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JUDGE BOLLWERK: Good morning. Today we're here to conduct an initial prehearing conference in an early site permit or ESP proceeding under Part 52 of Title 10 of the Code of Federal Regulations, also referred to as the CFR.

This prehearing conference has been convened as a result of the response of a number of groups, including the Center for Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and the Blue Ridge Environmental Defense League in response to a notice of opportunity for hearing published in the Federal Register on October 12, 2006.

In their joint response dated December 11, 2006, these Petitioners requested an adjudicatory hearing on the August 12, 2006, application of Southern Nuclear Operating Company for an ESP by which it seeks to have the existing location on which its two-unit Vogtle facility is situated approved as the site for two additional power reactor plants.

In a December 13, 2006, memorandum, the Secretary of the Nuclear Regulatory Commission, acting on behalf of the five-member Commission, referred the Joint Petitioners' hearing request to the Atomic Safety and

1 Licensing Board Panel for the appointment of a licensing
2 board.

3 On December 16, 2006, the licensing board
4 panel's chief Administrative Judge issued a notice,
5 designating this three-member licensing board to conduct
6 the proceeding. Up to this point, whether the various
7 petitioner groups have standing or the requisite legal
8 interest in this proceeding to be admitted as parties has
9 not been contested.

10 Therefore, in convening this prehearing
11 conference today, we're here to afford the participants an
12 opportunity to make oral presentations on the separate
13 question of whether the proposed issue statements or
14 contentions posited by the Joint Petitioners contesting
15 the adequacy of certain aspects of the Applicant's
16 National Environmental Policy Act or NEPA-related
17 environmental report are legally sufficient to be admitted
18 as litigable issues in this proceeding.

19 The focus of this prehearing conference thus
20 will be the admissibility of the contentions proffered by
21 the Petitioners.

22 Before we begin hearing the participants'
23 presentations on these matters, I'd like to introduce the
24 board members. To my right is Judge Nicholas Trikourous.
25 Judge is a nuclear engineer and a full-time member of the

1 Atomic Safety and Licensing Board Panel.

2 To my left is Dr. James Jackson. Judge Jackson
3 likewise is a nuclear engineer and a part-time member of
4 the panel.

5 My name is Paul Bollwerk, and I'm an attorney,
6 and I'm the chairman of this licensing board.

7 At this point, I'd like to have counsel for the
8 various participants identify themselves for the record.
9 Why don't we start with counsel for the Joint Petitioners,
10 then move to counsel for the Applicant, and finally the
11 NRC staff counsel. Sir?

12 MR. SANDERS: Good morning, Your Honor. My
13 name is Larry Sanders, and I represent the Petitioners.

14 JUDGE BOLLWERK: Is there anyone else at your
15 table you'd like to introduce?

16 MR. SANDERS: Yes. Sorry about that. To my
17 right I have Sara Barczak, and she is a representative of
18 the Southern Alliance for Clean Energy, and to my left, I
19 have two third-year law students from Turner Environmental
20 Law Clinic at Emory University, and that is Marirose Pratt
21 and Elaine Poon.

22 JUDGE BOLLWERK: All right. Good morning.
23 Hopefully you'll learn some things today about what to do
24 and what not to do.

25 MR. SANDERS: They're learning plenty about

1 what not to do.

2 JUDGE BOLLWERK: All right. Why don't we move
3 to counsel for the Applicant, please.

4 MR. BLANTON: Your Honor, my name is Stan
5 Blanton. I am counsel for Southern Nuclear Operating
6 Company. I have two co-counsel with me here today who I
7 will let introduce themselves, but in the meantime, I'm
8 going to introduce the rest of the people at the table.

9 To my far left is Bentina Terry, who's general
10 counsel, Southern Nuclear Operating Company; Tom Moorer,
11 who is responsible for the environmental report submitted
12 with the ESP application; and to my far right is my
13 associate, Casey Hairston.

14 JUDGE BOLLWERK: All right.

15 MS. SUTTON: Your Honor, I'm Kathryn Sutton.
16 I'm a partner with the law firm of Morgan, Lewis &
17 Bockius. As Mr. Blanton explained, we're co-counsel in
18 the case to the Applicant.

19 MR. MOORE: Good morning. I'm Grady Moore,
20 partner with Balch & Bingham, partner of Mr. Blanton's.

21 JUDGE BOLLWERK: All right. Anybody else? We
22 got everybody? All right.

23 Okay. Then staff counsel, if you would.

24 MS. POOLE: Good morning, Your Honors. I'm
25 Brooke Poole with the Office of the General Counsel. Also

1 from the Office of General Counsel, seated to my right is
2 Tison Campbell; seated to my left is Mark Notich, who is
3 the environmental project manager in conjunction with the
4 Vogtle ESP application, and seated to his left is Michael
5 Masnik, senior project manager. Both of them are with the
6 Office of New Reactors. Dr. Masnik is also an aquatic
7 biologist.

8 JUDGE BOLLWERK: All right. Thank you very
9 much.

10 I'd also note that the -- as we stated in our
11 January 11, 2007, issuance regarding scheduling and
12 procedures for this prehearing conference, presentations
13 to the Board during this prehearing conference will be
14 limited to the participant counsel who just identified
15 themselves. This early site permit proceeding, regardless
16 of the admissibility of any of the Petitioners'
17 contentions, requires a separate mandatory hearing with
18 findings on, among other matters, whether (a) the yearly
19 site permit issuance would be inimicable to the public
20 health and safety or the common defense and security, or
21 (b) a proposed facility or facilities having
22 characteristics that fall within the parameters of the
23 site can be constructed and operated without undue risk to
24 the public health and safety, taking into consideration
25 the site criteria contained in 10 Code of Federal

1 Regulations, Part 100.

2 Accordingly, sometime following the board
3 rulings on the admissibility of the Joint Petitioners'
4 contentions, the Board will issue a hearing notice under
5 which in accordance with Section 2.315(a) of Title 10 of
6 the Code of Federal Regulations, members of the public
7 will be afforded an opportunity to provide, as
8 appropriate, oral limited appearance statements regarding
9 issuance of the proposed early site permit.

10 Further in that issuance or a subsequent
11 notice, the Board will outline the times, places and
12 conditions of participation relative to the opportunity
13 for oral limited appearance statements. As the Board
14 noted in its January 11 issuance, however, in the interim,
15 any member of the public can submit -- and, indeed,
16 several individuals already have submitted -- a written
17 limited appearance statement providing his or her views
18 regarding the issues in this proceeding.

19 Those written statements can be sent at any
20 time by regular mail to the Office of the Secretary, U.S.
21 Nuclear Regulatory Commission, Washington, D.C. 20555-
22 0001, to the attention of the Rulemakings and Adjudication
23 Staff or by email to hearingdocket -- that's all one
24 word -- @nrc.gov.

25 A copy of the statement also should be provided

1 to me as the chairman of this licensing board by sending
2 it by regular mail to my attention at the Atomic Safety
3 and Licensing Board Panel, Mail Stop T-3F23, U.S. Nuclear
4 Regulatory Commission, Washington, D.C. 20555-0001 or by
5 email to gpb@nrc.gov.

6 As to the order of presentation by the
7 participants in this prehearing conference, in our January
8 11 order, we outlined a schedule for presentation that
9 affords an opportunity for participants to address the
10 various contested matters now before the Board. We would
11 intend to follow that schedule as closely as possible in
12 terms of the issues and the allocated times for argument.

13 In that regard, we request that before starting
14 on an issue for which the Joint Petitioners have been
15 afforded an opportunity for argument and rebuttal, counsel
16 should indicate how much of the total time allocation he
17 wishes to reserve for rebuttal. The Board will be
18 providing counsel with notice of the need to finish his or
19 her presentation toward the end of the allotted argument
20 time.

21 Also, as we noted in our January 11 issuance,
22 in making their arguments, the participants should bear in
23 mind that we have read their pleadings, and as such, they
24 should focus their presentations on the critical points in
25 controversy as those issues have emerged as a result of

1 the various participant filings over the last 60 days.

2 Finally, at some juncture, we would like to
3 have a brief discussion -- I think at the end probably --
4 regarding some of the administrative details involved in
5 this proceeding, and relative to administrative matters, I
6 would note that while this proceeding is in session, all
7 cell phones should be turned off or placed on vibrate, and
8 any cell phone conversations should be conducted outside
9 this room.

10 In light of that, this is a cell phone. I'm
11 now turning it off. I'm sticking it in my pocket, and I
12 will turn it on again this afternoon after this is over,
13 so I would urge everyone else to do the same thing or at
14 least put it on vibrate. If it goes off, you need to
15 leave the room before you have your conversation. We
16 appreciate that very much.

17 That all being said, before we get into
18 arguments regarding contention admissibility issues, we'd
19 like to briefly visit one point about the question of
20 standing, and that is in the staff's response to the
21 Petitioners' intervention petition, they had an appendix A
22 which had a number of listings of distances that they
23 thought that the individuals who filed affidavits had --
24 where they lived relative to the facility. And I didn't
25 see in your reply that you had any problems with those

1 distances as they were listed. I just wanted to confirm
2 that, given where we're going with this case.

3 MR. SANDERS: Yes. I think we looked at them,
4 and we didn't have an objection to their calculations.

5 JUDGE BOLLWERK: Okay. All right. Now, again,
6 recognizing that standing here hasn't been contested, the
7 Board nonetheless has to make standing findings. We have
8 to make an independent finding that the individuals would
9 provide the different organizations with standing, and we
10 will be doing that as part of our initial decision on
11 admissibility of contentions and the Petitioners'
12 standing.

13 All right. At this point then, let's -- unless
14 the parties have anything as a preliminary matter, let's
15 go ahead and begin the arguments on the contentions. What
16 I'd like to do is for the members of the public who are
17 here -- I think all the attorneys are well aware of what
18 each of these contentions is about. I'd like to take one
19 second before each one and sort of read the contention,
20 and then we'll begin the argument, and again I would need
21 to know what time you're allotting for your -- the
22 Petitioners are allotting for their direct presentation as
23 opposed to their rebuttal.

24 The first contention, which has been
25 designated, Environmental Contention or EC-1.1: The

1 environmental report fails to include an adequate aquatic
2 habitat baseline. The contention states basically: The
3 environmental report fails to use quantitative analysis
4 and field surveys to assess baseline habitat conditions
5 and species diversity and abundance in the projects area,
6 the project being the Vogtle ESP site.

7 All right. How would you like to break up the
8 time?

9 MR. SANDERS: I think we'll reserve ten minutes
10 for rebuttal.

11 JUDGE BOLLWERK: Ten minutes for rebuttal and
12 ten minutes then for your presentation.

13 MR. SANDERS: Yes, sir.

14 JUDGE BOLLWERK: Whenever you're ready.

15 MR. SANDERS: Sure. I'm going to start with,
16 even though I know this is a slight review, standards for
17 admission of contention, 10 CFR 2.309(f)(1), specific
18 statement of the issue. A brief explanation, must
19 demonstrate that it's within the scope, materiality, and
20 you have to have a concise statement, and you must include
21 sufficient information to raise your contention, to
22 establish that there is either a legal or factual dispute.

23 When I read the answers, it seems to be that
24 the staff and SNC want to propose a standard that would
25 require us to submit our entire case at the outset. Now,

1 I realize that the Commission's precedent requires that
2 contentions be strictly pled, strictly construed. It's an
3 exacting standard, as one of the Commission's cases says.
4 So there's two kind of things in tension.

5 On the one hand, it's a very strict standard.
6 You have to plead and make sure that you state your case
7 as fully as possible in your petition. On the other hand,
8 the Commission's rules talk about brief explanation,
9 concise statement, sufficient information.

10 So when you compare the standards to what the
11 staff and SNC answered, you have to -- you see this theme
12 coming out in the answers, which is, Not enough
13 information; they didn't cite this particular page of the
14 ER. They didn't go through the ER enough. We addressed
15 that on page 2.6.5, but they didn't cite to that, et
16 cetera.

17 Now, that's all correct, but it puts a very
18 high burden on the Petitioners to plead, and that burden
19 is not what's required by the Commission's rules. Again,
20 a brief explanation, a concise statement, provide
21 sufficient information.

22 If I knew that we would be required to go
23 through the ER and identify every little inconsistency on
24 the line-by-line basis, we would have done that, but our
25 petition for intervention would have been longer than the

1 application itself, which is already a number of volumes,
2 but that's not what the rules require. The rules require
3 us to simply establish that there is a basis for the
4 contention, establish that there is either a factual or a
5 legal dispute.

6 So now let's get on to the baseline. The
7 Council of Environmental Quality, which is the executive
8 agency in the executive office of the President that
9 issues NEPA regulations that are binding on all federal
10 agencies, the Council also has issued some guidance for
11 considering cumulative effects under NEPA, in which they
12 state, "The concept of baseline against which to compare
13 predictions of the effects of the proposed action and
14 reasonable alternatives is critical to the NEPA process.

15 Similarly, courts have looked at this issue,
16 baseline. For one, Half Moon Bay, Fisherman's Marketing
17 Association, versus Carlucci, 857 F.2d 505. It's a Ninth
18 Circuit case from 1988. The Court says, "Without
19 establishing baseline conditions, there is simply no way
20 to determine what effects an action will have on the
21 environment and consequently, no way to comply with NEPA."
22 That's the basis of our contention right there, that
23 without an adequate site description with specific
24 research and data, you cannot possibly comply with NEPA.

25 Now, of course, it's ultimately the NRC that

1 complies with NEPA, and the regulations say that the
2 environmental report must provide sufficient data to aid
3 the Commission in its development of an independent
4 analysis. That's 10 CFR 51.45(c). And further it says,
5 "The ER shall, to the fullest extent practicable, quantify
6 the various factors considered."

7 Now, when we looked through the ER, when our
8 expert, Dr. Sean Young, looked through the ER, he found a
9 discussion of the Middle Savannah River and the Savannah
10 River in general, and in mentioning a lot of the fish
11 species there, and the fact is that the Savannah River is
12 particularly near the Savannah River Site which is
13 adjacent to the Plant Vogtle site, has been studied.
14 There's been quite a bit of data collected, and the ER
15 summarizes that, reports it, provides a list of all of the
16 various research studies that have been done.

17 And in the answer, the ER -- the Southern
18 Nuclear Company, their answer is, We've done that; it's
19 exhaustive; look at the ER. It's got this list of all of
20 these studies. What more do you possibly want? And the
21 answer is: site-specific data from the actual site where
22 they're going to locate the intake structure and the
23 discharge structure.

24 It's one thing to say, as the ER does, the data
25 indicates that there is a relatively healthy population of

1 fish in the river. That -- we have no objection to that.
2 That's probably correct. There is a wide variety of fish
3 in the river, and there is a healthy fishery there. Now,
4 I think some people would quibble about how healthy and
5 all of that, but that's not our quibble with the ER.

6 The problem with the ER is that it doesn't take
7 that next step and say, Well, here's the background data;
8 here's what the studies say, and let's take a look at the
9 actual conditions to see how the environment will interact
10 with what we are planning on doing.

11 JUDGE TRIKOUROS: May I ask a question?

12 MR. SANDERS: Oh, yes, please.

13 JUDGE TRIKOUROS: So what you're saying -- and
14 really this goes to an earlier -- a question that I was
15 going to ask. In general, the baseline for that river on
16 a general basis has been characterized adequately to your
17 knowledge, based on work done by Savannah River Site and
18 also the existing Vogtle units?

19 MR. SANDERS: I believe that the general
20 population data and -- yes. Let me just say yes. I think
21 that there is sufficient information about the river in
22 general. We are talking about the specific site.

23 JUDGE TRIKOUROS: Now, when you talk about the
24 site, are you talking about some region around the intake
25 and some region around the discharge? Is that what you're

1 calling the site?

2 MR. SANDERS: Well, you see, again, this
3 illustrates the problem with the ER is that it doesn't --
4 that it should be identifying the site. It talks about
5 the Savannah River in general, but it doesn't provide a
6 description of the stretch of the river that is
7 immediately adjacent to the Plant Vogtle where the intake
8 and discharge structure will be located. That's really
9 the problem is that there really isn't that specific
10 description of the exact site.

11 So there's the Savannah River. There's the
12 Middle Savannah River around Plant Vogtle. There's, you
13 know, the Savannah River below the city of Augusta.
14 There's a description of that sort of stuff, but they
15 didn't take that next step and actually describe the flow
16 and habitat conditions on the river right there.

17 JUDGE TRIKOUROS: And your basis for that is
18 that there is not homogeneity across, say, a cross-section
19 of the river? Is that your argument that --

20 MR. SANDERS: Yes, sir.

21 JUDGE TRIKOUROS: Even though the baseline is
22 characterized properly for the river in general, you're
23 saying that there's some reason that you believe there's
24 not homogeneity of that characterization at specific
25 points in the river?

1 MR. SANDERS: Well, I'm not the fishery
2 biologist, so it's hard for me to explain this exactly.

3 JUDGE TRIKOUROS: Neither am I. I'm going to
4 ask very basic questions.

5 MR. SANDERS: My impression is, yes, that
6 the -- it's a dynamic system, and it changes over time,
7 and what species will be there at any particular time
8 depends on the flow of the river, because that indicates
9 how much habitat will be available, and that's very
10 specific to the site, and that's what we would rely on Dr.
11 Young to bring out in --

12 JUDGE TRIKOUROS: Because I was curious. My
13 understanding was that we were dealing with a transient
14 situation, that, in fact, the homogeneity -- on an average
15 basis, one might argue homogeneity, but in truth, it's a
16 transient situation, that if one does a study at a point
17 this year, they get certain results and do a study at the
18 same point next year, would they -- the question would be,
19 would they get the same results. These are questions that
20 I have, because --

21 MR. SANDERS: I'm not certain about year-to-
22 year change, but I think it depends more on the flow. The
23 amount of habitat and the type of habitat depends very
24 much on the flow, and then also it depends -- I think the
25 life stages of the species and what will be there is

1 fairly consistent year to year, but it changes seasonally,
2 so you need to know what species are there, what flows
3 they're likely to have, and how the intake and discharge
4 structure are going to interact with those conditions, and
5 that's what's missing in the ER.

6 JUDGE TRIKOUROS: Are you saying that there are
7 not enough documents out there to characterize that
8 specific region that you're talking about, or that there
9 is information but it hasn't been utilized in the
10 environmental report. Therefore, it requires a generation
11 of new information.

12 MR. SANDERS: Well, the environmental report --
13 it's not clear that it is 100 percent complete in terms of
14 all of the internal monitoring and studies that SNC might
15 have done. I'm not sure about that. Assuming that
16 they've included everything that there is, then the answer
17 is, no, that there needs to be additional data,
18 specifically data describing the exact location where
19 this -- where the facilities will be located.

20 JUDGE TRIKOUROS: And the definition of that
21 exact location is not clear.

22 MR. SANDERS: Yes. I couldn't find it.

23 JUDGE TRIKOUROS: Right. The quantitative
24 versus qualitative, you mentioned that you're looking for
25 quantitative information, and somewhere along the line I

1 wanted to have addressed for me at least the requirement
2 of qualitative versus quantitative.

3 My understanding is that the environmental
4 report can be qualitative and rely on existing
5 information, not new studies, but that it must be
6 quantitative with respect to certain -- I don't know what
7 the biological terms are -- sensitive aquatic organisms.
8 Only there does it need to be quantitative. It's rather
9 nebulous to me exactly what that means.

10 MR. SANDERS: Well, the guidance -- the NRC's
11 guidance document seems to have a serious preference for
12 quantitative analysis, particularly for sensitive species,
13 so I think you have that generally right. The question of
14 like under NEPA, how much data is required, I would say
15 that the SNC cites a case. I think it's Friends of
16 Endangered Species versus Jansen, another Ninth Circuit
17 case, for the proposition that no new data is required in
18 an environmental statement.

19 I think that that really misstates that case,
20 and that in many, many cases, NEPA puts the burden on the
21 Agency to provide sufficient data, and if that means going
22 out and doing some field studies, that's what's required
23 of the Agency.

24 Now, again, in this particular setting, the
25 regulations put that burden on the Applicant to begin

1 with, so I think that, yes, they have to go out and do
2 some studies. They can't just get away with going with
3 general statements when there are issues about site-
4 specific impacts.

5 JUDGE TRIKOUROS: It would certainly be clearer
6 to me if one would say, Here's an endangered species. It
7 was not included in the environmental report. It tends to
8 be located in vicinities like the site environment local
9 to the discharge and intake, and there are no -- and
10 requires quantitative evaluation. But I didn't hear any
11 of that or read any of that, not specifically. So I think
12 you were speaking in generalities as well, and that's part
13 of the difficulty for me.

14 MR. SANDERS: I see what you're saying, and our
15 response to that has got to be that without knowing -- you
16 know, it's kind of the chicken or the egg. We can't say
17 what the impacts are going to be on the listed species, on
18 the robust redhorse for instance, species that was
19 considered extinct until it was recently discovered. We
20 just don't know, because there isn't enough description of
21 the actual site, and that's the contention right there in
22 a nutshell.

23 But we really feel like it's on -- the burden
24 is on the Applicant to provide that sort of information
25 and not on us to speculate on, you know, what the impacts

1 are going to be.

2 JUDGE TRIKOUROS: Right. But I think what we
3 want to avoid is a situation in which you're saying that
4 you have insufficient information, bring me more; I'll
5 tell you when it's enough; bring me a rock kind of thing,
6 and --

7 MR. SANDERS: Right, right.

8 JUDGE TRIKOUROS: And obviously you don't --
9 you wouldn't expect that.

10 MR. SANDERS: Right. And I understand that,
11 and certainly there is some precedent again cited in SNC's
12 answer about how, you know, the contention that's just
13 saying, Well, that's not enough; we want more, isn't good
14 enough. And with due respect, we don't think that's
15 exactly what we're saying in this contention.

16 Now, I see I've gone at least five minutes over
17 my ten so --

18 JUDGE TRIKOUROS: I think that the time that we
19 take up in questioning --

20 JUDGE BOLLWERK: Right. I'll start watching
21 that, and we'll -- until we tell you to stop, keep going.

22 MR. SANDERS: Okay. Okay. In that case --

23 JUDGE BOLLWERK: Do you have another question,
24 Judge Trikouros?

25 JUDGE TRIKOUROS: No. I think that --

1 MR. SANDERS: Actually I do, so let me hop in,
2 and then we'll -- or Judge Jackson, did you have
3 something?

4 JUDGE JACKSON: I just had a clarifying
5 question to follow up on Judge Trikouros's line of
6 reasoning. I would like to ask: Do the Petitioners
7 believe that the studies cited in the ER do not involve
8 field studies and quantitative analysis? The contention
9 says that it fails to use quantitative analysis in field
10 surveys. Is it your position that the Academy of Natural
11 Sciences study, the '87 DuPont study and so on, do not
12 involve field surveys and analysis?

13 MR. SANDERS: No, no. Let me -- again, I think
14 it has to do with the exact site-specific nature. Okay.
15 What do those field studies show us is that there are
16 endangered species in the river. You know, there are
17 sturgeon, a listed species. There are the robust
18 redhorse. If it's not a listed species, at least it's --
19 it's a state-listed species, but not a federally listed
20 species.

21 There are other species of concern: shad and
22 bass. So we know that all of these species exist in the
23 general area, and some of them are migratory species, so
24 we know that they certainly go right by Plant Vogtle, but
25 the one piece of field surveys that we're missing is,

1 again, very specifically, how are those species going to
2 interact with the proposed plant at the flows that they
3 are likely to see throughout the course of the year.
4 That's the missing piece.

5 JUDGE JACKSON: So your contention is basically
6 that at the site or at the plant means specifically right
7 at the --

8 MR. SANDERS: Site-specific --

9 JUDGE JACKSON: -- structure.

10 MR. SANDERS: As I said, I think that part of
11 the difficulty we have is that that sort of zone of
12 influence or, you know, where -- what the site -- you
13 know, we know that the Plant Vogtle site is this 3,000 or
14 so acres -- I hope I have that number right. You know, we
15 know the land is the Plant Vogtle site. We know that
16 there's, you know, a fence around the site.

17 But is that riverfront that goes right along
18 the site, is that the site, or is that the vicinity of the
19 site? I don't know. It's -- but our problem is that here
20 they're putting -- they're proposing to put these
21 facilities right there on the river, and they already have
22 existing facilities right there on the river, and we just
23 don't know very specifically how those proposed facilities
24 are going to interact with the species that we know are
25 there. So it's very site-specific. Yes.

1 JUDGE BOLLWERK: My question, I guess, goes
2 probably to somewhat the same point. Let me frame it a
3 slightly different way. What we have here, I think, is
4 one, in NRC parlance, is a classic contention of omission,
5 in which you said basically there's something missing
6 here, and there is that tendency to be concerned about
7 bring me a rock, bring me a rock, bring me a rock.

8 But what I've heard, I think, is that there's
9 two things you're concerned about with this contention:
10 that there's no site description and that field studies
11 have not been done. And I guess I have two questions.
12 One is: How -- and admittedly this used to be one big
13 contention. At our direction, it was broken into three
14 separate ones. But how is this contention really
15 different from particularly 1.2, which deals with
16 entrainment of thermal impacts, chemical impacts?

17 MR. SANDERS: Well, I think they're --
18 obviously they're all three related. We did lump them
19 together to start with. I think we have to start with 10
20 CFR 51.45(b). What's the first thing that the NRC
21 regulations say? It's that the environmental report shall
22 provide a description of the environment affected. That's
23 the baseline, the project -- you know, the description of
24 the area.

25 And as I said, the cases and the CEQ guidance

1 says there's just no -- you don't know what the impacts
2 are if you don't know what you're starting with.
3 That's -- you know, that just is common sense, I think.
4 So 1.1 is that description of the project, of the area.
5 Then we move to 1.2 which is the impacts of the proposed
6 facilities on the -- what is likely to be found there.

7 So if you start with a general description that
8 just says, Well, the fisheries are more or less healthy
9 and that there's this wide variety of fish that will be
10 around, then you don't have a very specific idea of the
11 number of listed sturgeon that are likely to be impacted.
12 You can't get to actual impacts on actual species until
13 you have a fairly clear and specific idea of the baseline.
14 So that's the difference between the first and the second
15 contention.

16 JUDGE TRIKOUROS: And basically environmental
17 contention 1.2, which deals with impacts, seems
18 inextricably entwined with 1.1 which deals with baseline.

19 MR. SANDERS: That's correct.

20 JUDGE TRIKOUROS: Those are really one thing,
21 in essence.

22 JUDGE BOLLWERK: All right. Any other
23 questions anyone has?

24 (No response.)

25 JUDGE BOLLWERK: Let me give you about one

1 minute to wrap up, and then we're going to move on, and
2 we'll come back to you obviously with rebuttal.

3 MR. SANDERS: I'd like to just stress one more
4 time that the standard here, though exacting is to
5 establish an issue of law or fact in dispute, and I
6 believe that we've done that and that it is -- it's up to
7 the Agency to take a hard look at the issue under NEPA,
8 and under the Agency's regulations, it's up to the
9 Applicant to provide sufficient data for the Agency to do
10 that. And this contention goes after the fact that this
11 baseline is not as detailed as it ought to be to comply
12 with NEPA.

13 JUDGE BOLLWERK: All right. Thank you.

14 All right. Let's turn to the Applicant then.

15 MR. BLANTON: Yes, sir. Stan Blanton for
16 Southern Nuclear. The Board in its questions has
17 anticipated a good deal of my argument.

18 JUDGE BOLLWERK: Shall we just move on to the
19 staff, or do you want to --

20 MR. BLANTON: No, sir. I'm not going to let
21 you off that easy.

22 (General laughter.)

23 MR. BLANTON: I couldn't agree more with Judge
24 Trikouros's expression of what the standard for admission
25 of a contention is here. The burden is on the Petitioner

1 to read the environmental report or the application, to
2 cite the specific pertinent portions of the report, and to
3 support its contentions with either factual support, legal
4 support or both, and this contention that just says, The
5 environmental report doesn't contain some of the data we
6 would like to see, simply doesn't do that.

7 Previous boards have held that just a request
8 for more precision, without a specific factual or expert
9 witness support about why that precision is necessary or
10 how it would change the description of the aquatic ecology
11 in the environmental report is not sufficient for
12 admissibility.

13 And while I agree that 1.1 and 1.2 are
14 certainly related -- obviously you can't evaluate impacts
15 without a baseline. We agree that a baseline is
16 important. The fact that they're related does not excuse
17 the Petitioners or relax the requirement that they support
18 the contention that the baseline is inadequate. They
19 can't support the contention that the baseline is
20 inadequate with an affidavit that says, Impacts are not
21 sufficiently evaluated.

22 They have to show why or at least provide some
23 evidence why the description of the baseline aquatic
24 ecology in that report, which I'm glad to hear everybody
25 agree there is a discussion of the species in the Savannah

1 River in the vicinity of the site, there is a discussion
2 of the sensitive species, and there is, in accordance with
3 NUREG-1555 and Reg Guide 4.2, a discussion of the
4 quantitative abundance of the sensitive species in the
5 environmental report. I'm glad to hear everybody agree
6 with that, because that's in there.

7 And to the extent this is a contention of
8 omission, I think we've all agreed that that discussion of
9 those species is in the environmental report, and that's
10 what the NRC's guidance and the regulation at 51.45
11 requires.

12 Now, we spent a lot of time talking about the
13 amount of -- I guess, the precision maybe of the site
14 description or the location of the various field studies
15 on which admittedly the references in the ER are based. I
16 mean, it's not -- it's just simply not accurate that the
17 data in the environmental report's not based on field
18 studies or field surveys. The environmental report is a
19 summary of a number and a diverse variety of studies that
20 are based on field studies and field surveys, up and down,
21 along the Savannah River, at the -- you know, maybe done
22 under the auspices of the Savannah River Site but also
23 taking into consideration the Vogtle site, as we'll talk
24 in detail in a minute.

25 Those references are 13,000 pages, all of which

1 have been submitted and are in ADAMS -- in the public
2 document room right now. The ER simply can't discuss in
3 detail all 13,000 pages of those studies. They have to
4 summarize them and describe them and point the reader to
5 those studies, which it does. Otherwise, instead of 697-
6 page environmental report, we'd have a 13,000-page
7 environmental report.

8 Now, the contention that the surveys or studies
9 that the references are based isn't specific to the Vogtle
10 site is just demonstrably incorrect, and under the
11 authority of this -- under the Commission and the Board, a
12 contention can be dismissed if it just facially conflicts
13 with what's in the environmental report and in the
14 references.

15 Now, trusting that a picture is worth 1,000
16 words, rather than talk about all of the different parts
17 of the environmental report that discuss not only the
18 location of the site, but the location of the site in
19 relation to the Savannah River Site and the location of
20 the proposed discharge and intake facilities for the
21 proposed site on the Savannah River, we wanted to show you
22 what is in the environmental report and in the references
23 related to those structures.

24 Let's look at -- this is figure 2.1-1 of the
25 environmental report, and it's just a general depiction of

1 the site. Let's close-in on that, Casey. And just really
2 a couple things I want to show you. If I can operate this
3 laser pointer without hurting somebody, that would be
4 good.

5 The location of the proposed site is shown
6 there, and again, this is a map that's in the
7 environmental report. The proposed river intake structure
8 is shown in its relationship to the Savannah River Site.

9 JUDGE TRIKOUROS: What page of the
10 environmental report --

11 MR. BLANTON: Sir?

12 JUDGE TRIKOUROS: What page in the
13 environmental report is that?

14 MR. BLANTON: It's figure -- it's in the site
15 description in the environmental report in chapter 2 at
16 figure 2.1-1, and somebody will find that page. 2.1-2.
17 I'm sorry.

18 So then we have the general location of the
19 intake structure and the discharge line in relationship to
20 the Savannah River Site, and I would also note that
21 Petitioners agree with us that data regarding the Savannah
22 River Site is appropriate to use in the context of the
23 environmental report, because they base their
24 environmental justice contentions on data that was
25 generated regarding the Savannah River Site, so I don't

1 think there's any disagreement that information developed
2 in connection with the Savannah River Site, at least for
3 some purposes, is relevant to the condition of the species
4 in the Savannah River.

5 The next figure is 2.3.3-1, and the page number
6 is page 11 of -- well, it's 2.3.3-11 is the page number.
7 Now, Casey, close-up on the site. And the only reason for
8 showing you this is again to show you the proximity of the
9 site to the Savannah River Site and to note these are
10 river miles, so the Vogtle site runs from just short of
11 river mile 150 to about river mile 152, -1 or -2 or so.
12 And that will be important, because of some things I'm
13 going to show you in a minute.

14 Now, agreed, that's a very general picture, so
15 we're going to show you figure 3.1-3 from the
16 environmental report. And I've given hard copies of all
17 these slides to everybody, but the hard copy of this one
18 is going to be illegible without some enlargement, I'm
19 afraid. 3.1-7 is the page number of the environmental
20 report.

21 But what I want to show you here, again we have
22 the proposed discharge -- proposed intake structure and
23 proposed discharge line depicted, and we've shown mile 151
24 of the Savannah River basically equidistant between those
25 two structures. Again, this is in the environmental

1 report as a figure.

2 And to give you some sense of scale, these are
3 about -- go back to that again, Casey. This is just a few
4 hundred yards on either side of mile 151, and to give you
5 some scale, mile 150 is down here. So that's a mile, one
6 river mile, and that's the distance between mile 151 and
7 the discharge and the intake structure. So the
8 environmental report is very specific about the location
9 of those structures.

10 Now, the next thing we have is a page from the
11 DuPont study that was mentioned by one of the board a
12 minute -- by Judge Jackson a minute ago, which is 1980s
13 vintage study of impingement and entrainment along the
14 Savannah River Site, and the -- you can see there's
15 sampling -- this is -- each one of those river miles
16 indicates a sampling station used in that DuPont study.

17 And while they're up and down the Savannah
18 River, of particular interest are three sampling stations
19 at river mile 150.8, 150.6, and 150.4. So those are
20 directly in front of the Vogtle site. If you recall, we
21 showed you -- the second map we showed you, showed mile
22 150 right before the Savannah River Site, and the first
23 page of the site description in the environmental report
24 identifies mile 151 of the site as the precise location of
25 the site.

1 And again this DuPont study was one of many
2 studies summarized in the environmental report, and its
3 purpose, the reason we relied on it was that it showed the
4 effect of impingement on particular species, not
5 necessarily the -- just the presence of those species, but
6 the effect of the intake and discharge structure on those

7 JUDGE TRIKOUROS: But they're on the opposite
8 side of the river, those sampling stations. Right?

9 MR. BLANTON: Judge, the river --

10 MR. MOORER: Not the ones near Vogtle.

11 MR. BLANTON: They're just in the river near
12 Vogtle, and it's not that wide a river right there.

13 JUDGE TRIKOUROS: They're randomly placed in
14 the river or -- are they trying to get a cross-section of
15 the river or --

16 MR. MOORER: I'm Tom Moorer. I'm the
17 environmental project manager for the Applicant. The
18 sampling stations are located to look at a cross-sectional
19 view of the river, so there's a number of parameters that
20 are measured, so it's not a fixed station. It's a river
21 mile where things are evaluated.

22 JUDGE JACKSON: How close would you estimate
23 the nearest sampling stations were to what would be the
24 proposed intake structure?

25 MR. MOORER: One of the stations actually is

1 right on top of the proposed new intake structure, the
2 exact same river mile. I think the next figure will show
3 that.

4 MR. BLANTON: Well, and one of these -- 150.8,
5 Your Honor, is right on top of the discharge -- proposed
6 discharge line.

7 JUDGE JACKSON: Okay. And the next figure is a
8 slide from the Academy of Natural Sciences study, and what
9 that shows again is we have sampling stations up and down
10 the Savannah River. @-A and 2-B are the most relevant
11 here, and they are clearly identified, if you look at the
12 ANS report, they are clearly identified at river mile
13 151.2 and 149.8.

14 And you recall when we showed you the discharge
15 structure and -- excuse me -- the discharge line and the
16 intake structure a minute ago, they were basically on
17 either side of river mile 151. 2-A is right on top of the
18 intake structure, and one of the -- and 2-B is down at
19 kind of the south end of the site. But in the DuPont
20 study, one of the sampling stations was right on top of
21 the discharge line.

22 JUDGE TRIKOUROS: Well, when you say on top,
23 you mean in the same -- at the same river mile location,
24 not at the same coordinate along the cross-section of the
25 river.

1 MR. BLANTON: The river mile is as specific as
2 I can get, Your Honor. I don't have any GPS data on
3 exactly where the sampling station is, although that might
4 be in the study. I don't know.

5 JUDGE TRIKOUROS: All right.

6 MR. BLANTON: What we've done to try to pull
7 all this together is taken the first map we showed you and
8 laid these various sampling stations on top of that.
9 Casey, let's go to the enhanced. And what this shows you
10 is these various sampling stations in the ANS and the
11 DuPont studies, in relationship to both the Savannah River
12 Site and Plant Vogtle. And again that's the sampling
13 station from the DuPont study on the discharge structure.
14 That's the sampling station from the Academy of Natural
15 Sciences study on the intake structure, and then the other
16 is DuPont stations and the other ANS station.

17 This ANS study, I'd like to point out, was
18 started in 1951 and has been done regularly through 2005,
19 so that's very recent data there.

20 Quickly, there's also been a contention that
21 diadromous and anadromous fish species are not discussed
22 in the environmental report. They clearly are. There's
23 five, six pages of discussion of diadromous and anadromous
24 fish species. That's on page -- starts at page 2.4-10 of
25 the environmental report.

1 In particular, I want to point out that
2 contrary to an allegation in the petition about the
3 habitat not being described, the habitat is described, the
4 shifting sands, which essentially means there's not much
5 habitat in the Savannah River. It's a sandy-bottom river.

6 But clearly, I mean, if this is supposed to be
7 a contention of omission where we haven't described the
8 aquatic ecology, it's just simply not consistent with a
9 plain reading of the report, and the same thing is true
10 for the local species that are not diadromous species.

11 Again -- I'm about out of time -- merely
12 suggesting that more could have been done has not been a
13 basis for the admissibility of a contention under this
14 Board's decisions, and that is all that contention 1.1
15 does in this case. The affidavit of Mr. Young does not
16 discuss baseline data or how it should be collected.
17 They've cited no regulatory requirement. They've cited no
18 regulatory guide that says a particular type of field
19 study or particular source of data is preferred over
20 another. There are multiple and voluminous references.

21 Those references contain quantitative analysis
22 of the sensitive species and the description of the other
23 species in the river at the precise location of the plant,
24 and the contention is simply not supported by either law
25 or fact and is not admissible.

1 JUDGE BOLLWERK: All right. Any questions from
2 anyone? I have one, but I --

3 JUDGE JACKSON: Just a very quick question. In
4 your view, how close do you need to be to meet a criterion
5 of "in the vicinity of"?

6 MR. BLANTON: I don't think you need to be as
7 close as we are by a long stretch, Your Honor. The -- I
8 think the stations that are up and down the -- I'm about
9 to get some help here answering that question. But the --
10 that's right. Reg 1555 says for small sites, the vicinity
11 of the project is an area encompassed in the radius of ten
12 kilometers, six miles.

13 So sampling stations within that radius that
14 are fairly distributed ought to satisfy that standard.

15 JUDGE JACKSON: Thank you.

16 JUDGE BOLLWERK: Judge Trikouros, anything?

17 JUDGE TRIKOUROS: No.

18 JUDGE BOLLWERK: There was some discussion of
19 the relationship between this contention and 1.2. If we
20 were to admit 1.2 -- admittedly you say that it shouldn't
21 be admitted, but if we were to admit 1.2, are we going to
22 be litigating essentially the same things as they're
23 asking for in 1.1?

24 MR. BLANTON: I hadn't thought about it that
25 way, Your Honor. Certainly the same bases, the same

1 factual support does not support both 1.1 and 1.2. I
2 think if you were to admit 1.1, then there may be a fair
3 question as to whether we'll be talking about these same
4 issues in the discussion of 1.2. Can the impacts analysis
5 be correct if a baseline is not? I think the baseline
6 analysis could be correct and there still could be an
7 issue with impacts, although we think that's clearly not
8 the case here that we'll address in a minute.

9 Did that answer your question? I'm sorry.

10 JUDGE BOLLWERK: There does seem to be -- I
11 guess if I'm hearing what you're saying then is if 1.2 is
12 admitted -- let's just look at that for a second -- that
13 the impact -- I'm sorry. The baseline statements that are
14 in the environmental report at this point, including all
15 the supporting documentation, would be the baseline.
16 Correct?

17 MR. BLANTON: Yes, sir.

18 JUDGE BOLLWERK: So the only question would
19 then be: Have the impacts been analyzed correctly?

20 MR. BLANTON: Yes, sir. That would be my view.

21 JUDGE BOLLWERK: That would be your contention.

22 All right.

23 Any other questions from the Board?

24 (No response.)

25 JUDGE BOLLWERK: All right. Thank you.

1 MR. BLANTON: Thank you.

2 JUDGE BOLLWERK: Let's turn to the staff then.

3 MS. POOLE: Thank you, Your Honors. As stated
4 in our papers, it was true that contention 1 had some --
5 it mixed together some elements that sort of addressed
6 baseline and impacts of the proposed action, and so when
7 we looked at contention EC-1.1, we looked only at the
8 baseline, and as we stated in our papers, we noted three
9 specific statements of partial omissions from the ER that
10 we thought were sufficiently specifically stated to be
11 bases for a proposed contention.

12 And if you'd like, I can provide you some of
13 our thinking that underlay that determination.

14 JUDGE TRIKOUROS: Yes. I'd like to hear that.

15 MS. POOLE: Okay. Also, Judge Trikouros, in
16 connection with that, you had asked a question earlier
17 about what is an important species, and we would point you
18 to table 2.4.2-1 in the environmental SRP, section 2.4.2,
19 which talks about what the staff looks at in connection
20 with important species.

21 But also when we were looking at this, you
22 know, we acknowledged that quite a bit of data has been
23 collected over the past 50 to 60 years in this area, in
24 connection primarily with the Savannah River Site, but
25 what we saw here -- and it is true that this was not

1 necessarily stated in the petition -- that we didn't see a
2 discussion of site-specific data on the presence of unique
3 habitats, backwaters, unusual bottom types of the river,
4 shorelines that could, according to our technical staff,
5 profoundly affect the species present, sampling, et
6 cetera.

7 Without that information, it's difficult for us
8 to predict what will then be the construction and
9 operational impacts, and -- I'm just looking at my notes
10 here.

11 JUDGE TRIKOUROS: Well, let me interrupt you.
12 It may not be necessary to go into that much detail.
13 The -- one of the statements that you make of information
14 that's missing that you think is important is you say,
15 "The ER does not include field studies at the proposed
16 intake and discharge sites and therefore fails to identify
17 the current aquatic species assemblage or the presence or
18 absence of threatened, endangered or rare species in the
19 project area."

20 Now, we just heard the Applicant say that they
21 do have field studies that were done at least at the river
22 mile location associated with the intake and discharge,
23 but not necessarily close to the intake or discharge.

24 MS. POOLE: Well, looking at these studies --
25 let me -- may I take one moment to speak with Dr. Masnik?

1 JUDGE TRIKOUROS: Sure.

2 (Pause.)

3 MS. POOLE: Well, we had the following
4 observations about the slides that were shown by the
5 Applicant. The DuPont study -- and here I'm looking at, I
6 believe -- it was the fourth slide on figure V-4.1. That
7 sampling took place in the mid-'80s and not since then.
8 We're not sure that was an impingement and entrainment
9 issue, and we can discuss that more in the context of
10 contention 1.2, but that is old data.

11 In addition, figure 1, the following slide that
12 looked at the 2000 diatometer studies, our understanding
13 is that the diatometer studies are for water quality and
14 don't address aquatic impacts, and so it would not -- it's
15 true that the sampling took place, but without knowing
16 more about the timing and the types of studies and what
17 was sampled, there is an information gap there in the
18 baseline as far as the staff was concerned.

19 JUDGE JACKSON: Could I ask the same question
20 that I had asked before? In the staff's view in trying to
21 characterize the baseline, how close is close enough?

22 MS. POOLE: Well, I will say looking at the
23 environmental standard review plan, which is the guidance
24 that we follow, we look at available site-specific
25 information, and also Reg Guide 4.2 speaks to -- excuse

1 me -- Reg Guide 4.7, which is referenced in the ESRP and
2 the ESRP talk about the vicinity of the power station.

3 We're interested in, I believe, as close to
4 site-specific information as we can obtain, but it is true
5 that information from the Middle Savannah River, in the
6 region, is looked at also, in addition to what's
7 immediately by the site, but we are interested in as much
8 site-specific information as is available to review.

9 JUDGE JACKSON: I understand you would like as
10 much as is available, but what do the regs indicate would
11 satisfy a "within the vicinity" criterion?

12 MS. POOLE: The regs -- the regulations in Part
13 51 don't speak to specifically that issue. We look to our
14 guidance in the ESRP and the relevant reg guides, and as I
15 say, they speak to both site-specific and the vicinity,
16 and I do not believe a specific -- a specific definition
17 of "vicinity" is not given in the ESRP.

18 And my aquatic biologist tells me the
19 particulars of the river are also -- it's a case-by-case
20 determination. You have to look at the particulars of the
21 river to know what kind of studies that you need, so it
22 will -- it depends, I guess, is the answer to your
23 question.

24 JUDGE TRIKOUROS: Would it be fair to say that
25 if the data that's been referred to by the Applicant was

1 taken, say, in the 21st Century and not the 1980s and it
2 included not water quality but fish species, would you be
3 satisfied with that?

4 MS. POOLE: Well, we have to review whatever
5 was provided, but it would certainly be of assistance.

6 JUDGE TRIKOUROS: So by the location doesn't
7 concern you at all.

8 MS. POOLE: The location -- the close locations
9 by the intake and the discharge are -- they seem
10 reasonable.

11 JUDGE TRIKOUROS: Okay. So you would consider
12 those site vicinity -- the definition that we haven't
13 really had, you would say as long as it was at the river
14 location of the intake or discharge, it would be site
15 vicinity.

16 MS. POOLE: Yes. In addition to out-falls on
17 for the on-side streams.

18 JUDGE BOLLWERK: I have two questions. One,
19 I've heard that you'd like to see more information, and
20 recognizing that, again, we're dealing with the
21 Petitioners' contentions, not the staff's questions --

22 MS. POOLE: Of course.

23 JUDGE BOLLWERK: -- are you going to be asking
24 for this information yourself? I mean, the staff has the
25 opportunity with requests for additional information to

1 ask for the same sorts of things.

2 MS. POOLE: We have asked. On December 29,
3 2006, we issued a set of environmental RAIs. One of those
4 included -- it was RAI E-2.4-3, and it requested that the
5 Applicant highlight the most recent comprehensive and
6 applicable references regarding aquatic ecology of the
7 Savannah River in the vicinity of Vogtle, including field
8 studies, and we did receive a response from the Applicant
9 on January 30 of this year, which is being reviewed by the
10 staff.

11 JUDGE BOLLWERK: Do you know if that's in ADAMS
12 yet?

13 MS. POOLE: We weren't able to find it in ADAMS
14 yet. It should be in by now or in the next couple of
15 days, but we don't have an ADAMS accession number for you
16 now, although I can give you an accession number for the
17 outgoing, if you're interested in that. I believe I can.

18 JUDGE BOLLWERK: How about MLO63540072?

19 MS. POOLE: Okay.

20 JUDGE BOLLWERK: On page 8 of the intervention
21 petition, there are -- Judge Trikouros read, I guess, the
22 first one of these. There were three of them that you
23 found sufficient to form the basis for an admissible
24 contention. Within that paragraph, there are three
25 sentences that you liked and one that you didn't, and I'm

1 trying to figure out, in looking at the four of them,
2 starting with the first one that Judge Trikouros mentioned
3 and the last one, "Nor does the ER examine flow habitat
4 relationships and the potential impacts of the project on
5 habitat availability" --

6 These four sentences are stated. There's
7 really no specific references in terms of the affidavit
8 was attached to the intervention petition for support.
9 They're just four statements, three of which you liked and
10 one of which you didn't, and I'm trying to figure out why
11 one -- why three of them passed muster and one of them
12 didn't.

13 MS. POOLE: I'm sorry. Could you let me --
14 could you repeat for me the fourth item?

15 JUDGE BOLLWERK: The last one is, "Nor does the
16 ER examine flow habitat relationships and the potential
17 impacts of the project on habitat availability." And when
18 the staff dealt with these in your response, you said that
19 the first three were sufficient, and that fourth one that
20 I just read was not.

21 And I'm just -- given the way they're stated,
22 given the support that's given for them, I'm trying to
23 figure out what the difference, as to why three of them
24 would pass muster and one of them would not.

25 MS. POOLE: I would say when we talked about

1 it, we thought -- it's a close call. I think that at the
2 time we were preparing the answer, we thought, well, the
3 particularity of the first three sentences was just a
4 little bit greater than the fourth. But that is not to
5 say that were this contention to be admitted, that this
6 also could be considered, although at the time, I think we
7 looked at it as a statement that needed a little bit more
8 specificity.

9 JUDGE BOLLWERK: Could someone that you all --
10 flow habitat relationships, what exactly does that mean?

11 MS. POOLE: Let me take one moment here.

12 (Pause.)

13 MS. POOLE: As we understand flow habitat
14 relationships, it would be the relationship between the
15 flow of the Savannah River and the availability of
16 habitat. We understand there's a dam upstream which could
17 affect the river flow, could also be seasonal.

18 JUDGE BOLLWERK: Okay. Any other board
19 questions?

20 (No response.)

21 JUDGE BOLLWERK: Anything further you all want
22 to say on this particular contention?

23 MS. POOLE: I have nothing further to add.

24 JUDGE TRIKOUROS: I'm sorry. But you -- the
25 staff is comfortable -- well, I'll ask it this way, and I

1 don't really mean it exactly this way. The staff is
2 comfortable with the baseline except with respect to the
3 impacts analysis.

4 MS. POOLE: I think --

5 JUDGE BOLLWERK: We're looking at the
6 relationship between 1.1 and 1.2 here. Is that --

7 JUDGE TRIKOUROS: Yes. I'm just trying to get
8 at least a small differentiation of the differences
9 between.

10 MS. POOLE: I'm sorry. I was --

11 JUDGE TRIKOUROS: I'm sorry. The question
12 remains. I want to understand why one would say -- why
13 one would admit one contention like 1.2 and not admit a
14 contention like 1.1 or vice versa.

15 MS. POOLE: I think our general statement -- of
16 course, bearing in mind that the application is still
17 under review, looking at what we had here, the regional
18 data is reasonable and probably satisfactory for us to
19 perform our review. Looking at this -- you know, in the
20 context of this contention on the baseline information,
21 additional site-specific information would be helpful in
22 assessing the impacts in the areas that we identified that
23 we found the Petitioner to have been sufficiently
24 specific, so as not to oppose their admission.

25 JUDGE TRIKOUROS: And so you do differentiate

1 1.1 from 1.2.

2 MS. POOLE: Yes, we do. We saw 1.1 as
3 baseline, you know, and again, noting that there were
4 statements in 1.1 that, in our view, really went to 1.2,
5 and we considered them in that context, so we looked at
6 1.1 as baseline and 1.2 as impacts on the proposed
7 project, which we will talk about more in that contention.

8 JUDGE BOLLWERK: All right. Any other
9 questions then?

10 (No response.)

11 JUDGE BOLLWERK: All right. Let me turn back
12 to the Petitioners then for rebuttal.

13 MR. SANDERS: Yes, sir. Now, I should start by
14 saying that admittedly, the petition could have been pled
15 with greater precision and clarity, and, you know, I'm a
16 neophyte at this NRC stuff, and it's on me that we didn't
17 do it quite the way that we would have done it if we knew
18 a little bit more.

19 Now --

20 JUDGE BOLLWERK: It's often not easy.

21 MR. SANDERS: Yes. This is really a very
22 interesting proceeding for me. But I will say that I've
23 got the Arizona Public Service Company, the Palo Verde
24 Nuclear Generating Station case, which is 34 NRC 149. I
25 just want to mention that on that one, the Board affirms

1 admitting one of the contentions and says that, "The
2 licensing board found the Petitioners to be entitled to a
3 liberal construction of their contention, and their
4 allegations should be construed most favorably to them."

5 So that's at least the commission and one board
6 in the past has looked at this situation and cut a little
7 bit of slack to the Petitioners, so that's the first
8 thing.

9 Now, secondly, directly in response to the
10 studies, in our view, what SNC put up on the board
11 illustrates our point, and that is apparently there have
12 been field studies very close to this place, but if you
13 read the ER, you don't get the data. You get a
14 summarization. You get the Savannah River. I want to say
15 Sacramento. I'm a Californian at heart, I guess. You get
16 just the discussion of the Savannah River in general, when
17 apparently there really was some data collected at the
18 actual site. Where is it?

19 Well, it wasn't collected by SNC, and I don't
20 know that that data is readily available. It certainly
21 didn't make it into the ER.

22 Secondly, with regard to the DuPont study, a
23 study from 1987 of entrainment and impingement at the
24 Sacramento River -- the Savannah River Site, that's across
25 the river. Of course, we don't know exactly the

1 parameters of the study, but I would say if you're
2 studying entrainment and impingement at the Savannah River
3 Site, it seems to me that that data would be mostly site-
4 specific to the Savannah River Site.

5 And again, this illustrates our point that
6 there was no similar study done at the Plant Vogtle site.
7 We have no idea what the entrainment and impingement that
8 is currently going on with that site, and that's part of
9 the baseline as well. You know, the current intake
10 structure that's been there for 20 years becomes part of
11 the baseline, and they haven't studied that apparently.

12 So it is fair to say that, yes, there have been
13 field studies, but it's not fair to say that this site has
14 been studied in the way that it's required under NEPA and
15 under the Board's rules.

16 Now, again, Regulatory Guide 4.2 at 5-1 talks
17 about cooling system intake structures. "Describe the
18 effects of related heat on marine and freshwater life.
19 Give the basis for prediction of effects. In this
20 discussion, appropriate references to the baseline
21 ecological data presented in Section 2.2 should be made."

22 So I think this right here, this part of
23 Regulatory Guide 4.2, illustrates the difference between
24 our contention 1.1 and 1.2. And it's the same structure
25 as in the regulatory guide. You start by doing baseline

1 ecological data, and then you go to the impact analysis.
2 You can't go to the impact analysis without baseline data,
3 and without good baseline data, you don't get a good
4 impact analysis. All you get is generalities.

5 So, again, for instance, if we are interested
6 in the impacts on, let's say, listed sturgeon, the only
7 way you know whether listed sturgeon are impacted by the
8 proposed intake and discharge structure is, first, by
9 knowing if listed sturgeon are going to be in the
10 vicinity. You know, and when I say, in the vicinity, I
11 mean right there, right in front of where they are going
12 to interact with this structure.

13 And that's the data that's missing in the
14 environmental report. It's just not there. It's a
15 summary of other people's research, but -- and as the
16 staff said, that's fine for kind of looking at the general
17 regional impacts, what's happening is upstream. Is Vogtle
18 in combination with the reservoir -- the dam upstream
19 going to kind of globally or regionally have an impact?
20 That's one very important function of NEPA.

21 But the other important function is to know
22 what impacts will this specific intake structure have on
23 these specific species, and you just can't get there from
24 this site description in the ER.

25 JUDGE BOLLWERK: So I guess we're back -- you

1 really want a field study, then, in front of the intake
2 structure, bottom line.

3 MR. SANDERS: Yes. Bottom line, yes. There
4 should be some field surveys. There should be transects
5 of -- and there should be some kind of flow habitat
6 relationship developed at that river mile where the intake
7 structure is, because otherwise, you just have no idea of
8 the impacts on listed species and on other important
9 species.

10 JUDGE BOLLWERK: And since I frankly say I
11 don't know, how long does something like that take?

12 MR. SANDERS: My biologist couldn't make it
13 here today, so I couldn't say for sure, but this is stuff
14 that is routine in NEPA analysis, and frankly, it's just
15 an absurdity that Southern would apply for a license like
16 this without doing what is, you know, in biology or in
17 field ecology a standard study. And, of course, the staff
18 recognized this and sent out a request for additional
19 information.

20 JUDGE BOLLWERK: Anybody else have any
21 questions? I take it you're finished, it sounds like.

22 MR. SANDERS: Yes, sir.

23 JUDGE BOLLWERK: Questions?

24 JUDGE TRIKOUROS: With respect to the staff's
25 findings in the environmental impact statement, with

1 respect to an early site permit, does this particular
2 issue have to be, let me say, nailed down, so to speak,
3 with respect to the issuance of an early site permit, or
4 can this issue be an unresolved issue with the ESP stage?

5 MS. POOLE: Well, when we prepare our EIS, we
6 look at 10 CFR 52.17(a)(2), which, you know, in which the
7 Commission directed us to -- and 52.18, to look at
8 environmental effects of construction and operation both.
9 Now, is the staff is unable to draw a conclusion based on
10 the data that it has, then it can't be decided and would
11 have to be deferred to the COL stage. However, our
12 efforts are focused on doing that construction and
13 operation review, a disclosure of those impacts, at this
14 time, per the Commission's direction in that area.

15 JUDGE BOLLWERK: Anybody else want to comment
16 on the question I asked about field studies, since I don't
17 know the answer to any -- or not? It's up to you.

18 MS. POOLE: Well, we would say -- we were
19 talking about it here. When looking at a data collection
20 like that, the staff likes to see four seasons' or one
21 year's worth of data. It's not so much a survey that
22 would be desirable as it would be data that would be
23 collected over time.

24 JUDGE BOLLWERK: But I take it at this point,
25 the staff has not asked for such a survey to be done.

1 MS. POOLE: That's correct.

2 JUDGE TRIKOUROS: Well, then, does that -- is
3 that then a foregone conclusion answer to the question I
4 asked? I mean, the -- unless a year started immediately,
5 I'm not sure that you'd get the data you need to reach a
6 conclusion for the ESP, although maybe my scheduling is
7 off here.

8 MS. POOLE: Well, it's not necessarily a
9 foregone conclusion, based on -- you know, we're still
10 looking at information that's come in from the Applicant
11 and reviewing what data we have. The review's obviously
12 not complete yet.

13 JUDGE JACKSON: Let me just clarify then. This
14 is quite a specific piece of information that's being
15 talked about. This talks about what fish will be at one
16 particular place. Now, if you build a structure, wouldn't
17 that -- perhaps the fish change their mind about where
18 they would be? I mean, when you start talking about how
19 many fish will be at exactly one point at a given time, if
20 one fish passes through there in a year, does that meet
21 the criterion that there is an endangered species there,
22 for example?

23 Or is this -- again, you have average
24 information about a stretch of river versus exactly what's
25 going on within an area, say, the size of this table or

1 something like that. To me, again it's like the question
2 of how close is close enough, or how precise is precise
3 enough. And would regulatory precedence consider that a
4 reasonable piece of information, that you would know over
5 in an area, say, the size of this room how many fish might
6 be expected to be there at any given time?

7 I'm not an expert in this area. I'm trying to
8 understand if that's a level of precision that would be
9 consistent with regulatory guidance and practice.

10 MS. POOLE: Let me take a second, if I may.

11 (Pause.)

12 MS. POOLE: Thank you for the time. In some
13 circumstances, in a new construction circumstance like
14 this, it's not necessarily unreasonable to look for data
15 in a small area; for example, the area of the discharge or
16 the area of the intake, because in looking at some
17 mitigation and alternatives, there are construction
18 practices and operational practices, small design changes,
19 that could be made to resolve an impact that may be
20 identified for a present endangered, sensitive or
21 important species.

22 Does that answer your question?

23 JUDGE JACKSON: So you're saying basically
24 there is precedent for seeking information within a few
25 square yards and expecting that to still be valid once a

1 structure is put in place and so on, and there is precedent
2 for that.

3 MS. POOLE: It varied more than a few square
4 yards. I think the way we're thinking about it is to meet
5 the NEPA obligation, it's not unreasonable to look at data
6 in a small area, if you know -- if you are -- if you know
7 or suspect that there could be aquatic impacts that could
8 be mitigated in that area.

9 I guess we feel -- the staff feels it would be
10 within its bounds to ask for such information in
11 performing its independent evaluations.

12 JUDGE JACKSON: Okay. That's fair. Thank you.

13 JUDGE TRIKOUROS: I hope that somewhere along
14 the line -- and I think it's EC-1.3 -- we get into this
15 question of best available technology, because somehow I
16 think that's critically important to all of this as well.

17 JUDGE BOLLWERK: Let me just say, we've heard a
18 couple of statements from the staff. Anyone else have
19 further -- want to say anything about what we've heard?

20 MR. SANDERS: Can I just respond to Dr. Jackson
21 for a minute? I think your question goes actually to EC-
22 1.2. That's the question of, you know, how will the new
23 structure impact the -- you know, will things change once
24 you put the new structure in? That's an impact. So first
25 you need to know what's there, and then you need to

1 predict what the impacts will be once you build the new
2 structure.

3 So it's critically important to have that site-
4 specific information in order to then predict how what's
5 at the site is going to interact with the new structure,
6 and as the staff pointed out, then there's questions of,
7 you know, there might be ways to mitigate things or there
8 might be other technologies and all the rest.

9 But still it results back to you really need to
10 know what's there, and it's got to be pretty specific what
11 the substrate is, what the flow is, what's going to be in
12 there, all of that stuff, because, again, without knowing
13 that, you just have no way to say with any accuracy
14 whether there will be impacts.

15 And, you know, for endangered species, for
16 instance, it is unlawful, it is a federal offense to harm
17 one, not even to kill it, to harm it, to harass it, in any
18 of its life stages, so the fact that we're not going to --
19 this may or may not drive the listed species to extinction
20 is not the question here. The question for the endangered
21 species, the question is: Will even one be harmed?

22 And it seems to us that the answer there is
23 clearly yes. Absolutely there are listed species in this
24 river stretch. They migrate past the Vogtle site, and
25 without more information, we just do not know whether the

1 intake structure is going to impact them or not or the
2 discharge structure will impact them or not.

3 MR. BLANTON: Your Honor, if I may --

4 JUDGE BOLLWERK: Yes. He gets the last word.
5 That's my --

6 MR. BLANTON: I understand, and I hate to
7 belabor this, but three brief short points. First, the
8 standard that determines whether this contention is
9 admitted -- remember, we are talking about whether the
10 Petitioners have asserted an admissible contention, not
11 whether the staff thinks some additional information would
12 be helpful or whether it would be reasonable to get it.

13 The question is whether the Petitioners have
14 asserted a contention with adequate factual either legal
15 or expert testimony that says this environmental report
16 does not meet the standards under the Commission's
17 regulations. We've not heard any law cited that says that
18 the kind of data -- or regulatory requirements that says
19 the kind of data being requested here or the timing of the
20 data or the location of the test is required under a
21 Commission regulation or guidance.

22 We've heard a lot of factual discussion back
23 and forth about the inadequacy of the data, but I haven't
24 seen anything in anything the Petitioners have submitted
25 with their petition that contains any expert testimony or

1 other source material that says any of that. They haven't
2 supported this contention.

3 Third, the ANS study that we've -- the map of
4 which we put on the board that shows the location of those
5 sampling stations, two of them are where they are
6 specifically because they are in proximity to Plant
7 Vogtle. The 2-A and 2-B are there specifically -- if you
8 read the report, they're there specifically because that's
9 where Plant Vogtle is. That study is done periodically.
10 It's been done since the '50s. It's being done up through
11 the present, been annual.

12 It is not too much to ask a Petitioner in
13 specifying his contention to look at one of the principal
14 references that's available in the public document room
15 that supports the ER and that's discussed in the ER.
16 That's the question before this Board, is whether or not
17 the contention is admissible under the Commission's
18 regulations, and they've failed to satisfy that burden.

19 JUDGE BOLLWERK: All right. Anything further
20 you want to say, sir?

21 MR. SANDERS: Well, once again, the regulations
22 require a brief explanation, a concise statement,
23 sufficient information to show that a genuine dispute
24 exists. It doesn't require us to go through the
25 application line by line and identify every single,

1 distinct inconsistency, nor does it require Petitioners to
2 go to the data and background studies being relied upon
3 when the ER has -- claims to provide a comprehensive
4 discussion of the issue.

5 And when you look at this ER, you find again
6 it's a lot of general summation of the information, but
7 nothing that will tell you how individual species will
8 interact with the proposed structures, and with regard to
9 scientific studies -- and we submitted our expert
10 declaration. Dr. Young reviewed the studies. Dr. Young
11 is familiar with the scientific literature, and he
12 submitted a declaration, and it has precisely the type of
13 information in there.

14 And, again, you know, it's -- I could have done
15 a better job at citing to Dr. Young's specific statements
16 in our petition, but that doesn't change the fact that Dr.
17 Young does take issue with many of the specific statements
18 in the ER. And that's about all I should say.

19 JUDGE BOLLWERK: All right. Thank you. Any
20 other questions from board members. All right.

21 JUDGE JACKSON: Just a quick one. You
22 referenced an earlier board statement regarding Palo
23 Verde. What was the date on that?

24 MR. SANDERS: Okay. Well, the case --

25 JUDGE JACKSON: I just wanted the date.

1 MR. SANDERS: The date was -- I'm having
2 trouble finding it.

3 JUDGE BOLLWERK: Is that a Commission ruling or
4 a Board ruling?

5 MR. SANDERS: This is a Commission ruling from
6 1991.

7 JUDGE JACKSON: 1991. Okay. Thanks.

8 JUDGE BOLLWERK: All right. Why don't we go
9 ahead at this point and take a break. It's about -- come
10 back around a quarter till. I would like, if possible, to
11 get contentions 1.2 and 1.3 finished before we have our
12 lunch break, which is going to be a little bit of a
13 challenge.

14 I'm hoping that given the sort of expansive
15 discussion we've had, we can focus things a little bit
16 more with those two contentions and get them done in a
17 fairly timely manner, but that gives us all something to
18 shoot for. We get to eat when we get done with those two
19 contentions.

20 So all right. Let's come back about a quarter
21 till, please. Thank you.

22 (Whereupon, a short recess was taken.)

23 JUDGE BOLLWERK: Let me make one administrative
24 announcement while everyone's taking their seat. I
25 understand from Judge Trikouros at least one individual --

1 and perhaps there are others -- have a limited appearance
2 statement that they brought with them. If they want to go
3 ahead and give that to our law clerk, Marcia Carpentier at
4 the break, we'll go ahead and take that back to Maryland
5 with us, so we can put it in the docket.

6 So at the next break, if you have it, you can
7 just -- we can collect it then. We'll be glad to do that.
8 That's fine. Why don't you just hand it to her now.
9 Appreciate it. And as I say, we'll go ahead and put that
10 in the agency docket for this proceeding.

11 All right. I think we're now at contention EC-
12 1.2, which is a contention that the environmental report
13 fails to identify and consider cooling system impacts on
14 aquatic resources. It states that the environmental
15 report fails to identify and consider direct, indirect and
16 cumulative impacts of the proposed cooling system intake
17 and discharge structures on aquatic resources.

18 And how do you want to allocate your time?

19 MR. SANDERS: Again, I'll do ten minutes at the
20 end.

21 JUDGE BOLLWERK: Are you going to do ten-ten
22 for the rest of them?

23 MR. SANDERS: Yes. I think so.

24 JUDGE BOLLWERK: All right. Then we'll just
25 consider ten and ten, unless you tell us something

1 different.

2 MR. SANDERS: Okay. Thank you. Well, again,
3 starting with NEPA, impacts include past, present and
4 reasonably foreseeable future impacts and also include
5 direct, indirect and cumulative impacts. Cumulative
6 impacts are considered regardless of what agency, federal
7 or non-federal, or person undertakes such action.

8 The Agency must consider all impacts that have
9 or are expected to have in the same area, so that's really
10 the standard: past, present, future, direct, indirect,
11 cumulative. It's clearly a very broad standard. And,
12 again, kind of going along with the same theme as with
13 contention 1.1, the problem with this contention is that
14 it's -- it has a lot of statements of conclusions but
15 doesn't necessarily have data and science to back them up.

16 So we get a statement of, for instance, the 20
17 years of operating the cooling structure at the existing
18 facilities leads us to conclude that there's no problem.
19 Well, have they looked for a problem? Has there been any
20 studies of entrainment and impingement rates at the
21 current structure?

22 Now, you see, this is an interesting situation,
23 because unlike new construction, you already have an
24 existing facility at this -- at more or less the same
25 location, and the ER says, We're going to build the same

1 style of intake structure, almost exactly the same, if I
2 recall from the ER.

3 Well, there's a good way to know how that
4 structure is going to impact the surroundings, and it's,
5 take a look at the one you already got. And there is just
6 nothing like that in this ER. That to us is a striking
7 omission, and again if you look Dr. Young's affidavit, he
8 talks in detail about what's missing from the discussion
9 of impingement and entrainment at the new -- at the
10 proposed structure and takes particular exception to the
11 fact that general statements about the current structure
12 are being used as evidence of how the new structure will
13 perform.

14 And I think that the current structure probably
15 is very good evidence of how the new one will perform, and
16 it is really a glaring omission not to include that sort
17 of data, and it really leads one to conclude that there is
18 something going on here and that there are impacts that
19 are -- that have not been discussed. So that's the gist
20 of it.

21 And then when we get to -- Dr. Trikouros asked
22 about the best technology available standard which comes
23 up in this and also the next contention, so I might as
24 well just get to it right now. The Clean Water Act has a
25 standard called BTA, best technology available, for intake

1 structures, and what the ER does is it says, We're going
2 to comply with what EPA has said is the best technology
3 available, and therefore we presume that that's an
4 acceptable level of impacts.

5 And the problem with that is that the mere fact
6 that the EPA has done a rulemaking on intake structures
7 does not answer the NEPA question which is: What impacts
8 will this facility have on the environment? And that's
9 the difficulty here. To just say, We're going to comply
10 with the EPA standards doesn't tell you how many fish are
11 going to be impacted, and that's the question for NEPA.

12 So that's really the -- with regard to this
13 contention, that's the best technology available argument.
14 Now, as you all know, there's been some question about
15 which -- whether this would go under the Phase I rule or
16 the Phase II rule, and whether this would be -- which is
17 whether this would be an existing versus a new plant under
18 EPA's definition of things.

19 And there was a case a couple weeks ago where
20 the Second Circuit Court of Appeals found that EPA's rule
21 for existing plants was invalid and remanded it to the
22 Agency. Now, what's interesting about that case, which is
23 a lengthy discussion, is not about whether dry-cooling or
24 wet-cooling or what not is best available or not best
25 available. The case clearly doesn't get to that, doesn't

1 say, you know, The Agency should consider dry-cooling.
2 That's not what we gave you the case for.

3 Instead, what's interesting about the case is
4 that it has this lengthy discussion about best technology
5 available and what that standard means, and it's really
6 complex, and that Court more or less said, EPA made a
7 mistake, because they did a cost benefit analysis in
8 determining what BTA is, as opposed to a cost
9 effectiveness analysis. Cost effectiveness is okay, but
10 cost benefit is not okay.

11 Now, that's a really hard distinction to
12 understand, but the point is is that best technology
13 available is much more complicated than simply saying, Dry
14 cooling is not, or, you know, a closed system is the best
15 technology. That is not what those regulations say.
16 That's what Southern Company in their answer makes it out
17 to be. They say, EPA's already decided; closed loop is
18 the best technology; there's no need to go any further.

19 I think that if you look at the case, you'll
20 see that best technology available is not such a simple
21 matter. And ultimately, though, it's really not as
22 important as the issue for NEPA, which is, What are the
23 impacts going to be. And there's been no site-specific
24 evaluation of the current structure, which again that's
25 a -- the current structure is being pointed to as an

1 example of, you know, here it is.

2 So, again, we're not saying the impacts of the
3 current structure are -- need to be included as part of
4 the -- well, it's complicated stuff. The current
5 structure makes up -- part of the baseline, but as you can
6 see from the regulation, it also makes up part of the
7 cumulative impacts analysis, past, present, reasonably
8 foreseeable future impacts.

9 So you have this structure that's already there
10 that's causing some impacts. There's no evaluation of
11 those impacts, none whatsoever. And then on top of that,
12 the application offers that as the example of how the new
13 structure will perform. Well, again, there's no data to
14 back that up. There's just some, you know, EPA says --
15 well, this Board is not the EPA. EPA doesn't make rules
16 for the Nuclear Regulatory Commission, and all agencies
17 are required to comply with NEPA. So EPA's guidelines or
18 EPA's rules on what is best technology available is really
19 not entirely relevant to the discussion at hand.

20 JUDGE BOLLWERK: All right. Any board
21 questions at this point?

22 JUDGE TRIKOUROS: Not this instant.

23 JUDGE BOLLWERK: Not this instant? Let me
24 just -- maybe I'm being too linear, but doesn't -- I mean,
25 the EPA Phase I rule was upheld, so this is a Phase I

1 facility. Doesn't that mean if they comply with the Phase
2 I requirements, that they're okay?

3 MR. SANDERS: No. That's the short answer.
4 First, it's not clear whether this is a Phase I facility
5 or not. I think --

6 JUDGE BOLLWERK: Maybe they're going to tell us
7 that. I don't know.

8 MR. SANDERS: Well, in the ER, they say it's a
9 Phase II facility, and that's because --

10 JUDGE BOLLWERK: I'm not sure about that, but
11 okay.

12 MR. SANDERS: I think that's right. But we'll
13 let them tell us about that. I think that the way the EPA
14 looks at what's an existing and what's a new facility,
15 this would be a close call in my opinion, because their
16 standard is something like if you add new -- I mean, they
17 use as an example an electric generating plant, and they
18 say adding new units to a current electric generating
19 facility is -- would be Phase II, would be an existing
20 facility.

21 But they just use that as an example, and I
22 think you could argue it one way or the other. But, now,
23 to get to the point. If they comply with what EPA says is
24 all right for new facilities, Phase I -- and that's a
25 closed-loop system -- then our argument is you still need

1 to consider the impacts, that a general rulemaking that
2 says, best technology available is the closed-loop system,
3 that does not answer the question of what will the impacts
4 to the environment be of building that system. That's the
5 NEPA question.

6 The mere fact that it complies with what EPA
7 considers to be acceptable performance standards doesn't
8 tell you anything about the impacts, and in fact, the
9 Commission's guidance bears that out. NUREG 1555 -- and
10 we cite this on page 12 of our reply brief. In fact,
11 NUREG 1555 has the exact same language over and over and
12 over again, and we have a lengthy string cite in our reply
13 brief to all of those cases or all of those citations.

14 And it says, Compliance with standards and
15 requirements for the Clean Water Act is not a substitute
16 and does not negate the requirements for NRC to weigh the
17 environmental impacts of the proposed action. I think
18 that's the answer to the question right there.

19 "When no such assessment of aquatic is
20 available from the permitting authority, the NRC will
21 establish its own impact determination." Well, again,
22 that's the answer right there. The cases cited by
23 Southern in their response -- New England Coalition was a
24 case where EPA had actually done the exact same
25 environmental analysis of the impacts in issuing a permit,

1 and therefore, the Court said, There's no sense in making
2 NRC go through the same, exact motion.

3 Here EPA hasn't done those studies. Again,
4 it's a difference between general regulation and a site-
5 specific permitting decision.

6 JUDGE BOLLWERK: So you're saying as the
7 standard review plan suggests that there is a permit, then
8 that may well end the discussion, but there isn't a permit
9 here. Therefore, the discussion must go on.

10 MR. SANDERS: I think that's correct. I mean,
11 there would be at least some -- if the EPA or the State of
12 Georgia had done that level of analysis as part of issuing
13 the permit, then it would be appropriate for NRC and the
14 Applicant in the ER to rely on that, but there hasn't been
15 that sort of study here. Instead, there's been just a
16 rulemaking, and all that the ER does is cite to that
17 rulemaking and say, EPA, we're going to comply with
18 performance standards. That doesn't answer the question.

19 JUDGE BOLLWERK: All right. Any other
20 questions from the Board at this point?

21 (No response.)

22 JUDGE BOLLWERK: All right. Thank you, sir.
23 We'll just move on to the Applicant then.

24 MR. MOORE: Thank you, Your Honor. Grady Moore
25 for Southern Nuclear on contention 1.2.

1 First, I think we ought to remember exactly
2 what the contention says. It says that there is a failure
3 to consider or identify impacts from the cooling system's
4 intake structure or discharge system. And then we've
5 heard, I think, three points -- that's at least how I
6 categorized them -- that fall under the category of the
7 basis for that contention or in the reply.

8 That's this discussion of 316(b), best
9 available technology; there was a reference to Dr. Young's
10 declaration; and also a similar request to what we've been
11 discussing earlier this morning about a need in the
12 Petitioners' view for more evaluation and more study. I'm
13 going to get all those, but I want to start by just
14 showing that the environmental report does expressly
15 address and analyze impacts from the cooling system and
16 does not just say, We're going to comply with 316(b).

17 If you'll follow on the screen here, there's
18 a -- just a blow-up of the beginning of this discussion.
19 It's entitled, in fact, Cooling System Impacts; then
20 following the subtitles from the intake system to the
21 aquatic ecosystem. So here is a specific section on
22 impacts. And if you'll move on down, Casey, we can see
23 that the same is true for the other aspect of this
24 contention, not just intake structure but the discharge
25 system.

1 So here cooling system impacts, discharge
2 system, and then a couple pages down, aquatic ecosystem
3 effects. So the environmental report clearly contains
4 that analysis. Now, the basis for the most part continues
5 to use words like, There's no discussion, there's no
6 analysis provided, and it's here.

7 Turning to the 316(b) argument, this is really
8 a straw man, and I think we can clear this up, I hope,
9 pretty easily. Nowhere in here does the environmental
10 report say that in lieu of analysis, we're just going to
11 say that Southern Nuclear is going to comply with 316(b).
12 Instead, instead of trying to use 316(b) as some legal
13 shield from having to perform an analysis, we agree that
14 an analysis is required, and one is provided.

15 Now, that analysis does reference EPA's own
16 analysis of intake system, intake structure impacts, which
17 they went to great length to analyze in making their
18 rulemaking. So, in essence, the environmental report uses
19 EPA's approach to 316(b), as it would any other
20 environmental or scientific study on this matter.

21 We've heard that the discussion in here doesn't
22 regurgitate all that data that's provided in EPA's
23 underlying analysis, but that's just not required.
24 Instead, what's required is a summary discussion, which is
25 provided in the ER, which sets out why the impacts, which

1 have been analyzed, are what the ER concludes they are
2 going to be. So we've got an analysis. It points to
3 316(b) as a source of data.

4 And I'll point out. It's a major source of
5 data. There's no argument about that, because 316(b) that
6 harsh portion of the Clean Water Act, is about intake
7 structure impacts on aquatic NEPA systems. In the
8 petition they say we've mistakenly relied on that in some
9 way, but in our view, it would be a mistake not to have
10 looked directly at what EPA says on the matter. This is
11 one of the documents -- this is EPA's technical document
12 on development of these rules. They have another one for
13 Phase I that looks very similar.

14 So to say that there's no data to support the
15 analysis in the ER is just not accurate. The conclusion
16 reached in the ER is not just, We're going to comply with
17 316(b). It is the impacts will be small. They relied
18 upon -- in the ER, they relied upon not just 316(b), but
19 also the Academy of Sciences report that we heard a little
20 bit earlier about, and that gives me an opportunity to
21 point out that -- I guess, answer a question, I think,
22 came up during that discussion.

23 You'll remember there was some question about
24 whether that was water quality data only. The answer is,
25 no, it's not. The figure that was used up there is from

1 the section on water quality data, and that just was a
2 clear figure to show, but it is also on aquatic biology.
3 And in collecting their data, they put a screen all the
4 way across the river. This river's a couple hundred yards
5 wide at that point, so -- and that data was relied on in
6 estimating and confirming entrainment impacts in the
7 analysis in the ER.

8 Moving to the Riverkeeper case and the Phase I
9 and Phase II, we can take care of that quickly, I believe.
10 Riverkeeper's just not very relevant to this discussion.
11 It does remand portions of EPA's 316(b) rule, but what it
12 doesn't do at all is undermine the efficacy of closed-
13 cycle cooling, which is the proposed technology here. It
14 doesn't undermine all the science that EPA relied on in
15 analyzing that technology.

16 What it talks about is EPA's analysis of
17 alternative technologies like some screening and
18 restocking fish as an alternative to protecting habitat.
19 That's not just at issue here.

20 And similarly with Phase I and Phase II,
21 closed-cycle cooling would comply with either one, and
22 therefore, the same analysis that EPA has done on that
23 technology would apply in either event, so although there
24 is some debate going on about whether Phase I or Phase II
25 might apply, both those roads lead the same place in this case.

1 Turning now to their reliance on Young, I think
2 the first thing that must be noticed in reading the
3 petition is that in the intake structure portion, there's
4 no reference or citation to Dr. Young's declaration at
5 all. There's no citation to the ER either. There's no
6 citation to law either. It is attached, and the staff was
7 willing to sort of read it into the petition, but that's
8 not appropriate, and it doesn't comply with Board's ruling
9 on how to use expert opinion.

10 Experts have to -- you have to explain why it
11 is you're relying on an expert testimony. This is not
12 just some idle requirement. Excuse me. It's a
13 substantive necessity in order to really focus what the
14 dispute is. Otherwise, you end up with a situation like
15 this. If you blow up figure 12, this is not cited by the
16 Petitioners in their petition, but it's attached.

17 Here Dr. Young says the assumption of uniform
18 distribution in the drift community is invalid. And he
19 goes to explain why that may be so. But the petition
20 offered no explanation of how this is relevant or how it's
21 material, and in fact, if we go on to the report, the
22 environmental report makes the same statement, not that
23 the assumption is invalid, but that, yes, it's true that
24 sometimes uniformity in the drift community is not
25 accurate at every location, and it identifies some of the

1 very same factors that Dr. Young has pointed out.

2 But it goes further to say that the assumption
3 of uniformity makes the analysis conservative. In other
4 words, the assumption of uniformity bounds and overstates
5 probably the impacts of the intake structure. Now,
6 there's nothing in the petition that raises any
7 disagreement with that assessment, and that's the burden
8 of the Petitioners to say. They've pointed out something
9 that apparently we all agree with, and they haven't
10 explained why they're relying on that.

11 JUDGE TRIKOUROS: Well, I don't necessarily
12 know that I agree with that. Uniformity is conservative?
13 The assumption of uniformity is conservative?

14 MR. MOORE: Yes. Dr. Young's -- and I can --
15 if you want real technical detail on that, we can get it.
16 But my understanding is and Dr. Young, the Petitioners'
17 expert, says that a number of things that might make it
18 disuniform include that some of the drift community will
19 attach to larger objects. Some of the drift community
20 will sink or float, such that right where the structure
21 is, there may be less than a uniform distribution. And in
22 any event, it's the conclusion in the ER that's just not
23 disputed, that that assumption is conservative. There's
24 no dispute there.

25 JUDGE TRIKOUROS: Well, I don't know. The

1 conversation that we had just a few -- an hour ago on EC-
2 1.1 asked the question regarding uniformity, and the
3 answer was, yes, we believe there's uniformity, but -- or
4 not specifically the word "uniformity," but sort of a
5 general understanding that the baseline is sort of
6 homogeneous. But what's important is the site vicinity,
7 and that was the whole conversation.

8 So -- and I understood the staff as being on
9 that side as well, saying that the site vicinity
10 information was important, so your statement that
11 uniformity is conservative implies that all you need to do
12 is prove uniformity; you never to do anything site-
13 specific.

14 MR. MOORE: Well, I think that my statement
15 that -- repeating what the ER says, that this assumption
16 is conservative, deals specifically with the drift
17 community, and that's a specific sub-piece of the
18 homogeneity discussion you were having earlier. And in
19 any event, it's their burden to dispute it with some
20 evidence, and they haven't done that.

21 Everything else that we can gather out of
22 Young's statement is essentially conclusory, calling for
23 more study or using conditional statements like, There
24 might be an impact, or there could be an impact, and that
25 just doesn't satisfy the Commission's or the Board's

1 precedent on admissibility.

2 Let's turn quickly to the discharge system,
3 which is the other half of their contention. First, I
4 didn't hear anything -- there wasn't anything in the
5 reply, there wasn't anything that I heard directly
6 regarding the discharge of the chemical constituents. I
7 think we'll stand on our answer on that. We pointed
8 directly to where we provide the kind of information that
9 they say wasn't in the ER.

10 And with regard to the thermal discharge, here
11 at least they do cite to the declaration they attached.
12 They cite to two-and-a-half pages of it, but there's no
13 discussion provided in it again, so we're left to guess
14 exactly how they're using that declaration to dispute the
15 impacts that I showed you, go on several pages of impacts
16 from the thermal discharge.

17 And so without any understanding of how Young's
18 creating some material dispute, it's not clear what we
19 adjudicate. I want to point out something specific again
20 about that, that since they don't explain it, we're left
21 to sort of guess. Let's back up a page, paragraph 18.
22 Here's a paragraph that's cited to generically.

23 This paragraph specifically is not identified
24 or called out, but it's among the two-and-a-half pages
25 that are cited to, where it says that a worst-case

1 scenario of the 7Q10 flow should be analyzed.

2 JUDGE TRIKOUROS: Excuse me. It would be
3 helpful -- we're going to have to go back and read the
4 transcript, and it would be really helpful if you could
5 just state in words where that is, you know, what page and
6 paragraph.

7 MR. MOORE: Yes. Thank you. I apologize.
8 This is paragraph 18 --

9 JUDGE TRIKOUROS: Well, I understand --

10 MR. MOORE: -- of the Young declaration, which
11 is attached as a tab to the petition, page 8 out of 11.
12 It also has a pagination, for the record.

13 If you'll turn to the ER, please, Casey, 7Q10
14 flows were considered in the analysis, and that's directly
15 pointed out. This page, 5.3-2, and it's a middle
16 paragraph here I'm highlighting that, up near the top,
17 points out that we used more conservative 7Q10 flows. So
18 we're not sure exactly how they're using the Young
19 declaration to make a specific and identified statement of
20 dispute, and it's not up to us to try to create a dispute
21 or figure out for them exactly how they're relying on this
22 declaration.

23 The last thing I would get to here, they have
24 also said that there's no cumulative analysis. There
25 clearly is. There's a section that's titled, Cumulative

1 Impact of Operations. It involves an analysis of a
2 combination of the existing heat plume in with the new
3 proposed plume. I think you can highlight it right there.
4 And, again, let me give you the page number for that.
5 It's 10.5-2.

6 So the items that they say are missing from the
7 ER, we think they're here. To the extent they're saying
8 that we should just have done more study, we've heard that
9 discussion. NEPA doesn't require a comprehensive
10 discussion of data. It requires a comprehension
11 discussion of the impacts, and that is what's provided
12 here. There's a high burden on the Petitioners to come
13 forward with some evidence or law that clearly disputes
14 the analysis.

15 They haven't disputed the data. They're just
16 saying, Where is the data. Well, it's referenced
17 throughout this document, and the job of the ER is to
18 summarize that information in a way that reaches a
19 conclusion that supported about what the impacts are going
20 to be.

21 JUDGE TRIKOUROS: Have you ever -- has the
22 therma plume ever been measured of the existing discharge?

23 MR. MOORE: It's been modeled. It's a very
24 small plume. It's about the size of a small bedroom.

25 JUDGE TRIKOUROS: I understand that you used

1 core mix to --

2 MR. MOORE: Yes.

3 JUDGE TRIKOUROS: -- evaluate it, but I've
4 spent a lot of time with such computer codes, and they
5 require benchmarking greatly in order to be believable and
6 trustworthy. You're probably going to tell me that core
7 mix has been well benchmarked, which is true.

8 MR. MOORE: Yes. I probably will.

9 JUDGE TRIKOUROS: But it has never been
10 benchmarked against the Vogtle discharge. Is that --
11 that's a correct statement?

12 MR. MOORE: I think that's correct. I'll point
13 out that there's actually no dispute in front of the Board
14 about whether the core mix model is operating properly
15 here.

16 JUDGE TRIKOUROS: I understand.

17 MR. MOORE: And, in fact, it's my understanding
18 that this plume is so small, like I said about the size of
19 a small bedroom, in the Savannah River. I think with the
20 three dimensions of that, that would actually be hard to
21 field measure. It would be difficult to do, but there is
22 certainly analysis of the existing plume that's referenced
23 and addressed in the ER, and we don't need to repeat the
24 whole discussion about what type of data that has to be,
25 but we certainly think it's sufficient and meets our

1 obligations, and Petitioners haven't raised an issue that
2 would make it admissible.

3 JUDGE BOLLWERK: Counsel for Petitioner
4 suggested this is a Phase II facility.

5 MR. MOORE: Excuse me?

6 JUDGE BOLLWERK: He suggested this is a Phase
7 II facility.

8 MR. MOORE: Yes.

9 JUDGE BOLLWERK: Is it or isn't it?

10 MR. MOORE: Yes.

11 JUDGE BOLLWERK: It is a Phase II.

12 MR. MOORE: We believe it's a Phase II
13 facility, that we agree that there's discussion about how
14 to interpret that crossover between Phase I and Phase II,
15 and where this facility may ultimately end up, it might be
16 ultimately designated Phase I, but that, we don't think,
17 has any germaneness to the issue here, because under
18 either phase, we would be pointing to the same data about
19 closed-cycle cooling in order to support our analysis of
20 impacts.

21 JUDGE BOLLWERK: And when you say it might
22 ultimately be designated a Phase I, would EPA do it?
23 Who -- I mean, don't you --

24 MR. MOORE: Yes.

25 JUDGE BOLLWERK: -- have to --

1 MR. MOORE: You go to the State of Georgia to
2 get an NPES permit, and in order to obtain that permit,
3 the permitting agency would either make you comply with
4 Phase I or Phase II, and there might be future argument
5 about which phase this site has to go under, but either
6 way --

7 JUDGE TRIKOUROS: Phase I is more stringent,
8 isn't it?

9 MR. MOORE: Phase I, yes, is more stringent. I
10 mean, the very short answer to that would be yes, but even
11 though this is a Phase II facility, we believe it
12 complies -- would comply with Phase I, both on the
13 technical matter and also on the analysis piece, so -- on
14 the track I.

15 JUDGE TRIKOUROS: Do you have any data at all
16 on the existing intake and discharge? For example, the
17 Petitioner indicated that there's no impingement and
18 entrainment data at all. Is there any other data? Is
19 there -- so there's no thermal data, as we've just
20 determined. Is there any data associated with approach
21 velocities or anything along those lines? Is there any
22 data at all on the existing plant?

23 MR. MOORE: Yes. There is. First of all, the
24 existing intake structure I'm not aware has been subjected
25 to a peer-review, published study on impingement and

1 entrainment, but the site does have a lot of operational
2 experience with that device, and as has been explained to
3 me, they have a rotating screen in front of that intake to
4 keep it clear, and they have to clear off that screen, and
5 there's an automated device that turns that screen like a
6 belt, and anything that comes off the screen is collected
7 in a basin.

8 And then that basin has to be emptied so that
9 it doesn't overflow, and that basin fills up about once a
10 year. That basin's not very big, about eight feet. A
11 basket. It's a basket. And so there is a lot of
12 experience with whether things are impinging on that
13 structure which supports, in the view of Southern Nuclear,
14 the analysis that EPA's gone through that shows that this
15 type of system has very small impact. And so even though
16 that's not a peer-reviewed study, it's certainly data that
17 we've looked to, to confirm what we found elsewhere.

18 JUDGE TRIKOUROS: And you believe it's
19 sufficient information to perform a cumulative impacts
20 analysis?

21 MR. MOORE: We do, certainly in light of a
22 preexisting environmental impact statement on this issue
23 that you're entitled to rely on under NRC guidance and in
24 light of EPA's very lengthy analysis on this very type of
25 structure and the impacts that it would have, and just

1 confirming that with our own experience with the existing
2 structure, we believe that's sufficient.

3 JUDGE BOLLWERK: All right. And just so it's
4 clear in my mind again, with respect to the staff's
5 standard review plan, which is NUREG 1555 on page 5.3.1.2-
6 5, under subpart 3, it talks about review procedures. It
7 basically says if you don't have -- if you have a current
8 NPDES permit with a 316(b) determination, then you don't
9 have to go any further, but if you don't, you go to step
10 2, and step 2 has an analysis that has to be done. And
11 what you're saying is that what you have put into the
12 environmental report complies with that analysis, if
13 I'm --

14 MR. MOORE: Yes. That's right.

15 JUDGE BOLLWERK: Okay.

16 MR. MOORE: And we're saying that we have
17 looked to EPA's work under 316(b) to inform that analysis.

18 JUDGE BOLLWERK: So essentially that large
19 document you have in front of you, that I'm looking at now
20 with --

21 MR. MOORE: This is a reference. Yes.

22 JUDGE BOLLWERK: All right. And that, in part,
23 is what you would rely on to say that you've met the
24 standards, the additional analysis required under the
25 standard review plan.

1 MR. MOORE: Yes, sir. And let me get -- this
2 is called the technical development -- the one we're
3 looking at, technical development document for proposed
4 Section 316(b), Phase II existing facilities rule. This
5 is referenced in the Federal Register as the technical
6 document supporting EPA's analysis. There's a final
7 technical document, too, that I'm not pulling out here,
8 but it looks similar, about an inch and a half thick, it
9 looks like.

10 JUDGE BOLLWERK: All right. Anything further
11 from either of the Judges? No?

12 All right. Let's turn to the staff. Thank you
13 very much.

14 MS. POOLE: Thank you, Your Honors. Just a
15 couple of points. First I was going to briefly address
16 the 316(b) matter, but it's been pretty well discussed. I
17 don't need to say too much more, and that is, as the Board
18 just pointed out, under standard review plan Section
19 5.3.1.2, because there's no 316(b) determination now, the
20 staff will go on to prepare an impact assessment
21 independently of that.

22 The Applicants pointed out in their answer also
23 analogizing to the Yellow Creek matter and looking at
24 51.71, 10 CFR 51.71, that it is true that the NRC is
25 precluded from going into EPA's determinations on water

1 quality and matters under its jurisdiction, but it does
2 not prohibit us from performing our NEPA obligations to
3 assess impacts, and so we continue to do that.

4 As for the case that was provided as
5 supplemental authority, for those reasons, we don't think
6 the case is particularly relevant to the review that we're
7 going to perform here or to the admissibility of this
8 contention.

9 I would comment on a point raised by the
10 Applicant which is it is true in its discussion of
11 impingement and entrainment, in particular, the petition
12 did not specifically reference the Young declaration.
13 When the staff -- and we thought about that. When the
14 staff looked at the petition and its exhibits as a whole,
15 we didn't feel it was appropriate to ignore what was
16 there, so we looked at it as a whole, and for that reason,
17 as noted in our papers, we don't challenge the
18 admissibility of the discussion of impingement and
19 entrainment.

20 We defined the contention by its bases, which
21 talks about adequacy of the ER and not just omissions, and
22 that's how we looked at the contention as presented and as
23 supported by the Young affidavit, and that was primarily
24 the basis for the staff's determination in its answer.

25 And those are the only points I would make, but

1 we'll respond to any questions the Board has.

2 JUDGE BOLLWERK: Anything?

3 (No response.)

4 JUDGE BOLLWERK: All right. The staff's RAIs
5 did relate to this as well. You had one, but you just
6 simply asked for additional analysis, I take it. Right?

7 MS. POOLE: That's correct. We asked that the
8 Applicant provide results of any analyses of actual
9 entrainment and impingement estimates based on the
10 existing operations of units I and II for the past 20
11 years. That was -- the number of that is

12 JUDGE BOLLWERK: That's E-5.3-2.

13 MS. POOLE: Thank you, Judge Bollwerk. We have
14 received a response to that RAI.

15 JUDGE BOLLWERK: All right. Any other
16 questions from the Board?

17 (No response.)

18 JUDGE BOLLWERK: All right. Then do
19 Petitioners have anything they want to say further at this
20 point?

21 MR. SANDERS: Just one or two points. First,
22 the relying on EPA's technical reference document that was
23 cited in the Federal Register in conjunction with the 2001
24 rulemaking, that's a little tenuous. If there's -- you
25 know, at some point, the ER has to actually include

1 information and not just cite to other places. And, yes.
2 There is a heavy burden on the Petitioners to do their
3 homework in stating their contentions.

4 But to assume that a document that's not cited
5 in the ER at all that is a reference to a Federal Register
6 notice that also -- I can't say for certain, but I do not
7 believe that Federal Register notice was ever cited in the
8 ER. It puts too much of a burden on us. That's the first
9 point.

10 Secondly, just to hit on this Riverkeeper's
11 case, I think we are more or less in agreement with what
12 was said with everybody -- what everybody else said, that
13 that Riverkeeper case does not rule on the precise issue
14 of which type of cooling system is better and which is
15 worse. And instead, as I said in my opening statement,
16 the main thing of interest about that case is just how
17 difficult it is for EPA and the Courts to sort out exactly
18 what that standard of best technology available really
19 means.

20 So to simply say, as Southern Company did in
21 their answer, that EPA has determined, through notice and
22 comment in rulemaking, that closed-cycle cooling system is
23 the best technology overstates the case a little bit. So
24 that's the main reason that we brought the Riverkeeper
25 case to your attention.

1 And it also illustrates that the EPA's
2 regulations don't answer the question of what the
3 environmental impacts would be, and as the staff pointed
4 out, the NRC has an independent duty to evaluate those
5 impacts, and if there was a permit out there, Clean Water
6 Act permit out there, the Board would and the staff would
7 be entitled to rely on that, but to simply rely on EPA's
8 rulemaking, which applies generally to the whole country
9 as opposed to the specific site, is not in compliance with
10 the Board's regulations.

11 And that also, again, leads to what the ER does.
12 cite is the EPA's discussion in the Federal Register for
13 the Phase I rule, discussing dry cooling and closed-loop
14 systems, and it says something like, Dry cooling isn't
15 appropriate except where there's -- except in places where
16 there's sensitive species present. Well, that's exactly
17 what we have here. We've got listed species. We've got
18 important species, as NRC describes them.

19 Now, that doesn't mean that dry cooling must be
20 used. I want to be clear on that, and actually this is
21 getting into contention 1.3, so I will stop after this one
22 sentence, which is it does -- the mere fact that there are
23 sensitive species around doesn't mean that dry cooling is
24 required and that closed-circuit cooling is inappropriate.
25 Instead, it means that it must be studied and evaluated,

1 and that's what we find missing here.

2 Finally, we'll just take a quick look at the
3 exhibits or the handouts that Southern just put up on the
4 board. Section 5.3 is the cooling system impacts.
5 5.3.1.1 has a description of the physical impacts, and
6 it's two paragraphs long, and at the very end, the
7 conclusion is, "The cooling water impact system proposed
8 for the new units will be in compliance with 316(b) of the
9 Clean Water Act by virtue of the closed-cycle design which
10 incorporates these measures to mitigate impacts on aquatic
11 bodies."

12 It seems to me that they're saying, We're going
13 to comply with 316(b), and therefore, no need to go much
14 further. Once again, we get on to 5.3.2, aquatic
15 ecosystems, again discussing the rulemaking for Phase II,
16 and then it says, "Power plants with closed-cycle
17 recirculating cooling systems, such as the systems
18 proposed for the new units, meet the rule's performance
19 standards, because they are 'deemed to satisfy any
20 applicable impingement mortality and entrainment standards
21 for all water bodies.'

22 "The design of the new cooling water system
23 will be compliant with EPA's regulations for cooling water
24 intake structures, and by extension, represents best
25 available technology for reducing impacts to aquatic

1 communities."

2 Again, it seems to me like they are more or
3 less mostly relying on the 316(b) standards, and there
4 isn't much else there. Go on to page 5.3-3 in conclusion
5 about the intake system. "Based on the facts that, one,
6 the proposed cooling tower base heat dissipation system
7 will, under normal circumstances, withdraw small amounts
8 of Savannah River water" -- that's one, small amounts of
9 river water -- "two, the design of the system incorporates
10 features that will reduce impingement and entrainment, and
11 three, 20 years of operating experience suggest that fish
12 populations have not been adversely affected, and,
13 therefore, the impacts will be small and do not warrant
14 mitigation."

15 Well, we're told that the small amount of water
16 will be up to 3 percent of the 7Q10 flow. That's not very
17 small. That's quite a bit of water. And that also
18 doesn't include the current structure, which operates
19 exactly the same, so that means, all told, we're talking
20 about 6 percent of the 7Q10 flow. That's not a small
21 amount of water.

22 Two, the design incorporates the features of --
23 that are designed to reduce impingement and entrainment.
24 Again, yes, true, it is designed to reduce impingement and
25 entrainment, but nothing -- no estimate of what the level

1 of entrainment and impingement will be. It might be
2 reduced, but it still -- it's not eliminated.

3 And, three, 20 years of operating experience
4 suggests that the fish populations have not been adversely
5 affected. Well, that -- we're told that there's a bucket
6 that collects stuff from the filters or the screens.
7 We're told here in this hearing. It doesn't appear in the
8 ER... No information about how often the screens are
9 cleared, what they find in those screens, what species
10 have been impacted, whether those are rare species or
11 common species, whether they're endangered species, just
12 nothing. We just don't have that information, and we're
13 told that there hasn't been any studies.

14 And also somewhere else in this ER, we're told
15 that the State of Georgia doesn't require such studies on
16 the current intake, and that Southern expects the same
17 non-requirement on the new intake structures.

18 Then we go on to Section 10.5, cumulative
19 impacts. 10.5-1, this section discusses cumulative
20 adverse impacts to the region's environment that could
21 result from construction and operation of the two new
22 plants. And if you go on, you will see that it quotes the
23 Council of Environmental Quality regulation, 40 CFR
24 1508.7, saying, You must consider past, present and
25 reasonably foreseeable future actions.

1 However, if you look at this entire discussion,
2 it is entirely limited to current operations at Plant
3 Vogtle. We don't have a discussion of the operations
4 upstream and downstream -- well, I should -- let me -- I'm
5 overstating the case. Let me retract that, because I do
6 see there are some, but it is not what you would call a
7 conclusive -- a complete discussion.

8 So, for example, in other parts of the ER, in
9 the front of the ER at the site description, the existing
10 facilities, there's discussions of, say, upstream, the
11 reservoirs and stuff, but there is no cumulative impact
12 analysis that includes all of these impacts. Instead,
13 it's, Here's the cumulative impacts of operating the
14 intake and discharge structure, but we don't have, how
15 does it do those cumulative impacts combined with the
16 reservoirs upstream impact migratory species.

17 So it's not -- that cumulative impact analysis
18 is selective and does not include all of the past, present
19 and reasonably future impacts that it needs to.

20 JUDGE BOLLWERK: Anything from either of the
21 board members at this point?

22 (No response.)

23 JUDGE BOLLWERK: All right. Thank you. Let's
24 then go on and move on to environmental contention 1.3.
25 This is the contention regarding environmental report

1 alternatives, that their discussion fails to address
2 aquatic species impact.

3 And it reads, "The environmental report fails
4 to satisfy 10 Code of Federal Regulations Section
5 51.45(b)(3) because it fails to address the impacts to
6 aquatic species in its discussion of alternatives. In
7 particular, the environmental report's discussion of the
8 no-action alternative and of alternative cooling
9 technologies fails to consider environmental and economic
10 benefits of avoiding construction of the proposed cooling
11 system."

12 And I will turn then to the Petitioners and see
13 what they have to say.

14 MR. SANDERS: Well, I will move very briefly on
15 this one, because I think we've already covered some of
16 the issues. There are two alternatives that involve no
17 water. One is the no-action alternative, and the other is
18 the dry-cooling alternative.

19 For the no-action, I don't want to dwell on
20 that for very long, other than to say that the discussion
21 of no-action alternative does not consider the impacts
22 avoided by not building the plant at that site, and
23 particularly as it relates to the fisheries, the species,
24 and again, this really does resolve back to our number 1
25 and number 2 contentions, in that if you don't know what's

1 there, you really don't -- can't really say very much
2 about what -- kind of stating this in double negatives.

3 You don't know what's there, so you don't know
4 what impacts are not going to occur. It's a little bit
5 convoluted, but that's the argument. More important, I
6 think, is the argument about the dry-cooling alternative,
7 which again we discussed a little bit, so I'm not going to
8 belabor the point.

9 If you look at the discussion in the ER of that
10 alternative, you will find that the contention or that the
11 discussion quotes the Federal Register, EPA's Federal
12 Register notice from the Phase I rulemaking and says, Dry
13 cooling's expensive; dry cooling doesn't have -- and,
14 therefore, we're not going to use it, and it's appropriate
15 only where there's sensitive species or when there's
16 serious water issues. And that's it.

17 I mean, that's really the extent of the
18 discussion, and then they -- and, again, this is because
19 it's -- it's a discussion of why they rejected that
20 alternative, and there isn't more complete analysis, so
21 it's not surprising that that's a very limited analysis.
22 It's kind of by design it's limited.

23 But we are saying that it's inappropriate to
24 dismiss dry cooling without more consideration, because
25 this is a situation where there are sensitive species in

1 the vicinity, and as I was saying earlier, it's not a
2 matter of dry cooling is absolutely required under the
3 Clean Water Act or dry cooling is absolutely required
4 under the Agency's regulations or NEPA or anything like
5 that.

6 All we are saying is that once you have a
7 situation where you have listed species in the area and
8 sensitive species in the area, you can't just dismiss an
9 option that will avoid all impacts, and it might be that
10 that still -- that that alternative still doesn't pan out,
11 but you have to carry that alternative forward for
12 analysis. It is a reasonable alternative, and under NEPA,
13 the Agency is required to analyze and consider all
14 reasonable alternatives before making a decision as to
15 which one is the appropriate one.

16 And I think that's about it.

17 JUDGE BOLLWERK: Questions?

18 JUDGE TRIKOUROS: Not right now.

19 JUDGE BOLLWERK: All right. Let's turn then to
20 the Applicant.

21 MR. MOORE: Grady Moore again for Southern
22 Nuclear. Thank you.

23 First of all, it's good to hear that everyone
24 agrees -- I think I heard this -- that there is at least
25 some analysis of a no-action alternative. It's a very

1 extensive one. There's an entire chapter dedicated to it,
2 so I'm not going to go into that. It sounds like we're
3 more focused on the dry-cooling aspect of this, so I'll
4 focus my reply on that.

5 I believe the Petitioners have two bases that
6 they're mixing and matching a little bit here. I'm going
7 to go into both of them. One is an allegation that
8 somehow the ER doesn't consider the benefits of dry
9 cooling. At least that's the wording I think I read and
10 heard. That's at least what the contention itself says.

11 But I think I've also discerned that there's
12 really no argument about what those benefits would be;
13 that is, they would be the absence of the impacts of the
14 proposed system. So there's no material dispute here at
15 all about what the benefits are. To the extent that the
16 contention is, you haven't considered the benefits in some
17 way, then we actually just don't even understand it,
18 because the benefits have been described by the
19 Petitioners, in fact, as the absence of the impacts.

20 And either this means that the contention is a
21 dispute about format in some way, that those -- that the
22 absence of impact should have been restated as a benefit
23 and repeated in the section on dry cooling, the screening
24 analysis for dry cooling, but there's certainly no law
25 that they've cited to to support that, and there's -- it

1 leads to no fact in dispute. We all agree what the
2 benefits are.

3 The other possibility is that they are alleging
4 that the analysis of the impacts in the first place aren't
5 sufficient, but that's what we've just been through, so
6 you certainly couldn't admit this contention for that.
7 There's a contention that deals with that, and they're
8 separate, and the contention 1.3, if that's the issue,
9 doesn't just discuss or involve contention 1.1 and 1.2.
10 It repeats it.

11 The other aspect that we're picking up, at
12 least, from their allegation is that, okay, more
13 generically than considering the benefits, which clearly
14 is done in the ER, is that the ER doesn't consider the
15 technology in some way. But, again, it's hard to figure
16 out exactly what the Petitioners are asking us to do.
17 They -- I picked up in this phrase, extremely sensitive
18 biological resource, which is used in the ER, and I'll
19 talk about that in a second.

20 But really the question here for the Board is,
21 what would we adjudicate. There's no legal standard cited
22 for what they mean by more consideration. What more
23 information do they want presented about this technology?
24 What do they mean by, give it more consideration? They've
25 disclaimed that this means in their mind, Use it, select

1 it, as the alternative, but that's really where it leads
2 me. I'm not sure what else it could mean.

3 Certainly their reference to the phrase,
4 Extremely sensitive biological resource, deserves a little
5 discussion, and I'm going to give it now. I think it's
6 helpful to know what the context of that phrase is. It
7 comes out of the Federal Register on Phase I, 316(b), and
8 in that discussion -- let me put up the Federal Register.

9 In that Federal Register, EPA analyzes dry
10 cooling and asks whether or not it should make this a
11 requirement, and they've decided not to adopt dry cooling.
12 Let me give you the citation for this. It's -- it's below
13 that top right there. Let me see if we can read the cite
14 into the record. So that's 66 Federal Register 652 and
15 82, December 18, 2001.

16 That discussion of -- EPA's discussion of dry
17 cooling is summarized in the ER, and in that discussion,
18 EPA is very plain that dry cooling is just not the kind of
19 technology that is reasonable to expect to be employed,
20 and they go to some length about the inefficiency of the
21 technology and the lack of much relative benefit over
22 closed-cycle cooling of that technology.

23 And they note, however, that there are a couple
24 of northern states where the climate is much more suitable
25 for dry cooling that have suggested dry cooling be used in

1 certain circumstances, and so in my mind, almost as a
2 matter of comedy, the EPA says, Well, it would be okay to
3 consider dry cooling in some circumstances, such as this
4 one, extremely sensitive biological resources.

5 But this is not a legal standard. There's no
6 citation that anybody's offered to suggest what that --
7 how that's supposed to apply here, so it's a description,
8 and in our case, we think our citation to the rulemaking
9 that includes this discussion of dry cooling is more than
10 sufficient to address our requirements under for
11 completing an ER on this issue.

12 I'll note that the Riverkeeper case, just to
13 make the record clear on this, really doesn't pick up dry
14 cooling much in its discussion, although it does tend to
15 endorse the EPA's finding here. The Second Circuit does
16 do that.

17 Really the obligation of the ER and its support
18 of the NRC's NEPA obligation is to disclose what the
19 relative impacts or benefits of dry cooling would be and
20 compare those to the proposed alternative, and that is
21 plainly in the ER. That is contained. It's not restated
22 again under the heading, Dry cooling, but there's just no
23 argument about what those benefits are.

24 Petitioners haven't disputed that, except as I
25 pointed out, by saying that somehow the original analysis

1 of the impacts was inadequate in their view, which means
2 that it seems to us just a repetition of contention 1.2 or
3 maybe 1.1.

4 JUDGE TRIKOUROS: I guess one might argue that
5 dry cooling, for all intents and purposes, is equivalent
6 to the no-action alternative in the sense that one might
7 not be likely to build a plant of 8 gigawatt thermal size
8 in this part of the country. I would imagine it starts
9 approaching a no-action alternative. However, having said
10 that, the whole issue is that if there are extremely
11 sensitive -- I think that's the terminology that's used --
12 extremely sensitive biological organisms, that that would
13 be the appropriate technology, which might then be the no
14 action.

15 And I think the -- what I'm hearing is that the
16 argument is that you're being asked to demonstrate that
17 there is no extremely sensitive biological organisms. How
18 would you answer that?

19 MR. MOORE: A couple things. I'd say, first of
20 all, that we're not saying that the dry-cooling option is
21 the same as the no-action alternative --

22 JUDGE TRIKOUROS: I understand that. I made --

23 MR. MOORE: -- just as a practical matter.

24 JUDGE TRIKOUROS: -- connection, just as a
25 matter of common sense perhaps.

1 MR. MOORE: Well, really what we're saying is
2 that the same -- very brief on this, is that it is the
3 same as regards impacts on aquatic resources, because they
4 have the same impact, that is, no use of water.

5 All right. The EPA does not say that if you
6 have extremely sensitive biological resources, then you
7 must use dry cooling. That's not a legal standard, and
8 just from the way you worded your question, I wanted to
9 make that plain.

10 And last is that there's no evidence, no
11 argument, no statement that is disagreed about as to what
12 would constitute a extremely sensitive biological
13 resource. We all agree about what's present in the river.
14 We all agree that there's no critical habitat designated
15 here. Whatever those may mean, the factors that might
16 ultimately go into that determination are not in dispute,
17 and it's certainly not the Board's job to make that
18 determination, so what would they be adjudicating here?
19 It's not clear to us at all.

20 JUDGE TRIKOUROS: Okay. That question of what
21 constitutes extremely sensitive biological organisms is
22 certainly a question that the Board had as well, but,
23 again, I'm not sure that it's appropriate to even get into
24 that at this point.

25 MR. MOORE: Well, we think -- I guess we would

1 say we have answered that question in the negative by
2 doing the initial screening level on dry cooling, and they
3 have come forward with no evidence or law that would upset
4 our determination on that. And that's their burden.

5 JUDGE BOLLWERK: Anything further? Judge
6 Jackson?

7 JUDGE JACKSON: No.

8 JUDGE BOLLWERK: The only thing I would point
9 out is the word "extremely" is on the front of that, just
10 not sensitive, and I've heard the word "sensitive" used
11 several times, but this is extremely sensitive, whatever
12 that means. I believe there is a definition of sensitive
13 in the reg guide, if I'm correct, but no definition of
14 extremely sensitive. I was looking for --

15 MR. MOORE: I'm not sure if there's a
16 definition or not, but I'm not sure there's any dispute
17 about what the sensitive species are. We list them in the
18 ER under that heading, so --

19 JUDGE BOLLWERK: Right. But what's an
20 extremely sensitive --

21 MR. MOORE: Well, that's right. We say there
22 aren't any.

23 JUDGE BOLLWERK: All right. Let me turn to the
24 staff then.

25 MR. CAMPBELL: Thank you, Your Honor. Tison

1 Campbell for the NRC staff. We will limit our discussion
2 to dry cooling systems as well, and in light of the
3 additional references included in the Petitioners' reply,
4 the staff believes that the admissibility of the portion
5 of this contention related to dry cooling is a close issue
6 and that when considered with the staff's position on the
7 admissibility of proposed contention 1.2, the staff
8 believes that if the Board decides to admit proposed
9 contention 1.2, a limited version of proposed contention
10 1.3 should be admitted as well.

11 The staff believes that this contention should
12 be limited to state that the ER's discussion of
13 alternative cooling technologies related to dry cooling in
14 Section 9.4 of the ER fails to consider the environmental
15 and economic benefits of dry cooling over the proposed
16 cooling system.

17 Again, the staff believes that this limited
18 proposed contention 1.3 should only be admitted if the
19 Board decides to admit proposed contention 1.2, and the
20 staff still opposes the admission of the remainder of
21 proposed contention 1.3 which addresses the Applicant's
22 discussion of the no-action alternative in general, the
23 impacts of the proposed cooling system on the robust
24 redhorse and the short-nosed sturgeon, and the Applicant's
25 analysis of other aspects of alternative cooling systems.

1 And we'll take any questions from the Board.

2 JUDGE BOLLWERK: Any questions?

3 (No response.)

4 JUDGE BOLLWERK: All right. Then let's move
5 back to the Petitioner then for rebuttal.

6 MR. SANDERS: Just quickly, NEPA requires a
7 discussion of alternatives. In fact, the CEQ calls the
8 discussion of alternatives the heart of the NEPA analysis,
9 and I'm looking for the cite. It's in the CEQ. I'll have
10 it within a moment.

11 But, anyway, the point being is that the
12 alternatives analysis is required under NEPA. That's the
13 first part. Secondly, it's required under the Agency's
14 regulations, 10 CFR 51.45(b)(3), alternative -- an
15 analysis of alternatives available for reducing or
16 avoiding environmental effects.

17 And then -- that cite for the CEQ regs is 40
18 CFR 1502.14. The heart of the environmental impact
19 statement is the assessment of alternatives. The purpose
20 of the analysis is to provide "a clear basis for choice
21 among options by decision-makers and the public."

22 The cases reveal that reasonable
23 alternatives -- that that is bound by reasonable
24 alternatives. An alternative that isn't reasonable does
25 not need to be discussed.

1 Then we go to Regulatory Guide 2.4 at 10.1, and
2 it says the range of alternatives considered in the ER
3 should emphasize those alternative station systems that
4 "appear promising in terms of environmental protection."

5 It goes on, "The Applicant should include
6 alternatives that meeting the following criteria: They
7 provide improved levels of environmental protection, and,
8 two, although not necessarily economically attractive,
9 they are based on feasible technology available to the
10 Applicant during the design stage."

11 Okay. Well, EPA looked at this in 2001,
12 several years ago, and determined that it's expensive and
13 apparently might be okay in northern states but not down
14 here in the South, and therefore, it's not necessarily
15 economically attractive, as the regulatory guide says,
16 except that the regulatory guide says that you should --
17 that they should carry forward that analysis despite the
18 fact that it's not economically attractive.

19 Now, again, I want to be very clear here. This
20 is a NEPA argument. NEPA does not require any results.
21 It only requires analysis. And all that this contention
22 is saying is that the analysis of dry cooling, which is on
23 page 9.4-2, is one paragraph, and it starts by discussing
24 the preamble to EPA's rule, and then saying that it's high
25 capital and maintenance costs and electricity costs and

1 that that's the reason why it does not warrant further
2 consideration.

3 And all this contention argues is that under
4 the NEPA standards and under the Board's standards, there
5 needs to be a little bit more analysis of the actual
6 impacts. EPA -- and they state, Dry cooling requires
7 facility to use more energy. How much more would this
8 facility need to use?

9 And carries high capital and operating costs,
10 maintenance costs, that are sufficient to pose a barrier
11 to entry into marketplace for some facilities. There's no
12 data about this facility. What would be the carrying
13 costs, the capital costs of dry cooling, compared to the
14 proposal and compared to other alternatives? And then
15 make a reasoned decision based on the discussion.

16 That's what NEPA requires, and that's what's
17 missing here.

18 JUDGE TRIKOUROS: You do consider dry cooling a
19 reasonable alternative?

20 MR. SANDERS: From what I know about it, yes,
21 sure, it's a reasonable alternative. Again, I don't claim
22 to be an engineer, and I would not -- I wouldn't want to
23 go too far down this path, but I know that in the years
24 since 2001, there have been advances in technology in
25 general, and dry cooling is being used in warm places, and

1 it may or may not be a reasonable alternative, or it may
2 or may not be an attractive alternative or the best
3 decision for Plant Vogtle, but it is certainly a
4 reasonable alternative that needs to be carried forward
5 for more discussion before it is dismissed.

6 JUDGE TRIKOUROS: Okay. I don't know what more
7 to say about that. I think that we would be -- I think
8 they would be operating on untested ground. I just want
9 to make sure that you understand that there are direct
10 reactor safety implications which have never been
11 discussed between the ability to maintain a condenser
12 vacuum and the ability to not have that reactor go through
13 rather severe event. Just when you discuss reasonable, I
14 think you need, you know, to look at the whole.

15 MR. SANDERS: If that discussion were in the
16 ER, we wouldn't be sitting here having this conversation.
17 That's my answer to that.

18 JUDGE JACKSON: You referenced that dry cooling
19 had been used in warm climates. You're not aware of any
20 nuclear power plants that use dry cooling in warm climates
21 at these kinds of power levels.

22 MR. SANDERS: No, sir. And as I said, in fact
23 dry cooling may turn out to be an impractical alternative
24 for this plant, so this is very much a NEPA contention.
25 The problem here was dismissing it without a little bit

1 more discussion and analysis. If it turns out, again,
2 that there are safety reasons that it can't happen, it
3 should say it here. Here we have one paragraph discussing
4 costs and what not, and the NUREG says don't even -- you
5 know, costs shouldn't be your main issue. It should be
6 environmental benefit.

7 JUDGE TRIKOUROS: Would it have been adequate
8 to parrot back all of the EPA -- the EPA evaluation is
9 very thorough, and it does indicate a lot of effects that
10 haven't been raised here, but would that have been
11 adequate? What would you consider adequate in that sense?

12 MR. SANDERS: As I said, there are some general
13 statements here about dry cooling carries high capital and
14 operating and maintenance costs that are sufficient to
15 pose a barrier. Okay. Well, if you're talking -- you
16 know, that's a very general statement about dry cooling.
17 How about some information about the capital and
18 maintenance costs projected for dry cooling and projected
19 for the closed-circuit cooling that they've proposed, and
20 give a basis for comparing these two alternatives.
21 That --

22 You know, so, again, it's very -- it is a
23 limited argument. It's not -- it's just that you need to
24 go a little bit further to really show that this
25 alternative doesn't meet the standard.

1 JUDGE TRIKOUROS: So you're saying, take the
2 general EPA statements like that and give them some
3 quantitative meat --

4 MR. SANDERS: Develop some data --

5 JUDGE TRIKOUROS: -- in this particular
6 submittal.

7 MR. SANDERS: Yes. Develop some data for this
8 particular plant.

9 JUDGE BOLLWERK: Did you have anything further
10 at this point?

11 MR. SANDERS: No thanks.

12 JUDGE BOLLWERK: Okay.

13 MR. MOORE: Let me --

14 JUDGE BOLLWERK: Why don't you -- I'm going to
15 go back to the staff a second. Why don't you say what you
16 want to say --

17 MR. MOORE: I'd like to interject that the
18 staff has said something different from their response, so
19 I'd like an opportunity just to say a couple of things.
20 I'll be very quick.

21 What I hear them saying is that they consider
22 this a contention of omission, but what is plain to us is
23 that the ER contains an analysis that definitely complies
24 with the screening level analysis that you're supposed to
25 use under their NUREG 1555. Petitioners are saying that

1 we haven't discussed this. They want a little bit more
2 analysis.

3 We gave this technology the amount of
4 discussion that's required by law, and we've referenced in
5 that discussion to a much more thorough discussion that
6 whether or not it quantifies dollar figures on this
7 project, it's still more than satisfactory to deal with it
8 in the way that we've dealt with it in the ER.
9 Petitioners have not cited to any law, any evidence that
10 is to the contrary of the analysis that we provide here or
11 we cite to.

12 What they're saying is that this might be more
13 reasonable than we've concluded it is, but it's their
14 burden to come forward with something that explains that,
15 and at some point, this gets to materiality argument. The
16 impacts of dry cooling, which would be the absence of the
17 impacts of the proposed system, are all agreed to, and all
18 that's left is apparently a further economic analysis, and
19 we don't think that's required under NEPA or under the
20 Commission's rules.

21 JUDGE BOLLWERK: All right. Let me go back to
22 the staff. In light of what you originally had indicated
23 this contention was not admissible, now we're hearing
24 something slightly different. Given what you've heard the
25 Petitioners say and also what the Applicant says, can you

1 give us some sense of where you -- how you see this
2 contention's admissibility?

3 MR. CAMPBELL: Yes, Your Honor. When we looked
4 at the Petitioners' reply, we evaluated it in the context
5 of 10 CFR, Section 2.309, to see if the contention was
6 admissible, and we felt that when we took into account the
7 additional references the Petitioner provided, they were
8 able to meet the standards of that section, and therefore,
9 this limited portion of the contention should be admitted.

10 JUDGE BOLLWERK: All right. And -- I'm looking
11 for it now. What particular references did you find
12 compelling? Maybe I'll ask --

13 MR. CAMPBELL: There was an additional
14 reference to Reg Guide 4.2, which the Petitioner quoted
15 earlier.

16 JUDGE BOLLWERK: Can you tell me the exact --
17 I've got 4.2 in front of you. Can you just give me the
18 page?

19 MR. CAMPBELL: Yes. Just a second. I'm
20 looking -- yes. It's at page 10.1 and on page 14 of the
21 Petitioners' response.

22 JUDGE BOLLWERK: All right. Do any of the
23 board members have any questions then about -- no? All
24 right. Anything further that the Petitioners want to add
25 at this point?

1 MR. MOORE: Should I go first, because I know
2 he's going to go last.

3 JUDGE BOLLWERK: He will definitely go last.

4 MR. MOORE: Yes. We'd just like to say that we
5 have analyzed dry cooling and we have included it in the
6 ER, and although the analysis is not as long as the
7 Petitioners would like it to be, it references other
8 analysis that is longer, and so we think we've satisfied
9 this requirement.

10 Of course, you have to conclude that it is a
11 reasonable technology in the first instance to even get to
12 the portion of this that's cited. We think we've complied
13 with that reg guide.

14 JUDGE BOLLWERK: All right. Anything further?

15 MR. SANDERS: No.

16 JUDGE BOLLWERK: All right. At this point,
17 then, we'll take our lunch break. Why don't we come back
18 at 1:30. That gives us a little over an hour. Hopefully
19 everyone can get out and find something to eat and get
20 back in that time frame. And we will start then at 1:30
21 with the contention on environmental justice.

22 (Whereupon, at 12:20 p.m., the prehearing
23 conference in the above-entitled matter was recessed, to
24 reconvene at 1:30 p.m., this same day, Tuesday, February
25 13, 2007.)

A F T E R N O O N S E S S I O N

(1:35 p.m.)

1
2
3 JUDGE BOLLWERK: Why don't we go on the record,
4 please. All right. We're back from our lunch break. We
5 have several more contentions to do this afternoon.

6 Again, for anyone that wasn't here before, this
7 is a cell phone. I'm about to turn it off. If you would
8 do the same thing, I would appreciate it or put it on
9 vibrate, and again, if your cell phone happens to ring or
10 vibrate in your pocket, you need to go have your
11 conversation outside this room. We would appreciate that.

12 All right. The next contention we have is
13 environmental contention or EC-2. It deals with
14 environmental justice, the impact on minority and low-
15 income populations. The contention -- this one's a little
16 lengthy, so bear with me. I'm going to read it.

17 The environmental report for the proposed new
18 reactors at Plant Vogtle is inadequate to satisfy the
19 National Environmental Policy Act, because it fails to
20 provide a thorough analysis of the disparate environmental
21 impacts of the project on the minority and low-income
22 communities residing in close proximity to the site.

23 The environmental report fails to consider
24 factors particular to those communities which will magnify
25 the environmental impacts of the proposed reactors in a

1 way that's both disparate and significant.

2 In particular, the environmental report fails
3 to acknowledge the widespread practice of subsistence
4 fishing in the Savannah River and the likelihood that this
5 population's intake of radionuclides and other toxic
6 substances generated by the proposed reactors will be
7 significant and disproportionate to the rates of ingestion
8 by the general population.

9 In addition, the environmental report fails to
10 address the fact that cancer rates in the minority and
11 low-income communities surrounding Plant Vogtle are
12 already higher than for the general population and,
13 therefore, that they are more vulnerable to adverse
14 impacts of additional radiological and chemical pollution
15 in the environment.

16 Finally, the environmental report fails to
17 address disparate impacts on the minority and low-income
18 communities during a radiological emergency and
19 evacuation.

20 All right. And all that being said, I'll turn
21 then to the Petitioner.

22 MR. SANDERS: Thank you. My intention for the
23 afternoon is to move through all of our contentions
24 rapidly.

25 JUDGE BOLLWERK: All right.

1 MR. SANDERS: We'll see how successful that
2 will be. This contention is -- it's really one of these
3 one-plus-one-equals-two kind of contentions. What do we
4 have to show that minority communities exist in the area?
5 We know that they are already exposed from the Savannah
6 River Site, the existing Vogtle discharge, and other
7 discharges in the area.

8 We have Southern Company's monitoring data of
9 fish, which shows that they are almost uniformly
10 contaminated with tritium, and we have peer-reviewed
11 studies showing likely disparate impacts from consumption
12 and subsistence fishing on the Savannah River. And then
13 finally we also have higher cancer rates in the area.

14 The staff takes issue with the fact that some
15 of these studies are -- were conducted at the Savannah
16 River Site or along the Savannah River Site. If you look
17 at the studies, though, that's really not a correct
18 interpretation. A lot of the data was collected from on
19 the river, from upstream of the Plant Vogtle site, just
20 downstream of Augusta, and then taking data all the way
21 downstream. This data, of course, is interviews with
22 people they encounter fishing along the river.

23 And the conclusions that we've laid out in our
24 contention more or less speak for themselves. Dr. Berger
25 in several peer-reviewed studies, shows that subsistence

1 fishing is occurring and that there are differences
2 between the different communities on how the fish are
3 eaten, and these will have some effects on the amount of
4 exposure, none of which is addressed in the ER.

5 In the LES case, the Louisiana Energy Services
6 Claiborne Enrichment Facility case -- that's 47 NRC 77,
7 1988 -- the Commission says, "Admissible contentions in
8 this area are those which allege, with requisite
9 documentary basis and support as required by 10 CFR Part
10 2, that the proposed action will have a significant
11 adverse effect on the physical or human environment that
12 were not considered because of the impacts to the
13 community were not adequately evaluated."

14 I believe we've met that standard here. We've
15 identified a community. We've showed how the impacts to
16 this community are not adequately evaluated. We've
17 included documentary evidence to support that, and we
18 have -- and that's it. We've made the contention. I'm
19 not sure what more we need to do.

20 As I said, the staff takes issue with the fact
21 that some of these studies were done adjacent to Savannah
22 River Site or perhaps they think that the impacts are
23 associated with Savannah River Site. Now, let's take that
24 as -- for a minute, let's take that as true. All of the
25 impacts that Dr. Berger -- assume for a minute all of the

1 impacts that Dr. Berger discusses in her report come from
2 Savannah River Site and nothing but Savannah River Site.

3 Even if that were true, that still doesn't mean
4 that the NRC isn't required under NEPA to consider the
5 cumulative impacts of the new discharges with the existing
6 Savannah River Site. So it's really -- not only is the
7 staff incorrect. It is also irrelevant that Savannah
8 River's -- in terms of impacts, it's really not relevant
9 that the studies were or may have been done on the
10 Savannah River Site. And, of course, the Savannah River
11 Site is directly across the river from Plant Vogtle.

12 JUDGE JACKSON: Excuse me.

13 MR. SANDERS: Yes, sir.

14 JUDGE JACKSON: I have one question for you.
15 The -- your assertion is, your contention is that there's
16 a disparate impact.

17 MR. SANDERS: Right.

18 JUDGE JACKSON: And I was trying to make sure I
19 understood how you substantiate that. The information in
20 your exhibit with respect to Joanna Berger's paper
21 indicates a population which is a representative
22 population. The percentages were essentially
23 representative of the percentages in much of Georgia, a
24 slight variation but not a lot, and so it looked like it
25 was not disparate impact but kind of a, you know,

1 representative impact on the community at large. That's
2 one question I have.

3 The other is associated with the connection to
4 the environmental report and that paper in which that
5 paper mentions the mean fish consumption of that
6 representative group, and the mean numbers are actually
7 lower than the fish consumption rates that are reported to
8 have been analyzed in the environmental report.

9 So, in essence, it looked -- on first glance,
10 it looked to me as if the analysis of the environmental
11 report on a mean basis encompassed the data in the Berger
12 paper. So --

13 MR. SANDERS: Well, starting with the second --
14 or starting with the first question, I think the disparate
15 impact we are alleging is based on a couple of things.
16 One is socioeconomic. We're not -- Dr. Berger lays out
17 data about the racial make-up of the people that she
18 interviewed, but the allegation is that -- or one of the
19 allegations is that there is -- it's poor people who are
20 practicing subsistence fishing. Just lay it out like
21 that. And, you know, so this is a disparate impact on
22 poor people.

23 Now, secondly, Dr. Berger's studies, one of
24 them, at least, when she's studying the consumption rates
25 and differences in food preparation shows that there is a

1 potential disparate racial impact based on cultural fish
2 preparation methods. So that's the first piece.

3 The second piece, I'm actually also more
4 troubled by your second question which seems to be that
5 the NRC has already come up with a methodology for, you
6 know, determining what's an acceptable dose or how to look
7 at the dose responses, and that methodology encompasses
8 much of the exposure that Dr. Berger's figures would
9 include.

10 I think the answer to that is it's a mean, so
11 there are certainly some people who are going to be
12 exposed beyond the mean, but honestly, yes, that's -- I
13 think that that is a difficulty, and I do not have much
14 more to say about that.

15 JUDGE JACKSON: Excuse me. Could I just follow
16 up on -- maybe ask the question a little differently to
17 pin it down. I'm asking these questions, because I'm
18 trying to understand the basis for this contention.

19 MR. SANDERS: Sure.

20 JUDGE JACKSON: And on page 20, for example, in
21 one of your references that you've included, it says that
22 the practice is more common among African Americans,
23 talking about subsistence fishing, and that is reference
24 15. And I guess you could help me by just showing me what
25 data you were relying on to make that contention. I

1 couldn't see any data analysis in reference 15. It's just
2 a statement that references the Berger study.

3 And then I looked at that for something that
4 would truly support this notion, and if 70 percent of the
5 fishermen along the Savannah River were white and 28
6 percent, I think, were black, it seemed like more of the
7 Savannah River fish were being likely consumed in the
8 white community, and I didn't see a disproportionate
9 number of people in the black community fishing, and I
10 thought there was also a statement in one of your
11 references that said they didn't see a big difference
12 based on income in terms of fish consumption.

13 I'm trying to put these pieces together and
14 understand how you then conclude, make the statements in
15 this contention. If you could show me the table that has
16 the data in it, then maybe I could understand that.

17 THE WITNESS: Well, I wish we had a table with
18 more data in it, and the fact of the matter is this is not
19 an issue that gets a whole lot of study. I've been
20 looking a lot for information on subsistence fishing in
21 America, in Georgia, in the Savannah Basin or just
22 anything about subsistence fishing rates in this country,
23 and it really is nearly a black hole.

24 JUDGE JACKSON: Well, I guess I would just
25 take, without looking for other information, what you've

1 given us in the references. It seemed to almost say
2 something different than this conclusion, so I'm just
3 interested how -- what's the logic that gets you from the
4 data that's here to that conclusion. If you could just
5 show me the data you're relying on and what the logic is,
6 that would be fine. You wouldn't have to go to other
7 references.

8 MR. SANDERS: Well, as I said, I kind of went
9 through. We start with the environmental report which
10 discusses the minority communities in the area, within the
11 50-mile radius, and we have no quarrel with SNC in their
12 analysis of that data. Then we -- again, relying on the
13 environmental report, there's data about the existing
14 region with existing discharges, including Savannah River
15 Site, the existing Vogtle plant, and other discharges in
16 the area.

17 Okay. Then what gets really interesting is
18 Southern Company's data, which is our Exhibit 2.1 -- now,
19 this is just one of their radiological operating reports
20 for 2005, and they report their data. And, again, just
21 kind of as an aside, it's interesting that this data
22 doesn't appear in the ER, even though Southern Company has
23 been collecting data on fish for, you know -- twice a year
24 for the operational period of the existing plant.

25 And what that limited data shows is that the

1 fish are routinely contaminated, including what they
2 discuss one bass that was -- that had a very large
3 concentration of cesium 137 that apparently threw off the
4 statistics. They say, well, no specific cause for the
5 elevated concentration in this sample was known, except
6 that it's a large-mouthed bass that are predators and
7 concentrate cesium 137.

8 JUDGE JACKSON: Well, this is, of course, a
9 different issue than I was asking about. You're not --

10 MR. SANDERS: I'm sorry.

11 JUDGE JACKSON: I was trying to get to the
12 issue of the statement that said the African American
13 community was impacted more strongly, and you have another
14 issue which is contamination, and if you want to shift to
15 that, I have a question in that area, while you're --

16 MR. SANDERS: Well, no. I think, again, my
17 final answer to that is: All we have is what's in the
18 studies that we presented to you.

19 JUDGE TRIKOUROS: The numbers that you present
20 with respect to distribution, you know, the racial
21 distribution around the plant, if you look at that
22 distribution and you look at the fishing racial
23 distribution, you find that the minority groups around the
24 plant tend to be more prudent with respect to eating fish
25 that might have cesium 137 in it than the white population

1 around the plant.

2 Seventy percent of the white population is
3 consuming those fish in large numbers, and that's a
4 smaller percentage, I believe, than the make-up around the
5 plant. So not only -- we're having trouble with trying to
6 get the word "disparate" --

7 MR. SANDERS: Right.

8 JUDGE TRIKOUROS: -- "understood" in the
9 context of what you're saying. It seems just the opposite
10 to me, that, you know, in fact, it's the low-income white
11 population that seems to have the problem more than the --

12 MR. SANDERS: Okay. I can live with that.
13 They're a minority population as well.

14 JUDGE TRIKOUROS: I understand, but the average
15 income of that population that was looked at overall is
16 about \$22,000 in annual income compared to Georgia in
17 general, which was about, I think, 27,000. We're not
18 talking about huge numbers here, so -- you know, but I'll
19 grant you that of the people fishing in the river, they do
20 seem to have a lower average income than the rest of
21 Georgia, but --

22 MR. SANDERS: And I think that you have to go
23 beyond people fishing in the river to those who fish as a
24 source of subsistence --

25 JUDGE JACKSON: Excuse me. That was my

1 question. Where in any survey -- if you could show me one
2 piece of data that addresses that. Did anyone ask if this
3 was subsistence? I couldn't find that in any of the data
4 tables.

5 MR. SANDERS: And as I said, you know, other
6 than -- I'm agreeing with you. I hate to agree, because I
7 wish it was there. The only thing that we -- I mean, I
8 noticed the exact thing that you noticed. When I was
9 looking at those studies, I see that the statements that
10 African Americans or poor people are engaged in
11 subsistence fishing, but there is no data in that report,
12 and I went and looked for data, and I couldn't find it,
13 so, you know --

14 But then what I would say to that is we have
15 the studies that talk about subsistence fishing or talk
16 about fishing on the river, and differences in eating
17 habits and income and what we have instead -- or what we
18 have on the other side is a paragraph in the environmental
19 report that reports that Southern Company asked some folks
20 about subsistence fishing, and that was it. They
21 determined that there was none.

22 JUDGE BOLLWERK: Well, it's a little more -- I
23 mean, they didn't just ask some folks. They asked --

24 MR. SANDERS: Well, they --

25 JUDGE BOLLWERK: -- government, you know -- I

1 mean, other government entities. It just wasn't -- they
2 didn't kind of go out on the street corner and take a
3 survey.

4 MR. SANDERS: They didn't go to the river
5 either.

6 JUDGE BOLLWERK: No. But they asked, in
7 theory, some government agencies that probably have some
8 reason to know something about it, I would think. Maybe
9 not.

10 MR. SANDERS: But, again, that's -- you know,
11 my frustration has been that there's so little data that
12 I'm not sure the government officials are looking for
13 subsistence fishing in the United States. It doesn't seem
14 like they are. I mean, I've gone through census data. I
15 just couldn't find it at all.

16 And when we have peer-reviewed studies talking
17 about the rates of fishing on the Savannah River and we
18 know that there's contamination, and -- to me that's
19 sufficient to raise an issue of whether -- a factual issue
20 of whether subsistence fishing is occurring and at what
21 rate, and that is -- and it's insufficient to simply ask a
22 couple -- well, ask government officials and make a
23 conclusion on that basis.

24 Again, it would be simple enough to conduct a
25 survey, you know. That's really all I could respond on

1 that unfortunately.

2 JUDGE JACKSON: Earlier you started to talk
3 about cooking methods and cesium 137 in the fish, and I
4 would like to ask a question or two that relates to some
5 of the statements in the contention. It says that the
6 level of cesium 137 increases with cooking methods, and,
7 of course, no cesium atoms are created when you cook a
8 fish. We all know that. But --

9 So it comes down to a matter of how much weight
10 do you lose when you cook the fish, and if you use as a
11 unit the number of picocuries per gram or some other unit
12 of weight, then obviously that changes. Now, I was --
13 underhinging that argument would be some evidence that
14 people do tend to eat a larger number of fish to
15 compensate from this on the difference in cooking method,
16 and I couldn't see any evidence of that, other than
17 assertion.

18 Do you have any evidence that it has to do with
19 the difference in booking method A and method B would
20 cause people to consume?

21 MR. SANDERS: Well, again, you know, I really
22 have nothing beyond what we presented in the studies.
23 Correct.

24 JUDGE JACKSON: Okay.

25 MR. SANDERS: And, I mean, Dr. Berger reports

1 ethnicity and education contribute significantly to
2 explaining variations in the number of fish meals per
3 month, serving side, and the total quantity of fish
4 consumed per year.

5 JUDGE JACKSON: But I didn't see anything in
6 there that -- for example, would big difference that that
7 study in your attachment showed was whether or not you
8 bread the fish, deep-fry it with breading or not.

9 MR. SANDERS: Uh-huh.

10 JUDGE JACKSON: And I didn't see any questions
11 that asked anyone whether or not they were breading their
12 fish, so I don't know that that argument -- I don't know
13 how that feeds back into your contention. It talks about
14 deep-frying or not, but --

15 MR. SANDERS: Yes. You're right. It says 80
16 percent of people interviewed deep-fry it. You know, my
17 answer to this is this is the sort of factual dispute that
18 should be resolved in an evidentiary hearing, not here.
19 We've presented sufficient information to create a factual
20 dispute, and that's the standard for admitting a
21 contention.

22 JUDGE JACKSON: I hear you, and I wasn't trying
23 to argue the merits. I was just trying to say: What
24 facts are you relying on? Show me some data, for example,
25 that talks about --

1 MR. SANDERS: Yes, yes.

2 JUDGE JACKSON: -- that people fish breaded --
3 or cook fish breaded or unbreaded, that there's a
4 difference. I couldn't find the facts.

5 MR. SANDERS: Yes.

6 JUDGE JACKSON: I wasn't trying to argue their
7 merits.

8 MR. SANDERS: Right, right.

9 JUDGE JACKSON: It's just: What did you rely
10 on to reach these conclusions?

11 MR. SANDERS: We relied on Dr. Berger's
12 conclusions and whatever information is in her studies,
13 and, you know, if this contention were admitted, we would
14 bring her or some other expert to discuss the methodology,
15 to give you exactly that sort of information.

16 JUDGE JACKSON: Is there any evidence in your
17 report -- I tried to look at all of these attachments, but
18 is there anything that ties the cesium 137 level to the
19 operation of the existing plants?

20 MR. SANDERS: You know, another --

21 JUDGE JACKSON: Or is it related to fallout
22 from atmospheric testing that's slowly decaying away?

23 MR. SANDERS: Yes. That's another very good
24 question actually. And, yes. I would say that that kind
25 of gets us back to the idea that even if all of the cesium

1 137 is the result of something else, that is a cumulative
2 impact when combined with the additional radiation load
3 being discharged from the plant.

4 But, again, you're the person who's got the
5 doctorate and knows a whole lot more about this stuff than
6 me, but I was also bothered by this idea that, you know,
7 it's -- the discharge from that plant is not cesium 137,
8 so it's what's the connection between the discharge and
9 these fish and impacts to people who are eating the fish?
10 That's a very good question, and we are, again, more
11 relying on simply the increased burden in the environment.

12 JUDGE JACKSON: Thank you. I just wanted to
13 understand --

14 MR. SANDERS: Right.

15 JUDGE JACKSON: -- what you were relying on and
16 what the basis of it was. Thank you.

17 JUDGE BOLLWERK: I think the response is, what
18 you saw is what you got.

19 MR. SANDERS: That's pretty much it.

20 JUDGE JACKSON: All right.

21 JUDGE TRIKOUROS: Now, the references you quote
22 also discuss mercury in the same vein as cesium 137, which
23 is not a nuclear plant but a coal plant phenomenon, which
24 might, in fact, be more severe. I don't know. I'm not an
25 expert in that.

1 The other question I had which I will also ask
2 the Applicant is that the dose numbers that are presented
3 for the two new plants, AP-1000 Westinghouse plants that
4 are the newest technology Westinghouse is selling around
5 the world, have a dose which is on a total basis 20 times
6 worse than the existing plants. Everything I understand
7 about AP-1000s would lead me to conclude that that's not
8 the case.

9 But it's extremely conservative to assume 20
10 times more dose. I'd like to understand how one gets 20
11 times more dose out of an AP-1000 than from a technology
12 that's 20 years old. But --

13 MR. SANDERS: That is really beyond my
14 expertise.

15 JUDGE TRIKOUROS: I will leave that question
16 for the Applicant perhaps.

17 JUDGE BOLLWERK: I think there are two other
18 aspects to your contention, one being the cancer rates and
19 the other one being the question of emergency planning,
20 which you haven't had a chance to address. We've been
21 asking you a lot of questions, so if you want to say
22 something about each of those points, why don't you go
23 ahead and do that now.

24 MR. SANDERS: You know what? I would prefer
25 just to rest on what we've got.

1 JUDGE BOLLWERK: Okay. All right. Very good.
2 Let me turn then to the Applicant.

3 MR. BLANTON: Stan Blanton again for Southern
4 Nuclear on this contention. I am tempted -- well, I do
5 think, with all due respect to Petitioners, what we just
6 heard is they have not supported this environmental
7 justice contention with adequate evidentiary or legal
8 support to satisfy the Commission's standards for the
9 admission of a contention.

10 Before I get -- say any more directly to Judge
11 Trikouros's question, it's my understanding -- and I'll
12 let Tom Moorer speak to this, if you want to hear more --
13 that the dose numbers for the existing units are based on
14 actual operating experience, and the dose numbers used in
15 the ER for AP-1000 are more bounding-type, worst-case kind
16 of numbers.

17 JUDGE TRIKOUROS: Makes sense to me. I just
18 wanted to hear you say it.

19 MR. MOORER: I'll be happy to expand if you'd
20 like, but, in essence, that's what it is.

21 MR. BLANTON: Yes. The calculated or expected
22 dose for 3 and 4 are expected to be about the same as 1
23 and 2.

24 JUDGE TRIKOUROS: The reason that's important
25 to me from the point of view of environmental justice is

1 that if those numbers are, indeed, more even in line with
2 the existing unit, which I have no reason to believe they
3 wouldn't be in reality, then the -- even if the analysis
4 had assumed consumption levels of fish that were higher
5 than the highest consumption reported in the Berger
6 report, the dose numbers would be significantly lower than
7 the lowest. So when you look at it that way, it just -- I
8 needed to understand, you know, the background to that.

9 MR. BLANTON: In our answer, we touched on a
10 number of the same issues that the Board has already
11 touched on in discussing the contentions, particularly
12 regarding fish consumption, and again, to the extent there
13 is an impact, it is as a result of fish consumption, not
14 just fishing. And so to the extent the Petitioner relies
15 on the Berger studies, they are relevant only to the
16 extent they provide information about fish consumption.

17 The problem with the Berger studies, in
18 addition to what we've described in our answer, is they
19 don't ask that question of the minority or low-income
20 communities in general. They --

21 JUDGE TRIKOUROS: They actually do. They
22 actually do. They do report a mean annual ingestion in
23 kilograms per year.

24 MR. BLANTON: But the survey is based on people
25 they found fishing in the river.

1 JUDGE TRIKOUROS: Right.

2 MR. BLANTON: Well, you would expect -- with
3 all due respect, you'd expect people fishing at the river
4 to eat more fish than people who don't fish, and what
5 they've not done is examined the minority community in
6 general.

7 JUDGE TRIKOUROS: That's true.

8 MR. BLANTON: And I would just point out that
9 the environmental policy statement that the Commission has
10 issued stresses that the focus should be on the minority
11 community in general and not subgroups within that
12 community.

13 Yes, sir.

14 JUDGE JACKSON: That was basically my question.
15 I didn't -- I think that's the way to frame it, and I was
16 going to ask you. My understanding is that this is an
17 evaluation of neighboring community in total, and so if
18 the demographics in the Berger study were different from
19 the demographics in the community, I'd be interested in
20 how those differences are reconciled in interpreting the
21 data.

22 But you've answered my question, and that is it
23 should be an issue that relates to the entire neighboring
24 population, not a subset that happens to fish.

25 MR. BLANTON: Certainly. I would agree totally

1 with that. That's the -- again, we rely on all of our
2 discussion of the Berger report in the answer, but I did
3 want to make that point, in addition to those points, and
4 the Board has addressed some of those other points, I
5 think, better than I could here.

6 A couple other things. The Berger reports,
7 first of all, don't -- or the data in those reports don't,
8 in our estimation, show any sort of significant
9 disproportionate difference based on income in the amount
10 of fish consumed. The cut-off line's at \$20,000 a year,
11 and you just don't see a significant difference.

12 Secondly, the income measurement used in the
13 Berger reports is a fisherman-per-fisherman assessment.
14 It doesn't contain any information one way or the other
15 about the household income of that fisherman or whether
16 that fisherman is a minor child who doesn't have any
17 income or a dependent of somebody else. There's just --
18 there's no data one way or the other about the income
19 level or whether that person, regardless of income, is a
20 member of an environmental justice community because of
21 being part of the low-income community.

22 Secondly, staying on the fishing, I do want to
23 address this issue of whether or not these reports that
24 they rely on are probative of the environmental impact of
25 the proposed action that is the subject of the ESP. What

1 these reports do is attempt to collect some information
2 about the impact of contamination in the Savannah River
3 from the Savannah River Site.

4 If you read the reports, those are the subjects
5 of the reports. What is the impact on the fishing
6 population of contamination from the Savannah River Site?
7 There is nothing, not one word in any of those reports,
8 about contamination from the existing Vogtle units and
9 certainly not from any proposed Vogtle unit, and as the
10 Board's already pointed out, the majority of the
11 discussion in those reports is on contamination resulting
12 from mercury and PCB which is the principal basis for the
13 fishing advisories issued by the States of South Carolina
14 and the -- I don't think we have one from Georgia on PCB;
15 we may have one on mercury.

16 So there's -- while we can talk about -- aside
17 from the failure of those reports to show any disparate
18 impact, they're not showing -- they're not probative of
19 any impact from this proposed action, and certainly the --
20 I think the Petitioners can see that the data they've
21 cited in the petition about effluent from the plant is not
22 probative of cesium 137 in fish or mercury or PCB or
23 anything else. So they've simply failed to satisfy their
24 burden on that issue.

25 One other point that I don't want to fail to

1 make, and Judge Jackson's already referred to the fact
2 that cesium 137 from nuclear testing is decaying. The
3 same data that the Petitioners rely on for the presence of
4 cesium 137 in fish do show a general decline in the
5 presence of the cesium 137 being measured over the life
6 span of the Vogtle units, one of the two existing Vogtle
7 units. One of the highest measurements taken occurred
8 before -- at the pre-operational phase of Vogtle Unit 1
9 and 2, and that's in the exhibit cited by the Petitioners.

10 Quickly to the other two bases. The basis that
11 deals with cancer rates in the community, the petition
12 concedes that the two types of cancers that have been
13 noticed as being slightly elevated in this community,
14 neither of which had anything to do with radiation, the
15 causes of those particular types of cancers are addressed
16 in the same health bulletin that the Petitioners cite, and
17 both of them are behavioral causes. Neither one of them
18 have anything to do with radiation.

19 In fact, that health bulletin notes -- and
20 that, I think, is Exhibit 2.7 of the petition -- notes
21 that general cancer rates in the community are about what
22 one would expect to find in any rural community. We've
23 put it on the board. That's Exhibit 2.7, page 2. They're
24 about what you would expect to see in a non-metropolitan
25 area.

1 Third, the contention regarding evacuation in
2 the event of an emergency requiring mandatory evacuation,
3 again we've addressed that in the answer. I don't need to
4 belabor it here, except to say they've completely ignored
5 the provision in the emergency plan for the evacuation of
6 individuals without transportation.

7 They've completely failed and not even tried to
8 support that contention with any evidence that minority or
9 low-income communities are disproportionately lacking in
10 the ability to evacuate in the event of a mandatory
11 evacuation, and they just haven't met the requirements
12 2.309(f) of 10 CFR with respect to this contention.

13 JUDGE BOLLWERK: All right. Anything from the
14 board members?

15 JUDGE TRIKOUROS: The existing emergency plan
16 for Vogtle units includes a provision for -- I'm asking --
17 includes a provision for transportation for people who
18 don't have automobiles and that sort of thing?

19 MR. BLANTON: Yes, sir. I'm sure it does.
20 Yes.

21 JUDGE BOLLWERK: Anything further?

22 JUDGE JACKSON: Do you have any other evidence
23 that the cancer rates aren't elevated, other than the -- I
24 guess it was Exhibit 2.7 in the petition. I think that's
25 the one you had.

1 MR. BLANTON: Do I have any other evidence that
2 they are not elevated?

3 JUDGE JACKSON: That they are not elevated,
4 that the cancer rates in this area are about --

5 MR. BLANTON: I don't know if we addressed that
6 in the ER or not, but it's not our contention. We
7 didn't --

8 JUDGE JACKSON: Right. Okay. Fair enough.

9 JUDGE BOLLWERK: Anything further?

10 (No response.)

11 JUDGE BOLLWERK: All right. Let me turn to the
12 staff then.

13 MS. POOLE: Thank you, Your Honors. Brooke
14 Poole again. Mr. Blanton made this point, but I wanted to
15 address it also because it was something that was raised
16 by the Petitioners in their reply, in response to the
17 staff's answer, and that is just to focus on the Executive
18 Order 12898 which instructs federal agencies to consider
19 environmental justice in their decision, whether a
20 proposed government action will have a disproportionately
21 high and adverse impact on minorities and low-income
22 populations.

23 Similarly, in the Commission's final policy
24 statement on environmental justice, it states -- and I
25 quote -- "Admissible contentions are those which allege,

1 in addition to meeting 10 CFR Part 2 requirements, that
2 the proposed action will have significant adverse impacts
3 on the physical human environment that were not
4 considered, because impacts to community were not
5 adequately evaluated.

6 Now, in its reply, Petitioners argue that the
7 staff's principal argument against this contention, which
8 is that the Berger reports and the other reports cited by
9 the Petitioners showed no nexus to the proposed -- new
10 proposed Vogtle Units 3 and 4, they said that argument is
11 formalistic, and the data gathered from the Savannah River
12 Site should "logically be applied to the Vogtle site
13 because of the close proximity and overlap of the two
14 sites."

15 But as was previously mentioned, the difficulty
16 the staff has with this argument is that the
17 disproportionately high and adverse impacts have to come
18 from the proposed action, which has simply not been
19 demonstrated here, and that's the basis for the staff's
20 opposition to this portion of the proposed contention.

21 That's all I had on this one, but I will take
22 board questions.

23 JUDGE BOLLWERK: You're looking thoughtful.
24 No? Nothing?

25 JUDGE TRIKOUROS: Basically you're saying the

1 plant has to be operating in order to be able to show an
2 impact.

3 MS. POOLE: The plant doesn't have to be
4 operating, but the environmental report, for example, in
5 table 3.0-1, shows .52 curies, excluding tritium, from
6 routine liquid -- liquid effluent from routine operations,
7 2,020 curies of tritium, .013 curies per gram of cesium
8 137. Those doses aren't challenged, and it has not
9 been -- the Petitioner didn't discuss how those doses
10 would affect subsistence fishing, if there is any, and how
11 that would provide an adversely high and disparate impact
12 on minority and low-income populations.

13 JUDGE BOLLWERK: All right. Anything further?
14 No?

15 MR. BLANTON: Your Honor, I have an answer to
16 Judge Jackson's question about cancer rates. I'm told
17 that the ER did cite a CDC study which addresses that --
18 or which states that cancer rates in this area are
19 actually lower than, I guess, the national -- general
20 population because of better-than-average health care in
21 this area.

22 JUDGE JACKSON: I thought I had remembered
23 reading something, but I didn't have the ER in front of me
24 right now.

25 MR. BLANTON: Your memory is better than mine

1 is, Judge.

2 JUDGE JACKSON: That's one reason I asked, so
3 thank you.

4 MR. BLANTON: I'm sorry. It discusses it,
5 doesn't cite it.

6 JUDGE BOLLWERK: It talks about it, but it
7 doesn't cite it?

8 MR. BLANTON: That's what I'm being told, Your
9 Honor.

10 JUDGE BOLLWERK: Okay.

11 JUDGE JACKSON: Thank you.

12 JUDGE BOLLWERK: All right. Any rebuttal from
13 the Petitioners?

14 MR. SANDERS: Yes. Very briefly, just to be
15 clear about Dr. Berger's studies. She sampled three
16 sections of river, upriver from the site to the Augusta
17 lock and dam and downriver from the site to Barton's
18 Landing, which is about 90 kilometers of river, so it's
19 incorrect to say that this is a study of the Savannah
20 River Site. That is just not the case.

21 Secondly, with regard to cancer rates, I do
22 recall the studies, although more or less showing no
23 unusual cancers, they do note populations around Plant
24 Vogtle have higher than average incidents of cervical
25 cancer in black woman, higher rate of esophageal cancer in

1 black men within a 50-mile radius of the Savannah River
2 Site.

3 So there is some cancer data that shows
4 something to be concerned about, though I wouldn't go too
5 far beyond what the studies say the cancer rates don't
6 appear to be abnormal, except with those two exceptions.

7 And that's about it.

8 JUDGE BOLLWERK: All right. Yes.

9 JUDGE JACKSON: Could I ask the same question
10 that I asked the Applicant and that is: How do you view
11 the environmental justice argument? Do you view it that
12 it is -- the population that you're concerned about is the
13 neighboring population and not the subset that fishes?

14 MR. SANDERS: I can't disagree that that's what
15 the Commission's guidance says. You're supposed to look
16 at the entire population, not a subsection. I would point
17 out, though, that NEPA may not -- when you have evidence
18 that there are people being exposed, regardless of whether
19 they are an environmental justice community or not,
20 there's some duty to consider that population.

21 So fisherman is not a recognized minority
22 community, though they might think they should be. They
23 perhaps -- under NEPA, when you know that there is a
24 community that is being exposed, they perhaps deserve a
25 little bit of scrutiny, though, again, though that

1 wouldn't be an environmental justice contention, so --

2 JUDGE JACKSON: Thank you.

3 JUDGE BOLLWERK: Anything further from the
4 Board?

5 (No response.)

6 JUDGE BOLLWERK: All right. Then the next
7 contention, EC-3, deals with the failure to evaluate
8 whether and in what time frames spent fuel generated by
9 proposed reactors can be safely disposed of. Again, this
10 one states that the environmental report for the Vogtle
11 ESP is deficient, because it fails to discuss the
12 environmental implications of the substantial likelihood
13 that spent fuel generated by the reactors will have to be
14 stored at the Vogtle site for more than 30 years after the
15 reactors cease to operate and perhaps indefinitely.

16 The waste competence decision does not support
17 Southern's failure to address this issue in the
18 environmental report, because it has been outdated by
19 changed circumstances and new and significant information.
20 As required by NEPA, the NRC may not permit construction
21 or operation of the new Vogtle reactors unless and until
22 it is taken into account these changed circumstances and
23 new and significant information, citing 10 CFR Section
24 51.92 and Marsh versus Oregon Natural Resources Council, a
25 Supreme Court decision from 1989.

1 Anything the Petitioners wish to say on this
2 one?

3 MR. SANDERS: Well, as the Board indicated in
4 its order, we have determined that the best course of
5 action is to petition for rulemaking, and that is
6 something that we intend to do, and particularly with the
7 Commission's recent rulings in the Entergy Vermont Yankee
8 case and the Pilgrim Nuclear case. It seems that, you
9 know, despite the fact that we disagree, the Commission
10 has spoken on this issue, and therefore, we would --

11 I would just cut to the chase and get to what
12 we request in our reply is a ruling from the Board on the
13 admissibility of Petitioners' contention if this
14 contention is dismissed on procedural grounds rather than
15 substantive grounds, and (b), a ruling retaining
16 Petitioners as parties until action on the petition for
17 rulemaking.

18 JUDGE BOLLWERK: All right. Anything the
19 Applicants want to say about that?

20 MS. SUTTON: Yes, Your Honor. There are
21 several reasons why the proposed contention should be
22 dismissed as a matter of law. We outlined these in detail
23 in our answer, but I would like to hit the high points.
24 First, pursuant to Section 2.335(a) of NRC regulations,
25 this proposed contention constitutes an impermissible

1 challenge to a Commission rule, i.e., 10 CFR Section
2 51.23.

3 Now, in their reply, Petitioners claim that
4 they are not challenging the regulation per se. Rather
5 they are challenging the ER. This claim is simply without
6 merit. By claiming that the ER complies with NRC
7 regulations, they are, in fact, challenging the
8 regulation. We need to be clear about that.

9 Second, there is extensive precedent where
10 identical contentions have been dismissed in other ESP
11 proceedings, namely those for Clinton, Grand Gulf, and
12 North Anna. And in those cases, the SLB ruled that this
13 was, in fact, impermissible pursuant to Section 2.335(a).

14 Petitioners also, as we note in our answer, did
15 not request a waiver from the waste competence rule per
16 Section 2.335(b). They have not presented adequate
17 grounds for waiver of the rule. I won't repeat our
18 reasons why. In fact, now in their reply again,
19 Petitioners acknowledge that they are unable to satisfy
20 the waiver requirements, and in that regard, I would point
21 to the reply at page 26, note 33.

22 So at bottom, they do recognize, as they just
23 noted a moment ago, that this raises a matter that is
24 beyond the scope of this proceeding and that the remedy
25 lies in the rulemaking arena, and in fact, that's where

1 Petitioners intend to proceed. In the meantime, however,
2 they have asked for relief on these two additional fronts,
3 first this ruling on admissibility that is only procedural
4 versus substantive in nature, and, two, a ruling that
5 preserves their status as a party in this proceeding with
6 respect to this issue, pending the disposition of their
7 petition for rulemaking.

8 Neither element of the requested relief should
9 be granted. As I just explained, the proposed contention
10 is inadmissible. It should be rejected as a matter of
11 law.

12 Second, there is simply no legal basis upon
13 which to grant Petitioners what I would characterize as
14 conditional standing in this proceeding. Standing does
15 not exist in a vacuum. It's not a matter of contingency.
16 It's not a matter of convenience. There simply is no
17 basis upon which, once the contention is dismissed, to
18 maintain their standing in this proceeding, so for these
19 reasons, we would advise that the proposed contention is
20 inadmissible and that the additional requests for relief
21 be denied.

22 JUDGE BOLLWERK: All right. Thank you.

23 Anything from the staff?

24 MR. CAMPBELL: Yes. This is Tison Campbell for
25 the staff. We just have a brief statement to follow up on

1 what's been said. The staff does not staff retaining
2 Petitioners as parties to this proceeding pending
3 completion of NRC action on their petition for rulemaking.
4 A rulemaking is a separate proceeding from this hearing,
5 and a rulemaking on the waste competence rule will deal
6 with the generic issues raised in that rule.

7 The Petitioners have no relief in this
8 proceeding with respect to any petition for rulemaking
9 that may be filed. In the event their petition is denied,
10 their remedy is an appeal to the Courts of Appeal. I'll
11 take any questions from the Board.

12 JUDGE BOLLWERK: Any rebuttal or additional
13 information?

14 MR. SANDERS: No.

15 JUDGE BOLLWERK: All right. Just out of
16 interest, when do you plan on filing your rulemaking
17 petition, if you know?

18 MR. SANDERS: I just don't know, but I'd expect
19 soon.

20 JUDGE BOLLWERK: All right. The next
21 contention then is contention EC-4. This one deals with a
22 failure to address environmental impacts of intentional
23 attacks, and it states that the environmental report for
24 Vogtle ESP application is inadequate to satisfy NEPA and
25 NRC regulation 10 CFR Section 51.45(b) and (c) for the

1 following reasons.

2 (a) It fails to address the environmental
3 impacts of intentional attacks on the proposed nuclear
4 plants or to evaluate a reasonable range of alternatives
5 for avoiding or mitigating those impacts.

6 And, (b), it fails to address the cumulative
7 impacts of an intentional attack on the existing Plant
8 Vogtle or to evaluate a reasonable range of alternatives
9 for avoiding or mitigating those impacts.

10 Any comments on this particular --

11 MR. SANDERS: This one again I'm going to be
12 very brief. The main argument is what was set out in the
13 Ninth Circuit's recent case, the San Luis Obispo Mothers
14 for Peace case, which held that the NRC must consider
15 intentional attacks as part of its NEPA obligation. We
16 believe that the decision was correct and lays out the
17 law, and now clearly this is a legal dispute.

18 The environmental report doesn't address this,
19 because the Commission and the NRC has previously ruled
20 that this was not an issue that they would take up in a
21 NEPA case or in the NEPA environmental analysis. The
22 Court said, That's wrong. And we -- I believe our
23 solution to that is for the Board to refer this contention
24 to the Commission for disposition.

25 We think that this is an impact that should be

1 analyzed as part of the NEPA analysis. At least one court
2 has said that, and until there's some clarity from the
3 Commission itself, it's not easy to move forward with
4 this. We think as a matter of law, though, that's what's
5 in the environmental report, it translates to the NEPA
6 analysis that the staff will ultimately put together will
7 be insufficient as far as NEPA goes.

8 JUDGE TRIKOUROS: Are you representing this
9 with respect to intentional attacks on the plant in total,
10 or -- because the Ninth Circuit decision dealt with
11 independent spent fuel pool storage facilities. So are
12 you representing here that spent fuel pool -- attacks on
13 spent fuel pools as well as attacks on reactors?

14 MR. SANDERS: Yes.

15 JUDGE TRIKOUROS: Okay. And if I remember
16 correctly, in the environmental report, there's an
17 evaluation of severe accidents with respect to the reactor
18 side, and I don't remember specifically reading it, but it
19 should have included severe accident management design
20 alternatives as well. And a severe accident, whether it's
21 caused by random equipment failures or intentional
22 attacks, it ends up the same way. So I wasn't sure where
23 you were coming from on that.

24 MR. SANDERS: Yes. That's an interesting point
25 that I hadn't thought of.

1 JUDGE BOLLWERK: I think what he's saying,
2 there's a bounding analysis here.

3 MR. SANDERS: Right, right. That if they've
4 done a severe impact analysis, that would necessarily
5 include the impacts of a terrorist attack.

6 JUDGE TRIKOUROS: There is no requirement to do
7 that for spent fuel pools, which I thought maybe that was
8 the focus of your contention, but I wasn't sure. I
9 couldn't tell.

10 MR. SANDERS: Yes. Well, I think that major
11 concern is the spent fuel, and that also goes back to the
12 waste competence contention. It's like if you've got this
13 stuff just sitting around for decades, it's an attractive
14 target, and NEPA requires some analysis of that.
15 Unfortunately, my co-counsel, Diane Currin, is the real
16 expert on this, and she's home with the flu, so I'm kind
17 of left flying blind, so I'm sorry I can't be more
18 helpful.

19 JUDGE BOLLWERK: Any questions?

20 JUDGE JACKSON: Just a quick question. You can
21 help me as I'm certainly not a lawyer, but the Ninth
22 Circuit decision, what's the applicability of that here?

23 MR. SANDERS: It's not legally binding here in
24 the Eleventh Circuit. The Supreme Court didn't take
25 review of the case, but that you really can't read too

1 much into. They don't take a lot of cases. I think that,
2 again, is why we urged that this be referred to the
3 Commission for some action, because it seems to me that
4 the Commission is now -- you know, just last week or the
5 week before had issued some ruling on a related terrorist
6 topic.

7 So there is some interest in terrorism and
8 terrorist attacks, so perhaps the Commission would be the
9 best place -- the best venue to consider how terrorism
10 should be analyzed in the context of a licensing
11 proceeding.

12 JUDGE BOLLWERK: All right. I believe the
13 Commission actually has at least two and maybe three cases
14 of one sort or another, Oyster Creek, Diablo Canyon.
15 They're all pending in front of it, that raised this or
16 similar issues, so --

17 All right. Applicant?

18 MS. SUTTON: Yes. Petitioners are correct that
19 they rest their argument on the Ninth Circuit decision,
20 and unfortunately that decision is not binding in this
21 proceeding and does not drive the outcome. There are
22 several reasons why this particular contention is
23 inadmissible and should be rejected in this proceeding.

24 First, it's contrary to established Commission
25 precedent which does not require the impacts of an

1 intentional attack to be addressed in an environmental
2 report. That is the state of the law today. The
3 benchmark case as discussed in our answer is Private Fuel
4 Storage, and that decision sets forth in detail the
5 principal reasons why these sort of attacks are not
6 appropriate for analysis in the NEPA context.

7 In this proceeding, Petitioners have not
8 presented any information that would call into question
9 the bases underlying the PFS holding. Judge Trikouros,
10 you hinted at some of them perhaps with respect to
11 mitigation alternatives, design alternatives, but to the
12 extent they intend to challenge, for example, Section
13 52.17, this again is the inappropriate forum in which to
14 do so, and they would need to do so through the rulemaking
15 route.

16 Thus, the ASLB is bound by the Commission's
17 established precedent as we sit here today and should
18 reject the contention. However, there is an additional
19 reason, and it deals with the Mothers for Peace decision
20 because it is not binding, and in our answer we direct you
21 to the UTA, Inc., versus Thornberg case, 880 F.2d 1325,
22 D.C. Circuit, 1989. It's in our answer at page 52, note
23 35.

24 The Ninth Circuit decision does not change the
25 binding law which is applicable to the Vogtle ESP

1 application. The Ninth Circuit does not require the NRC
2 to change its regulations or take any other action that
3 would affect the Vogtle ESP application. Thus, EC-4 under
4 the current state of the law is not material to the
5 findings the NRC must make to issue an ESP, nor is it
6 within the scope of this proceeding.

7 Judge Bollwerk, we agree that nearly identical
8 contentions are currently awaiting Commission review in
9 three ongoing licensing proceedings, one of which involves
10 the Grand Gulf ESP application, and as stated by the
11 Commission when they took that matter up, they said,
12 "Fundamentally, this is a question of law and policy which
13 calls for a Commission determination." Therefore, we
14 believe that EC-4 should be rejected in this proceeding as
15 a matter of law.

16 However, recognizing the pendency of the issue
17 before the Commission and the question of policy that it
18 raises, we would not oppose an interlocutory appeal of
19 such rejection by the Petitioners to the Commission.

20 JUDGE BOLLWERK: All right. Any board
21 questions?

22 (No response.)

23 JUDGE BOLLWERK: All right. Let me turn to the
24 staff then.

25 MS. POOLE: Thank you, Your Honors. For

1 reasons articulated by the Applicant and similarly
2 articulated in our brief, the staff currently also argues
3 that this issue is not material for litigation in this
4 proceeding.

5 I would note that there was a question or
6 comment that Mr. Sanders made that denial of cert doesn't
7 mean much. I would amplify that and say a denial of cert
8 means nothing, and refer you to United States versus
9 Carver, 260 U.S. 482, 490, in which the Supreme Court held
10 that the denial of a writ of certiorari imports no
11 expression of opinion on the merits of the case.

12 However, as noted, several proceedings are
13 pending, including the Grand Gulf ESP, which when
14 completed would control -- we would think would control
15 this case also as an ESP matter. We would also, as stated
16 in our petition, request that the proposed contention be
17 rejected. We would not object to the Board's referral of
18 the contention to the -- following that decision to the
19 Commission for disposition or certifying the question
20 directly.

21 JUDGE BOLLWERK: All right.

22 MS. POOLE: That's all we have, but we'll take
23 questions.

24 JUDGE BOLLWERK: Anything further, then, from
25 the Petitioners?

1 MR. SANDERS: Yes. I think that legally the
2 answers that were given by staff and SNC are correct, that
3 the Ninth Circuit decision does not control here.
4 However, it certainly calls the Private Fuel Storage case
5 into question. If you read the case, that court, at
6 least, really rejects the logic of that case
7 wholeheartedly, and, you know, so whether it remains
8 binding authority on this Board, okay, yes, it does.

9 But is this an area of law that's clearly
10 moving in some direction, in a different direction? That
11 is true as well, and therefore, it seems that the best
12 venue is for some action on the Commission's part, and if
13 this Board can make that happen, that would be the best
14 disposition of this contention.

15 JUDGE BOLLWERK: All right. Thank you.

16 JUDGE TRIKOUROS: You also had mentioned in
17 your petition that intentional attacks on the existing
18 unit should be evaluated with respect to their impact on
19 the proposed new units. Are you still supporting that?

20 MR. SANDERS: I believe yes, kind of again as a
21 NEPA issue. If there is a potential of intentional
22 attacks on the existing units, then they should, too,
23 be -- I'm just trying to work this through in my mind.
24 The short answer is yes.

25 JUDGE BOLLWERK: All right. Anything further

1 from the board members on this?

2 (No response.)

3 JUDGE BOLLWERK: All right. At this point,
4 we've been going about an hour since lunch. Why don't we
5 go ahead and take a break, say, ten minutes. Come about
6 2:50, and we have one more contention, EC-5, that we'll
7 talk a little bit about and then perhaps deal with a
8 couple of administrative matters, and I think at that
9 point, we'll be finished with this prehearing conference.

10 So why don't we take a break for about ten
11 minutes. Thank you.

12 (Whereupon, a short recess was taken.)

13 JUDGE BOLLWERK: Let's go back on the record.
14 The break went a little long. I apologize. We had some
15 information about the government shutdown in Washington,
16 which means the Republic is safe. But we're trying to
17 deal with a couple of things with regard to that.

18 So we have one more contention, I think, we
19 need to deal with and talk about, and I suspect we're
20 going to be out of here by four o'clock if not well before
21 that, so let's look at that one, the last contention
22 that's been filed, EC-5: failure to evaluate energy
23 alternatives.

24 The contention is that the environmental report
25 for the Vogtle early site permit is deficient because the

1 alternatives analysis is flawed on two accounts. First,
2 it is based on premature and incomplete information that
3 cannot be adequately assessed at this point in time as
4 Georgia Power has been ordered submit a detailed
5 assessment of the maximum achievable cost effective
6 potential for energy efficiency and demand response
7 programs in its service area in 2007. Second, it lacks a
8 full and objective evaluation of all the reasonable
9 alternatives.

10 All right.

11 MR. SANDERS: This contention is similar to our
12 first contentions in that it challenges the adequacy of
13 the discussion contained in the ER. One, we document a
14 certain number of inaccurate statements, and we believe
15 that there are factual disputes among the parties as to
16 some of the presumptions in the ER, and, two, that once
17 the Applicant elected to discuss energy alternatives in
18 the application, they have a duty under NEPA to conduct a
19 full and accurate evaluation.

20 Then just briefly, NRC staff, on page 34, takes
21 issue with the fact that we -- or actually page 37; excuse
22 me -- that this is a contention that has to do with
23 economic concerns, purely economic concerns, that fall
24 outside of NRC's jurisdiction, citing the final rule for
25 decommissioning nuclear facilities as a source.

1 Of course, that was a rulemaking, not a permit,
2 and also that case or that rule was decided under the
3 Atomic Energy Act and not NEPA. NEPA includes a broader
4 discussion of impacts and includes consideration of costs,
5 or as we discussed earlier this morning in the
6 Commission's regulatory guide, there is, on some
7 occasions, even specific instructions to consider
8 alternatives regardless of the cost.

9 So cost is not necessarily a -- you know, costs
10 and economic arguments do not necessarily render this
11 contention outside of NRC's jurisdiction, and Duke Power,
12 William McGuire Nuclear Station case, 9 NRC 489, discusses
13 demand for power from proposed nuclear power plants as
14 affected by energy pricing. Kansas Gas & Electric, that's
15 the Wolf Creek Generating Station, 5 NRC 301, from 343 to
16 365, 1977, evaluation of energy alternatives based in part
17 on costs.

18 So there is some precedent for the Commission
19 considering costs of different energy alternatives in the
20 context of a permitting proceeding, which is what we have
21 here.

22 I think that's -- I will stop for now.

23 JUDGE BOLLWERK: All right. Let me turn to the
24 Applicant. Are there any board questions before I do
25 that? Sorry.

1 JUDGE TRIKOUROS: Well, just with respect to
2 the Georgia Public Service Commission, you were arguing
3 with respect to -- in an earlier contention with respect
4 to the EPA review, you were saying that one can't simply
5 rely on the EPA review; one has to do it -- look at this
6 thing independently.

7 In this contention, it sounds like you're in
8 the opposite mode, saying, you know, You can't evaluate
9 this independently. You have to rely on the Georgia Power
10 or the Georgia Public Service Commission. So I'm trying
11 to understand that.

12 MR. SANDERS: Well, the -- my first reaction is
13 earlier we were saying that you can't rely on EPA's
14 rulemaking, because it didn't address the specific issues
15 that permit evaluation would address, so it wasn't as
16 broad as you stated, so that's the first reaction.

17 So, again, it would be perfectly appropriate
18 if, say, the State of Georgia or the EPA had actually done
19 a site-specific evaluation and issued a Clean Water Act
20 permit. There wouldn't be any problem with NRC relying on
21 that. I think this would be more equivalent to the latter
22 case, where the PSC has already looked at the same exact
23 issues and done a full analysis, and that the ER is
24 lacking, so it's not that we are just saying, the PSC has
25 spoken, but we're saying the PSC has developed information

1 and data that the ER has ignored.

2 JUDGE TRIKOUROS: But in reading your
3 contention, it sounded to me as if you were saying it's
4 the next evaluation of the PSC, the 2007 evaluation, which
5 hasn't occurred yet, that you were saying should be relied
6 upon in the future, that things should be put off, if you
7 will, till then. So --

8 MR. SANDERS: Well -- I think the difference is
9 that the complaint here is that that analysis doesn't
10 exist in the ER. It's like the PSC is planning on
11 analyzing all these different energy alternatives in the
12 next year, and the ER purports to address that, but as we
13 discuss in the contention and our reply, we find that
14 discussion to be incomplete and inaccurate.

15 And, therefore, it's not saying necessarily you
16 can't act or that the Board can't consider energy
17 alternatives at this stage, but if the Applicant elects to
18 address those issues in its application, then NEPA
19 requires a full and complete analysis, and they might be
20 better off waiting for the State to act.

21 JUDGE TRIKOUROS: Okay.

22 JUDGE BOLLWERK: Although the Applicant asserts
23 this is subject to an annual review and says it is up to
24 date. Does that --

25 (Pause.)

1 MR. SANDERS: I am told that nuclear power was
2 not part of the 2004 IRP that the State put together and
3 that it will be included in the 2007 as part of the base
4 load, so again it's just not -- the information in the ER
5 is either inaccurate or not up to date.

6 JUDGE BOLLWERK: So essentially the annual
7 assessments have not included any discussion of nuclear as
8 base load or --

9 MR. SANDERS: That is my understanding.

10 JUDGE BOLLWERK: Okay.

11 JUDGE TRIKOUROS: The other question that I
12 have is -- and I'll ask this in general. I believe that
13 the staff has -- the only thing they really have to do for
14 an ESP, the only finding they have to make for an ESP, is
15 this alternatives analysis. I'm asking, but I believe
16 that's the case.

17 MS. POOLE: Should the Applicant choose to
18 address need for power and energy alternatives, they can
19 be addressed at the ESP stage. They're not required to
20 be.

21 JUDGE BOLLWERK: I think that's true, but I
22 think they have been put in play here. In fact, the
23 Applicant says in the environmental report that there's a
24 pressing need for power.

25 JUDGE TRIKOUROS: Right. In another proceeding

1 I asked the question, what had to be addressed and --

2 MS. POOLE: What has to be is alternative
3 sites.

4 JUDGE TRIKOUROS: Alternative sites.

5 MS. POOLE: Alternative sites..

6 JUDGE TRIKOUROS: That's what it was. Thank
7 you.

8 MR. SANDERS: I think Chairman Bollwerk had it
9 correctly that once it's put into play, then NEPA really
10 requires you to do the full analysis now, particularly
11 because this could very well be the only opportunity, and
12 once the permit's issued, it's unclear that that issue
13 would be subject to reevaluation in the future.

14 JUDGE TRIKOUROS: Well, again, I'm not clear on
15 that. And I'm asking again. If it were put into play, as
16 it has been, and the information is judged to be
17 insufficient to resolve it at this stage, would it then
18 simply move on to the COL stage, or is there some other
19 hook that gets picked up here?

20 MS. POOLE: From the staff's perspective,
21 because this determination wouldn't affect the necessary
22 alternative sites determination, it could be deferred.

23 JUDGE TRIKOUROS: It could be --

24 MS. POOLE: It could be deferred until the COL
25 stage.

1 JUDGE BOLLWERK: Anything further from the
2 Petitioners on this point?

3 MR. SANDERS: Not thanks.

4 JUDGE BOLLWERK: Okay. Other board questions?
5 All right. Let me turn to the Applicant then.

6 MR. BLANTON: Stan Blanton for Southern Nuclear
7 on this one, Your Honors. This contention takes sort of a
8 shotgun approach at the need for power/generation
9 alternatives analysis in the ER and addresses a laundry
10 list of perceived or alleged deficiencies, but what none
11 of the discussion in the petition does is contend with any
12 sort of evidentiary or legal support that the analysis is
13 wrong. They haven't created an issue of fact that either
14 the need for power analysis or the energy efficiency
15 analysis, the demand side option analysis, is wrong.

16 And we believe that's a requirement under
17 2309(f). Now, taking the --

18 JUDGE TRIKOUROS: Let me ask -- I understood
19 them to be saying that it was wrong with respect to the
20 potential implications of demand side management
21 improvements and that -- I think they were questioning
22 that part of it specifically, weren't they?

23 MR. BLANTON: I think they've cited the ICF
24 study on demand side management and discussed some of the
25 detail in that. What I don't think they've asserted, at

1 least with any support for the assertion, is that the
2 conclusion that demand side management options are not
3 going to be adequate to satisfy the need for power
4 addressed in the environmental report is wrong. I mean,
5 that's the conclusion of the environmental report, and
6 it's unchallenged.

7 Let me step back just a second and talk about
8 the Georgia IRP process. The Georgia integrated resource
9 planning process is relied upon by the Applicant in the ER
10 to demonstrate need for power as is contemplated by NUREG
11 1555. There are two options in NUREG 1555 for doing a
12 need-for-power analysis.

13 One is that the State has a systematic resource
14 planning process. That process can be relied upon by the
15 Commission to satisfy the requirement under NEPA that need
16 for power be analyzed. Failing that, the staff has to do
17 its own need-for-power analysis, and there are provisions
18 in the NUREG 1555 for doing that.

19 The Georgia IRP is relied upon in the ER to
20 satisfy that need-for-power analysis. It is a systematic
21 analysis. It's -- an integrated resource plan is done
22 every three years with annual updates in the middle two
23 years, so the idea that the '06 update, the '06 update of
24 the '04 plan, is somehow premature to be relied upon in
25 the need-for-power analysis because there's another one

1 that's -- a new IRP is going to be issued in '07 -- well,
2 if we use the '07, the argument's going to be that there's
3 one -- there's an update due in '08 and '09, and new one
4 in '10.

5 So the way this process is structured, it's to
6 be systematic and to be repeatable and to update the
7 information, so you never get to the point where under the
8 Petitioners' theory it's complete and can be relied on.
9 And we don't think that's the regulatory requirement. The
10 need-for-power analysis has to be done with the
11 environmental report, and you have to use the data
12 available to you when you submit the environmental report,
13 and that was the '06 update.

14 If there's new and significant information that
15 comes out of the '07 plan or any of the future updates to
16 that plan, then we'll address that new significant data
17 when it comes about, but the reliance on the '06 -- or
18 actually the '04 IRP and through the '06 update is
19 entirely consistent with Commission guidance and with the
20 guidance the staff has for preparing an EIS.

21 Now, one thing that I would like to correct
22 that came up in the Petitioners' argument is that the '05,
23 '06 IRP does address nuclear power as an option for base-
24 load generation, but the thing I want to emphasize is this
25 is a need-for-power analysis. It's not an analysis of how

1 that need for power is going to be met.

2 The Georgia Public Service Commission will
3 address how need for power is to be satisfied in a
4 separate certification process, where it certifies the
5 generating resource that will be relied on by the Georgia
6 Power Company to satisfy or meet the demands of its
7 customers. The part of the integrated resource plan
8 that's relevant to the need-for-power analysis is load
9 forecast, not what the generating resource is going to be
10 relied on to be.

11 Now, as to alternatives, the ER analyzes
12 alternatives, including energy efficiency, including
13 demand-side options, including purchase power, and
14 including both individual base-load generating resources
15 and combinations of potential base-load generating
16 resources. And there's -- I don't think there's any
17 argument about that.

18 The Petitioners haven't cited anything that
19 suggests any of those analyses are incorrect. They have
20 complained about the length maybe of the demand-side
21 analysis or the energy efficiency analysis, which sounds a
22 little bit more -- a little bit like the little-bit-more
23 standard we heard about this morning, which is not the
24 standard for compliance with NEPA and not the standard for
25 the admissibility of a contention.

1 They're required to come forward with evidence
2 or legal argument to show there's a genuine issue of fact
3 about the accuracy of that analysis. They haven't done
4 that. They raise an issue regarding so-called combined
5 heat and power, or CHP. They rely on a PowerPoint
6 presentation that wasn't attached to the petition. They
7 really don't define what CHP is, but we did some research
8 and thought we found what it was, and what it looks to be
9 is reliance on the production of waste heat and generation
10 of electricity from the production of waste heat through
11 co-generation projects which are not viable alternatives
12 for base-load generation. They're not even under Georgia
13 Power's control. They would have to be constructed by
14 somebody else, so that's not a viable alternative.

15 In addition to that, generation that was
16 produced through CHP would have to be purchased. Well,
17 there is a purchase -- there's an analysis of the
18 purchased power alternative in the ER, and it's not
19 limited to any particular type of fuel, but it does
20 include gas, which you presumably would think a CHP
21 alternative would be based on, although the Petitioners
22 don't tell us that. We don't get enough information about
23 CHP to know exactly what kind of generation alternative
24 that is, just that somebody doing a seminar said something
25 about it, and they cite to the PowerPoint presentation.

1 So without any more information than that, they
2 clearly haven't met the burden for providing a specific
3 supported contention that raises a genuine issue of fact
4 about an alternative to base-load generation, which is the
5 purpose of this proposed action.

6 They throw in at the end a basis that deals
7 with our discussion or the ER's discussion of biomass
8 fuel. They cite no authority for that. They cite no
9 factual support for that. The discussion of -- and
10 description of the biomass fuel alternative is spelled out
11 in the ER and described, and there's just nothing that
12 they've cited that raises any issue of fact about that.

13 That's all I have.

14 JUDGE BOLLWERK: All right. Let me see if
15 there are any board questions. Just let me make sure I
16 understand. The argument with respect to the Public
17 Service Commission is essentially that as long as there is
18 a process, even if that process doesn't include up to this
19 point consideration of nuclear base load, that the
20 existence of the process is sufficient to take care of the
21 concerns that are -- to address what needs to be addressed
22 in the environmental report.

23 MR. BLANTON: Yes, sir. I think that's right,
24 because --

25 JUDGE BOLLWERK: And the details will follow,

1 but that process is what needs to be -- as long as that
2 process is in place, that's what needs to be there.

3 MR. BLANTON: Well, I think there's two issues.
4 One is there's a process in place that performs a state-
5 approved and implemented process that assesses demand for
6 power, load forecasting on a rolling basis going forward,
7 and that's a continuous process. It's updated annually,
8 and that is being relied upon for the need-for-power
9 analysis.

10 The need-for-power analysis is not required to
11 assess the particular generation option that will be
12 certified by the State of Georgia, Public Service
13 Commission, at the appropriate time to meet that need.
14 It's just being used to analyze the demand for electricity
15 that is causing -- that would cause you to pick any one of
16 a number of generating options.

17 JUDGE BOLLWERK: So a need for power is not
18 need for nuclear power. It's just need for power.

19 MR. BLANTON: Yes, sir. Need for base-load
20 generation in this case.

21 JUDGE BOLLWERK: Right. Need for base-load
22 generation. All right. We may come back to that, but
23 let's go ahead, and if other board members don't have
24 anything, let's turn to the staff.

25 MS. POOLE: Thank you, Your Honors. I'd like

1 to address your point, Judge Bollwerk, that you just
2 raised and talk a little -- just for a moment about the
3 staff's review of need for power.

4 We -- as mentioned, we look at what is provided
5 in the Applicant's ER. ESRP Section 8.2 -- and it's
6 specifically 8.2.1-2, page number -- allows an Applicant
7 to rely on a state IRP, as was done here. You can rely on
8 a regional authority's assessment or an ISO assessment.
9 In this case, it was chosen to be the State.

10 What we look at is the ultimate need for
11 electrical production capability of a proposed facility,
12 and we look at things like base load -- I'm looking here
13 at ESRP Section 8.4, which is entitled, Assessment of Need
14 for Power. We look at base-load capacity and compare it
15 to base-load demand, look at a reserve margin assessment,
16 cost of power projections, compare the total capacity in
17 relation to peak-load demand, look at schedule.

18 And what we're really looking for fundamentally
19 is whether the analysis that is relied upon in the ER, be
20 it performed by the Applicant or by the State in this
21 case, whether it's reasonable and meets high-quality
22 standards, and that -- reasonable and meets high-quality
23 standards is the language in the ESRP.

24 As far as this analysis goes, what's stated in
25 the ER and what we looked at in the petition were concerns

1 by the Petitioners that the Georgia Public Service
2 Commission had not -- you know, has more yet to approve,
3 that nuclear power itself had not been reviewed as part of
4 the 2004 IRP, but as stated by Mr. Blanton, from the NRC's
5 standpoint, we don't care. It's beyond --

6 Well, it's more correct to say it is beyond the
7 NRC's purview how the need for power is filled. It is our
8 job only to look at it, to look at the need for base-load
9 power, and our ER is -- the EIS will look at that.
10 Whether the State or the Applicant ultimately chooses to
11 construct nuclear power as base load or not is not
12 relevant to our review.

13 As far as alternatives go, I only have --

14 JUDGE BOLLWERK: Let me just interrupt one
15 second. So if the State were to make -- can the Applicant
16 continue to pursue an application with the Agency based on
17 the state finding of need for power if the State, in turn,
18 certifies it, We have a need for power, but nuclear ain't
19 it?

20 MS. POOLE: From the NRC's standpoint, sure,
21 because that's not our decision. We just look to see
22 whether the need for power is there.

23 JUDGE BOLLWERK: All right.

24 MS. POOLE: Just one correction to make
25 regarding the discussion of alternatives. The reply

1 states that the staff incorrectly discussed the ICF report
2 as not being relevant to the application, because it was
3 cited, and what, in fact, we were referring to there in
4 our answer at page 39 were the CHP market review slides,
5 which were not cited anywhere and just kind of came --
6 they were cited in the petition, but they were not, in
7 fact, associated with the ER, so we just wanted to correct
8 that.

9 And we stand on our argument with respect to
10 combined heat and power, that that presentation didn't
11 provide sufficient context or basis to support the
12 contention. And everything else regarding alternatives is
13 in our papers, and we'll take questions from the Board.

14 JUDGE TRIKOUROS: This statement that was made
15 about CHP not being a relevant or a permissible -- I don't
16 know what word you used --

17 MR. BLANTON: Reasonable alternative for base
18 load?

19 JUDGE TRIKOUROS: Is that what you said?

20 MR. BLANTON: I said it was not a reasonable
21 alternative for base-load generation. Yes, sir.

22 JUDGE TRIKOUROS: And does the staff agree with
23 that, that co-gen is not a --

24 MS. POOLE: From a merit standpoint, I don't
25 know that I have an answer for you. I think in the

1 context of this petition, we didn't see a sufficient basis
2 for an argument that it would be, and so it wouldn't be at
3 issue here.

4 JUDGE BOLLWERK: All right. Let's go back to
5 the Petitioners then in terms of any rebuttal.

6 MR. SANDERS: Well, this -- the issue of the
7 CHP market review slides, my understanding is that this
8 PowerPoint presentation was initially referenced in the
9 Applicant, in the application, in the ER, and we're a
10 little at a loss about the criticism of relying on a
11 document that is referenced in the ER itself.

12 That aside, the main thrust of the argument
13 is -- with regard to alternatives is, again, similar to
14 our NEPA alternatives arguments this morning, and that is
15 just that the discussion is conclusory and doesn't meet
16 the NEPA standards of what an alternatives analysis should
17 look like, and that's all I got.

18 JUDGE BOLLWERK: Do you have any comments on
19 the characterization that's been made by about the need-
20 for-power finding by the Public Service Commission in
21 terms of the way it interacts with -- put it this way --
22 the Public Service Commission need-for-power finding is a
23 little different than what the NRC is doing?

24 MR. SANDERS: That is absolutely true, and
25 that's an interesting perspective that even if the State

1 says, Nuclear is not going to be in our power mix, that
2 doesn't influence the staff's evaluation of the need for
3 power, of nuclear as part of the answer.

4 Again, I think that still the 2007 IRP is going
5 to be coming out within the next several months, and it
6 will be a more complete analysis and will include nuclear
7 as part of the need-for-power analysis, and whether that
8 means the Applicant must wait or should wait or can rely
9 on the most recent 2004 IRP, I don't have much else to say
10 on that, other than the Applicant elected to raise this
11 issue in their environmental report.

12 And, again, once they determined to raise the
13 issue, we think that the report needs to then comply with
14 the -- I'm sorry. I think I should just stop. I'm
15 getting a little tired.

16 JUDGE BOLLWERK: All right.

17 JUDGE TRIKOUROS: I have a question for the
18 Applicant. You had indicated earlier that when the 2007
19 report is issued, you would treat it as new and
20 significant information.

21 MR. BLANTON: No, sir. I said if there is new
22 and significant information in the 2007 report, we'll deal
23 with that at that time, but I did not mean to suggest that
24 we thought that the 2007 report would contain new and
25 significant information. In fact, we think it does not.

1 JUDGE TRIKOUROS: Could you give me a little
2 insight into what that might be? In other words, what in
3 that report might constitute new and significant
4 information, or why is it relevant at all, this 2007
5 report?

6 MR. BLANTON: Well, the easiest, for the
7 purpose we've used it for, which is need for power, the
8 easiest example would be if there were drastically reduced
9 load forecasts for the Georgia -- Atlanta and the rest of
10 Georgia in that IRP such that the -- instead of the need
11 for X megawatts of new base-load generation by 2020, there
12 were only the need for .3X megawatts of new generation
13 through 2020. That's the easiest example that a lawyer
14 can come up with on the spur of the moment.

15 JUDGE TRIKOUROS: So, in fact -- and I take
16 that as relatively obvious, that if they came out and said
17 that there is no need for power, that would be a big
18 impact.

19 MR. BLANTON: We would treat that as new and
20 significant information.

21 JUDGE TRIKOUROS: But the nuclear power side of
22 that, which did not exist in the 2004, it's not relevant
23 to this -- to anything going on here.

24 MR. BLANTON: That's our position. Yes, sir.
25 Now, it's relevant to the comparison of alternatives, but

1 it's not relevant to the assessment of the need for power.

2 JUDGE BOLLWERK: My understanding is you have
3 put in your filings with the Public Service Commission for
4 this process.

5 MR. BLANTON: Yes, sir. The IRP filed by
6 Georgia Power Company with the Georgia Public Service
7 Commission for 2007 has been filed. The Public Service
8 Commission will act on that, and that's still to be done.

9 JUDGE BOLLWERK: All right.

10 MR. BLANTON: I think the only other point I
11 would make on that is just -- ask everybody to remember,
12 This is a NEPA analysis. This is an assessment of
13 environmental impact. It is not a state certification
14 process, which is where the question of whether or not a
15 nuclear plant will actually be built will be decided. So
16 the only thing that NEPA's concerned with is what the
17 environmental impact of that nuclear plant will be.

18 JUDGE BOLLWERK: I shouldn't say -- make clear
19 my statement, obviously, that the NRC may or may not care
20 about what the State of Georgia, you obviously do care, an
21 if they came out with a negative finding, that would be a
22 significant concern to you obviously, so --

23 MR. BLANTON: I think it would.

24 JUDGE TRIKOUROS: I haven't looked at the 2004
25 IRP. With respect to demand-side management, do these

1 reports evaluate whether or not -- is that -- that's
2 factored into the need for power in the sense that if they
3 conclude that there are opportunities for 8,000 megawatts
4 or 2,000 megawatts electric or 2,500 megawatts electric in
5 this case, associated with demand-side management
6 improvements, that would be an indication that there was
7 not a need for new base-load generation?

8 MR. BLANTON: That is, well, certainly a factor
9 that goes into the analysis of whether or not there is a
10 need for new base-load generation and how great that need
11 is. The 2004 IRP, I'm fairly certain, did take into
12 consideration demand-side options, including energy
13 efficiency and concluded that while there was some
14 potential for reduction of demand from those options and
15 Georgia Power's pursuing some of those, that it does not
16 eliminate the need for new base-load generating capacity
17 through the period of an IRP.

18 And those demand-side options that were
19 evaluated were determined not to -- like CHP, not to be a
20 alternative -- a reasonable alternative for base-load
21 generation, more for peak-load generation.

22 JUDGE TRIKOUROS: I'm sorry. Say that again.

23 MR. BLANTON: The demand-side options that were
24 evaluated and determined to be feasible to some extent
25 were determined to be feasible for peaking generation, not

1 for base-load generation.

2 JUDGE TRIKOUROS: I see. So the -- and is that
3 the -- going to be the focus of the 2007 report as well,
4 or is that a general rule, that demand-side management
5 doesn't impact base-load generation issues but only
6 peaking?

7 MR. BLANTON: I don't know that I would say it
8 was a general rule, Your Honor, but I think it was the
9 conclusion of the 2004 IRP. I think it's probably the
10 position of Georgia Power Company and the document it's
11 filed for the 2007 IRP, and whether the Georgia Public
12 Service Commission adopts that in its final IRP, we'll
13 have to see.

14 JUDGE TRIKOUROS: Because I think the
15 Petitioners are basically in their petition indicated that
16 there were flaws in the demand-side management evaluation
17 in the environmental report, which would lead one to
18 conclude that the base-load generation proposed is not
19 necessary, so that seems -- I was just curious what the
20 truth is there.

21 MR. BLANTON: If I can speak to that, we would
22 say that there is no truth to that, Your Honor, and that
23 the demand-side management options analyzed have been
24 determined to be not a substitute for new base-load
25 generation and that the Petitioners have not cited to any

1 factual support or basis for a contention that that's an
2 incorrect conclusion.

3 MR. SANDERS: I'd point you to footnote 42 in
4 our petition. Now, my understanding of this is that the
5 2004 IRP was considered insufficient and, in fact, the
6 Georgia Public Service Commission established a demand-
7 side working group to assess demand-side options, and the
8 group is still operating and collecting data for the 2007
9 plan.

10 So it seems that we do have a factual dispute
11 about the need for power and the demand-side options for
12 meeting that need for power, and relying on -- just simply
13 relying on the 2004 IRP is not sufficient.

14 JUDGE BOLLWERK: Do you want to respond to
15 that? Obviously he gets the last word.

16 MR. BLANTON: My response to that is the fact
17 that there's still somebody working on demand-side options
18 does not raise a question of fact regarding whether the
19 conclusions in the ER are correct. I mean, if they think
20 the conclusions in the ER are incorrect, they ought to
21 tell us what their conclusion is and support it.

22 JUDGE BOLLWERK: All right. Anything further
23 from the staff or the Petitioners on this point?

24 MS. POOLE: Nothing further from the staff.
25 Thank you.

1 MR. SANDERS: Nothing further. Thank you.

2 JUDGE BOLLWERK: All right. Any further
3 questions from the Board on this contention?

4 (No response.)

5 JUDGE BOLLWERK: All right. I believe then
6 that that brings us to the conclusion of the Board's oral
7 argument on the contentions, the seven contentions that
8 have been proffered by Petitioners. Under the Agency's
9 rules, the Board is to rule on these contentions by
10 approximately mid-March, and I think it's our anticipation
11 at this point we will meet that deadline. If not, we will
12 have to tell the Commission, according to the rules, that
13 we will not and give some explanation as to why, and we
14 will do that as well.

15 I did want to raise a couple of procedural
16 points with the parties, sort of looking forward
17 potentially. And, again, these are hypothetical, I should
18 say, because I'm frank to say I don't know what the
19 Board's going to do with the contentions at this point.
20 We haven't conferenced this, so we haven't really talked
21 about it and decided.

22 But assuming that one contention was to be
23 admitted, I'd like you to think and perhaps give us a
24 response on a couple different items. One is with respect
25 to Section 2.332(d) of the Agency's regulations which

1 suggests that litigation relative to environmental
2 contentions is not to go forward until the final
3 environmental impact statement has been issued.

4 That is not necessarily the path that the Board
5 took, for instance, in the Louisiana Energy Services case
6 recently. In fact, that case went forward on the draft
7 environmental impact statement. And something I would
8 like to know from the parties actually by the end of next
9 week if you could tell us -- and, again, dealing in a
10 theoretical basis if a contention were to be admitted:
11 Would there be any objection to going forward based on the
12 draft EIS rather than the final environmental impact
13 statement?

14 MR. BLANTON: None from the Applicant, Your
15 Honor.

16 JUDGE BOLLWERK: Well, I suspected I might hear
17 that from you, but I'd like everybody to talk about it,
18 and maybe you can put together a joint report and let the
19 Board know whether there would be an objection to that.

20 Again, one thing to think about from
21 perspective of the process is that anything the Board were
22 to issue with respect to the environmental impact
23 statement, notwithstanding it's generally the staff's
24 responsibility to put together, if the Board says
25 something about it, that amends potentially the final

1 environmental impact statement.

2 And while I suppose it's theoretically possible
3 that the Board could say something that the staff might
4 try to change in the final environmental impact statement,
5 I would be surprised if that were to happen, so -- but
6 that's something to be thought out.

7 And, frankly, it would allow this litigation to
8 move forward potentially in the fall of the year rather
9 than having to wait until next spring, so -- if this
10 were -- again, this is all hypothetical, if a contention
11 were to be admitted. So perhaps -- let me give you a date
12 here. I believe next Friday is the 23rd. If you all
13 could sort of talk among yourselves and one of the parties
14 file -- one of the participants file a joint report with
15 the Board, indicating whether there's any objection if we
16 were to admit a contention, of moving forward based on the
17 draft EIS.

18 And in doing that, we obviously would have to
19 take into account opportunities to amend contentions or to
20 file new late-filed contentions based on the draft EIS,
21 but that would be part of the process in any event, so if
22 you could do that, we'd appreciate it.

23 Also I want to take a second and -- any
24 questions about that, what we're asking for?

25 (No response.)

1 JUDGE BOLLWERK: All right. The other question
2 I had basically for the staff: I know you all have been
3 working on a new way of putting together the hearing file.
4 I just wanted to know if you have anything you want to
5 report to us or to the parties about what you're thinking
6 about doing in that regard?

7 MS. POOLE: Not at the current time. I
8 think -- we're still working on it, but I also think that
9 the changes that we're contemplating won't -- are internal
10 and won't change the format of the mandatory disclosures
11 and hearing file as they appear to the public and to the
12 parties. So I don't know that that's going to affect the
13 parties if a hearing is granted.

14 JUDGE BOLLWERK: All right. Just so you
15 know -- and I'll let the staff speak to this if I
16 misrepresent it. But currently the hearing file resides
17 in the electronic hearing docket with the Agency. I think
18 the staff is contemplating moving it out of the electronic
19 hearing docket and actually keeping it separately on the
20 website that they would essentially administer, rather
21 than having the Office of the Secretary administer it.

22 And it is basically, in one sense, a discovery
23 database. Normally parties deal with their own discovery
24 databases, and I think that's what the staff is
25 contemplating.

1 MS. POOLE: I don't know if it's going to be
2 completed in time for an initial hearing file and
3 mandatory disclosures by the staff, were a hearing to be
4 granted in this case, but what we can commit to do is as
5 soon as we find out or have a final disposition on any
6 changes that might take place, we would perhaps propose a
7 filing, explaining that. Would that be acceptable?

8 JUDGE BOLLWERK: Yes. I mean, it would
9 obviously be better if we could not start under one regime
10 and move to another, but IT projects are IT projects, and
11 you have to deal with them as they come forward, so I
12 think this is -- I understand it's part of the staff's
13 longer-term view of how they also want to be dealing with
14 the combined operating license cases, of which there may
15 be a number within the next nine months, so --

16 And actually probably in the general sense,
17 it's a good thing for the staff to be basically
18 administering its own database rather than having the
19 Office of the Secretary do it, but that's to be
20 determined. Okay.

21 At this point, do the parties have anything
22 else for the Board?

23 MR. SANDERS: We just had one question --

24 JUDGE BOLLWERK: Sure.

25 MR. SANDERS: -- about the written limited

1 appearance statements.

2 JUDGE BOLLWERK: Uh-huh.

3 MR. SANDERS: Is there any deadline at all, or
4 are you just taking them --

5 JUDGE BOLLWERK: We will take them whenever
6 folks submit them. It's sort of an open opportunity to
7 address the Board and the process, and those can be put in
8 at any point, so -- we have several, I think -- two? --
9 two that we're going to be putting in the docket when we
10 get back, assuming we ever get back to Rockville. I guess
11 at some point it will stop sleeting, snowing, whatever
12 it's doing.

13 And if there are others that come in, certainly
14 folks are welcome to put them in there. We do read every
15 one, and it is placed in the official docket of the
16 proceeding, so if folks have those -- and, again, as we
17 indicated at the beginning, the Board does contemplate at
18 some point an opportunity for oral limited appearance
19 statements. We'll do that as well.

20 At this point, I want to thank the parties for
21 their presentations. I think -- I personally feel and I'm
22 sure the others -- well, I'll let them speak for
23 themselves. But we found what you had to say useful to
24 us. I think you were very straightforward with your
25 responses. I hope you found -- I think the Board's

1 questions were fairly probing. We have taken this
2 seriously. We've been looking at the information you
3 provided and are thinking about this in some detail.

4 But we do appreciate the opportunity we had to
5 talk with you about this and to get your input. It was
6 very useful to us, and we appreciate it. Thank you for
7 that.

8 I also want to thank the Augusta Technical
9 College, the Waynesboro campus, for allowing us to use
10 this room. I think it was a very good facility, and we're
11 glad to know that there's this type of facility in the
12 area that we may be able to use in the future if need be.

13 I'd also like to thank our law clerk, Marcia
14 Carpentier, and Ashley Pranger, our administrative person,
15 for helping us out and moving the hearing forward with all
16 the administrative details that are always important.

17 Do either of the other Judges want to say
18 anything at this point?

19 JUDGE TRIKOUROS: I just wanted to say that
20 everybody was well-informed and very responsive, and we
21 really appreciated that very much.

22 JUDGE JACKSON: I appreciate the input that we
23 received. It was very helpful. Thank you for your
24 patience, putting up with our questions.

25 JUDGE BOLLWERK: This is Judge Jackson's first

1 time to do this. I think he --

2 JUDGE JACKSON: It is.

3 JUDGE BOLLWERK: -- found it interesting?

4 JUDGE JACKSON: Very interesting.

5 JUDGE BOLLWERK: And we appreciate coming down
6 here to the nice weather, so it's like it was in
7 Washington back in January, but not like what it is now.
8 So, anyway, I hope it continues here. You get to have the
9 benefit of it for another several weeks.

10 If there's nothing else from the Board then,
11 again we appreciate the parties' efforts. We thank the
12 members of the public that took the time to come out and
13 hear what went on here, and at this point, we're headed
14 towards some kind of decision on the contentions and the
15 standing of the Petitioners by the middle of March, and we
16 stand adjourned. Thank you.

17 (Whereupon, at 3:50 p.m., the prehearing
18 conference in the above-entitled matter was concluded.)

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CERTIFICATE

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

Name of Proceeding: Southern Nuclear Operating
Company Pre-Hearing Conference

Docket Number: 52-011-ESP; 07-850-01-ESP-
BD01

Location: Waynesboro, Georgia

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.



Brenda Thompson
Official Reporter
Neal R. Gross & Co., Inc.

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