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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DUKE POWER COMPANY Docket No. 70-2623

(Oconee-McGuire)

Place - Charlotte, North Carolina

Date - Tuesday, 19 June 1979

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of:	:	
DUKE POWER COMPANY	:	Docket No. 70-2623
(Oconee-McGuire)	:	

Fourth Floor
Mecklenburg Administration Bldg.
720 E. Fourth Street
Charlotte, North Carolina

Tuesday, 19 June 1979

Hearing in the above-entitled matter was convened, pursuant to notice, at 9:30 a.m.

BEFORE:

MARSHALL E. MILLER, Esq., Chairman, Atomic Safety and Licensing Board.

DR. EMMETH A. LUEBKE, Member.

DR. CADET H. HAND, Jr., Member

APPEARANCES:

J. MICHAEL MC GARRY, III, Esq., Debevoise & Liberman, 700 Shoreham Bldg., 806 15th Street, N.W., Washington, D.C. 20005; and
WILLIAM LARRY PORTER, Esq., Associate General Counsel, Duke Power Company, on behalf of the Applicant.

JAMES TOURTELLOTTE, Esq., EDWARD G. KETCHEN, Esq., and RICHARD K. HOEFLING, Esq., Office of Executive Legal Director, Nuclear Regulatory Commission, Washington, D.C. 20555, on behalf of the Regulatory Staff.

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APPEARANCES: (Continued)

ANTHONY Z. ROISMAN, Esq., on behalf of the Natural Resources Defense Council.

SHELLEY BLUM, Esq., Blum & Sheely, Charlotte, on behalf of Carolina Environmental Study Group.

RICHARD WILSON, State Attorney General's Office, on behalf of the State of South Carolina.

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I N D E X

WITNESSES:

None.

EXHIBITS:

None.

P R O C E E D I N G S

CHAIRMAN MILLER: The evidentiary hearing will come to order, please.

As you know, this is an evidentiary hearing in the matter of the Duke Power Company's amendment to materials license SNM-1773, Transportation of Spent Fuel from Oconee Nuclear Station for storage at McGuire Nuclear Station, Docket No. 70-2623.

The evidentiary hearing is pursuant to notice thereof, which was duly published in the Federal Register on Wednesday, April 18, 1979 giving notice that the hearing would commence at 9:30 this day at this place and the like.

We have also indicated that the first day, or at least part of the first day will be devoted cothe Board hearing counsel and parties with reference to certain motions. The bulk of them being rather extensive motions for summary disposition supported by points and authorities, briefs, affidavits and the like.

That the Board intends to commence the evidentiary portion of the hearing at least tomorrow and thereafter, tomorrow at 9:00 a.m. each day, including Saturday and next week. That between 8:00 and 9:00 a.m. Wednesday, Thursday and Friday of this week, we will hear from those persons who have requested the opportunity to make limited appearances or limited appearance statements, whether orally or in writing.

I think at this time we will identify ourselves.

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My name is Marshall E. Miller. I am the attorney Chairman of the Licensing Panel.

You have met, I think, Dr. Luebke to my left, and Dr. Hand to my right, who were and are members of the Licensing Board.

I will ask Counsel to identify themselves and their associates for the record. We will start with Mr. McGarry to the left here and go clockwise.

MR. MC GARRY: Thank you, Mr. Chairman.

My name is Michael McGarry. I am with the law firm of Debevoise & Liberman. I am representing Duke Power in this proceeding.

MR. PORTER: I am Larry Porter, associate general counsel for Duke Power Company.

MR. BOSTIAN: I am Ralph Bostian, manager of Systems, Resources and Fuel Management of Duke Power Company.

MR. ROISMAN: My name is Anthony Z. Roisman. I represent the Natural Resources Defense Council.

MR. RILEY: My name is Jesse Riley. I represent the Carolina Environmental Study Group, but not in the capacity of attorney.

MR. BLUM: Mr. Miller, my name is Shelley Blum. I am with the law firm of Blum & Sheely in Charlotte representing the Carolina Environmental Study Group.

MS. ALLEN: My name is Debbie Allen, and I am a

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paralegal with Blum & Sheely law firm.

MR. TOURTELLOTTE: My name is Jim Tourtellotte. I am assistant chief hearing counsel for the Nuclear Regulatory Commission.

With me today on the Staff are Mr. Ed Ketchen and Mr. Richard Hoefling.

CHAIRMAN MILLER: Thank you.

Now, let's see, do we have any other attorneys or counsel who didn't make the first four tables?

I hope that we will have enough facilities. Everyone here is doing the best we can. I know we don't have as many microphones as we would like, so keep your voices up and we will try to make do with what we have. If we run into a problem we will go from there.

Is there anyone now who has not yet been identified for the record?

MR. MC GARRY: Mr. Chairman, I know Malcolm Phillips from my office will be joining me this morning.

CHAIRMAN MILLER: All right. VEry well.

Unless counsel and parties have a different order of business, the Board will now take up the various motions for summary disposition or other matters which have been hitherto filed and not ruled upon by the Board.

MR. ROISMAN: Mr. Chairman.

CHAIRMAN MILLER: Yes?

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MR. ROISMAN: Could I ask two primary questions.

One, will the Board object if counsel remain seated rather than having an up and down.

CHAIRMAN MILLER: No objection whatever.

We think it would be helpful.

MR. ROISMAN: Secondly, I wonder if it would be possible for the Board to make arrangements so the copy of the transcript that would normally be provided for the local Public Document Room be made available to the intervening parties with the understanding that they, in turn, will make it available to the members of the public who want to see it.

For my purposes, it would be perfectly all right, and I would be glad to designate my hotel room at the Quality Inn as the local public document room until the hearings are over. That will enable us to have a transcript on the evening, if it is being prepared on a three-hour basis or five-hour basis, at the same time as the other parties. We are not financially able to order one.

(Board conferring)

CHAIRMAN MILLER: The Board certainly is perfectly willing to have that arrangement made.

May I inquire of the Staff counsel, is there any problem that the Staff sees in that regard?

MR. KETCHEN: I don't have any problem. I haven't

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been involved in a case where it's been done before. I don't know what the procedures are. I don't have anything to do with the Ace-Federal contract, so I don't know how it is done. But I have no problem with it.

CHAIRMAN MILLER: Well, we will assume then that at least initially the court reporter and the reporting service will make available to Mr. Roisman, counsel for one of the intervenors, at his hotel room No. 417 at the Quality Inn in Charlotte, North Carolina, that copy of the transcript, exhibits and other documents which would normally be filed in the Public Documents Room. This will be in lieu of such filing, that Mr. Roisman will undertake both to make such documents available to other intervenors, to the interested public, and to let the Board know if it has presented any problems with people who go to the public document room and find nothing there, so that we can seek to accommodate all.

With that understanding, the Board approves the practice.

MR. ROISMAN: Thank you, Mr. Chairman.

CHAIRMAN MILLER: Off the record, please.

(Discussion off the record.)

CHAIRMAN MILLER: All right, back on the record.

Any other preliminary matters that counsel and parties wish to call to our attention?

MR. WILSON: Yes, Mr. Chairman.

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I am Richard Wilson with the State Attorney General's Office in South Carolina. I am here to appear on behalf of the State.

CHAIRMAN MILLER: Thank you. You are welcome.

Anyone else?

(No response)

All right. Let us take up, unless someone has a different order, the Staff's motion for summary disposition of NRC contentions 1, 2, 3, 4 and 5 filed on May 11, 1979, accompanied by a number of affidavits -- I think five or six in number, six, apparently.

The response of NRDC to such motions was filed on June 5, 1979.

I believe the Applicant filed its memorandum of support of its motion for summary disposition respecting NRDC on May 21, 1979.

I realize that there is some duplication and overlapping inasmuch as other motions for summary disposition filed by other parties either overlap, or in some cases incorporate by reference portions.

In order to get started, is there anything further we need, in order to get into this subject matter?

First of all, I inquire of the Staff who filed the original motion for summary disposition, contentions 1 through

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MR. KETCHEN: I don't believe so. We did file a document on June 15, a letter which indicated that our previous motion for summary disposition on May 11 would constitute our response to the respective motions for summary disposition of CESG and NRDC.

And to the extent they overlap, we are essentially saying that our motion for summary disposition covers all the ground. However, once, at the appropriate time we go through this before we start into the Staff's motion for summary disposition, I would like to make some preliminary comments, if I may since we are taking up the Staff's motion first.

CHAIRMAN MILLER: Yes, we have no objection.

Would this be an appropriate time for the Staff to make its comments?

Other parties will be given like opportunity concerning, I take it, the subject matter and how it fits into -- well, the Staff's motions as to NRDC's contentions that are described. Is that correct?

MR. KETCHEN: Yes, sir.

CHAIRMAN MILLER: You may proceed.

MR. KETCHEN: My comments are very general in form, but I think they go to the focus of this case and how it is going to proceed after today.

What my comments briefly do is call attention to

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the problem of the issues in this case. Our case and our motion for summary disposition was based on the express language of the contentions as expressed and admitted into this proceeding following the March 13, 1979 prehearing conference. And we go into Contention 1 briefly, which is a discussion of the criteria that the Applicant has to meet to get an interim licensing authority to undertake the proposed cation.

Contention No. 2, whether the proposed action is a major federal action or not.

Contention No. 3, alternatives that the Intervenor suggests that the NRC Staff has not considered.

Contention No. 4, the radiological impacts of the transportation and storage portion of the proposed action.

Contention No. 5, whether or not a full core reserve should or should not be maintained by the Applicant as a design operating feature.

Contention No. 6 on sabotage -- and I am speaking with respect to NRDC's contentions.

With respect to -- I'm just outlining these.

With respect to the Carolina Environmental Study Group, they had three contentions.

The first one involved alternatives to the proposed action.

The second one also involved transportation.

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sense. It wants to discuss, at least as I read their case, what happens 20 years hence if there is no interim spent fuel storage facility available, or no ultimate spent fuel storage available.

Their case also indicates that the So-called Duke cascade plan is before this Board for consideration. And their case, as part of their summary disposition motion, at least, indicates that it would be wise to delay proceeding with this hearing until the Staff and the Commission complete the generic environmental impact statement with respect to the handling and storage of spent fuel.

Now the problem we are having, if that is the NRDC's case, then we have not met head on on the issues. We have, in essence, evaluated and offered evidence and testimony and the motion for summary disposition on one case in one set of specific issues, and NRDC is here to plead and offer evidence and testimony on another case.

And we believe that to go forward in this case, the Board has got to focus on which type of issues we are talking about. It will be burdensome to the record if NRDC at least presents its case on one set of issues and we present our case on another set of issues. I mean broad, general issues. And they are either going parallel to each other or going in opposite directions.

Specifically what we would like to draw your

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attention to is the cascade plan.

Now, if the ruling is that that particular plan is before this Board as an issue, then we would have to say that we haven't prepared a case on that cascade plan. As far as we know Duke Power Company has not presented that plan as a licensing action that we could review and we could make our decision under NEPA as to whether or not it is acceptable or not, or under the Atomic Energy Act as to whether that plan is acceptable or not.

So if your judgment is that that type of specific issue is before this Board, then we have just got to take an alternative action.

One point though, in our testimony we have mentioned the cascade plan with respect to NRDC, at least contention 3D and 3C, we do discuss that, but we discuss that plan only in the sense of an alternative with respect to the other alternatives that have been suggested.

We indicate -- our case is that that particular cascade plan is not before this Board as an alternative, it is a speculative alternatiave at best.

NRDC, I believe, in its testimony will show that that plan has speculative attributes to it because it entails future licensing of other actions by the Commission. And the Applicant indicates in affidavit or a piece of testimony filed by Mr. Bostian, that that so-called plan is just that,

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a plan -- it is a goal, but not anything set in concrete. So I am not sure, even on that subissue, that there is an issue joined on whether that cascade plan is before this Board. And if it is, in what status or context it is before this Board.

Now, if I could just very quickly go to the generic environmental impact statement --

CHAIRMAN MILLER: Well, do you want to have that matter that you just raised considered by the Board at this time? You indicated you are doubtful.

You rarecall, we had a telephone conference in which the Board raised the question as to whether or not we should have this initial discussion.

It was a consensus, I think, joined in by everybody except Mr. Roisman of NRDC that the parties were prepared. You had 21 to 24 witnesses. You should proceed. And that in response to his last motion, which was to suspend the matter, in their position the Staff has indicated that they are very substantial, if not total issues, which should be gone into.

Now we have all this in the picture. We have set aside the time, we have done all the scheduling, all the parties and attorneys and witnesses have gone to a lot of trouble and expense in their schedules. So, don't you want to consider then what the Board's ruling should be if you see the possibility

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of parallel courses that don't meet, and the Board and other parties might see a little more confrontation depending on the nature of the rulings? Isn't that something you are asking the Board to consider first?

Or, are you?

MR. KETCHEN: Yes and no.

CHAIRMAN MILLER: That's a very clearcut response.

Let me hold the yes or no a minute, because my colleague has a question, I think, on the issue we are now discussing with you.

MR. KETCHEN: You have raised several questions.

DR. LUEBKE: Before we get away from the cascade unit going on to the generics issues, I have heard several times, and in considerable detail and as much as one full page outlining places like McGuire, Perkins, Cherokee and how many fuel elements are being transferred where, and when, and several documents I can't lay my hands on because we have somewhat of a paper blizzard.

Are those just imaginative pages, or has the Duke Power Company contributed to establish that information?

MR. KETCHEN: No, no.

DR. LUEBKE: What is the meaning of those pages I read?

MR. KETCHEN: No, no. They are not imaginative at all. They are there -- they get there by this route:

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Our case before this Board is that the case is about transshipment of 300 fuel assemblies to McGuire for storage. That is our case. And our case is that that is under NEPA, a negligible action.

However -- and our case also is that because under NEPA it involves negligible or insignificant impacts, you don't have to consider alternatives.

DR. LUEBKE: You say.

MR. KETCHEN: I said. I'm only saying what my case is.

If, on the other hand, the way our procedures work we don't have a two-step process, we wind up evaluating those alternatives assuming that the ruling may be that you have to. Even if you evaluate alternatives, even if this were a major federal action, we are saying that cascade plan is a speculative or type of option that even under NEPA would not have to be evaluated in this case based on interpretations of NEPA by the courts.

But we have to talk about it some.

CHAIRMAN MILLER: Well it is an issue whether or not --

DR. LUEBKE: But it originates from the Duke Power Company. It didn't come out of the blue.

MR. KETCHEN: No, it originates from documents that I believe Mr. Roisman put together during his discovery process.

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CHAIRMAN MILLER: Where did the term "cascade plan" or the use of the word "cascade," where did that originate?

MR.KETCHEN: That's, I believe, in one of Duke Power Company's documents, and it is one of their characterizations of what they intended in the particular document that talked about.

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CHAIRMAN MILLER: Very well. I thought the references indicated that, but I wasn't sure whether Mr. Roisman or NRDC coined the term or whether it stemmed father back with some description of the process, whatever it may be, on the part of the Applicant.

DR. LUEBKE: Some further clarification. As I read about these Cascade Plans, I made the mental picture that these 300 fuel assemblies you say are specifically part of the application and within the jurisdiction of this hearing, if they were given red tags placed on them, I could visualize those same 300 fuel assemblies being moved from McGuire to Perkins to Cherokee, wherever -- I don't remember the stations -- and eventually conceptually getting back to Oconee where they started from. Is that unreasonable?

CHAIRMAN MILLER: The Cascade Plan, is it theoretically possible that you could have this movement wind up whence it started, namely Oconee?

MR. KETCHEN: I think it is theoretically possible but not conceivable. I don't think those things would be red tagged in that type of fashion. I think it would be sort of a fungible goods type of thing. I think the next action would have to undergo -- since transshipment and storage at other reactors whether you are storing fuel from one reactor at another reactor right now has to undergo a licensing review -- review. At that point, when you went to do that

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again if you were an Applicant, you would probably have to go through this same process.

DR. LUEBKE: I viewed it from the basis that these are the oldest rods, least radioactive rods so if you had a choice you would move these red tagged rods around instead of some new rods.

MR. KETCHEN: That is an option I am sure that would be considered if it came up. I would believe good practice would indicate you would transfer the oldest spent fuel rods first.

CHAIRMAN MILLER: Is that necessarily speculative given the fact that the Duke Power Company apparently at some point in time, and I am sure we would hear about it from the Applicant, devised a plan, whatever it is denoted, a Cascade Plan, and gave it life in the sense of at least this consideration. Has it not moved from the speculative to the at least possible and hence comprises a subissue in this proceeding?

MR. KETCHEN: I don't believe so. I believe that is where the Minnesota case, Footnote 5, page 9, insofar as that guidance directs us --

CHAIRMAN MILLER: That was a wholly different state of facts. Wasn't that simply an addition to the capacity of the spent fuel storage pool by compaction?

MR. KETCHEN: Factually, yes; but in principle, no.

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CHAIRMAN MILLER: Did it involve this shipping, perhaps shipping or cascading? It involved one nuclear facility and enlargement of the capacity by virtue of an ac[illegible]tion. Isn't that the case you are talking about?

MR. KETCHEN: That is the case I am talking about. It involved segmenting of licensing actions or not segmenting of licensing actions and we are saying that that plan that is sort of on the periphery of this case in our view, is one that would have to be implemented with further applications to the Commission for future authorizations to do what I have sought to do if indeed they followed that plan.

CHAIRMAN MILLER: Are you talking now about the present Duke Cascade Plan in your latter remarks?

MR. KETCHEN: Yes.

CHAIRMAN MILLER: In that event, hasn't the Staff taken the position in some of its papers that at this hearing, whatever it may entail, that the Staff and the Board and the parties should and would consider cumulative effects, if any. And would not cumulative effects when you have a so-called Cascade Plan at least described in some fashion, would that not clearly take it outside the ambit of the single facility of the Minnesota case and an alleged segmentation there, and alleged whole series of at least described actions. Either you have a wholly different qualitative characterization depending on what the evidence shows of the plan or at

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least raise a consideration for Board determination on the evidence as to whether or not such a plan, from the Staff's analysis would be an impermissible type of segmentation as distinguished from the Minnesota single facility expansion type of thing or create an issue that the Board should and would take evidence on and consider.

MR. KETCHEN: I don't think so. I think, based on our position, our position again, that it is a negligible action --

CHAIRMAN MILLER: Are you looking at all of the reasonably possible Cascade operations or not?

MR. KETCHEN: No. I will tell why I am not. I think that is what the Commission is going to cover in the generic environmental impact statement.

CHAIRMAN MILLER: We don't know and will not guess what the Commission will cover. That is a job for somebody else, not a Licensing Board in an ongoing evidentiary hearing. If that is your position, while we haven't made a final decision, our provisional judgment will consider do you look at a cumulative effect of the whole matter or look at an attempted segmentation which is or is not a limiting factor or whatever else the evidence may show.

Our provisionsal judgment would be in response to your question: what are we looking at. The Board will look at the Cascade Plan, its nature, quality, ramifications,

eak3 possible impact.

MR. KETCHEN: If I may go back to your opening remarks, when we had the conference call, pending before the Board were various motions for summary disposition. I did indicate that we were prepared on all of the issues and were, as we have attempted to, focusing on them. But I must say, if that plan and all of its environmental impacts in the future for 20 years is before this Board, we haven't prepared that case and if that is the Board's ruling, that we are going to go into all of the --

CHAIRMAN MILLER: All of the cumulative impacts that you said you were going to go to in your own papers, we expect you to do that. We cautioned you this matter could well come up. I don't know why you presumed the Board would overrule all contentions that relate to an evidentiary matter relating to the so-called Cascade Plan.

I don't know why the Staff assumed the Board would adopt the Staff's limited position in that regard and say we would take the Staff's position throughout this hearing. If you did so, I think the Staff is wrong.

We will be prepared, once we have heard from Applicant and other counsel, to make a ruling. I have indicated what our provisional or tentative disposition is so that counsel and the Applicant may know what is in the Board's mind in this regard.

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MR. KETCHEN: I may indicate one other thing: It's really and expressly that plant or as an alternative, is not mentioned in any of the contentions that we address. It does come up in discovery --

CHAIRMAN MILLER: Contention 1, NRDC: "Proposed action is a step in a proposed program to handle the shortage by shipping and storage of spent fuel away from the place generated."

"A step in a proposed program" along with all of the papers filed by NRDC and others in this case is a clear signal as to what is intended to be gone into right in the first sentence, it seems to me. "Program."

MR. KETCHEN: The program in that contention, as I read the contention, and discovery, is the DOE program to address the overall shortage of spent fuel storage space and the ultimate disposal question and once again, I think our discussion here is apropos and important. I myself and the Staff have had a -- once again, our opening remarks are the focus of this case is important and exactly what the judgment is and I think we have a problem in this case.

DR. LUEBKE: Another question along different lines. This morning you have used the word "negligible" several times and in your writings it is used quite often. The question is, when you have used that word, are you referring to normal operation, the truck never gets off the

eak7 1 road, has an accident, nothing untoward happens; or do you
2 consider accidents and now we have a new proposed regulation
3 coming up which -- which takes rather seriously matters of
4 terrorism and hijacking. Are you considering abnormal
5 operations when you use the word "negligible".
6 MR. KETCHEN: Yes.
7 DR. LUEBKE: Even under those circumstances you
8 say the effects are negligible and you are ready to prove
9 that?
10 MR. KETCHEN: Yes. May I go back to -- if that
11 answers your question, may I go back to you, Mr. Miller. I
12 would ask you if you would, could you indicate to us --
13 I am not sure we have it -- where the Staff indicated its
14 case would be built on the cumulative effects from the --
15 CHAIRMAN MILLER: As I recall it, I didn't say
16 your case was built upon it. I think in discussing the
17 various options available to the Board in the evidentiary
18 hearing -- and it may have been earlier than that when you
19 were looking at the Commission's statement of policy and the
20 two descriptions published in the Federal Register, one where
21 they denied NRDC's motion and the earlier one
22 where they granted it in the sense that the Commissioners
23 decided to go forward with an environmental impact statement,
24 but not hold up licensing in the meantime -- cumulative
25 impacts or those things reasonably possible in the future are

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one element of consideration and my recollection is and I will try to find it -- if I am wrong I apologize -- but the Staff at some point in its papers recognized that and said at this hearing it is possible and proper for us to consider the cumulative impacts.

I don't think you tied it necessarily to the so-called Cascade Plan. I don't think you did. That is not my memory. You recognized when some action is sought that possible cumulative impacts are to be considered. This isn't a new law in NEPA or our own decision or anything else.

In Kleppe, you will recall, there was no desire and there was a finding by the U.S. District Court, that there was no programmatic action intended on a regional basis, local, and I believe national. But there was an expressed finding that I think is the sweep of Kleppe. You have here a situation where it is alleged and presumably proof will be offered as to whether or not this is a step in a proposed program; in other words, whether it is a program, not just a single, first and perhaps only application but whether it is a step or first step in a proposed program which may or may not have certain dimensions.

We don't know what the evidence is and we are not prejudging it in any way. It is certainly an issue in fact or mixed fact and law, that the Board would have to look at: What would be the cumulative impact -- not whether or not

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it is step one -- if it is step one and could be found to b reasonably part of a program or not.

It could be either way. The Board would consider the evidence in that regard. Hence, it would behoove all parties to put on whatever proof they have.

MR. KETCHEN: Depending on how the ruling comes out, I think that is going to affect our proof on how this case goes, because as I said before, our case proves one set of what we conceive the issues to be and I think the other cases do otherwise. I think that has got to--

CHAIRMAN MILLER: The Board agrees. That is why we have to see what the issues are and what the reasonable ramifications of the issues are. That is why the Board suggested you might want to take several days at this time and start the evidentiary hearing a few weeks hence.

That is what the Board and parties decided was convenient. We are here today for this purpose and will start the evidentiary hearing and witnesses tomorrow morning.

MR. KETCHEN: The reason was, as I indicated to you, it is easier to tell the witnesses not to come if we are wrong than to reschedule them. That was tentative based on a prehearing conference, argument on these issues and depending on what the Board's ruling was.

CHAIRMAN MILLER: It is easier I suppose to go forward with what witnesses you do have. If you feel there

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are additional matters we can schedule them in the two weeks you have before the hearing ends or in some fashion get them before the Board.

Your papers show you wanted to go ahead and you felt you could do so under the Douglas Point criteria.

MR. KETCHEN: There are other discrete areas we can spend our time doing. I would like to as a final comment indicate throughout this hearing and we took this position at the prehearing conference too, we have never agreed that the contentions as specified by at least NRDC properly set the framework for this hearing.

CHAIRMAN MILLER: You haven't waived anything.

MR. KETCHEN: We haven't waived anything. That is the purpose of our trying to find out what the focus is, what the factual focus is of this case.

Thank you, sir.

CHAIRMAN MILLER: Who wishes to go next.

(No response.)

CHAIRMAN MILLER: Well, then, who opposes the Staff motion for summary disposition in the sense that counsel has rightly raised the question of what the issues and the impact of those issues are?

MR. ROISMAN: Mr. Chairman, we oppose it but we think the appropriate procedure would be that the parties who support it complete their statement in support and then

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CHAIRMAN MILLER: I have no objection; doing it as a whole rather than piecemeal.

MR. MC GARRY: I think the Applicant's position is we would like to hear the response to the motion since we are not a party to this motion. We have an interest in this motion and after we have heard the various views of the parties, I think it would be appropriate for us to comment, Mr. Chairman.

CHAIRMAN MILLER: Let's get the ground rules straight here at the beginning. An evidentiary hearing by the NRC is a serious and substantial matter, not only for the Applicant and Staff, but it costs a lot of money. There are many public interest matters that get involved, too. We don't want to play the business of going in the baseball bat to see who is next. There is no doubt that the Applicant in the course of its own findings and in stating its position, substantially follows the Staff position and substantially, but not totally, opposes the NRDC position; isn't that correct?

MR. MC GARRY: That is correct, Mr. Chairman.

CHAIRMAN MILLER: We would like you to go next. We would like response then from the NRDC, the true adversary on this issue and then other parties opposing the Staff and

eakl2 Applicant will be heard. We don't want to get involved in procedural games. This is so serious. I am not trying to castigate counsel at all. In the course of a long hearing, we find there is a temptation, very human, to engage in technical maneuvering. We don't want it or intend to permit it. We are conducting a public hearing. We want these matters considered fully and fairly and have a record which will assist in the decision making we will engage in, to be available for appeal, be known to the people of North Carolina and South Carolina, whoever wants to read the record.

As lawyers, I suggest we hold down what we might do if this were strictly an adversarial court of law and realistically take positions that enhance the development of the record and which fully and fairly reflect the opposing and competing principles which are significant and important.

In that spirit, I suggest the Applicant might well proceed at this time.

MR. MC GARRY: We welcome those comments and appreciate them and we think they are helpful at an early stage. As the Chairman indicated, the Applicant's position is consistent with the Staff's position. We do feel if we are dealing and focusing specifically on the cascade program, that that is not before this Board.

eak13 1 The Board raised an interesting question; that is
2 one of cumulative effects. It appears the Board, if I get the
3 sense of the Board, is of the view that this is perhaps
4 a cumulative effect that should be considered. The Applicant's
5 position is cumulative effects should be considered when
6 such cumulative effects are known and are quantifiable.
7 We maintain that the cumulative effects in this instance are
8 unknown and unquantifiable. And therefore, this Board
9 need not concern itself with such speculative effects.
10 I think the case law is legion. I must confess I have been
11 diving into my briefcase to try to find the case and haven't
12 come up with it.
13 But as many a lawyer is wont to say, doggone it,
14 I have read the case. I will provide the Board with the
15 appropriate authority.
16 CHAIRMAN MILLER: It gets down to, in this case,
17 what is the proof going to show. We have the principles
18 you enunciated or the Staff does, but when you get down to
19 it, what is the evidence or inferences that reasonably flow
20 either way from the evidence. That is where we should be
21 spending our time.
22 MR. MC GARRY: I can see we are going to save a
23 lot of time. You are getting right to the gut issue.
24 CHAIRMAN MILLER: Better to start at the gut and
25 move out rather than wind up a week later saying, gee, I wish

eak14 we had known what we would talk about.

MR. MC GARRY: Our proof will be consistent with the statement of Mr. Bostian, in the affidavit of Mr. Bostian, which is attached to our opposition to the summary disposition motion of NRDC. The essence of our position is simply that yes, Duke has considered cascading. And may I stop there so the record is clear as to what we are talking about.

CHAIRMAN MILLER: Yes; I wish you would.

MR. MC GARRY: Cascading is nothing more than transshipment. Those words are synonymous.

CHAIRMAN MILLER: Multiple transshipments or singular?

MR. MC GARRY: The concept of cascading is a multiple effect.

CHAIRMAN MILLER: I want the theory in mind so I understand the terms as you and other counsel use them.

MR. MC GARRY: That being the case, yes, as Mr. Bostian has indicated in his affidavit, Duke has considered this. It would be imprudent for Duke not to consider one of the options that are available to it in solving the spent fuel storage problem which we must remember from Duke's point of view, was foisted upon the company as a result of the President's 1977 statement declaring no reprocessing.

As this Board well knows, since that time, the industry has been faced with a dilemma of what to do with the

eak15 spent fuel. Duke is considering various aspects of treating the spent fuel; cascading(shipment) is one alternative. Reracking with high density racks is another alternative; reracking with poison racks, building an independent spent fuel storage facility on or off site are other alternatives.

Duke examines all of these. That is the essence of Mr. Bostian's testimony. In none of the documents that Duke has filed has Duke maintained it has a hard and fast cascade(transportation) program. Merely, it is one of the options that it is looking at.

CHAIRMAN MILLER: Would the proposed action as narrowly described in your application in this proceeding, would that be a step in any other options, save the cascade option?

MR. MC GARRY: Duke maintains that -- I am attempting to answer your question.

CHAIRMAN MILLER: I know you have a list. Some it would not be part of. Others I am not sure of.

MR. MC GARRY: Duke is striving to maintain flexibility, to cope with the spent fuel problem. Duke would take the position that by embarking upon this particular transshipment activity, it would not prejudice other alternatives including subsequent transshipments.

CHAIRMAN MILLER: My question is would it be pursuant to other options or alternatives other than the transshipments

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or would it be fair to consider it as connected with that option, whereas you will put on evidence as to the availability of other alternatives with your own views as to their viability and the like? You have mentioned three or four.

In most of those, as I was following you, I did not see that this particular transshipment license would be a part of it. Nonetheless, I wanted to be certain in my thinking at the beginning as to how it bears in its relation to the whole range of options and alternatives?

MR. MC GARRY: Yes, Mr. Chairman. Let's take the present reracking option which Duke has pending before the Commission. In that instance, as Mr. Bostian's affidavit indicates, it may end up that we will have to transship even though we are not reracking. If we want to poison rack, we may have to transship to accommodate that alternative; just to physically get into the doggone spent fuel pools we will have to ship some of the fuel around.

The testimony will speak to that also.

DR. LUEBKE: My impression is that the reracking has been approved. You use the word "pending".

MR. MC GARRY: That is incorrect, Mr. Chairman.

CHAIRMAN MILLER: What is the status. I think the Staff left the date in June blank, which I assumed was a pending matter. What is the status with NRC of that application?

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MR. MC GARRY: I should leave that to NRC, but the pending status to the Applicant's best knowledge is just that; it is pending, not approved.

CHAIRMAN MILLER: It was expected to be approved on June 8, if I recall the filings of some of the parties.

MR. MC GARRY: That is what some of the pleadings indicated. As late as yesterday afternoon and I believe as early as this morning, we have still not received approval to rerack.

DR. LUEBKE: Another question. You said the situation has existed since the President's statement of policy in 1977 and you are considering this and that. It is now June 1979. It seems to me you could have built some of these things you were considering.

MR. MC GARRY: An interesting question, Dr. Luebke. One has to remember, when one plans, it takes time to properly evaluate what some of the options are. This is a fast-changing area and we are attempting to do the best we possibly can. Since that time, 1977, we have embarked on some spent fuel modifications. Indeed, witness our reracking application. We are attempting to accommodate that reracking application.

CHAIRMAN MILLER: Let me interrupt for a moment. Maybe we can find out what the ststus of that application is from the Staff.

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MR. KETCHEN: Mr. Chairman, as I understand it, the status of the application is it is still being reviewed in the Commission and has not been approved yet.

CHAIRMAN MILLER: When were the projected dates?

MR. KETCHEN: June 8 was the first one.

CHAIRMAN MILLER: That contemplated action by whom?

MR. KETCHEN: By the Commission in issuance of the amendment.

CHAIRMAN MILLER: By the Commissioners or some segment of NRC?

MR. KETCHEN: Probably at that time, it constituted action by the NRC Staff in issuance of the amendment, because it was uncontested.

CHAIRMAN MILLER: Has the Staff in that sense taken any action or made recommendation, to your knowledge?

MR. KETCHEN: Yes, they have. As I understand it, it has been recommended that the amendment be issued and that -- I understand it has been sent to the Commission for their approval.

CHAIRMAN MILLER: Is that sending it to the Commission -- you mean the Commissioners?

MR. KETCHEN: Yes, the Commissioners.

CHAIRMAN MILLER: Is that standard practice?

MR. KETCHEN: No, it is not the standard practice.

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It was done in this case because of the current situation in Minnesota and so forth and the recommendation was we are going ahead and issue the amendment unless we are directed otherwise.

CHAIRMAN MILLER: Thank you. I believe that is as far as we can go to clarify the matter. If you should obtain additional information, add it to the record so we will be current on it.

MR. KETCHEN: Right, sir. I might point out my pleading filed last week is inaccurate. It anticipated that it would be issued, some date. It didn't come to pass.

CHAIRMAN MILLER: I believe in one or two places you left the date blank, June blank, for that reason, that you didn't know.

MR. KETCHEN: It never happened.

CHAIRMAN MILLER: We have one question on this subject and then we will get back to you.

DR. LUEBKE: To get back to the President's policy statement in 1977, and the interval of time that has passed, sometime during this hearing or maybe now, the Staff could tell us how many nuclear plants in the country have taken steps to build additional storage and accommodate themselv to this need for additional storage.

MR. KETCHEN: We can do that.

CHAIRMAN MILLER: You may continue.

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MR. MC GARRY: Thank you, Mr. Chairman.

Two points I would like to pick up on that the Board had inquired about: No. 1, Dr. Luebke, you asked why haven't we taken other measures since 1977. You must remember, and this is not pointing a finger at anybody, that we filed this application in March of 1978. Now addressing Chairman Miller's question, with respect to the need to transship with respect to other alternatives and I indicated the poison racks, I am informed now that every single alternative we are going to have to, from Duke's point of view, transship and that is what our testimony will show.

CHAIRMAN MILLER: Is that transshipment of the same quality as that which might be encompassed by the cascading or would that include some transshipment at or near site in some circumstances, in order to obtain space and that type of thing?

MR. MC GARRY: Both.

CHAIRMAN MILLER: Did you have anything further.

MR. MC GARRY: I believe I have addressed the Board's concerns and fairly stated our position. I simply note the discussion was focused on the Minnesota vs. NRC case. We do maintain that that case is directly on point with the instant proceeding when we look to the famous footnote 5 on page 9, which we have all focused upon, and we read it as saying that with respect to the segmentation

eak21 argument, that the next action that Duke seeks that will enable it to come to grips with the spent fuel problem, will be a subsequent application; and that application will be reviewed by the NRC and will be before the Board if that is the appropriate course.

We are saying we are not avoiding discussing impacts of the spent fuel storage problem. It is simply we are talking today about this activity; if we choose to pursue another course of action like the reracking we will file an application and that then will be subject to review.

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CHAIRMAN MILLER: Well, let me inquire last, then, as to the Applicants position on the consideration of possible future cumulative impacts if the cascading plan in some form were to be followed.

Is it the Applicant's position that this Board should consider potential cumulative impacts from the Cascade plan or not?

MR. MC GARRY: Should not.

CHAIRMAN MILLER: Should not. Very well.

DR. LEUBKE: I would like to ask if we consider ourselves limited to just this shipment of 300 fuel assemblies and put a condition on the decision which says 'that and no more'.

Would that be a hardship?

CHAIRMAN MILLER: It couldn't be a hardship, could it?

MR. MC GARRY: The Staff has evaluated 300.

DR. LEUBKE: No, but if we came out with a decision that says it's acceptable to ship these 300 but no more on this Cascading.

CHAIRMAN MILLER: That wouldn't be any more hardship than you contemplate anyway because you say you'll do anything, and whatever it is you'd have to come back to another board.

MR. MC GARRY: That's correct, Mr. Chairman.

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That answers your question.

Just so the record is clear, there has been a question of just exactly how many shipments we were talking about. There was a range between 300 and 400. But whatever that number is, that's exactly what this application is for.

I might inform the Board that at 9:30 today we did receive the reracking approval.

CHAIRMAN MILLER: Oh, you did receive it at 9:30. Well, at 10:30 we're going to note that fact, and we think that's very expeditious intelligence. We commend everyone involved.

What did they use, pigeons?

(Laughter.)

MR. TOURTELLOTTE: As usual, the Applicant knows before the Staff.

(Laughter.)

CHAIRMAN MILLER: And the Staff knows it before the Board.

All right. That's swell. We have the record established.

Now may I inquire: I take it that you have covered your points at this stage, Mr. McGarry.

MR. MC GARRY: Yes, Mr. Chairman.

CHAIRMAN MILLER: Are there other parties or counsel now who take substantially the same or similar

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positions as the Staff and the Applicant in this regard? If so, we would like to hear from whoever might wish to associate himself or herself, or otherwise make a position on the record.

(No response.)

CHAIRMAN MILLER: No one else?

MR. KETCHEN: Mr. Chairman, just very quickly, since we're going to the next, I want to clarify one point responding to Dr. Leubke.

This case is about 300, the shipment of 300 fuel assemblies of 270 day old fuel. That's all we see that this Board would be authorizing the Staff to amend the permit for. And the Applicant would not be able to ship less than 270 day old fuel under this authorization.

CHAIRMAN MILLER: Very well.

We'll now ask Counsel for NRDC, as well as other parties or counsel who may wish to associate themselves in some fashion with the NRDC position.

Mr. Roisman?

MR. ROISMAN: Thank you, Mr. Chairman.

Let me just begin by noting that I must say, I found it curious, but in dealings with the Staff not surprising, that the Staff today tells us that the reracking proposal, the early approval of which would have strengthened our case, was sent to the Commission before any action was taken because

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of the Minnesota case. And yet the Staff went to the trouble of writing an extensive memorandum saying that this case ought to proceed ahead in spite of the Minnesota decision and that no one ought to wait for the Commission.

Noting that anomaly, and since the approval has already been granted on the reracking, I wouldn't want to come back through it again if we get into the suspension question.

I'm not sure that the suspension motion was necessarily still right in light of the Staff concessions today, which are that they are not prepared to go ahead if the Board should rule that the proper scope of the proceeding is the consequences that reach out to as far as the Cascade plan is talking about reaching out.

If that's true, I think it is clear under the relevant rulings of the Commission and of the courts that the hearing must await the preparation by the Staff of the data necessary to make their case.

Let's go back first to the ultimate underlying question: What should the scope of the proceeding be?

Basically, what the dispute is about is whether the Board and the Commission should attempt to get Duke into a better planning mode than it appears to be in. Duke would like to look at the next six months or year or year and a half or two years. And what it refers to as "flexibility" is

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really not flexibility at all.

If you read the documents, many of which we've attached to our motions, that come out of Duke's own internal discussions, it's clear that each day that passes with Duke making a commitment toward one course of action is impacting on another. You'll see in documents prepared by the Staff and the Applicant statements that, for instance, putting poison racks in, which would allow more fuel to be stored at Oconee than this reracking proposal which was approved at 9:30 this morning, putting poison racks in would have allowed even more fuel there.

But they go so far down the line with the transshipment proposal that they didn't have enough time to order the poison racks which apparently are being back-ordered on a larger scale, and there wouldn't be enough time to get those in place given that transshipment got held up.

So Duke, having thought the transshipment would come along, passed by the chance of being able to put poison racks in and had to go with the stainless steel racks.

Now they're telling us in affidavits that we see filed with their papers that the independent spent fuel storage facility that might be available to displace the need to transship once reracking has been exhausted can't be done because it's a 44 month to 60 month prospect, and they're too close to the date on which the reracking will have used up

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the capability of Oconee, May of 1982 approximately. And therefore the independent spent fuel storage option doesn't exist. They've got to have transshipment.

Each time Duke's statement of flexibility has really been a statement that they are counting on something, let's call it the Knight in Shining Armor theory. Someone will show up riding on a white horse carrying a spent fuel storage pool, and nowhere in Duke's system will that spent fuel storage pool alleviate Duke from all this aggrevation: no more hearings, no more requests for license amendments, no more transshipping of spent fuel, no more spent fuel storage expansions.

And the one they're counting on is the government and their own affidavits which are attached to our papers.

Mr. Snead, who is the manager for Nuclear Fuel Services, in a memorandum dated March 23rd of 1979, says, and I quote:

> "Indeed, our plans are premised on avoiding significant costs of spent fuel storage while waiting for government to act on their plans for storage."

Now that's why we're here. We're here because we do not want to see Duke making a fait accompli of a government away-from-reactor storage facility. We're not here to argue with you about whether we're right that a government

mpb7 away-from-reactor storage facility is a good idea or a bad idea.

We think you don't have to reach that issue because if you just look at the realities of spent fuel storage management and do what the Staff wants you to do and disregard those contingencies that we really can't prove, when will the government, if ever, build one of those, you'll see that the course of action that Duke's taking is not prudent. It doesn't make sense.

It has to be evaluated, though, in the context of Duke keeping its reactors running. That's kind of the bottom line. And the one thing that Duke considers intolerable, and we will accept for a moment without necessarily conceding that it's intolerable, is that one of these plants gets shut down someday because it doesn't have anyplace to put its spent fuel.

And they give us costs ranging from $165,000 a day up to half a million dollars a day as to what the cost of that might be. Whatever it is, if the costs are like that and if costs are the sole factor, it's a big number. And we can assume and accept for the moment that that wouldn't want to occur.

To get the answer to the question how they keep the Duke plants running irrespective of the spent fuel storage problem, you have to look beyond the end of your nose.

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You have to look beyond 300 spent fuel shipments from Duke Oconee to Duke McGuire.

Now Duke's got an idea. It's called the cascade plan. And I would concede that if economics were the sole factor that that might look like a very good plan. If you assume that all the Duke reactors were going to shut down for some other reason some time in the early 1990s because you wouldn't have to worry about building an independent spent fuel storage pool and you could--if Duke got its approvals to build all the plants that it has on the drawing boards, you would have enough in their spent fuel storage pools to handle the shuffling.

The flaw in the analysis comes because Duke doesn't even know that it's going to build all those plants. I am told that if asked, Duke will have to tell you that the Perkins facilities are beginning to go into a holding mode. That's three plants, an important part of the cascade plan. That one of the Cherokee units is starting to go into a holding mode, an indefinite deferral.

Now those spent fuel storage pools -- Just think of those plants for a moment as spent fuel storage pools -- are going off-line. They aren't going to be there. The cascade plan already has some glitches in it. But Duke still wants to keep the transshipment option open because Mr. Snead, stating the position of the company, indicates to us that

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what they're really waiting for is the government to build this big pool.

Now I don't think the company really disputes what I've just said. What they really dispute is whether they are really shutting off the options. I think the problem is a polycentric problem: Every time you touch one piece of it, all the other pieces change.

We have an affidavit, for instance, from Mr. Glover identified as RMG, who indicates that if the spent fuel storage option that's being proposed in this proposal, namely transshipment, isn't approved, they had better have an independent spent fuel storage facility backup because they're going to really be in trouble. They can only rerack so much, and they're ultimately going to run into trouble with Oconee.

On the other hand, if this one is approved, that sort of is a green light that they're going to get other approvals, that they will be treated as independent actions, not linked together with all the other actions, and that the mechanics of spent fuel transshipment won't be markedly different.

So if you go ahead and evaluate the 300 and give them the okay, even if you put in the condition that Dr. Leubke suggested, which is that all approvals are for 300 and nothing more, you have given them the green light to go

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ahead with cascade, given them the green light to wait until the eleventh hour to decide whether to seek another transshipment proposal, which, I might add, is the one with the shortest lead time, because all they have to do is make sure they have a cask available or two if they're transshipping very rapidly, and a storage facility at another reactor which is being built and is therefore presumably going to be available.

The independent spent fuel storage pool has the longest lead time. The reracking with poison racks has the next longest; the reracking with stainless steel racks, the shortest of the options to transshipment.

We want to try to stop that. We're not trying to prejudge it, I want to be clear about this. Our witnesses have been asked in depositions and have given their judgment. They think the independent spent fuel storage facility is the right answer. But we do not have a case to make to that effect.

We are not experts in all the areas that one would need to evaluate. We want this hearing to evaluate that question. We want them to look at the real problem that Duke has, which is what to do with spent fuel given that we don't have a permanent waste disposal facility to put it in, and that there's no reprocessing, which was a sort of kind of interim disposal method. And to answer the question: What's

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the best thing?

Now maybe transshipment comes out, or maybe something with a transshipment option in it works. Offhand we would not be offended if you came to the conclusion that transshipment ought to be available as a last resort, that if Duke's reracking couldn't get ready quite in time, they were about to lose their FCR, and if you really thought that a full core reserve retention was crucial -- as you know that's a contention of ours -- but if you really thought it was crucial, that you could say 'All right, in that case transshipment until the reracking is ready and then stop it', or if they're building an independent spent fuel storage facility -- and our estimate that they could do the whole thing in 32 months is overly optimistic and it took 38 months and there are a few months there when they would have to shut down the reactors or lose the full core reserve -- maybe in that case you could say 'All right, there, transship if that's all you've got left, if the choice is between transship or shut down.'

But that's not the proposal in front of you. The proposal in front of you is unlimited or unrestrained transshipment except for the number of 300 or 400 at this point. And the Applicant argues that it's speculative to look beyond the 300 transshipment, that you've got all these different permutations and combinations. To some extent

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they're right. But mere speculation alone is not a basis for rejection of something that the Commission is considering. If it were, the Board would reject the 300 transshipment because it too is based upon speculation. It's based upon the speculation that the company's reactors at Oconee will continue to run anyway, a speculation which would have seemed more speculative three or four weeks ago when their orders were outstanding from the Commission ordering them not to run, a speculation which depends upon the availability of spent fuel casks, approvals by the Staff of the routing that the spent fuel is going to take in light of the new safeguards regulations, and, of course, the availability of McGuire itself.

McGuire does not yet have an operating license. The Staff in this case has taken the position that it won't allow the spent fuel to go from Oconee to McGuire until it has an operating license. And the Staff has got an authorization from a licensing board, But it has not yet seen fit to issue that approval.

So everything involves some speculation. And offhand, I would be sympathetic to the view that the Chairman has stated, that 'Well, let's get to the facts', because they think -- I mean, from the phone conversation we had the other day and from what you said this morning, I think where your head and maybe your heart are also is 'Come on,

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let's get down and fight about the facts and get the thing resolved.' I would be inclined to do that too if my client were as well situated factually as the Applicant and the Staff were. If I didn't have anything to rely upon but our own resources, we would just have to go with it.

But the law is not that way. The law says two things:

First, in the Barnwell case, which has been cited here for a different proposition, the appeal board laid down a standard. "When does the absence of a Staff" -- in that case environmental impact statement -- "mean that you should not go ahead with the hearing?"

To begin with, they recognized that in principle there are times when the absence of an impact statement prevents the hearing from proceeding. And the logic of that was that the impact statement is the full disclosure statement that gives the parties, even those like ourselves without the resources, the benefit of an independent unbiased objective look at the facts by the Regulatory Staff. They used basically the standard of significance: Is it a really important crucial thing that's missing that the Staff hasn't completed? In that case the question was whether or not the Staff needed to evaluate some additional factors that they hadn't looked at in the impact statement. How crucial are they?

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In this case it's more than crucial. It is the whole case. If the Board concludes that the scope of this case is -- not the cascade plan because that's just an option -- the scope of this case is the solution to the real problem that Duke is trying to get a solution to, namely what to do with spent fuel storage in our present situation, then in that case, at least from the perspective of my client, all turns on the look at those alternatives: cascading, independent spent fuel storage, limited transshipment, reracking with poison racks, reracking with non-poison racks, all of those options become considerations.

And we've been arguing since our first motion for summary disposition on the ALARA question and, of course, in our second motion for summary disposition. The key to our case is the analyses have not been done. And we are not equipped to do them.

We believe we are entitled by law to expect the Staff to do them. We cited on page 2 of the NRDC Response to the Staff Motions for Summary Disposition a document dated June 5th of '79 --

CHAIRMAN MILLER: Pardon me, Mr. Roisman.

The Board finds it necessary to have our morning recess at this time, perhaps a little unanticipated.

We'll take about 10 or 15 minutes, please. And you will resume afterward.

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MR. ROISMAN: I'll zing you will the cases afterward.

CHAIRMAN MILLER: Fine. Thank you.

(Recess.)

CHAIRMAN MILLER: The hearing will resume, please. Take your seats. Everyone be seated, please. Come to order.

Mr. Roisman, I think that you were in mid-sentence when I asked to interrupt for our recess. You may resume.

MR. ROISMAN: Yes, Mr. Chairman.

I had just finished emphasizing why I thought the Barnwell case and the line of reasoning used there was applicable here, namely that the absence of the Staff analysis really goes to a significant issue and was then about to address the Board's attention to the NRDC Response to the Staff Motions for Summary Disposition dated June 5, 1979.

And on page 2, the cases which we cited there, including Calvert Cliffs and York Committee for a Safe Environment, et cetera, which deal with the question of whether it's reasonable to assume that a citizen organization like ours or like CESG should have the resources to be able to develop their case, or is it more appropriate to say that the cases have to be developed as a result of the work done by the Regulatory Staff of the Agency. And I think if you look at the discovery that was filed against

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NRDC and in subsequent filings made by the Applicant and the Staff with regard to that discovery, their position is essentially that we should do the economic analysis of comparing the independent spent fuel storage pool against other options.

We should do an analysis of what the man-rem dosages would be; we should do an analysis of all of these different considerations associated with the cascade plan versus other alternatives; and our position is that that's not correct, that there is nothing in the case law that would suggest that we have the duty or carry the burden of proof on those issues.

Now as you know, the Vermont Yankee case in the Supreme Court decided that that case only stands for the proposition that there is a -- quote -- "threshold test". I don't think under any interpretation of what a threshold is, we could be interpreted as having failed to meet that.

Our client has identified the existence of a scheme which none of us knew about until we did our discovery and identified it through the Applicant's papers, the existence of alternatives to that schema, the existence of some potential environmental problems associated with that specifically identified in the context of how many spent fuel rods might be subject to the cascade plan shipment. We've brought in the implications of all of this in light of how DOE is

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doing its thinking on whether the government should or shouldn't build an away-from-reactor storage facility.

We've demonstrated from the Applicant's documents what their thinking processes are, how approval of transshipment will give them the incentive to not plan an independent spent fuel storage facility in time to meet Oconee's problems by 1982 or '83. All of these things we have brought to your attention.

We do not have the capability, don't feel that we should be obligated to go beyond that into doing the kind of study that the Staff would be obligated to do if the scope of the proceeding were as we urge that it should be.

The ALARA considerations, the as low as reasonably achievable considerations would require them to do an analysis of a wide range of alternatives. The National Environmental Policy Act, even if no impact statement is required, would require them to do an analysis of a wide range of alternatives.

The provisions of Section 102.2.E of the NEPA actually requires a more stringent alternatives analysis than the one that relates to impact statements.

CHAIRMAN MILLER: Does that case require a licensing proceeding where the action is a federal licensing -- I know the line that you speak of -- and looking at alternatives, whether or not the environmental impact statement must be prepared by the agency that apparently is going to engage in

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a major federal action? I was curious and I couldn't tell from our initial examination whether you considered that equally applicable to a licensing situation where it is the licensing, the federal licensing which is the major federal action that's the subject of inquiry.

MR. ROISMAN: I'm trying to remember.

CHAIRMAN MILLER: Well, perhaps you'll think of it.

MR. ROISMAN: I think in the two cases that we've cited -- and they're cited in the same NRDC response to the Staff motions for summary disposition at page 13 -- I believe both of those involve the federal agency taking its own action, as opposed to having someone propose an action to it.

The Romney case involving HUD, housing, and the Corps of Engineers was I believe another one of the Corps dam projects and not an outside applicant for a license to do something.

I don't think that that would make a difference in this sense, that the purpose of NEPA -- the underlying purpose was before you do something you should look before you leap. I mean that's essentially the understanding of it, that if you're getting ready to do something which is going to utilize resources in a way that they cannot be utilized for something else, you ought to think about it.

That shouldn't change because it's an outsider asking the government's approval for it any more than it

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changes in terms of whether you should do an impact statement at all, if it's the government that is asking.

CHAIRMAN MILLER: We have this question to which you have addressed yourself I think in the past, and that is the application of resources. And it's considered I think by the appeal board in the Midland decision, one of the Midland decisions, Are not certain business judgments with regard to the application resources to be made initially by the utility and the state authorities rather than by NRC in that sense, the impact of the two principles.

I'm not sure what your position is. If you'd give me a thought on that?

MR. ROISMAN: If we were talking here only about dollars, if those were the only resources, there might be something to be said for that demarkation. But we are talking about more because I think that really the undisputed evidence that we've indicated in our affidavits demonstrates that as Duke makes this decision -- and maybe it made it for only a dollars and cents purpose -- it is for closing substantive options with environmental impacts different than the course that it's going on.

CHAIRMAN MILLER: I see.

You bring it into the foreclosure aspect of analysis.

MR. ROISMAN: Yes.

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CHAIRMAN MILLER: I follow you. Thank you.

MR. ROISMAN: I guess the only thing that I would say in conclusion is that we are very concerned that if this hearing were to proceed now, it would be unavoidable that it would have to proceed again in the future, and that we would be piecemealing the issues by not having the Staff's analysis on the proper scope of the alternatives in the proposed action here, and that whatever convenience there may be for the benefit of X number of witnesses who have decided to be in Charlotte today and tomorrow and for the next few days, that that really shouldn't be the overriding consideration.

We think that the overriding consideration here has got to be the total time that we're all spending. I mean, we all could be doing something else if we weren't here. It's not that anybody's got a lot of free time on their hands. And if this is the wrong time to hold this hearing because the Staff has not really got its case together, if the Board agrees with us on the scope question, then let's have the Staff get its ducks in a row and come back here and have the hearing that goes to the issues as we see them.

I think there's going to be a lot of redundancy, a lot of repeating, a lot of questions asked that might not have to be asked if the analyses were there and available. And I would urge the Board to the extent that it's inclined

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because we're here and there is some inertia for being here, to really not be swept along by that.

In fact, to some extent, being here is like approving transshipment. It looks like it's going to tend to foreclose some other options for us down the road, namely having one cohesive hearing on this. And we're as much against the momentum toward the cascade plan the transshipment creates, as we are against the momentum for having this hearing that our presence here today creates.

And I hope the Board will seriously consider and perhaps ask the Applicant and more importantly the Staff what kind of things they would be getting into if the Board ruled that the scope is what we are arguing it is, and how much more data would they be presenting, so that we would get some knowledge of just how much better the record would be if we waited for that.

Thank you.

CHAIRMAN MILLER: Let me ask your reaction to this possible situation:

Suppose that the Board believes that the determination of whether or not the scope should be of the breadth that you suggest on behalf of NRDC or the limited version which the Staff and the Applicant believe appropriate. Suppose the Board believes that we don't really have an evidentiary record. Now we've got a lot of papers flying around, we've

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got a lot of affidavits. We're not certain to what extent they are confrontational, to what extent they are parallel and to what extent they just simply don't meet squarely the ramifications of some of these issues.

The Board might well believe therefore that in order to decide which scope is appropriate for the totality of the hearing that some evidence is necessary from the Staff's point of view and the Applicants. Just what are the facts established here in an evidentiary record, and explore it fully and test it by cross-examination, as to those matters which the Staff believes that no environmental impact statement is required, that it is limited, so limited that it is not an improper segmentation.

We've heard from you, Mr. Roisman, as to your counter-theory. But the Board itself I believe is under the apprehension of trying to decide as a matter of law conflicting and inconsistent claims in contentions and principles when it may well be very premature to make such a decision as a matter of law, whatever that decision may be.

We have not had the benefit of the evidentiary underpinning in a form that we would regard as a full and complete record, recognizing that there have been some approaches to it in the form in which these multiple motions for summary disposition have come to us, the affidavits of witnesses, even of the prepared written testimony. But

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nonetheless the Board has not really had a chance to develop an evidentiary record upon which it could rely in deciding which, if either or any of these matters really scope out the things which we might call ultimate issues or mixed issues of law, in fact whatever characterization you wish to make them, they would be premature from anyone's point of view to do it now. But that proceeding with an evidentiary hearing which could develop the record to that extent, which might or might not be completely dispositive, but would certainly be a long way down the road of decisionmaking, to take a reading into this week and next week to see where we are on some of these issues after they are delineated, leaving it to the parties to present the evidentiary underpinning upon which the inferences are to flow, declining as a Board either to decide it as a matter of law upon the pleadings, such as you have, when we have the disposition of contention arguments, or a more refined but nonetheless disposition as a matter of law when we have the contentions plus the depositions plus the answers and so forth all developed and supported by affidavits which, of course, obviously are not tested by cross-examination or any other of the prophylactic measures of an evidentiary hearing.

I believe that the Board is considering that it would be premature and improper at this time to decide some very complex matters, a fairly wide range in their nature,

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as a matter of law in the present stage of having a non-evidentiary record.

I want to think about it further, but I'm indicating to you provisionally what our belief is so that you will have it, Mr. Roisman, before you, and so the counsel for Applicant and Staff in their rebuttal arguments will be able to address that matter as far as scoping of issues at this point, which is pre-evidentiary hearing by a few hours or a day.

MR. ROISMAN: Mr. Chairman, I think I would like to say two things in response to that.

One, as I'm sure you appreciate, there's a certain Catch-22 element in there. If our position is right that the scope issue, even if it's an unresolved issue until you have an evidentiary hearing, depends to some extent on the development of facts which we feel we're entitled to expect the Staff to develop, then making the decision on the scope without requiring the Staff to first develop the facts and disadvantages to us and conversely making the STaff develop the facts before you've made the decision on the scope may argueably disadvantage them. They would be required to do the work and then you might argue that, Well, after having looked at the work, it didn't look like it made any difference.

And I can't give you a Solomon-like solution to that except to say that I do believe that the Intervenors

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here do have to some extent greater rights in this regard than other parties to the proceeding. We have the right to expect that the Regulatory Staff will develop the record, and while I don't seem to have the case cited here -- and I must confess, having created part of the paper blizzard, I'm now a victim of it, I can't remember which damn motion I put the cite into -- but someplace in here I've cited to you the decision in the Scenic Hudson case and also the decision in the Office of Communications of the United Church of Christ case.

And those cases, the thrust of those cases -- which were both pre-NEPA, they just involved the administrative duties of a federal agency -- were to the effect that the agency had the duty to develop the record once an intervenor party shows up and identifies the issues with some particularity.

We'll assume that the subsequent Vermont Yankee case from the supreme court is a loss of the threshold test, but I think, as I indicated before, we've met that. But now we're at that point.

If the Board is saying We're not willing to accept the basic argument at this point that the scope is necessarily limited to the scope that the Staff analysis has gone to, but that it might be a broader scope, then that question itself we feel we deserve to have the Staff develop the more

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adequate record on.

CHAIRMAN MILLER: So you'd like to have that issue, then, addressed first in an evidentiary hearing.

MR. ROISMAN: Yes.

But I would argue that if the Staff were not able to address it, that is that they were not able to address what your perceptions were of the issues that had to be resolved to describe the scope evidentiarily, then that the hearings shouldn't proceed until they were ready to do that.

Now my second comment goes really to a separate question.

I think you were identifying now -- and we'll assume for a moment that the Board's initial thinking turns out to be the Board's final thinking -- that there are -- and perhaps you already have in your heads an idea of some specific things--factual items that you would like to see resolved in order to help you decide what should the scope of the proceeding be. Maybe you want to know just what is behind Mr. Bostian's affidavit that got attached to the last paper filed by the Applicant When he said 'Well, we've got all our options open, we haven't committed to the cascade plan.' And so the Applicant's plans on how these different things might interrelate might be one of the issues you're looking at. Another one might be to what extent is the Department of Energy's actions dependent upon this Applicant

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in similar transshipment proposals. Would they come out differently if this Applicant announced tomorrow that it was going to build the independent spent fuel storage facility at Oconee and later at McGuire, Perkins, Catawba, Cherokee, to hold the lifetime supply of spent fuel? What would that mean in their judgment?

In other words, are the options subject to being foreclosed by this action?

If you identified those and then said the hearing is going to be limited to those first, and when that's over if the Board feels like it can give us an immediate decision it would, and if not it would then leave open the question of whether to decide to go on with other issues in the hearing or whether to postpone the rest of the hearing until it had developed the record in its own mind and come out with a decision, I think that would be helpful if you decide to go ahead at all.

To facilitate that I might suggest that we either have a period of time, a couple of hours, to suggest to the Board if the question is what should the scope of the proceeding be, and assuming for a moment that it is an issue to be resolved factually and not legally, what facts we think the Board ought to take evidence of that would give us some guidance, and start with that because there are witnesses here who are obviously addressing a range of issues, some of which

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we would certainly concede, and I suspect the other parties would too. They have nothing to do with the scope question, and others of which clearly would have something to do with the scope question if we were beyond just the law.

So that guidance -- and perhaps if you want to give us the chance at least we would be prepared to do it in a couple of hours, to present to you orally what we would see as the fact issues on that, and then have a hearing on that point.

That's all I have to say.

CHAIRMAN MILLER: We'll take that under consideration.

Are there other parties or counsel who wish to be heard in association with the position taken by NRDC and its counsel?

MR. BLUME: Chairman Miller, Carolina Environmental Study Group supports the proposition that the Board consider the entire package of the plan. And if the Staff is not ready to do that, then I believe it's the Applicant that must suffer rather than the environment.

We're ready to show that there are residual effects and dangers connected with the regular shipments. For example -- and if we're planning 300 shipments, that would give us a certain amount of residual environmental effects.

If we're considering a multiplier effect as is

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proposed in the cascade plan, then there's obviously a much higher level of effect.

Further, we're afraid that one of the alternatives that we intend to discuss, which would be the extension of enlargement of fuel pool number three at Oconee, the opportunity to do that might be past if time goes on. That's one of the factors that must be considered in this matter.

There are a great many other speculative kinds of issues that have been raised, to say that we can't consider the total package at this time.

I would throw in some more. There are a lot of speculative matters. We don't know the exact status of the McGuire plant.

In the newspaper today they are discussing the extension of the deadline for that plant by another year or so. I'm not sure exactly what the status is. And I think the Staff ought to comment on exactly what that is so that we can have that matter clarified if in fact it is the Staff's position, as I stated, that they're not going to allow fuel from Oconee to be stored there until it's granted an operating license.

Further, I would note that the County Commission, the Mecklenburg County Commission has authority from the state by legislation to act in regards to transport through Mecklenburg County of hazardous waste, and also storage in

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Mecklenburg County of hazardous wastes, and that the County Commission has taken a resolution. Mr. Herr was going to present that in a limited appearance, and might, if this is seen as a not part of a plan, and if the NRC -- if this Board considers it piecemeal as opposed to part of an entire storage plan -- might be moved to, say, Why should Mecklenburg County be singled out in this matter and take some further action in this regard.

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So those are all speculative matters. It seems to me there are a great number of those and that the Board is, in fact, set up to consider speculative matters in this hearing.

Rather than operate on a theory of -- I think it is fair to characterize what the Board is being asked to do, to decide a very small piece of this matter, I think Applicant and Staff are operating on a sort of divide and then decide theory. It is a lot easier to decide a small piece of it. But in fact, that may lock you into the entire plan.

I had not thought of the possibility of Oconee fuel ending up back at Oconee prior to that, but I had considered this whole scheme as part of a musical fuel pool arrangement. And I think that the whole plan has to be decided in this hearing, or at least fully considered rather than decide just a piece of it.

Thank you.

CHAIRMAN MILLER: I guess we haven't heard from the State of South Carolina, have we?

MR. WILSON: No, Mr. Chairman, at this point you haven't.

Principally we are here to monitor and participate if necessary in the proceedings as a part of the State. At this point, of course, we have taken no position and we continue

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to do so, we do neither join nor oppose the motion at this time, and rely upon the discretion of the Board as to defining the scope of this hearing.

We will, of course abide and participate within the bounds of that scope as edfined by the Board.

CHAIRMAN MILLER: Thank you.

All right. I think rebuttal or response by either Applicant or Staff, in whichever order you wish to do so.

MR. MC GARRY: I'm prepared to go forward.

MR. KETCHEN: Go ahead.

CHAIRMAN MILLER: Very well, Mr. McGarry.

MR. MC GARRY: There seems to me to be several pertinent points to address here, and then some tangential points by way of housekeeping.

Let's get to the important points:

What NRDC and CESG seem to be saying -- indeed not "seem," are saying -- is they want Duke to look at matters that will treat the entire spent fuel problem.

Now these are the facts. This is the precise issue that NRDC has raised before the Licensing Board in Vermont Yankee, Prairie Island. It is precisely the point that was raised before the Appeal Board, precisely the point that was raised before the Commission back in 1975, precisely the point that's been raised in the courts.

We submit that in every single instance the

mm3 decisionmaking body has rejected that argument. And now this Board is confronted with that argument yet once again. There may be a variation to the theme, but the theme still lingers.

Let's treat the entire spent fuel problem now on this record.

Now, to elaborate, I am sure this Board is well familiar, but I will just take one of those examples, and that's the Commission decision in 1975. In that instance NRDC petitioned for rulemaking to halt all spent fuel pool modifications until the generic impact statement was completed.

The Commission rejected that. The Commission said:

"Based on weighing and balancing five factors, individual licensing of specified limited actions can take place until such time as a generic impact statement is completed."

This is precisely what has happened at Vermont Yankee. Vermont Yankee had a spent fuel pool modification that is only going to take it to mid-1980s until it will cease operation.

Prairie Island, the same situation.

Trojan will go until 1982 until it loses fuel.

And in each one of these instances, the Boards did not pass upon an entire program, an entire project. They looked at that one isolated situation, balanced the five factors

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that the Commission has directed it balance.

We submit that is exactly the position, that is exactly the case that is before this Board. This Board is guided by the Commission decision to balance those five factors.

The Staff has addressed those five factors, has weighed those five factors in its environmental impact appraisal. It is now before this Board to determine whether that analysis has been adequate, the parties are free to cross-examine and we will put on our evidence that will be directed to that situation.

CHAIRMAN MILLER: Well now, to follow through then on your suggestion, it would be necessary for the Board, would it not, to consider and interpret the decision regarding spent fuel storage to which you allude, the action by the Commission, at least as printed in the Federal Register Tuesday September 16, 1975 including the scope of the inquiry that the Commission on a generic basis intended to undertake and has undertaken with A, B, C through E, their consideration of the impacts and more definite standards which I take it would be Commission action only since the Board would not have any jurisdiction over matters of that kind.

And then the five factors that the Commission considered in determining that there was no necessity to suspend the licensing of any further facilities until that generic environmental impact statement study was completed.

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But noting that, the Boards, Licensing Boards are expected to consider these same five factors, not necessarily limited to them but to be applied, weighed and balanced within the context of the statements of appraisals made by the Staff in a particular licensing situation with regard to either an environmental impact statement or an impact appraisal under the Commissions regulations. That therefore the five factors would be considered by this Board in this context:

Whether or not it would be limited to the one action or whether it should fairly contemplate the cascade theory whatever form that might take; whether it should consider that the previous actions by the Appeal Board and Boards on spent fuel facilities' expansion or enlargement were both by their own terms limited to that particular facility, did not involve any improper segmenting as the court held in the Minnesota case and as the Appeal Board has held. But queried whether that request is really analogous to what the proof might show the situation could be in this case. If there is proof in evidence that the Board would have to evaluate as to the cascade theory or some variation thereof.

Now those are questions the Board is going to have to address. And as we indicated at least provisionally, I prefer to do it on the record. This is the interpretation that is going to have to be done in the light of where we stand and not solely as a matter of law, which is again the

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thrust that is made by all of these motions by the various parties, for us to decide now as a matter of law, with certainly different results depending on the maker of the motion, but it certainly is a matter of law, which the Board is reluctant to do.

It would consider among those factors the ones which you ladies and gentlemen have addressed in your moving papers; the utility or usefulness of this individual licensing action in whatever context it is; whether or not there would be a commitment of resources that would tend to significantly foreclose.

These seem to be in dispute and we would expect to have evidence and inferences to be made both ways.

And number three, whether or not the environmental impacts associated with whatever this is, could be adequately addressed within the context of the individual license application without overlooking any cumulative environmental impacts. Those cumulative environmental impacts are significantly different if we are looking at one shipment in one plant, or if we are looking at multiple shipments in whatever range the evidence might show.

So it seems to us that once again we are told by the Commission -- at least we have to interpret what the Commission has said in the matter of interpreting, we have to apply its reason to the facts of this case, tailored to

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whatever they may be. And they are not going to be established by affidavits.

So once again we are in the direction of considering the moving forward on an evidentiary basis.

Now, as far as what that outcome is we don't know. The Staff has indicated under its theory it is prepared to proceed.

Well, the Staff takes a hazard whether or not the evidence sustains their theory. If it does, then I guess the evidentiary record and other issues they address will be complete.

If the Staff is not correct, then the sStaff knows very well, as in other cases if there is not an adequate environmental FES and DES, where required, then the Staff is going to have to do it. But this is a consequence the Staff faces every time it has a contested Final Environmental Impact Statement or a negative impact appraisal of whatever it does. As in the case of Trojan, which was a single application for expanason of the facilities, it was held and sustained by the Appeal Board that that was not a significant change, that there wasn't any more spent fuel going to be created than it was licensed for, it was right at the same plant and so on.

Well, does that apply to this in view of whatever the facts are going to be shown to be or not? We don't know. We are not going to prejudge, we don't have the evidence.

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So, from almost every point of view you have presented to us so far, we are disposed to go ahead with our evidentiary hearing. But we do agree there should be clarification of issues and then the suggestion of Mr. Roisman has some appeal to us as to those issues, factual or mixed facts and law that the Board should look at in deciding that issue which, although broad, is nonetheless only one of the potential issues at this evidentiary hearing.

We are hopeful, therefore, that over the lunch recess, perhaps counsel could consider the suggestion Mr. Roisman made, in the fashion of however they think it will be useful from their point of view in assisting the Board in formulating factual issues that would be meaningful not because we are here but because we think this is the way we should proceed.

MR. MC GARRY: Mr. Chairman, picking up on your point which I have styled the scoping of issues, I would submit that if indeed this were an application for an entire cascade plan you would still be guided as you have indicated, by those five factors. So that is the $64-question.

CHAIRMAN MILLER: Yes.

MR. MC GARRY: I am just suggesting those are the five factors that will provide the guidance tothis Board.

Now, to get to the evidence we understand that the Board indicates it needs more substantive evidence,that the

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affidavits will not suffice.

That being the case, we say, let's get to the evidence. We are certainly willing to sit down and see what Mr. Roisman has in mind. It seems to us fairly clearcut that the evidence with respect to this cascading issue, if the Applicants -- the Applicant will put on this evidence with respect to the affidavit and whatever supports the affidavit of Mr. Bostian, that will be subject to cross-examination.

CHAIRMAN MILLER: You are going to call the gentleman, are you not? You are not going to submit an affidavit?

MR. MC GARRY: Absolutely not.

CHAIRMAN MILLER: We will have testimony, we will have cross-examination and go from there?

MR. MC GARRY: Exactly.

Now let me just get to a couple of other points. One is, regardless of this issue of cascading, we still have various motions for summary disposition. In other words, the ALARA contention, as low as reasonably achievable, of NRDC.

I would submit we should take time today if the Board is so disposed, to addressing the various issues contained in the various motions for summary disposition. I think they would lend themselves one way or the other to

mm10 summary disposition.

CHAIRMAN MILLER: At any rate, they would help to clarify the issues.

MR. MC GARRY: At the least.

CHAIRMAN MILLER: And that, we think, would be very useful.

MR. MC GARRY: Now to clarify some of the issues that have been raised so we have a clean slate when we are starting here, Mr. Chairman, certain things have been mentioned. These are the housekeeping items.

One is the status of McGuire. And I believe Mr. Roisman indicated the Staff said that McGuire needs a Part 50 license before it will be permitted, the Applicant will be permitted to ship this fuel to McGuire.

Well, that is totally contrary to this entire proceeding. That's the reason we went a Part 70 route.

If we had a Part 50 license, then we would not have had to go forward in this particular proceeding. We have a Part 70 license at McGuire and we are amending that license so as to license McGuire to be able to receive this fuel.

The status of the Part 50 --

CHAIRMAN MILLER: Pardon me. Say that again?

MR. MC GARRY: We presently have a Part 70 license to receive cold fuel at McGuire, new fuel.

This license is an amendment, this application is

mm11 an amendment to that license which will then permit us to recieve the Oconee fuel at McGuire.

In other words we need a license at that McGuire station. You can only store spent fuel at a licensed facility. If we had a Part 50 license, it would have beenaa licensed facility. Since we don't have a Part 50 license, we have to seek a license, to wit, the Part 70 license.

I misspoke earlier when I referred to the President's 1977 statement on reprocessing as eliminating that option. That is incorrect. It simply deferred that option. I would like the record to be correct.

There has been another point raised, and that has to do with NRDC and CESG's responsibility.

Applicant would take the position, relying upon the Vermont Yankee Supreme Court Case, that the intervenors have a duty and responsibility to alert the parties as to what, indeed, their case is. We would not go the further step at this particular point in time and submit that they have the burden to perform the calculations, et cetera, et cetera. We would simply say that they have that burden. And that will be one of the issues when we discuss summary disposition -- have they fulfilled that Vermont Yankee burden.

I would like the record to be clear on that.

And I guess the final point here is that one of the last statements made by CESG was that the Board is set

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up to consider speculative matters.

And just so the Applicant's position is clear on the record, the Appeal Board in the Prairie Island Vermont Yankee case, that is ALAB 455, said the following:

> "We have long been of the belief that the environmental review mandated by NEPA is subject to a rule of reason and as such need not include all theoretically possible environmental effects arising out of an action, but rather may be limited to effects which are shown to have some likelihood of occurring."

That will be the standard the Applicant would submitt, is before the Board.

I am sorry to belabor those points. They are, as I said, housekeeping, but I believe that will encompass the Applicant's position at this time.

Mr. Chairman, if you are looking for that --

CHAIRMAN MILLER: I have found it.

It goes on to say then, that of course the appropriate inquiry is not whether it is theoretically possible, but no offsite spent fuel repositories will be available when the operating license term for these reactors is due to expire, but must be decided instead as to whether it is reasonably proper that the situation will obtain.

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question unaided, it is not certain what result might be reached.

It has turned out, however, the Commission has spoken on this subject. Of course I would introduce the fact that the court has spoken subsequently to the Commission and we will be getting into that matter then, which formed the predicate of your quotation.

MR. MC GARRY: That's correct.

Would you like to hear our position at this point?

CHAIRMAN MILLER: I don't know. There are a number of other questions we haven't addressed.

I was going to ask the counsel, once we take this under submission which we are going to do shortly, either to advise us now or perhaps again whether it would be well to have the time spent during the recess, what are the issues now remaining other than the central one, which has been brought to our attention we think quite properly, that the Board should consider and there should be some rulings upon.

MR. KETCHEN: Are you going to come back for rebuttal on this, Mr. Chairman?

CHAIRMAN MILLER: On which?

MR. KETCHEN: On the central issue we have been discussing.

CHAIRMAN MILLER: I thought this was the rebuttal.

We are not going to cut anybody off. Let me make a

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point. These are serious, complex matters and we are not going to cut anybody off.

On the other hand, under the procedure we had adopted, we had thought this was the rebuttal of Mr. McGarry on behalf of Applicant, and of yourself on behalf of Staff.

MR. KETCHEN: I thought you were going to another subject matter at this point.

CHAIRMAN MILLER: You know, we are vlflexible at this [illegible] When witnesses are sworn, we are going to have to have a little more abiding by the rules, analogous at least to the Federal Rules of Evidence and the like. But right now, since we are talking with counsel, we are experienced trial counsel, we have a certain responsibility.

Are you prepared to go forward with your rebuttal at this point, or do you wish to defer for some reason?

MR. KETCHEN: I was just going to speak to the items that Mr. McGarry and Mr. Roisman and Mr. Blum raised; some housekeeping and some more significant.

CHAIRMAN MILLER: Fine. Why don't you go right ahead with whatever time you think you need.

MR. KETCHEN: I would like to take up Mr. Roisman's suggestion about the procedure. And he, rightly, I think, gets at the Staff's problem on this central issue. And the Staff's problem is about the burden in the record.

And he indicated that going forward without some

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sort of a decision had disadvantages possibly to NRDC, and he identified some to the Staff as well.

And I just wanted to further that discussion a little bit and try to give you the flavor of the Staff's position, which may appear to be a little bit ambiguous, but I hope not.

The problem with going forward with Mr. Roisman's suggestion -- and as the Board has indicated it is disposed to do -- is that when the Staff comes in with its case we are going to be adjusting our case to the issues as we see them still, assuming again that we are correct in what we interpret the central issue to be, pending a ruling.

I think -- I'm not speaking for Mr. Roisman, but as I understand his case, he would probably do the same thing we would do, he would present his case on what he thinks the central issue is. So, I'm not -- it would be confusing to me even as a cross-examiner, to try to cross-examine these witnesses on a central issue on their case when I don't know what the central issue is. I don't know whether he would have that problem, but I certainly would and I don't know whether the Board would have that kind of a problem.

But I suspect that we would just be pushing off into the future facing the issue. And I would -- that's the first part.

CHAIRMAN MILLER: Well, would you like to make a

preliminary showing of proof by witnesses in a manner analogous to voir dire examination with expert witness, when proferred, as to whether he is really an expert and whether his expertise covers the subject matter in the sense of getting an early evidentiary ruling on which it is?

Would you wish to consider that procedural possibility?

MR. KETCHEN: I think that is attractive to me.

CHAIRMAN MILLER: Do we have the witnesses necessary for that purpose on hand, or reasonably available on call? So does Mr. Roisman, and so does Mr. McGarry and so do the other parties?

MR. KETCHEN: I'm not sure I do yet. I guess I've got to tell my witness, this is what you are going to talk about. And under the 20-day rule they haven't prepared any testimony at all --

CHAIRMAN MILLER: We won't stand on the 20-day rule if there is testimony -- as a matter of fact this might be better to have it come directly from the lips of the witnesses for the first time. Then we don't have to worry about the extent of cross-, find out who prepared it and people defending to the path and so on.

There are certain advantages to having witnesses just testifying right out as to what their view is, and we wouldn't at all beadverse to having that occur.

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MR. KETCHEN: And there are a lot of disadvantages to the trial counsel who wants to conduct effective cross-examination, with that kind of a process.

CHAIRMAN MILLER: These are all experienced counsel and I think they can cross-examine from the hip if they have to, because these issues are well known to them. Although the outcome, of course, might be highly controversial.

MR. KETCHEN: In any case, let me go to my second point. And I do have a third one.

The second, the attractiveness of what you say and Mr. Roisman suggests, that there are -- and I think Mr. McGarry points to this,too -- there are things that we can accomplish, however, the central issue aside. I think there are specific factual issues on specific contentions that do not get into, directly into the factors one through five,that go more into what I want to call the old, normal CP case, OL case issues of whether or not this is a major federal action, and if so, what the alternatives are.

And on those discrete issues like whether or not the alternative of more spent fuel pool expansion, or the alternative of on-site -- just what the economic costs of that are, or what the environmental costs of that are, weighing those alternatives one among the other, I think they tend to spill over into the other thing. But I think there are benefits, and there are -- there is a schedule and

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there is a process where we can use our testimony that we have already filed and go forward on that type of situation.

CHAIRMAN MILLER: What about ALARA situations which I think is the other area where one weighs and balances environmental costs and economic and other benefits?

I think it is on the other area in our regulations where we do have that kind of balancing.

Would it be possible to go forward with the evidence upon the ruling of the Board, to go forward with the evidence on this proposal, in those terms?

MR. KETCHEN: Yes, sir.

That is an example of what I was thinking. We can go through on this proposal. But, of course, we don't have a case on what the environmental impacts would be on a similar ALARA contention, for example. Say, shipping from Perkins to Cherokee; A, we don't know how much or when. That's where we spill over to, yes, those are the types of things --

CHAIRMAN MILLER: That's where you have a problem because either the Board is going to have to sustain your limited position as a matter of law, or we are going to be up against certain ramifications which flow from our contrary ruling in whole or in part, but the Staff may not be prepared to go forward on.

Isn't that about it?

MR. KETCHEN: That's correct, sir.

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CHAIRMAN MILLER: So what your study is going to be, assuming that the Board is going to go into issues in an evidentiary hearing as broadly as is possible and necessary, given relevance, what matters you are able to go forward with now and next week -- and you better also define those which are not, because that may or may not have some significance, depending on what the ultimate ruling of the Board is.

MR. KETCHEN: Yes, sir.

And then on that I have some other things I would like to go into, but I think that kind of a suggestion is an important one and should be addressed.

The third point on that suggestion is, although it is attractive, another of the disadvantages to the Staff in deferring a ruling is, the Staff would like to keep its legal options open pending that ruling. And if we can go ahead and exercise our legal option -- I'm speaking of appeals and certification and that sort of thing -- it would be better to know right away what the ruling is so we can take that tack if we feel that is the tack we want to take, and get, hopefully, an early resolution on that matter. And then maybe not waste time if we are incorrect or somebody else is, the Board is incorrect, that tack.

That's our thinking on the suggestion.

I would like very quickly just to turn to some of

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the other points that the Board brought up in the arguments, if I may, and just touch on them briefly.

I think we have talked about the Douglas Point type of -- the ability to proceed and conduct some business.

I would like to point out again, back to the central issue, our inability to understand what the case is we are supposed to present, propose to, or present at all.

In contention 1, the NRDC Contention 1, it is mentioned, a proposed program is mentioned.

In our interrogatory No. 1A, of -- I don't know the date, but the Intervenor, NRDC's response is dated April 11, 1979 -- we had asked the Intervenor, NRDC, to explain what it meant by the term "proposed program" in trying to, at the prehearing conference, pin down the issue.

And Intervenor starts out:

"The proposed program is a DOE proposal to build away from reactor storage capability for the nuclear industry."

Okay. I heard Mr. Roisman say today, I believe, that this case is all about Duke's program, the solution to its spent fuel program.

As I read Mr. Roisman's affidavits, they discuss a little bit of both, presented in its motion for summary disposition. Those affidavits are pointed to the Department of Energy's program and DOE's program -- I'm sorry --

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Duke Power Company's program, and indicate at least in my mind again, speaking for myself, that neither of those programs are feasible to solve Duke Power Company's spent fuel problem in 1995.

And I just want to highlight the point that if that is the case, and we are talking about the ability of DOE to resolve the interim away from reactor, or interim spent fuel and ultimate storage program in 1995 or sometime in the future 1990s any days, and the issue springing from that is whether that will happen, or whether Duke Power Company will be able to avail itself of that program. That is the kind of case that we have not really put together, although I reiterate once again we have mentioned the so-called cascade program in our affidavits on contentions 3C and 3D in order to do at least a preliminary assessment of that program if it is an alternative.

But our position is -- and as I hear Mr. Roisman and as I read his evidence, those future steps in the so-called cascade program are somewhat speculative. And I think NRDC versus Morton, and some of those cases say that the Staff does not have to go into detail on alternatives which you can see at the beginning of the analysis with some searching, appear to be speculative.

CHAIRMAN MILLER: Such as repeal of the antitrust laws.

MR. KETCHEN: Right.

CHAIRMAN MILLER: Well those examples in the Morton-NRDC case seem to go into alternatives or alternative action or alternative analyses, which on the face of it almost appear to be highly unlikely, very remote on any probability scale.

Now the question is here, when did the Staff first become aware of the so-called cascade plan in whatever form -- it may have been rudimentary or whatever. When did the Staff first become aware of it?

MR. KETCHEN: Well, I think we probably became aware of it when the Intervenors -- well, I'm not sure.

CHAIRMAN MILLER: Not before the Intervenor's raising it?

MR. KETCHEN: I will have to check that.

CHAIRMAN MILLER: That raises a question, because what did the Staff do in its original analysis, what did it do when it made its negative impact appraisal, what did it do when it took whatever position it has taken?

Was it done in light of the knowledge of the so-called cascade plan and a rejection of it, was it on the grounds of a spectator, whatever other grounds the sStaff may have done it, was it just not done because the Staff wasn't aware of it or it didn't, for no special type reason choose to put it into its analytical process.

Those are two different things, aren't they?

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We would expect the evidence to bear upon that. But the inference is, we come close, which is quite different, depending on which is the fact. And I am calling this to your attention because this is the kind of thing the Board is going to be looking at. It isn't just a matter of a smooth analytical argument to address as a lawyer, and come up with a conclusion A which is diametrically opposed to conclusion B, and the Board is asked to choose among them and to give a judgment or a series of judgments based on determination as a matter of law.

What we are being asked to do is evaluate a very complex series of things involving case law, the Minnesota case, the two actions taken by the Commissioners and the like. This is where we need to know a lot more than a simple syllogistic form of reasoning.

Now I am suggesting to the Staff, I would like very much to know about this cascade because you are telling us now, certainly we will look forward to the proof, but did the Staff consider it or not. And at what point of time did it or did it not. And for what reasons, which are or are not valid, as the Board will then have to make the ultimate judgment.

MR. KETCHEN: I think that also flows from a decision during the analysis as to whether the action proposed is a major federal action significantly affecting it, or it is

mm24 not.

CHAIRMAN MILLER: Yes, but that is not just said by rote.

MR. KETCHEN: That's true.

CHAIRMAN MILLER: We want to go behind or below the rote and find out what are the judgmental factors, A, that went into the Staff that had the first task under its NEPA responsibilities initially.

The Board now has some of looking at the whole matter through the evidence presented by Applicant, environmentalists, Staff and the like. These are the kinds of things we are asking you to look at as you confer over the lunch hour, to decide those matters that the Board needs or wants, rightly or wrongly, some evidence concerning.

We are starting to point out to you now, get away from the rote reasoning and get away from syllogisms, get right down to where the evidence is.

I think Mr. McGarry said he would rather have us do this now than be aware a week from now that was really in our mind and we have been spinning our wheels. I am saying this without prejudging anything, but in an effort to be helpful to counsel to help get this evidentiary hearing, which is likely to start at 9:00 a.m. tomorrow morning, in a way that will be useful and helpful and as fruitful as possible.

Also, let's delineate what deficiencies there may be, so we can evaluate that.

I think if I am not trespassing on anybody's time or thoughts, and we are not foreclosing you, that it might be useful to recess now for our luncheon recess.

Do you want an hour and a half? Do you think you want to confer?

Would you rather have two hours?

Do you want an hour?

What is your judgment on the lunch recess?

MR. ROISMAN: Mr. Chairman, let me just say I was not suggesting anything as lengthy or monumental as the Parties conferring among themselves.

CHAIRMAN MILLER: All right. They can contemplate their own navels. We don't know what process --

MR. ROISMAN: I was suggesting that they confer within themselves and give you their suggestions on what the fact issues might be.

CHAIRMAN MILLER: Fair enough.

MR. KETCHEN: Staff would like 2:00 o'clock. We do have a couple of more points.

CHAIRMAN MILLER: All right. We will recess for lunch and return at 2:00. Whatever form you wish to do it.

Think about some of these things so that we can get down to what we are going to do about the central issue

and relations to it. Then get down to a number of issues.

We are going to have some evidentiary hearing, unless we throw up our hands -- which we are not likely to do.

Thank you.

(Whereupon, at 12:00 Noon, the hearing was recessed to resume at 2:00 P.M. this same day.)

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AFTERNOON SESSION

(2:05 p.m.)

CHAIRMAN MILLER: The evidentiary hearing will resume.

This morning we had been discussing, of course, the major issues and the large issue of the nature and scope of the kind of action which we consider to be reasonably subsumed in these proceedings.

I think that several counsel had indicated that they would give some thought to issues reasonably related to the larger ultimate issues and make recommendations to the Board. Mr. Roisman, I recall you did and I think perhaps Mr. McGarry.

So, would you go ahead. Mr. Roisman, you may proceed.

MR. ROISMAN: It seems to me that the -- if I understand and maybe some give and take between the Board and myself will clarify it more -- it seems to me the question you are asking us to focus on now is what should the scope of the proceeding be and that ought to be a preliminary question as to how the proceeding should come out. You want to try to define what all of the parties ought to be addressing. If that is the case, as best as I can see it, what we are looking at is sort of the Kleppe question: what is really being planned by the company here.

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There, you had the question of whether the Northwest region had its own independent coal plan separate from the national coal plan. Here the question is how is Duke approaching the question of spent fuel storage. Are they really approaching it as though the 300 assembly transshipment is an isolated event or do they in fact have a plan.

I would think you would want to take evidence from the appropriate Duke witnesses which are, I might add, not the witnesses identified by Mr. McGarry in his June 4 letter to you. But I did speak to him and he indicated the witnesses which I think are the pertinent ones will be made available. What assumptions did they use in their planning that could affect their thinking.

In other words, do they look at the availability or unavailability of a government AFR, the date on which permanent waste disposal will or will not be available. Are those factors that would change their thinking.

Secondly, the Staff has an independent duty to look at the same sort of questions and as you stressed this morning, how did the Staff happen to pick 300 assemblies. You heard Mr. McGarry suggest the company is thinking about 300 to 400. The Staff is explicit in its environmental impact appraisal, only 300 assemblies.

Presumably there must have been some reason for the Staff setting the limit at that number and no other

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number. How did it get to that number. And a related question: how does the Staff, if it does, reach the conclusion that no transshipments will be allowed to McGuire until it has an operating license, not merely an amended Part 70 license.

Now what I similarly thought about was whether the independence of each of these decisions ought to affect the question of scope. Like could you now decide to transship 300 and not foreclose anything and does 300 stand by itself or does it automatically have to be linked to a plan. That seemed to go more to the merits. That went to the issue of the Commission's factors, how do you define independent utility.

You remember there has been some argument between the Staff and Applicant on the one hand and ourselves on the other. In Factor 1, what this concept "ameliorate" meant. Did ameliorate a possible shortage of spent fuel capacity mean, when the Commission used the phrase, to include only short-term measures and therefore, automatically to limit the scope.

So that before you get to the question of whether, in fact, independent utility exists or not, you have to define independent utility of what scope of the proceeding.

So I would think before we got to that, before we heard evidence on independent utility, you would want to

eak4 have defined the scope and the same thing for the foreclosing of options.

You have to know the scope of consideration before we know what set of options are being foreclosed. I think it is important that those things happen before we go into the merits and the reason is if we don't do that, we are going to have an awful lot of parties arguing about the relevance of direct testimony of another party or the cross-examination proposed by another party.

If we think the scope is as broad as NRDC suggests, then we would argue a discussion that centered only on the 300 assemblies was irrelevant. If it narrow like the Staff and the Applicant think, they would say our discussion about cascading and going into the 1990s would similarly be irrelevant.

That would be a continuing battle. Every single piece of direct testimony and every single item of cross-examination would create a battle.

I see only a morning's worth of direct testimony and probably it would have to be oral direct as well as oral cross, because I don't see anything in the direct testimony offered by the Applicant or the Staff that answers the question as I have just framed it, which I think is the question the Board wants.

Finally, I think that there is a problem of what the

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Board does after it gets that information. Do we go on with the rest of the hearing and let that decision await further consideration by the Board or does the Board rule from the bench or what? There clearly are some issues that are in a way, unaffected by the scope question. Most of the issues that CESG is raising are those, rather than the issues we are raising.

I think it is fair to say if the Board ruled that the scope of the proceeding were 300 assemblies, alternatives to 300 assemblies and nothing beyond that, that we would feel there was nothing left for us to litigate, that our case is based on the broader scope.

But clearly if there is a question of what the consequences of an accident might be while shipping the 300 assemblies or the dangers associated with sabotage of the 300 assemblies, those are discrete questions which would remain live in the hearing regardless of how you defined the scope question, which I could see the Board proceeding with and then if it found the scope question was one it wanted to think about more, it wouldn't have to rule on it instantly.

But a morning, tomorrow morning, for instance, just on the two things I have identified: what is Duke's planning, how did they define the problem themselves: their own experts, what assumptions do they make affecting that thinking and the Staff, how did it get to the position it

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got to in the environmental impact appraisal.

The only other thing I include in that is that I think it might be helpful if the Board got from the Staff and Applicant some definitive factual statement and I would suspect that there is one on some of these key questions. For instance, in the affidavit we had from Dr. Tamplin which was attached to our motion for summary disposition and dated May 25, Dr. Tamplin analyzes what happens after transshipment between Oconee and McGuire and between Oconee, McGuire and Catawba is exhausted which happens in 1991. He goes on and looks at the Applicant's cascade plan and sees they start transshipping in 1992, first to the three Cherokee reactors and then after those have been exhausted, they start transshipping to the three Perkins reactors.

This morning's newspaper carries a story that says that Duke is postponing the Perkins plants and some of the Cherokee plants and if that is so, that would be a fact that ought to come out.

We ought to know that because that in a way does affect some of this.

Similarly we ought to know the fact about the Staff,if it really does have a position that you have to have an operating license at McGuire before you can transship.

Third,we ought to know the fact about the availability of reracking at Oconee to deal with their full core reserve

eak7 1 problem as of the filing.

2 We have a filing from the Applicant in February saying
3 that they believe if they got their approval on or about the
4 8th of June, that they could have the reracking completed
5 so that they wouldn't have to transship. We ought to know
6 whether they still take that position.

7 That will affect that.

8 Does that address your perception -- am I correct
9 in assuming that I have the right idea as to what your
10 perception of the scope question is.

11 CHAIRMAN MILLER: Yes, I believe so. I believe
12 that is correct.

13 MR. ROISMAN: I don't see any role for the NRDC
14 witnesses on those questions. I don't think our witnesses --
15 our witnesses can analyze what it is -- the proposals that the
16 Applicant has. But we have no basis for testifying that we
17 know they have a plan that is bigger than what they know
18 they have.

19 DR. LUEBKE: I might add one item. The alternati
20 reracking, poison racks, steel racks, I have heard about.
21 But I never hear about building an additional pool in the
22 same breath. I would like to have that addresses as to the
23 potentialities, possibilities and so on.

24 CHAIRMAN MILLER: Mr. McGarry?

25 MR. MC GARRY: We have heard what Mr. Roisman said.

eak8 Our planning of this proceeding led us to conclude that we would anticipate putting on our alternative witnesses the first thing tomorrow morning. We would speak to the matters that Mr. Roisman has raised tomorrow morning.

Now, if indeed we get into the -- we focus initially on the cascading alternative, we have the lead witness, Mr. Bostian whose affidavit is the affidavit I referred to earlier this morning and he will be a member of that panel. Pursuant to discussions I had with Mr. Roisman we also have the other two individuals present and they will be here tomorrow morning to speak to that additional aspect that the parties may wish to inquire into.

So from the Applicant's point of view, we are prepared to go forward and address these matters.

CHAIRMAN MILLER: Staff?

MR. KETCHEN: Mr. Chairman, first part I will go into my presentation of what we considered over lunch and then I will probably cover some of the things that Mr. Roisman speaks of and Mr. McGarry speaks of.

Point 1 is as we said before, we don't think the cascade plan is in this case and we don't agree that it comes in under Contention 1. We are sticking with our case that it is a simple transshipment case. If the ruling is otherwise, that indeed the entire cascade plan is in this case and should be considered under either NEPA, the statute, or under

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the Commission's policy statement, then we are -- our position is prejudiced because as we have indicated before, under the law as we have read it, we didn't anticipate that it could get in this case.

At this point, I think I will respond to one of the comments that Mr. Roisman makes about the scope. Our case in its limited form as we see the scope, can address some of the points raised by the cascade plan where it is an alternative or is not an alternative.

It can only go so far. The point is where do we draw the line. Our factual case is that -- our legal case is yes, you do have to evaluate alternatives but not speculative alternatives. So our factual case will, depending on where the line is drawn, get into the cascade plan as far as it being an alternative.

On the scope question, our position is still that -- and I think it is important as Mr. Roisman points out -- his witnesses will not have a role in this proceeding depending on how the scope is defined or they will have a role.

That brings us to part of our point here that insofar as Mr. Roisman's contentions talk about the DOE program and policy, that is sort of shifted aside, but I think it is another discrete issue that the Board needs to consider.

That is whether we are indeed undertaking as part

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of this case and focusing on the DOE progarm or the DOE program to resolve the interim spent fuel storage or the ultimate spent fuel storage problem.

Our position on that is that we --

CHAIRMAN MILLER: What would be the relevance of that before this Board? Isn't that a matter for the Commission, depending on what view the Commission takes of the Minnesota decision of the United States Court of Appeals for the District of Columbia Circuit? Isn't that more appropriate for the Commission to consider rather than this licensing board with the issues presented to it?

MR. KETCHEN: That is our point. We don't believe it is in this case. We believe it is a Department of Energy problem or a Commission problem, but it is not our problem. And I am addressing -- looking at Mr. Roisman's affidavits. A lot of those affidavits talk about the DOE policy. We once again agree with you that that is not in this case. That is why we are asking for again a focus on a second point besides the cascade plan.

CHAIRMAN MILLER: Weren't those matters contained in Mr. Roisman's original formulation of issues and has he not since that time discovered what he considers more profitable ground, the affect, if any, of the Minnesota case, court decision, and the development of the cascade theory, its relationship to the two Commission statements of

eakll policy and the like. Hasn't that been overtaken by history as far as the major significance in this case is concerned?

MR. KETCHEN: That is what we are trying to find out and we have a right to know so that we can address it. If indeed that is the case, we would like to know.

CHAIRMAN MILLER: Let me ask Mr. Roisman. Maybe I can find out for you quickly as to what the position of NRDC is at the present time.

MR. ROISMAN: I think what has happened is partially as you described it, Mr. Chairman. Certainly, discovery showed us something we had not known was there before. That was that Duke itself had a "plan". We nonetheless still feel and stress this in our most recent filing which is --

CHAIRMAN MILLER: June 1 motion for suspension of hearing schedule?

MR. ROISMAN: No. We wrote about it in our response to the Applicant's motion for summary disposition which I have now lost. I can explain the position even if I can't give you the exact page number.

The point was this: at the top of all of this, we have the DOE doing national planning on spent fuel storage. That event overtook the Commission's generic environmental impact statement on spent fuel storage and created a situation analogous to what we faced in the Clinch River Breeder case where we had an ERDA policy statement as to how the Clinch

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River program fit into a national program. And the Commission then ruled that the national goals and policies are to be laid down by ERDA, now DOE, and that they are to control the Commission.

Okay. So when we started this case or I should say when the NRC started it by denying the NRDC petition back in 1975 there was no DOE or ERDA involvement in the issue. Since that time, as of 1977, DOE announced something. We still think there is a question in this case that relates to that.

Question 1 is does the Commission's Clinch River Breeder decision require this Board and the Commission to now wait for the Department of Energy to articulate its national spent fuel storage policy and then to fit the individual actions like the transshipment proposal into that policy? For instance, if the policy came down and said we favor maximum transshipment, then reracking and only as a last resort, independent spent fuel storage facilities, that would affect this Board's valuation as to how to balance the alternatives that we will argue about.

CHAIRMAN MILLER: You don't expect that, do you?

MR. ROISMAN: No, because we see the reverse. In the draft statement, they look the opposite way. Do as much as we can at the site and use the off site option then.

If we thought it would come out the other way, we might not argue so vehemently for waiting. Be that as it

eakl3 may, the law guides. We might not have proffered the point.

When the Commission talked in its five factors about the consideration of whether you might be foreclosing options in the future, they had in mind the generic solutions. They weren't necessarily thinking of the generic solutions being implemented by the Department of Energy, but even at that time, there was the possibility of a single spent fuel storage facility being built and housing all of the spent fuel.

We now see the possibility that a decision in the Duke case will tend to foreclose the option or not depending on whose side of this case you are on. We have to look at the DOE study in a second light.

If we choose not to wait for it, which would give us an immediate answer, we have to look to see, is it possible that something that happens in this case will foreclose an option being looked at by DOE. That is the second way this comes up. That might be an option independent of the foreclosing of options for Duke itself.

The third way it comes up is the extent to which Duke's own planning is based on its own set of assumptions about what the Department of Energy is ultimately going to do. We quoted earlier today from the memorandum from a Duke employee indicating that they saw all of this transshipment as a holding action, trying to minimize their costs until

the government built the away-from-reactor storage facility.

That was the policy enunciated by the Department of Energy in the preliminary matter in October of '77. That policy seems to be evolving over time and they seem to have a different view now but that is still there and in Duke's planning.

That is a third way that knowing what DOE has in mind can have some impact. The affidavit of Dimitri Rotow is pertinent to that. He talked to the DOE officials and got from them some perception of how do they go about building their case for needing away-from-reactor storage facilities.

They do it by looking at Duke and seeing that Duke has only a program on paper, to be a little tiny transshipment of 300 fuel rods and that means Duke will need an away-from-reactor storage facility soon and the government uses that to argue to Congress we have to build one.

So, there is an interrelationship there. So, I don't think that DOE or its policies are out of the case.

We have not proposed to bring DOE in here as a witness which I suspect if we did, we would have to do by subpoena. We do have an internal document from Duke Power Company indicating that they had made some preliminary inquiries with the Department of Energy about whether the

Department of Energy would come in as their witness on some of these issues.

And that memorandum suggested that they thought that they would, although nobody has been called yet. That is a bridge which we are not yet ready to cross. It may be that the parties will not be able to do any damage to the Rotow analysis and that Cochram and Tamplin to-some-extent analysis of what the DOE policy is.

If they do and we have to go to the horse's mouth to get the direct word, we will have to subpoena probably two or three officials of DOE to get to it.

The bottom line is we think the DOE policy remains an issue in the case. It is Duke's long-term policy which becomes a new change and of course, the Minnesota case which adds an entirely different element into the case.

CHAIRMAN MILLER: Anyone else wish to be heard on this point? I guess not.

MR. KETCHEN: To continue and partly to respond to that, once again, that is one of the issues we believe is not before this Board and that is why we raised it by way of motion for summary disposition. We don't think the DOE policy is in this case and we think the arguments which we have just heard are contrary to the policy established by the Commission in its issuance in 40 Fed. Reg. 42801, September 16, 1975, giving a procedure that could be invoked in the interim

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while these other issues, broader generic type issues, are being resolved by the Department of Energy.

To continue, and getting more back to the discussion we left off with prior to the luncheon break, I think we would start with the point that I believe was made by Mr. McGarry, that we think the Board is being asked by Mr. Roisman to do something re the cascade plan that no other adjudicatory body, at least in the Commission, has done to date.

In essence we think that if we don't prevail or are not persuasive -- it is a line drawing thing -- that what the Board would be doing is asking us to do in effect a generic environmental impact evaluation of this Duke plan which is not before the Commission at this time, unless it somehow comes in this case.

However, we are willing to proceed on the limited issues and the discrete issues at least insofar as we have put the case together and along that line -- in aid of the Board in making its decision, we would propose that after the Applicant puts on whatever it does about the cascade plan, either tomorrow or whenever, that we would offer a witness out of time to indicate to the Board answers to the types of questions that it posited this morning: when did the Staff know about the cascade plan; why isn't it considered in the EIA; what criteria did you use in evaluating it, this type of

thing.

We would submit that after that presentation, that it would be, we believe, the best way to proceed that we have a distinct and clear ruling from the Board as to exactly how and what nature the cascade plan is in this case and then we would at that time, depending on how the Board is disposed to rule, probably request that the Board certify this question to the Appeal Board, because we believe it is an important issue.

CHAIRMAN MILLER: We think a lot of issues are important and we don't think that is cause for certifying them. It is our job to explore them initially. We intend to perform our duty. The Appeal Board can reach down anytime it wants. If it wishes to accelerate things, it can. We will not certify these matters for appeal in order to shirk our responsibility.

MR. KETCHEN: I didn't mean to intend you should shirk your responsibility. I think these are questions of law that spill into lots of other cases and are important to the Commission business outside the bounds of this case.

CHAIRMAN MILLER: We think that is perfectly true. We don't think the issue is novel in that respect. The Northern States Power, Prairie Island and Vermont Yankee Appeal Board, pages 47 and 48, discuss whether they needed to go beyond the Staff's and Applicant's limited views under

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Kleppe. They discussed at length the limitations of Kleppe and why we find that line of argument unpersuasive. They discuss why Kleppe was inapposite. It is a similar argument to what is being made here.

They point out, page 48, that the question of adverse environmental effects which cannot be avoided should the proposal be implemented, "was, of course, no suggestion that implementation of the action proposed by Interior in the Kleppe case, the issuance of a limited number of short-term coal leases, might entail environmental impacts of a regional scope."

And as the Kleppe court noted, the District Court had "expressly found that there was no existing or proposed plan or program on the part of the federal government for the regional development of the area described in the complaint."

There is your issue. There is an issue subject to proof and the like which we have suggested we regard as a significant issue at any rate in this case.

That is to say, whether or not there is or was an existing or proposed plan or program on the part of the Applicant for the multiple transshipment. It is to us very analogous to the analysis that the Appeal Board made on whether or not to follow the Kleppe limitation.

We are hearing the same arguments now. They are not

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new. They do require evidence; they do require some sensitive weighing of the factors but they are there.

They are not novel. We don't have to go to the Appeal Board or to anyone else for help to at least proceed in this case the way the Appeal Board analyzed the Kleppe decision. We are indicating to you we are inclined to do that.

It is suggested we put on evidence first on that matter. The Applicant has said he could and would; you indicated you would follow; NRDC and others could proceed as they wish, whether by cross examination alone or witnesses as indicated and let's find that out. The District Court, U.S. District Court found there was no existing plan or program.

Let's find out whether or not there is or was or is reasonable likelihood of it being a step in a proposed program. Let's let this Board have the chance to see the evidence both ways tested by cross examination and we will make a determination.

This will not interrupt the evidentiary hearing. It may make it qualitatively different, depending on the nature of the ruling, but there are other issues which are susceptible of going ahead which you and others have described.

In addition, we can find out once we have the

esk20 evidence and once we make a decision as to what the proposed action is, which is licensing of a certain kind requested of the NRC; let's find out what it is, whether it is a single limited one, whether it is the Kleppe limitation, beyond Kleppe, whether it is beyond what the Appeal Board talked about, the same Appeal Board you are wanting to certify.

I would as soon take what they said in Prairie Island and Vermont Yankee. We appreciate your suggestion as to getting this matter solved.

We will start at nine in the morning with that aspect of it. You will have your witnesses.

MR. MC GARRY: Our first panel will be four witnesses: Mr. Bostian who is our overall witness in this regard; Mr. Sherrett who will address purchase power; Mr. Lewis who will be speaking to the doses associated with the various alternatives and Mr. Hager who will be speaking to the various alternatives in terms of time and cost.

CHAIRMAN MILLER: From your point of view then, cross examination by counsel and Staff will sufficiently project the evidentiary basis for your contention regarding Contention I and the scope of this hearing?

MR. MC GARRY: Yes. Let me say, the scope has broadened. I heard people talking about various alternatives. That is why we are putting on this alternative panel. If we focus again on the cascade program, Mr. Bostian in the first

eak21 instance is the appropriate individual and then pursuant to the parties' choice or course of action, we have the two necessary back-up witnesses, Mr. Snead and Mr. Glover, who will be here tomorrow and they can join the panel or sit in a panel with Mr. Bostian.

However you want to proceed, we have the people and can go forward.

MR. ROISMAN: Mr. Chairman, I want to say one thing. I would rather have us have our fight tonight rather than tomorrow. What Mr. McGarry described as the witnesses he wants to put on doesn't have -- with the exception of Mr. Snead, Mr. Glover and Mr. Bostian's tiny affidavit -- anything to do with the scope question.

The scope question doesn't depend on the environmental impact associated with the 300 fuel rods being transshipped or the cost of what the alternatives are.

It has to do with, as I described earlier, what Duke's plans are.

CHAIRMAN MILLER: Are those witnesses prepared to identify, give the history and development of and give the present description of Duke's plans regarding the cascade program?

MR. ROISMAN: I don't know about that but their testimony as prefiled by Mr. McGarry -- if what he is proposing is to put that in -- doesn't go to that. I will

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not cross examine them tomorrow morning on that. If they have something to add to this question -- I am dubious about whether Mr. Bostian is qualified to address any issues here.

Assuming that he is, he, Mr. Snead and Mr. Glover -- for Snead and Glover there is no prefiled testimony -- I have no problem with Mr. McGarry putting them on -- and he and I discussed this on the phone -- giving them direct questions, getting direct answers and doing cross examination.

From the internal memoranda we have seen and we may have to ask preliminary questions of them to make sure the preliminary data are correct, those two men, Glover and Snead, seem to be the ones with the principal planning function here.

They can tell us whether they have a cascade plan on the drawing board, how they define the scope of the problem, do they look from now to 1992 or from now through the years the plants will run, those questions.

CHAIRMAN MILLER: I assume that is the kind of testimony that will be offered?

MR. MC GARRY: That is exactly correct.

CHAIRMAN MILLER: It goes beyond the prepared prefiled testimony?

MR. MC GARRY: Exactly. Mr. Bostian is the man with the ultimate responsibility with respect to establishing a course of action at Duke Power Company with respect to

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spent fuel problems. So, I am alerting Mr. Roisman at this point in time we do intend to put him on as the head man.

He is and we will demonstrate he is qualified in this regard. I don't anticipate a big to do about that. Just so we are clear.

CHAIRMAN MILLER: He is Mr. Cascade at present?

MR. MC GARRY: You said it; that is it.

CHAIRMAN MILLER: He can address that plan from your client's point of view?

MR. MC GARRY: He is Mr. Cascade.

MR. ROISMAN: Maybe that is an admission. We don't have to have a hearing.

CHAIRMAN MILLER: I am not pressing an admission. I want to identify him in a shorthand way.

MR. MC GARRY: Let me explain. The reason I mentioned the other individuals who are our alternative panel and once we get into the main case the first issue we anticipate covering is the alternative panel. First we have the scope question. We will have the appropriate people. However, during the discussion of the scoping issue, Dr. Luebke asked about building an additional pool. Well, that is Mr. Hager. He can talk about that.

So I think in the interests of time, we will put the panel up there and let the chips fall where they may. I think we will provide the appropriate people who can

eak 24

address the questions in this first issue.

CHAIRMAN MILLER: Much of their testimony in the first go-round will be given orally and for the first time. It is not covered therefore to any significant extent as far as the cascade plan is concerned by prefiled testimony.

MR. MC GARRY: We have not addressed the cascade program by prefiled testimony. So, this is a choice. Maybe we ought to discuss it for a moment here, Mr. Chairman.

I would anticipate putting in all of their testimony in the first instance.

CHAIRMAN MILLER: If you proffer them as direct witnesses with regard to the genesis and development and present status of the cascade plan, I would think you would go farther at that point, to ask questions, make your record in chief and turn them over for cross examination. If it is agreeable with you, it would get the whole matter out to interrogation.

MR. MC GARRY: That is our plan. Put in the prefiled testimony, ask additional questions --

MR. ROISMAN: We will oppose the prefiled testimony going in on the ground it has no relevance to the potential scope of the proceeding. I don't want to be obligated to cross on it or argue in front of the Board its relevance. Its relevance will depend on your resolution of

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the scope question.

MR. KETCHEN: Mr. Chairman, I think that is the way to proceed. I think it fuzzes up the issue if we have to sit down and take out a section of cross examination on the other alternatives. I think we ought to get resolved right away what the lines are about the cascade plan. Our witness will be presented for that limited purpose.

CHAIRMAN MILLER: The Board agrees with you, Mr. Roisman. Mr. McGarry, you may as well join us. We see there may be a problem initially. If you would bring forward the witnesses you wish, in whatever order you desire. Perhaps we should start with the direct oral testimony, recognizing it has not been prefiled and we will let you go ahead and make your case on that issue.

MR. ROISMAN: One exception to my statement. The Bostian affidavit, the second one, does purport to address this issue in part. I don't have a problem with Mr. McGarry --

CHAIRMAN MILLER: If that is just an affidavit -- one chairman said he can't cross examine a piece of paper. Whatever he said in the affidavit you should be prepared to address on direct and it will be available for cross examination.

We don't anticipate the affidavit being offered in evidence.

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MR. ROISMAN: I would like to get the preliminaries out of the way. We would like the Board to make clear, if it would, that we may direct questions to individual members of the panel. The panel may not consult with each other before answering and the witness will be obligated to answer or we will oppose the use of the panel.

CHAIRMAN MILLER: That is fair and we have done that before. Do you have a problem with that?

MR. MC GARRY: I have no problem. I would mention one thing. We can pick this up on rebuttal. But sometimes in the panel approach, another witness would like to clarify a statement. Is Mr. Roisman objecting to that?

MR.ROISMAN: I will if it is Mr. Bostian.

CHAIRMAN MILLER: Perhaps we better use the analog of the courtroom here. If we were tightly bound by the Federal Rules of Evidence and the like -- let's structure the first one which is oral direct more as if we were in the courtroom than an administrative hearing. I don't want to bind you. That way it will be helpful to the Board. Initially it will help the parties who wish to cross examine and you on redirect. Let's try that with the first group. We will not follow as much of the panel presentation or the prefiled direct testimony approach. Then we will go from there.

MR. ROISMAN: I have no problem with all of them

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sitting there so that we can talk about the issue cohesively, but I want to pick and choose whoever I want to answer the question.

CHAIRMAN MILLER: These are witnesses, experts. I would like to hear from each one sequentially. They can pool when they pool. Pooling is difficult when you have multi-headed witnesses. We will put together the segments. We will give them a fair opportunity if someone wants to give a summary of matters that have been covered in exhibits that are in. But largely this is a man-for-man proposition. The fact they sit together doesn't change that context. Staff, do you have any problem with that type of procedure for this panel?

MR. KETCHEN: For the first section of this hearing, I have no problem. We will reserve for later.

CHAIRMAN MILLER: This is because of the nature of the testimony and the kind of panel and the subject that is before them. We are not saying this will be true of all. In fact, we will discuss it with counsel subsequently.

MR. KETCHEN: Mr. Chairman, I want to make clear as to what we are about. Is it my understanding that the Board will hear this evidence and then give us some direction --

CHAIRMAN MILLER: We will hear that evidence, whatever evidence you wish to put on, as well as your examination of witnesses; we will hear the evidence

eak28

Mr. Roisman, Mr. Blum or anyone else wishes to put in on that subject. At that point, the Board will confer and orally rule what the scope is.

It will essentially be A or B as you have described it to us. That will be the nature of that issue.

We will then proceed as counsel wish to proceed, probably with the Applicant's witnesses. They normally put on their witnesses first on the other matters.

MR. KETCHEN: May we ask of the Chair whether Mr. Roisman will be putting on a direct case on this question?

CHAIRMAN MILLER: Yes, I think it is fair to inquire on that subject.

MR. ROISMAN: No, we will not be putting on a direct case on the question of scope. But we will be introducing a fair number of exhibits all of which are prepared by Applicant witnesses and we will introduce them through those Applicant witnesses.

CHAIRMAN MILLER: It is fair so that we all know what is coming up since we are doing this without prepared direct testimony. Ask any questions you want.

MR. KETCHEN: I may or may not have problems with that. We will address those. We ask the same question of Carolina Environmental Study Group, whether they intend to put on a witness on this subject.

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MR. BLUM: We may have testimony on the building of an additional fuel pool. That will be Mr. Riley. If that is an issue.

CHAIRMAN MILLER: Do you consider that to be an issue on the first aspect we have been discussing all day?

MR. BLUM: Only that Dr. Luebke raised that as a possibilit at the end of what Mr. Roisman said. If it is, then Mr. Riley is ready to testify on it.

DR. LUEBKE: That probably comes under the heading of alternatives and maybe alternatives come a little later, after the major questions of cascade or no cascade is settled. Is that reasonable?

MR. ROISMAN: I think, as I see what happens tomorrow, our effort will be -- my theory is that we don't Perry Mason it. Paul Drake is not with me today nor will he be tomorrow. We will try to have the Applicant witnesses demonstrate to you through their testimony that Duke thinks about the spent fuel problem in terms of time periods far beyond the time period that this 300 transshipment looks at; that cascade is a plan in their head; that independent fuel storage is a plan in their head; that pin packing is a plan in their head; that the government building an AFR is a plan in their head and that the scope of the problem is a problem that relates to the lifetime of the reactors and not a problem that relates to the next three years.

eak30

In that sense, the independent spent fuel storage existence will be discussed tomorrow but we would not necessarily plan to get into and we think it would be beyond the scope of what we are looking at initially, how much it will cost, when it would be available --

DR. LUEBKE: That is a later detail.

MR. ROISMAN: That is a later detail if we ultimately decide it is a viable option to the proposal on the table.

MR. KETCHEN: Mr. Chairman, there were lots of other arguments that came up during the course of the day. I think we have covered them and I guess I am asking what the Board's pleasure is on these. Probably they will come out in the direct case later, after the first phase, with respect to how the Staff evaluated the Part 70 application vis-a-vis the McGuire operating license, that type of thing.

Unless you ask me to, I won't bother to address that particular one at this time.

DR. LUEBKE: Well, I think you could clarify that the operating license has a stay on it and people ought to know about it and if you know when the stay might get lifted, that might be pertinent to some of the future thinking.

MR. KETCHEN: All right; I think we can answer that through our witness as ancillary matter after we finish with the other business tomorrow.

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CHAIRMAN MILLER: Did we ask you about how many witnesses the Staff would put on following the Applicant's presentation?

MR. KETCHEN: We will probably have one witness. We have no Mr. Cascade. That is our position before this Board. We will tell you what we did and didn't do and why.

Then, I would assume that that witness would be taken out of time and our direct case would come later after the Applicant puts in his direct case and the Intervenors put in their direct case, depending on how the rulings go.

I think we have covered most of the items of business that we wanted to rebut.

CHAIRMAN MILLER: Anyone not been heard from who wishes to be heard. Anyone who has been heard who wishes to be heard further?

That is what we will do at nine in the morning. You will recall, between eight and nine, we make ourselves available for the limited appearance statements, oral and written; that is tomorrow, Wednesday, Thursday, Friday of this week.

I think the hearing on Friday will be held in the large room immediately ajoining. This room will be occupied or used by the Commissioners on Friday. Saturday, I suppose you know we have obtained a room where we can conduct the hearing starting at 9:30, at the Quality Inn, the Marco Polo

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Room.

Mr. Roisman, you indicated you would not be present. We will confer with you as to subjects to which you have no objection to the Board proceeding on which will not impinge upon your client in the case.

Anything further on this particular matter today? We are going to go through now some of the other issues but this is the major issue. Anything further?

As far as transcripts are concerned, Dr. Luebke will make available to the NRDC and such Intervenors counsel who wish to use it also, his copy. I don't know what the mechanics are for getting the third Board copy back to Mr. Luebke.

MR. ROISMAN: Thank you, Doctor.

CHAIRMAN MILLER: For the record now, was your request limited to the transcripts which are the product of this evidentiary hearing, for the next ten days?

MR. ROISMAN: You mean as opposed to the transcript -- that is the one we are concerned with now. Prehearing conference transcripts where you don't have a second day coming up are not crucial. We can look at them at the public document room in Washington.

It is here when we want to prepare overnight for the next day's hearing that it is crucial to have them and have them on the five hour schedule that they are ordered on.

eak33

CHAIRMAN MILLER: Mr. Roisman will get it on the same time schedule as the Board and other parties.

There are two more issues under the NRDC.

MR. ROISMAN: Maybe three more.

CHAIRMAN MILLER: Well then, consider 2, 4, 5, 6. We will then go into CESG's two contentions and I think there is probably three. Was that an overlap? There was another one. PIRG had a contention which was the same or similar to one of the three.

MR. RILEY: It was concerned with emergency planning, Mr. Chairman.

CHAIRMAN MILLER: Those are the contentions, are they not, that are before us. We have touched however lightly on all of them. HAve we forgotten any of them? We will take a short recess.

We would like you to move sequentially among these.

(Recess.)

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CHAIRMAN MILLER: All right, the hearing will resume, please.

We will now go over the remaining issues insofar as the Board wishes to consider motions for summary disposition or any other kind of motions with regard to proffered issues.

We have on NRDC's issues sufficiently heard from counsel and made the arrangements on contentions 1 and 3 dealing with alternatives.

Contention number 2 is that which raises the question of whether the proposed action is a major federal action significantly affecting the quality of the human environment, and whether or not an environmental impact statement need be prepared by NRC, which is to say the Staff initially, and the Board in reviewing authority, or whether in the position taken by the Staff it is not significantly affecting the environment, the effects are inconsequential or insignificant.

That I believe is tied to the issue as the Staff sees it. And consequantly no environmental impact statement has been or will be prepared.

As far as the motion is concerned for summary disposition, that will be denied. We think that the nature of this proposed action, whatever it might be, and as the term is used in the KLEPPP case, and as the appeal board has

mpb2

used the term and so forth, we will know more after we've heard the witnesses tomorrow. The Applicant and the Staff will know more what the nature of the proposed action is.

We were not disposed to rule as a matter of law, nor at this stage in summary disposition motions. So the motions -- I take it there are two, the Applicant and the Staff each have a summary disposition motion on issue number 2, is that correct?

MR. MC GARRY: That's correct, Mr. Chairman.

MR. KETCHEN: Yes, sir.

CHAIRMAN MILLER: All right.

They will both be denied.

Now Contention number 3 we've already discussed, and we're going to go into that tomorrow with your witnesses, okay?

Now NRDC contention number 4.

Does anyone wish to be heard further on this, beyond the matters contained in your motion, affidavits, and the like? And I believe there was incorporation by reference. If so, you may be heard.

MR. MC GARRY: Mr. Chairman, I might go very briefly to sum our position, I think, with respect to NRDC contention 4.

The issue, from the Applicant's point of view, is relatively simple. We maintain that under Part 20 and as low

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as reasonably achieveable analysis pertains to the proposed action and not to all the alternatives. And I believe the Board is familiar with our argument. That's in essence exactly what it is.

If I might just look at my notes to see if I have anything to supplement that?

CHAIRMAN MILLER: Fine.

(Pause.)

MR. MC GARRY: I believe it's fairly well laid out.

The only thing that I might add to support that position is that if we were to look at the Prairie Island Vermont Yankee appeal board decision, ALAB 455, there at page 52 they talk about in the ALARA context they refer to the proposed spent fuel pool modification, not to other alternatives, but to that modification.

On page 56 they speak to applying ALARA to applicant's proposal. That's on footnote 13.

On page 61 they refer to applicant's activities. We would also make reference to the York Committee versus NRC, the DC circuit case, at page 814, where they were discussing as low as reasonably achieveable and its predecessor, and there they said the ALARA consideration was considered -- was limited to -- quote -- "expected radiation releases from the Peachbottom site", not from alternatives but from the selected action.

mpb4

We would simply say that with respect to NRDC's reliance on the Dresden Quad-Cities licensing board decision, with all due respect to that board, we think that decision is wrong.

And then finally I think in summarizing our position, if we are correct that you look to the Part 20 application of ALARA just to the proposed action, NRDC does not take issue with the fact that this transportation action is ALARA with respect to other transportation actions. And therefore that we are correct, there is no material issue of fact and summary disposition ought to be granted for the Applicant and that contention ought to be dismissed.

That's our position, Mr. Chairman.

CHAIRMAN MILLER: Thank you.

The Staff?

MR. KETCHEN: Mr. Chairman, our position is consistent with that in that as we understand NRDC's case -- Well, our papers pretty well speak for themselves.

But as we understand NRDC's case, as it's presently pending before the Board, it is they have no direct presentation on the specific proposed action and any material issue of fact with respect to ALARA as it relates to the proposed transshipment.

We would just note for the record that the filing of the testimony on June 4th subsequent to the filing of the

mpb5

motions for summary disposition, including Mr. Roisman's motions for summary disposition, as far as its affidavits, they're not changed. In other words, there's no evaluation of ALARA, at least from Mr. Roisman's point of view.

CHAIRMAN MILLER: Thank you.

Mr. Roisman?

MR. ROISMAN: Well, Mr. Chairman, either I am reading a different version of all these cases or the Applicant and Staff are grossly misreading the cases.

As we see it, the obligation that's imposed by the ALARA standard is an obligation on the Staff to analyze whether or not the Applicant will keep the releases as low as reasonably achieveable. That means that they have to figure out what are the options.

Now the Applicant quotes in cases in which the issue is presented not as we presented it. Language happens to be in there that doesn't talk about the scope of the options we're talking about.

That, with all due respect, Mr. Chairman, is not citation to authority. You might as well cite the dictionary.

Citation to authority deals with holding. I mean, that was black letter law. We learned it when we all went to law school. There are no holdings on those questions because this is the first case that I'm aware of, with the exception of one authority directly on point which the Applicant duly

mpb6

wishes to acknowledge it doesn't agree with, but we still would respect that it's a three-member board of fairly distinguished people.

That happens to hold that our position is exactly right. That is the only case that we're aware of that directly addresses the question.

The question is if there are alternative ways of achieving what the Applicant has in mind, do you have to investigate them to see which would be the lowest reasonably achievable exposures? We contend that there is, and in our motion for summary disposition on this question which we filed on May the 4th I believe and is really in effect a rebuttal to the subsequent motions for summary disposition that were filed -- I'm sorry, May the 1st we filed ours -- the subsequent motions for summary disposition filed by the Applicant and the Staff simply make the point that the kind of rigorous analysis that you would need to do to consider the economics and the health effects of each action and alternatives to it has not been conducted by the Regulatory Staff.

That statement is true not only with regard to the breadth of the alternatives that need to be looked at, which goes back somewhat to the question we'll deal with tomorrow morning, but also even to the narrow question.

Mr. Nehamias's affidavit is an affidavit of what he supposes, assumes, estimates, guesses; there is no

mpb7

rigorous calculation. Now that is not in our judgment what the ALARA calculations were intended to be. They're supposed to be a rigorous calculation.

He should have had available an analysis based upon the rerackings and the transshipments and the building of independant spent fuel storage facilities, whatever he considered the options to be, a rigorous statement where he would be able to say something more substantial and more precise about these calculations. He did not do it.

We feel not only that the Applicant and Staff are wrong in their position that there is nothing more to be done on the ALARA, that our motion for summary disposition should be granted, and that the Staff should be directed to prepare an ALARA analysis consistent with the applications of the law.

That's it.

MR. KETCHEN: Mr. Chairman, may I be heard?

CHAIRMAN MILLER: Yes.

MR. KETCHEN: One quick point:

I think the point is is that we did our evaluation in the affidavit submitted with our motion for summary disposition, and we laid our case before the Board. And other than out of Mr. Roisman's mouth, there is nothing that says we're wrong.

And we've only got out of Mr. Roisman's mouth not an affidavit of a witness, a factual affidavit, indicating

mpb8

that we're wrong. We've got his opinion about how we should conduct our review. And we think we've done out -- we've presented our case and the point is not what Mr. Roisman said, but what the facts say, not how Mr. Roisman would like them to be, but what they are.

And our case is there, and we see no opposition to that case.

CHAIRMAN MILLER: So the Staff is prepared to put on its direct case, then, with regard to the ALARA analysis?

MR. KETCHEN: Yes, sir, if required. But we don't think we should have to. In a motion for summary disposition procedure --

CHAIRMAN MILLER: I suppose I might say, the Board really doesn't feel that the summary disposition procedure is particularly appropriate in this kind of a case.

The issues are first of a kind, there are complexities. The Board feels that it would be fulfilling its responsibilities by going on an evidentiary record.

So with all due respect to the multiple motions and the work that you have all done -- and you've done very considerable work which the Board appreciates in the presentation of affidavits and the like -- we wish to have this matter proceed as an issue and to have the direct testimony and the

mpb9

cross-examination of the witnesses.

We are therefore going to overrule the Staff and Applicant's motion for summary disposition on Contention 4 of NRDC, which is the ALARA issue.

We are likewise overruling the motion for summary disposition on Contention 4 of NRDC. We wish to have the matter handled by the presentation of the evidence. And we will then rule in accordance with that.

All right.

Next is contention number 5, the full core reserve matter.

Does anyone wish to be heard on that?

MR. MC GARRY: I'll lead off again, Mr. Chairman. I'll make it brief.

Mr. Chairman, just so I can clear up my mind, I can take it as a given that the Board is totally familiar with our --

CHAIRMAN MILLER: We've read your papers. I won't say "totally familiar" because you do raise some complex matters, and sometimes they meet in confrontation, sometimes not. But that isn't your fault.

Counsel has done an excellent job of preparation and we have read it.

MR. MC GARRY: Thank you, Mr. Chairman.

With respect to the full core reserve contention,

mpb10 1 our position is that it should be dismissed.

2 Interestingly enough, NRDC does not object to the
3 existence of such a capability. They recognize that there is
4 no NRC requirement. They don't contend that a full core
5 reserve is necessary either for environmental or health and
6 safety reasons.

7 They have performed no analysis. I mentioned this
8 point with respect to the Vermont Yankee supreme court
9 language. In other words, they have not alerted us to their
10 case in this regard.

11 It's simply that they wish this to be proposed,
12 over and out. The facts show that without a full core
13 reserve, consequences would be severe. That's contained in
14 our interrogatory responses to the parties.

15 The facts also show that Duke has had to unload
16 a full core on past occasions, and therefore a full core
17 reserve is therefore warranted.

18 That being the case, we think there is nothing
19 to -- there is no substance to this contention by NRDC. As
20 we indicated on previous occasions, this is a managerial
21 decision.

22 I believe that sums it up. NRDC has made no case
23 for or against full core reserve, and accordingly there is no
24 basis for the contention.

25 CHAIRMAN MILLER: Thank you.

mpb11

The Staff?

MR. KETCHEN: Mr. Chairman, we made our presentation on our motion for summary disposition of May 11th, 1979. We will not add to that at this time except just one administrative comment.

We believe that the statement of the contention here is some sort of a statement of an alternative, and it's linked to consideration of alternatives under contention 3, we believe. And we would probably propose an administrative matter at the later time to present the witnesses on 3 and 5 together. We think they're intertwined. We just offer that comment.

CHAIRMAN MILLER: Mr. Roisman?

MR. ROISMAN: We are not arguing in this contention that an option to the retention of full core reserve is the shutdown of the reactor.

What we are arguing is that the way the Applicant chooses to use it, that is as a "item of flexibility" inherently runs some health and safety risks on the one hand, or else is irrelevant on the other, and ought not to be a factor at all in deciding when the plant will lose the capability of continuing to operate.

If the retention of a full core reserve has a health and safety function -- let's just assume for a moment it's worker exposures, we don't want the workers working near

mpb12

the vessel if the vessel has fuel in it, so you want to have the capability of taking it out. And you don't make it a requirement that they retain the full core reserve, then Duke has indicated that it would under its flexible program continue to operate the reactor after it loses full core reserve.

Then, having done so, it runs into a problem where it needs to do the core work, and needs to have workers near the pressure vessel. What does the Applicant do in that case? It says "It will cost us $165,000 a day to shut the plant down. It will take us 25 days to get the casks here and move all of this fuel out of the spent fuel pool into casks off to some other pool at another plant, or just store it in the casks. If we send the workers in they can get the job done in two days. They'll get 150 man-rems in the two days, but even if we multiply that times $1500, it won't even approach our $165,000 a day. Therefore, as an ALARA consideration, we will go ahead and let the workers get their 150 man-rems."

Now if we say that is a possibility, and it looks to us from statements made by the Applicant and Staff that it is, then full core reserve retention should be made a licensing requirement.

On the other hand, we're aware of the appeal board decision in ALAB-531 where a state, in that case Oregon, complained of the failure to make the full core reserve

mpb13 1 capability a licensing requirement. And the appeal board
2 responded. The simple and dispositive answer is that if a
3 full core reserve is not then available, shipping casks can
4 be employed to hold the spent fuel assemblies that must be
5 removed to obtain space to perform the repair work.
6 Now I think that this citation, with all due
7 respect to my own citation, is comparable to the ones that
8 Mr. McGarry was making. I'm not sure the issue was really
9 joined right there, and I don't want to suggest to you that
10 that is the whole answer to the question. But it at least
11 suggests that there is another side to this question.
12 The other side might be that this retention of a
13 full core reserve is a bug-a-boo, that there really are some
14 easy simplistic things to do to keep it without having to
15 actually keep extra space in the spent fuel storage pool. And
16 that would stretch out the lifetime of the Oconee reactors
17 for another full year.
18 I don't know the answer to that.
19 I am trying to get the Applicant and the Staff to
20 'fess up to it and jump. They can be in the pan or they can
21 be in the fire, but I don't think they can be standing out-
22 side the kitchen.
23 And that's the whole thrust of our contention
24 number 5, most unsuitable, in my judgment, for summary
25 disposition, much more suitable for getting the facts in [illegible]

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record and then having this Board decide the question that the appeal board may have decided with an evidentiary record and maybe not in the Trojan case.

And that is:

Is a full core reserve requirement an essential safety feature and you don't want to compromise workers later because of the way the ALARA thing works and therefore you require it, or is it one of those things that you can really deal with without requiring it and use shipping casks or something else. Or are the worker exposures potentially involved so negligible that you don't have to worry about it?

150 man-rems I don't think is even remotely negligible. I don't know where negligible comes in. You know, we have a little problem with that term from the Staff. But I think 150 man-rems, particularly if I'm the man, is a lot of rems.

In any event, I think the issue ought to go to hearing. I think the Applicant and Staff ought to have to address those two sides of the question. And if they're not willing to decide how it should come out, the Board will have to decide. It's either going to be a condition and therefore you can think of these plants running out of their full core reserve as being the crucial day, or it's not going to be a condition and you can think about the plants being able to run for at least another whole year. That would take you

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into 1983 before they have to be shut down.

As you look at this question, think about its implications for this independent spent fuel storage question. There is now a dispute going on between several of the Applicant's witnesses as to how long it would take to build an independent spent fuel storage facility. The difference may be the year between May of '82, when they lose the full core reserve, and May of '83, when they lose the capability of discharging a reload at all.

So it may really make a difference whether the full core reserve is a requirement or not a requirement. We think it's got to be one or the other.

That's all.

DR. LEUBKE: This matter of shipping casks, my impression is there aren't very many of those in the country that exist.

MR. ROISMAN: That would certainly be a legitimate point for somebody here to put evidence into the record, and there are train shipping casks and there are, you know, truck shipping casks, and it's not clear whether if you had any you'd have to actually ship them anywhere, whether they could just stay on the site.

DR. LEUBKE: And there are other aspects that Mr. McGarry mentioned to this situation, and it can be severe if you don't have the capability of storing a full core.

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We could find out from the Staff how many other situations have occurred and so on. And let's just get some of this data into the record.

MR. ROISMAN: In fact, I'm glad you mentioned Mr. McGarry because there's another point here that the record could get cleared up on.

Again, we don't have testimony yet on it that I've seen. As I understand it, Oconee's fuel pools, 1 and 2, are all together, and their fuel pool 3 is a separate pool. Now I don't know how they transfer from 1 and 2 over to 3, but my guess is they're doing it with a cask and not underwater. If so, when they retain a single full core reserve discharge capability at the site, they're already running the risk that they need to use the number of days necessary to move by a cask. So they may already have built into their system some of the days that cask unloading would require, and then the only issue may be do you have enough casks, enough places to put it. And maybe that just gets down to dollars and cents.

But, okay, let's find out what those dollars and cents are. I've never bought one of these casks, I don't know what they run. I don't know what it would cost Duke to have them standing by for its projected 13 reactors.

(The Board conferring.)

CHAIRMAN MILLER: The Board wishes to hear the

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evidence.

The motion or motions for summary disposition on contention 5 will be overruled.

I believe as to contention 6, which is vulnerability of shipped fuel to sabotage or other malevolent acts, I think there's been no motion filed by any party.

MR. MC GARRY: Yes, there has, Mr. Chairman.

CHAIRMAN MILLER: There has? Oh, I'm sorry. Then I'll back up.

Is it the Applicant that filed it?

MR. MC GARRY: Yes.

CHAIRMAN MILLER: Fine.

You may proceed, then.

MR. ROISMAN: Mr. Chairman, before he does, I'd like to clarify the record on our position on contention number 6.

If that's all right?

MR. MC GARRY: Fine.

My lead off question, Mr. Roisman, is perhaps has your position changed.

MR. ROISMAN: The Commission has now adopted a regulation dealing with the safeguards.

CHAIRMAN MILLER: It's alluded to in the papers submitted by both Applicant and Staff.

MR. ROISMAN: Right.

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Here in the context of a public record, I guess we'd like to say it vindicated our contention. Maybe the Applicant and Staff don't agree.

The question now is really:

Is the Applicant going to have to comply with that regulation? Is it subject to some grandfathering exemption? What is its position on the regulation? And precisely how will the regulation be applied by the Applicant?

We have been in some discussions with one of the representatives from the Staff suggesting that if they could give us some assurrances about how the Applicant is going to comply with the regulation, if they are, and we could see that that satisfied our concern, we could withdraw the contantion. That has not materialized.

Assuming that it does not materialize, I think essentially our contention 6 would then be amended, which I would be glad to do on paper if that's necessary, to an assertion that the Applicant has failed to demonstrate that it will be in compliance with applicable regulations with respect to the transshipment. That would then force the Applicant to produce for the record what it proposes to do to come into compliance with the regulation.

We propose to avoid that problem, that we just find out privately what the Applicant is going to do, and then knowing it could make a judgment as to whether we thought

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that was satisfactory. That would obviate the need to actually create a new contention on this issue.

I don't know -- and maybe the person on the Staff that I spoke to wants to address what's going on.

MR. HOEFLING: Mr. Chairman, I would like to comment briefly on what counsel for NRDC has just presented to the Board.

The Staff has had some discussions with Mr. Roisman in this area and it wanted to follow up on these discussions last week, but Mr. Roisman is a terribly difficult fellow to get hold of on the phone.

The situation basically is as presented in the Staff testimony, the Staff witness being Mr. Carl Sawyer, and that is that these regulations will be applied to these shipments should they materialize. The guidance document which makes specific what the requirements of the regulation will be in the Staff's view is being prepared and may already have issued. That would be NUREG-561, a detailed document providing guidance to the Applicant as to what will be required. And I will endeavor to speak with Mr. Roisman and attempt to make that document available to his expert to see whether or not this issue can be resolved without burdening the record with presentation of witnesses and the like.

DR. LEUBKE: Well, in addition, I think part of the history, as time went on here there was another document

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that happened, and it's a General Accounting Office document which discusses the handling of radioactive materials as issued on May 7th. I don't remember the numerical identification. But I have a notion that it has some grandfathering effect to this proposed new regulation perhaps. And I think it relates to, should I say, how the General Accounting Office views the severity of the sabotage and hijacking credits.

MR. HOEFLING: Yes, Dr. Leubke. GAO did issue a report. That report predated the Commission's action in this area, applying interim safeguards to the spent fuel shipments.

I've read the GAO report and I'll attempt a re-characterization of it. It did not primarily focus on security considerations related to spent fuel, but rather focused on security considerations related to other forms of radioactive material, enriched material, identifying areas where the GAO believed there were witnesses.

But I do believe that whatever extensive GAO report substantively identified a problem in GAO's mind with regard to spent fuel shipments, that a direction by the Commission would --

DR. LEUBKE: Well, as I recall they spent 15 or 20 pages on that. They didn't exactly ignore it.

I kind of also remember a sentence in there which says that shipping spent fuel is one of the most radioactive shipments that we make in this country, things of that nature.

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It wasn't very complimentary.

MR. HOEFLING: Well, I think the report did recognize the nature of the package, Dr. Leubke, the spent fuel shipping container as providing a high degree of assurance of the integrity of the package could be maintained, and that sabotage could be affected only with great difficulty.

DR. LEUBKE: To that I would like to add I think it also discusses a few methods or mechanisms of sabotage, one of which being to use high explosives, and this being done in a high density area, we might even look forward in the record here for some ideas of -- Here I think you'd get outright fatalities. You don't argue about latent cancers or things like that. I mean you get fatalities on the scene because of the sabotage effort.

It hasn't got anything to do with radioactivity except that it was an attractive -- nuisance isn't the proper word, I guess target maybe -- an attractive target. And I think that should be addressed.

MR. HOEFLING: I don't think I'm quite following you, Dr. Leubke.

DR. LEUBKE: I'm saying the fatalities caused by the explosive to sabotage a fuel shipment, those people are just as dead because of the fuel shipment as somebody who gets cancer ten years later, fatal cancer.

MR. HOEFLING: I think that the question that

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you raise has to be viewed in terms of risk, not only in terms of consequences given that an actual effort is made to produce an explosion of this magnitude. The other element of risk would be probability of occurrence, the likelihood of that type of a scenario actually coming to pass.

DR. LEUBKE: And mainly involving whether you put these shipments through high density populations or not.

MR. HOEFLING: Dr. Leubke, this raises a question in the Staff's mind.

As you know, the proceeding has up to this point been controlled to some degree by the contentions that are raised by the parties and put into issue, and one of the contentions that has been put before the Board is the one raised by NRDC on the sabotage question.

As both Mr. Roisman and I have discussed, he and I are in the process of seeing whether or not the actions which have occurred since the contention has been admitted, specifically the placement of these interim safeguards, whether those actions satisfy concerns that NRDC had in this area, which carries with it the implication that the possibility exists that this contention might be withdrawn by the parties sponsoring it as an issue in this proceeding.

Given that to be the case, would the Board still be interested in pursuing aspects related to this issue? Is that the pleasure of the Board?

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MR. LEUBKE: Well, I think the GAO report happened. I've read it. It's circulating. It raises some questions that weren't put forth that prominently while people were writing contentions.

It might be under the character of what you might call "new information", if you will. I have a guess: It might end up ultimately as a Congressional investigation if they weren't all so busy with Three Mile Island.

MR. HOEFLING: Dr. Laubke, if I can make a suggestion:

It's customary in proceedings of this type that if the Board has special areas of inquiry which may not be congruent with contentions, areas that it feels it would wish to receive testimony on, the Board poses specific questions to either the Staff or the Applicant to which they can then respond.

And I would suggest that given the nature of your concern, which really is directed at the more general question of explosives rather than -- or fatalities from explosives, if I perceived the question correctly, rather than effects relating to the radioactive release, should there be one itself, that the Board reflect and pose questions to the Staff and the Applicant.

MR. LEUBKE: I guess I'm doing that this afternoon.

In other words, I wasn't aware that contention six

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was about to be withdrawn.

MR. HOEFLING: I don't think we're saying it's about to be withdrawn, but the possibility is there.

DR. LEUBKE: Then I was saying if we're going to have testimony and consideration of contention six, we ought to recognize the existence of this GAO report which has historically happened during the month of May.

MR. HOEFLING: I'm trying to sharpen the area for the purpose of providing the Board with a response.

As I understand it, the Board recognizes that the GAO report predated the Commission's regulations --

DR. LEUBKE: Yes.

MR. HOEFLING: -- in the sabotage area, and the Board's inquiry is limited to the effects of an explosion in terms of fatality?

CHAIRMAN MILLER: No.

DR. LEUBKE: I'm saying that you have this shipment of spent fuel in a cask, and it's being sabotaged.

I think when you analyze the problem completely it's sabotaged by high explosives. But the fatalities occurring from radioactive emissions and the resulting latent cancers and so on may be diminimous compared to the instant fatalities in a crowded area that might occur from the associated high explosives, not any old high explosive, just a high explosive that occurred during the sabotage of

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a shipment of fuel.

I can't separate the two effects. I merely ask the Staff and the other parties to think aobut the combination of effects, that the radioactive emissions become perhaps turbulent.

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MR. HOEFLING: I think if the Staff does proceed with the witness on this subject, the witness will be able to respond to that question. And should the contention be withdrawn, the Staff will also attempt to respond to that concern.

DR. LUEBKE: Thank you, that's all I'm asking.

CHAIRMAN MILLER: Let me refresh my memory, Mr. McGarry.

Wasn't this contention No. 6 the issue of potential sabotage or shipments of spent fuel, wasn't that initially objected to by the Applicant on the grounds that the Commission had not acted and hence it was a disguised attack upon Commission regulations?

MR. MC GARRY: That is correct. Things have changed.

CHAIRMAN MILLER: Now, since we have the changes, don't you think it would be pleasant if the record reflected that there were changes, that the Commission has acted, so that would render obsolete, I suppose, the original contention of the Applicant based upon the then state of the record.

And wouldn't it be nice if we now had the record reflect what has happened [illegible] changed posture resulting therefrom?

MR. MC GARRY: That is fine with the Applicant. Applicant's position is simply it is a regulation it has to

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comply with.

CHAIRMAN MILLER: I am thinking of it from the standpoint of the public who might be confused that one day it was so foreign to what we could look at that we could throw it out on summary judgment motion because it would be an attack on the regulation.

And then a few weeks later it becomes so significant from the analysis made by the Staff, presented to the Commissioners, that they put into force this regulation on 30-days publication in the Federal Register, an accelerated expedited kind of proceeding.

And I don't want the public to be confused as to our processes, or to think that we are stultifying ourself or anyone else.

I, therefore suggest maybe the record should, at any rate, be updated in that respect by all parties.

MR. HOEFLING: Mr. Chairman?

CHAIRMAN MILLER: Yes?

MR. HOEFLING: May I respond to that?

CHAIRMAN MILLER: Of course.

MR. HOEFLING: To give a background on this particular --

CHAIRMAN MILLER: You can do it tomorrow, if you wish. I am not asking that it be by argument of counsel, but rather something that should be going into the record.

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MR. HOEFLING: I see. I understand.

CHAIRMAN MILLER: Okay.

I don't mean to cut off your argument, but I am suggesting that if the Staff would want to present some evidence of some kind, which would make the record complete --

MR. BLUM: Mr. Chairman?

CHAIRMAN MILLER: Yes?

MR. BLUM: Part of our second contention which relates to hazards in transit --

CHAIRMAN MILLER: You are on accidents though, aren't you?

MR. BLUM: Our contention relates to --

CHAIRMAN MILLER: Accidents or delays in transit, hazards due to delay in transit, unacceptable hazards by increasing dosage to persons near the route and so forth.

I think that encompasses sabotage.

MR. BLUM: Yes, sir.

CHAIRMAN MILLER: Was it so intended when you framed it?

MR. BLUM: Yes, sir.

CHAIRMAN MILLER: It was?

MR. BLUM: We had intended to cover all three possibilities; normal radiation, those occurring in accidents or delay, and those deliberately caused.

CHAIRMAN MILLER: Residual effects as well as

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implications of attempted sabotage enroute. Is that what you deem to be encompassed in your Contention No. 2?

MR. BLUM: Yes, sir.

CHAIRMAN MILLER: All right.

Redraft it, present it to us in the morning. We will consider it as redrafted for purposes of preparing testimony. But do it so we can read it and clearly be cognizant of what it is. You now intend to insert it as an issue, and reasonably related to what we have allowed you to do.

MR. BLUM: I felt we did that when we filed the motion for summary judgment.

CHAIRMAN MILLER: That was a very curious motion. I don't altogether understand it, to be frank with you. But I wish you would go ahead and rephrase your contention in a flash so that we will have it, and then we will consider it further.

Was it your motion that was considered also, kind of speaking demurrer kind of thing, or am I thinking of something else? It was both substantive as well as a procedural motion?

MR. BLUM: Well, the thrust of it was that given the release of Nuclear Regulatory Commission decision, I guess, of April 18, that the consequences of sabotage are now a valid contention, and the risks of spent fuel sabotage are significant, that that would require a full-scale

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environmental impact statement prior to a decision being rendered.

CHAIRMAN MILLER: Why so?

Why would that require an environmental impact statement?

MR. BLUM: Well, you need an environmental impact statement when you have a major federal action that impacts on the environment in this substantial manner.

CHAIRMAN MILLER: This is a regulation of the Commissioners which say 'Thou shalt do so and so' with reference to spent fuel, and you think that requires some kind of a NEPA-type of environmental impact statement?

MR. BLUM: No.

Issuing the regulation does not require that, but the foundation for the regulation is that the risks of spent fuel sabotage are significant. If they are significant, then that means that the whole question has a significant impact on the environment, or potentially that.

CHAIRMAN MILLER: I suppose that is true of all radiation, health and safety. It is significant. But that doesn't bear, does it, directly upon the question of the NEPA implication as such?

MR. BLUM: Well I would argue that it does.

CHAIRMAN MILLER: Well can you remold your contention No. 2 which does not presently spell out, at least

mm6 very clearly the NEPA implications of sabotage and the rest, and present it in writing so the parties can all see it in the morning.

Can you do that?

MR. BLUM: Certainly.

MR. HOEFLING: Mr. Chairman, would you entertain argument on the contention?

CHAIRMAN MILLER: Sure.

In the morning, or now?

MR. HOEFLING: Anytime is fine.

CHAIRMAN MILLER: Well, do it now because in the morning we are going to start with the witnesses.

MR. HOEFLING: All right, Mr. Chairman.

The Staff's position, quite frankly, is that CESG has not raised a contention related to sabotage. The contention that was stipulated to by the parties, or the contentions that were stipulated to by the parties, seem to be quite clear, and the Staff has filed affidavits on that contention, I think beyond argument, addressing what the contention clearly states. And it does not raise a question relative to sabotage.

I think that should CESG want to litigate this issue at this point, they are not timely and they certainly have a heavy burden of showing good cause to make, to relate that issue to some developments that have taken place since

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that stipulation was originally entered into in October of 1978.

The only fact which has changed -- and it is not really a fact in the real world -- is the imposition by the Commission of interim regulations. But there have been no documents --

CHAIRMAN NILLER: There have been preceding studies by the Sandia Laboratories, and those results were made known. They were the subject of the publication that you and Dr. Luebke were talking about by the General Accounting Office.

In other words, there has been an increase in public knowledge, if not a change in circumstances, which normally are considered to bring about a sufficient basis for a reexamination of something that one might consider hasn't been examined previously.

Now with that predicate, don't you think that the Staff is being a little technical in the position it has now taken?

MR. HOEFLING: I want to take that back one more step. The real information or data which is pertinent to this area which is sabotage related to urban environment, was a study that was prepared by the Sandia Laboratories, SAN 77-1927, was prepared in 1978.

CHAIRMAN MILLER: That is what I was referring to.

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MR. HOEFLING: There is a GAO report that Dr. Luebke was referring to.

CHAIRMAN MILLER: Are there two Sandia Laboratories studies and reports on this subject?

MR.HOEFLING: There are many on this subject. But there is also a GAO report, which is a different group that Dr. Luebke was referring to.

CHAIRMAN MILLER: Which cites the Sandia study.

MR. HOEFLING: But my point is the Sandia study issued in 1978 and the Commission's evaluations and deliberations on that study also issued in 1978. And CESG has had these documents since 1978.

And why now, at the last moment, when we are at hearing, does CESG want to expand its contentions in this area?

There must be a showing of good cause to overcome this untimely action on the part of CESG.

DR. LUEBKE: If the NRDC contention 6 remains in, it is possible that what CESG writes tomorrow morning would be somewhat similar, and one might even think about consolidating. So it really isn't adding a new contention in my mind to this case, a new issue.

MR. HOEFLING: Given that sequence of events, I think that is correct.

DR. LUEBKE: Unless CESG is much interested in

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presenting its own direct case --

MR. BLUM: We are interested in presenting evidence on that point. We have done a substantial amount of discovery of both Staff and Applicant on this issue. And I am surprised that anybody is surprised.

DR. LUEBKE: So you do have a wish for your own contention in this matter?

MR. BLUM: Yes.

MR. MC GARRY: Speaking for the Applicant, we were surprised.

CHAIRMAN MILLER: You were what?

MR. MC GARRY: Speaking for the Applicant, we were surprised. We had no idea CESG was coming up with the sabotage contention.

I can state for the record in my discussions with respect to the settlement discussions that gave rise to the stipulation we helped frame that contention, there was no mention of sabotage. We were talking about transportation and the routine effects of transportation, any accidents, and the delay situation. We never talked about sabotage.

MR. HOEFLING: Mr. Chairman, I would also like to raise now a prejudice, prejudice to the Staff and possibly to the Applicant. Being unaware, quite unaware that sabotage was going to be pressed by CESG in this hearing, the Staff has effectively been denied its discovery

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rights on this subject.

We filed extensive discovery directed at CESG and I think we tried to be comprehensive in what we did file. But we certainly didn't anticipate discovery on sabotage.

CHAIRMAN MILLER: I don't understand you. Didn't NRDC on Contention 6 raise a question of sabotage in the course of shipments?

Wasn't that in NRDC Contention 6?

MR. HOEFLING: Yes, Mr. Chairman.

But the point is, we haven't been able to practice discovery against CESG and whatever case or basis for --

CHAIRMAN MILLER: Is the Staff is going to rise or fall on what they learn from CESG on an issue that it has been contained in NRDC's contention?

Are you serious about taking that position?

I don't think you really mean that. The Staff isn't surprised. You have a right to raise your questions on your issues, but not on the basis of surprise.

And the Sandia study that you refer to, I think, is that which is footnoted on page 19 of the Comptroller General's Study which is the SAN 77-1927, May 1978 Transport of Radionuclides in Urban Environments, Working Draft Assessment.

I think that is a matter that you have mentioned, and I think Mr. McGarry has alluded to also, the Sandia

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study. Is that correct? The one of May 1978, SAM 77-1927?

MR. MC GARRY: I believe that is the document Mr. Hoefling referred to.

CHAIRMAN MILLER: All right, I think that the --

MR. ROISMAN: Mr. Chairman, I just want to say one other thing on the sabotage thing.

I want to be clear what it is that we would expect. We would expect the Applicant to provide the precise method by which it intends to comply with the regulations, a blanket statement that they will be in compliance would not be satisfactory. We are concerned that the area through which this transshipment is proposed to go does include what we think is a high density area, one in which the Applicant would either have to avoid it -- and we are talking about Charlotte -- either would have to go around Charlotte, or if it went through it, it would have to demonstrate that it was going to have the kind of police escort that could effectively prevent the kind of sabotage that we are concerned with here -- whether it is the high explosive one that Dr. Luebke talked about, whether it is the type that Mr. Riley has analyzed which involves an unexplosive way of getting the cask opened -- so that we would have some confidence that the protective measures that are going to be taken will be adequate.

So the Staff producing their document, NUREG

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whatever, that describes what their guidelines are going to be, and the Applicant saying that they are going to be in compliance, would not be enough.

Now we are going to try to work that out and get that information.

CHAIRMAN MILLER: I assume the Staff is going to produce reasonable evidence for the record covering that subject. Are you not?

MR. HOEFLING: If we are going forward with this contention, then that is our intention, yes, sir.

CHAIRMAN MILLER: Okay.

That should cover the record. And it is under NRDC's Contention 6 at the moment.

Now if CESG wants to get leave -- that this has been raised initially for the first time, a subject where it really surprised the counsel, why it might be one thing. But the Board believes that you are all familiar with it, that the Staff will produce the evidence that will update the record, whatever that may be and sufficiently cover the matter for the Board to make whatever decisions are required of it.

If CESG wishes to associate themselves in some way by expanding within reasonable limits, Contention 2, which certianly doesn't clearly set forth among its hazards due to transit, the hazard of urban transportation inviting

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possible sabotage by explosives, I think the Board would be inclined to grant it leave to do so on the theory it is not really expanding the issues and it is not surprising anyone significantly.

MR. BLUM: I would like to point out in answer to Staff Interrogatory we did answer that we were concerned with, and "removal of the cask lid and exposure of the assembly by unauthorized parties during a forced delay."

CHAIRMAN MILLER: Yes, I think that was commented on by some counsel, I seem to recall the matter.

All right, I think that is enough, unless someone wishes to be heard.

Contention 6 remains. And the motion, if there be a motion for summary disposition -- I'm not sure at the moment -- Mr. McGarry says there still is -- if it is, it is overruled. We will expect to have the facts produced by appropriate means.

MR. ROISMAN: Mr. Chairman, just two matters, if I can take one second to go back to.

Dr. Luebke, you expressed some interest in the independent spent fuel storage facility.

DR. LUEBKE: At the site?

MR. ROISMAN: Yes, at the site.

I would like to draw your attention to our response to the Staff motions for summary disposition dated

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Attached to it is Exhibit B.

CHAIRMAN MILLER: Is that your enclosures, your drawings, your blueprints?

MR. ROISMAN: Yes.

We have Stone & Webster proposal to the Applicant for building an independent spent fuel storage facility.

CHAIRMAN MILLER: We have studied that.

MR. LUEBKE: I guess my point was to get some of this into the testimony.

MR. ROISMAN: Good.

That is one of the things that we would be doing.

Secondly, I made reference earlier today to Duke's plans, and I didn't have the newspaper. I think this newspaper is probably still on the stand. It is this morning's Charlotte Observer. It says "Duke broadens energy search, delays 2-N. . ." -- which I think means nuclear plants.

I just wanted to reference it.

CHAIRMAN MILLER: Thank you for bringing it to our attention. I think you know from our previous dealings that we don't like to get our information from the press.

MR. ROISMAN: I had made reference to it. I just wanted to tell you where it was. I wouldn't consider it evidence.

CHAIRMAN MILLER: We do consider it insofar as the

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facts are concerned. Some of them appear to have materiality concerning the plans of Duke Power company.

We expect Mr. McGarry will present it in some kind of admissible, non-newspaper form.

VEry well.

Now, CESG has three contentions of which we have already discussed Contention No. 2.

Contention No. 1 is the -- well, it is the consideration of alternatives which has substantial overlap, at any rate, with those that have been held admissible on the part of NRDC.

I guess there are some motions. Did the Staff make some motions regarding CESG's contentions? I'm sure they did.

MR. KETCHEN: Oh, yes we did on May 11th.

CHAIRMAN MILLER: I guess you had better go forward.

Is there someone here from PIRG, P-I-R-G, the Davidson Chapter, PIRG?

Anyone here?

(No response)

Well, there is one contention that has been advanced hitherto and admitted, I believe.

All right, Mr. Ketchen?

MR. KETCHEN: Essentially, Mr Chairman, our case is as we laid it out in our May 11, 1979 motion, and

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is our position in this case.

We might point out again events have caught up with us and Contention 1C would seem to be somewhat academic -- I'm sorry, Contention 1A, to the extent that this morning it was announced that Duke Power Company had received an amendment to their license to rerack. It would seem insofar as that there is probably a stipulation in being, that as far as that is proposed as an alternative by CESG that seems to me is obvious that that has been considered as an alternative.

But the rest of our case there is what we say it is.

My response to one other item to indicate that Intervenor CESG's response to NRC Staff's motion for summary disposition, the form of testimony of Jesse L. Riley, there were two documents, one filed on June 7th and one filed on June 11th is the response to our motion, in case you are looking for it.

MR. MC GARRY: Mr. Chairman, I might note that the Applicant also has a motion for summary disposition with respect to CESG.

I have examined that document. We have nothing further to add.

CHAIRMAN MILLER: CESG? They are talking about you.

MR. BLUM: Yes, sir.

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CHAIRMAN MILLER: Do you want to respond?

MR. BLUM: Mr. Riley has filed two substantial documents discussing his proposed testimony, and the fact that he doesn't feel that the things that Applicant and Staff feels are agreed upon, are in fact agreed upon.

And to that extent we feel that our contentions are substantial and that evidence should be taken on both of them.

CHAIRMAN MILLER: Anyone else?

(No response)

The Board wishes to hear the testimony, so we will overrule the motion.

I believe there are some other motions pending, aren't there?

MR. MC GARRY: Mr. Chairman, we do have a motion -- we, the Applicant have a motion for summary disposition with respect to Davidson PIRG.

CHAIRMAN MILLER: Yes, that's true.

MR. MC GARRY: I might add some things for the record, Mr. Chairman.

CHAIRMAN MILLER: Pardon me?

MR. MC GARRY: If I might add some things for the record.

CHAIRMAN MILLER: This is now with reference to PIRG?

MR. MC GARRY: That's correct.

CHAIRMAN MILLER: Let us rule, then.

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The motions of Applicant and Staff for summary disposition of CESG contentions 1, 2 and 3 are denied.

Okay. Now you wish to go into the PIRG situation. You may proceed.

MR. MC GARRY: Yes, Mr. Chairman.

Again our document speaks for itself. What is significant here is like Safe Energy Alliance, PIRG just has not participated in this case. They have not filed any response to the summary disposition.

On numerous occasions we have prepared a motion to dismiss and haven't filed it in the hopes that we could get some rapport with Davidson PIRG, and better understand their case. As our documents indicate, we have never been able to understand their case. It is premised upon a survey that they have conducted.

We have asked for the survey. It has never been presented.

In addition, the February 27 order of this Board which permitted, pursuant to the Appeal Board's reversal, PIRG back in this case, it instructed PIRG to identify its representation or authority much the same -- or I will even say identical -- to Safe Energy Alliance.

Safe Energy Alliance never informed the Board as to their representation standing and they were dismissed as a party.

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We have waited until the end, we asked questions in discovery. PIRG, tothis day, has not complied with the Board's February 27, 1979 order.

So, for this additional reason we would submit that PIRG has just indicated that it has not participated, it does not wish to participate, and for the reasons, additional reasons set forth in our pleading and the reasons I mentioned today, we submit that they should be dismissed as a party.

(Board conferring.)

CHAIRMAN MILLER: Does the Staff have any additional response with regard to the PIRG participation?

MR. HOEFLING: Only one comment, Mr. Chairman.

I don't know if it is clear, but the Staff also has a motion before the Board on the PIRG contention, motion for summary disposition which was filed simultaneously with our other motions. And the basic posture of that motion is that it is unopposed and the Staff urges that the Board grant it.

CHAIRMAN MILLER: I see.

Does anyone else wish to be heard who is entitled to be heard on this issue?

(No response)

The Board will grant the motions of Staff and Applicant. PIRG has not complied with the directives or

mm2

orders of the Board, has not participated meaningfully, has not shown any disposition or ability to contribute to the development of a meaningful record. We therefore feel that they should be and they are dismissed as parties to intervene.

Now I think there is still a matter that Dr. Luebke has and there still may be one pending motion.

DR. LUEBKE: That having been done, as I recall the contention by PIRG, it related to the existence and planning of state and local bodies to arrive at the scene of an accident.

Nowhere in the many papers did I see much mention of the DOE emergency response teams, and I would like the parties to perhaps address the existence of these teams; where they are headquartered; if, as and when they might be called into action.

I would suspect it might be connected to the new regulation that is being issued, even. In other words, if you have a nasty situation, sooner or later somebody might want to call in the DOE emergency response teams.

I think it would offer some explanation to the public and even to myself as to how this DOE response team operates.

MR. MC GARRY: Mr. Chairman, I believe there are several other motions. I am going through my pleadings right

mm21 now to get a handle on them.

I believe NRDC had motions for summary disposition as to all of its contentions.

CHAIRMAN MILLER: Pardon me, I didn't follow you.

MR. MC GARRY: I believe NRDC had -- as I understand the record now, we have now gone through the Applicant's motion for summary disposition with respect to NRDC.

We have gone through Applicant's motion for summary disposition with respect to CESG.

We have gone through all those contentions.

And we have just taken care of PIRG.

We have also gone through the Staff's motions for summary disposition with respect to CESG and NRDC.

I believe the Board has made several rulings with respect to NRDC's motion for summary disposition. But I don't believe it has ruled on all of NRDC's motions for summary disposition.

CESG has a motion for summary disposition. I don't think we ruled on that yet.

And that might be it.

CHAIRMAN MILLER: What about NRDC's motion to compel Applicant to respond to admissions? Has history overtaken that one filed April 25, 1979?

MR. ROISMAN: We haven't gotten any more answers.

CHAIRMAN MILLER: Has it become moot inthe meantime?

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MR. ROISMAN: Not in our judgment, but we would not argue it any more.

CHAIRMAN MILLER: All right.

I think as far as CESG's motion for summary disposition, that will be denied.

I thought we had denied NRDC's motions for summary disposition of the matters in Contention 4.

And insofar as NRDC's motion to suspend proceedings and the like, insofar as that contains matters that were cognizable in the motion for summary disposition, I thought we had denied that one.

Am I correct?

MR. ROISMAN: I wasn't sure about that.

We do have a full-blown motion for summary disposition. It doesn't cover all the contentions. It was a motion -- really covered by the scope hearing tomorrow. It was a motion that said, if the scope is as broad as we say it is, then we don't have the analysis from the Staff that is required and it is part and parcel of the ALARA one which preceded it by a few weeks.

But essentially, it had the same thrust to it. So, if the Board would, I think it would be appropriate to wait until you have ruled on the scope, and then we will be glad to argue why we think those motions for summary disposition ought to be granted, why they present a clear legal question

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and maybe Mr. Ketchen has, in effect, conceded the underlying basis, if not the need for an environmental impact statement. At least the need for something more from the Staff if we are right, that the scope is as broad as we say it- is.

CHAIRMAN MILLER: I think we will take that up after we have our initial evidentiary hearing on the issues we have discussed and the Staff has filed the opposition to NRDC's motion for suspension of hearing schedule which they have set up under Douglas Point criteria, the frontal matters which can be gone into. Some, I do believe, impact on this question.

So we would, therefore, await hearing from NRDC, Applicant and the Staff when we have concluded that first phase of our evidentiary hearing tomorrow.

MR. ROISMAN: Mr. Chairman, I was a little unclear about what you were saying about the motion to suspend.

I had the feeling perhaps the Board has de facto ruled on the motion to suspend. Here we are, we are not suspended and we are going to have a hearing tomorrow morning that is evidentiary, and that sort of moots it.

But there is the underlying question that I had thought we were going to get to today. I don't know how you would characterize it. That is, what is the meaning of Minnesota versus NRC and then what is its implications for this case.

mm24

CHAIRMAN MILLER: Yes.

Well, I had mentioned this morning we expected to hear from counsel further with respect to the Minnesota case.

When do counsel wish to be heard on the relationship or whatever that case held to this evidentiary hearing?

MR. MC GARR: Applicant's pleasure would be to do it now so we can get right to the evidence tomorrow, Mr. Chairman.

MR. ROISMAN: We are similarly prepared.

CHAIRMAN MILLER: Staff?

MR. KETCHEN: We are ready.

CHAIRMAN MILLER: NRDC take ten. We are a little tired, but we will hear you.

Five, ten minutes. Short recess.

end T7

(Recess.)

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CHAIRMAN MILLER: We will move into the last issue we have to consider this afternoon. That is the meaning, effect, nature and impact of the decision by the United States Court of Appeals for the District of Columbia Circuit, Cause 78-1269 and 2032, involving the State of Minnesota by the Minnesota Pollution Control Agency v. United States Nuclear Regulatory Commission and the New England Coalition on Nuclear Pollution versus the same Commission, matter involving Vermont Yankee Nuclear Power Corporation, Intervenor.

Who wishes to lead off on the effect and impact upon this hearing, if any, of the recent decision.

MR. ROISMAN: Mr. Chairman, I would be glad to.

CHAIRMAN MILLER: Very well.

MR. ROISMAN: One preliminary matter. I have discussed with Mr. Hoefling during the break the question of the security. We are going to amend which we will do orally or in writing, our Contention No. 6, from its original framework, to a contention that is merely, "Applicant has failed to demonstrate that it is in compliance with applicable Commission regulations with regard to safeguarding spent fuel shipment".

What Mr. Hoefling has told me is the Staff is in the process of evaluating the Applicant's proposal, that they will either approve what the Applicant is proposing which is the

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route we are familiar with in this case, or propose an alternative route to the Applicant, that if they go with the route involved in this case, it will involve some kind of security force with armed guards while the shipment travels through the towns of Greensboro and Charlotte.

We need to see what the Applicant is proposing to evaluate whether in our judgment the force they are proposing to use will be sufficient to deter the size threat we believe is credible.

It is not inconceivable and when that process is completed there will be an issue to be joined, the issue being what is the nature of the threat tha the shipment might be exposed to and what is the nature of the protective measure needed to protect against a threat of that size.

It is premature for us to do that now. We are not pressing the Applicant at this moment to give us the answer. We understand the Staff has three weeks it needs to do the evaluation. If we do go to hearing there isn't any way it can be handled in this two weeks because we don't know what is being proposed.

I would rather since the reporter has taken down the contention as I stated it, for that to be the contention. If you want, I can handwrite it out but it will just be a handwritten thing. I don't have it in any formal document.

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CHAIRMAN MILLER: It will be sufficient to take kt from the transcript. We recorded your present description of it. Does the Staff wish to be heard on that?

MR. HOEFLING: Mr. Chairman, I would comment on the difficulty of treating that issue, if the Board considers that to be an appropriate issue, within the time that has been set aside for these present hearing. As I mentioned before the Staff has just completed and I believe issued either yesterday or today, its guidance document which sets down what it is that the Applicant must provide in this area.

And it just doesn't seem we will be able to reach that kind of issue in these two weeks if the Board deems that to be an appropriate issue.

CHAIRMAN MILLER: Does the Staff deem it to be an appropriate issue?

MR. HOEFLING: Well, I think that the question comes down to what record evidence the Board needs to make its finding of reasonable assurance and the situation that we have is that we have a Commission regulation; we have detailed Staff guidance to the Applicant as to what is required to meet that regulation and a Staff analysis of that response.

In many instances, that structure or that context is adequate for the Board to make a determination that there will indeed be reasonable assurance. The

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presence of the regulation, a defined Staff effort and there is a requirement for the Applicant to respond.

I must admit that Mr. Roisman's contention is vague. The answer to that is he hasn't seen what it is in detail that the Applicant proposes. It is an issue that has merits to both sides.

CHAIRMAN MILLER: That is certainly even handed justice. Would there be any possible issue here of residual impact even if the Applicant complies fully;but there are still some residual risks that should be weighed in any kind of balancing that the Board may be asked to perform. Is there a possibility of this in this type of case or not?

MR. ROISMAN: We would not be pressing the residual. At this point, we would be limiting the contention to evidence of compliance with the regulation. I think the key is there is sort of an -- we are basically in agreement with the principle that if you keep the spent fuel shipments out of the populus areas you substantially reduce the sabotage risk given the nature of spent fuel casks and the like

If the Applicant proposes or if the Staff requires them to propose to ship this away from what would generally be called populus areas, which means a different routing than they are now planning, that will dispose of the issue probably for our purposes. I say probably because Dr. Cochran would have to look at it.

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We have discussed it generally and depending on the precise route that would be a generally precise statement.

If we move it through the populus areas, we need them to take a corrective measure. That is where the dispute is. If they go through populus areas, we would hone our contention down precisely to what it is the Applicant is proposing.

They may propose such a force that we would not feel this sabotage risk would be a problem. We feel the force level they would propose, however, would be below the force required for the potential threat we are concerned about.

CHAIRMAN MILLER: You are speaking of urban areas?

MR. ROISMAN: Having the spent fuel go through an urban area makes the spent fuel an attractive target. It is not so much so in a non-urban area.

MR. MC GARRY: We are in somewhat of a dilemna. The regulation just came down, the guidance just came out. We, of course, will comply with that regulation. We will provide the necessary information to the Staff. But the question is one of timing. We are using our best efforts on many pursuits at Duke Power Company. We will use our best efforts here. But I envisage a circumstance that this matter may not be resolved for two or three or four months and indeed we would not want this license held up during the interim.

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I do hasten to add, of course, we will not be able to pursue this activity that we seek until we comply with those regulations. But once we comply with those regulations and the Staff will make that determination, then we should be able to conduct this activity if we get ourselves in a time bind.

That then leads us to Mr. Roisman's position. It seems to me if we do find ourselves three, four, five months down the pike and we do -- Mr. Roisman is unsatisfied or dissatisfied with the response made or Staff's review, it seems we will get ourselves a full-blown issue. We would maintain this license can be approved and we will just cross this bridge when we get to it. It is a tough one.

CHAIRMAN MILLER: It is. We will probably handle it by means of a license condition if we get to that point. We will think about it.

MR.ROISMAN: I want to be very clear on this. We are of the opinion we are entitled to a hearing on Applicant's compliance with applicable regulations to the extent we make a reasonable contention about whether they do comply. If Applicant has a timing problem, I must say quite frankly, that gives them every incentive to come to Dr. Cochran and get him to agree that what they are doing is a good idea. That gives them every incentive to stay out of urban areas with these shipments. We would not stand by nor do we think it is

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authorized for the Board to delegate its decisionmaking authority or our right to participate in that to an Applicant-Staff licensing condition that says when the Staff signs off on it. then the Applicant can go ahead.

That for us will not be satisfactory.

CHAIRMAN MILLER: That was not the kind of condition we were thinking of.

MR. ROISMAN: I have been in cases where the Board has deferred for after the hearing what we thought were important conditions for the hearing.

CHAIRMAN MILLER: We were not talking about that kind of condition. All right. What about our last point for today?

MR. ROISMAN: The reach of the Minnesota case starts with ALAB-455. ALAB-455 held that the question that the D. C. Circuit said had not yet been answered adequately by the Commission must be answered as a condition before you can approve a spent fuel storage expansion. They ruled in ruling out the Applicant and Staff arguments about Kleppe and I quote from page 48 of the opinion which is reported at 7 NRC 41 and then 48 for the quote, they say: "As such, that decision" -- referring to Kleppe -- "is of no assistance to the Applicant and Staff if there is a sufficient basis in fact for assuming that the assessment proposals in enlarging the capacity of fuel pools that are

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offsite spent fuel repositories" -- they meant permanent disposal there -- "would be unavailable at the end of the operating license term. It is to whether such basis exists that we now must turn."

That part of the decision is in complete agreement with the position taken by the parties in those two cases. It was affirmed by the U.S. Court of Appeals and I might add that the Intervenor, Vermont Yankee Nuclear Power Corporation, argued on appeal to the Court that that decision was wrong, that this question wasn't a relevant question to licensing.

So there is an explicit holding on that from the D. C. Circuit that the question is relevant. The next thing is the D. C. Circuit similarly said the Commission's decision in rejecting an NRDC petition dealing with the question of making a safety finding on the nuclear waste question didn't dispose of this question.

You can read the opinion several ways. One way is to read it that they essentially reversed the Second Circuit opinion nicely.

Another way to read it is they ignored the Second Circuit opinion nicely.

A third way to read it is they focused on the fact that new evidence that is available on the waste disposal question since the date when the Commission denied the NRDC

eak9 petition warrants the Commission relooking at the question.

I guess I favor the third because the D. C. Circuit doesn't do things nicely when they feel really upset and I suspec they didn't want to bother with the Second Circuit opinion.

They did say, Commission, you have not yet made a record sufficient to make a finding on the question of whether there is reasonable assurance that there will be a method to dispose of radioactive wastes safely and permanently offsite or conversely, that it will be safe to keep them permanently onsite.

That issue is now back in front of the Commission. Now, you can play with the language anyway you want. But the key here is that the decision of the D. C. Circuit is based not on the National Enviornmental Policy Act, but on the Atomic Energy Act, the reasonable assurance finding.

Ever since the day of the power reactor case and again repeated by the Appeal Board in ALAB-138, in the Vermont Yankee case, the Commission's rules and regulations and the statute when they relate to safety questions have no flexibility.

You must be in compliance with those regulations and statutes. What the D. C. Circuit has done in light of what the Appeal Board did in ALAB-455 is say there is a requirement before you can reach a conclusion on a spent fuel storage option which is that you make the finding

eakl) related to safety.

Now, the Commission hasn't made the finding yet. They have a lot of different ways and a lot of latitude in the ways they can make that finding. They are given all of the discretion they can possibly ask for. For this Board at this point, I don't think there is any option. You must wait for the Commission to make the required finding.

Now, the Applicant and Staff say we can make the finding in this individual proceeding. I won't quarrel with that in principle. Except that I read the Court's decision as accepting the argument of Mr. Eilford who argued the case -- by the way there is a transcript of that oral argument which the Board can look at -- it was recorded because Judge Tam was not there at the time of the argument -- Mr. Eilford made the jpoint that the Commission intended to deal with this question generically. That is why the court went out of the way to say dealing with it generically was appropriate.

We have a statement from the Commission through its General Counsel's office, the Solicitor, that it intends to deal with the question generically. The S3 Table.

I admit in theory the Board is authorized without the Commission speaking out to handle the question individually. Quite frankly, I wouldn't be at all objecting to it but I don't see that you have the legal authority to do it.

CHAIRMAN MILLER: What about the way the Commission

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handled the transportation of the fuel and the five factors, handled it generically but then left the tailoring after analysis to the individual Boards.

MR. ROISMAN: I think the Commission might do that. But all I am suggesting is that at this point, given Mr. Eilford's argument and the way they have handled the S3 case and the fact that they are trying to use as much of the S3 record as they can for the basis of making the ultimate finding here, is that now it looks like they are leaning toward doing it generically.

They might say they will do it generically as to the general question and leave to individual Boards the finding of the crucial date because that was very important in that case and is arguably very important here.

When do you have to have the spent fuel storage permanently -- the permanent repository available. In that case, it was 2007, 2009 --

CHAIRMAN MILLER: The life of the plant or else a finding that it could remain beyond the life of the plant with safety under the Atomic Energy Act. One of the two.

MR. ROISMAN: That is correct. I want to be clear about that. You could have a situation where the Commission might say we think the permanent waste repository, there is reasonable assurance that one will exist that will meet the standards and it looks like the year 2050 to us. Well, we will

eak12

look at spent fuel storage at the plant sites between now and 2050 and it is okay. That is plausible.

We don't know because no one has ever addressed the question that way. I just don't see -- I don't know.

Maybe I am blinded by it or too close to the case. I don't see any way around the Minnesota case. The Applicant and Staff -- one of them is what I think is a foolish argument with all due respect to them -- is the idea that this doesn't reach this case because this is transshipment and that is expansion of spent fuel pools.

The logic of the case was if you are authorizing further handling of the spent fuel beyond what you were essentially going to do at the reactor site without a new amendment, you have to look at this question.

And that is what we have here. The fact that McGuire is going to be the repository and later Catawba, et cetera, doesn't change the meaning of it.

The Court's language clearly relates to that. The second argument is well, why do you have to hold up licensing in light of this question. The Court did not direct that the Vermont Yankee and Prairie Island licenses be revoked. Two answers to that: one, at least in the Vermont Yankee case, we didn't ask that they revoke it. There was no request that it be revoked. More significantly,

eak13 that is exactly what happened after the first Vermont Yankee case, the so-called S3 Vermont Yankee case, when the Court did not order that Vermont Yankee operating license be revoked even though there had not been a finding with respect to the adequacy of an environmental impact of waste disposal with regard to the Vermont Yankee plant.

As soon as the case got back to the Commission, a Commission which I think we could take judicial notice of as being conservative on such questions, ordered no further operating licenses for nuclear plants or construction permits until they had replaced the then to be defective S3 rule with a new rule.

That came out in the form of the interim rule and the Commission lifted the ban. The Commission read themselves as being required to do that under the law. That was a NEPA finding not an Atomic Energy Act finding, where there is more reason in the Atomic Energy Act area not to go ahead.

What should the Board do? I think the Board should reconsider the denial of our motion for suspension. Alternatively, make a ruling that this hearing cannot be concluded until such time as the Commission has spoken to the question and that the Board will have to abide by that decision of the Commission.

If it says do the hearing yourselves, we will have the hearing.

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If it says wait until we finish the hearing, they will have to wait. If it says make the finding in the context of the new S[illegible] proceeding, you will then have a finding to apply to this c[illegible]se, if they give you the latitude to apply it on a case-by-case basis.

You have to wait, I think, at least for the conclusion of the hearing, if not for the commencement. That is it.

CHAIRMAN MILLER: You are suggesting that the Board shoudl take under advisement your motion?

MR. ROISMAN: You mean on suspension?

CHAIRMAN MILLER: Yes.

MR. ROISMAN: Well, if you wait more than ten days, then you will have ruled. I guess I wouldn't mind you rethinking it and reconsidering it tomorrow morning and I would say I think probably Mr. Ketchen made an effective argument this morning that resolving the scope question at this time would be useful but I would continue to press the argument that once you have rules on the scope, particularly if you rule our direction on the question of scope, that stopping the hearing right then and A, getting the parties to come back with testimony that addresses the scope question in its proper context and B, getting direction from the Commission on this Minnesota case would be the more prudent course of action, even though the witnesses are here.

DR. LUEBKE. On the other hand, we could go through with the hearing, the testimony, the Board could come to a

eak 16 decision, good or bad, reviewed by the Appeal Board, reviewed by the Commission and at that time, the Commission could step in and say, hey fellows, you went too fast, you didn't wait for us.

That is a possible scenario.

MR. ROISMAN: Yes. Also I think -- it is not as though the Minnesota case is irrelevant to the pursuit of the case. It doesn't touch every issue. I don't really see it touching the sabotage question. Where it does come in again, as we come back to the scope question and I am seeing this in the context of NRDC and its contention -- we are arguing about alternatives.

If the alternatives are the broader scope that we argued it should be, then the date on which permanent waste disposal is going to be available for Duke is going to make a difference in deciding what the alternatives are.

For instance, even assuming that the newspaper citation is wrong, and that Duke is going to go ahead and we will see Cherokee and Perkins in the scheule, sometime in 1995, Duke runs out of spent fuel storage under either cascade plan, it then has to do something.

It looks to us as though the only thing that will be available for Duke is to build an independent spent fuel storage facility. That would be true unless there is a permanent waste repository available as of 1995. If they are

eak17 ultimately going to have to build an independent spent fuel storage facility then whether they do build one now rather than go through the cascade plan and then build it, becomes a different question.

You will not know the answer to that question until you know whether in 1995 there will be permanent repository or not. You can't know that until we make a record on that. Our judgment is 1995 is out of the question. Duke cannot get there.

I assume there is a contrary view and that is one of the views that the Commission would consider when it addresses the Minnesota case.

If there were going to be something available in 1995 for permanent repository for the spent fuel, I think it will materially affect our case. So that question that the Minnesota case raises really can destroy the substance of a lot of testimony that you would hear as it relates to our particular issue.

DR. LUEBKE: Suppose it takes some time for the commission to do what the Judge said and it will and Duke has shipped say 57 fuel assemblies and aten the Commission makes a ruling that seriously affects the arrangement under which this is going on; the Commission could say don't ship No. 58.

MR. ROISMAN: They could but the teaching of what we

eak18 saw in the Minnesota case is and I have to confess to you, Doctor, as a lawyer talking to a scientist that I can't explain it to you -- I'm not sure I couldever explain it to you as a layman either -- but there is a difference where the situation has been approved and started to operate and a situatic where you catch it in advance.

That is why the Commission when it got back the S3 case after the first Vermont Yankee decision didn't immediately suspend the effectiveness of the Vermont Yankee operating license but did immediately stop issuing any new operating licenses.

To me, conceptually, those ought to be the same. If the new plant isn't qualified to get the license, then the old one must not have a valid one. But when we got to the old one, we started balancing. We started considering on the one hand, what it would cost to take the plant off line, the replacement power. For the plant that didn't have a license it didn't allow anybody to balance that even though for some of those plants, I assume a persuasive argument could have been made that it was expensive to wait a month or two months or three months before giving the operating license.

To allow this procedure to go forward and give approval for the transshipment is in our judgment to make it a markedly more difficult case to stop the

transshipment subsequently. You have the problem in deciding to go ahead and approve the transshipment of how will you answer the question what is the date on which Duke can ship to a permanent repository when you start weighing the alternatives to the transshipment if you agree on the scope.

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Now I can see if you go with the scope argument the way the Staff and the Applicant want you to and say the only question is shipping 300 and direct alternatives to shipping 300, we don't really have a factual case to give you. We would essentially leave our affidavits in as a proffer of proof, to see that they are essentially not relevant to the scope of the hearing as you have confined it and wait for our appellate rights to try to vindicate our position.

But if you go with us on the question of scope, you're going to have to answer the question that the Minnesota case says the Commission has not yet answered. You're going to have to set the date on which a permanent repository is going to be available to evaluate the time frame in which alternatives have to be considered.

Was that not clear?

DR. LEUBKE: I guess I'm just thinking in my mind that whether you ship or not, so long as you run these electric power plant you're going to make spent fuel assemblies. And whether the Commission acts or not, we are just going to keep on accumulating. And I somehow feel somebody is going to contend with it.

MR. ROISMAN: Well, I think that's a fair conclusion.

DR. LEUBKE: As someone mentioned, Mr. McGarry, it becomes a business decision.

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CHAIRMAN MILLER: All right.

Mr. McGarry, do you wish to....

MR. MC GARRY: Yes, Mr. Chairman.

First an observation:

During the course of NRDC's presentation, a curious statement was made, and that was that one of the parties, either Applicant or Staff, had raised an argument that there was a distinction in the Minnesota case because Minnesota dealt with the spent fuel pool modification. And in this case it deals with transportation.

I don't believe we raised that argument. However NRDC's response to that was somewhat curious. NRDC said in essence both of the modes, that is modification, transportation, are dealing with the same thing, really, the handling of the spent fuel storage problem, and attempted to answer that question in that regard.

The curious point is, all day today we've been hearing from NRDC that this case, this transportation case is different from other types of spent fuel storage modes. We've maintained all along it is not, it is simply one of the solutions. And curiously enough, NRDC seemed to me taking that position late in the day.

Be that as it may, we maintain that a reasonable assurance finding was made by the Commission in 1977 with regard to a petition by NRDC. The -- As NRDC has pointed out,

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that reasonable assurance finding was the subject of the Prairie Island appeal board's consideration, and they relied upon that.

We maintain that the court in Minnesota did not disturb that finding. We rely upon the language on page 15, where the court simply inquired -- quote -- "into the basis of those assurances of confidence."

That's the bottom of page 15 of the opinion, about six or seven lines above "Conclusion".

My point is very simple:

The court did not disturb that decision. It is simply inquiring as to the basis of those assurances. Accordingly, if we are correct in our argument, there was no basis then for the court to reverse the Commission and accordingly it was consistent for the board neither to stay or vacate.

So under our logic, then there is no basis to suspend this hearing.

I would raise one interesting point, and that is with respect to the 9:30 announcement of the reracking. The Commission, Mr. Denton, whoever it might have been, approved the reracking option which dealt with a spent fuel pool modification, and was well aware of the Minnesota case.

That concludes the Applicant's position. We maintain that the motion to suspend should be rejectsd.

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CHAIRMAN MILLER: Well, do you take the position, then, that Mr. Denton's approval of the rerecking application amounts to implicit determination that there is reasonable assurance of ultimate waste fuel management?

MR. MC GARRY: On first blush, that's our position. Of course, Mr. Chairman, we haven't had an opportunity, but that's what we would maintain. And, again, that position is clearly consistent with our view of this case, that the reasonable assurance finding has never been disturbed.

CHAIRMAN MILLER: Well, wait a minute.

The reasonable assurance finding, which reasonable assurance finding?

MR. MC GARRY: The reasonable assurance finding of the Commission that was relied upon by the appeal board in Prairie Island, which then became the subject of the Minnesota court's review.

That reasonable assurance finding was not disturbed, was not overruled by the court in Minnesota. The court in Minnesota simply said -- and I referred you to the language. They sent it back to the Commission to inquire as to the basis of the assurances of confidence. They wanted to have a proper --

CHAIRMAN MILLER: What page are you referring to?

MR. MC GARRY: Page 15.

As we read the case, the court was somewhat in a

mpb5

quandry. They wanted to have an adequate record with respect to the reasonable assurance finding. And that's why they sent it back to the Commission. 'Let's get an adequate record,' they're telling the Commission. But they didn't disturb that reasonable assurance finding. They just wanted a record developed on it.

I think we could all admit, Mr. Chairman, that this decision is a hydra in that there are many facets to it. And we would maintain that support for our position, as Mr. Roisman indicated that we would be arguing, that the court did not vacate and did not stay, but permitted the spent fuel pool modification.

So that leads us to our position.

(Pause.)

CHAIRMAN MILLER: Has the Staff been heard from?

MR. TOURTELLOTTE: Mr. Chairman, if it weren't for the fact that Mr. McGarry is sitting clear across the room, I would think he was reading my notes over my shoulder, because I made almost the same notes.

I noted with interest the statement about either the Applicant or the Staff made some representation in the answer to Mr. Roisman's motion that there was no distinction between the expansion -- or the distinction between the expansion of a fuel pool and transshipment somehow had a bearing on this case. And yet, if indeed that was what

mpb6

Mr. Roisman thought our answer was, he's wrong because the thrust of our answer insofar as the Minnesota case went was simply that the Minnesota case did not see fit to stay in the proceedings that they were reviewing. And therefore it seemed to us that it was not logical to require a stay in this proceeding.

Moreover the stay that is requested by Mr. Roisman is based upon conjecture and speculation and is not substantiated in any way. And he, after all, is the movant and therefore has the burden of coming forward and showing that his stay should be granted.

The argument on the fact that there is no distinction between expansion of the fuel pool and transshipment is also interesting to me because if you apply that as a basis for an argument, then footnote five on page 9 immediately wipes out Mr. Roisman's case because at least as I understand the board, the board seems to feel that there is some kind of a distinction there, and that the distinction makes footnote 5 not applicable to the arguments that Mr. Roisman is making.

But if you take Mr. Roisman's argument on this other issue and apply it around to footnote 5, then his case immediately is supposed to go away, and he's taking exception to the basis for the board's ruling in his own favor. It's very interesting.

mpb7

I also noted with interest the fact that Mr. Roisman said if you decide in his favor on reviewing the cascade plan that you ultimately are going to have to set a date on the permanent repository. And my view is that the Commission actions of the past do not indicate in any way that they expect a licensing board to undertake that kind of action.

I would agree with Mr. McGarry that the ruling that was made by the board previously, the policy that was established then was not overturned either by the appeal board nor by the courts, and that the only thing that the court is saying in Minnesota is that they want a basis for the administrative determination that the Commission made. And they were remanding it for that purpose.

I don't know exactly what the Commission intends to do. I do know that last week before this morning's action, last week they had a rather lengthy meeting on the Minnesota case, and its meaning, and what they might do in terms of future actions. Yet nevertheless, after having that meeting, this morning they took this action on reracking for Oconee.

Moreover they know that the Zion proceedings are going on. And it seems to me that if the Commission, having had its meeting on the Minnesota case and having been fully apprised and having the Oconee matter brought directly to their

mpb8

attention and knowing what's going on at Zion, if they had felt that a stay was required in these proceedings they would have been able to take that sort of action and they would have done so, if they felt compelled to do so.

I therefore feel that it would probably be improper for this Board to assume to do what the Commission has not seen fit to do, and for which in fact there is no basis for doing.

I do think that there is implicit in the rerack decision of the Commission a sense from the Commission that indeed business is to go on as usual.

I think that was four minutes and 50 seconds of the five minutes.

CHAIRMAN MILLER: Well, we'll give you more time if you wish.

(Laughter.)

MR. TOURTELLOTTE: Basically I don't know that it's necessary to go on. But the other part of our answer to Mr. Roisman was that we could go on with these proceedings.

I would point out for the Board's information that we made that entire argument on the basis of an assumption. It's arguendo that we were advancing these statements. We do believe that if you have to look at the long term -- and we don't believe for a moment that that is the proper approach here, we think it flies in the face of everything that's gone

mpb9

before in terms of the legal procedure. But if indeed that's what happens, we still will have to look at the single transshipment to decide whether this single transshipment can be moved safely. And we will still have to arrive at the decision that there are reasonable assurances that this shipment can be made safely and that it won't detrimentally affect the public health and safety, nor will it materially affect the quality of the human environment.

If the ultimate decision of the Board is that we will have to consider the whole cascade plan, and indeed the Board is going to assume the responsibility of coming up with a permanent repository, and resolving in this proceeding the ultimate waste question --

CHAIRMAN MILLER: Wait a minute.

What are you saying the Board is supposed to do?

MR. TOURTELLOTTE: Well, I'm just telling you what Mr. Roisman -- I'm basing my statements on what Mr. Roisman just told you, and he said that if you decide to go his way -- his precise words are 'you're going to have to set a date on the permanent repository'.

And in my view that is tantamount to coming up with the ultimate waste question, a resolution of the ultimate waste question.

I don't think that's what you're intending to do, but what I'm saying is if you go Mr. Roisman's way and if you

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take the entire cascade plan and you game it out environmentally and you make all your cost-benefit balances, then what that will have to be is that will have to be another end of this proceeding which, after we determine that there are reasonable assurances for the public health and safety and that the environment will not be significantly affected by the single transshipment, then we will have to see whether the cost-benefit balances are too great for the balance of the plan to make this single transshipment undesirable.

Or an alternative would be that perhaps this transshipment could go on, but it would have to cut off somewhere down in 1985 or after the third transshipment or after the fourth transshipment or something of that nature.

But that's the kind of decision that you're going to ultimately wind up having to make if indeed we go the full cascade plan approach as Mr. Roisman suggests.

CHAIRMAN MILLER: Mr. Roisman?

MR. ROISMAN: Mr. Chairman, let's take this question of this language on page 15 that Mr. McGarry cites as curious.

Mr. McGarry seems to make a lot more out of that language than the opinion would suggest is warranted. But let's take it at face value.

"This court does not exceed its judicial province by inquiring into the basis of those

mpbll

assurances of confidence."

Now Mr. McGarry would have us believe that that means that the present decision of the agency remains in place. But the absence of an articulated basis is merely a technicality.

I would point out to the Board that there is a whole line of cases beginning with Greater Boston TV Corporation versus SEC and 444 Fed 2d, most of them decided, by the way, by Judge Leventhal, who decided this case, holding that the absence of a reasoned basis for a decision by an agency destroys the validity of the rule which it purports to promulgate.

Mr. McGarry makes this sound like some technicality. If the Board will read Greater Boston and cases citing it subsequently, it will see that particularly of all the judges on that circuit, Judge Leventhal knows full well that when he says there is no basis given to sustain a rule, he means the rule no longer has validity. He's not sending it back to get a new piece of paper; he is saying the rule isn't valid.

Judge Tam, who often concurs with Judge Leventhal on that, certainly understood that very well. On the page 2 of his concurring opinion, the very last sentence:

"Our opinion merely remands this case to the Commission for such proceedings as it deems appropriate to determine whether there is

mpb12

reasonable assurance that an offsite storage solution will be available when needed."

Now he doesn't say 'to find a basis for their earlier finding', but whether there is reasonable assurance. In other words, he sees it as the reasonable assurance finding having not been made.

The court writing as the majority on page 14 defines the issue:

"In particular, the court contemplates consideration on remand of the specific problem isolated by petitioners, determining whether there is reasonable assurance that an offsite storage solution will be available by the years 2007 to 2009."

And cites in the footnotes there the fact that the hearings on S-3 or any other rulemaking hearings, have never addressed precisely the questions raised by the intervenors.

Mr. McGarry's reading of this little sentence over on page 15 makes it sound like the whole record is there and the Commission somehow inartfully forgot to mention what part of the record they were relying upon. The truth is that this opinion stands for the proposition that the records have never been made, and that because the record has never been made, there is no valid ruling on this question.

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Now I believe -- and I'm sorry I don't have it here with me, and I should have thought to bring it -- that to some extent this question is answered in the Vermont Yankee case in the supreme court. If I remember correctly -- and Mr. Blum has said that he will provide me with a copy of Vermont Yankee and I can give you the direct citation tomorrow -- but I think it's footnote 13 in the supreme court's decision in Vermont Yankee. They address the question of what are the implications of Judge Tam's concurrence which they essentially endorsed.

As you remember, they remanded the case back to the D.C. circuit to decide whether Judge Tam was right, namely to make the decision which the court here makes on this issue: Is there an adequate basis in the record to sustain the conclusion of the agency?

CHAIRMAN MILLER: Pardon me.

It's footnote 14, isn't it?

MR. ROISMAN: 14?

CHAIRMAN MILLER: Let me hand you a copy.

MR. ROISMAN: Oh, thank you.

(Handing document to counsel.)

#10 flws

MR. ROISMAN: May I have just one moment to let me find this?

CHAIRMAN MILLER: Yes.

(Pause.)

mpb14

MR. ROISMAN: Okay.

In footnote 14 -- and I will read it.

In the second full paragraph of the footnote it says:

"Upon remand the majority of the panel of the court of appeals is entirely free to agree or disagree with Judge Tam's conclusion that the rule pertaining to the back end of the fuel cycle under which petitioner Vermont Yankee's license was considered is arbitrary and capricious within the meaning of Section 706 of the Administrative Procedure Act, even though it may not hold as it did in its previous opinion that the rule is invalid because of the inadequacy of agency procedures."

It's important to note that they equate the kind of finding which the court in the Minnesota case is making absence of a reasonable basis as being the equivalent of an arbitrary and capricious rule, because if you go back and look at Judge Tam's concurrence in the original Vermont Yankee case, a peak of which is cited in footnote 6 of the Minnesota case, Judge Tam was talking about the absence of a basis in the record, and that is what Judge Leventhal always refers to when he talks about the absence of a rational basis.

The supreme court goes on, now, in the footnote:

mpb15

"Should it hold the rule invalid, it appears in all probability that the Commission will proceed to promulgate a rule resulting from rulemaking proceedings currently in progress. In all likelihood, the Commission would then be required under the compulsion of the court's order to examine Vermont Yankee's license under that new rule."

Now that's dealing with the pending case, exactly as this court deals with the Minnesota and Vermont Yankee case. That is, not taking the license away.

The point is they're talking about precisely the kind of question that I think is raised by the Applicant, even if we took these words as meaning nothing more than they're saying it means.

The remand to the agency does not leave the rule in place. The court would hardly be able to say that when it says to the agency in the same proceeding 'You never asked the right questions in your other proceeding and you haven't yet developed the record that you need to make that finding.'

CHAIRMAN MILLER: Your position, then, is that the remand does not leave the rule in place.

MR. ROISMAN: No.

CHAIRMAN MILLER: But at least inferentially it holds it will be invalid because of lacking a sufficient

mpb16

basis, but that the license proceedings or the licensed proceedings may continue; they are not suspended in any way.

MR. ROISMAN: Well, the licenses that have already been issued are not suspended.

DR. LEUBKE: How about the one at 9:30 this morning?

MR. ROISMAN: Well, I too have not seen it, and I don't know who ruled on it. But I must say that I find it a fairly weak reed to draw conclusions for an uncontested decision of an agency which, with all due respect, I think we can take some official notice of, has a tendency to duck tough issues, not facing up to it in the context of an uncontested reracking case for Oconee when it knows damn well it will have to face up to it in a contested case in Zion and a contested case here and a contested case in the Commonwealth case and the like.

If it was done by Mr. Denton and not by the Commissioners themselves, of course its validity from this point is totally irrelevant. Mr. Denton is not the equivalent of the Commissioners despite the tendency of some people, after Three Mile Island, to perhaps wish that he were.

On this question, his fallibility is as much as if it had been Mr. Tourtellotte who had decided.

I'm not disturbed by the action at 9:30 this morning any more than I am by any case in which the question is not directly presented by an adversary party. I am perhaps,

mpb17

being a lawyer, a little bit more enamored of the adversarial process than most. But I think it is a good way of presenting the issue.

Third and last, this question about the difference between spent fuel and reracking and transshipment, I guess the word "different" meant more things to me in the context in which it was spoken at different times than it did to the Applicant and the Staff. It's one thing to say that the spent fuel rerack on the one hand and the transshipment on the other are not any different for purposes of applying the decision in the Minnesota case, and it's another thing to say whether theyeare any different for purposes of deciding whether one ought to be approved and the other ought not to be approved.

In one we're going to the substance of the environmental impacts of it, the other we're trying to find out the reach of a court decision that didn't even have transshipment in front of it.

I don't think the fact that at one point today I told you that transshipping and reracking are different for one reason means that I can't tell you they're similar for a different reason. I think that just requires a bit more analysis than the Applicant and the Staff were willing to give it.

I admit to occasional lapses of inconsistency.

mpb18

but I don't think this has been one of them.

I guess the last thing Mr. Tourtellotte ended with, about you having to decide this question of the date, what I'm trying to say is not that you are going to usurp the Commission, but that you cannot avoid asking and answering the question if you're going to look at alternatives that they will be affected by the date. You may have to do it on the basis of an assumption rather than a finding. You might even try to get the parties to stipulate, like the parties in the Vermont Yankee case did. We'll stipulate that permanent waste repository won't be available at least before the plant's operating license is expired, and then you won't have to address the question.

But you have to have something to evaluate the alternatives against. If permanent waste repositories were going to be available in May of 1982, the viability of transshipment as an option would be markedly different than if it's not going to be avialable until the year 2010.

And that's why we think that you are going to be addressing that date.

I guess that's all I have on that, and thank you, Mr. Chairman, for the Vermont Yankee opinion.

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CHAIRMAN MILLER: Anything further?

MR. TOURTELLOTTE: Mr. Chairman?

CHAIRMAN MILLER: Mr. Tourtellotte?

MR. TOURTELLOTTE: I would have to take exception to Mr. Roisman's comment about what he characterizes as, "we all know that the Commission ducks important issues."

I'm not sure that I know that, and I'm not sure what issues Mr. Roisman is talking about, and I don't really want to give them the dignity of asking that they be stricken.

But, as long as we are talking about avoiding important issues, it occurred to me while Mr. Roisman was speaking all of this time and having very erudite descriptions of what the case law was and what the cases meant, that he, nevertheless, failed to ever straightforwardly address the question of why it is necessary to stay the hand of the Board in this proceeding, when the case that he is citing, the court there did not see fit to stay their own hand in those proceedings themselves.

And I think it would be very interesting to know what Mr. Roisman really has to think about, or why it is that there is something about this proceeding that is so different from the Minnesota proceeding, and why that difference entitles him to the benefits of the stay as mentioned by the Minnesota proceeding, but not the inconvenience of -- I'm sorry -- the benefits of using the Minnesota

mm2

decision for his stay, but not the disadvantage of not being able -- the disadvantage of not using this stay, if I make myself clear.

It seems to me we are arguing two different things. He is using as the basis for his argument for a stay, a case where the judges themselves say there is no reason for a stay because of this action that we are taking, and he has not addressed that at all.

CHAIRMAN MILLER: Anything further?

(No response)

We stand in recess until 8:00 o'clock in the morning --

MR. KETCHEN: Mr. Chairman, may I, before you go off the record, make one housekeeping notification.

On May 31 we were served with a discovery request which, under our calculations under the rules, would be due today.

It was made by NRDC.

I just wanted to indicate we won't be filing by mail, but we will be hand-serving today our response to that discovery request on all the parties and the Board.

MR. ROISMAN: Here?

MR. KETCHEN: Right now.

CHAIRMAN MILLER: Was that the request for admissions?

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MR. KLAUSNER: That was a request to identify the persons and documents that were the supporting basis for our testimony and affidavits which had been underlined by Mr. Reisman.

CHAIRMAN MILLER: I recall that. Very well. The record will show that you are filing that response which you say is due today?

MR. KETCHUM: Yes, sir.

(Counsel distributing document to Board and Parties.)

CHAIRMAN MILLER: I think this room is going to be used to night for a meeting of the Commissioners. You are requested, therefore, to remove your papers from the tables. You may store or stack them, if you wish, over in the corner, which is the left rear corner as I face the rear of the room, and they will be, I am sure, respected, although I don't suggest you leave anything of great privacy.

But nonetheless, you are welcome to do so.

Thank you. We will see you in the morning at 8:00 o'clock. At any rate, we will be here at 8:00 o'clock. We will start the evidentiary hearing at 9:00 a.m.

(Whereupon, at 5:25 p.m., the hearing in the above-entitled matter was adjourned, to resume at 8:00 a.m. on Wednesday, 20 June 1979.)