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**NUCLEAR REGULATORY COMMISSION**

**PUBLIC REDACTED VERSION**

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Docket Number: 50-413-ola, 50-414-OLA

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

(ASLB)

+ + + + +

ORAL ARGUMENT

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In the Matter of: ||

DUKE ENERGY CORPORATION || Docket Nos. 50-413-OLA,  
Catawba Nuclear Station, || 50-414-OLA  
Units 1 and 2 || ASLBP No. 03-815-03-OLA  
\_\_\_\_\_

Friday, June 25, 2004

ASLBP Hearing Room  
Nuclear Regulatory Commission  
T3-B45, Two White Flint North  
11545 Rockville Pike  
Rockville, Maryland

The above-entitled matter came on for hearing,  
pursuant to notice, at 1:00 p.m.

BEFORE:

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

\_\_\_\_\_  
NEAL R. GROSS

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Edwin S. Lyman, Ph.D.

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Sean Peters, NRC

Billy Williamson, Duke Energy

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
EDWIN S. LYMAN	1971	1976		
		1982	2008	--

<u>EXHIBIT</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
(No exhibits)	--	--

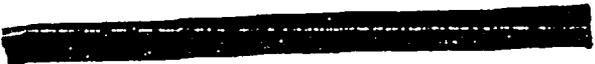
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BY MR. FERNANDEZ, page 2065

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P R O C E E D I N G S

1:01 P.M.

1  
2  
3 JUDGE YOUNG: All right, let's come to  
4 order. We're here pursuant to a previously scheduled,  
5 an earlier schedule that we set for dealing with  
6 various discovery and other issues as they arise. And  
7 as I also indicated to the parties in a June 10th  
8 e-mail cover to the last order, I think we issued,  
9 this is the last time that all three of the Board  
10 Members are all going to be available until we meet  
11 again on July 14th. So we want to try to resolve and  
12 hear argument on everything possible at this time,  
13 based on that. And that's part of the reason why we  
14 let you know that at that point.

15 Just to go over the list of items. Well,  
16 first, Ms. Shafeek-Horton, we met in Charlotte at the  
17 limited appearance statement and we welcome you to  
18 join us in this case, now part of Duke's Office of  
19 General Counsel, correct?

20 MS. SHAFEEK-HORTON: Yes ma'am.

21 MR. WETTERHAHN: Your Honor, with regard  
22 to Ms. Shafeek-Horton, Duke certifies that she has a  
23 need-to-know in order to attend this conference.

24 JUDGE YOUNG: Thank you. Another item  
25 before we get into the discovery issues. We have been

[REDACTED]

1 informed by Mr. Manilli who has been advising us on  
2 security issues. I thought I saw Mr. Stapleton here,  
3 didn't I? Oh, he was just on the list.

4 We've been advised by Mr. Manilli because  
5 of other issues that he has to deal with, he's not  
6 able to be with us today and he's also not going to be  
7 able to be with us at the September hearing on the  
8 security contentions. And has suggested that we might  
9 want to either have someone sit in or get a new person  
10 to advise us.

11 I had actually hoped that Mr. Stapleton  
12 might be here and had run into him and even indicated  
13 I hoped he might be here because we're sort of in a  
14 position where we probably will need to request  
15 another person to advise us to the extent that we  
16 cannot -- we don't have assistance from the parties.  
17 We're telling you this for two reasons. One, so that  
18 we can indicate to you that we may be seeking your  
19 participation arguments on any security type issues,  
20 classification issues such as those Mr. Manilli would  
21 have advised us on and wanted to hear whether the  
22 parties had anything to say on our seeking a  
23 replacement for Mr. Manilli since he's not going to be  
24 available on the date that the actual hearing takes  
25 place.

[REDACTED]

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1 Now theoretically, he could read a  
2 transcript, but he is sort of -- he's working on  
3 another fairly significant project for the NRC and  
4 he's also moving towards retirement. So that makes  
5 his availability somewhat problematic.

6 Do the parties have anything to say and do  
7 you think that we could count on at least having Mr.  
8 Stapleton here with the staff, so that we could, with  
9 all parties present, talk to him at least? We  
10 wouldn't want to talk to him privately without the  
11 parties being present. That would be the purpose of  
12 having our own advisor. But it is still helpful to  
13 discuss these thing when you are all present as well.

14 Ms. Uttal?

15 MS. UTTAL: Thank you, Judge. It is the  
16 Staff's position that you should request we --  
17 somebody else and if you do, as soon as possible. Mr.  
18 Stapleton has been advising the Staff. And I don't  
19 want to put him in the place of being in a conflict.

20 JUDGE YOUNG: Oh no, we would never be  
21 consulting with him privately. However, it has been  
22 helpful to have him here as the Staff's expert to whom  
23 we can ask questions with all parties present and then  
24 hear all parties' positions with regard to security-  
25 related issues. I think that has been helpful. So we

1 would encourage you to continue that to the fullest  
2 extent possible, particularly in the September  
3 hearing.

4 MS. UTTAL: We don't know at this point  
5 what his availability is for the September hearing, so  
6 I again would suggest that the Board move --

7 JUDGE YOUNG: And I don't know if you have  
8 anyone else. And I don't know about Duke either, but  
9 that's just an issue of concern and we, frankly, have  
10 just found out about it yesterday about the September  
11 dates. So we probably will be requesting someone.

12 Anything else?

13 MR. WETTERHAHN: Given that the expertise  
14 in this is likely to lie within the Staff, we believe  
15 that that expert should come from within the Staff,  
16 whether a Staff expert has been advising the Staff or  
17 somebody independently advising the Board.

18 JUDGE YOUNG: All right, anything else on  
19 that?

20 Okay, then we have to consider today  
21 BREDL's request for a need-to-know determination and  
22 the Staff's determination. And we also have Duke's  
23 response to that. BREDL's objections to certain  
24 discovery requests of Duke and the Staff. Staff's  
25 objections to certain BREDL's requests. Duke's

1 objections to certain BREDL requests.

2 Mr. Wetterhahn has provided an addendum to  
3 a confidentiality agreement that -- which is a  
4 December 15th protective order that all the parties  
5 have agreed to and assuming --

6 MR. WETTERHAHN: May I explain?

7 JUDGE YOUNG: Go ahead.

8 MR. WETTERHAHN: In order to be absolutely  
9 sure that any material which was exchanged on  
10 discovery was included in the Board's previous  
11 protective order, we crafted a third category of items  
12 which was general and hopefully all inclusive. That  
13 is the only change.

14 We didn't really know whether to number it  
15 number 2 or number 1. We didn't know the Board's  
16 numbering system. There's one addendum with two  
17 paragraphs in it previously.

18 JUDGE YOUNG: Right, right. This is -- I  
19 mean you're all in agreement to it, so I don't see any  
20 problems with it, but frankly, I probably would have  
21 considered that the earlier one did cover it, but  
22 that's fine to specify that.

23 Are there any other things apart from  
24 those I listed that any party wants to raise or  
25 discuss today?

1 MR. WETTERHAHN: There's one nuance. Duke  
2 requested of the NRC Staff a need-to-know  
3 determination with regard to certain requests of BREDL  
4 which went beyond the need-to-know request that BREDL  
5 made of the Staff. They are probably minor additional  
6 information, but we have not heard back from the Staff  
7 ruling on that particular need-to-know evaluation.

8 JUDGE YOUNG: You did that in your June  
9 23rd filing, is that right?

10 MR. WETTERHAHN: There's a -- our June  
11 23rd letter to Mr. Fernandez and Ms. Uttal.

12 You should have received an electronic  
13 copy.

14 JUDGE YOUNG: I assumed -- but of course,  
15 it would not have -- it could -- Staff's determination  
16 was dated the same date, so I don't know when -- how  
17 these -- did you have Duke's letter? Did the Staff  
18 have Duke's letter when you made your determination?

19 MS. BUPP: No, the determination that we  
20 filed on the 23rd was made earlier in the day than we  
21 received the letter on the 23rd. So while we have  
22 received it and are considering it, we haven't reached  
23 a final determination, Your Honor.

24 JUDGE YOUNG: Help me out, Mr. Wetterhahn,  
25 where specifically in the letter, what, which page of

1 the letter did you make that request? I've read it  
2 and for some reason I'm not putting my finger on it  
3 right this minute.

4 MR. WETTERHAHN: The last paragraph. The  
5 purpose of this letter was to request a need-to-know  
6 evaluation as to the certain documents requested by  
7 BREDL.

8 JUDGE YOUNG: You're talking about the  
9 June 23rd letter?

10 MR. WETTERHAHN: That's correct.

11 JUDGE YOUNG: What I'm asking is which  
12 specific portion of it are you talking about in which  
13 you make a request for an additional need-to-know  
14 determination?

15 MR. WETTERHAHN: The first paragraph on  
16 page 2. And also again the first full paragraph on  
17 page 3, Staff considered the following factors in  
18 making its need-to-know determination.

19 JUDGE YOUNG: But these relate to the  
20 Staff's need-to-know determination in response to  
21 BREDL's request?

22 MR. WETTERHAHN: Almost, but not quite.  
23 BREDL has requested a number of documents from the  
24 licensee, Duke, some of which are safeguards  
25 information. Beyond the safeguards, the security

[REDACTED];

1 plant, to the extent they are safeguards information,  
2 we cannot release those documents to BREDL without a  
3 need-to-know determination initially made by the Staff  
4 and then if there's a question on it, that made by the  
5 Board.

6 JUDGE YOUNG: What I'm asking you to do to  
7 help me out here, is to tell me the specific language  
8 in this letter that asks for an additional need-to-  
9 know determination beyond which the Staff has already  
10 been requested to do by BREDL and done. I'm just  
11 asking me to point me to the words, because I'm not  
12 putting my finger on them.

13 MR. WETTERHAHN: The last couple of  
14 sentences at the bottom of page 1. "BREDL's discovery  
15 request to Duke contains several document production  
16 requests that overlap with the documents sought in  
17 BREDL's letter. In addition, there are documents  
18 responsive to BREDL's discovery request which contain  
19 safeguards information which are not discussed in  
20 BREDL's letter of June 19, 2004."

21 JUDGE YOUNG: Okay, and then anything  
22 else?

23 MR. WETTERHAHN: That would be it.

24 MS. CURRAN: I just wanted to comment the  
25 way I experienced this process. It went a little bit

[REDACTED]

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1 backwards in the sense that we didn't know when we  
2 asked -- when we made our request for information what  
3 information might be identified as safeguards. We  
4 knew some of it that probably would be identified as  
5 safeguards or maybe classified, but we had to make the  
6 need-to-know request before we really knew what the  
7 responses were going to be. So we had kind of a  
8 catchall category of information that anything else  
9 that might be considered to be safeguards we'd like  
10 that too. And I think that's what Duke was responding  
11 to.

12 MR. WETTERHAHN: Yes, that is what we are  
13 responding to.

14 JUDGE YOUNG: So then that was -- well,  
15 BREDL's request on the next to the last paragraph  
16 "BREDL also requests the Staff to make a need-to-know  
17 determination with respect to any other information  
18 identified in response to BREDL's discovery request  
19 for which such a determination would be needed in  
20 order to grant BREDL access to the information."

21 So I guess I was assuming that the Staff's  
22 determination addressed everything in BREDL's request.  
23 And the catchall would include anything in your -- in  
24 the last sentence of the first paragraph of Duke's  
25 letter, wouldn't it?

1 MR. FERNANDEZ: Just one minor detail is  
2 that to the extent that Duke and the Staff possess the  
3 same documents, the same universe of documents that  
4 would be true. And the need-to-know determinations  
5 would overlap.

6 To the extent that Duke has a different  
7 document than the Staff, the Staff, not being the  
8 holder of that protected information, our need-to-know  
9 determination would not extend to those universe of  
10 documents, that Staff and the licensee don't have in  
11 common.

12 JUDGE YOUNG: Okay, so there may be some  
13 that you haven't yet seen.

14 MR. FERNANDEZ: Nor will we see them. The  
15 licensee, as the holder of the safeguards information  
16 would have to make their need-to-know determination.

17 JUDGE YOUNG: Would have to make their  
18 own?

19 MR. FERNANDEZ: Yes.

20 JUDGE YOUNG: Okay, so you're saying that  
21 Duke's request to the extent that it covers anything  
22 other than what your determination already covers,  
23 they need to make their own determination first.

24 MR. FERNANDEZ: Pursuant to part 73,  
25 that's correct.

1 MR. WETTERHAHN: I read CLI-0406 slightly  
2 differently. I think we got into this because the  
3 licensee had made its own determination with regard to  
4 a particular document and that document was determined  
5 to be safeguards information later by the Staff, so I  
6 believe that the Commission suggested that before any  
7 document be released, that the Staff be consulted by  
8 virtue of their making a need-to-know decision with  
9 regard to the need-to-know of an outsider for some  
10 safeguards information for Duke. Duke has no problem  
11 making a need-to-know determination internally because  
12 of the Commission decision, we believe, that an  
13 intermediate step is the staff making a need-to-know  
14 determination on any document which is safeguards  
15 material and solely in the possession of the Staff or  
16 in common.

17 I'll give you an example. I'm not sure  
18 whether the Staff will release the new DBT in response  
19 to a question. We have material in-house which is  
20 developed by Duke which rehearses, which repeats the  
21 DBT. So rather than the licensee making an  
22 inconsistent finding, we wanted the Staff to  
23 coordinate it, make sure that we did not inadvertently  
24 release a document which contains safeguards  
25 information which was common.

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1 JUDGE YOUNG: Okay.

2 MR. WETTERHAHN: That was our purpose in  
3 making the request.

4 JUDGE YOUNG: Okay, so theoretically --

5 JUDGE BARATTA: Yes, what you're referring  
6 to when you said that the mission in the CLI-406 is  
7 this paragraph that appears on page 2 of the June 23rd  
8 letter, is that it?

9 MR. WETTERHAHN: That is correct.

10 JUDGE BARATTA: Okay. I'm set.

11 JUDGE YOUNG: All right. Then with the  
12 possible exception of some documents, as Mr. Fernandez  
13 states, might be documents that the Staff doesn't  
14 have. The Staff's determination at least applies to  
15 everything the Staff is aware of that would fall  
16 within the request of BREDL.

17 MS. UTTAL: Yes, Your Honor.

18 JUDGE YOUNG: Now, I guess since so many  
19 of the discovery issues center around the need-to-know  
20 issue, looking at your determination, we read that as  
21 stated in the final paragraph of your determination on  
22 page 2 of it, that the basis of your determination  
23 that BREDL does not have a need-to-know is the -- is  
24 your determination that Dr. Lyman does not have  
25 expertise on security matters.

1 MS. BUPP: Yes, that is the basis of the  
2 determination that we made this week.

3 JUDGE YOUNG: Then I guess we can assume  
4 should we find that Dr. Lyman does have expertise, the  
5 documents would be provided in some manner to BREDL.

6 MS. BUPP: Your Honor, I don't think  
7 that's a safe assumption to make because it really is  
8 a two-part process. Once Dr. Lyman is determined to  
9 be an expert, then we would have to look at the  
10 individual documents themselves and determine if each  
11 document, if there's a need-to-know for each document.

12 JUDGE YOUNG: Where is that two-step  
13 process defined?

14 MS. BUPP: Well, if you read, there's  
15 really three separate regulations that read together  
16 explain the need-to-know. The need-to-know standard  
17 is outlined in Section 73.21(c) of the regulations  
18 which states that "no person may have access to  
19 safeguards information unless that person has  
20 established a need-to-know for the information and is"  
21 and there are several possibilities listed including  
22 "an individual to whom disclosure is ordered pursuant  
23 to 2.744(e) of this chapter." 2.744(e) regards  
24 production of NRC records and documents and I'll  
25 report to you because it's quite a long section but

1 I'll try to explain the relevant portions.

2 It states that "in the case of requested  
3 documents and records including" --

4 JUDGE YOUNG: Tell me where you're reading  
5 from before you start.

6 MS. BUPP: 2.744(e) which is on page 68.

7 JUDGE YOUNG: You said you were going to  
8 read selected parts of it.

9 MS. BUPP: I'm starting at the beginning  
10 of (e). I won't read all of section (e).

11 JUDGE YOUNG: The old Part 2 applies.  
12 You're reading from the old Part 2?

13 MS. BUPP: Yes.

14 JUDGE YOUNG: Okay. Now where are you  
15 going to start to read again from?

16 MS. BUPP: At the beginning of Section  
17 (e).

18 JUDGE YOUNG: Okay, and then you'll tell  
19 me when you skip over?

20 MS. BUPP: I'll tell you when I stop. "In  
21 the case of requested documents and records including  
22 safeguards information exempt from disclosure under  
23 2.790, but whose disclosure is found by the presiding  
24 officer to be necessary to a proper decision in the  
25 proceeding, any order to the Executive Director for

[REDACTED] \*

1 Operations to produce the document or records may  
2 contain such protective terms and conditions as may be  
3 necessary and appropriate to limit the disclosure to  
4 parties in the proceeding to interested states and  
5 other governmental entities participating pursuant to  
6 2.715(c) and to their qualified witnesses and  
7 counsel."

8 And I'll stop there. In this case, it  
9 appears that BREDL is proffering Dr. Lyman as a  
10 qualified witness.

11 JUDGE YOUNG: Are there any other  
12 regulations that you're relying on for the two-part  
13 process?

14 MS. BUPP: The third one that I mentioned  
15 is 73.2 which defines the need-to-know as necessary to  
16 perform an official duty, any information as necessary  
17 to perform an official duty.

18 Both the requirement that the information  
19 be need-to-know in an official duty and a limitation  
20 to qualified witnesses is why we need to determination  
21 whether or not Dr. Lyman is an expert in these  
22 security matters.

23 Then once we've determined whether he's an  
24 expert, we need to determine whether the information  
25 that is sought is necessary for him to perform his

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1 official duty of serving as an expert in this case.

2 JUDGE YOUNG: The question I was trying to  
3 get you to answer was where does the authority for the  
4 two-step process come from and more specifically, why  
5 haven't you provided all parts of your determination  
6 rather than divided up into a two-step process which  
7 will obviously take more time and add to possible  
8 delay in the proceedings.

9 JUDGE BARATTA: I mean throughout this  
10 proceeding it's been emphasized that we, as a Board,  
11 have been trying to expedite our actions considerably  
12 and now it seems like you're dragging things out.

13 MS. BUPP: Well, we were able to look at  
14 the question of whether or not Dr. Lyman was an expert  
15 as a threshold question and because we were able to  
16 answer that question quickly within the two-day period  
17 of time that we had to respond, the two working day  
18 period of time that we had to respond to the need-to-  
19 know determination, we provided that as our answer  
20 because --

21 JUDGE YOUNG: Why didn't you provide the  
22 rest of the determination because the Staff has known,  
23 as have we all from the beginning of this, what we  
24 were dealing with here and one reading, your  
25 determination would -- could well -- would reasonably

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1 conclude that the basis of your determination was Dr.  
2 Lyman's asserted lack of expertise. Now what you're  
3 doing is you're creating a two-step process which will  
4 take more time, add to the delay when you could easily  
5 have based on your knowledge of the issues and of the  
6 necessities from the very beginning of the security  
7 portion of this case, included all grounds for your  
8 determination in this determination.

9 What you're asking us to do is wait for  
10 you to make another determination later should we find  
11 something different on Dr. Lyman and it obviously adds  
12 to the time that we're all going to have to deal with  
13 in making a determination in this case in which we,  
14 ourselves, have indicated the desire to move  
15 expeditious. Duke has asked us to move quickly and  
16 the Commission has indicated that they wish us to move  
17 quickly and you're asking us to hold everything up  
18 based on this two-step process that you have found  
19 somewhere, but don't appear to us, does not appear to  
20 us to be specified or required in the rules.

21 MS. BUPP: Well, Your Honor, as we have  
22 stated in our objections and as, I think, all the  
23 counsel here are aware, going through all of the  
24 documents to answer interrogatories takes a great deal  
25 of time. We are currently going through all of the

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1 documents that will be responsive and considering  
2 whether or not Dr. Lyman is found to be an expert  
3 would have a need-to-know these documents. We have  
4 not completed that yet. But we are continuing to work  
5 on it and will continue to work on it while the Board  
6 is determining whether or not Dr. Lyman is an expert  
7 on security matters.

8 JUDGE BARATTA: In any case, it would have  
9 seemed appropriate for you to advise the Board of that  
10 and request a delay in the proceedings which you  
11 didn't want to do. But in effect, you have -- you are  
12 delaying the proceedings because I frankly see very  
13 difficult now to proceed, to move forward.

14 JUDGE YOUNG: Furthermore, let me ask you,  
15 the second paragraph of BREDL's request includes two  
16 very specific requests and this doesn't revolve around  
17 specific interrogatories completely, does it? I mean  
18 you see what they're asking for. We can discuss  
19 needs, certainly, with regard to specific  
20 interrogatories, but I would think that you would have  
21 enough familiarity with the case to be able to give us  
22 some indication of what the Staff feels or what the  
23 Staff's opinion is on the necessity or  
24 indispensability or need for these two particular  
25 pieces of information.

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1 MS. BUPP: Well, the necessity  
2 determination is not always, Your Honor, as simple as  
3 determining whether or not an entire document is  
4 necessary. The case law on this determination states  
5 that at some times it may be necessary to release only  
6 portions of a document or a redacted version of a  
7 document.

8 JUDGE YOUNG: That's right.

9 MS. BUPP: So we --

10 JUDGE YOUNG: We would expect to hear that  
11 from you.

12 MS. BUPP: We have not finished reviewing  
13 all of the requests in order to determine which  
14 portions, if any, they would have a need-to-know of  
15 these documents.

16 JUDGE YOUNG: When do you anticipate doing  
17 that?

18 MS. BUPP: We will complete our  
19 determination on the portions of the documents or the  
20 entire documents that may be necessary after we have  
21 received a determination from Ford about whether or  
22 not --

23 JUDGE BARATTA: How would you proceed if  
24 you received a determination now?

25 MS. BUPP: If we received a determination

1 now, I don't think a decision by the end of the day  
2 would be possible, but we would move very quickly to  
3 a decision.

4 JUDGE YOUNG: Let's -- I think what we  
5 would like is to have that determination pending our  
6 determination on the expertise because you don't --  
7 there's no necessity for you to have that  
8 determination in order for you to go ahead and do what  
9 you need to do to make your determinations on  
10 necessity.

11 MS. BUPP: Well, our thinking and asking  
12 for the determination on necessity was that if on the  
13 expertise is that if Dr. Lyman is not an expert that  
14 closes the question and there's no need to --

15 JUDGE BARATTA: And if he is an expert,  
16 doesn't that then delay the proceeding?

17 MS. BUPP: We will certainly have, we will  
18 move with all deliberate speed to determine document  
19 by document and portion by portion which ones are  
20 necessary --

21 JUDGE BARATTA: That's not what I asked.  
22 That's not what I asked.

23 Answer yes or no.

24 MS. BUPP: It will not delay the  
25 proceeding because we will be able to make a

1 determination by the time the answers to the  
2 interrogatory --

3 JUDGE BARATTA: Because your determination  
4 is that they are not entitled to those documents, that  
5 they do not have a need-to-know?

6 MS. BUPP: Well, then pursuant to the  
7 schedule that is already set up, BREDL would have an  
8 opportunity to file an motion to compel.

9 JUDGE BARATTA: Okay, and then would we  
10 have to -- when we would have another hearing on that  
11 motion to compel?

12 MS. BUPP: Well, at that point in time,  
13 the Board would make the decision whether or not to  
14 grant the motion to compel.

15 JUDGE BARATTA: Okay.

16 JUDGE YOUNG: What he asked was when would  
17 we hear oral argument on that?

18 JUDGE BARATTA: That's right.

19 MS. BUPP: At the next hearing on July  
20 16th.

21 JUDGE BARATTA: Which -- and what were we  
22 supposed to do on July 16th?

23 MS. BUPP: To discuss any outstanding  
24 security-related matters, I believe, was the purpose  
25 of the hearing.

1 JUDGE YOUNG: All right -- go ahead.

2 JUDGE ELLEMAN: The wording in your  
3 document of June 23rd appears to relate Dr. Lyman's  
4 lack of expertise to safeguards or classified material  
5 only. If we're dealing here with non-safeguards or  
6 classified material, then is it clear that that  
7 material is available?

8 MS. BUPP: The NRC does not have any power  
9 to withhold any publicly available information, so  
10 that would not be covered by any need-to-know  
11 determination. We would not withhold it from  
12 discovery unless it was subject to another discovery  
13 objection, such as attorney-client work product.

14 JUDGE ELLEMAN: So you would provide that  
15 information as requested in the discovery request?

16 MS. BUPP: Yes, we would provide any  
17 publicly available information that is not subject to  
18 any other discovery privilege and within the scope of  
19 the discovery, obviously.

20 (Pause.)

21 (Judges consulting.)

22 JUDGE ELLEMAN: One more question. In the  
23 very last sentence of your June 23rd submission you  
24 say that "therefore, the NRC Staff has determined that  
25 BREDL does not have a need-to-know for the documents

[REDACTED]

1 discussed in the June 19, 2004 letter." And that's  
2 really -- it sounds like it's excluding almost  
3 everything, but you're now saying that's not true.  
4 You're in the process of deciding what you're going to  
5 provide and what you're not.

6 MS. BUPP: Well, at the time the letter  
7 was written on June 23rd, we determined that there was  
8 no need-to-know because Dr. Lyman was not an expert.  
9 If the Board were to decide today or some time in the  
10 near future that Dr. Lyman is, in fact, not an expert,  
11 that would close the question we would need to make no  
12 further determination. In order to not delay the  
13 proceedings, we are considering the second question of  
14 whether or not the documents requested are necessary  
15 while we await the Board's decision on Dr. Lyman's  
16 status.

17 JUDGE ELLEMAN: And so if it were  
18 concluded that Dr. Lyman is not an expert, you would  
19 not anticipate submitting any additional material on  
20 your discovery at that time, is that correct?

21 MS. BUPP: Could you repeat the question,  
22 please, Your Honor?

23 JUDGE ELLEMAN: Well, if he were found not  
24 to be an expert, then you would not feel that there  
25 was any material you would need to submit to Ms.

1 Curran and to BREDL in response?

2 MS. BUPP: There would be no safeguards or  
3 classified material that we would need to submit  
4 during discovery.

5 JUDGE ELLEMAN: But you would still  
6 continue to submit the non -- any non-safeguards or  
7 nonclassified?

8 MS. BUPP: Yes.

9 JUDGE ELLEMAN: Okay.

10 JUDGE BARATTA: Now with respect to the  
11 July 2nd date that appears in our order that deals  
12 with initial written discovery requests of security-  
13 related issues should be -- the response, that is, the  
14 initial written discovery requests on security-related  
15 issues shall be served and filed no later than July 2,  
16 2004. In other words, your response back to BREDL.

17 MS. BUPP: Our response back to BREDL  
18 would answer all their questions and the request for  
19 the production of documents insofar as they can be  
20 answered either through publicly available information  
21 or through the information that has already been made  
22 available to them.

23 JUDGE BARATTA: Assuming that we made a  
24 determination today that Dr. Lyman were --  
25 hypothetically, would make a determination today that

1 he is an expert for the purposes of these proceedings  
2 in security-related matters, would you still be able  
3 to comply with that July 2nd date?

4 MS. BUPP: At this time we can't be  
5 absolutely certain, but we would make every effort to  
6 and we would at least have a response, the response  
7 that I mentioned to you previously including all  
8 publicly available information, all information  
9 already provided to them.

10 JUDGE BARATTA: So in other words, you  
11 cannot assure me that documents that you would not  
12 have objection to that might be safeguards information.  
13 would be, in fact, provided by July 2nd?

14 MS. BUPP: Some of them might.

15 JUDGE BARATTA: And some of them might  
16 not?

17 MS. UTTAL: We just can't guarantee it --

18 JUDGE BARATTA: So in other words, we may  
19 have a delay.

20 JUDGE YOUNG: One of the things I think  
21 that we're concerned about is in contrast to, for  
22 example, Duke's objections and BREDL's objections  
23 which do address specific interrogatories, the Staff  
24 largely makes general objections and says you aren't  
25 going to make those now because your deadline, I think

[REDACTED]

1 in footnote 2 of your objection to BREDL's first set  
2 of discovery requests, you say that you have not yet  
3 designated the documents that may be responsible to  
4 BREDL's request and cannot at this time identify those  
5 documents.

6 In effect, you're sort of taking the  
7 deadline for objections and extending it and just  
8 providing general statement. At this point, in  
9 contrast to the other parties who made specific  
10 objections to specific requests based on specific  
11 reasons. And given that we -- when we laid out this  
12 schedule indicated that the whole purpose was to bring  
13 these things out as soon as possible so that things  
14 would not extend on and on. I guess we're a little  
15 disappointed. We had hoped for me.

16 MS. BUPP: Well, we don't have any  
17 objection to answering any of BREDL's questions or  
18 providing documents in response to any of their  
19 requests so long as those answers or documents would  
20 not be safeguards information that they have not  
21 already received and in which they do not have a need-  
22 to-know or --

23 JUDGE YOUNG: But you haven't given a  
24 specific, you didn't give specific responses to the  
25 individual requests. You're saying that you're going

[REDACTED]

1 to do that later. Your objections basically say we're  
2 not sure. We have these two broad objections. One,  
3 the safeguards one and the other one the deliberative  
4 privilege one, but you're not willing or able to  
5 specify the extent to which either of those grounds  
6 for objection goes to specific requests at this time  
7 which we had hoped we would get from you at this time.

8 MS. BUPP: Well, all of the documents that  
9 BREDL specifically requested in their need-to-know  
10 determination, a decision has been made on those which  
11 is evident in our response.

12 JUDGE YOUNG: Only based on the issue of  
13 expertise, not based on the issue of necessity or  
14 indispensability.

15 MS. BUPP: Well, we have not -- in less  
16 than two working days between receiving the  
17 interrogatories and filing our objections, no, Your  
18 Honor, we had not completely answered all the  
19 interrogatories.

20 JUDGE YOUNG: Okay, for the future, the  
21 purpose of that schedule which we hammered out -- we  
22 didn't do this unilaterally. We hammered it out with  
23 the parties. The purpose of the deadline was to move  
24 things along very quickly on issues that everyone is  
25 familiar with so should not have to take a long time

[REDACTED] \*

1 to apply them to specifics as they come up and we hope  
2 that this won't cause a delay and that in the future  
3 we will be provided with more specific responses and  
4 objections on the dates that they're due. It would be  
5 very helpful to us.

6 MS. UTTAL: Judge, I don't think that the  
7 Staff's response in this case is inconsistent with our  
8 prior responses to prior discovery.

9 JUDGE YOUNG: You're right, it's not  
10 inconsistent with your prior responses. It is  
11 inconsistent with our expectation as previous ones  
12 have been also.

13 Now, let's move on then.

14 JUDGE BARATTA: So am I to take it then in  
15 the spirit of cooperation we will have everything we  
16 need by July 2nd?

17 MS. UTTAL: We will, as Ms. Bupp has said  
18 before, we will make every effort to have it answered  
19 as fully as possible, depending on what we look at.  
20 But we will not be providing safeguards material to a  
21 person who is not an expert. So we would need that  
22 determination before we would be releasing any  
23 documents.

24 JUDGE YOUNG: Let's assume, for argument's  
25 sake, that we found that Dr. Lyman was an expert for

1 purposes of security today. How long would it take  
2 you to make your need-to-know determination, all  
3 aspects of it?

4 MS. BUPP: Can we have a moment to discuss  
5 this with the Staff?

6 JUDGE YOUNG: Sure.

7 (Pause.)

8 (Staff consulting.)

9 MS. UTTAL: Judge?

10 JUDGE YOUNG: Yes.

11 MS. UTTAL: By the time the discovery  
12 answers are due, I've been informed by the Staff that  
13 they will have a list of documents that would not be  
14 released. The privilege log would be available.

15 JUDGE YOUNG: Are you saying that you will  
16 be able to make a specific need-to-know determination,  
17 giving the grounds for your need-to-know determination  
18 with regard to all outstanding issues of this nature?

19 MS. UTTAL: That's what the Staff is  
20 telling me.

21 JUDGE YOUNG: Okay, great.

22 MS. CURRAN: By what date? July 2nd?

23 MS. UTTAL: The date the interrogatories  
24 are due.

25 JUDGE BARATTA: July 2nd is the response

[REDACTED] \*

1 to the initial interrogatories per our original  
2 schedule.

3 JUDGE YOUNG: Okay. Moving on then to the  
4 expertise issue, we do have questions and want to hear  
5 briefly argument from all of you. Since the issue has  
6 been raised and I think there is some -- well, the  
7 Carolina Power and Light case does say when the  
8 qualifications of an expert witness are challenged,  
9 the parties sponsoring the witness has the burden of  
10 demonstrating his or her expertise. I think it would  
11 probably be appropriate to go to BREDL first on this  
12 and then we may have some questions based on what  
13 BREDL says to us and based on the case law that Duke  
14 and the staff have provided.

15 So briefly, Ms. Curran, could you address  
16 the expertise issue.

17 MS. CURRAN: We believe that we did  
18 demonstrate Dr. Lyman's expertise in our contentions.  
19 The Board did make a finding that the security  
20 contentions were supported by Dr. Lyman's expertise.  
21 That's on page 70 of the Board's slip opinion.

22 JUDGE YOUNG: The redacted or the  
23 original?

24 MS. CURRAN: The original.

25 JUDGE YOUNG: Let me get that out. Page

1 70, I believe?

2 (Pause.)

3 Okay, go ahead.

4 MS. CURRAN: This seems to me to be  
5 comparable to the stage in a hearing of voir dire of  
6 the expert. And if that is the case, then we would  
7 like some opportunity to present Dr. Lyman's  
8 qualifications formally, whether we swear him in and  
9 have him testify to his qualifications.

10 JUDGE YOUNG: Could we do that now?

11 MS. CURRAN: Yes, that would be fine with  
12 BREDL.

13 JUDGE YOUNG: Any objection?

14 MR. WETTERHAHN: With the proviso that we  
15 would have voir dire of Dr. Lyman.

16 JUDGE YOUNG: Right. Everyone would be  
17 able to ask him questions, certainly.

18 MR. WETTERHAHN: No objection.

19 JUDGE YOUNG: Staff?

20 MR. FERNANDEZ: No objection from Staff.

21 JUDGE YOUNG: Okay. Dr. Lyman, raise your  
22 right hand.

23 WHEREUPON,

24 EDWIN S. LYMAN, PH.D.

25 WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE

[REDACTED]

1 PETITIONER, AND, HAVING FIRST BEEN DULY SWORN, WAS  
2 EXAMINED AND TESTIFIED AS FOLLOWS:

3 JUDGE YOUNG: Go ahead, Ms. Curran.

4 DIRECT EXAMINATION

5 BY MS. CURRAN:

6 Q Dr. Lyman, I'd like to ask you some  
7 questions about your qualifications to serve as an  
8 expert witness in this case.

9 Would you please describe your educational  
10 background for me?

11 JUDGE YOUNG: And if you could direct it,  
12 not to limit you, but if you could direct it primarily  
13 to the security issues that have been raised in the  
14 objections of the Staff.

15 THE WITNESS: Well, my general education

16 --

17 BY MS. CURRAN:

18 Q College and grad school.

19 A I have a Ph.D. in Physics from Cornell  
20 University, 1992. I have a Master of Science in  
21 Physics from Cornell, 1990. And a Bachelor of Arts in  
22 Physics from New York University, 1986.

23 Subsequent to my Ph.D. I was a post-  
24 doctoral research associate for three years at Center  
25 for Energy and Environmental Studies in the School of

[REDACTED]

NEAL R. GROSS

1 Engineering at Princeton University where I researched  
2 issues associated with security and safety of nuclear  
3 materials, nuclear weapons.

4 Q What aspects of security of nuclear  
5 weapons did you research?

6 A General issues associated with the  
7 physical protection regime for the security of  
8 plutonium, in general, and MOX fuel, in particular,  
9 the security of the reprocessing plants, the physical  
10 protection of spent nuclear fuel and immobilized  
11 plutonium.

12 Q What kind of written materials did you  
13 review for your work?

14 A Did I review?

15 Q In the course of doing this work, what  
16 kind of written material did you review?

17 A Specifically the period I referred to?

18 Q Yes, on your security work at Princeton.

19 A Reviewed all publicly available documents  
20 that we had referring to the security and safety of  
21 the storage and processing of plutonium, highly  
22 enriched uranium.

23 Q What other work experience do you have  
24 with issues of nuclear security?

25 A Well, since 1995, between 1995 and 2003,

[REDACTED]

1 I was at the Nuclear Control Institute, a public  
2 policy and research organization focusing on nuclear  
3 nonproliferation as the Scientific Director. I  
4 evaluated or I did considerable detail into publicly  
5 available aspects of the security and safety of the  
6 nuclear fuel cycle, safeguard physical protection of  
7 special nuclear materials; physical protection of  
8 nuclear materials and nuclear facilities against  
9 sabotage.

10 I've been a member of the Institute of  
11 Nuclear Materials Management since 1996. I've  
12 provided at least one paper every year at their annual  
13 conference, many of which pertain to physical  
14 protection issues.

15 I've had the opportunity to brief  
16 congressional staff. I was invited to brief, let's  
17 see -- the Joint Atomic Energy Intelligence Committee  
18 on issues associated with post-September 11, security  
19 issues related to nuclear terrorism. I was invited in  
20 to brief them as well as the National Intelligence  
21 Council, Central Intelligence Agency with regard to  
22 issues of security of spent fuel storage.

23 For several years prior to September 11th,  
24 I participated in routine meetings with NRC Staff and  
25 the industry on issues pertaining to the security of

[REDACTED]

**NEAL R. GROSS**

1 nuclear power plants, issues associated with force-on-  
2 force exercises, the revised rulemaking, Part 73, that  
3 had been processed before September 11th. I was  
4 routinely invited to sit at the table at these  
5 meetings and was an active participant in those  
6 discussions.

7 Q Can you tell me a little bit about the  
8 revised rulemaking that you just mentioned?

9 A Yes, there was, prior to September 11,  
10 there was a desire on the part of the NRC Staff to  
11 revise the Part 73 rulemaking to make explicit the  
12 requirement that force-on-force tests be carried on  
13 with regard to the design basis threat or sabotage at  
14 nuclear power plants and other associated issues with  
15 the definition of radiological sabotage, whether or  
16 not that included spent fuel pools and so forth.

17 During that process, I was asked to speak  
18 at the NRC's Regulatory Information Conference twice  
19 on panels discussing NRC safeguards policy.

20 Q Any other experience that you consider  
21 relevant that you'd like to tell us about?

22 A My expertise was sought out by nuclear  
23 weapons scientists at Lawrence Livermore National  
24 Laboratory in reference to a particular nuclear  
25 terrorism issue that I had raised in a closed meeting

**NEAL R. GROSS**

[REDACTED]

1 that had been attended by Lawrence Livermore staff on  
2 particular vulnerability with regard to the use of  
3 nuclear materials in radiological device.

4 I've also, as one of the few independent  
5 scientists who studied history of the nuclear weapons  
6 development, I was a co-author of an addendum to an  
7 article in 1992 by J. Carson Mark who was the former  
8 Director of Los Alamos National Laboratory with regard  
9 to the useability of reactor grade plutonium in  
10 nuclear weapons. For that addendum, my colleague,  
11 Frank Von Hippel and I verified the statement in the  
12 letter from J. Robert Oppenheimer to Leslie Gross with  
13 regard to the potential yield of nuclear weapons. We  
14 were able to verify the contents of that letter using  
15 publicly available information involving the Los  
16 Alamos plant. This is directly relevant to the  
17 concept of improvised nuclear devices.

18 Q Now in your -- in support of BREDL's  
19 safety contentions you may recall that we submitted a  
20 copy of your curriculum vitae.

21 A Yes.

22 Q This curriculum vitae lists your -- it  
23 describes your education and employment and also has  
24 a list of publications attached to it.

25 A Yes.

[REDACTED]

**NEAL R. GROSS**

1 Q The information in that CV, is it  
2 accurate?

3 A It's accurate, but I haven't updated it in  
4 a number of months. It's accurate to the date when it  
5 was filed.

6 Q And in the attached list of publications,  
7 there are a number of publications that address  
8 security issues, is that true?

9 A Yes.

10 Q I don't have any questions at the moment  
11 in addition.

12 JUDGE YOUNG: Let's move to Mr.  
13 Wetterhahn?

14 CROSS EXAMINATION

15 BY MR. WETTERHAHN:

16 Q Dr. Lyman, any course that you have  
17 taken, did they relate specifically to security at  
18 nuclear power plants?

19 A No.

20 Q Did they relate to the strategy for  
21 defense of nuclear power plants?

22 A No. The extent of my formal education  
23 pertained to physics issues and my expertise in  
24 nuclear security was acquired on the job, so to speak,  
25 after my formal education.

1 Q So you've had no educational training in  
2 weaponry, explosives, military tactics, is that  
3 correct?

4 A That's correct.

5 Q Do you have any training in the design of  
6 structures against explosives?

7 A No.

8 Q Have you ever served in the military?

9 A No.

10 Q So you have no military experience which  
11 would be relevant to the defense of a nuclear power  
12 plant?

13 A That's correct.

14 Q Have you participated in any table top  
15 exercises with regard to designing a strategy for the  
16 defense of a nuclear power plant?

17 A No.

18 Q Have you done any electronic simulations  
19 of security training?

20 A No.

21 Q Any computer-based vulnerability  
22 assessments?

23 A No.

24 Q Any risk assessment for nuclear power  
25 plants with regard to security?

1           A       I would say in general terms, but again,  
2 as a member of the public who has not had access to  
3 safeguards information until this proceeding, my  
4 expertise pertains to what the public is able to glean  
5 with regard to these matters, in particular, through  
6 discussions, dialogue, observation, publicly available  
7 meetings and information that's obtained on the site.  
8 So obviously, as a member of the public with no -- who  
9 was not seeing safeguards information until then, it's  
10 clear that my formal -- I have not participated  
11 formally in such exercises, but I've acquired a  
12 general understanding of how NRC regulations with  
13 regard to physical protection is received.

14           Q       Are you familiar with the initials MILES?

15           A       Yes.

16           Q       Have you ever participated in a MILES  
17 drill?

18           A       No.

19           Q       Have you ever been a controller?

20           A       No.

21           Q       Have you ever seen the results of a MILES  
22 exercise?

23           A       Only -- well, when you say results, have  
24 I watched an entire MILES exercise in person?

25           Q       Or seen an analysis of a MILES exercise?

**NEAL R. GROSS**

1 A No.

2 Q Are you familiar with NIJ ratings?

3 A Yes, just broadly, the concept.

4 Q With the concept. Have you ever studied  
5 UL-752?

6 A No.

7 Q Do you know what it is?

8 A I don't know.

9 Q Do you know what a BFR is?

10 A No.

11 Q Do you have any experience in evaluating  
12 delay barriers?

13 A I am familiar with some documents that  
14 pertain to the structure of delay barriers.

15 Q But this is an academic knowledge rather  
16 than a practical knowledge gained by experience, isn't  
17 that correct?

18 A That's correct.

19 Q Have you evaluated electronic entry  
20 systems at nuclear power plants?

21 A No.

22 Q How about TV cameras associated with  
23 electronic surveillance at nuclear power plants?

24 A When you say "evaluate"?

25 Q Evaluated their efficacy?

**NEAL R. GROSS**

1 A No.

2 Q Have you ever designed such a system?

3 A No.

4 Q Have you ever participated in any exercise  
5 or drill associated with security at a nuclear power  
6 plant?

7 A No, not having held safeguards clearance.

8 Q Have you ever designed a nuclear security  
9 system?

10 A No.

11 Q Have you served in any intelligence,  
12 specific intelligence capacity?

13 A Not served, but as I discussed before, I  
14 was asked to brief the intelligence community on three  
15 separate occasions.

16 Q And that was -- was that a classified  
17 briefing?

18 A The meetings were classified. My  
19 participation was not.

20 Q I assume you have not been an armed  
21 responder at a nuclear power plant?

22 A No. I'm a pacifist. I don't have  
23 anything to do with weapons.

24 Q Okay, have you ever fired an AR-15?

25 A No.

1 Q Have you ever fired a weapon?

2 A No.

3 Q Are you familiar with weaponry, the range  
4 of weaponry?

5 A I have a general familiarity with regard  
6 to the regulations and some publicly available  
7 information and capabilities of weapons.

8 Q Are you familiar with the MP-5?

9 A No.

10 Q An HK-91?

11 A No.

12 Q An AK-47?

13 A No, but I know what it is.

14 Q Do you know what the term Barrett, B-A-R-  
15 R-E-T-T refers to?

16 A No.

17 Q Do you have any knowledge of silencers?

18 A Not specific. I know what they are.

19 Q Ever been a member of a SWAT team or a  
20 police officer?

21 A No.

22 Q Are you familiar with the use of  
23 explosives for breaching, demolition of hard targets?

24 A I'm familiar with the literature that  
25 describes the capabilities of explosives.

1 Q But you have no practical experience?

2 A That's correct.

3 Q Do you have any knowledge of detonation  
4 techniques?

5 A No.

6 Q How about the characteristics of  
7 explosives?

8 A I have some general familiarity.

9 Q We have no further questions. Thank you.

10 JUDGE YOUNG: Staff?

11 CROSS EXAMINATION

12 BY MR. FERNANDEZ:

13 Q Dr. Lyman, it's true that you don't have  
14 any specific security training in the defense of  
15 nuclear facilities, is that correct?

16 A That's correct.

17 Q Isn't it also correct that you don't  
18 belong to any professional security organizations?

19 A Well, the Institute of Nuclear Materials  
20 Management, which is a professional organization of  
21 experts from all over the world who are involved in  
22 the protection of nuclear materials.

23 Q And is that organization specifically  
24 dedicated to the security of a nuclear facility,  
25 nuclear power plant?

1 A Any what?

2 Q Is that facility specifically dedicated  
3 issues regarding the security of nuclear power plants?

4 A It's a professional organization. There's  
5 a section on physical protection which I'm an active  
6 participant in.

7 Q And is it the physical protection of  
8 nuclear power plants that is the focus of that  
9 subsection of that organization?

10 A No. It's physical protection of both  
11 plants and materials.

12 Q But it doesn't concern nuclear power  
13 plants specifically?

14 A It involves both physical protection  
15 issues at nuclear power plants and fuel cycle  
16 facilities.

17 Q You have never had any experience where  
18 you have overseen the implementation of a security  
19 program, have you?

20 A No.

21 Q And you have never had any put to the  
22 development of a security program at a facility?

23

24 (Pause.)

25 A I would say not directly, but --

**NEAL R. GROSS**

1 Q But you --

2 MS. CURRAN: Would you let him finish the  
3 question, please.

4 THE WITNESS: I would say indirectly,  
5 through my participation and active oversight as a  
6 member of the public with regard to NRC issues and  
7 issues we raised, I would say that had a direct impact  
8 of security at nuclear power plants in this country.

9 BY MR. FERNANDEZ:

10 Q You haven't provided anything specific  
11 with regard to that?

12 A I provided specific input, yet.

13 Q To a nuclear power plant?

14 A To all nuclear power plants in this  
15 country. For instance, our advocacy that spent fuel  
16 pools should be considered a target in the target sets  
17 and force-on-force drills was an issue that I raised  
18 with my colleagues. It is now, I believe,  
19 incorporated into the current security plan.

20 Q Have you reviewed current security plans?

21 A No.

22 Q So you haven't reviewed current security  
23 plans?

24 A Well, you know that.

25 Q I'm asking you have you or have you not

1 reviewed current security plans?

2 A Security plans from where?

3 Q For nuclear power plants?

4 A Current meaning?

5 Q Have you reviewed any currently existing  
6 security plans for Part 50 facilities regulated by the

7 --

8 A When you say "security plan"?

9 MR. FERNANDEZ: Objection, Your Honor, non  
10 responsive.

11 JUDGE YOUNG: Well, I think you're pushing  
12 this a little far after he said you know he doesn't  
13 have access, but your question about what does he mean  
14 by security plan, clarify for me what you're trying to

15 --

16 THE WITNESS: Do you mean the physical  
17 security plan, the entire plan of a nuclear power  
18 plant, Part 50 facility? You know that I've reviewed  
19 the security plan submittal in this case.

20 BY MR. FERNANDEZ:

21 Q Do you think that the portion of the plan  
22 that you reviewed in this case encompassed the  
23 security plan for a Part 50 facility?

24 A No, it didn't. That's why I'm asking.

25 Q So you haven't reviewed the physical

1 security plan for a facility, have you?

2 A No.

3 (Off the record.)

4 (Replacing mic battery.)

5 JUDGE YOUNG: Go ahead, Mr. Fernandez.

6 BY MR. FERNANDEZ:

7 Q Dr. Lyman, will you please describe the  
8 time probability of neutralization and related to the  
9 protection of nuclear material, please?

10 JUDGE YOUNG: Excuse me, I didn't hear the  
11 last half of that. Go ahead.

12 BY MR. FERNANDEZ:

13 Q The probability of neutralization and  
14 related to the protection of --

15 JUDGE YOUNG: And related to?

16 BY MR. FERNANDEZ:

17 Q The protection of nuclear material.

18 MS. CURRAN: Of what?

19 BY MR. FERNANDEZ:

20 Q Protection of nuclear material.

21 A I'm not familiar with the exact term, but  
22 if I had to guess, it would be the probability that an  
23 adversary is stopped from completing its task.

24 Q Could you please describe the term  
25 probability of protection and related to the

1 protection of nuclear material?

2 A Probably would be just that, the  
3 probability that an adversary is detected in his  
4 attempt to gain access to a facility.

5 Q Would you please briefly describe the  
6 strategy and pertinent tactics employed in such a  
7 strategy?

8 A A denial strategy would be the strategy to  
9 -- well, a denial of access or a denial of task?

10 Q Please describe both.

11 A A denial of access strategy means that a  
12 perimeter is defended to the extent that you are  
13 denied access to the site. And your protective  
14 strategy is keyed to that.

15 Denial of task is if adversaries  
16 penetrate, you deny them the ability to either access  
17 the target which in the case of theft of special  
18 nuclear material would be to actually gain access to  
19 that material and if the task is actually to remove it  
20 from site, then that would be a containment strategy  
21 which you could say was denial of removal of the  
22 special nuclear material from the site or recapture.

23 Q Now that you've described those strategies  
24 could you please describe what tactics are used at  
25 Part 50 licensees for example.

1 JUDGE YOUNG: At what licensees?

2 BY MR. FERNANDEZ:

3 Q Part 50 to employ a denial strategy?

4 A A denial of access or a denial of task?

5 Q Both.

6 A Well, all I know is what's in the  
7 regulations.

8 Q So could you please submit your answer to  
9 what it is that you know?

10 A It's in the regulations.

11 Q Could you please explain what tactics  
12 those would be?

13 A Do you want me to read from the  
14 regulations?

15 Q You just said you know what's in the  
16 regulations.

17 A How much detail do you want? To satisfy  
18 Part 73, you need to have a protected area boundary.  
19 You need to have adequate systems to be able to detect  
20 an adversary to penetrate the boundary. You need to  
21 have a protective strategy so that -- if you're  
22 talking about -- so you're talking about protection  
23 against the design basis through sabotage?

24 Q Does a Part 50 licensee protect against  
25 design basis threat?

1 A Under Part 73(1)(a) or (A)(1)?

2 Q I'm asking you to just please tell what is  
3 the pertinent tactics used in employing a denial  
4 strategy. You've defined possible denial strategies.  
5 You said that they are defined in -- these tactics are  
6 defined in Part 73. I'm just asking you to please  
7 state what it is that in your opinion would be?

8 A The basic strategy for physical protection  
9 system consists of four, well, you need to have an  
10 armed response force that is able to be in the right  
11 place, in sufficient numbers, with proper equipment  
12 and time. Those are the four basic criteria for  
13 judging the adequacy of an armed response force.

14 Q Have you ever been in a position to judge  
15 such adequacy?

16 A No.

17 Q Could you briefly describe a containment  
18 strategy and the pertinent tactics that would be  
19 employed to accomplish such a strategy?

20 A Well, in a containment strategy, you may  
21 not have sufficient numbers to actually prevent an  
22 adversary from reaching target, if the target is theft  
23 of special nuclear material, containment is simply  
24 having a response strategy that will prevent the  
25 adversary from leaving the site with that material.

1 Q And what tactics are you aware of are  
2 employed to accomplish this strategy?

3 A Again, you have an armed response force  
4 who is adequately equipped in sufficient number in the  
5 right place in time. Now to go in more detail than  
6 that, one needs to have details about the specific  
7 site and the layout and other -- I don't think it's  
8 possible to provide much more detail than that.  
9 Obviously, containment means that you have to  
10 intercept someone before they leave the site.

11 Q And have you ever been in that position to  
12 judge the adequacy of such tactics or strategy with  
13 regard to a containment strategy?

14 A No.

15 Q So other than the tactics described in the  
16 regulations, you would not be able to provide other  
17 tactics that you would be aware of?

18 A The characteristics of our responders, I  
19 describe are not in the regulations, but that is how  
20 a protective force or a response strategy is judged in  
21 concert with communications, in concert with detection  
22 and armed response communications and detection  
23 equipment is one of the cornerstones of physical  
24 detection strategy.

25 MR. FERNANDEZ: We have nothing further,

1 Your Honor.

2 JUDGE YOUNG: Do you want to go ahead?

3 JUDGE ELLEMAN: Why don't you ask your  
4 questions first.

5 JUDGE YOUNG: Okay. I just have probably  
6 one question that I wanted to ask. Tell me what you  
7 can about assessing overall plant security with an  
8 appreciation for its interrelated aspects?

9 THE WITNESS: I'm sorry, could you be a  
10 little more specific, what are the aspects that are  
11 interrelated?

12 JUDGE YOUNG: Okay, in one of the cases  
13 cited by Duke, it was another Catawba case from 1982,  
14 16 NRC 167.

15 The Commission said that an expert in  
16 nuclear power plant security should possess extensive  
17 training or experience in that or closely related  
18 fields. Such a person should be able to assess  
19 overall plant security with an appreciation for its  
20 interrelated aspects and so in that context could you  
21 tell me the extent to which and how you would -- how  
22 you can -- or could --

23 THE WITNESS: I would say, I find that  
24 language still a big vague, but if I had to offer my  
25 own interpretation, I would say obviously that

1 security is one aspect of an integrated plant  
2 response. If you define what the particular object or  
3 target an adversary is, security has to be a holistic  
4 assessment of not simply the adequacy of the security  
5 plan and security plans that don't meet regulations,  
6 but also an assessment of the practical factors  
7 associated with the ability -- well, the  
8 interrelationship of the detection systems, the  
9 communication systems and the armed response force to  
10 mount an adequate protective strategy, also,  
11 operations personnel, emergency responders, depending  
12 on the specific target, whether it's sabotage or theft  
13 may also be involved.

14 Other aspects, I might imagine, would be  
15 considered an interrelationship are the interaction  
16 with off-site local law enforcement with emergency  
17 planning officials, if you're talking about sabotage.  
18 So I would say those are some of the aspects I would  
19 expect go into an interrelated assessment.

20 Also important, in my view, is the human  
21 aspect of security which always has to be considered  
22 when you're assessing plant security. The fact that  
23 the stress on guard forces is severe and that fatigue  
24 is a major consideration, one which was overlooked  
25 until quite recently by a Commission, I would add, is

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1 an important human aspect of security that has to be  
2 evaluated.

3 In assessing the interrelationship of all  
4 these factors, the only practical way to do that is  
5 through conduct of force-on-force tests and that's  
6 why, as I said before, the Commission was moving in  
7 the direction of explicit statutory requirement for  
8 force-on-force testing, essentially taking the  
9 existing operational safeguards and response  
10 evaluation, the OSRE Program and converting that  
11 program to a statutory requirement because --

12 JUDGE YOUNG: Do you mean statutory or  
13 regulatory?

14 THE WITNESS: Regulatory, sorry. Well,  
15 the statutory requirement is, of course, there has to  
16 be adequate protection and the way to -- the way that  
17 a force-on-force testing program would also have to be  
18 part of the regulatory requirement to be able to meet  
19 that statutory requirement because only a force-on-  
20 force exercise can evaluate the interrelated aspects  
21 of detection, communications, armed response of  
22 training, armed response of weaponry, armed response  
23 of altercations and the adequacy of the overall  
24 security plan.

25 So I'd say that the force-on-force testing

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1 program is the consummate or the encapsulation of the  
2 interrelationship of various aspects of physical  
3 protection that would be required. So my  
4 interpretation of the language would be the ability to  
5 appreciate those interrelated aspects in an integrated  
6 exercise.

7 JUDGE YOUNG: Thank you.

8 THE WITNESS: Does that answer your  
9 question?

10 JUDGE YOUNG: Either one of you.

11 JUDGE ELLEMAN: Dr. Lyman, you were  
12 scheduled to give a deposition and I've lost track of  
13 whether that happened or not? Did it occur?

14 THE WITNESS: The deposition was in the  
15 safety contention 1. That took place on the 14th.

16 JUDGE ELLEMAN: But it that deposition was  
17 made?

18 THE WITNESS: Yes. June 11th.

19 JUDGE ELLEMAN: I guess I would ask the  
20 Staff, was there anything in that deposition that  
21 contradicts or augments or is relative to the question  
22 we're dealing with today?

23 MR. FERNANDEZ: The deposition focused on  
24 the safety contention, so Dr. Lyman's qualifications  
25 as an expert in the area of security were not a matter

[REDACTED]

1 that were being addressed during that day. So I  
2 believe the deposition for that date did not speak to  
3 this issue.

4 The other parties can correct me, if I'm  
5 wrong.

6 MR. WETTERHAHN: Your Honor, I was not  
7 there, but I'm informed that prior to Dr. Lyman's  
8 deposition, Ms. Curran suggested that the security  
9 qualifications of Dr. Lyman were not appropriate for  
10 discussion at that deposition and therefore they were  
11 not the subject of that deposition. Is that correct?

12 MS. CURRAN: All I remember is there was  
13 an extremely broad question that kind of covered  
14 anything to do with Catawba Nuclear Plant or anything  
15 and I suggested that that wasn't a productive area of  
16 inquiry.

17 I don't remember the issue of security  
18 coming up at all.

19 MS. UTTAL: I don't think it came up.  
20 What the context was was Dr. Lyman asked if an answer  
21 he should give should encompass issues other than  
22 Contention 1 and he was told yes, and as Ms. Curran  
23 said, no, no, we're only here for Contention 1. And  
24 that was about it. Is that right?

25 MS. CURRAN: Yes.

[REDACTED]

1 JUDGE BARATTA: Could you describe for me  
2 this Journal of Science and Global Security, what type  
3 of articles appear in there, what's the focus of the  
4 journal?

5 THE WITNESS: The journal was established  
6 to provide a peer reviewed vehicle for scientists who  
7 work in technical aspects of security and who are  
8 outside the generally independent academics and  
9 occasionally lab staff. But it's a vehicle for --  
10 there's a community of scientists who have studied  
11 security issues outside of the traditional Government  
12 nuclear infrastructure and it provides a vehicle for  
13 technical analysis of security and arms control issues  
14 and a place for publication of related articles.

15 JUDGE BARATTA: Could you -- do you have  
16 any specific topics that are covered in there or  
17 remember some articles that were covered in there?  
18 I'm just trying to get a sense of what the journal  
19 covers.

20 THE WITNESS: I myself published in 1992,  
21 there was one of the seminal articles on the options  
22 for disposing of separated plutonium coming out of  
23 nuclear warheads. It was one of the first places  
24 where the MOX option is analyzed, as well as the  
25 immobilization option.

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1 Other papers that I've published there,  
2 one had to do with safeguards on spent fuel  
3 repositories. A recent series of articles had to do  
4 with the vulnerabilities of spent fuel pools, to  
5 sabotage or accident and the consequences of a  
6 successful terrorist attack on a spent fuel pool. The  
7 journal also contains a wide range of articles having  
8 to do with verification of the Comprehensive Test Ban  
9 Treaty, the Biological Weapons Convention. It runs  
10 the gamut.

11 JUDGE BARATTA: Could you describe the  
12 peer review process that you mentioned?

13 THE WITNESS: It's a peer review journal  
14 where there are blind peer reviews on every paper  
15 that's submitted and sent for -- I'm not totally  
16 familiar with -- just my experience with the editorial  
17 processes, there are two to three blind peer reviews  
18 and --

19 JUDGE YOUNG: What do you mean by "blind"?

20 THE WITNESS: Double blind.

21 JUDGE YOUNG: So in other words --

22 THE WITNESS: They don't know who we are  
23 and we don't know who they are.

24 JUDGE YOUNG: Right.

25 THE WITNESS: At least two rounds of

1 response to questions raised by reviewers before the  
2 paper is accepted.

3 JUDGE BARATTA: Are you familiar with any  
4 other -- say the American Association of Physics,  
5 American Physical Society, excuse me, any of their  
6 publications at all?

7 THE WITNESS: Yes, from my previous life  
8 as a physicist.

9 JUDGE BARATTA: Would you say the peer  
10 review process there is comparable to the peer review  
11 process in the Science and Global Security?

12 THE WITNESS: Unfortunately, I didn't have  
13 physical review letters in the Journal of American  
14 Physical Society. My career in physics was not long  
15 enough to experience that peer review process, so I  
16 can't -- I can't comment on that.

17 JUDGE BARATTA: I see you had an article  
18 in Physical Review itself.

19 THE WITNESS: Physical Review D, yes, it  
20 was a long time ago.

21 Yes, I would certainly from my experience  
22 -- the intent of the journal was to establish a peer  
23 reviewed journal for scientists in this field, so the  
24 standards, I'm sure, I'm not a member of the editorial  
25 board or anything, so I can't speak --

1 JUDGE BARATTA: Is that somewhat to what  
2 you experienced with your Physical Review D, if you  
3 recall?

4 THE WITNESS: Yes, insofar as it takes a  
5 struggle sometimes to get something published.

6 JUDGE BARATTA: The articles that you  
7 published in Science and Global Security, could you  
8 point to any specific, it doesn't have to be the whole  
9 article, but significant part in the article or  
10 significant section of the article that dealt with  
11 specifically security of a nuclear facility or nuclear  
12 material?

13 THE WITNESS: The -- let me think. The  
14 paper I published on the plutonium mine issue --

15 JUDGE BARATTA: "Proliferation Risks of  
16 Plutonium Mines"?

17 THE WITNESS: Yes, looks specifically at  
18 issues associated with the claim that nuclear or spent  
19 fuel repositories could be vulnerable to diversion of  
20 plutonium which was an argument that's been raised in  
21 support of programs to partition and transmute spent  
22 fuel and plutonium they contain. So that was an  
23 analysis of certain security issues associated with  
24 the storage and disposal of spent fuel.

25 The original article on disposition of

1 separated plutonium, obviously, the focus was on how  
2 to take separated plutonium and process it in such a  
3 way to reduce its vulnerability to --

4 (Telephone interruption.)

5 JUDGE BARATTA: Mea culpa, mea culpa. I'm  
6 sorry.

7 THE WITNESS: Specifically looking at  
8 approaches to take the U.S. and Russia separated  
9 plutonium stockpile and transform it in such a way so  
10 they would have reduced vulnerability to divergent  
11 theft or breakdown. So I looked at general security  
12 issues in that context.

13 The papers on the security of the  
14 vulnerability of spent fuel storage and wet pools had  
15 some discussion of security issues, but my  
16 contribution there was mainly a consequence analysis.

17 MR. FERNANDEZ: Your Honors, all cell  
18 phone should be turned off during the time that we're  
19 doing safeguards, so not just silent.

20 JUDGE BARATTA: It's off.

21 MR. FERNANDEZ: Okay.

22 JUDGE YOUNG: Anybody else.

23 JUDGE BARATTA: I was aware of that.

24 MS. UTTAL: He just forgot.

25 JUDGE BARATTA: Could you go into a little

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1 more detail. You mentioned meeting with the  
2 intelligence community, but that your discussions were  
3 classified so I assume that you could talk about  
4 those?

5 THE WITNESS: Yes.

6 JUDGE BARATTA: Could you -- determine one  
7 you think would be best to speak to. Could you  
8 describe what you talked about?

9 THE WITNESS: Well, the briefing before  
10 the Joint Atomic Energy Intelligence Committee, we  
11 were asked to discuss vulnerabilities and physical  
12 protection post-September 11th. And so I described my  
13 -- I gave a briefing on my view of the NRC's evolution  
14 of physical protection before and after September 11  
15 with regard to protection of nuclear power plants.

16 JUDGE BARATTA: Could you describe the --  
17 I want to use -- I don't want to lead your answer, but  
18 I'm having difficulty phrasing the question.

19 People oftentimes talk about higher level  
20 views of a particular problem and then very detailed  
21 views of a particular problem. Could you in some way  
22 -- where would your discussion have fit in there?

23 THE WITNESS: I would say in between. I  
24 mean it was a discussion of general policy issues plus  
25 specific details of concern with regard to NRC's

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1 implementation of physical protection in that context.

2 The briefing for the National Intelligence  
3 Council was on the results of our spent fuel pool  
4 study and so that was a fairly detailed presentation  
5 on the results of that study.

6 JUDGE BARATTA: I'm sorry, I didn't mean  
7 to interrupt you. I apologize. I thought you were  
8 done.

9 The study, the spent fuel pool study, was  
10 that conceptual? Would you describe that as  
11 conceptual?

12 THE WITNESS: In what sense?

13 JUDGE BARATTA: In that you didn't really  
14 analyze a real spent fuel pool. It was a generic --

15 THE WITNESS: Yes, it was an analysis of  
16 a generic issue associated with dense packing spent  
17 fuel. We have a supplemental article which was just  
18 published where we evaluated, it was a site-specific  
19 with respect to consequence analysis. So conducted  
20 the consequences of essentially cesium-137 release at  
21 five different plants, but that was with regard to  
22 consequences as opposed to specific security analysis  
23 which, of course, we can't do because we don't have  
24 the need to know or any access to that.

25 JUDGE BARATTA: With regards to the

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1 generic security, you did say you did a generic  
2 security analysis?

3 THE WITNESS: Well, there was some  
4 discussion of the potential vulnerabilities of the  
5 spent fuel pool to sabotage.

6 JUDGE BARATTA: Was that again more of a  
7 conceptual nature?

8 Let me ask this. Were you looking more at  
9 the threat potential or the ability to deal with the  
10 threat? What part of --

11 THE WITNESS: There was a discussion of  
12 some plausible scenarios by which spent fuel --  
13 terrorists could cause a rapid draining of the coolant  
14 in a spent fuel pool. Again, since I was looking at  
15 generic spent fuel pool I didn't have  
16 site specific details.

17 JUDGE BARATTA: You mentioned this  
18 Institute for Nuclear Materials Management, is it?

19 THE WITNESS: Yes.

20 JUDGE BARATTA: Could you give me a  
21 little more information as to its objective and  
22 purpose and its membership?

23 THE WITNESS: You know, I'd be more  
24 comfortable maybe just directing you to their website  
25 for their own characterization because I don't want to

1 -- it's a professional organization of professionals  
2 in various nuclear security realms. There are members  
3 from the commercial nuclear power industry, from  
4 academia, from foreign nuclear establishments, both  
5 regulatory and research, a large representation of  
6 national laboratory people including those with  
7 responsibility for physical protection at NNSA sites.

8 JUDGE BARATTA: You mentioned you serve on  
9 a particular committee within that?

10 THE WITNESS: No, there are several  
11 divisions and I don't serve in any administrative  
12 capacity because I don't have the time, but there are  
13 opportunities. There's the Physical Protection  
14 Division.

15 JUDGE BARATTA: And you did say something  
16 about having presented it at the meeting?

17 THE WITNESS: Yes, I present at least one  
18 paper every year.

19 JUDGE BARATTA: What was the topic of that  
20 paper?

21 JUDGE YOUNG: He said one every year.

22 JUDGE BARATTA: Oh, I'm sorry. You're  
23 right. He did say one every year.

24 What -- could you give me the topics that  
25 would be relevant to this discussion.

1 THE WITNESS: Yes, for instance, at the  
2 2003 meeting I spoke about the interaction between the  
3 Department of Homeland Security and the Nuclear  
4 Regulatory Commission on physical protection of  
5 nuclear power plants and particularly the gap in  
6 coverage between the NRC's responsibility and that of  
7 the Federal Government.

8 In previous years, let's see, I gave a  
9 presentation on the NRC's physical protection  
10 standards for transport of spent fuel and sabotage.

11 I gave a presentation on international  
12 standards for protection of certain -- of nonpiling  
13 enriched uranium materials and the potential threat of  
14 criticality-induced radiological weapons which is a  
15 concern that I have.

16 I gave another presentation about the  
17 NRC's, the evolution of physical protection  
18 regulations pre-September 11 and the rulemaking  
19 process that I described.

20 JUDGE BARATTA: Were the sessions that you  
21 gave these presentations at, were they well attended  
22 or were they like the usual NS meeting where you're  
23 looking at six people in the room?

24 THE WITNESS: In the beginning, actually  
25 mine are generally pretty well attended. Barry

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1 Westreich was at the 2003 meeting. He's a -- I'm not  
2 sure what his exact title is, but he's an NSIR.

3 JUDGE BARATTA: How would you characterize  
4 the audience response to your papers?

5 THE WITNESS: Generally, I got positive  
6 feedback from the audience.

7 JUDGE BARATTA: Did you receive a lot of  
8 questions at the end?

9 THE WITNESS: I usually get quite a few  
10 questions.

11 JUDGE BARATTA: And did they appear to you  
12 to be critical in your opinion?

13 THE WITNESS: Not overly so. Generally,  
14 I raise controversial issues and sometimes it pushes  
15 the wrong button, but my feedback is generally that I  
16 raise issues that aren't discussed as much as they  
17 should and people appreciate that.

18 JUDGE YOUNG: I just have another couple  
19 of questions that I'd like to ask. Actually, the  
20 Staff -- well, all counsel, really I think -- are  
21 there any other questions for Dr. Lyman himself?

22 MS. CURRAN: I wondered if I could ask  
23 some follow-up, but also have a break before that?

24 JUDGE YOUNG: Okay, then why don't I go  
25 ahead and these should be very quick and then we can

1 come back and you can do your follow up and finish  
2 with that and move more into the discovery.

3 JUDGE BARATTA: Are you going to go follow  
4 up questions with Dr. Lyman?

5 MS. CURRAN: Yes.

6 JUDGE YOUNG: With Dr. Lyman.

7 JUDGE BARATTA: But you're going to ask  
8 questions of the Staff?

9 JUDGE YOUNG: Yes, I just want to ask  
10 briefly and in that we can sort of wrap everything up.

11 JUDGE BARATTA: I wanted to ask a couple  
12 of the Staff too. When would that be appropriate to  
13 do, before? We can have our break whenever, but it  
14 would be appropriate before she raises questions?

15 Maybe we should take our break now.

16 JUDGE YOUNG: It sounds like you want to  
17 take a break now.

18 JUDGE BARATTA: I don't want to, but I  
19 think it's easier.

20 JUDGE YOUNG: Okay, well, we'll take a  
21 break and you can come back and follow up and then  
22 we'll finish with any questions for counsel and make  
23 sure we finish on this issue and then after that we'll  
24 move into the specific discovery issues and some  
25 questions that we might have on those, including not

1 only these need-to-know related issues, but also the  
2 deliberative process privilege issue that the staff  
3 has raised. And I think that's all on our agenda.

4 Thank you.

5 MR. WETTERHAHN: Your Honor, I would  
6 appreciate after all the questions have been laid on  
7 the table that we have a very brief period for  
8 argument with regard to Dr. Lyman.

9 JUDGE YOUNG: Very brief.

10 MR. WETTERHAHN: Thank you.

11 JUDGE BARATTA: When do you want us back?

12 JUDGE YOUNG: Let's be back -- what time  
13 do you have?

14 JUDGE BARATTA: I have 2:42.

15 JUDGE YOUNG: Can we be back in 10  
16 minutes?

17 (Off the record.)

18 JUDGE YOUNG: Back on the record.

19 MS. CURRAN: Should I ask my follow up  
20 questions?

21 JUDGE YOUNG: Go ahead.

22 REDIRECT EXAMINATION

23 BY MS. CURRAN:

24 Q Dr. Lyman, I believe you said earlier that  
25 you haven't prepared any security plans for nuclear

1 power plants, is that correct?

2 A Yes.

3 Q And you haven't reviewed specific security  
4 plans for nuclear power plants?

5 A Yes.

6 Q Do you believe that your lack of that type  
7 of experience would preclude you from making an  
8 effective evaluation of Duke's security plan for  
9 purposes of preparing your testimony on BREDL  
10 Contention 5?

11 A No, I don't.

12 Q Can you explain why not?

13 A Well, to restate our overarching argument,  
14 Duke is committed to meeting the Category 1 design  
15 basis threat for theft of strategic special nuclear  
16 material. They have asserted that their existing  
17 security plan, with the post-September 11th upgrades,  
18 plus the additional measures and the security plan  
19 submittal are going to be adequate to meet that  
20 requirement.

21 We do not have access as we had asked for  
22 for the design basis threats, simply to compare the  
23 standard between the post-September 11 sabotage  
24 standard which is operating at Duke's plant and the  
25 pre-September 11th Category 1 standard which is the

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1 get access to the plan are the broad brush aspects of  
2 the protective strategy, including the numbers of  
3 guards on the shift, their positions. The plan may  
4 not contain everything that we need to fully evaluate  
5 whether the plan will be effective. That will be a  
6 separate issue. But we will be trying to extract the  
7 minimum amount of information that we need to make the  
8 determination whether the security plan to defend  
9 against the post-September 11th threat is sabotage,  
10 plus the additional commitments in the security plan  
11 submittal together will be adequate to defend against  
12 the theft of Category 1 quantities of strategic  
13 special nuclear material.

14 MS. CURRAN: That's all.

15 JUDGE YOUNG: All right. Are there any  
16 other questions for Dr. Lyman?

17 MR. FERNANDEZ: Not from the Staff, Your  
18 Honor.

19 JUDGE YOUNG: If not, we'll move on. We  
20 have a couple questions of counsel that we have.

21 MR. WETTERHAHN: I'm waiting for your  
22 question.

23 JUDGE YOUNG: Go ahead.

24 JUDGE BARATTA: For the Staff, could you  
25 give me the definition or an expert that you use to

1 evaluate Dr. Lyman?

2 MR. FERNANDEZ: Could you repeat that  
3 question, Your Honor?

4 JUDGE BARATTA: What was the definition of  
5 an expert that you used in evaluating whether Dr.  
6 Lyman was an expert in security?

7 MR. FERNANDEZ: Although the Commission  
8 does not have a regulation that specifically addresses  
9 your question, the Commission and Appeal Boards have  
10 addressed the issue of expertise in NRC licensing.

11 I would offer the Board an Appeal Board  
12 decision regarding the McGuire Station.

13 JUDGE YOUNG: Is this one of the ones that  
14 you've cited already?

15 MS. BUPP: Yes, it is, Your Honor.

16 JUDGE BARATTA: Could you give me  
17 specifically that's in there?

18 MR. FERNANDEZ: Yes, Your Honor. The  
19 specific reference for the case is 15 NRC 453.

20 JUDGE YOUNG: Where did you cite that now?

21 MS. BUPP: We cited it in our -- either  
22 our objections or in the need-to-know determination or  
23 both. It's on page 4 of our objections in the second  
24 paragraph.

25 MR. FERNANDEZ: At page 475 of that case

1 --

2 JUDGE BARATTA: Wait, I'd like to find it  
3 first. Hold on a second before you go on.

4 Go ahead, proceed.

5 MR. FERNANDEZ: On page 475 of the Appeal  
6 Board case it reads "the Commission's rules of  
7 practice do not expressly state the standard for  
8 judging whether a prospective witness qualifies as an  
9 expert. In that circumstance we find the standard  
10 incorporated in Federal Rule 702 to be a suitable test  
11 for determining the propriety of the licensing board's  
12 rejection of Mr. Riley's claim of expert status. As  
13 noted above, that rule allows a witness qualified as  
14 an expert by knowledge, skill, experience, training or  
15 education to testify if scientific, technical or other  
16 specialized knowledge will assist the trier of fact to  
17 understand the evidence or to determine a fact in  
18 issue."

19 I would just leave it at that, Your Honor.

20 JUDGE BARATTA: Okay.

21 MR. FERNANDEZ: So one of the guiding  
22 principles that we use is Federal Rule of Evidence  
23 702.

24 JUDGE BARATTA: All right now, could you  
25 tell me how you -- what criteria you used to determine

1 whether or not this particular witness qualified?

2 MR. FERNANDEZ: We used the criteria laid  
3 out in the rule which is knowledge, skill or  
4 experience, training or education that would assist  
5 the trier of fact to understand the evidence or  
6 determine the fact or issue in the case.

7 JUDGE BARATTA: Okay. And could you tell  
8 me then how you determined his level of knowledge and  
9 his level of skill, level of experience, level of  
10 training and education?

11 MR. FERNANDEZ: Given that the proponent  
12 of the expert in this case is the party that bears the  
13 burden of eliciting enough evidence to prove that the  
14 individual are purporting to be an expert is actually  
15 an expert, all we had on the record, aside from the  
16 deposition which Judge Elleman addressed earlier which  
17 did not address security, all we had was the CV that  
18 was provided to us by BREDL. Aside from that, we had  
19 no other information available to the staff when we  
20 made our need-to-know determination.

21 JUDGE BARATTA: All right, so you used the  
22 information that was in the CV, is that correct?

23 MR. FERNANDEZ: We used the information  
24 that BREDL had to this point used to support their  
25 claim that Dr. Lyman is an expert in security.

[REDACTED]

1 JUDGE BARATTA: Did you at any point, for  
2 example, question or look at or discuss, for example,  
3 the publications that he himself wrote or where he --  
4 the particular journals he published in, and made some  
5 assessment?

6 MR. FERNANDEZ: I don't understand the  
7 question. When you mean question do you mean  
8 questions to BREDL?

9 JUDGE BARATTA: No, were there  
10 discussions, did you consider in your evaluation of  
11 the CV, his contents of his publications?

12 MR. FERNANDEZ: Yes, Your Honor.

13 JUDGE BARATTA: And the particular  
14 journals that they were published in?

15 MR. FERNANDEZ: Yes, Your Honor.

16 JUDGE BARATTA: Did you consider in your  
17 discussions specifically his membership in  
18 professional societies?

19 MR. FERNANDEZ: Yes, Your Honor.

20 JUDGE BARATTA: And could you then tell me  
21 what your -- when you had those discussions, you said  
22 you considered them, right?

23 MR. FERNANDEZ: Yes, Your Honor.

24 JUDGE BARATTA: Could you then tell me  
25 what your thought are as to the journal that he

1 published several security-related articles as to what  
2 you think whether or not it's a peer-reviewed journal  
3 comparable to most technical journals?

4 MR. FERNANDEZ: The Staff did not raise  
5 that which you are raising right now. All we did was  
6 actually review the document which was published in  
7 the journal and it did not address any matters which  
8 would be relevant to the security of a nuclear power  
9 plant having mixed oxide fuel. Therefore, we didn't  
10 need to go into any further inquiry as to the adequacy  
11 of the journal which was publishing the article.

12 JUDGE BARATTA: Did it, in your mind  
13 address security-related issues of a nuclear facility  
14 or nuclear material?

15 MR. FERNANDEZ: It addressed certain  
16 issues related to generic matters concerning security,  
17 yes.

18 JUDGE BARATTA: When you say "generic"  
19 would you characterize that as they asked Dr. Lyman to  
20 in his presentations before the intelligence  
21 committees as being high level or left out the detail  
22 level or somewhere in between?

23 MR. FERNANDEZ: As they relate to the  
24 security of a Part 50 licensee --

25 JUDGE BARATTA: Let me clarify my

1 question. To a security -- the question of security  
2 at a nuclear facility or nuclear materials?

3 MR. FERNANDEZ: Let me consult the Staff  
4 on that issue.

5 (Pause.)

6 (Staff consulting.)

7 MR. FERNANDEZ: We would characterize that  
8 article as concerning high level concepts, generically  
9 addressing security.

10 JUDGE BARATTA: Okay, could you -- does  
11 the question of security of a facility involve such  
12 high level concepts?

13 MR. FERNANDEZ: One moment, Your Honor.

14 (Pause.)

15 (Staff consulting.)

16 MR. FERNANDEZ: The Staff would answer  
17 your question in the affirmative, but we would like to  
18 add a qualifier to that answer which is that in  
19 theory, such generic principles are applicable, but  
20 without any basis for any specific methods for  
21 protection in our defense of a facility, these  
22 principles are meaningless.

23 JUDGE BARATTA: In your opinion.

24 MR. FERNANDEZ: In the Staff's opinion,  
25 yes.

[REDACTED]

1 JUDGE BARATTA: Now just to give me a  
2 metric of what you think are high level versus low  
3 level or detail level. I don't mean not a merit  
4 basis. I'm trying to characterize it in terms of  
5 concepts versus details. How would you characterize  
6 in your opinion. I realize you didn't ask these  
7 questions, Mr. Wetterhahn -- the topics that Mr.  
8 Wetterhahn was asking, were they low level or detailed  
9 issues related to security or did were they a little  
10 bit broader scope issues?

11 MR. FERNANDEZ: I think you would have to  
12 refer to what specific concepts you're talking about.  
13 Mr. Wetterhahn covered a variety of issues in his voir  
14 dire.

15 JUDGE BARATTA: Okay, are you at all  
16 familiar with the Union of Concerned Scientists?

17 MR. FERNANDEZ: We are generically  
18 familiar with the organization, yes.

19 JUDGE BARATTA: And that is, I believe,  
20 Dr. Lyman's employer stated in his CV?

21 MR. FERNANDEZ: That's what his CV states  
22 and that's what he stated at the deposition.

23 JUDGE BARATTA: Has the Staff formulated  
24 any opinion with respect to the credibility of -- and  
25 I'm not talking on any specific issue, but in general,

1 the Union of Concerned Scientists?

2 MR. FERNANDEZ: No, we have not.

3 JUDGE BARATTA: So far you have told me  
4 then that you are not that familiar with the journal  
5 he publishes in. You're not that familiar,  
6 apparently, with his employer. You're not familiar  
7 with the professional societies he belongs to.

8 Have you ever done any hiring?

9 MR. FERNANDEZ: Given that the burden of  
10 proving that this individual is an expert is on the  
11 party proposing the expert. I believe, respectfully,  
12 Your Honor, that you've merely just proven our case,  
13 that the proponent of the expert has not provided us  
14 with enough information to make a determination of  
15 whether this individual is an expert in the area of  
16 security or not.

17 JUDGE BARATTA: Obviously, you've never  
18 done any hiring, I guess.

19 Mr. Wetterhahn, may I ask you a question?

20 MR. WETTERHAHN: Certainly.

21 JUDGE BARATTA: Apparently, Mr. Fernandez  
22 is -- apparently, he was not able to answer my  
23 question about the -- you asked a lot of good  
24 questions and I appreciate those.

25 I was curious though about how you would

1 characterize that, to give me a metric. A lot of  
2 those terms I'm not familiar with and are they -- do  
3 they tend towards the global or the detail or  
4 somewhere in between?

5 MR. WETTERHAHN: I think both. The focus  
6 of our review today is the licensee's security plan  
7 which is detailed. That's how the licensee takes the  
8 concepts found in the regulations in various order and  
9 translates it into the concrete. And in order to do  
10 that you need a high appreciation of concepts such as  
11 defensive concepts, a knowledge of explosives,  
12 knowledge of weaponry, knowledge of military tactics  
13 and those start at the very top in formulating a plan  
14 and as you work through the plan, you use those  
15 concepts also to fill in the details, how many  
16 individuals you finally need, fields of fire, bullet-  
17 resistance enclosures. So I would contend that his  
18 lack of knowledge with regard to these concepts which  
19 are universal to the consideration of a security plan  
20 are both at the top, the overall strategic view and  
21 the tactical view and his lack of knowledge would  
22 disqualify him from being an expert and reviewing the  
23 details of the security plan, the matter at issue  
24 here.

25 JUDGE BARATTA: You used the word

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1 "academic". Could you give me a little better  
2 understanding of how you used that, how you meant  
3 that?

4 MR. WETTERHAHN: The issue here is not his  
5 experience in the academic consideration of policy  
6 issues. That's not here. We're here to decide  
7 whether he sees a particular document and I believe  
8 under the questioning of the panel and the other  
9 attorneys, it is clear that his, first of all, his  
10 academic, his education had nothing to do with  
11 security. I think he would concede that.

12 And as you look at the papers that he's  
13 written, as I have written them down, they really  
14 didn't go to nuclear power plant security.

15 One thing about the fuel pool, he was very  
16 candid. His analysis in an article went towards the  
17 consequences of given a fuel pool meltdown or a  
18 breach, he did not prepare an analysis of the  
19 security, either on a generic or a specific basis.

20 One of his studies dealt with spent fuel  
21 repository plutonium mining issues, not having  
22 anything to do factually or tied by virtue of the  
23 regulations to nuclear power plant security.

24 The National Intelligence Council, as I  
25 heard it, they were generic analysis of policy. So we

1 don't believe that he has demonstrated the sufficient  
2 depth of knowledge necessary to review this power  
3 plant security plan. We would call him at best a well  
4 informed layman and a well informed layman does not  
5 meet the qualifications of an expert.

6 JUDGE BARATTA: Do you consider the  
7 definition of an expert as proffered by the Staff, is  
8 that your definition as well?

9 MR. WETTERHAHN: I looked at the  
10 regulations and the cases and yes. The Staff is  
11 correct, that constitutes knowledge, skill,  
12 experience, training or education. And clearly,  
13 knowledge, he does not have the skills. I asked a  
14 number of questions about explosives, about munitions,  
15 about weaponry. He doesn't have the depth of  
16 knowledge which one would expect in an expert.

17 JUDGE YOUNG: Let's move on and we'll hear  
18 -- I think maybe since it's getting a little late, we  
19 need to limit the time on this, but we'll hear  
20 argument, anything other than argument you want to  
21 make?

22 MS. CURRAN: I would like a chance to  
23 respond to Mr. Wetterhahn at some point because --

24 JUDGE YOUNG: Do it in your argument on  
25 this. And I want to try to move to that right now.

1 MS. CURRAN: Oh, okay. I thought that's  
2 what we just -- I thought it was an answer to a  
3 question.

4 JUDGE YOUNG: I thought we had. Let's  
5 move on and let's try to get -- make the best use of  
6 our time here.

7 I want to give each party three minutes  
8 just to wrap up your arguments on this issue and in  
9 it, I would just ask -- I'm not going to ask this as  
10 a separate question, but in looking at the Catawba  
11 case from the early -- old case and then the more  
12 recent, I think it was Carolina Power and Light case,  
13 in the Catawba case the proffered expert, I think the  
14 qualifications that were described for that person was  
15 that he was a former security employee. The  
16 qualifications of the expert in Carolina Power and  
17 Light was someone who had little experience in actual  
18 operation of a nuclear power plant, but did have  
19 education and experience relating to nuclear facility  
20 and in that case spent fuel pool design.

21 You might want to touch on those examples  
22 in making your final arguments on this and let's try  
23 to wrap that up quickly and then we'll move on to the  
24 discovery issues.

25 We'll start with you.

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1 MS. CURRAN: I think it is worthy of note  
2 that in the Catawba case the expert was a former  
3 employee of the plant, a security-rated employee,  
4 almost the other end of the spectrum. From Dr.  
5 Lyman's qualifications, are obviously more conceptual.  
6 He hasn't reviewed a security plan. He hasn't written  
7 a security plan, but the question is can he assist the  
8 trier of fact in reaching a decision on the admitted  
9 contention in this proceeding? And it seems to me  
10 that BREDL has raised some really fundamental  
11 conceptual disputes with Duke about the security plan.  
12 They're not the kinds of disputes for which you need  
13 to know every abbreviation in Duke's security plan  
14 regarding every piece of equipment. And I have only  
15 Mr. Wetterhahn's word for his statement that some of  
16 these abbreviations he gave relate to major security  
17 concepts.

18 But it seems to me Dr. Lyman has showed  
19 you that he's familiar with what Mr. Wetterhahn calls  
20 high security concepts, fundamental concepts of  
21 nuclear security. He's familiar with nuclear power  
22 plant design and how it relates to security. Contrary  
23 to what Mr. Wetterhahn says he has written articles  
24 about nuclear power plant security. He's essentially  
25 familiar with these things. He prepared these

1 contentions that the Board found admissible, that the  
2 Board found to pose compelling issues that deserve  
3 further inquiry and I think he's demonstrated here  
4 that he can assist --

5 JUDGE BARATTA: Let's go off the record  
6 for a second.

7 (Off the record.)

8 JUDGE YOUNG: We'll go back on.

9 MS. CURRAN: I would just like to say that  
10 I would gladly accept the title of the well-informed  
11 lay person, but I think Dr. Lyman has shown himself to  
12 be a qualified expert by virtue of, although he does  
13 not have education in security, he certainly has  
14 educational qualifications to review a security plan  
15 for a nuclear plant and he has extensive experience in  
16 that field.

17 JUDGE YOUNG: Mr. Wetterhahn.

18 Do you want to ask a question before he  
19 starts?

20 JUDGE ELLEMAN: No, later. I'll ask  
21 later.

22 MR. WETTERHAHN: I'll just touch on a  
23 couple of concepts. I asked a number of questions  
24 with regard to education and practical knowledge of  
25 issues that would come up when one reviews a security

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1 plan. Weaponry. I asked about UL-752 which is an  
2 Underwriters Laboratory standard for bullet  
3 resistance. An expert would have known about that and  
4 would be knowledgeable. In order to review a plant  
5 like this, an expert would need that information,  
6 would need information on delay barriers, how long  
7 would a delay barrier keep somebody out? The use of  
8 explosives, charges.

9 These issues form and these questions form  
10 the fundamental base of knowledge that one reviewing  
11 the details of a security plan and being able to  
12 understand the overall concept and translate it into  
13 actuality, these are the skills and knowledge that one  
14 needs. Clearly, Dr. Lyman doesn't have those skills.  
15 He cannot be declared an expert with regard to the  
16 review of the security plan.

17 Even, as the panel pointed out, someone  
18 low in the organization, who only saw certain details  
19 was not qualified as an expert in that Catawba case.  
20 Here, one needs a thorough integrated view of the  
21 entire security program.

22 Thank you.

23 Did you have a question?

24 JUDGE ELLEMAN: Well, it was more an  
25 aside. You endorse the written definition of an

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1 expert. You cited knowledge, skill, experience,  
2 training. But you said "and education" and the  
3 operative word is "or" education.

4 MR. WETTERHAHN: Excuse me if I misspoke.  
5 I don't believe that any of those specific attributes,  
6 if viewed in light of the questions asked here would  
7 indicate that Dr. Lyman is an expert. None. If you  
8 add and/or or the conjunction or, he doesn't have any  
9 of those attributes.

10 JUDGE YOUNG: Go ahead.

11 MR. FERNANDEZ: Your Honor, given that the  
12 Intervenors have the burden of proving that Dr. Lyman  
13 is an expert, the Staff maintains its position as  
14 expressed in our need-to-know determination that Dr.  
15 Lyman is not an expert and should not be qualified as  
16 an expert in this proceeding.

17 I won't belabor the points that Mr.  
18 Wetterhahn addressed, but I would point out that all  
19 of the questions that the licensee and the Staff  
20 raised with regard to specific measures that would be  
21 applicable to protect the facility were merely  
22 responded by vague responses or references back to the  
23 regulations.

24 If the trier of fact in this case, meaning  
25 the panel of the Board, that's presiding over the case

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1 is to be assisted by an individual that purports to be  
2 an expert, I would expect that the Board would want  
3 assistance as to what specific measures are adequate  
4 to meet the requirements in Part 73 and I believe Dr.  
5 Lyman specifically said that beyond the requirements  
6 of Part 73, he couldn't really talk as to tactics to  
7 accomplish a lot of the strategies that are used by  
8 licensees to accomplish the goals laid out in the  
9 regulations.

10 If a purported expert doesn't know what  
11 specific tactics are adequate to meet what the  
12 regulatory requirements laid out in the regulations  
13 are, I have no idea how that individual could truly  
14 assist a panel faced with a fact question as to the  
15 adequacy of a particular plan. I don't understand how  
16 that individual could offer an opinion as to the  
17 adequacy of any specific tactics employed.

18 Therefore, I would reiterate that Dr.  
19 Lyman is not an expert in the area of security,  
20 particularly concerning the application now before the  
21 Board.

22 Thank you.

23 JUDGE YOUNG: Thank you for your  
24 arguments.

25 We're going to move in moment to discuss

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1 the specific objections with regard to the discovery.  
2 We're going to take a couple of minutes and while we  
3 were conferring, we'd like you to get prepared to be  
4 able to address the specific objections raised by all  
5 the parties. If you have any suggestions to us, about  
6 the most logical order to proceed in, you can tell us  
7 that when we get back. Otherwise, we'll just -- we'll  
8 let you know and move forward on that basis.

9 (Off the record.)

10 JUDGE YOUNG: Back on the record. We have  
11 considered all your arguments and we appreciate Dr.  
12 Lyman's testimony. We find that he has been very  
13 straightforward in telling us what he does know and  
14 what experience he does have, what experience and  
15 knowledge he does not have and we find that he has  
16 demonstrated sufficient knowledge, skill, experience,  
17 training and education to be able to ask the probing  
18 questions and do the evaluations on behalf of the  
19 Intervenor that would assist and aid us in making our  
20 determinations in this case.

21 We find that he has shown skill and  
22 ability to understand, analyze and utilize the sort of  
23 specific information that would be relevant in such a  
24 way that it would aid us in our determinations and so  
25 while we will be issuing something in writing later to

1 confirm our ruling today, we are going to go ahead and  
2 make that ruling today, verbally on the record now, so  
3 that we won't hold up the Staff in going ahead and  
4 making your need-to-know determination on the  
5 necessity and indispensability aspects of the need  
6 issue.

7 And I think that pretty much summarizes  
8 it. Have I left anything out?

9 JUDGE ELLEMAN: I think that's sufficient.

10 MS. UTTAL: Judge, can I ask one question?  
11 Can you qualify what area you found him to be expert  
12 in?

13 JUDGE YOUNG: In the security areas that  
14 we've been discussing. As a matter of fact, one of  
15 the things that we would like for the Staff to do when  
16 you get into your need-to-know determinations is to --  
17 and this is particularly in light of the Commission's  
18 statement that an expert should be able to have an  
19 appreciation of the interrelated aspects of security  
20 at a nuclear power plant, that you would be able to  
21 help us by addressing with some specificity the issue  
22 of designating which portions of a plan or any other  
23 documents would be something for which there would be  
24 a need.

25 MS. UTTAL: I'm sorry, I didn't understand

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1 exactly what you meant by designated the portions for  
2 which there would be a need.

3 JUDGE YOUNG: I believe that the -- let me  
4 find a case. In one of the cases, and I think I have  
5 it here, obviously if any security plan is released,  
6 as stated in the PG&E case, it would be subject to a  
7 protective order. That sort of goes without saying  
8 and if there are an agenda to any protective orders,  
9 that would be something that you could address.

10 Also, the Board in that case talked about  
11 the need to designate or said that only those portions  
12 of the plan which are both relevant to and necessary  
13 for the litigation of an Intervenor's contention need  
14 be released. And so that's -- rather than make it a  
15 broad need-to-know determination, we would appreciate  
16 it and it would help us if you could address the issue  
17 of which portions, and particularly, in light of the  
18 language of the Commission in the Catawba case about  
19 the ability to appreciate the interrelated aspects of  
20 a plan, because that's something that both as a  
21 substantive and if we find a need-to-know as a  
22 procedural matter, would need to be addressed is what  
23 portions of the plan should be released, whether  
24 there's specific ones that should not be released and  
25 we would appreciate whatever assistance you can

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1 provide on that.

2 MS. UTTAL: Fine, I understand now.

3 JUDGE YOUNG: Okay. I'm going to get  
4 muscles from carrying all these books around.

5 Okay, moving now to Duke's objections.  
6 Let's see, you made a couple of general objections.

7 MR. WETTERHAHN: I believe they can stand  
8 on their own. I don't propose to argue them further  
9 in this stretch of time.

10 JUDGE YOUNG: Actually, the reason I raise  
11 them is that I doubt -- let me just ask.

12 Ms. Curran, you're not asking -- I assume  
13 that you would agree that attorney work product  
14 privilege and attorney-client privilege, etcetera, is  
15 not something you would argue over?

16 MS. CURRAN: No, I wouldn't. I also  
17 wanted to mention that Item B on Duke's page 2, it's  
18 the same as another interrogatory that we settled on  
19 the last go round by agreeing that Duke would provide  
20 e-mails that are already in the security files and we  
21 agreed that we weren't asking Duke to go through some  
22 kind of global search of every e-mail in its  
23 possession, but if it would give us e-mails that it  
24 keeps with its security files, that would satisfy us.

25 MR. WETTERHAHN: We will do that. As I

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1 explained, I think, in the last sentence, given the  
2 nature of the e-mails and the nature of safeguards  
3 information, it's quite unlikely that much substantive  
4 information would be contained in the e-mails.

5 JUDGE YOUNG: Is going to be in an e-mail.

6 MR. WETTERHAHN: But we will do the  
7 search.

8 JUDGE YOUNG: I guess the point I was  
9 trying to get at here is there really anything in the  
10 general objections that you don't agree with, Ms.  
11 Curran? Is there anything that we need to even rule  
12 on here?

13 MS. CURRAN: No. I think that the only  
14 other one I see that they objected to was request  
15 number 2 and I'm satisfied --

16 JUDGE YOUNG: I mean before we get to the  
17 specifics.

18 MS. CURRAN: I'm looking at all the  
19 general discovery.

20 JUDGE YOUNG: Oh, general discovery  
21 responses, okay.

22 MS. CURRAN: It's on page 4 of Duke's  
23 response and I'm satisfied with their answer to that.

24 JUDGE YOUNG: Okay. You're satisfied with  
25 their answer to --

1 MS. CURRAN: What they say in their  
2 objection is that they will give us the information  
3 that they used to answer the interrogatories. They'll  
4 give us the information they're going to rely on in  
5 the hearing and that is satisfactory.

6 JUDGE YOUNG: Okay. So basically down to  
7 --

8 MR. WETTERHAHN: With the proviso, we will  
9 discuss -- we may not agree on what the appropriate  
10 scope of documentation necessary to fulfill that  
11 general statement may be.

12 MS. CURRAN: You mean the need-to-know?

13 MR. WETTERHAHN: Not need-to-know and  
14 maybe I should get into it right now.

15 JUDGE YOUNG: Are we on the documents now?  
16 Are we all okay on the general discovery -- I'm sorry,  
17 what you termed general objections and then the  
18 general discovery responses? There are no disputes on  
19 those? We're now down to general document production  
20 request responses?

21 MR. WETTERHAHN: Yes.

22 MS. CURRAN: Yes.

23 JUDGE YOUNG: Okay, so that's what we're  
24 on.

25 Is that what your comment was addressed

1 to?

2 MR. WETTERHAHN: Yes, and also throughout  
3 this pleading. We believe the Commission's focus in  
4 CLI-406 was the incremental measures necessary for the  
5 licensee to take to receive and store MOX fuel. That  
6 is the scope of this proceeding.

7 As the Commission points out, it's not to  
8 retry the general security of Catawba or its ability  
9 to effectively defend against the radiological DBT.  
10 I think the Commission said all parties must assume  
11 that that state that we're in compliance with that --

12 JUDGE YOUNG: I want to try to get you to  
13 sort of move on to the point here. We've got a lot to  
14 go through. And so I'm going to interrupt you. I  
15 have interrupted you. I'm going to continue to  
16 interrupt you for just a moment here.

17 Our certification of questions related to  
18 one of the contentions and some of those questions  
19 were somewhat broader. We certified certain questions  
20 to the Commission. We have not yet heard from the  
21 Commission.

22 MR. WETTERHAHN: And I believe we're all  
23 hampered by that.

24 JUDGE YOUNG: Pardon?

25 MR. WETTERHAHN: We're all hampered by not

1 having those answers.

2 JUDGE YOUNG: And so we don't have  
3 clarification on all of these issues.

4 The Commission, as I recall, and I'm not  
5 going to be able to point to the exact page, but the  
6 Commission did talk about a need to know may be  
7 different at different stages of the proceeding and so  
8 if you are limiting your response based on the  
9 argument you've just made, I think you need to  
10 identify that so that there won't be an assumption  
11 that -- either way on that. Okay?

12 MR. WETTERHAHN: Yes. We agree you have  
13 to look at the need-to-know at each stage of the  
14 proceeding, but our position is that even at this  
15 stage of the proceeding, there is not a general or a  
16 need-to-know with regard to the underlying plan as it  
17 relates to radiological sabotage and all the  
18 implementing procedures and all it takes to implement  
19 that plan. We believe the focus --

20 JUDGE YOUNG: The point of your saying  
21 this though, that's what I'm trying to ascertain. Is  
22 the point of your saying this that they can assume  
23 that your answers will not encompass anything more  
24 than the incremental measures or --

25 MR. WETTERHAHN: That is correct.

[REDACTED]

1 JUDGE YOUNG: Okay, because I think, as  
2 you said, we're still awaiting some clarification. We  
3 are at a different stage of the proceedings, as I see  
4 it, and the fact that there are some need-to-know  
5 issues pending may lead to one or another conclusion  
6 on the issue that you're raising.

7 So just identify it in your responses if  
8 you want to maintain it and as we get into specific  
9 ones, I want you to make that argument again. But  
10 right now, other than what I said, I'm not following  
11 exactly the point of making argument now.

12 I wanted to get to specific objections.

13 MR. WETTERHAHN: Thank you for allowing me  
14 to preserve that.

15 JUDGE YOUNG: Preserve it, but identify  
16 it.

17 MR. WETTERHAHN: Hopefully I've identified  
18 it now.

19 JUDGE YOUNG: No, no. What I'm saying is  
20 in the specific responses, if you're going to -- when  
21 you file your responses whenever the deadline, was it  
22 July 2nd?

23 MR. WETTERHAHN: Yes.

24 JUDGE YOUNG: If you file a response don't  
25 leave the issue silent such that one might be in

1 question over whether your response provides  
2 everything or is limited. Because some answers might  
3 be different than others. So what I'm saying is  
4 identify the extent to which your response may be  
5 limited by the principle you're talking about, okay?

6 MR. WETTERHAHN: Thank you.

7 JUDGE YOUNG: Does that make sense?

8 MR. WETTERHAHN: That's fine. We will do  
9 that.

10 JUDGE ELLEMAN: May I ask a question  
11 related to the security plan. Catawba had security  
12 plan before you decided to do a mixed oxide fuel test  
13 burn?

14 MR. WETTERHAHN: Yes.

15 JUDGE ELLEMAN: And on page 5, you've  
16 identified the augmenting procedures of changes that  
17 you are implementing to accommodate the test burn that  
18 you want to make. Does the new, current, active  
19 security plan consist of the old one with just these  
20 identified items superimposed on them plus whatever  
21 procedures would relate to the implementation of these  
22 items?

23 MR. WETTERHAHN: The answer is yes, but  
24 it's a little more complicated. The complication is  
25 that we had to submit an entirely new security plan to

[REDACTED]

1 meet the Commission's orders on DBT, training and the  
2 other orders. That was filed on April 29th of this  
3 year and it must be implemented by October 29th of  
4 this year. But that plan, which we're all talking  
5 about, hopefully since that's the plan which will be  
6 effective when MOX fuel is received.

7 JUDGE YOUNG: Are we all in agreement on  
8 that that's whenever we talk about security plan,  
9 we're talking about the new one?

10 MR. FERNANDEZ: The Staff does not agree  
11 with that.

12 JUDGE YOUNG: The Staff does not agree  
13 with that?

14 MR. FERNANDEZ: No, Your Honor. I believe  
15 that if you -- first of all, let me start by saying  
16 that when the Staff reviewed the application, we did  
17 not review the security plan. We just reviewed the  
18 incremental procedures that were proposed to support  
19 the extensions from 7345 and 46.

20 Traditional administrative law would, in  
21 forming this question say that one judges the adequacy  
22 of an application for a license given the status of  
23 the facts as they are at the time that the application  
24 is made.

25 JUDGE YOUNG: Wouldn't you want to

1 evaluate it based on the status at the time it was  
2 going to go into effect?

3 MR. FERNANDEZ: Yes, and that's why we  
4 reviewed the application regarding the incremental  
5 with regard to the proposal of what's going to be in  
6 place at the time that the MOX is in place.

7 So at the time that the Staff reviewed the  
8 incremental changes to the security plan, the  
9 responses to the DBT orders, the security orders were  
10 not in-house.

11 JUDGE YOUNG: But they are now and Duke is  
12 asking us to take that as the current security plan  
13 that will be in place in October prior to any use of  
14 the lead test assemblies assuming they are approved  
15 and BREDL agrees to that and you're saying that that  
16 won't be evaluated?

17 MR. FERNANDEZ: Given that the Staff has  
18 not approved a new security plan for this facility,  
19 the security plan that controls by law is the one  
20 that's currently in existence.

21 JUDGE YOUNG: And you're not going to look  
22 at the one that's now been submitted?

23 MR. FERNANDEZ: For purposes of approving  
24 that plan under the orders, we will review it and may  
25 approve it with purposes of this proceeding. As we've

1 maintained from the very beginning, the security plan  
2 is relevant. All we're looking at is the incremental  
3 improvements to the plan as proposed in the security  
4 submittal from September.

5 JUDGE YOUNG: Okay, in light of what Mr.  
6 Fernandez says, why don't all parties, when you're  
7 talking about security plans identify whether you're  
8 talking about the old, the new or both.

9 MR. WETTERHAHN: I didn't get the answer  
10 to Dr. Elleman's, the second part of his question.

11 JUDGE YOUNG: You're right, we went off on  
12 that, but we clarified it. Go ahead.

13 MR. WETTERHAHN: Hopefully, it won't make  
14 a difference, because as an attachment, as an integral  
15 part of the new security plan, we have provided the  
16 incremental discussion of MOX fuel very similar,  
17 essentially identical to that which was under the old  
18 plan. So as far as the increment is concerned, the  
19 underlying plan, it shouldn't make a difference  
20 whether it's one or the other.

21 But to answer your question, it's the same  
22 incremental activities that's presented in our  
23 objections on page 5.

24 JUDGE ELLEMAN: Plus the training and  
25 other things you alluded to.

[REDACTED]

1 MR. WETTERHAHN: That is correct.

2 MS. CURRAN: I just want to ask a point of  
3 clarification. I'm finding myself a little confused  
4 and my supposition is that the plan -- well, there's  
5 an issue here that's come up in the Licensing Board's  
6 decision admitting our contention and in other places  
7 that Duke is relying on elements of its existing  
8 security plan to complement the security plan  
9 submittal. So for our purposes, it seems important to  
10 clarify what Duke is relying on because that is what  
11 the application is. That's what we're supposed to  
12 dispute, I think, the application. If the NRC Staff  
13 is doing something different, then we all ought to  
14 know what they're doing that's different, but our  
15 focus would be on whatever Duke represents is its --  
16 the security measures it proposed for this license  
17 amendment request.

18 JUDGE YOUNG: Okay, I think the thing that  
19 needs to be emphasized is in your responses be  
20 specific with regard to -- don't assume anything in  
21 terms of what anyone would expect would be included in  
22 your response or not included in your response and  
23 that goes for all parties. That makes it a lot easier  
24 and saves a lot of confusion.

25 So with that said, did you finish what you

[REDACTED]

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1 wanted to say, Mr. Wetterhahn?

2 MR. WETTERHAHN: I'm sorry?

3 JUDGE YOUNG: I said with that said, to  
4 clarify.

5 MR. WETTERHAHN: Yes.

6 JUDGE YOUNG: Did you have anything else  
7 you wanted to say on these general document production  
8 request responses?

9 MR. WETTERHAHN: The only one and maybe  
10 we're not at that stage yet is the question of the  
11 necessity and indispensability.

12 JUDGE YOUNG: Well, that's the issue that  
13 we're going to have to address in the need-to-know  
14 determination, but it may come up in specific  
15 discovery responses. But what I'm trying to get to is  
16 we are talking about the general document production  
17 request responses.

18 MR. WETTERHAHN: Yes. My only -- the  
19 somewhat loose standard of general relevance may lead  
20 to admissible evidence is somewhat tempered in our  
21 view by this additional necessity and  
22 indispensability. So whatever that decides, it may  
23 affect the amount of material that the document  
24 response that we would be giving them.

25 JUDGE YOUNG: Well, again, just note that

1 in your response.

2 MR. WETTERHAHN: We will.

3 JUDGE YOUNG: Okay.

4 MR. WETTERHAHN: I'm prepared to go  
5 through each of these interrogatories.

6 JUDGE YOUNG: Okay, so we're done on the  
7 document responses. Are we all clear on those?

8 Okay, specific discovery responses, number  
9 1, this relates to the need-to-know issue. You also  
10 raise the issue of narrowing its request and that, I  
11 think, gets to the issue that I raised with the Staff  
12 about portions, right? So again, that's something  
13 that we hope the Staff will address and when and if  
14 there's any need to make a determination on that,  
15 we'll want to hear from everyone on it as to if you  
16 can identify portions like the X-part, and as to the  
17 method that we would go about in making those  
18 determinations because we probably have to have an in  
19 camera inspection, if we got to that point. And it's  
20 better to sort of pre-think these things, not  
21 indicating any ruling one way or the other, but just  
22 to be prepared so that you won't get slowed down along  
23 the way.

24 Anything else other than the need-to-know  
25 issue and the narrowness of the request on that one?

1 Because those seem to be ones that are going to be  
2 outstanding until we make the need-to-know -- we get  
3 the Staff's need-to-know determination and then if  
4 anyone appeals that, ours.

5 MR. WETTERHAHN: We will attempt to  
6 provide information with regard to what I will call  
7 the increment. So we're not going to -- if -- so we  
8 will be providing certain information --

9 JUDGE YOUNG: And you'll say this is just  
10 addressed to the increment?

11 MR. WETTERHAHN: That's correct.

12 JUDGE YOUNG: Okay.

13 MR. WETTERHAHN: Same thing is true of  
14 interrogatories 2, 3 and 4; 5 we had no objection to;  
15 6, 7, again, the same thing. Eight, 9 and 10 we had  
16 no objection to, so we will be responding.

17 Just let me look at 11. This puts us in  
18 the awkward position of by responding we would  
19 possibly be revealing information on the DBT, so we  
20 just can't do that at this point in time.

21 And 12 --

22 JUDGE YOUNG: And request for need-to-know  
23 determination, just to go back to that for a second,  
24 includes --

25 (Pause.)

1 Well, specifically, includes the security  
2 plan and then the information on the feasibility of  
3 manufacturing nuclear weapons, etcetera. And then  
4 there's the catchall, I suppose that would fall in the  
5 catchall.

6 And I think we've asked the Staff to make  
7 the need-to-know determination on --

8 JUDGE YOUNG: As much as possible.

9 MR. WETTERHAHN: As much as possible,  
10 specifically to cover, among other things,  
11 interrogatory 11.

12 JUDGE YOUNG: Okay, Staff is okay with  
13 that?

14 MR. WETTERHAHN: Clearly within their  
15 purview to decide.

16 JUDGE YOUNG: Thank you. Same for 12?

17 MR. WETTERHAHN: Twelve and 13 was no  
18 objection.

19 Specific document production 1, I think  
20 we've exhausted that discussion here. I won't expand  
21 upon that.

22 MS. CURRAN: Mark, did you say there was  
23 no objection on 12? There is --

24 JUDGE YOUNG: Twelve was the same issue  
25 that was involved in 11, right?

1 MS. CURRAN: Yes. I just wanted to  
2 clarify if you had an objection on 12.

3 MR. WETTERHAHN: Let me just -- what was  
4 that number?

5 JUDGE YOUNG: I think you said 12 and then  
6 you said "and 13, no objection." You meant to put a  
7 comma between them?

8 MR. WETTERHAHN: That's correct. There's  
9 a partial objection on 12, no objection on 13.

10 MS. CURRAN: Okay.

11 MR. WETTERHAHN: So you will expect to see  
12 certain information on 12.

13 JUDGE YOUNG: Are there any other bases  
14 for objection in any of yours other than the ones that  
15 are related to the need-to-know? I'm just looking  
16 through them. You did have undue burdensomeness issue  
17 that you raised.

18 MR. WETTERHAHN: To the one that said give  
19 me every document that you've got related to this.

20 JUDGE YOUNG: Is that of the same nature  
21 as we were talking about earlier that, in effect, your  
22 practical agreement addresses that or not?

23 MR. WETTERHAHN: We will provide all the  
24 documents that support our filings with regard to  
25 incremental activities that we're taking to safeguard

1 the MOX fuel.

2 JUDGE YOUNG: And you'll preface each one  
3 by saying that so there won't be any conclusion?

4 MR. WETTERHAHN: Right.

5 JUDGE YOUNG: So --

6 MR. WETTERHAHN: The OSRE, I think there's  
7 an -- in addition to the usual need-to-know, I think  
8 there's a general relevance issue of, as a factual  
9 matter, the last OSRE was in 1997.

10 JUDGE YOUNG: Right.

11 MR. WETTERHAHN: And we would urge you to  
12 consider that period of time, not only in years, but  
13 considering that a seminal event, 9/11 occurred  
14 between, so the relevance -- when you consider the  
15 relevance of need-to-know, I believe you should take  
16 that into account.

17 JUDGE YOUNG: What's your response on the  
18 relevance?

19 MS. CURRAN: Can I ask Dr. Lyman to answer  
20 that?

21 DR. LYMAN: Well, the relevance is seven  
22 years ago or not, that was the last force-on-force  
23 test of the security force at the Catawba Plant and  
24 that's all the information that there is as far as the  
25 ability of their security force to stage an armed

[REDACTED]:

1 response. It may not be much, but it's all we've got  
2 to start to assess whether or not it's credible that  
3 Duke says it will be able to protect against design  
4 basis threat of effective strategic special nuclear  
5 material.

6 The one thing that the OSRE tests have  
7 shown is that a force-on-force testing regime is an  
8 essential complement to a security plan on paper for  
9 establishing the operational responses adequate for  
10 meeting the regulations.

11 (Pause.)

12 (Judges consulting.)

13 JUDGE YOUNG: Okay, anything else on  
14 Duke's objections?

15 MR. WETTERHAHN: In the interest of  
16 speeding things up, no.

17 JUDGE YOUNG: Okay. So we've got  
18 basically the issue of the increment or the  
19 increment/reliance issue, the need-to-know issue and  
20 the relevance of OSRE records issue that are the three  
21 things that need to be resolved and we're going to  
22 hold on on those. Go ahead and answer everything else  
23 and we'll see where we go with the other ones as we  
24 proceed along this path.

25 Anything else on Duke's objections? Did

1 you want to say something?

2 MS. CURRAN: Are you saying that you're  
3 going to hold off ruling on these issues until after  
4 Duke responds to the discovery?

5 JUDGE YOUNG: We're going to hold off on  
6 ruling on them. We're not going to rule on them  
7 today. On the need-to-know and the  
8 reliance/incremental issue and possibly on the last,  
9 the OSRE issue as well, we're going to hold off. And  
10 possibly, well, we're going to see what clarification  
11 may come from the Commission if we get anything soon,  
12 as well as see what the Staff provides to us in their  
13 need-to-know determination.

14 So we're not making a ruling on any of  
15 those things now.

16 MS. CURRAN: I just want to make one brief  
17 comment which is that we think we certainly meet the  
18 relevance standard, but we also meet the necessity  
19 standard for all the information that we've requested  
20 because Duke has now made it clear that the existing  
21 security plan, and I'm talking about the post-  
22 September 11th plan that was submitted April 29, 2004,  
23 is a relevant component of this -- to some extent, of  
24 this security plan submittal and that it's also, I  
25 believe, it's necessary for us to understand the

[REDACTED]

1 design basis threat, which we could -- might be able  
2 to back out of the security plan if we had it, but we  
3 really should be able to see that too, to understand  
4 what the security plan submittal is being designed to,  
5 both a Category 1 threat and the threat of sabotage.  
6 And finally, as Dr. Lyman was saying, the OSRE tests  
7 are really a critical tool for evaluating the  
8 effectiveness of security plans. So we would consider  
9 those to be necessary.

10 JUDGE YOUNG: All those issues, we're  
11 going to leave pending for now. Go ahead and answer  
12 all the rest and identify -- go ahead.

13 JUDGE ELLEMAN: Ms. Curran, has the Duke  
14 response modified in any way your perception of the  
15 information you feel you have to have in order to  
16 address this case?

17 MS. CURRAN: No, it hasn't. But if  
18 there's something that you think maybe should have  
19 modified my perception, please tell me what it is  
20 because sometimes I don't see everything. But I  
21 haven't seen anything that has changed my perception  
22 of what we need to see.

23 JUDGE YOUNG: So that wraps us up on what  
24 discussion we need to hold today on Duke's objections.  
25 On the Staff's objections, yours were more general

objections, and as I'm recalling, they are apart from the expertise issue, they have to do with need-to-know and deliberative process privilege.

Are there any other portions of it -- I had tabbed a few pages.

MS. BUPP: No, because we did not find any of the interrogatories proposed to the Staff by BREDL to be objectionable, in and of themselves, we're prepared to make an answer to them to the extent that they wouldn't require safeguards information or deliberative process information.

We have made the same objections we have made in our other discovery objections before in this case that we've been making with objection from either BREDL or the Board.

JUDGE YOUNG: Well, you worked those out before. And by the fact that you were working those out, I think we probably indicated that we would have preferred to have more specific ones, but there was no necessity for that. You have worked those out. We encourage you to try to work these out. It sounds as though you may not have as easy a time of working these out. But to the extent that you do make these objections in your specific responses, identify them and do as you have done before. On the deliberative

1 process privilege -- well, hold on one second.

2 (Pause.)

3 Obviously, the publicly available issue is  
4 not one that you're going to argue about, right? You  
5 worked that out before, the same process?

6 MS. CURRAN: Oh yes, that's right. There  
7 was just a couple that I wanted to raise and it may be  
8 something we can work out right here.

9 JUDGE YOUNG: Okay.

10 MS. CURRAN: Just a point of  
11 clarification.

12 JUDGE YOUNG: On that one? Okay, go  
13 ahead.

14 MS. CURRAN: Numbers -- on page 3 of the  
15 Staff's response, number 2 discusses deliberative  
16 process privilege and number 3 discusses proprietary  
17 documents. I would just ask as the Staff has done  
18 before, that the Staff would create a privileged log  
19 and also with respect to any documents that either the  
20 Staff or Duke identifies as being relevant, responsive  
21 to our requests, but falling into the categories of no  
22 need-to-know or this relates to the existing security  
23 plan, we'd like as precise a description as possible  
24 of what it is you're withholding so that we can  
25 intelligently discuss whether we need to fight about

1 it.

2 MS. BUPP: In the past, if I can respond  
3 to that?

4 JUDGE YOUNG: Yes.

5 MS. BUPP: In the past, for deliberative  
6 process, we've usually just provided a title of the  
7 document. For anything that we're withholding on  
8 safeguards, I propose that we would provide not only  
9 the title, but a brief non-safeguards summary of the  
10 document, you know, not a long summary, a paragraph or  
11 a few sentences, but to summarize what is in that  
12 document, if that would be sufficient for you.

13 MS. CURRAN: That would be helpful.

14 JUDGE YOUNG: Okay, great.

15 JUDGE ELLEMAN: Thank you for volunteering  
16 that.

17 JUDGE YOUNG: Let's see. On the  
18 deliberative process privilege, I just want to say one  
19 thing and that is that it is a balancing test and so  
20 we encourage you to address the whole issue of need in  
21 that because that's one of the factors in the  
22 balancing test. You balance the -- even if the  
23 privilege applies, you balance the Government's  
24 interest in confidentiality against the litigant's  
25 need for the information. So whatever objection you

1 make, specific objections, based on deliberative  
2 process privilege, you might want to address that as  
3 well, because that is one of the factors that you look  
4 at.

5 MS. BUPP: I would ask for clarification  
6 on that because the way I understand the case law, it  
7 is the burden of the Government to raise the fact that  
8 there is some sort of deliberative process and it is  
9 the burden of the parties seeking the information to  
10 show that they have some sort of overriding need for  
11 the information.

12 JUDGE YOUNG: Let's see if I brought the  
13 right book.

14 (Pause.)

15 If you'll look on -- or if you don't have  
16 it, the Vogtle case, I think you cited to us earlier.

17 MS. BUPP: I don't have the case in front  
18 of me, but I do have our prior brief that we provided  
19 to the Board.

20 JUDGE YOUNG: Okay. In the Vogtle case,  
21 the Commission pointed out that at the conclusion of  
22 the discussion about that, that and I'll just read  
23 what they said. "In litigation context, the  
24 deliberative process privilege is a qualified, not  
25 absolute, privilege. The Government's interest in

1 confidentiality is balanced against the litigant's  
2 need for the information. The Government agency bears  
3 the initial burden of showing that the privilege  
4 should be invoked. Once the applicability of the  
5 privilege has been established, the litigant seeking  
6 the information must demonstrate an overriding need  
7 for the material."

8 Now to the extent that the need has been  
9 specified, respond to that and if you want to make any  
10 more arguments on that need, at this point, I don't  
11 know whether you can because it's only been asserted  
12 generally at this point, not with regard to specific  
13 ones, but when we make our decision, we will be  
14 looking at and as the Commission did, balancing those  
15 two things with each other.

16 MS. CURRAN: Your Honor, I think it might  
17 be helpful if the Staff just gave a summary  
18 explanation of the reason that the document is being  
19 withheld and then we can discuss whether it's  
20 something we want to pursue.

21 JUDGE YOUNG: You all have worked well  
22 together on this before, so I mean we encourage you to  
23 try to do that in these cases as well. On that  
24 particular basis for objection.

25 MS. UTTAL: We'll try and work it out.

[REDACTED]

1 MS. CURRAN: The trouble is, there's not  
2 much time. That's the only thing I'm concerned about.

3 JUDGE YOUNG: But again, to the degree  
4 that there's any dispute and in your discussions  
5 working it out, you can do your own balancing and then  
6 to the extent, if any, you don't work it out, bring  
7 those issues to us.

8 Anything else in the Staff objections that  
9 we can really address productively at this point?

10 MS. BUPP: The only objection, I'm sorry,  
11 I'm looking for the cases. I've lost my place in my  
12 other documents.

13 JUDGE YOUNG: You did actually --

14 MS. BUPP: We did raise one specific  
15 objection to a specific interrogatory. It's actually  
16 the same interrogatory was asked in the first --

17 JUDGE YOUNG: You're right.

18 MS. BUPP: And we don't object to laying  
19 out obviously the -- any of the opinions of  
20 individuals who have -- the Staff interrogatories will  
21 lay out the Staff's position and we don't feel that it  
22 is necessary for all of the discussions that go into  
23 making the Staff's positions we've laid out because  
24 they'll be covered by the deliberative process.

25 JUDGE YOUNG: You're talking basically

[REDACTED]

1 just for the record, we're talking about the objection  
2 to general interrogatory number one, the paragraph  
3 that talks about opinions that differed from the  
4 ultimate answer and as you pointed out, Ms. Bupp, that  
5 was worked out between the two of you before. If you  
6 can do that, that's great. If not, then we get into  
7 the issues I was talking about before.

8 Anything else on Staff's objections?

9 MS. BUPP: No, Your Honor.

10 JUDGE YOUNG: Okay, the last thing, I  
11 think, are BREDL's objections and you enumerate the  
12 specific ones on page 2 of your objections and so it  
13 might be, let's see --

14 MS. CURRAN: They all fall into certain  
15 categories, but I think they have a lot in common.

16 JUDGE YOUNG: Actually, the one I was  
17 referring to -- I was referring to the paragraph where  
18 you listed all the, or a number of specific  
19 interrogatories from Duke. Now that I'm looking at  
20 it, I notice I don't think you do -- well, I don't  
21 think you do the same thing with regard to the Staff's  
22 requests.

23 MS. CURRAN: Yes, we did. We list the  
24 Staff interrogatories also.

25 Right below the listing of Duke

1 interrogatories is a list of Staff interrogatories.

2 JUDGE YOUNG: Oh, you're right, I'm sorry.  
3 Excuse me, I'm blind, for the moment.

4 I think it might be helpful just to  
5 quickly go through these.

6 MS. BUPP: Your Honor, with your  
7 permission in the interest of time since time is  
8 running late, I think that we could respond to BREDL's  
9 objections with just a clarification on our  
10 interrogatories and the scope of our interrogatories.

11 JUDGE YOUNG: Go ahead.

12 MS. BUPP: When we proffered the  
13 interrogatories to BREDL, we were merely seeking to  
14 probe the basis for their opinions that were stated in  
15 the contentions and so we would expect the answers to  
16 be based only on the information that they already had  
17 and would certainly not ask for any of their opinions  
18 on information that they have not been granted access  
19 to. So we would ask for their answers just to be  
20 based on the safety evaluation, as much of the  
21 security submittal that they have already received  
22 access to and answers to requests for additional  
23 information they already have access to; the  
24 regulations and any other publicly available  
25 information.

[REDACTED]

1 I don't know if that helps to clarify your  
2 objection.

3 MS. CURRAN: Well, that certainly would do  
4 away with the dispute because our answers would just  
5 -- even if your interrogatories seem to be asking for  
6 knowledge of something we don't have, we would just  
7 respond that we don't have knowledge and that would  
8 clarify it.

9 MR. WETTERHAHN: Your Honor, I believe  
10 that a number of their objections to our  
11 interrogatories fall in the same category. What we  
12 were seeking and we objected to interrogatories was  
13 twofold and if they can provide an answer and our  
14 understanding, we can agree, I think the objections  
15 might go away.

16 We want to know initially, based upon  
17 their present knowledge, what is their response. As  
18 an example, they objected to Interrogatory 9 which  
19 says "what maximum number of individuals does BREDL  
20 assert as constituting a small group?" Well, if they  
21 have no number or no number in mind right now, I would  
22 like to know that information if they do have a  
23 number. Plus, if they get additional documents, this  
24 brings in supplementation matters so that we will  
25 automatically get information supplemented, so that's

[REDACTED]

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1 a two prong request and I believe these are relevant  
2 and with that understanding I don't know if that would  
3 resolve the objection.

4 MS. CURRAN: Well, we had a choice when we  
5 got these discovery requests. We thought we could  
6 have just waited until it was time to answer and said  
7 we don't know. But that didn't seem to be  
8 appropriate, given that the Board wants to hear from  
9 us right away if we think there's some problem. And  
10 it seems to us that there's a number of -- especially  
11 Duke's interrogatories that ask us to provide  
12 information that we couldn't give if we didn't have  
13 access to Duke's security plan or if we didn't have  
14 access to the design basis threat. And we give two  
15 examples, well, three examples. One is the  
16 interrogatory that asks about credible adversarial  
17 paths. Well, you just cannot formulate --

18 JUDGE YOUNG: which one is that?

19 MS. CURRAN: That's number 6 that has  
20 many, many, you get into the double alphabet subparts.

21 JUDGE YOUNG: Right, right.

22 MS. CURRAN: You can't formulate a  
23 credible scenario if you don't know anything about the  
24 security plan or the plan.

25 Same thing with 19 where Duke specifically

[REDACTED]

1 asks BREDL to identify and describe any asserted  
2 deficiency in the existing Catawba security force.  
3 Well, we don't have that information. So it seemed to  
4 us that it was appropriate to bring this to the Board,  
5 if Duke is presuming we have information that we don't  
6 have. And we would like to be able to respond to  
7 relevant discovery requests, but we can't.

8 MR. WETTERHAHN: Without, again, raising  
9 the question of expertise, it is Duke's view that an  
10 expert in security would be able to, given what's  
11 already been given to them, what is available in the  
12 public domain, and what might be observable to an  
13 individual outside the protected area that that  
14 individual would be able to answer a number, if not  
15 all of these questions. So we believe that there was  
16 a basis for these interrogatories, but we understand  
17 their position and whatever answer they give and if  
18 they supplement that, we'll view that.

19 JUDGE YOUNG: It sounds as though with  
20 regard to both the Staff's interrogatories and Duke's  
21 interrogatories, that BREDL can respond by saying this  
22 is what we can tell you or not tell you at this point  
23 based on the information we have and in order to  
24 provide a further response, we would need X and then  
25 of course, as with all of you, you'll have a

1 continuing duty to supplement.

2 And looking at 19, I can see how that one,  
3 when you're talking about deficiency in existing  
4 security force in numbers, I think we can all  
5 appreciate the argument that BREDL is making and a lot  
6 of this will depend on the determinations on the  
7 outstanding issues.

8 But can it be said with regard to all of  
9 these that you can provide the responses in the manner  
10 I described a second ago and then we'll sort of see  
11 where we're led as we move along in receiving and  
12 making any further necessary determinations?

13 MS. CURRAN: That seems fine to us.

14 JUDGE YOUNG: Well, all right, then is  
15 there anything else that we need to address  
16 specifically?

17 MR. WETTERHAHN: Just one item and perhaps  
18 we can state an understanding. Motions to compel are  
19 due on the 7th. It's my understanding that to  
20 preserve our objections with regard to these generic  
21 issues that we had discussed, we would not have to put  
22 in a motion to compel. Is that your understanding?

23 JUDGE YOUNG: Well, you know, I was  
24 thinking that, but then on the other hand since we've  
25 got some things that are going to -- we're assuming

1 that there's going to be some efforts to work out  
2 things by agreement, it would probably be helpful to  
3 indicate in a motion to compel which things have not  
4 been worked out by agreement, even though they're  
5 still sort of pending, just to identify them in some  
6 way.

7 MR. WETTERHAHN: Certainly, we'll try to  
8 work together to do that and if we can't get a common  
9 position to present to the Board we'll present our  
10 position and I assume the other parties will present  
11 their position.

12 JUDGE YOUNG: Okay, so we're going to get  
13 the responses on the second, any motions to compel on  
14 the 7th and then we're going to talk about this again  
15 on the 16th, all of those dates in July, of course.

16 MR. WETTERHAHN: Our understanding is  
17 we're serving responses on the Board as well, I assume  
18 that we are?

19 JUDGE YOUNG: Probably be just as well.  
20 I mean, you know, you can do it when you serve them on  
21 the parties or you can wait and do it with any motions  
22 to compel. I mean what we did to prepare here was  
23 gather together all of the requests. Normally, unless  
24 there are disputes, we don't even need discovery  
25 material, but since in the security area it seems like

1. there are a lot more disputes than in the safety area.  
2 Give us what we need in order to consider your  
3 objections and any motions to compel and arguments and  
4 we'll talk about it again on the 16th.

5 Ms. Cottingham?

6 MS. COTTINGHAM: So Your Honor, if we will  
7 be serving a safeguards document on the 2nd, I will be  
8 hand delivering it to the Staff and Ms. Curran and  
9 should I deliver copies to you and Judge Baratta and  
10 for Judge Elleman, would Federal Express delivery for  
11 Tuesday be acceptable, because Monday is a federal  
12 holiday?

13 JUDGE YOUNG: Oh sure, Tuesday would be  
14 acceptable, but whether we get them when you serve the  
15 responses on each other or --

16 MS. COTTINGHAM: Or with the motion.

17 JUDGE YOUNG: Or with the motion, it  
18 doesn't really -- I think Judge Elleman's come to us  
19 and then we send them to him to the degree, depending  
20 upon where he is and what the circumstances are.

21 MS. CURRAN: That's not how I send them.  
22 It's now different?

23 JUDGE YOUNG: Yes. Send them to us for  
24 Judge Elleman. Thank you for bringing that up. And  
25 again, if you know you're going to work everything

1 out, we don't need to see the discovery responses. If  
2 there's any disputes, you can do it with either the  
3 motion or when you file the responses, whichever you  
4 prefer because they only become relevant to us if  
5 there's a dispute between you such that you file a  
6 motion.

7 MS. CURRAN: I think it's safe to say that  
8 we should send copies to you.

9 JUDGE YOUNG: That's fine, that's fine.

10 MS. UTTAL: Normally, we serve the Board  
11 with the answers to the -- the pleading itself, the  
12 answers to interrogatories and the production, but not  
13 the documents --

14 JUDGE YOUNG: Not the documents  
15 themselves.

16 MS. UTTAL: Yes.

17 JUDGE YOUNG: That's fine, that's fine.  
18 I mean it's -- all right.

19 Is there anything else?

20 (Pause.)

21 Duke and the Staff can work together on  
22 making any determinations about safeguards and working  
23 out any procedural aspect of Duke's needing to make  
24 some --

25 MR. FERNANDEZ: We've already talked about

1 that, Your Honor, Mr. Wetterhahn and I have.

2 JUDGE YOUNG: Okay. Anything else we need  
3 to talk about today?

4 MR. WETTERHAHN: One thing, can I inquire  
5 of the reporter when we'll be able to get a  
6 transcript?

7 COURT REPORTER: I know this is a daily  
8 turnaround, but I don't know if it's Saturday or  
9 Monday.

10 MR. WETTERHAHN: Monday is fine.

11 JUDGE YOUNG: Actually, after she gives it  
12 to them, it takes them a little bit longer on security  
13 ones and I've got to go to Connecticut on Tuesday for  
14 a case, so unless I get it before I leave, I'll be  
15 coming back -- I'll be back in the office on Thursday  
16 of next week, I believe.

17 MS. COTTINGHAM: We would need the  
18 transcript before then, Your Honor.

19 JUDGE YOUNG: I will see if we can make  
20 sure we get it Monday so that I can go ahead and  
21 certify it, because it's basically just me certifying  
22 it, okaying -- and I may be able to do that in advance  
23 anyway. I think it's more or less a standing okay  
24 that one person from Winston & Strawn gets it and you  
25 get it at Harmon and Curran. And one person --

[REDACTED]

1 actually, we've always designated Mr. Repka. Do you  
2 want us to designate another one?

3 MR. WETTERHAHN: That's fine, we'll take  
4 care of it.

5 MR. FERNANDEZ: Your Honor, just a quick  
6 information, the certification as to the safeguards,  
7 although that's entirely up to the Board, it can be  
8 made by a non-attorney.

9 So I just leave that up to the Board.

10 JUDGE YOUNG: Well, right now we don't  
11 have any --

12 MR. FERNANDEZ: Any other Judges that are  
13 here next week, they could do it.

14 MS. UTTAL: Judge Baratta is not  
15 available.

16 JUDGE YOUNG: You know, I suppose we have  
17 talked about -- I don't know whether anyone is going  
18 to want to make this transcript public. I can't  
19 recall whether we've actually described, actually  
20 talked about safeguards information or just talked  
21 about it in such a way that it's not an issue. But in  
22 any event, unless there's some procedural impediment  
23 to me doing so, I may be able to just tell the person  
24 in our office who handles the transcripts that there's  
25 a continuing permission for Dave Repka and Diane

1 Curran to order copies of it. The only question is  
2 whether I need to -- whether anyone needs to make a  
3 determination whether it is safeguards before that's  
4 done. And surely that's not required. But I would  
5 direct you to treat it as safeguards until we decide  
6 otherwise and then --

7 JUDGE BARATTA: It can be so marked.

8 JUDGE YOUNG: Right, right. Normally, I  
9 do the little certification on the first page before  
10 passing it on, find out if there's any reason why we  
11 can't just allow you to get, assume it's safeguards  
12 until told otherwise.

13 MS. CURRAN: Judge Young, I just would  
14 like to make a formal request that the Board publicly  
15 release the transcript because I can't think of a  
16 single thing that was said today that constituted  
17 safeguards information and there was definitely in the  
18 transcript that the public would be interested in  
19 knowing.

20 JUDGE YOUNG: Why don't -- when you get  
21 the transcript, assuming we can do it like I just  
22 said, treat it as safeguards until otherwise notified,  
23 once you've looked at it, if the Staff or Duke have  
24 any objections to Ms. Curran's request, let us know  
25 and if there are no objections and we want you to take

1 that through your security people, obviously, before  
2 you make that determination and let us know. And if  
3 there are no objections and the security people have  
4 looked at it, then I don't see any problem with doing  
5 that.

6 JUDGE BARATTA: Mr. Manilli will be  
7 available.

8 JUDGE YOUNG: He was gone for a period of  
9 time and so I'm not sure exactly when --

10 JUDGE BARATTA: We'll talk about this  
11 offline.

12 JUDGE YOUNG: Right. In any event, I will  
13 be here Monday. Right now they've got me scheduled to  
14 leave Tuesday morning, so I probably would not come in  
15 on Tuesday. I may be able to change that schedule.  
16 But if there's any issues, call me or e-mail me on  
17 Monday.

18 Okay, I think we made the verbal ruling on  
19 the expertise issue. The written confirmation of that  
20 probably won't be made before I get back from  
21 Connecticut and have a chance to look at the  
22 transcript and we'll need to work together on that.  
23 But you know our ruling. You know the basis of it, so  
24 the Staff can go ahead and to the degree there needs  
25 to be any record of it, it's in the transcript.

1                   So with that, I don't think there are any  
2 other rulings we need to make. I think we've  
3 basically dealt with anything and everything that we  
4 need to verbally that we can at this point, right?

5                   MS. CURRAN: Right.

6                   JUDGE YOUNG: Okay, great. Good night.  
7 thank you.

8                   (Whereupon, at 4:41 p.m., the oral  
9 argument was concluded.)

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**\*\*SAFEGUARDS INFORMATION \*\***

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CERTIFICATE

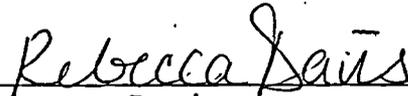
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Name of Proceeding: Oral Argument

Docket Number: 50-413-OLA, 50-414-OLA

Location: Rockville, Maryland

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.



Rebecca Davis  
Official Reporter  
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