To satisfy the Commission's contention rules,
18 Petitioners must do more than rest on the mere
19 existence of an RAI or RAIs as the basis for their
20 contentions. The NRC's issuance of RAIs does not
21 alone establish deficiency in the application or that
22 the Staff will go on to find any of the Applicant's
23 verifications, justifications or other responses to be
24 unsatisfactory."

25 Putting aside the RAI then, the contention

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1 is a challenge to the major features emergency plan
2 provided by SERI in Part 4 of the application, rather
3 than an EJ contention. The focus of the reply again
4 is on the adequacy of resources and the ability of
5 county agencies to respond to an emergency. This is
6 not an environmental justice issue. It is a resource
7 issue that falls in the area of emergency preparedness
8 implementation. It does not challenge the analysis
9 and conclusions set forth in the environmental report,
10 Section 5.8.2, which consider the impacts of future
11 station operation on local public services, public
12 safety, and social services.

13 These safety and security-related concerns
14 relative to existing and future Grand Gulf emergency
15 plans are outside the scope of this proceeding.
16 Issues associated with the implementation of emergency
17 planning are more appropriate for a future COL
18 proceeding. Alternatively, allegations concerning the
19 current emergency plans and the current ability of
20 these communities to respond to such emergencies are
21 more appropriately raised pursuant to Section 2.4-6.

22 Finally, with respect to Petitioners
23 complaints regarding the Mississippi Tax Code on this
24 basis, they simply fall outside the scope of this
25 proceeding.

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1 Next basis, F - regarding economic
2 impacts. The reply argues that there should be a
3 comparison to other sites regarding the degree of
4 poverty in other regions. This, however, is not
5 necessary. The EJ review is intended to take
6 cognizance of the existence of minority communities so
7 that any particular or peculiar impacts resulting from
8 cultural differences can be considered.

9 Petitioners have provided no factual
10 documentary or expert support for the assertion that
11 issuance of an ESP or the addition of a new reactor or
12 reactors at Grand Gulf will likely cause a decline in
13 local property values. In this regard, Petitioners in
14 here today have directed us to Mr. Bollard's exhibit,
15 which is 3.1-1, referenced on page 13 of their reply.

16 Dr. Bollard's declaration does not
17 suffice to support admission of this contention for
18 several reasons. Neither Petitioners' original
19 proposed contention, the reply including the
20 information contained in Dr. Bollard's declaration
21 offer any explanation or analysis as to why an ESP or
22 the addition of a new reactor or reactors at Grand
23 Gulf would adversely impact property values.

24 Dr. Bollard's declaration contains no
25 explanation of this issue. Attached to this

1 declaration is a resume; second, a preface to a paper
2 entitled "A Little Taste of Freedom"; and third, a
3 U.S. Census Bureau - Census 2003. None of these
4 materials address or even are germane to the issue of
5 the purported decline in property values caused by the
6 ESP or additional reactors at Grand Gulf.

7 And much like the discussion yesterday
8 regarding Mr. Lockbaum's declaration, whether or not
9 Dr. Bollard attests to the truth of Petitioners'
10 factual assertions or claims, they are all expressions
11 of opinion and they are based on his professional
12 judgment. That is irrelevant. They need some
13 supporting reasons or a minimal factual or legal
14 foundation to be of meaning.

15 Basis G, which relates to the
16 disproportionately low benefits. As a matter of law,
17 this simply turns NEPA on its head. NEPA looks at
18 significant environmental impacts. It is not looking
19 at disproportionately low benefits. I believe Ms.
20 Curran has acknowledged that the PFS case is square on
21 this point when it states that unequivocally the
22 executive order, which I cited earlier, and NEPA do
23 not call for an investigation into disparate economic
24 benefits as a matter of environmental justice. And
25 there is nothing in this case to distinguish it from

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1 the PFS decision.

2 Finally, with respect to Basis H, weighing
3 alternatives, contrary to Petitioners's claim, SERI
4 need not conduct a new evaluation of alternatives
5 considering environmental impacts on low income and
6 minority populations. Moreover, and contrary to the
7 discussion on page 13 of the reply, Petitioners have
8 not established a genuine and material dispute with
9 regard to the adequacy of SERI's alternatives
10 analysis, be it with respect to alternative sites, or
11 alternatives to the proposed action. And earlier
12 today, we discussed 10 CFR 51.45(c), which also
13 applies here. It requires an analysis that considers,
14 among other things, the environmental impacts of
15 alternatives to the proposed action. It does not
16 require an applicant to evaluate such alternatives
17 based solely on impacts to minority or low income
18 populations. And in any event, Section 9 of the
19 environmental report contains a detailed analysis of
20 alternatives, so we feel to see how that satisfies the
21 bases for admission of this contention. For these
22 reasons, we would argue that the contention is
23 inadmissible and should be rejected.

24 CHAIRMAN BOLLWERK: Okay. Board
25 questions? Judge Abramson?

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1 JUDGE ABRAMSON: No.

2 CHAIRMAN BOLLWERK: Ms. Curran makes the
3 point that there's something peculiar here. It does
4 seem to be the Mississippi Tax Code. Is that -- and
5 certainly, it seems to have a disproportionate impact
6 here. Literally, it's an economic matter, but it does
7 seem to be weighing on this community rather heavily.

8 MS. SUTTON: And as we've indicated,
9 Judge, we recognize that the tax code issue is there,
10 and we have examined that. However, to the extent
11 that it seems that Petitioners are tying it to
12 emergency preparedness in the community, to the extent
13 that's a current date issue, that needs to be dealt
14 with in current space. And we would suggest again,
15 2.206, there's no indication that Grand Gulf is not
16 meeting its emergency preparedness responsibility
17 today as a result of the Mississippi Tax Code. And we
18 do not see a basis or jurisdiction to address the tax
19 code in the future ESP. If it remains to be a concern
20 later, it can be dealt with at the COL stage.

21 CHAIRMAN BOLLWERK: All right. Any other
22 questions from anyone? All right. Thank you. Let's
23 turn then to the Staff.

24 MR. SMITH: As we've heard today,
25 environmental justice issues at NRC are considered as

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1 part of the agency's NEPA responsibilities. In the
2 environmental justice review, the goal is to identify
3 environmental impacts on low income or minority
4 communities that are disproportionately high and
5 adverse as a result of factors unique to those
6 communities; that is, to identify impacts that are
7 overlooked in the regular analysis.

8 The process of doing that consists of two
9 parts. One is identifying the low income and minority
10 communities at issue; and two, assessing the impacts
11 on those communities and determining whether there are
12 any that are high and adverse that fall into these
13 particular populations disproportionately.

14 As the Petitioners have formulated, they
15 assert that the minority population here is unique in
16 the sense that it lies directly adjacent to the site,
17 is uniquely under-equipped and under-staffed to
18 respond to an accident by virtue of the fact that it's
19 been deprived of the tax revenues that it would
20 otherwise have received. Neither aspect of their
21 formulation of the environmental justice contention is
22 sufficient to support this proposed contention.

23 First, as you've heard from the Applicant,
24 proximity alone is not a factor unique to minority or
25 low income communities relative to the general

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1 population around the site. Put simply, proximity
2 doesn't amplify the environmental effects of the
3 action on these populations beyond the effects felt by
4 the general population. I believe this is what Judge
5 Bollwerk was getting at earlier.

6 Environmental justice typically considers
7 inter-related social, occupational, historical factors
8 that amplify the effect on a particular community.
9 Here the environmental effects of proximity are the
10 same regardless of whether you're a minority
11 community, low income community, or the general
12 population within the relevant area. There's simply
13 no need for an environmental justice review separate
14 from the review that's already performed as part of
15 the environmental report.

16 As to the second part of the Petitioners'
17 formulation, they assert that the disproportionate
18 impact stems from unfair distribution of tax revenues.
19 However, the Commission has explicitly stated that
20 disproportionate distribution of financial benefits of
21 a proposed project cannot form the basis of an
22 environmental justice contention because there is no
23 adverse environmental impact. A disparity in
24 financial benefits is not the equivalent of a
25 disparity in the project's impacts.

1 In any project, there's going to be people
2 who enjoy the benefits and those who do not. And
3 groups who feel the impacts of the action and those
4 that do not. Those two groups do not necessarily
5 overlap. Again, as the Commission has said, NEPA
6 simply doesn't call for investigation into disparate
7 economic benefits as a matter of environmental
8 justice.

9 Petitioners here today, as well as in
10 their reply, have raised the issue of the Staff's
11 request for information as support for their proposed
12 contention, and they further claimed in their reply
13 that the Staff denies the relevance of economic
14 benefits of the project. And that's incorrect for two
15 reasons.

16 First, as you heard from the Applicant,
17 under the Commission's longstanding practice,
18 contentions rest on the license application, not on
19 the NRC Staff's review. The NRC Staff's mere posing
20 of questions does not suggest that the application was
21 incomplete in any way. Rather, these requests for
22 information are part of the Staff's ongoing licensing
23 review, and simply shows that they're doing their job;
24 which is to make sure that they have all the
25 information that they need to make a decision on the

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1 project.

2 Second, tax revenue is relevant to this,
3 but not in the way in which Petitioners would have you
4 believe. The Commission has stated it is appropriate
5 to consider the secondary effects of an action; such
6 as, the secondary effects on transportation or land-
7 use patterns. They've also said it's appropriate to
8 consider the secondary benefits, like jobs and tax
9 revenues. Again, that doesn't mean that failure to
10 receive revenue is the equivalent of an environmental
11 impact, which is what NEPA is primarily concerned
12 with.

13 Petitioners have also asserted that the
14 environmental report distorts the minority and low
15 income populations. There is no dispute on the
16 current issue here, nor the contention if proven, how
17 a Petitioner could get any relief. The environmental
18 report follows the procedure laid out in NRC Staff's
19 guidance for identifying the minority and low income
20 populations in the area. Once that threshold level is
21 satisfied, the exact numbers, the exact percentages
22 are not relevant so long as the review identifies the
23 communities, and goes on to the second step; which was
24 to assess the impacts on these communities. Again,
25 the purpose of the review is to identify and make sure

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1 that impacts on minority and low income populations
2 are not overlooked.

3 Petitioners have also raised the issue of
4 the effect of adding reactors on property values and
5 overall economic health of the community. This brings
6 us to a discussion of Petitioners' expert opinion by
7 Dr. Bollard.

8 Dr. Bollard's affidavit provides no
9 specific information to support that assertion that
10 property values and economic health of the county will
11 decline as a result of a new reactor. Simply stating
12 that our expert says so, does not make it so, and is
13 insufficient to demonstrate a genuine dispute.

14 The admissibility of contentions in Part
15 2 says that, "An admissible contention would provide
16 a concise statement of the expert opinion which
17 support Petitioners' position with references to the
18 specific sources and documents on which the Petitioner
19 intends to rely."

20 Dr. Bollard's affidavit points to no
21 study, no specific documents, no specific source on
22 which he bases his assertion that siting an additional
23 reactor would lead to a predictable decline in
24 property values or overall economic health of the
25 community.

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1 Finally, Petitioners allege that the ER
2 fails to adequately weigh the costs on minority
3 populations and low income populations against the
4 benefits. In doing so, Petitioners allege omission of
5 information that is included in the ER. The
6 environmental report did consider environmental
7 justice issues in its evaluation of alternative sites
8 and energy sources. Thus, to the extent that the
9 petition is based on this omission, it is
10 inadmissible. Staff has nothing else to add at this
11 time.

12 CHAIRMAN BOLLWERK: Any questions from the
13 Board?

14 JUDGE ABRAMSON: Yes. I want to make sure
15 I get this right. Counselor, as I understand it, your
16 contention is that this minority community is
17 particularly affected because the unique circumstances
18 of the tax code prohibit them from getting appropriate
19 or equivalent economic benefits that might fall to
20 another similarly situated community, which would
21 enable them otherwise to deal with emergency
22 preparedness and emergency planning. Is that a fair
23 summary?

24 MS. CURRAN: That's fair, but I also want
25 to amend the answer that I gave to you earlier when

1 you asked if that was all. You asked a question that
2 basically went to the issue of if the only factor here
3 is that the minority community is living close to the
4 plant, is that enough? And I said no, that you need
5 something else, but I've reconsidered that. And I
6 think you do -- it is a peculiar characteristic of
7 this minority community that it lies within 10 miles
8 of this plant; that if you look at the demographics of
9 the community within 10 miles of this plant, it's 85
10 percent minority, and the poverty level is high. So
11 you have to ask yourself why is it if in a 50 mile
12 radius the minority representation, average minority
13 representation is lower, is on the order of 50
14 percent, why is this plant in an area where the
15 minority representation is 85 percent? That's what
16 environmental justice tries to get at.

17 If you have a minority community, does it
18 have to be acknowledged, looked at that you are
19 putting that minority community on the front line of
20 the risk of a hazardous facility? They are uniquely
21 affected because they are on the front line. So I
22 would amend my answer to say it's not just - it is
23 important that they have this longstanding
24 discriminatory impact of the Mississippi Tax Code, but
25 it is also relevant that within 10 miles of this

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1 proposed nuclear plant site, the community is 85
2 percent minority, that they are uniquely situated.
3 Their peculiar characteristic is that they are
4 uniquely close to and vulnerable to a severe accident
5 at that plant.

6 JUDGE ABRAMSON: Do I accurately
7 understand the Staff's view to be that pure financial
8 impact on a community is not the basis for an
9 environmental justice claim. Is that --

10 MR. SMITH: Yes, failure to benefit does
11 not equal an environmental impact; therefore,
12 disproportionate distribution of economic benefits of
13 a project cannot support an environmental justice
14 contention.

15 JUDGE ABRAMSON: What's the Staff's view
16 of Petitioners' concept that the proximity -- that the
17 population in closest proximity to the plant is
18 heavily weighted minority and economically
19 disadvantaged and, therefore, that community, because
20 it's in closest proximity, is more subject to the risk
21 from a severe accident. Does that rise to the level
22 of the disproportionate effect?

23 In other words, what she's saying is look
24 at the community close to the plant. They're the ones
25 that will get the risk of a severe accident, and that

1 community happens to be predominantly minority, i.e.,
2 you plopped this plant in an area because of that, or
3 that it has -- plopping it there has a disproportional
4 effect on that sector.

5 MR. SMITH: The reason that we don't
6 believe that that constitutes an environmental justice
7 claim is because the impacts on communities near the
8 plant are the same, regardless of whether that
9 community is minority, low income, or the general
10 population. The purpose of an environmental justice
11 review or component of the NEPA analysis is to
12 identify impacts that would be overlooked in the
13 normal review on account of some special factors.

14 Here the general environment review, that
15 doesn't contain a specific environmental justice
16 component, already encompasses the impact on the
17 community near the site, so there's no need for -- we
18 interpret their contention to be seeking, there's no
19 need for a separate environmental justice review
20 because that is already -- the impacts to those
21 communities are already considered as part of the
22 regular environmental.

23 JUDGE ABRAMSON: So there's no
24 environmental justice issue raised by selecting a site
25 that -- and I'm just speculating on the possibility

1 that suppose somebody elected to put a new facility,
2 a new nuclear facility in the middle of an
3 economically disadvantaged community or minority
4 community, that would not raise environmental justice
5 concern in and of itself?

6 MR. SMITH: Not in and of itself. The
7 caveat is that part of the -- one part of our
8 environmental justice procedure includes increased
9 scoping, which is going into communities and making
10 sure what all these impacts we might be overlooking
11 are, so that would also come into play.

12 MS. SUTTON: Your Honor, I'd like to add
13 one other thing. As we discussed yesterday, in the
14 environmental report, SERI has assessed the
15 significance of the severe accident risk and deemed it
16 to be small, so if it is by virtue of just the
17 location of the population, the impact is small. It's
18 no different from their population segment to any
19 other population segment.

20 CHAIRMAN BOLLWERK: Are you going to say
21 anything?

22 JUDGE BARATTA: I was going to, but I'll
23 wait.

24 CHAIRMAN BOLLWERK: Do you have anything?
25 Could you again explain, you mentioned about secondary

1 effects and how tax revenue might be looked at in
2 terms of that? Can you expand on that or explain it
3 again?

4 MR. SMITH: Certainly. The Commission has
5 said - I'm looking at Louisiana Energy Services, CLI
6 98-3. The Commission discusses secondary benefits.
7 They said that socio-economic benefits such as added
8 jobs and tax revenues are frequently termed secondary
9 benefits because they're not the primary justification
10 for a project. Nevertheless, it's appropriate for
11 NEPA documents and statements to consider the socio-
12 economic benefits that flow from a project.

13 The Commission they think it logical that
14 you would discuss both the secondary benefits and
15 secondary impacts; that is, that the benefits would be
16 increased revenue, increased jobs. The secondary
17 impacts would be perhaps changes in transportation
18 patterns or land-use patterns, those sorts of things.
19 So the Staff does consider tax revenues as part of its
20 analysis of the project. But what it doesn't say is
21 that failure to receive a benefit is equal to an
22 impact, and those two are incompatible.

23 CHAIRMAN BOLLWERK: All right. Second
24 question I have - I take it the Staff -- the RAI
25 that's been discussed here, the RAIs that have been

1 discussed here, the Staff, obviously -- I take it it's
2 your position that those -- putting aside whether they
3 provide a basis for a contention that they really
4 aren't relevant to environmental justice in any way,
5 shape, or form.

6 MR. SMITH: That's correct.

7 CHAIRMAN BOLLWERK: And they relevant to
8 what then?

9 MR. SMITH: They are relevant to a
10 discussion of secondary benefits of the project, what
11 is the tax revenue from the project? And then the
12 specific question, it asks for additional revenue, tax
13 revenue from other sites, same thing - comparing the
14 revenue and secondary benefits from other sites as
15 independent of an environmental justice significance.

16 CHAIRMAN BOLLWERK: And do they have any
17 relevance to emergency planning?

18 MR. SMITH: Not at the ESP phase. No,
19 sir.

20 CHAIRMAN BOLLWERK: All right. Any other
21 Board questions?

22 JUDGE ABRAMSON: Let's pick up on the
23 planning stage question. We're at the ESP stage and
24 both the Applicant and the Staff have indicated it
25 sounded to me like emergency planning and preparedness

1 are not issues at this point, because in a new plant
2 going in they wouldn't be. They would then be
3 appropriate for consideration at the COL stage. Is
4 that correct?

5 MR. SMITH: No, sir. No, Your Honor,
6 that's not entirely correct. At the ESP stage what an
7 application for an ESP is required to -- only required
8 to include a description of contacts and arrangements
9 with local, state, and federal official with emergency
10 planning responsibilities.

11 JUDGE BARATTA: All right. At this stage,
12 there's no effort expended towards developing or
13 reviewing any sort of emergency preparedness plan, as
14 there would be when a submittal came in for the
15 operating license, for example.

16 MR. SMITH: That's not entirely correct.
17 At the ESP phase, the Applicant has a choice. There
18 are three levels at which they address emergency
19 planning at the ESP stage. The first is the
20 description of contacts, and that's required to be
21 included in the ESP stage.

22 Second is a discussion of the major
23 features of the proposed plan, which I believe the
24 Applicant that we're discussing here has included in
25 their application. And the third level is the full

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1 emergency plan, which they did not choose here. So
2 you have the option that --

3 JUDGE ABRAMSON: And the elements that
4 they have not elected to consider at the ESP stage,
5 would then be proper for litigation at the COL stage.

6 MR. SMITH: If the ESP was ultimately
7 referenced in the combined license or some construct
8 permit base, that's correct.

9 CHAIRMAN BOLLWERK: Counsel.

10 MS. SUTTON: The relevant regulatory
11 citation for these ESP EP-related requirements are at
12 10 CFR Section 52.17(b) (1) and (2).

13 JUDGE ABRAMSON: Ms. Curran, do you want
14 to respond to that? Do you have anything to add to
15 that?

16 MS. CURRAN: A couple of things. First of
17 all, I think it's important to clarify that the
18 problem of the tax revenue not having flowed from the
19 existing -- from SERI to Cleveland County, it's not an
20 issue of the benefits of the proposed project. It's
21 an issue of this is the historical pattern over the
22 last more than 15 years, that this rather small
23 fraction of the tax revenue has gone to the county,
24 leaving the county in a certain condition. This is
25 the condition that SERI comes into. This doesn't have

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1 to do with perspective benefits under NEPA. It has to
2 do with the characteristics of this community, and the
3 vulnerability of this community in radiological
4 emergency.

5 In terms of when you get to the COL stage,
6 well, my guess is that emergency planning isn't much
7 of an issue at the COL stage or at the construction
8 permit stage it wouldn't be. If it was a combined
9 operating license -- construction permit and operating
10 license, emergency planning would come up then. I am
11 not sure to what degree the NRC would look at the
12 condition of the infrastructure of Clayborn County.
13 I just don't know.

14 It seems to me that regardless of what
15 might happen in a licensing proceeding some time in
16 the future, the NRC has an obligation now to look at
17 the characteristics of this community, whether they
18 are such that they could cause this proposed facility
19 to have a disproportionate adverse impact on the
20 community. And that's the situation right now.

21 I don't think you could kind of leap frog
22 to a prospective proceeding in the future and based on
23 that, disregard the situation that exists now. And I
24 also, as I said before, I'm not sure that proceeding
25 would resolve this problem.

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1 CHAIRMAN BOLLWERK: All right. Is there
2 anything else that you wanted to say in reply to
3 anything else that has been said by the --

4 MS. CURRAN: I have a couple of points I'd
5 like to make.

6 CHAIRMAN BOLLWERK: All right. There's no
7 other questions of the Staff at this point? Why don't
8 you go ahead then.

9 MS. CURRAN: I think I heard it argued
10 that just because an applicant has gotten an RAI, that
11 doesn't mean you get a contention admitted, and I
12 think that's true. We're not asserting that the mere
13 existence of an RAI is enough to support the admission
14 of a contention. The reason that we cited this RAI in
15 our reply is that it supports the concerns we've
16 raised. And if you look at the LES case that I cited
17 yesterday, that's what the licensing board was looking
18 for. Does the RAI or I think that in that case there
19 was correspondence from the Staff involved, that
20 tended to support the concerns that the Petitioners
21 have raised, and that's the case here.

22 It's not just a question where we
23 submitted a letter and said this shows that there is
24 an issue here. We raised the issue, and this
25 correspondence shows that we're not the only party to

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1 these concerns, that the NRC Staff also shares this
2 concern despite what its lawyers might say.

3 I think I heard Mr. Smith argue that the
4 benefits of this proposed project are not within the
5 scope of this environmental justice inquiry, and he
6 was relying on the PFS case for that argument. I
7 think I've already said that I think the PFS decision
8 involves circumstances that are different from this
9 one, where in that case the primary impacts that were
10 at issue were economic impacts, both positive and
11 negative. There was a significant dispute over the
12 distribution of benefits, and that was the main issue.
13 But in this case, we have significant adverse impacts.

14 I don't think that the PFS case is meant
15 to completely excuse an applicant from making an
16 accurate assessment of the benefits of a proposed
17 facility. That can't be the case because 10 CFR
18 Section 51.45(e)(4), which lists the requirements for
19 an environmental report, states that in addition to
20 discussing adverse impacts, an environmental report
21 has to discuss the economic, technical, and other
22 benefits and costs of the proposed action and of the
23 alternatives. So an ER is meant to address the
24 benefits. And in this case, as we state on page 26 of
25 our contention, the ER says that the new reactor would

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1 have "several positive socio-economic impacts". These
2 impacts include "employment opportunities both
3 directly and indirectly related to facility operation
4 for workers within the region of the Grand Gulf
5 nuclear power plant site, and increased tax revenues."

6 So if the Applicant is representing that
7 a benefit of this facility is going to be increased
8 job opportunities, then it should be accurate
9 information about who is going to get those jobs, and
10 whether they are going to go to the people who live in
11 the immediate vicinity of the plant.

12 I think I also heard Mr. Smith say that
13 there is a two-stage process that the Staff goes
14 through in its environmental justice analysis. One is
15 to first identify the communities that are impacted,
16 and the second is to look at the impacts. And I think
17 he's right that a correct identification of the
18 impacted communities is important. It's important to
19 have an accurate understanding of what the
20 demographics are of the community that's being
21 impacted. And we actually -- Mr. Smith said that the
22 Staff followed the NRC guidance for doing that.

23 We believe we have a material dispute with
24 the Staff over whether they did, in fact, follow the
25 Staff guidance. We think that if they had followed

1 the Staff guidance, they would have recognized that
2 the level of poverty in the impacted area is
3 significant, and they overlooked that. I'm sorry.
4 This was SERI that failed to follow this guidance, not
5 the Staff. But we do have an issue, a material
6 disputed issue with SERI over how that guidance should
7 be interpreted.

8 And, of course, identifying and describing
9 the impacted community is important, not just for the
10 purpose of disclosing those impacts, but also it
11 becomes relevant to the discussion of alternatives
12 because one tries to compare the impacts of the
13 proposal on this community with what the impacts would
14 be on similarly situated communities at other sites,
15 so you would want to make a reasonable comparison that
16 the demographics of the communities around the sites
17 that you're comparing, that is a meaningful
18 comparison. That's all I have at this point.

19 CHAIRMAN BOLLWERK: I take it your last
20 point then is that notwithstanding the fact that they
21 did identify minority and/or economically
22 disadvantaged populations and did the analysis, at
23 least what they consider appropriate analysis, that
24 nonetheless, how they did it is still material. The
25 fact that they reached the threshold and did the

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1 analysis doesn't make it immaterial as to how they
2 defined the populations.

3 MS. CURRAN: That is right. It is
4 important to do it in a way that gives meaningful
5 information, and doesn't distort what the actual
6 situation is.

7 CHAIRMAN BOLLWERK: I'm trying to --

8 MS. CURRAN: I guess the word is to
9 dilute. We're concerned that because of the way it
10 was done, it dilutes the representation of what is the
11 level of minority population, and what is the level of
12 poverty. And that's something you want to avoid.

13 JUDGE BARATTA: And is that primarily
14 because of the use of the 50 miles or something
15 closer?

16 MS. CURRAN: Two things. One is the use
17 of 50 miles for racial population, and the other is
18 comparing, I believe, the poverty level they compared
19 Clayborn County with the State of Mississippi, and in
20 the NRC guidance they suggest using a -- if you're
21 going to be looking at national alternatives to use
22 those demographics. And here, the State of
23 Mississippi is one of the poorest states in the
24 country, so if you're actually comparing sites in
25 other parts of the county, you want to be including a

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1 comparison of Clayborn County with other parts of the
2 country, not with Mississippi.

3 CHAIRMAN BOLLWERK: In looking at the
4 effects on property values, did you all say anything
5 about the effects of this facility when it was
6 originally, or the facilities when it was originally
7 put in in terms of what it did to property values? I
8 mean, this is an existing site. Did you say anything
9 about what it did initially? Did property values go
10 up, down, or weren't affected?

11 MS. CURRAN: If you'll bear with me on
12 that, I'll look. We did not include specific
13 statistics about property values. And one of the
14 introductory sections of the contention which appears
15 on pages 16 and 17, we do give statistics about
16 demographic trends in the county, including a trend of
17 white flight, a trend of comparative levels of poverty
18 that are very high compared to the rest of the county.
19 But no, not in particular respecting property values.

20 CHAIRMAN BOLLWERK: All right. All right.
21 Anything else from the Board at this point, or other
22 parties, do you want to say anything about what anyone
23 has heard?

24 MS. SUTTON: Yes, Your Honor. I'd like to
25 add one point which --

1 CHAIRMAN BOLLWERK: All right. Ms. Curran
2 gets the last word, obviously.

3 MS. SUTTON: With respect to LIC 203.3 and
4 our answer at pages 23 and 24. It specifically says,
5 and this is the Staff's guidance document, that the
6 impact should be considered in the areas used to
7 review environmental impacts in the EIS. And this
8 review should be focused on the areas closer to the
9 site as opposed to in this case, the seaboard.

10 Furthermore, with respect to Section 9,
11 the alternatives, if the Petitioner is, in fact,
12 challenging the accuracy of the information in there,
13 then they must do so with the requisite bases and
14 specificity, and they have not done this in this case.
15 I have nothing further.

16 CHAIRMAN BOLLWERK: Ms. Curran, do you
17 have anything further?

18 MS. CURRAN: Yes. Just one minute.

19 CHAIRMAN BOLLWERK: All right.

20 MS. CURRAN: In terms of the
21 appropriateness of the basis that was used by SERI for
22 evaluating the poverty level, I just refer the Board
23 to page 19 of our contention in which we quote from
24 NRC-203, where it says, "When a regulatory action is
25 being considered that involves alternative site

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1 considerations, such as an early site or construction
2 permit, then in addition to determining the individual
3 geographic area of each site as defined above,
4 determine an overall geographic area that encompasses
5 all of the alternative site geographic area", so that
6 would include alternative sites elsewhere around the
7 country. That's what we're relying on.

8 JUDGE ABRAMSON: To your knowledge,
9 counselor, does SERI have operations throughout the
10 country? Is it practical for SERI to consider sites
11 outside of this territory where it operates?

12 MS. CURRAN: They did. In their
13 environmental report they have an analysis of various
14 alternative sites. They identify River Bend,
15 Fitzpatrick. There's several sites and they're kind
16 of scattered around the country. I know there's a
17 citation to that somewhere.

18 JUDGE ABRAMSON: That analysis was
19 insufficiently broad for you?

20 MS. CURRAN: That's right. And that's
21 discussed in our contention.

22 CHAIRMAN BOLLWERK: All right. Anything
23 further from anyone on this contention? Anything from
24 the Board? All right. Thank you very much. At this
25 point, it's about almost quarter after 2. Why don't

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1 we go ahead and take a 10 minute break until 2:25, and
2 then we'll come back and discuss the emergency
3 planning deficiency.

4 (Whereupon, the proceedings in the above-
5 entitled matter went off the record at 2:13 p.m. and
6 went back on the record at 2:25 p.m.)

7 CHAIRMAN BOLLWERK: Why don't we go back
8 on the record. We're back after a break. I should
9 just mention that I've had several questions about
10 scheduling. My expectation given we have two
11 contentions left is that we probably will finish this
12 this afternoon. That's certainly my hope at this
13 point.

14 After we've had arguments on these two
15 contentions, we do need to have a brief discussion
16 with the parties about some administrative scheduling
17 matters. That will not take long, but we do need to
18 have that discussion. That's what I'm looking at in
19 terms of the rest of the afternoon.

20 Having said that, let's go ahead and move
21 on to the next contention, the category which is
22 Emergency Planning Deficiencies. This deals with
23 Grand Gulf Emergency Planning Contention 4.1. Are you
24 going to be arguing that one, Ms. Curran?

25 MS. CURRAN: Yes, I am.

1 CHAIRMAN BOLLWERK: All right. Ten and
2 ten again?

3 MS. CURRAN: Yes.

4 CHAIRMAN BOLLWERK: All right.

5 MS. CURRAN: This contention asserts that
6 the application for this early site permit emphasized
7 by 10 CFR 52.17(b)(1) which requires that the
8 application must identify physical characteristics
9 unique to the proposed site such as egress limitations
10 from the area surrounding the site that could pose a
11 significant impediment to the development of emergency
12 plans. The basic thesis of the contention is that
13 because of the limitations on the resources and the
14 infrastructure in Clayborn County for responding to a
15 radiological emergency that these are impediments to
16 emergency planning that ought to be taken into account
17 by SERI in conformance with this regulation.

18 SERI and the Staff argue that what the
19 Commission had in mind was characteristics such as
20 seismology, meteorology, geology and hydrology that
21 are described in 10 CFR 100.20(c), the siting
22 requirements for nuclear power plants. We would
23 respond that in 10 CFR 52.17(b)(1) it isn't defined
24 what the Commission is talking about when they say
25 physical characteristics, but they do give one example

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1 as egress limitations.

2 Of course, that's a concern that people
3 won't be able to get out when they are evacuated and
4 egress limitations in our view could extend to
5 limitations on the infrastructure in a cavity, the
6 adequacy of the roads, the adequacy of the police
7 department to staff intersections or direct in an
8 evacuation. Those kinds of things constitute egress
9 limitations that should be considered under this
10 regulation. We acknowledge that the term is not
11 defined here, but it seems to us to be a reasonable
12 interpretation in light of the Commission's use of the
13 term egress limitations in the regulation itself. I
14 think I'll stop there.

15 CHAIRMAN BOLLWERK: Any Board questions at
16 this point?

17 JUDGE BARATTA: I guess I'm a little
18 confused by what you say because if you read on in
19 52.17, there are several paragraphs, as was explained
20 by the Staff a little while ago, relating to the
21 discussion on the previous contention that established
22 different levels and it would appear that what you're
23 really questioning is the practicability of an
24 emergency plan. It looks like that discussion really
25 occurs at a different time.

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1 If you look down under paragraph
2 52.17(a) (3) in about the middle of that paragraph, it
3 says "Under the options set forth in paragraph
4 (b) (2) (ii) of this section" which (b) (2) (ii) really
5 deals with one of the other levels that "the Applicant
6 shall go make good faith effort to obtain from the
7 same governmental agency certification that the
8 proposed emergency plans are practicable." The type
9 of things that you're going to seem to be in that
10 arena.

11 And then it also goes on that "these
12 agencies are committed to participating in further
13 developments of the plans including any required
14 demonstrations to settle." How does that fit in with
15 your contention?

16 MS. CURRAN: Well, section b(1) is
17 concerned with the physical setup of the situation and
18 it seems to me that it's a little more specific that
19 whether a plan is practicable, there may be a lot of
20 things that affect the practicability of a plan and
21 section b(1) is more concerned with the physical
22 characteristics with things and, for instance, roads
23 would be one. If the condition of the roads is poor
24 because the county doesn't have enough money to
25 maintain them, that's a physical condition that ought

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1 to be considered. Practicability might have to do
2 with the government structure or whether there's
3 enough people to carry it out, whether the county
4 government is willing to do it, that sort of thing.

5 JUDGE BARATTA: Well, maybe I
6 misunderstood what you said, but it seemed like you
7 were extending the concept of egress into those types
8 of issues such as whether or not there are enough
9 police to direct traffic or things like that as
10 opposed to the issue of roads and the condition of the
11 roads and the adequacy of the roads.

12 MS. CURRAN: Obviously, the roads would be
13 one very concrete example of physical and I'm thinking
14 that there's a gray area in these things. They
15 overlap and bleed into each other some. But for
16 instance, if you were to look at issues such as the
17 size of the county and how many roads there are and
18 how many stations would have to be staffed in order to
19 assist in an evacuation, that would involve questions
20 of practicability and it also would overlap with
21 questions of physical characteristics of the road. So
22 they would probably go together.

23 JUDGE BARATTA: All right.

24 JUDGE ABRAMSON: Counselor, how would your
25 view of the physical characteristics of the area

1 around the existing site be different when there's
2 another plant? Would they not be identical? And
3 we'll be in a situation today. We have a certain set
4 of physical conditions. We have an emergency plan
5 that's based on the plants that are there and the
6 current existing conditions. How would that be
7 altered when we add another plant? What are we adding
8 that I'm missing here?

9 MS. CURRAN: Well, I'm not sure you are
10 adding anything, but I don't know if that matters to
11 this regulatory analysis. The regulation doesn't
12 grandfather in if you already have an emergency plan
13 that you don't have describe this.

14 JUDGE ABRAMSON: I understand. So you are
15 saying that it has to be covered because the reg says
16 it has to be covered. I want to ask you about how you
17 see b(2) because I think this also goes to things we
18 were discussing earlier. The Applicant has a choice,
19 as I understand it. In b(1), it must identify
20 physical characteristics unique to the site such as.
21 (2) on the other hand offers them the option. They
22 can propose major features or they can propose a
23 complete plan. As I gather, the Applicant in this
24 case elected to choose to propose major features.

25 MS. CURRAN: That's correct.

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1 JUDGE ABRAMSON: Which eliminates a lot of
2 the detailed requirements from what they are going to
3 do. How does that bear on your earlier arguments
4 about the absence of certain things in the plan?

5 MS. CURRAN: Well, it doesn't change the
6 contention. It seems as though these are two, (b) (1)
7 and (b) (2) (I), are different requirements.

8 JUDGE ABRAMSON: Yes. I'm not asking
9 about your contention here as to the physical
10 characteristics. I'm asking about the earlier
11 arguments you were making about incompleteness of the
12 plan, not with respect to this contention, but with
13 respect to prior -

14 MS. CURRAN: Wait. Just refresh my memory
15 because I'm not sure exactly what you are referring
16 to.

17 JUDGE ABRAMSON: You were arguing earlier
18 that their plan was incomplete. They hadn't gotten
19 the permits. They hadn't address all the other things
20 they needed to address in the plan. Am I missing
21 something?

22 MS. CURRAN: Are you talking about the
23 water --

24 JUDGE ABRAMSON: No, I'm not talking about
25 the water. Let's go on.

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1 MS. CURRAN: I'm sorry.

2 JUDGE ABRAMSON: That's okay.

3 MS. CURRAN: It's been getting too late.

4 JUDGE ABRAMSON: Maybe for both of us.

5 JUDGE BARATTA: I think I just want to
6 pick up. I realize that the ESP process requires
7 something to be submitted with respect to emergency
8 planning. However, isn't it reasonable at this point
9 to assume that the existing emergency plan meets
10 current NRC requirements and if anything, the only
11 issue would be if there's an incremental change that
12 would be required as a result of the third unit being
13 put in there? I'm trying to understand the issues
14 that you raised how they would relate to that in other
15 words.

16 MS. CURRAN: I don't know what is the
17 status of the NRC's oversight of emergency planning in
18 Clayborn County. I can't comment on that. But all
19 we're going on is what the regulation says an
20 applicant or a new plant needs to do per an ESP.
21 There isn't anything in this regulation that says if
22 there's already a nuclear plant on this site you can
23 pass over this requirement. The requirement has to be
24 met.

25 So in our view, the situation is that

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1 there are physical characteristics having to do with
2 the condition of the infrastructure in Clayborn County
3 that should be discussed in this application. So it
4 is really a side issue of whether or not there is an
5 existing emergency plan. That doesn't answer the
6 question of what are the physical characteristics here
7 that might impede an evacuation.

8 CHAIRMAN BOLLWERK: All right. Anything
9 further? All right. Let me turn to the Applicant
10 then.

11 MS. SUTTON: Thank you, Your Honor. Let's
12 be perfectly clear at the outset. SERI has satisfied
13 the applicable regulatory requirements. I drew them
14 out and I'll explain why. Second, Petitioners have
15 misconstrued the meaning of these regulatory
16 requirements particularly those in 52.17 which we will
17 explore, 52.18 and 52.21. For this reason, we are
18 proposing Contention 4.1 must be rejected as a matter
19 of law.

20 We'll start with 52.17(b) (1). It requires
21 ESP applicants to identify the site's unique physical
22 characteristics. I'll put bullets around the word
23 physical characteristics. It's in the regulations and
24 it's what we should be focused on.

25 Contrary to what Ms. Curran has opined

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1 here this afternoon, Part 100 specifies that the
2 physical characteristics of the site includes
3 seismology, meteorology, geology and hydrology. There
4 I cite 10 CFR Part 100.20(c). Financial
5 considerations and funding considerations such as
6 those which lie at the heart of this contention are
7 not among the physical characteristics that are at
8 issue here. Nor are institutions or equipment as she
9 avers in reply brief at page 22.

10 As for the roads, Part 4 of the
11 application which is entitled "Emergency Planning
12 Information" and in particular, section 2.2.2 at page
13 2-4 addresses roads. Within the context of the unique
14 physical characteristics which are called out by 52.17
15 Part 100, the NRC must then determine in consultation
16 with FEMA whether such characteristics impede the
17 develop of emergency plans. That's what's stated in
18 Section 52.18. So that's the regulatory framework.

19 Within that framework, Contention 4.1 is
20 focused not on the site characteristics, but rather on
21 resources and funding. Petitioner did acknowledge
22 that SERI has identified physical characteristics of
23 the proposed site in Part 4 of its application as I
24 just mentioned.

25 However, they do not focus on those

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1 characteristics, but rather on existing emergency
2 response facilities in Clayborn County. In
3 particular, they claim that local officials lack
4 sufficient resources to develop effective emergency
5 plans. Petitioner seems to be relying to Appendix A
6 of Part 4 which contains a series of letters in which
7 SERI had gone to a whole variety of state and local
8 emergency planning officials and requested their input
9 and their certification pursuant to Part 52 as to
10 whether or not and I'll quote.

11 Each letter states the same thing. It's
12 on page two of each letter. I'm reading from a letter
13 dated April 11, 2003 to Mr. Frank Davis who is the
14 Clayborn County Sheriff. "In support of the ESP
15 application, we are seeking your concurrence as
16 indicated by your signature below that Clayborn County
17 Sheriff Department will be willing to enter into
18 discussion with SERI to extend the current emergency
19 planning arrangements implemented for the existing
20 GGNS facility to a new facility or facilities that may
21 be constructed at the Grand Gulf site."

22 This is the last sentence "And most
23 importantly, your signature will also indicate that at
24 this time you are aware of no significant impediments
25 to the development and implementation of emergency

1 plans for the site that could include a future nuclear
2 facility or facilities." So this goes directly to the
3 issue and this goes directly to the regulatory
4 framework.

5 In this case, Mr. Frank Davis signed the
6 letter. We also had signed letters from the Fort
7 Gibson Police Department and a host of other letters
8 that I just direct the Board's attention to in
9 Appendix A of Part 4. So aside from a complete lack
10 of basis for this claim, the issue of financial
11 resources outside of the scope of a Part 52 ESP
12 requirement as it bears no nexus to the identification
13 of physical characteristics required by Section
14 52.17(b)(1).

15 As we discussed earlier today, such
16 funding issues may be pertinent to current regulatory
17 requirements in compliance to the extent that they
18 have any basis in fact. In this case, we have no
19 basis whatsoever to assume that Grand Gulf is not
20 meeting its current emergency planning obligations.
21 And if that was the case, then it would need to be
22 pursued pursuant to 10 CFR 2.206.

23 To the extent that Petitioners are raising
24 funding issues as they pertain to future reactors
25 which seems to be the case, they would need to raise

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1 that in the future COL proceeding as again we
2 discussed earlier today. But right now in the context
3 of these proceedings, these issues are without basis.
4 They are outside the scope of the proceeding. They
5 should not be admitted.

6 CHAIRMAN BOLLWERK: All right. You
7 mentioned, I guess, that there's a discussion of roads
8 in the environmental report. Yes.

9 JUDGE ABRAMSON: Or in the application.

10 MS. SUTTON: Part 4.

11 CHAIRMAN BOLLWERK: In the application.
12 I haven't read it I have to admit, but what does it
13 say if you could summarize in some way, shape or form?

14 MS. SUTTON: There are numerous places,
15 Your Honor, in Part 4 that discuss roads. For
16 example, in 2.2.2, we indicate that they are regarded
17 roadways, were collected from the Mississippi
18 Department of Transportation website, Traffic County
19 Data for Clayborn County roads and through interviews
20 with Mississippi and Louisiana DOT supervisors and
21 through direct observations of each major road, and
22 this is in support of our evaluation of time
23 estimates, in terms of evaluation time estimates to
24 make sure that the roads are sufficient to allow for
25 a timely evacuation.

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1 CHAIRMAN BOLLWERK: Is that in terms of
2 the size of the road, the number of lanes or the
3 condition of the road in terms of if it's full of
4 potholes? Both? Neither?

5 MS. SUTTON: It's looking at the capacity
6 of the road vis á vis the population. It's looking at
7 population growth and trying to maintain that the
8 roads will be sufficient in the future.

9 CHAIRMAN BOLLWERK: So it sounds like it's
10 aimed mostly at capacity then.

11 MS. SUTTON: This particular section seems
12 to be focused on capacity, but we could provide you
13 with further follow-up if you need it regarding
14 others.

15 CHAIRMAN BOLLWERK: Well, the application
16 is there. We can read if we need to.

17 MS. SUTTON: It's in Part 4.

18 CHAIRMAN BOLLWERK: All right. Any other
19 Board questions? All right. Let me turn to the Staff
20 then.

21 MR. SMITH: Thank you. The Staff hasn't
22 had too much to add to this. There's a couple of
23 points we would like to point out. We agree that
24 physical characteristics at the site include more than
25 just seismology, meteorology, geology and hydrology.

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1 In NUREG 654 which is a joint guidance document that
2 we issued with FEMA entitled "The Criteria for
3 Emergency Planning in an Early Site Permit
4 Application" describes some additional physical
5 characteristics needed to support an ESP application.
6 That includes transportation networks, topographical
7 features and the effects of adverse weather conditions
8 such as the potential for flooding and seasonal
9 impassability of the roads.

10 Perhaps let me give an example of what are
11 physical characteristics means to the Staff would be
12 helpful. For instance, you have a peninsula with a
13 reactor on the peninsula and there was a certain
14 population below the reactor on the peninsula and also
15 below the furthest bridge. That's the type of
16 impediment that might impose to the point where the
17 people who are trying to evaluate would have to drive
18 past the facility to get to the bridge. That is an
19 example of how physical characteristics might work in
20 concert with some of other these other aspects like
21 topographical features, transportation network, etc.

22 JUDGE ABRAMSON: Like Shoreham.

23 MR. SMITH: Sir?

24 JUDGE ABRAMSON: Like Shoreham?

25 CHAIRMAN BOLLWERK: He doesn't remember

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1 Shoreham.

2 (Laughter.)

3 MR. SMITH: Anyway, I think there's
4 nothing to suggest that economic information, adequacy
5 of funding or implementation issues are physical
6 characteristics of the site. Those issues regarding
7 adequacy of funding and implementation go to the
8 practicability issue that Judge Baratta spoke about
9 earlier or a more appropriate issue in another
10 proceeding where the Staff viewed the full emergency
11 plan and determine whether reasonable assurance exists
12 that adequate protective measurements can be taken and
13 will be taken in the event of an emergency. That
14 finding is simply not part of an ESP application. The
15 Staff has nothing further.

16 CHAIRMAN BOLLWERK: You mentioned
17 transportation networks. In terms of what you're
18 looking at on transportation networks, are you looking
19 at capacity or transportation worthiness in terms of
20 the shape that the particular road is in of whatever
21 network you are talking about?

22 MR. SMITH: Absolutely. You're looking at
23 all of those and how they can interrelate to one
24 another. The primary method used to determine whether
25 physical characteristics exist that might pose a

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1 significant impediment is through an evacuation time
2 estimate or an ETE study. It takes into account all
3 of these factors and evaluates all of these components
4 and looks to see if there is any interplay even rather
5 than even a single characteristic that might pose an
6 impediment. That's what this Part 4 contains.

7 CHAIRMAN BOLLWERK: Will that include the
8 number of police that are around to direct traffic?
9 Is that part of the network or isn't it?

10 MR. SMITH: Give me a moment to consult.
11 No, it would not. Police and other police needed
12 would something that would be identified by the ETE
13 and that would go into helping shape what the full
14 emergency plan would look like at a later stage.

15 CHAIRMAN BOLLWERK: All right. Any other
16 questions? All right. Let me turn to Ms. Curran
17 then.

18 MS. CURRAN: Looking at this regulation
19 52.17(b)(1) again, it refers to "physical
20 characteristics you need to the proposed site such as
21 egress limitations from the area surrounding the site
22 that could pose a significant impediment to the
23 development of emergency planning." I think what
24 we're talking about here is, as we've described in the
25 environmental justice contention, a situation that has

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1 been going on for 50 years which is the lack of
2 investment in the infrastructure of this county
3 because of the high poverty level here. We've given
4 the examples of the police department, the fire
5 department, the hospital. I think it's reasonable to
6 question whether this also extends to maintenance of
7 roads.

8 What we're talking about is physical
9 characteristics that could impede the development of
10 effective emergency plans. An emergency plan, of
11 course, is something that's on a piece of paper. It
12 depends a lot on the infrastructure, on the resources
13 to carry it out. And that's what this contention is
14 trying to get at which is that there are physical
15 limitations on what the county has been able to do to
16 keep up with emergency planning with those
17 infrastructural things that you need to do to do
18 effective emergency planning. So it seems to us that
19 really a look to see what is the condition of the
20 roads and what is the condition of whatever
21 infrastructure is called upon in an evacuation here
22 and are there fundamental problems with it such that
23 it would interfere with the development of effective
24 emergency plans?

25 JUDGE ABRAMSON: The basic point being

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1 given the tax problem or given the financial problems
2 that all these things are deficient and therefore,
3 they need to be looked at.

4 MS. CURRAN: And it's a long standing
5 problem. It's something that's been developing over
6 the years. So there was a question before. This
7 community already has an emergency plan because it has
8 a nuclear plant. It also has a 15 year period in
9 which tax revenue was reduced and it hasn't been
10 investing in some of this infrastructure that one
11 would need in order to do effective emergency
12 planning.

13 So then when you get a proposal for a new
14 plant, the regulation seems to call for an examination
15 of those physical characteristics. Setting aside the
16 question of whether an emergency plan exists, the
17 regulation calls for an examination of physical
18 characteristics that could impede the development of
19 effective emergency plans. It seems appropriate to us
20 in this case to look at that carefully.

21 JUDGE ABRAMSON: You're not at this moment
22 challenging the existing emergency plan. Is that
23 correct, Counselor?

24 MS. CURRAN: That's right.

25 JUDGE ABRAMSON: And as I understand it,

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1 the application does address whether the road network
2 without -- Let's come back to the condition of it of
3 the roads, but that the road network without examining
4 condition is sufficient for this purpose. Is that
5 accurate?

6 MS. CURRAN: Well, I heard Ms. Sutton say
7 that. I don't know.

8 JUDGE ABRAMSON: Well, the application
9 addresses it which is the question. You don't know.
10 You have not examined the application to see whether
11 it does or does not.

12 MS. CURRAN: I'm not familiar with that
13 part of the application and I'd like to look at it,
14 but I didn't bring that part of the application with
15 me.

16 JUDGE ABRAMSON: But your contention is
17 that the application is deficient. Is that correct?

18 MS. CURRAN: Right, but there's a
19 difference between saying that the road has a certain
20 capacity and discussing the condition.

21 JUDGE ABRAMSON: I understand that.

22 MS. CURRAN: All I'm saying is it may be
23 true what she says. I can't verify that that's what
24 the application says because I don't have it in front
25 of me.

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1 JUDGE ABRAMSON: But you did look at the
2 application to make the determination that or to
3 support your allegation that the condition of the
4 roads has not been examined.

5 MS. CURRAN: Yes.

6 JUDGE ABRAMSON: So there is a deficiency
7 alleged because the application has not looked at the
8 condition of the roads. But otherwise you're not
9 challenging whether the roads themselves or road
10 network if its condition were good would be
11 sufficient.

12 I'm trying to understand the extent of
13 this contention. If you haven't look at the
14 application to see whether it addressed that road
15 network, then it's hard for me to see how your
16 contention could have addressed it.

17 MS. CURRAN: I did not see a discussion in
18 the application of the physical characteristics of
19 this emergency planning area whether they would
20 impeded evacuation and I do not recall seeing a
21 discussion of road conditions.

22 CHAIRMAN BOLLWERK: Okay. Your point is,
23 I take it, that there's funding deficiencies here and
24 followed from that just like there are inadequacies of
25 the police department, there are inadequacies with

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1 other parts of the infrastructure.

2 MS. CURRAN: Yes.

3 CHAIRMAN BOLLWERK: Okay. Did you have
4 any further points?

5 MS. CURRAN: No.

6 CHAIRMAN BOLLWERK: All right. Any
7 questions? Any points anyone else wants to make on
8 this contention? All right. Then let's move to what
9 we have listed as the last contention, a question
10 about the Illinois State Moratorium. This is a
11 Clinton focus contention, Miscellaneous Contention
12 5.1. Petitioners.

13 MR. FISK: Thank you, Your Honor. I guess
14 I will split 10 and 10 also.

15 CHAIRMAN BOLLWERK: All right.

16 MR. FISK: This contention boils down to
17 a simple point. Illinois law currently deems all
18 potential sites for a new nuclear power plant in
19 Illinois inappropriate and therefore the ESP should
20 not be granted unless and until the moratorium is
21 lifted.

22 Since 1987, Illinois has had a law
23 prohibiting the locating of new nuclear power plants
24 within the state. In particular, 220 ILCS 5/8-406C as
25 cited at page 18 of our supplemental request provides

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1 that "no construction shall commence on any new
2 nuclear power plant to be located within this state
3 and no certificate of public convenience and necessity
4 or other authorization shall be issued therefore by
5 the Illinois Commerce Commission until the director of
6 the IEPA finds that the U.S. Government through its
7 authorized agency has identified and improved a
8 demonstrable technology or means for the disposal of
9 high level nuclear waste or until such construction
10 has been specifically approved by statute and enacted
11 by the General Assembly."

12 This moratorium is an appropriate exercise
13 of the state's authority over economic and non-nuclear
14 and safety issues. Illinois exercises its authority
15 to prohibit new nuclear power plants in the state
16 essentially until the Federal Government has solved
17 the problems relating to the disposal of high level
18 nuclear waste.

19 The moratorium has not been lifted and
20 therefore the answer to the question presented in this
21 proceeding, i.e., whether or not the Clinton site is
22 appropriate for a new nuclear power plant, is no.
23 Therefore we contend that the panel must either
24 dismiss Exelon's ESP application, would need to refile
25 when and if the moratorium is lifted or the panel

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1 should simply table the application until and unless
2 the moratorium is lifted.

3 I would like to briefly address the three
4 objections that have been raised by Exelon and/or the
5 Staff to this contention. First, the Staff asserts
6 that the panel's consideration of the Illinois
7 moratorium would somehow interfere with or duplicate
8 the permitting authority of the state agency. Unlike
9 the cases cited by the Staff, however, this case does
10 not involve the permitting authority of the state
11 agency.

12 The moratorium does not require Exelon to
13 go to Illinois EPA with an application for a permit
14 and doesn't require Illinois EPA to determine whether
15 some application regarding the Clinton plant satisfies
16 particularly statutory standards. Instead, the
17 moratorium is a clear bar of new nuclear plants in the
18 state and simply calls for IEPA to decide whether or
19 not some day in the future the moratorium should be
20 lifted for issues related to the disposal of nuclear
21 waste, not specifically the Clinton plant. Therefore,
22 the panel's recognition that the moratorium makes the
23 Clinton site inappropriate for a new nuclear facility
24 wouldn't in any way interfere with the IEPA's decision
25 making on this issue.

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1 Second, Exelon, seizing on the word
2 "construction" in the moratorium, starts the
3 moratorium is not relevant to this siting proceeding,
4 but this reading ignores the best of the moratorium
5 law. It also prohibits the issuance of "a certificate
6 of public convenience and necessity for other
7 authorization." The clear intent of the Illinois
8 General Assembly here is to prohibit new nuclear power
9 plants from being located in this state, i.e., making
10 any site in the state inappropriate for a new plant
11 and therefore the moratorium bars the issuance of the
12 ESP until it is lifted.

13 And finally, Exelon asserts that the panel
14 doesn't need to consider the moratorium because it
15 will most likely be lifted before the expiration of
16 any ESP that might be issued. In particular, Exelon
17 asserts that the Yucca Mountain facility will most
18 likely open perhaps in 2010 and that such opening
19 would satisfy the requirements for the lifting of the
20 moratorium.

21 But the panel can't consider that argument
22 because such consideration would clearly interfere
23 with the state decision making, i.e., it would be the
24 NRC determining when the state moratorium should or
25 should not be lifted. Instead the panel must simply

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1 acknowledge and recognize the existence of the
2 moratorium and realize that it deems the Clinton site
3 inappropriate for a new nuclear power plant. That's
4 all I have for right now.

5 JUDGE ABRAMSON: Counselor, that
6 moratorium is a state law that restricts state
7 agencies. Do you suggest that it reaches this Federal
8 agency?

9 MR. FISK: We believe that it speaks
10 specifically to the issue at hand here, whether or not
11 this site is appropriate. Exelon is presenting --

12 JUDGE ABRAMSON: Sorry. The statute
13 specifically prohibits Illinois agencies from issuing
14 certificates of convenience and necessity or
15 permitting construction. Does it reach this Federal
16 agency? Yes or no?

17 MR. FISK: We believe that it should
18 answer the question of whether or not the site is
19 appropriate which is before the NRC today.

20 JUDGE ABRAMSON: If the Commission issues
21 the early site permit, does that have any effect on
22 the state agency's authority to decide not to issue
23 its construction permit or its certificate of
24 convenience and necessity?

25 MR. FISK: It would not force the state to

1 issue an approval for a Clinton II nuclear plant, but
2 this is an issue that the state has authority over and
3 has made the determination these sites are not
4 appropriate.

5 JUDGE ABRAMSON: I'm not questioning the
6 state's authority to pass its regulations and laws on
7 it. I'm simply asking if this panel or this
8 Commission determines to issue the early site permit,
9 that would have any effect whatsoever on the ability
10 of the state agencies to continue to enforce and
11 respect their own laws. Do you believe, for example,
12 that somehow issuance of the EPS would preempt the
13 state that there is some Federal preemption at work
14 here?

15 MR. FISK: No, it's been set forth that
16 such moratoriums cannot preempted by Federal law. So,
17 no, we just believe that it is appropriate in this
18 proceeding for the panel to consider the state's
19 determination on this issue.

20 JUDGE ABRAMSON: Thank you.

21 JUDGE BARATTA: The way that moratorium is
22 worded it is not absolute in respect that it provides
23 for certain things to happen and the moratorium to be
24 lifted even automatically. Because of that, I don't
25 quite understand your argument that this Board should

1 wait to take action on the EPS application. Nothing
2 would happen until the moratorium is lifted, but by
3 the same token, there are provisions for that both
4 automatically and by action of the legislature.

5 MR. FISK: Well, the moratorium would not
6 be lifted. I mean the moratorium is not lifted
7 automatically. It's lifted when the director of IEPA
8 makes a determination that certain conditions are met.

9 JUDGE BARATTA: So it is not absolute, I'm
10 trying to say. In other words, it does not say "Thou
11 shalt not."

12 MR. FISK: Right, it can be lifted by the
13 state. Yes, definitely.

14 JUDGE BARATTA: And since as you've
15 already suggested action by this board would not
16 preempt them from refusing to issue a construction
17 permit or certification, I guess it's called, what is
18 the issue that is being raised here?

19 MR. FISK: The issue being raised here is
20 that Exelon is seeking a determination that this is an
21 appropriate site for a new nuclear power plant and
22 that state has already made a clear statement that
23 these sites are inappropriate and we believe the NRC
24 should take that into consideration and defer
25 consideration of the ESP application until and unless

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1 the moratorium is lifted.

2 CHAIRMAN BOLLWERK: All right. Any other
3 questions? All right. I'll turn to the Applicant
4 then.

5 MR. FRANTZ: Thank you. Normally, in a
6 case like this, where the Petitioner is raising a
7 question of state law, I would target really that
8 isn't enforcing the state law and should not consider
9 the matter at all. However, we believe the case here
10 is somewhat different. The statute itself is so clear
11 on the space and so obviously is not implying to the
12 early -- of the proceeding that we believe the Board
13 will rule that it does not apply in this case and
14 therefore the contention should be dismissed.

15 Contention 5.1, we believe, reflects the
16 Petitioner's plain misreading of the clear language of
17 the statute. They are ignoring language that's in the
18 statute and they are also reading into the statute
19 language that does not exist.

20 The statute itself only imposes a
21 moratorium on construction. Contrary to the claims by
22 the Petitioners, it does not refer to siting anywhere
23 at all in the statute. It does not prohibit issuance
24 of an early site permit. Again, it's the case where
25 Petitioners are reading the word "siting" into the

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1 statute and that's certainly does not exist.

2 As has already been pointed out, the
3 moratorium is temporary. It only exists until such
4 time as the Federal Government identifies and approves
5 a demonstrable technology or means of disposal of high
6 level nuclear waste. Such a technology should be
7 identified and approved relatively shortly.

8 The Department of Energy due to submit its
9 application in December of this year. Under the
10 governing statute, the NRC will then have about three
11 years to review and approve the application.
12 Certainly at that time, there will be an
13 identification or approval of a demonstrable
14 technology for storing high level waste.

15 Contrary to the claims of Petitioners in
16 their reply brief, there is no requirement in the
17 statute that Yucca Mountain be sufficient to store all
18 of this waste. There is only a requirement that there
19 be a demonstrable technology identified and approved
20 and surely that will occur with the approval of
21 construction of Yucca Mountain by the NRC.

22 Issuance of an early site permit itself
23 would not be inconsistent with either of the language
24 or the intent of the statute. An ESP does not
25 authorize construction as Ms. Curran has repeatedly

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1 stated during the last two days. An ESP essentially
2 has no physical impact.

3 The purpose of an ESP is solely to bank a
4 site for possible future use up to 20 years with a
5 possible extension of that 20 year period. It's
6 designed to save time and increase certainty in the
7 licensing process. It will expedite issuance of COL
8 if, in fact, we ever intend to go ahead and go forward
9 with the COL application. Therefore, approving ESP
10 now would certainly have benefit even though there
11 might be a temporary moratorium on construction.

12 Petitioners' arguments on the certificate
13 of public necessity and convenience simply are not
14 relevant in this context. If you look at the section
15 they cite, it's part of a larger section that deals
16 with issuance of certificates of public convenience
17 and necessity. Those are required before a public
18 utility can commence construction. There is no
19 requirement to seek a certificate prior to setting the
20 site.

21 Additionally, we note that nowhere at all
22 in the statute is there a requirement for anybody to
23 seek a certificate for siting. It simply is not part
24 of the statute. Again, this is a case where they seem
25 to be reading language in it that doesn't exist.

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1 I think as the Board members already
2 pointed out the statute on its face does not apply to
3 the NRC. It does not cover NRC activities. Although
4 the statute does refer to the Commission, the statute
5 defines the Commission as being the only way to
6 Commerce Commission which is the State Public Utility
7 Commission. It does not refer to the NRC and would
8 not govern NRC activities.

9 In fact, if you were interpret the
10 language as applying to the NRC, I think, it would
11 clearly be corrected by the Atomic Energy Act. The
12 states simply have no authority to govern NRC
13 activities.

14 Then finally, I'd like to say that the
15 band on the issuance of the certificate for
16 construction only applies to public utilities. It
17 would not apply to an entity such as Exelon
18 Generation. Exelon Generation does not need to seek
19 a certificate from the ICC for construction of this
20 plant. Therefore, this band on the issuance of a
21 certificate of authorization by the ICC simply is not
22 relevant to this proceeding. So for all these
23 reasons, we believe the statute that the Petitioners
24 have raised simply does not apply and the contention
25 should be dismissed.

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1 CHAIRMAN BOLLWERK: So essentially you're
2 saying on the last point that when the time comes to
3 apply for a combined operating license and
4 construction permit that you wouldn't need to seek a
5 certificate of convenience and necessity from the
6 Illinois Commerce Commission.

7 MR. FRANTZ: That's correct. In
8 generation of nuclear power, the state of Illinois
9 has been deregulated. Since Exelon Generation is not
10 a public utility, it does not need to seek a
11 certificate.

12 CHAIRMAN BOLLWERK: In looking at an early
13 site permit, it's not a construction permit. It does
14 have certain characteristics arguably of a
15 construction permit. For instance, we have to hold a
16 mandatory hearing. For the purposes brought into that
17 notwithstanding in fact is not called a construction
18 permit, why doesn't that move it into a different
19 category?

20 MR. FRANTZ: The statute does not speak
21 about issuance of a construction permit itself. It
22 talks about construction and issuance and early
23 acceptance is not authorized construction.

24 JUDGE BARATTA: However, your early site
25 application, if I recall from the discussion that you

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1 had earlier on the earlier contentions, does have
2 provisions for site preparation and redress in the
3 event that you don't go forward.

4 MR. FRANTZ: Yes.

5 JUDGE BARATTA: So it does include some
6 construction.

7 MR. FRANTZ: It would include construction
8 of the power plant itself. It would not include
9 construction of ancillary facilities. NRC defines
10 construction in 50.10 of the Regulations as being
11 basically construction of the power block. In this
12 case, we would not be authorized to do any of that
13 construction without a construction permit or a COL.

14 JUDGE BARATTA: Okay. Thank you.

15 CHAIRMAN BOLLWERK: Any other questions?

16 JUDGE ABRAMSON: Counselor, let's just see
17 if we can get confirmation on all of this. Is it
18 Exelon's view that the granting by the Commission
19 ultimately of the early site permit would have any
20 impact whatsoever on any state requirements you might
21 need to satisfy regarding commencement of construction
22 or operation?

23 MR. FRANTZ: No, the state would still
24 have full authority on the statute.

25 JUDGE ABRAMSON: Thank you.

1 CHAIRMAN BOLLWERK: All right. Although
2 apparently, the moratorium wouldn't apply.

3 MR. FRANTZ: Assuming that the state qual
4 applies to us and we believe that's an open question
5 for the Board we need not address. Assuming that the
6 band on construction applied to Exelon Generation, we
7 don't believe that issuance of an ESP would at all
8 preclude the state's determination to enforce that
9 type of thing.

10 CHAIRMAN BOLLWERK: Although the position
11 you've occupied here, as I understand it, it doesn't
12 apply. Is that right?

13 MR. FRANTZ: At that very least, we
14 believe there's no requirement for a merchant
15 generator to seek a certificate from the ICC. That
16 part of the band does now apply quite clearly. There
17 is also a statement that would prohibit construction.
18 That is a somewhat ambiguous phrase. It appears in a
19 broader context of the certificate of convenience.

20 Like I said, the state boards argue that
21 because we aren't require to seek a certificate of
22 public convenience because the band is intended to
23 protect rate payors - and we are dealing with rate
24 payors here. We are merchant generator -- that the
25 band of construction should not apply to us. But

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1 again, that's a very technical interpretation of the
2 state law. I don't believe the licensing board needs
3 to go quite that far. It still is in its contention

4 CHAIRMAN BOLLWERK: Are there other -- It
5 says "certificates of convenience or other
6 authorizations." Are there other authorizations you
7 need?

8 MR. FRANTZ: There will be other
9 authorizations we need from the state and local
10 governments to construct the plant. We'll also from
11 the Federal government need FAA authorizations and so
12 forth.

13 CHAIRMAN BOLLWERK: All right. Anything
14 further? All right. We'll turn to the Staff.

15 MS. REDDICK: Thank you. Simply put, Your
16 Honors, the Staff believes that this contention is
17 inadmissible because it is not within the scope of
18 this proceeding. The Illinois Moratorium statute
19 conditions the construction and the granting of a
20 certificate of public convenience, are actions taken
21 by the director of IEPA and the Illinois Commerce
22 Commission, the ICC.

23 The contention based on this statute does
24 not raise the issue within the scope of this
25 proceeding because it concerns completely different

1 agency's permitting authority. The Commission has
2 clearly stated that it's improper to litigate concerns
3 regarding other agency's permitting authority in an
4 NRC adjudicatory proceeding.

5 Now whether a non-NRC permit is required
6 is solely the responsibility of the agency that
7 actually issues that permit. In this case whether the
8 ICC lifts the moratorium on new nuclear plant
9 construction and decides to issue a certificate of
10 public convenience is entirely up to the ICC and is
11 not a matter to be addressed by the NRC.

12 The NRC's concern in this proceeding is
13 the suitability of the site and the NRC's ability to
14 issue a permit is no way depended upon the ICC's
15 decision providing the Illinois band on new plant
16 construction. Furthermore, it's neither the place nor
17 the responsibility of the NRC to determine whether or
18 not the ICC will actually lift the moratorium. The
19 Commission's authority regarding the ESPs does not
20 encompass these types of matter pertaining to
21 requirements for other agency's permits and to
22 consider that issue here would be to exceed the scope
23 of this proceeding.

24 Petitioners assert that NRC consideration
25 of this contention would not interfere with state

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1 agency's authority. In fact, Petitioners assert that
2 the only way the NRC could, in fact, interfere with
3 the state agency would be to issue the ESP without
4 considering the Illinois moratorium. However, to do
5 so would require an examination that is not
6 appropriate in an ESP proceeding and would duplicate
7 the work to be done by the state agency itself.

8 Furthermore, the Petitioner implied that
9 the Illinois statute prohibits siting of a new nuclear
10 plant in the state. However, the language of the
11 statute is silent on siting issues and this goes to
12 what the Applicant just commented on. The state
13 statute only prohibits actual plant construction and
14 the issuance of certificates of public convenience or
15 other authorizations by the Illinois Commerce
16 Commission. Neither of these matters is at issue in
17 the proceeding. The suitability of the site is the
18 issue at hand and to require the NRC to consider the
19 applicability of the state's moratorium would extend
20 beyond the planning issues.

21 So, in summary, the Staff believes this
22 contention is admissible even though this is an issue
23 that goes beyond the scope of this proceeding. Our
24 agency's permitting authority is not a proper issue
25 for an NRC adjudicatory forum. The responsibility for

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1 determining whether another agency's permit should or
2 should not be issued falls strictly upon that other
3 agency.

4 In this case, deciding to lift the
5 moratorium on new plant construction for issuance of
6 a certificate of public convenience is the sole
7 responsibility of the Illinois Commerce Commission and
8 resolution of this issue should not be addressed or
9 duplicated in an ESP proceeding. That's all the Staff
10 has. Thank you.

11 CHAIRMAN BOLLWERK: Questions?

12 JUDGE ABRAMSON: No.

13 CHAIRMAN BOLLWERK: Let me pose the same
14 question to you which I did to Counsel for Exelon
15 which is the question of construction and the
16 definition. Obviously, as I mentioned earlier, site
17 permit does have certain characteristics of a
18 construction permit to the degree that it points that
19 we have to hold a mandatory hearing. How do you
20 distinguish between the two for these purposes given
21 the word "construction issues"?

22 MS. REDDICK: Your Honor, I don't believe
23 that the Board even has to get to this issue even
24 though it still relates to the ability for the state
25 agency to lift this moratorium which is something that

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1 is beyond the scope of this proceeding.

2 CHAIRMAN BOLLWERK: All right. Any other
3 questions?

4 JUDGE ABRAMSON: Yeah. Let me just make
5 sure I'm getting the same story from everybody. Does
6 the Staff have any reason to believe that the issuance
7 of the ESP by the Commission would have any effect
8 whatsoever, whatsoever, on the state's ability to
9 continue to enforce its own internal laws?

10 MS. REDDICK: No, Your Honor, we do not.

11 CHAIRMAN BOLLWERK: All right. Any other
12 questions at this point? Let me turn then to the
13 Petitioner and see if there's anything you want to say
14 more about it.

15 MR. FISK: Thank you, Your Honor. First,
16 I definitely disagree with Exelon that the moratorium
17 does not apply to them a non-regulated utility. Even
18 if they don't have to pursue a certificate of public
19 convenience, both the construction band and the
20 provision, the reference to any other authorizations,
21 clearly extends this moratorium to Exelon and any
22 pursuit of a new nuclear power plant in Illinois.

23 I would also note that ESP proceeding does
24 have elements that suggest it's at least a partial
25 construction permit is the phrase I believe that's

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1 been used. That would trigger even the construction
2 part, but even without the construction part, we
3 believe that this moratorium applies more broadly as
4 a broad statement that all sites in Illinois are
5 inappropriate for the nuclear power plants at this
6 time. The moratorium applies.

7 As for Exelon's discussion on to whether
8 or not the IEPA will lift the moratorium before any
9 ESP would expire, I believe the reference was and it's
10 temporary and that Yucca will open soon. We've
11 discussed the factual part of that in our reply that
12 as factual matter we did not believe that was true,
13 but that issue is inappropriate for this panel to
14 consider because that's for the IEPA to determine. If
15 the panel has to take the situation as it has it now
16 which is that there is a moratorium in Illinois and
17 whether or not that moratorium is lifted is up to the
18 IEPA.

19 That turns to the bulk of the Staff's
20 response which is that the panel's consideration of
21 this moratorium would somehow interfere with the
22 IEPA's decision. That's clearly not true recognizing
23 and taking into account the moratorium doesn't
24 interfere with the IEPA's decision whether or not life
25 that moratorium. That's where I would leave it.

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1 CHAIRMAN BOLLWERK: All right. Any
2 questions for him?

3 JUDGE ABRAMSON: Let's just keep following
4 this same line. If the Nuclear Regulatory Commission
5 decides to issue an ESP and if as you postulate that
6 ESP includes some elements of a construction permit,
7 would that have any effect whatsoever on the ability
8 of the ICC or the other Illinois state agencies to
9 continue to enforce the internal laws of the State of
10 Illinois? Would it mandate that Illinois give some
11 preference to this applicant or would it be binding
12 upon any Illinois agency?

13 MR. FISK: I don't know of anything that
14 would make it binding on the agency because these
15 issues the state has authority under the Atomic Energy
16 Act to address and I believe that the fact that the
17 Atomic Energy Act leaves these issues to the state
18 because of that, should factor in the factor that the
19 state has made a clear statement regarding the
20 appropriateness of sites Illinois for the nuclear
21 power plants in determining whether or not to issue an
22 ESP. Given that, their statements should put this on
23 hold or dismiss with need to refile until that
24 moratorium is lifted.

25 JUDGE ABRAMSON: But the issuance of the

1 ESP just one more time would have no effect on whether
2 or not the state agencies continue to enforce their
3 own laws.

4 MR. FISK: I don't know of any.

5 CHAIRMAN BOLLWERK: Any further questions
6 on this issue? Any other comments from any other
7 counsel for the Applicant or for the Staff?

8 MR. FRANTZ: I have nothing further.

9 CHAIRMAN BOLLWERK: All right. Then we
10 thank you very much. At this point, we have concluded
11 the arguments on the contentions that were proffered
12 by Petitioners and they are submitted for our
13 consideration. Under the Agency's rule that are
14 applicable through this proceeding, the Commission
15 made it clear that the new rules were adopted in
16 January and became effective in February, are
17 applicable in this case. This would be Subpart L
18 proceeding if it were to go forward and I should say
19 that the statements I'm going to make are based on
20 suppositions.

21 We're not ruling on whether we are
22 applying questions of standing or admissible
23 contentions, but I want to talk to hypothetically with
24 the parties briefly about what would happen if we were
25 to do so. Under the Commission's new rules, we are to

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1 issue a decision and absence an extension from the
2 Commission we should issue a decision on questions of
3 standing and contention and admissibility by the
4 middle of July. Thereafter discovering it to the
5 degree that's set forth in the rules dealing with
6 Subpart L would be applicable.

7 One thing that you could anticipate if
8 that we were to find admissions contentions and things
9 were to move forward is that there would be some
10 mandatory disclosures that are due fairly promptly I
11 believe after that. I believe 30 days under the
12 rules. In terms of the Staff's hearing file, we would
13 anticipate as we've done some other Subpart L
14 proceedings that it would be done electronically. I
15 think we've made the procedures that are available or
16 applicable there clear on a couple other cases. We
17 would apply them here. I think it's worked fairly
18 well in terms of the ability of Staff to get the
19 documentation out so that the other parties' reactions
20 from that. So that's what we would contemplate.

21 More than likely, we would be holding any
22 prehearing conferences to begin to set schedules
23 fairly promptly after an order were issued if we were
24 to find the proceeding to go forward. That order
25 would indicate to the parties that they may well wish

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1 to get together and have some discussion about a
2 schedule for any hearings prior to having that
3 conference with the Board. So that's something they
4 should contemplate as well, to look at the
5 possibilities of a schedule in terms of what you would
6 want to do. Let me ask the Staff. What do you
7 contemplate in terms of both the draft and final ESP
8 and any SER we're going to be issuing these cases in
9 terms of dates?

10 MR. WEISMAN: Your Honor, if you'll allow
11 us to conference to determine this for a moment.

12 CHAIRMAN BOLLWERK: Surely.

13 MR. WEISMAN: Your Honor, do you want to
14 know when the draft ESP will be available?

15 CHAIRMAN BOLLWERK: Both the draft and the
16 final and I don't know if you're going to do a draft
17 SER or not.

18 JUDGE ABRAMSON: I think they will be
19 issued all at the same time.

20 CHAIRMAN BOLLWERK: That I don't know.
21 That's what we're probably going to find out.

22 (Conference off record.)

23 CHAIRMAN BOLLWERK: Would you like us to
24 take a brief recess? We can do that if this is going
25 to take a couple minutes.

1 MR. WEISMAN: I think we probably need to
2 take that.

3 CHAIRMAN BOLLWERK: That's useful. Why
4 don't we take a five minute recess and let them
5 conference over here rather than having everybody
6 stand here? Off the record.

7 (Whereupon, the foregoing matter went off
8 the record at 3:33 p.m. and went back on
9 the record at 3:38 p.m.)

10 CHAIRMAN BOLLWERK: Can we go back on the
11 record please. The pending question when we took the
12 break was what information the Staff could provide us
13 with regard to the Environmental Impact Statement,
14 both draft and final, and any SERs, both draft and
15 final, they were going to issue with respect to the
16 site permits for these facilities.

17 MR. WOLFE: Yes, Your Honor. Bob Weisman
18 speaking for the Staff. We do have target dates.
19 These are schedules that the Staff certainly intends
20 to meet, but they are dependent on the number of days
21 that are not necessarily under the Staff's control
22 such as Applicant's response to the RAIs and any other
23 documents. So we will inform the Board of any changes
24 to the dates that we're going to give you.

25 CHAIRMAN BOLLWERK: All right.

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1 MR. WEISMAN: And we also came up with the
2 schedule will be updated on the Staff's website. For
3 the North Anna application, the draft EIS approved
4 schedule is October of '04. That's October of this
5 year and the final EIS is scheduled for June of '05.
6 The SER for North Anna application, the draft is
7 scheduled to issue in December of this year in '04 and
8 the final is scheduled to be issued in June of '05.

9 For the Clinton review, the draft EIS
10 currently scheduled for December of '04 and the final
11 EIS will be scheduled to be issued in August of '05.
12 Again for Clinton, the draft SER will be scheduled to
13 be issued in February of '05 with the final SER to be
14 issued in August of '05.

15 For Grand Gulf, the draft EIS is scheduled
16 to be issued in February of '05 and the final EIS in
17 October of '05. The SERs for Grand Gulf, the draft
18 SER would issued in April of '05 and the current
19 schedule for the final SER would be October of '05.

20 CHAIRMAN BOLLWERK: All right. Thank you
21 very much. We appreciate the information. Obviously,
22 in doing any future scheduling, those dates would have
23 to be kept and taken into account and dealt with in
24 terms of anything that came up. One of the issues
25 here or questions putting aside the admission of any

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1 contentions that have been raised by the Petitioners
2 is the need for the Boards to conduct a mandatory
3 hearing. We haven't done a mandatory hearing in a
4 number of years, probably back into the '70s sometime
5 if I were to guess.

6 One of the things were going to be looking
7 to the various parties that would be involved in that
8 mandatory hearing is some point beginning discussion
9 about probably earlier rather than later about what
10 sort of evidence your presentations would contemplate
11 in terms of that sort of mandatory hearing to make
12 sure we understand what you would intend to present
13 and also that we can clear additional items or
14 information that we would need that we would make that
15 clear to you so that we'll all working off the same
16 page in terms of at least what needs to be presented.
17 Obviously the Board would listen, ask questions.

18 Under Subpart L, we would have that
19 authority and make the appropriate findings based on
20 what we heard. That would be the general process.
21 That's what a mandatory hearing involves. Again
22 there's not any advisory presentations at that point.
23 It's basically the Staff and the Applicants making a
24 presentation before the Board and the Board asking
25 questions on the items that are necessary for us to

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1 make the findings that have been specified within the
2 scope of the order.

3 MS. CURRAN: Judge Bollwerk?

4 CHAIRMAN BOLLWERK: Yes.

5 MS. CURRAN: I don't think I've done one.
6 Is there typically a role for the Intervenor who is a
7 party here?

8 CHAIRMAN BOLLWERK: Well, again, in a
9 mandatory hearing, there are no "contentions." The
10 contentions are what you've brought up and what would
11 be admitted.

12 MS. CURRAN: Right.

13 CHAIRMAN BOLLWERK: So essentially, I'd
14 have to go back and look at the practice, but I
15 suspect other than a role of an observer the answer to
16 that would be no.

17 MS. CURRAN: But you're talking about
18 they're required.

19 CHAIRMAN BOLLWERK: That's correct.

20 MS. CURRAN: You have to make findings
21 under the Atomic Energy Act.

22 CHAIRMAN BOLLWERK: That's correct. I
23 should mention there are no questions that have come
24 up about where we would hold these and as well in
25 terms of future proceedings. I recognize there is a

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1 considerable amount of interest at the different sites
2 in holding proceedings in the future out there. We
3 will do our best to do that, both limited appearances
4 and the mandatory hearing more than likely.

5 Again I can't commit at this point, but to
6 say we're certainly taking that into account and give
7 it serious consideration as something that needs to be
8 addressed and taken into account. So we will do that.
9 But at some point we will need to hold the mandatory
10 hearings and again I would urge the participants to
11 begin to take that into account and think about it in
12 terms of what they would be presenting to the Board.

13 It may be some ways off, but I probably
14 would be starting that planning process earlier rather
15 than later would be useful for everyone involved
16 because frankly we haven't done one of these in quite
17 a number of year. So we need to make sure that we've
18 covered the bases that need to be covered in terms of
19 whatever presentations are made and what the Board
20 needs to do in response to those. All right.

21 Let me just stop there. Any questions at
22 this point in terms of a procedural nature from any of
23 the participants? No.

24 MS. CURRAN: Judge Bollwerk, are you
25 contemplating any site visits?

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1 CHAIRMAN BOLLWERK: That's possible. It's
2 hard to say exactly when. Again if we do some
3 additional prehearing conferences or limited
4 appearances, that might be an opportunity to do those
5 as well. I guess we really haven't talked about that.
6 But if that were the case, obviously we would follow
7 the standard practice that we have for site visits in
8 terms of the interacting with the Applicants with the
9 ability to get at least on a pertinent part of the
10 site and as well involving anyone else that needed to
11 be involved in terms of the Petitioner and the Staff
12 obviously.

13 Let me just see at this point. Do either
14 the Board members have anything they want to say at
15 this point? On behalf of the Boards, --

16 MR. WEISMAN: Your Honor.

17 CHAIRMAN BOLLWERK: Yes. Go ahead.

18 MR. WEISMAN: I'm sorry to interrupt.

19 CHAIRMAN BOLLWERK: That's all right.

20 MR. WEISMAN: I just want to clarify
21 something about the mandatory hearing. It's the
22 Staff's understanding that if a proceeding is
23 contested, that is, if contentions are admitted and
24 the potential for a hearing, that 2104 would provide
25 the finds that would be made and in that case in a

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1 contested proceeding, then the Petitioners and
2 Intervenors would have a role in the hearing.

3 CHAIRMAN BOLLWERK: Yes.

4 MR. WEISMAN: But if it's not contested,
5 there are no remaining contentions. I just want to
6 clarify it.

7 CHAIRMAN BOLLWERK: Exactly. Right.

8 MR. FRANTZ: Just to follow up on that, if
9 they are admitted as Intervenors, they would limited
10 to their contentions and not to the overall findings
11 of the Board.

12 MR. WEISMAN: I'm sorry. Your Honor. I
13 was looking at the procedures in 2104 and that's what
14 I was trying to address, what 2104 specifies for the
15 contested proceeding and what it specifies for a non-
16 contested proceeding.

17 CHAIRMAN BOLLWERK: Right. And there were
18 some proceedings. This is something we can discuss
19 further once we get to that step, but again we do have
20 to hold a mandatory hearing here. That's clear.

21 MR. WEISMAN: Yes. Absolutely.

22 CHAIRMAN BOLLWERK: One thing on behalf of
23 the Board which is I like to thank all of the
24 participants, the Petitioners and the three Applicants
25 and the Staff for their presentations. We tried to

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1 emphasize that we wanted to hear the crux or the focus
2 of the disputes that were between the parties. I
3 think you did an excellent job of providing that for
4 us. I know when we're talking we've felt we've gotten
5 the information in terms of the things that we were
6 interested in that are really at issue between the
7 different participants in the proceeding. So again on
8 behalf of the Board, thank you very much for your
9 presentations. We found them very useful. If none of
10 the Board members have anything further to add, at
11 this point, I again would thank you for your presence
12 here for the last several days and thank you also for
13 the members of the public that came quite a way to
14 Washington to observe this proceeding. I hope you
15 found it useful and information and at this point,
16 thank you and we stand adjourned. Off the record.

17 (Whereupon, the above-entitled matter was
18 concluded at 3:48 p.m.)
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CERTIFICATE

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

Name of Proceeding: Early Site Permits

Pre-Hearing Conference

Docket Number: 52-007-ESP, et al.

Location: Rockville, MD

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



Matthew Needham
Official Reporter
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