

NUCLEAR REGULATORY COMMISSION

ORIGINAL

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

UNITED STATES DEPARTMENT OF ENERGY
PROJECT MANAGEMENT CORPORATION
TENNESSEE VALLEY AUTHORITY

(CLINCH RIVER BREEDER REACTOR)



DATE: April 5, 1982

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

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4 In the Matter of: :
5 UNITED STATES DEPARTMENT OF ENERGY :
PROJECT MANAGEMENT CORPORATION :
6 TENNESSEE VALLEY AUTHORITY : Docket No.
: 50-537
7 (CLINCH RIVER BREEDER REACTOR) :
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9 4350 East West Highway
10 5th Floor
Bethesda, Maryland
11 Monday, April 5, 1982

12 The prehearing conference in the above-entitled
13 matter convened, pursuant to notice, at 9:00 a.m.

14 BEFORE:

15 MARSHALL E. MILLER, Chairman
GUSTVE A. LINENBERGER
16 Atomic Safety and Licensing Board

17 On behalf of Department of Energy:

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20 On behalf of Project Management Corporation:

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12 On behalf of the NRC staff:

13 DANIEL T. SWANSON, Esq.
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19 On behalf of Intervenors, NRDC and Sierra Club:

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1 matters which at least need to be discussed to see
2 whether or not there have been any significant or
3 pertinent changes of any kind, or to establish not only
4 the pleadings, the contentions, the new ones that have
5 been filed apparently by NRDC, by the intervenors NRDC
6 and the Sierra Club, but to rule upon all pending
7 motions some of which or all of which are related to
8 discovery, which may be interrelated with pleading
9 questions as well as the future progress of this
10 proceeding, which has already been commenced in that
11 sense and a schedule adopted.

12 Let me at this time now call upon the counsel
13 and parties to identify themselves and their associates
14 at counsel table, at any rate, for the record. I guess
15 we will start with the applicants.

16 MR. EDGAR: My name is George Edgar with the
17 Washington law firm of Morgan, Lewis & Bockius. I
18 represent --

19 JUDGE MILLER: A little louder.

20 MR. EDGAR: I represent Project Management
21 Corporation. Seated to my left are Messrs. Walt LaRoche
22 and Edward Vigluicci, representing the Tennessee Valley
23 Authority. And on my immediate right is Mr. Leon
24 Silverstrom, assistant general counsel of the Department
25 of Energy.

1 JUDGE MILLER: Do you anticipate anyone else
2 being with you today or tomorrow? That covers it?

3 MR. EDGAR: Yes.

4 JUDGE MILLER: Very well. Next, intervenors.
5 Who is next in order here? As I look upon your lovely
6 and handsome faces, it looks to me like the intervenors
7 are next, is that correct, in the order of your
8 seating? Whatever.

9 MS. WEISS: We are definitely the intervenors,
10 Mr. Chairman.

11 JUDGE MILLER: Very well, glad to have that
12 established. Now tell me who you are.

13 MS. WEISS: My name is Ellyn Weiss from the
14 firm of Harmon & Weiss, representing Natural Resources
15 Defense Council. I will be taking over much of the work
16 for NRDC. With me is Mr. Greenberg, whom you met
17 before, Elion Greenberg. On my right is Barbara
18 Finamore, staff counsel with NRDC, and on her right is
19 Tom Cochran, staff scientist, Dr. Cochran.

20 JUDGE MILLER: Staff?

21 MR. SWANSON: Thank you. My name is Daniel T.
22 Swanson, counsel for NRC staff. On my immediate left is
23 Mr. Stuart Treby, Assistant Chief Hearing Counsel for
24 the staff, and on his immediate left is Mr. Bradley
25 Jones, also co-counsel for the NRC staff.

1 JUDGE MILLER: Is there anyone else now who
2 should be identified for the record? That is to say,
3 anyone we are likely to hear from or concerning?

4 MS. BRECKENRIDGE: Mr. Chairman, I guess I
5 will move in here if I can find a chair.

6 JUDGE MILLER: Please do. We will see that
7 you get a chair. We are glad to see you.

8 MS. BRECKENRIDGE: For the record, my name is
9 Lee Breckenridge, representing the state of Tennessee.

10 JUDGE MILLER: Is there counsel here
11 representing Oak Ridge?

12 MS. BRECKENRIDGE: I have not seen him.

13 JUDGE MILLER: All right. Anyone else now?

14 (No response.)

15 There is one preliminary matter that we would
16 like to take up at the threshold -- a document dated
17 March 29, 1982, received by the Board at any rate on
18 April 1, 1982, filed by the intervenors and entitled
19 "Answers and Objections of Intervenors, Natural
20 Resources Defense Council, Inc, and the Sierra Club, to
21 NRC Staff's Fifth Set of Interrogatories to NRDC."

22 The Board has noted that at least several of
23 the documents which we have not examined other than
24 facially contain a stamp marked Secret in one or two
25 places on several of the documents. The matter has

1 therefore been brought to the attention of NRC security
2 people, and I think through them, inquiries have been
3 made probably to the Department of Defense.

4 I do not wish to do anything more at the
5 moment to publicize these documents, but we do want the
6 record to note the facts as we have observed them.
7 There may be a quick explanation, there may not be. In
8 the event that there is any question at all, we would
9 suspend any further proceeding in regard to that matter
10 and impound all such documents, and let security handle
11 the inquiry. If, on the other hand, there is an
12 explanation we will take it up now as a threshold matter.

13 MR. GREENBERG: I believe, Mr. Chairman, that
14 I can explain that, and Dr. Cochran can correct me if I
15 am wrong. My understanding is that these documents were
16 -- at least some parts of the documents if not all of
17 them were originally classified Secret. They were
18 subsequently released under the Freedom of Information
19 Act, and those details of the documents which were
20 sensitive or otherwise deserved to remain classified,
21 were deleted.

22 Dr. Cochran, is that correct? We are now
23 referring to --

24 JUDGE MILLER: I do not want to identify it in
25 the record any further until we establish the status of

1 these documents. Once we see that there is a Secret
2 stamp on them we stop right there until we find out the
3 status. We have not looked at them, we do not intend to
4 publicize them in any way, and we want to know right now
5 whether or not there is any remaining classification

6 Is the gentleman from NRC, Mr. Brady's office,
7 on security here? Could you enlighten us, sir?

8 MR. WHIPP: If they were declassified, they
9 are not properly marked so to indicate that. They
10 appear to come from the Department of Energy, the old
11 AEC. We will have to take those documents and have the
12 Department of Energy look at them to determine their
13 current status.

14 JUDGE MILLER: Mr. Reporter, did you get that
15 statement?

16 (Reporting nods in the affirmative.)

17 JUDGE MILLER: In light of the present
18 somewhat ambiguous nature of the status of these
19 documents, please, anyone who has them, immediately
20 remove them, consider them impounded at the moment until
21 we get further information showing they have been
22 properly declassified or whatever is necessary. We will
23 give you about 30 seconds to do that. Leave them with
24 the reporter until we get further information. We will
25 not further identify nor go into them or their contents

1 until their status is clarified.

2 Mr. Whipp, do I have your name correct, sir?

3 Would you give us your name for the record?

4 MR. WHIPP: It is Robert Whipp, W-h-i-p-p.

5 JUDGE MILLER: Would you follow through on
6 this and let us know whether and when, as soon as
7 possible, whether these documents may or may not be
8 properly considered?

9 MR. WHIPP: I certainly will.

10 JUDGE MILLER: They will be suspended then
11 until such time.

12 MR. WHIPP: Thank you.

13 JUDGE MILLER: Let me inquire now, are there
14 any other documents of a similar nature which we should
15 have clarified before having them spread upon the public
16 record? Does anyone know of any?

17 (No response.)

18 I guess there are not. All right. Since we
19 have a large number of documents which were requested by
20 the Board so that we would have this opportunity, in
21 accordance with the hearing schedule we have adopted and
22 the orders concerning discovery and the like, we would
23 like to identify for the record all of the pending
24 documents, filings, motions and the like, so that when
25 we look at the transcript in a few days to prepare an

1 appropriate order, we will not have overlooked
2 something, which well could happen.

3 Let me start out by reading the titles into
4 the record of certain documents which are clustered for
5 convenience, and then ask counsel to check their files
6 as we go along and either verify or call to our
7 attention additional documents in the particular areas
8 that we are describing. It may also be because our
9 first group relates to contentions, amendments and the
10 like as well as objects thereto, so it is entirely
11 possible that there are other filings that are so
12 closely interrelated they should be considered at the
13 same time.

14 We know that there are subsequent motions
15 addressed to particular interrogatories or discovery
16 matters and the like, so it is a matter simply of
17 practicality or convenience.

18 We want to wind up having everything noted for
19 the record, and we would like to cluster them for our
20 consideration in approximately the order that we are
21 going to start describing them, so we will solicit your
22 cooperation to help us achieve that.

23 Let me note first of all, that a revised
24 Statement of Contentions and Bases of Intervenor,
25 Natural Resources Defense Council, Inc. and the Sierra

1 Club, was filed at the request of the Board on March 5,
2 1982. NRDC did file a copy of that which appeared to be
3 as of March 31, 1982. Am I correct that the copy which
4 was, I think, in connection with the responses of NRDC,
5 are simply copies and do not vary in any way?

6 MS. WEISS: Yes, Mr. Chairman.

7 JUDGE MILLER: Now, I have also, as of that
8 same date, March 31, NRDC and Sierra Club Restated
9 Appendix B Contentions. Now, what are those? They were
10 in the same group of documents. Do you have the
11 pleading to which I am referring? What are the Restated
12 Appendix B Contentions which were filed by the
13 intervenors with the Board on March 31? Are they
14 related to some precedent document? Are they copies of
15 your original Revised Statement of Contentions? Are
16 they in addition thereto, or what?

17 MS. WEISS: Those are just a statement of the
18 contentions as they stood as of that period of time.

19 JUDGE MILLER: Well, what was that period of
20 time?

21 MS. WEISS: That is as of April 25, 1977.

22 JUDGE MILLER: Was this document filed at that
23 time?

24 MS. WEISS: Yes. No. It is an effort so that
25 when you read through these documents you have all the

1 contentions, both the ones that are presently being
2 objected to and the contentions as originally stated.
3 So that was just -- we pulled together the existing
4 contentions as of the time of the termination of the
5 proceeding.

6 JUDGE MILLER: I thought you had done that in
7 the Revised Statement of Contentions and Bases which
8 starts off 1, 2, A, B, C, and so forth. Am I incorrect
9 in that? I thought that was your revised contentions
10 which picked up both the original admitted contentions,
11 those original contentions that had some revisions
12 whether they were, as you say, editorial or mechanical
13 corrections or not, and so forth. Now I am completely
14 puzzled what these two documents are. Do you have them
15 both before you, counsel?

16 MS. WEISS: I am trying to find them, Mr.
17 Chairman.

18 JUDGE MILLER: Okay, take your time, take your
19 time.

20 MS. WEISS: The Revised Statement of
21 Contentions states the contentions as we would like to
22 have them -- as we would like to proceed with them.
23 Those are the revisions, the modifications --

24 JUDGE MILLER: Wait a minute, don't confuse me
25 further. First of all, what I want to know is what are

1 these two documents? We will just start from there and
2 then we will work out their history, derivation, and
3 future application if any.

4 MS. WEISS: The Revised Statement of
5 Contentions and Bases of Intervenors NRDC and Sierra
6 Club --

7 JUDGE MILLER: How many pages, 38?

8 MS. WEISS: Yes.

9 JUDGE MILLER: Dated March 5, 1982.

10 MS. WEISS: Yes.

11 JUDGE MILLER: Now tell me what that is.

12 MS. WEISS: That is a statement of all the
13 contentions in the form in which we would like to
14 proceed with them as of now. It includes the old
15 contentions, the old contentions as revised, and the new
16 contentions as proposed.

17 JUDGE MILLER: Do you indicate which is which
18 among those at least three categories, or are they just
19 flung at us?

20 MS. WEISS: The statement of bases --

21 JUDGE MILLER: Yes? Now you are now going to
22 another document? Restated Appendix B Contentions now?
23 Is that what you are now looking at?

24 MS. WEISS: No, Mr. Chairman.

25 JUDGE MILLER: Do you know what that is? That

1 seems to be about 14 pages, and my notes indicate it was
2 received by the Board on March 31, 1982. I would like
3 to know next just what that document is.

4 MS. WEISS: Since I did not put that together,
5 Mr. Chairman, I will let Ms. Finamore speak to that.

6 JUDGE MILLER: Very well.

7 MS. FINAMORE: My understanding of that
8 document, Mr. Chairman, is it is an effort to put
9 together all of the contentions that were admitted by
10 the Board as of April 25, 1977.

11 JUDGE MILLER: That is the -- let me get it
12 for the record. Now, that is the document that was
13 filed on March 31 and consists of 14 pages. Check it
14 out because we want to be careful.

15 MS. FINAMORE: It is our understanding that we
16 attached that document to our filing on March 5, to aid
17 the Board in comparing the documents -- the contentions
18 as they were previously admitted and the contentions as
19 we wish to proceed with them now. They were not in one
20 particular document before this time.

21 JUDGE MILLER: Are you telling me now that the
22 Appendix B contentions -- are you telling me that that
23 contains, in the original verbatim form, the
24 contentions which had previously been admitted by the
25 Board as of 1977?

1 MS. FINAMORE: That is correct.

2 JUDGE MILLER: Without any change on
3 mechanical application and the like?

4 MS. FINAMORE: That is correct.

5 JUDGE MILLER: Then the next or the other one
6 that you submitted, then, the Revised Statement of
7 Contentions is everything?

8 MS. FINAMORE: That is correct.

9 JUDGE MILLER: Because it would contain the
10 original, not mechanically revised, it would contain the
11 originally not changed, it would contain the restated
12 contentions, it would contain new contentions and
13 anything else.

14 MS. FINAMORE: That is correct.

15 JUDGE MILLER: But undifferentiated.

16 MS. FINAMORE: We attempt to explain --

17 JUDGE MILLER: Is that correct? They are not
18 differentiated?

19 MS. FINAMORE: Yes, that is correct.

20 JUDGE MILLER: Now one more question. At the
21 request of the Board, we asked counsel I think for NRDC,
22 which was good enough to furnish with the admitted
23 contentions of the intervenors as of April 25, 1977, and
24 such a document was filed. That is a 10-page document.
25 Now, do you have that? We received that one, by the

1 way, on February 17 at 9:32 a.m.

2 So that now is a third document which is
3 headed or entitled, "Admitted Contentions of
4 Intervenors, Natural Resources Defense Council, Inc. and
5 Sierra Club, as of April 25, 1977," and purports to set
6 forth contentions. Now, I do not know how that matches
7 up with the other two documents that you just described.

8 MS. FINAMORE: That document is the same as
9 the Restated Appendix B Contentions.

10 JUDGE MILLER: As the Restated Appendix B
11 Contentions?

12 MS. FINAMORE: Yes.

13 JUDGE MILLER: It does not look the same on
14 the first page, but maybe it is. Well, I am not going
15 to take the time, but apparently, it seems to be
16 facially -- and I will assume that it is then, -- an
17 identical copy of the same document, unless you advise
18 us of any difference.

19 So, we now have two documents setting forth
20 your contentions and you have described them, is that
21 correct?

22 MS. FINAMORE: That is correct.

23 JUDGE MILLER: Thank you. Now, from those two
24 documents, the next ones we have in this group is one
25 dated March 19, 1982, entitled "NRC Staff Response to

1 Intervenor's Revised Statement of Contentions and
2 Proposed Areas of Discovery." Is that correct so far,
3 staff?

4 MR. SWANSON: That is correct, that would be
5 the only document before the Board dealing with
6 contentions by the staff.

7 JUDGE MILLER: Now we have bearing the same
8 date, March 19, 1982, a document entitled "Applicants'
9 Response to NRDC's Revised Statement of Contentions and
10 Bases," which has attached to it some apparently lengthy
11 appendices. I see Appendix B seems to be the
12 preliminary SAR Chapter 15. Is that the extent so far
13 of the applicants' filings on the contentions?

14 MR. EDGAR: That is correct.

15 JUDGE MILLER: Now we have further NRDC's
16 Response to Objections to Contentions, which I have
17 marked March 31, 1982, and it bears the same date on the
18 certificate of service. Now, is that another NRDC
19 filing?

20 MS. WEISS: Yes, Mr. Chairman.

21 JUDGE MILLER: Well, that consists of how
22 many, 40-some pages, plus appendices?

23 MS. WEISS: It begins with an introduction
24 which is numbered in Roman numerals through page viii;
25 then a text in Arabic.

1 JUDGE MILLER: One through -- ?

2 MS. WEISS: Through 43, together with eight
3 attachments.

4 JUDGE MILLER: Okay. Now I think perhaps in
5 the same group I have a document dated -- well,
6 apparently filed March 19, 1982. Yes, which is the
7 intervenors' by name Statement of Position Regarding
8 Discovery Matters.

9 Now, am I correct that that document has some
10 bearing at least upon our examination initially of the
11 contentions which have been filed? I ask that because I
12 noticed -- I think it was the staff and perhaps both
13 staff and applicants which included in their answers to
14 responses some discussion of the statement of position
15 on discovery matters, which I believe was in response to
16 the request of the Board at the prehearing conference
17 that we held down in Oak Ridge.

18 MS. WEISS: I do not think that -- well, that
19 document is certainly before us if we discuss discovery
20 matters at some point, but I do not think that it bears
21 on the question of the objections to the contentions or
22 responses thereto.

23 JUDGE MILLER: It would bear upon the
24 statements of positions that are contained in those
25 responses by -- I remember the staff. Did the

1 applicants also cover that in their response?

2 MR. EDGAR: Yes.

3 JUDGE MILLER: Actually, see, those matters
4 were covered in both of those papers. Now, did you,
5 NRDC or intervenors cover it elsewhere, or is this the
6 place that you covered it?

7 MS. WEISS: That is the place that we covered
8 it.

9 JUDGE MILLER: We will include it in the group
10 because it has some relationship.

11 Now, I see also that there is a letter dated
12 March 12, 1982. It was directed by NRDC to various
13 counsel and a copy to the Board, which recited the
14 Board's order of February 11, 1982 concerning the
15 filings or pleadings addressing areas of discovery upon
16 which no agreement could be reached, reciting a meeting
17 and then containing a draft dated March 1, 1982 of
18 proposed areas of discovery for new contentions, which
19 goes into, in some detail, those matters.

20 I take it now this is another NRDC filing
21 relating to contentions.

22 MS. WEISS: The purpose of that letter, Mr.
23 Chairman, was simply to remind the applicants that we
24 were awaiting a statement from them, a general statement
25 on discovery and how they interpreted the Board's order,

1 so that we could prepare a response by March 19, as the
2 Board has requested.

3 JUDGE MILLER: Did you get that information?

4 MS. WEISS: Yes, we did.

5 JUDGE MILLER: And the statement of position
6 filed by NRDC on the date of March 19, then, was the
7 result of this analysis?

8 MS. WEISS: Yes, Mr. Chairman.

9 JUDGE MILLER: Well, we will give it a happy
10 position then. Now, let us see. We have also a letter
11 from the staff to counsel and copies to the Board. That
12 is the Dear Eldon and Barbara letter in which the staff
13 points out that the staff has classified prior discovery
14 into three categories, and the reasons of the update and
15 so forth. I take it that also is a later analysis by
16 the staff on the status at least of various contentions,
17 going back at least to the first answers to
18 interrogatories & responses to admissions, some of
19 which are still applicable, some of which need updating,
20 some of which do not. Is that correct?

21 MR. SWANSON: You described the letter
22 accurately, although it would relate solely to discovery
23 and update of previously-filed discovery. By
24 previously-filed I mean discovery filed prior April 25,
25 1977.

1 JUDGE MILLER: Isn't that discussed by the
2 staff in its response, though? Didn't you go into those
3 matters that are covered, and hence, nothing further?
4 You and applicants both.

5 MR. SWANSON: We did, that is correct.

6 JUDGE MILLER: Well then, there is some
7 relationship, I suppose.

8 MR. SWANSON: Yes. All that letter does,
9 though, is indicate the status and some indication of
10 the staff's position on its update of the old discovery,
11 without getting into any matters of objections or
12 contentions.

13 JUDGE MILLER: Except insofar as either staff
14 or applicants have contended that the matters that were
15 admitted before were thoroughly and completely covered
16 before and there is no need to burden the record
17 further. And I remember there was that argument that
18 runs from time to time like a thread. And therefore,
19 you would want to know the status of the original
20 contention of whatever discovery there was, whether or
21 not it is sufficiently complete to sustain whatever
22 argument is being made in that regard or not.

23 MR. SWANSON: That is correct.

24 JUDGE MILLER: Now, would there be some other
25 place where it would be more relevant -- I guess is

1 really what I am trying to find out -- or would it be
2 here where we are going to consider all contentions,
3 past, present and future?

4 MR. SWANSON: It would probably be -- to the
5 extent it has any relevance to this prehearing
6 conference, it would be in the present group.

7 JUDGE MILLER: All right, we will keep it in
8 that category.

9 Now, are there any documents that should be
10 considered in this grouping which I have just described
11 for you? I am now going to go into various motions for
12 protective orders and the like, which undoubtedly will
13 pick up certain contentions. But are there any other
14 documents which should be reviewed by the Board as
15 listens to the arguments of counsel regarding the
16 admissibility of this whole spectrum of contentions?

17 MR. EDGAR: No.

18 MS. WEISS: No, Mr. Chairman.

19 MR. SWANSON: No.

20 JUDGE MILLER: I regard that as our first
21 order of business.

22 Next, I do not know in quite what order I have
23 various motions. Perhaps the best thing to do in that
24 regard would simply be to go through and list what I
25 have and let counsel verify or update or whatever. And

1 these are not necessarily in chronological order.

2 I see the first one is dated April 2, 1982.

3 The title is The Applicants' Motion for a Protective
4 Order, and it appears to relate to Intervenors' 17th Set
5 of Interrogatories and Requests to Produce, accompanied
6 by a statement of points and authorities. I think that
7 just came in very recently.

8 MR. EDGAR: That is correct.

9 JUDGE MILLER: I take it there is nothing,
10 then, either in response thereto or which bears upon it
11 from either intervenors or staff.

12 MS. WEISS: Mr. Chairman, our response time
13 has not yet passed on either of those motions. We
14 received one Monday or Tuesday of last week and one on
15 Friday of last week, so our position would be you that
16 none of those motions are ripe for argument before the
17 Board at this time.

18 JUDGE MILLER: I think maybe you do not -- you
19 were not there at Clinch River. I think we indicated we
20 are going to go on a reasonably expedited track on this
21 and we said do not stand on ceremony and dates because
22 we will exercise our power to shorten dates where it is
23 reasonable.

24 Now, we would not want to put you to any
25 disadvantage, but if you had knowledge of this last

1 week, you ought to be prepared to argue today or
2 tomorrow.

3 MS. WEISS: We have been assuming that the
4 Comanche Peak deadlines were those that were in effect,
5 which would give us ten days. But it is not a matter of
6 sitting and back and waiting for that time to expire.
7 We had a big pleading that this responds to the
8 applicants and the staff's objections to our new and
9 revised contentions which was due at this Board on
10 Wednesday and delivered on Wednesday, and we really have
11 not had time to turn our attention to them in other than
12 a very cursory way.

13 JUDGE MILLER: It may well be that cursory
14 inspection is all that is necessary, one way or
15 another. We are not going to make a big production of
16 it everytime somebody files a motion. We told you this
17 before. You were not present, but we intend to have
18 answers filed as promptly as possible. And in the
19 notice of this hearing we said we would hear all pending
20 motions. We did not say all pending motions minus six
21 or eight or whatever, so give it some thought. You will
22 have a chance to look at it overnight. We will not
23 throw it at you today, but we will tomorrow.

24 MS. WEISS: Mr. Chairman, we do not feel that
25 that is -- we do not feel that that is really fair. We

1 have had essentially no time to look at the staff's
2 paper. We have had no time to look at the licensee's
3 paper that came in on Friday, and we thought that the
4 Comanche Peak deadlines were the definition of
5 expedition.

6 JUDGE MILLER: Comanche Peak was another case
7 where we incorporated by reference in order to show you
8 some examples, in a sense, of the expedition required.
9 But in this case we told you expressly and we told you in
10 our notice we were going to take up today and hear from
11 counsel on all pending motions, period.

12 MS. WEISS: Well, we did not interpret a
13 motion --

14 JUDGE MILLER: You interpreted wrongly. Back
15 off. You are not going to be put to much of a
16 disadvantage. It is a short motion. I do not think it
17 will take much cogitation one way or the other. But we
18 do not intend to get slowed down every time there is a
19 motion. I thought I made that clear to all counsel and
20 all parties. We want prompt responses. We do not want
21 you standing off and waiting your ten days and then,
22 whether you get one more day or five more days from
23 then, we do not want that. We want to have prompt
24 responses and we think it is possible.

25 If it appears to be unfair we will hear you on

1 the merits, but since you have not never read it you are
2 not in much of a position to tell me, on the merits,
3 where it hurts. So take the opportunity today and
4 tonight. We will hear from you tomorrow.

5 All right. The next motion that I have -- the
6 same goes for the staff on this, by the way. We are
7 going to expect to hear the staff's position on that.

8 The next one that I have is dated April 2,
9 1982, which appears to be Objections to NRDC's 22nd Set
10 of Interrogatories to the Staff and Motion for
11 Protective Order, and NRDC -- I use NRDC collectively,
12 generically. I mean intervenors, the two that we have
13 been identifying. I take it NRDC is now filing separate
14 documents from the Sierra Club, are they?

15 MS. WEISS: No, Mr. Chairman.

16 JUDGE MILLER: When we say intervenors or NRDC
17 we mean the same combination. NRDC filed the 22nd Set
18 of Interrogatories to the Staff on the date of March 18,
19 1982, and that is the document to which these objections
20 were filed by staff, I assume. Yes. So we will be
21 hearing from you respectively on those.

22 Are there any others? Did the applicants file
23 anything?

24 MR. EDGAR: Yes.

25 JUDGE MILLER: We overlooked some?

1 MR. EDGAR: Let me go back and make sure the
2 inventory is correct. You mentioned first a motion for
3 protective order, and an accompanying memorandum on
4 points and authorities dated April 2, in relation to the
5 17th Set of Interrogatories. We have also filed a
6 motion for a protective order, and accompanying motion
7 or memorandum of points and authorities dated March 29,
8 1982.

9 JUDGE MILLER: Yes, I see that. I was going
10 to get to that group next. Does that apply to this
11 motion?

12 MR. EDGAR: No. That is an earlier motion.

13 JUDGE MILLER: The 16th Set of Interrogatories
14 -- we are just taking them as they come up according to
15 subject matter unless they overlap.

16 MR. EDGAR: I got confused.

17 JUDGE MILLER: Let me back up just a moment on
18 this motion or the Objections to the NRDC's
19 Interrogatories filed by the staff on the date of April
20 2, and then Response to the Interrogatories -- pardon
21 me, I am sorry -- and then Response to NRDC's Request
22 for Interrogatories. I mean, 22nd Set of
23 Interrogatories and Request, which was dated or filed on
24 March 18, 1982.

25 Now, has the applicant filed anything anywhere

1 that we should look at when we consider those
2 interrogatories and the staff's objections?

3 MR. EDGAR: Yes.

4 JUDGE MILLER: Okay, what is that?

5 MR. EDGAR: Well, I think our March 29 motion
6 is relevant. It deals with many of the same issues.

7 JUDGE MILLER: All right. We will note then
8 to take into consideration your March 29 filing, which
9 you identify next, when we hear from staff and
10 intervenors on that motion.

11 The next one we will take up then will be
12 Applicants' Motion for a Protective Order, dated March
13 29, 1982, which appears to be directed at least in part
14 to the Intervenor's 16th Set of Interrogatories and 9th
15 Request for Admissions and 5th Request for Production of
16 Documents, served on March 18, 1982, accompanied by
17 Memorandum of Points and Authorities in Support of
18 Applicants' Motion for a Protective Order, which we have
19 just been advised by counsel should be considered
20 together with the later motion which I described a few
21 moments ago.

22 Now, is there anything else that has been
23 filed to the Applicants' Motion for a Protective Order
24 with regard to those interrogatories?

25 MS. WEISS: No, Mr. Chairman.

1 JUDGE MILLER: Will you be prepared to argue?
2 Since you filed the interrogatories, presumably you can
3 sustain them. Do you have a problem in that regard?

4 MS. WEISS: No. I have the same problem that
5 I had, and I understood the Chairman to overrule.

6 JUDGE MILLER: I did the other. This is a
7 little bit different. These are objections, a motion
8 for a protective order to your own three sets of
9 interrogatories and request for admissions.

10 MS. WEISS: It is the same class. All of
11 these motions relate to NRDC discovery requests. All of
12 the motions.

13 JUDGE MILLER: Yes.

14 MS. WEISS: And we have not responded to them
15 yet and we do not believe we have had an opportunity, a
16 fair opportunity, to respond in writing to the Board.
17 But I understood the Board to have ordered me to be
18 prepared to argue those orally tomorrow.

19 JUDGE MILLER: Well the other one tomorrow,
20 yes, because you said you had looked at it cursorily.
21 But this one, you should have looked at your original
22 interrogatories more than cursorily, I would suppose.

23

24

25

1 Therefore, we are asking you to be prepared
2 now, I mean shortly, at least, to argue the basis upon
3 which you advanced them and say you were entitled to
4 them. These are not two things.

5 MS. WEISS: I understand the objections, the
6 motion for protective order as of March 29 to have
7 exactly the same status as the motions for protective
8 order as of April 2. They object to discovery. And
9 yes, we know our contentions, and yes, if the Board
10 directs us to go forward tomorrow, we can go forward
11 tomorrow. We have not had an opportunity to respond in
12 writing.

13 JUDGE MILLER: Well, so that we are not
14 confusing each other, the tomorrow referred to the one I
15 previously identified.

16 MS. WEISS: I guess I do not --

17 JUDGE MILLER: Today if we get through the
18 contentions, we want to get to this. We want you to
19 move along. We do not expect pro forma interrogatories
20 to be filed by anybody. This relates to all parties.
21 We expect you to be able to sustain the basis for them,
22 which you do preliminarily by conference, by the way,
23 since we asked you to use the Comanche Peak rules to
24 confer on these things.

25 MS. WEISS: Mr. Chairman, we will go forward,

1 obviously, at the Board's order, but I just want it on
2 the record that I do not believe there is any sense in
3 which NRDC can be accused of sitting back.

4 JUDGE MILLER: You have not been sitting back
5 so far, but you seem to have it in mind now. That is
6 where the problem is.

7 MS. WEISS: I am simply trying to protect my
8 client's right to respond in writing to rather lengthy
9 objections to our interrogatories. We have not had a
10 reasonable opportunity to do that. Now, I understand
11 the Board to have now ruled that we should be prepared
12 to argue them orally, and therefore we will be prepared
13 to argue them orally. But I can tell you that, you
14 know, that is going to take a few minutes, and our
15 understanding was that those were not on the table today.

16 I might add that we did not have any real
17 disagreement from the licensees about that. It was also
18 their feeling that those were not on the table today.
19 If the Board wishes to have them on, they will be.
20 Obviously I cannot resist that, but we have not had yet
21 an opportunity --

22 JUDGE MILLER: Ms. Weiss, you are going to
23 have a busy evening or maybe afternoon if we get to
24 them. When the Board enters an order, some of you come
25 from out of state, we expect to cover everything that is

1 then pending on the table. When you file something, it
2 is pending right then and there on the table.

3 Now, when we say in that notice that we are
4 going to take up all pending motions, that means all
5 pending motions, not those -- whatever your problems
6 that you have not had a chance to look at, because we
7 expect counsel to proceed with reasonable dispatch. We
8 tried to make that clear in our previous session, and we
9 are not changing it in any way.

10 And we do not expect to have motions or
11 objections filed by anybody purely for formal reasons;
12 we expect you to get right down to the merits of it. And
13 when you or any party gets these and you see that there
14 is a motion for protective order, we suggested before,
15 ad nauseum, maybe, pick up telephone, find out what the
16 problem is, resolve it so the Board does not have to
17 have all these big, thick documents that are starting to
18 bulk up here like they did in Comanche Peak.

19 Now, that was foreshortened by the fact that
20 our order said expressly we are going to take up all
21 pending motions. We did not mean for you to sit back
22 and count the calendar days or how many pounds of paper
23 you had filed or were filed against you; we meant for
24 you to come in here and talk.

25 You probably are not going to be as

1 hard-pressed as you think because I believe in going
2 through the contentions it is going to take some time.
3 You are going to have an opportunity, I think, in the
4 course of these two days to acquaint yourselves with why
5 you filed or why you object to whatever they filed, but
6 we are going to go forward, yes.

7 Is there any question? We make this rule
8 applicable to all parties now, Staff and Applicants as
9 well, the State of Tennessee. All right.

10 Now we have a document which I previously
11 identified, filed March 29, 1982, so dated, and received
12 by the Board April 1, 1982, from NRDC, which is the
13 answers and objections to Intervenors, to NRC Staff's
14 fifth set of interroga+ ries to NRDC. That contains the
15 attachments that we asked you to delete.

16 Now, I do not know whether those attachments
17 have a bearing upon the merits or not. We will not put
18 you at any disadvantage in that regard because the Board
19 has raised the question, but in any event, those are
20 answers and objections of the Intervenors, and there we
21 would regard that as a pending motion and expect
22 Applicants and Staff to be prepared to go forward in
23 argument today.

24 MR. GREENBERG: Mr. Chairman, on that point,
25 there was only one outstanding objection made by NRDC

1 and the Sierra Club to those interrogatories, and I
2 believe that objection has been resolved in discussions
3 between Mr. Jones and myself, so that at this point
4 there is nothing on the table with regard to the fifth
5 set.

6 MR. JONES: That is correct.

7 JUDGE MILLER: That is correct. Then I take
8 it that the document which I just described consists
9 solely of answers by the Intervenors to the Staff's
10 fifth set of interrogatories and that there is nothing
11 pending in that regard. Is that correct?

12 MR. GREENBERG: Correct.

13 JUDGE MILLER: I understand further that a
14 document which is stapled to this document, entitled
15 "Objection to Interrogatory 3(a)" by you, Mr. Greenberg,
16 has been resolved to your satisfaction and need not be
17 ruled upon by the Board.

18 MR. GREENBERG: Yes, it has.

19 JUDGE MILLER: Do you want to state for the
20 record your resolution or are you content to rest upon
21 the informal arrangement.

22 MR. GREENBERG: I will rest upon the informal
23 arrangement.

24 JUDGE MILLER: I will show that this has been
25 withdrawn.

1 MR. GREENBERG: Correct. Well, Mr. Chairman,
2 when you say withdrawn, the staff has withdrawn the
3 request that we answer the objectionable interrogatory.

4 JUDGE MILLER: All right. Is that correct?

5 MR. JONES: That is correct.

6 JUDGE MILLER: All right. The Staff, then,
7 has withdrawn Interrogatory 3(a), and accordingly, the
8 objection thereto is withdrawn.

9 MR. GREENBERG: Correct.

10 JUDGE MILLER: Okay. Let me, Mr. Greenberg,
11 point out to you and your co-counsel, by the way, the
12 Board did and does ask that when there are objections to
13 interrogatories, that you not just rest by the statement
14 of an objection but rather that they be the subject of a
15 motion for a protective order, that being the procedure
16 whereby it is brought to the Board's attention.

17 MR. GREENBERG: We recognize that, Mr.
18 Chairman, and we will follow that procedure.

19 JUDGE MILLER: Okay. You almost did, and we
20 would regard it, except by attaching it to a big thing,
21 you do not now when we plow through to get to that. If
22 you would, I would be just as happy.

23 Now, we have a group of documents which are
24 apparently are either requests for discovery or maybe
25 responses to it. Let me just run through these and make

1 sure that there are no pending objections or matters
2 which could be the subject of either hearing from
3 counsel or the Board ruling on them at this time. Not
4 in any particular order.

5 The first one is NRDC's fifth request to
6 Applicants for production of documents received by the
7 Board on March 18. Stop me if there is any question
8 about these. Otherwise, I will assume that they were
9 simply filed with the Board but that there are no
10 questions which require argument to or rulings by the
11 Board.

12 MR. EDGAR: On that one, Mr. Chairman, that
13 document is one of three documents which, or portions of
14 it are the subject of our April 29 motion -- I am sorry,
15 March 29 motion for a protective order.

16 JUDGE MILLER: Yes. Applicant's motion for a
17 protective order, accompanied by points and authorities.

18 MR. EDGAR: Dated March 29. That is correct.
19 That relates to portions of the fifth set of document
20 requests.

21 JUDGE MILLER: All right. Now tell me, there
22 apparently will be some more that will be in the same
23 group. The next one I have is NRDC's first request to
24 Staff for production of documents received 3/18. Is
25 there any questions about that?

1 MR. JONES: No.

2 JUDGE MILLER: NRDC, you do put your dates at
3 the end, but would you put them on the face somewhere so
4 as we go through we are a little able to identify them?
5 That document, by the way, is dated 3/18, so it must
6 have been hand delivered because that is the date of our
7 receipt and your certificate.

8 Staff, I guess I was asking is there anything
9 in here now that is currently relevant?

10 MR. JONES: The Staff does have an objection
11 to a portion of that document request but we have not
12 yet had a chance to negotiate with NRDC on that
13 particular point, but we are prepared to discuss that.

14 JUDGE MILLER: All right. Let me suggest
15 first of all you try to negotiate, perhaps over the
16 lunch hour, something like that. If you are able to
17 resolve it between yourselves, fine, we encourage it.
18 If not, then tell them what your objection is going to
19 be and then let's put it on the agenda for tomorrow.
20 But advise the Board if we are going to have to hear
21 from anyone tomorrow on that. Okay?

22 MR. JONES: Okay.

23 JUDGE MILLER: The next one I have is NRDC's
24 ninth request to Staff for admissions. That, I think,
25 is also dated and filed March 18. Anything about this

1 document that you are going to want to talk about?

2 MR. JONES: Yes, Mr. Chairman. We have
3 reached an agreement with Intervenors that where an
4 identical set of admissions is filed on both the
5 Applicant and the NRC, that the NRC may respond by
6 looking at the Applicants' answers and indicating that
7 we agree with them rather than duplicating writing up
8 the answers.

9 JUDGE MILLER: Let me inquire whether NRDC has
10 made such an agreement. If so, state it with clarity
11 for the record. We will consider that governs unless
12 the parties agree to disagree, but if it is going to be
13 a procedure that you intend to follow where there are no
14 objections stated for the record, then we will take that
15 for your agreed procedure.

16 MS. WEISS: The agreement, Mr. Chairman, is
17 that the Staff will indicate in writing in the form of
18 an answer that it accepts verbatim the answer of the
19 licensee -- the Applicant, excuse me; and that is
20 acceptable to us.

21 JUDGE MILLER: Is that the Staff's
22 understanding?

23 MR. JONES: That is the Staff's understanding,
24 and if we disagree with any answers, we will, of course,
25 write up a different answer. We just received answers

1 to a large portion of those admissions filed by the
2 Applicant and they are presently being looked at by our
3 staff to determine if we agree with them.

4 JUDGE MILLER: All right. Then you will
5 follow that procedure. For that reason, then, the Board
6 need not consider the ninth request for admissions of
7 NRDC to the Staff.

8 MR. JONES: That is correct. I might note
9 that the Applicant has objected to some of those
10 admissions and we will determine if we agree with the
11 objection. If not, we will answer the question.

12 JUDGE MILLER: Let me inquire of the
13 Applicants: Where does that document come in your motion
14 for protective order, or does it?

15 MR. EDGAR: Our March 29, 1982 motion for
16 protective order relates to the NRDC's ninth set of
17 admissions to the Applicants.

18 JUDGE MILLER: Oh.

19 MR. EDGAR: And it happens that many of the
20 admissions as between the Staff and Applicants are the
21 same, so that our March 29, 1982 motion would be
22 relevant to consideration of any objections, as the
23 Staff had mentioned.

24 JUDGE MILLER: I see. I have neither
25 document, which is NRDC's ninth request to Applicants

1 for admissions, which you tell me are similar, at least,
2 and in many cases identical with the Intervenor's request
3 to Staff for admissions.

4 MR. EDGAR: That is correct.

5 JUDGE MILLER: Now the Staff tells us that
6 they have an arrangement whereby they are going to look
7 at your responses and then indicate in writing whether
8 they agree with your responses in toto, or if not, they
9 will proceed to set forth its own response.

10 MS. WEISS: May I add to that, Mr. Chairman?

11 JUDGE MILLER: Sure. I want you to think of
12 everything now so we get one almost stipulation.

13 MS. WEISS: Yes. It was not part of the
14 stipulation and it was expressly not part that the Staff
15 be given an extension of time if the Licensee objected.
16 In other words, we had not waived the appropriate times
17 for responses for the Staff. To the extent that they
18 can rely on Licensee responses if they are given within
19 the appropriate time frame, that is fine with us, and
20 that is the total scope of the agreement.

21 We do not mean that if the Licensee objects,
22 that that gives the Staff an extra period of time until
23 the objection is resolved, or if they are late filing,
24 that that gives the Staff an extension. I wanted to
25 make that clear because it sounds to me like --

1 JUDGE MILLER: I want you to make everything
2 clear that we can now so we can anticipate and avoid,
3 where possible, any misunderstandings, both by the Board
4 as well as the parties. Now, is that understood and
5 agreed to by the Staff, this last clarification?

6 MR. JONES: I think as the Board is aware, the
7 regulations do not provide any time limits that by their
8 terms apply to the Staff. In fact, there are separate
9 discovery provisions for the Staff. We do attempt to
10 voluntarily comply with --

11 JUDGE MILLER: Yes, that is true, but wait a
12 minute now, let's not talk about apples and oranges.
13 There is a procedure whereby the Board can make a
14 determination whether or not the factors set forth in
15 the regulations are applicable and, if so, would direct
16 the Staff to respond, and if not, would relieve the
17 Staff of the obligation, either way.

18 MR. JONES: That is correct.

19 JUDGE MILLER: That will set its own time
20 frame. That should not be mixed up with the stipulation.

21 MR. JONES: No, I think what we are pointing
22 out is that the stipulation, we did not intend it to
23 extend our time or shorten our time or in any way change
24 it. In fact, there is no definite time and we will
25 respond as soon as we can when we receive the

1 Applicant's answers. We will not be attempting to delay
2 --

3 JUDGE MILLER: There is a possible area where
4 you may not have had a meeting of minds. If for some
5 reason it is acceptable to the parties, the Board,
6 whatever, there could be the time extension granted to
7 the Applicants for causes which might be peculiar to
8 them. We do not know.

9 Now, we do not think we should leave
10 unresolved the question of when the Staff should respond
11 in some fashion to discovery directed to it. It is
12 true, of course, the Staff has the right to rely on the
13 procedures set forth, and the Board would make its own
14 rulings and that would establish its own time frame, but
15 that would be separate and apart, now, from the
16 Applicants. Is that understood?

17 MR. JONES: That is right, Mr. Chairman, and
18 our intention is, and maybe this will solve the problem,
19 our intention is to reply within two weeks of receiving
20 Applicant's answers, with an indication of whether we
21 agree; but in any case, we would respond before the
22 first April 30 date for update, so that there would
23 still be until June 18 for any additional questions that
24 those answers might raise.

25 JUDGE MILLER: I am not sure that totally

1 meets the point. You see, we do not want things to stack
2 up because there are a lot of questions in this
3 hearing. We are trying to resolve them as we go and
4 encourage informal resolution by the parties because we
5 do not want to stack up on NRDC or anyone else a whole
6 lot of things they have to follow through on if they see
7 the necessity for it and the push for time on it. So I
8 am not sure.

9 Let me hear from counsel on that.

10 MS. WEISS: We do not agree to that, Mr.
11 Chairman, and I am afraid that there is a fundamental
12 problem that we have with the Staff's position. They
13 seem to be taking the position that they have no
14 deadlines whatsoever to either respond or object to
15 discovery, and if that is the case, I think it needs to
16 resolved right away.

17 JUDGE MILLER: Let me interrupt you just a
18 moment, now, to get everything involved as part of your
19 analysis. You recognize the procedures that are
20 applicable to the Staff and to no other party in regard
21 to discovery, do you not?

22 MS. WEISS: I do understand that there is a
23 rule which if the Staff wishes to stand on it would
24 require the Board to make findings on every single
25 interrogatory or request for discovery.

1 JUDGE MILLER: Well, wait a minute. Let me
2 keep you on the point, that point, and then I will give
3 you all the time you want. Don't you recognize that
4 NRDC or any party seeking discovery from the Staff has a
5 preliminary duty to set forth the bases upon which it
6 seeks to compel the Staff to give the requested
7 discovery? Do you have the rule before you?

8 MS. WEISS: I am generally familiar with it.

9 JUDGE MILLER: I know you handle a lot of
10 these matters.

11 MS. WEISS: I am generally familiar with the
12 rule, Mr. Chairman, but it has certainly been applied
13 very differently from case to case depending on --

14 JUDGE MILLER: Let's just go by the rules and
15 our own modification of the rules as we have explained
16 them or entered them in orders here because once we get
17 onto what So-and-So did, then it is going to confuse
18 everything.

19 MS. WEISS: Well, let me apologize --

20 JUDGE MILLER: Do you want to state your
21 understanding in this case of discovery directed against
22 the Staff? And I think maybe you ought to look at the
23 rule and cite it for the record while you do, Ms. Weiss.

24 While Ms. Weiss is examining that, does Staff
25 disagree with the statement of the rules as the Board

1 understands them?

2 MR. JONES: No.

3 JUDGE MILLER: Anytime you want to agree with
4 Ms. Weiss, tell us, we will end the discussion real
5 quick.

6 MR. JONES: Mr. Chairman, I might point out
7 that the Staff is trying to avoid trying to have to
8 stand on the formality of the regulations for
9 discovery. In fact, we are responding to some discovery
10 requests this week and that sort of thing, and we are
11 trying to only resort to those when there is an
12 unresolvable problem. With the magnitude of the update
13 that is going on, the answers to interrogatories are
14 delayed or we are going to have to, you know, delay the
15 update. The same individual is doing both jobs. He
16 cannot do both at once.

17 JUDGE MILLER: We understand. We know that
18 the Staff has followed a practice, which is not binding
19 or mandatory upon it in this or any other case, but
20 nonetheless, of attempting to voluntarily provide as
21 much information as it can without resorting to the
22 procedures set up by the regulation. Where the Staff
23 does that and has its own arrangements with NRDC or
24 anybody else, fine; but we find now when we explore this
25 quasi-stipulation that there are areas which are

1 completely addressed or agree to. There we are trying
2 to find out what is to govern in the future so we do not
3 have six motions coming at us with the responses and
4 responses to responses and all that. We are trying to
5 get away from that, which was a function, as you
6 recognize, of the Comanche Peak type of procedure.

7 Now, here we see where there could be a clear
8 area of confusion where the Staff does not voluntarily
9 supply, and within the time constraints that NRDC feels
10 applicable, somewhere near the time, I suppose, of the
11 Applicant, where the Staff has not really made a
12 commitment.

13 Now, what I am trying to find out is, if you
14 are going to do something voluntarily, all right, set
15 forth the terms of your agreement, but in those areas
16 where the Staff for whatever reason says no, we want
17 them to follow the practice and we want the Board to
18 rule on it, then we want to know what the time and other
19 constraints are. That is all we are asking at the
20 moment.

21 Now, Ms. Weiss, have you had a chance to look
22 at the rule?

23 MS. WEISS: Yes. The rule is
24 2.720(h)(1)(2)(ii).

25 JUDGE MILLER: I know the one you mean.

1 [Laughter.]

2 MS. WEISS: Which states that a party may file
3 with the presenting officer written interrogatories to
4 be answered by NRC personnel, with knowledge of the
5 facts designated by the Executive Director for
6 Operations. Upon a finding by the presenting officer
7 that answers to the interrogatories are necessary to a
8 proper decision in the proceeding and that answers to
9 the interrogatories are not reasonably obtainable from
10 any other source, the presiding officer may require that
11 the Staff answer the interrogatories.

12 JUDGE MILLER: Yes.

13 MS. WEISS: And that, as I understand it, is
14 the applicable rule on that. We have filed with the
15 Board, along with the interrogatories that we sent to
16 the staff on March 18, 1982, a document, a two-page
17 document entitled "Request for Finding Pursuant to
18 10 CFR 2.720(h)(2)(ii)," asking the Board to make those
19 findings.

20 JUDGE MILLER: Yes, I know, I have seen that.

21 MS. WEISS: The thing that concerns us now is
22 that the Staff will have some period of time to look
23 over our interrogatories and our discovery requests and
24 decide whether they are going to answer them or whether
25 they are going to go to the Board and ask the Board to

1 resolve this question of necessity called for by the
2 rule, which then requires some more papers to be filed
3 before the Board and requires a ruling, and then we have
4 another open-ended period of time before those have to
5 be responded to. Conceivably that could be an awfully
6 long period of time from the time that we first send in
7 the interrogatories or the request for discovery and we
8 get an answer.

9 JUDGE MILLER: Well, we do not want it to be a
10 long period of time.

11 MS. WEISS: At the minimum we need to get
12 some, I think -- the Staff has to be under some
13 recognized obligation to at least tell us as of a
14 certain period of time whether it is going to answer or
15 whether it is going to invoke the rule, and then I think
16 we should agree on another period of time for answering,
17 assuming that they are ordered to answer. Otherwise, we
18 would ask the Board to make the finding at the outset so
19 as not to prejudice us, so that we will get our answers
20 within some reasonable period of time.

21 MR. JONES: Mr. Chairman, if I can make a
22 suggestion that perhaps can solve this, the Staff is
23 willing to respond, and with the ones where we have not
24 responded, we will do so next week. But we are willing
25 to respond to any discovery and let NRDC know of any

1 objections within ten days of receipt. It is the
2 responses --

3 JUDGE MILLER: Within ten days of receipt of
4 what?

5 MR. JONES: Of the discovery requests.

6 JUDGE MILLER: Interrogatories, document
7 requests. Within ten days of the date that the Staff
8 receives the discovery requests from NRDC, you will
9 advise the Intervenor whether or not you intend to --

10 MR. JONES: Intend to object to any questions.
11 And if that will solve --

12 JUDGE MILLER: Object. Do you mean object
13 because you say it is not required, irrelevant and the
14 like, or object because it is a matter where you can say
15 go get it elsewhere, don't bother us under the rules?
16 You see, there are two bases for objections. I do not
17 know whether you are covering both or not.

18 MR. JONES: That is correct. I think both
19 areas of objections, we would let them know within the
20 ten days, and that should give them ample time to come
21 to the Board on those. The ones we do not object to, we
22 will prepare answers as soon as we can.

23 JUDGE MILLER: All right. Is that
24 satisfactory?

25 MS. WEISS: No. If they do not object, then

1 we think there are -- there are two classes of
2 interrogatories, one class on which they are going to
3 stand on the rule and one in which they are not. As to
4 Category B, those in which you are not going to stand by
5 the rule, we think we want a deadline as to when those
6 answers are going to come in.

7 JUDGE MILLER: He said he would let you know.

8 MS. WEISS: No, he did not.

9 JUDGE MILLER: He said he would let you know
10 within ten days and then your stipulation sets in
11 whereby they have X time following the filing of answers
12 on the merits by the Applicants to let you know (a) they
13 agree in toto, or (b) they frame it differently.

14 MS. WEISS: No. Well, that -- first of all,
15 that would only go to requests for admissions and not
16 interrogatories, and secondly --

17 JUDGE MILLER: I did not so understand that.
18 Let's have the exceptions now to your rule upon a rule.

19 MS. WEISS: The stipulation, which we tried to
20 set out to the Board, and I think we succeeded in, if
21 not confusing, at least enlightening to such a degree
22 that we want to reconsider the stipulation.

23 JUDGE MILLER: It might be better if you jot
24 it down over the lunch hour and read it into the record,
25 whatever your stipulation is. We want to know with

1 clarify.

2 MS. WEISS: It was intended, Mr. Chairman,
3 only to apply to requests for admissions, not to cover
4 other discovery.

5 JUDGE MILLER: We did not understand that.

6 MS. WEISS: I am sorry.

7 JUDGE MILLER: We thought of it -- do you want
8 to drop it from discussion at this point, and the three
9 parties get together after, say, the noon recess or
10 whenever you can conveniently draft something, although
11 we will not require you to file it in writing, but we
12 are going to ask you to dictate it into the record and
13 the others indicate orally acquiescence or
14 non-acquiescence.

15 MS. WEISS: Yes.

16 JUDGE MILLER: Okay, fair enough.

17 All right, let's see now. We have another
18 group of documents -- let me see how that hits you --
19 dated 4/1/82. I have Applicant's Response to NRDC's
20 16th Set of Interrogatories to Applicants.

21 Is there anything that needst to be discussed
22 on that? Anybody? Anybody? Anybody?

23 [No response.]

24 Next I have under the date of 3/26/82
25 Intervenor's 23rd Set of Interrogatories and Requests to

1 Produce to the Staff. Now, is that going to follow your
2 ongoing semi-quasi-partial and to be further defined
3 stipulation, or are there other matters you want to
4 bring up. We will rule on them. It can go either way.

5 MS. WEISS: There is nothing we want to bring
6 up, Mr. Chairman.

7 JUDGE MILLER: All right. Let's see how Staff
8 feels, since they have the laboring aura on this one.

9 MR. JONES: We received those last week and
10 have looked through them preliminarily, and there are a
11 number of them to which we are clearly going to object.
12 We have not written up any formal document doing that.

13 JUDGE MILLER: Could you overnight, then --
14 March 26 is the date. Overnight, then, could the Staff
15 be prepared tomorrow to tell us what the objections are
16 and let the other parties respond and let us rule on
17 them?

18 MR. JONES: Sure.

19 JUDGE MILLER: Okay.

20 MR. JONES: Did you want that in writing?

21 JUDGE MILLER: No, we will take up all pending
22 motions. We are relieving you in the sense of the duty
23 of last-minute writing where you bring it to bear orally
24 because you are all experienced lawyers. We do not want
25 to prejudice anybody, Ms. Weiss or anybody else, you

1 know. If it really hurts, tell us, but so far what we
2 have been hearing are the standard objections that any
3 trial lawyer raises. I do not blame you for raising
4 them, but it just means we are going to move faster than
5 you anticipated, but you will have a chance to think
6 about it.

7 Now, be prepared, then, tomorrow to justify
8 these requests to produce, knowing that the Staff will
9 have some objections. We will ask the Staff even
10 informally to advise NRDC counsel as soon as you can of
11 the nature of your objections so they can think about
12 them before they have to address us.

13 MR. JONES: I will be happy to tell them the
14 general nature of the objections at lunch.

15 JUDGE MILLER: Okay, fine. Then we will
16 expect to hear from you on that one tomorrow.

17 Now, we have dated March 26, Intervenor's 17th
18 Set of Interrogatories and Requests to Produce to the
19 Applicants. Have I already covered this, Mr. Edgar? I
20 am getting a little confused about it all.

21 MR. EDGAR: Yes, sir, in part. Well, I would
22 say yes.

23 JUDGE MILLER: Yes what?

24 MR. EDGAR: Our April 2 motion for protective
25 order with accompanying memorandum of points and

1 authorities relates to certain of the interrogatories in
2 that 17th set.

3 JUDGE MILLER: That is your April 2, not March
4 29.

5 MR. EDGAR: That is correct. Let me just
6 recap. Just to recap the grouping, our April 2, 1982
7 motion relates to NRDC's 17th Set of Interrogatories and
8 Requests to Produce. Our March 29 motion for a
9 protective order relates to NRDC's 16th Set of
10 Interrogatories, Ninth Request for Admissions and Fifth
11 Request for Production of Documents.

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1 JUDGE MILLER: Your April 2 objection to the
2 22nd set of interrogatories from the Staff does contain
3 some material, then, that relates to the Intervenor's
4 17th set to Applicants.

5 MR. EDGAR: No. I think you have --

6 JUDGE MILLER: Let us just take where I was
7 first and then you can educate me. I was inquiring, you
8 see, about the Intervenor's 17th set, dated March 26 to
9 the Applicants.

10 MR. EDGAR: Yes. Our motion dated April 2,
11 1982, relates to that set.

12 JUDGE MILLER: Okay, fair enough.

13 I have also now, under the same date of
14 3/29/82, Applicant's response to the Intervenor's ninth
15 request for admissions. Now what is that in relation to?

16 MR. EDGAR: That is the response to those
17 admissions in the set number 9 of NRDC to which we did
18 not object. Those are our responses to the discovery
19 request.

20 JUDGE MILLER: Well, are there any
21 controverted matters contained in either of those?

22 MR. EDGAR: Not that we are aware of.

23 JUDGE MILLER: Have you responded to all the
24 requests that the Applicant put to you on the ninth set?

25 MR. EDGAR: No. There are certain other

1 requests in the ninth set for admissions to which we
2 have objected and that is the subject of our March 29,
3 1982, motion.

4 JUDGE MILLER: Okay. I think I have it now.
5 So the document that I have just read, then, your
6 responses to those interrogatories or requests, I guess,
7 are requests for admissions to which there is no
8 objection.

9 MR. EDGAR: That is correct.

10 JUDGE MILLER: You have answered, and unless
11 somewhere along the line they deem them insufficient, at
12 least we do not have to take it up now. Is that correct?

13 MR. EDGAR: That is correct.

14 JUDGE MILLER: Ms. Weiss?

15 MS. WEISS: I agree with what the Chairman
16 just said. We do not intend to waive our right to come
17 to this Board to claim that some of them are
18 insufficient.

19 JUDGE MILLER: We are not asking you to waive
20 any rights. We are just trying to get the substance of
21 the thing out to the Board as soon as possible. We do
22 not, however, want to prejudice you nor to ask you to
23 waive any of your rights. You will be entitled to
24 reserve your record or your right to argue to the Board.

25 Now I have something else here. I have

1 already asked of you to put dates on the face of these,
2 haven't I?

3 MR. EDGAR: Yes.

4 JUDGE MILLER: Because it causes us a lot of
5 trouble in shuffling through and keeping things
6 straight. I have a letter dated April 1, 1982, from Mr.
7 Jones. It states that he has discussed with Mr.
8 Greenberg and Ms. Finamore on the phone some
9 interrogatories served on NRDC by the Staff which may be
10 withdrawn. Are those the same ones you previously
11 identified?

12 Well, it states that the Staff withdraws from
13 a third set of interrogatories to NRDC dated November
14 12, 1976, interrogatories 1, 2, 5, 11 and 12 on
15 Contention 5. Now nobody objects to that being
16 withdrawn, I assume. Nobody objects, do they?

17 (No response.)

18 Now is there anything that the Board needs to
19 consider?

20 (No response.)

21 One ahead there. Now I think you have already
22 covered this -- NRDC's first request to the Staff for
23 production dated March 18, 1982. I believe that the
24 parties and counsel agreed that they would negotiate on
25 this, attempting to resolve whatever differences there

1 may be, and if not successful will advise the Board this
2 afternoon or tomorrow.

3 But at the present we can pass that one.

4 MR. JONES: That is correct.

5 JUDGE MILLER: I think we have covered this,
6 but refresh my memory at this point. The ninth request
7 for admissions filed by NRC against both the Staff and
8 the Applicant with the same number, what did we agree to
9 do with that? Was that to be governed by whatever
10 stipulation eventuates?

11 MS. WEISS: Yes.

12 JUDGE MILLER: Or what?

13 MR. EDGAR: It was my understanding that there
14 are two parts to it. The first part is that we have a
15 motion pending on the ninth set, dated March 29, 1982.
16 The second part of it is as to the Staff's responses in
17 terms of the time or manner of response. That would be
18 the subject of discussion amongst the parties.

19 JUDGE MILLER: Is that correct, Miss Weiss?

20 MS. WEISS: I think so, yes.

21 JUDGE MILLER: Or Staff. I am going to carry
22 this one also. We are passing at this time because you
23 are going to negotiate about it and you will advise us
24 one way or the other for the record, but certainly let
25 us know if it can be taken up in any form tomorrow.

1 Now let's see. What about -- what happened to
2 the NRDC's ninth request to Applicants for admissions
3 dated 3/18/82?

4 MR. EDGAR: We responded to certain of those
5 admissions on the 29th of March and as to the balance we
6 filed our motion for a protective order on the 29th of
7 March.

8 JUDGE MILLER: Okay. Miss Weiss or Staff, if
9 you do not agree with what we think -- not to resolve
10 but to schedule these matters, let us know as we go so
11 when we read this transcript at least we can find out
12 what we thought we were doing.

13 We agree that the statements of position would
14 be considered to the extent applicable as we go through
15 the restated contentions and the responses thereto. Is
16 that right?

17 There was a letter March 30 from the Staff
18 that we identified and the statement that was made on
19 March 19 by NRDC, a statement of position regarding
20 discovery matters as well as an earlier analysis where
21 you were attempting to focus attention. Is this all
22 correct and is this what we said we would consider so
23 far as applicable when we go to the Contentions?

24 (No response.)

25 I presume everybody agrees. What did we do

1 with the Intervenor's 23rd set of interrogatories and
2 request to produce to the Staff dated 3/25?

3 MR. JONES: We are going to inform the
4 Intervenor's of the general nature of our objections
5 today and then tomorrow we would be prepared to discuss
6 those.

7 JUDGE MILLER: But there will be some
8 objections which will be communicated to NRDC.

9 MR. JONES: Yes, there will be.

10 JUDGE MILLER: I think Judge Linenberger has
11 some more documents. We would like to find out what
12 they are and when we are going to discuss them -- just a
13 few.

14 JUDGE LINENBERGER: It was not clear to me
15 that in our reviewing filings of NRC under the date of
16 March 18, 1872, that two filings here had been discussed
17 this morning, the first one being NRDC's 16th set of
18 interrogatories to Applicants and the second one being
19 NRDC's 22nd set of interrogatories to Staff.

20 I was not aware that we had reviewed those in
21 our discussions so far. Let's take the first one first,
22 the 16th set of interrogatories to Applicants.

23 MR. EDGAR: Yes. The Applicants have filed,
24 first of all, a motion for a protective order with
25 accompanying memorandum of points and authorities on

1 March 29, 1982, in regard to certain of those
2 interrogatories.

3 As to the remaining interrogatories, the
4 Applicants have filed their responses to those
5 interrogatories last Thursday, which was April 1, 1982.

6 JUDGE LINENBERGER: Thank you, Mr. Edgar.

7 Now, the other one was the 22nd set of
8 interrogatories to the Staff. Mr. Jones, did we --

9 MR. JONES: We filed a document entitled
10 "Objections to NRDC's 22nd set of interrogatories to the
11 Staff" and the motion for the protective order. That
12 was hand-delivered to the Board on Friday. It was
13 mailed to the other parties and I brought some copies
14 which I have given to Intervenors. I have not got over
15 to that side of the room yet.

16 MS. WEISS: The first time we saw that
17 document was about an hour ago, Mr. Chairman.

18 JUDGE MILLER: About an hour ago?

19 MS. WEISS: Yes.

20 JUDGE MILLER: Which one is that now?

21 MS. WEISS: Staff's objections to the NRDC's
22 22nd set of interrogatories.

23 JUDGE MILLER: 22nd? When did the Staff file
24 that?

25 MR. JONES: This was sent out on Friday.

1 JUDGE MILLER: Last Friday?

2 MR. JONES: Yes, April 2.

3 JUDGE LINENBERGER: I do not believe the Board
4 has seen that either. At least this Member has not.

5 MR. JONES: I personally hand-delivered it to
6 your secretary.

7 JUDGE MILLER: What is the title of that?
8 What is the title of that?

9 MR. JONES: "Objections to NRDC's 22nd set of
10 interrogatories to the Staff.

11 JUDGE MILLER: We have it.

12 JUDGE LINENBERGER: All right. Thank you.

13 JUDGE MILLER: Now let me inquire. NRDC has
14 not had a chance to read it. About all we can do is ask
15 you to read it overnight and if it is something that
16 goes into matters that up anyhow, I would have to rely
17 on your judgment. If it is matters that we are ruling
18 one way or the other, whatever it is, whether you like
19 the rulings or not, if it is in that category that is
20 covered tomorrow.

21 If, on the other hand, it is matters that you
22 feel you really require additional time, well, we will
23 protect you. That will subject to your advising us
24 tomorrow on that.

25 JUDGE LINENBERGER: I have one more document

1 here that I do not think I have heard discussed and that
2 is the Staff's fifth set of interrogatories to NRDC
3 filed by the Staff under the date of March 9, 1982.

4 MR. JONES: We received responses to those and
5 everybody is happy.

6 JUDGE LINENBERGER: Fine.

7 JUDGE MILLER: Anybody else have miscellaneous
8 unidentified or objectional documents of any kind? I
9 ran out of miscellaneous.

10 MR. JONES: Mr. Chairman, I have a document
11 that I do not believe the Board got a copy of that might
12 be useful. It is -- there is a cover letter on it and
13 it is a one-line letter just saying: "Enclosed, as
14 promised, is a protocol for discovery dated March 4,
15 1982, reflecting the agreements we reached last week."
16 It is signed by Eldon Greenberg and it was sent to
17 George Edgar, and I can get a copy of that made -- a
18 couple of copies -- and give to the Board at the next
19 break.

20 JUDGE MILLER: Any objection, Mr. Greenberg?

21 MR. GREENBERG: No.

22 JUDGE MILLER: Okay, at your convenience have
23 it copied and supply copies to the Board and we will
24 note it for the record.

25 Anything further? All right, let us take

1 about a ten or fifteen minute recess, please.

2 MS. WEISS: Will we be beginning on the
3 arguments or the Contentions?

4 JUDGE MILLER: Numero uno.

5 (A brief recess was taken.)

6 JUDGE MILLER: All right. The hearing will
7 resume, please. I would like to identify for the record
8 a document, a letter dated March 8, 1982, from Mr.
9 Greenberg to Mr. Edgar and I am sure copies went to the
10 other counsel, which is entitled "A Protocol for
11 Discovery". Was that the document that has previously
12 been referred to of record?

13 MR. JONES: Yes, it is.

14 JUDGE MILLER: And what is the effect of it?
15 What is its effect? What does it do?

16 MR. GREENBERG: Mr. Chairman, the basic
17 purpose of this document was to try to lay down some
18 ground rules for the parties in responding to discovery
19 requests.

20 The basic purpose of it was to deal with what
21 we called the boilerplate in the outstanding
22 interrogatories and prior interrogatories from the 1975
23 to 1977 period. We had asked, in connection with each
24 interrogatory for the Applicants, the Staff would
25 provide six categories of information and we modified in

1 this Protocol what we were asking for under those
2 boilerplate categories.

3 JUDGE MILLER: Will it relate to any of the
4 matters that we discuss concerning the Contentions and
5 the objections thereto as well as all pending motions?

6 MR. GREENBERG: I do not believe it relates to
7 the Contentions, Mr. Chairman, nor does it relating to
8 the timing issues which seem to be in dispute at the
9 moment between the Staff and the Applicants -- the Staff
10 and the Intervenors.

11 JUDGE MILLER: May we regard it, then, as a
12 stipulation between, at least, the counsel for NRDC and
13 the Staff?

14 MS. WEISS: This was a stipulation that we
15 discussed earlier before the break, Mr. Chairman, and we
16 have become convinced that there are significant gaps.

17 JUDGE MILLER: You are going to discuss it and
18 refine it further?

19 MS. WEISS: Yes, we are.

20 JUDGE MILLER: Thank you. We will expect to
21 hear from you, then, when counsel have had a chance to
22 get together and discuss it, if you would advise us as
23 to the status of whatever agreements or no agreements
24 that you come to.

25 All right. Before now we go into the

1 statement of Contentions, the bases, objections thereto
2 by the other parties, is there anything further that any
3 party or counsel wants to make of record at this time?

4 MR. EDGAR: We have one minor item and I just
5 wanted to state for the record the rules of practice in
6 regard to admissions do not specify a date certain for a
7 response. They specify a minimum date of ten days.

8 Mr. Greenberg and I have conferred and we
9 think the most logical way to go about this response
10 late is to make it the same as that under the rules of
11 practice for interrogatories, 14 days. It will save us
12 all a lot of accounting difficulties, and we have agreed
13 to a 14-day time response for the Applicants for
14 admissions.

15 This agreement, however, explicitly does not
16 involve the NRC Staff.

17 JUDGE MILLER: Is that agreed to by NRDC
18 counsel?

19 MS. WEISS: Yes, Mr. Chairman.

20 JUDGE MILLER: If I understand it, then, the
21 time for response to admissions would be the same as the
22 regulations regarding replies or answers to
23 interrogatories, namely 14 days, and under our rules we
24 have asked it would be hand-delivered. It would
25 next-day or expedited delivery, so the maximum would be

1 15 days. Is that understood?

2 MR. EDGAR: That is correct.

3 JUDGE MILLER: Does the Staff want to take
4 part in this, or do you want to contemplate your navel,
5 so to speak?

6 MR. JONES: I think we want to discuss that
7 along with everything else.

8 JUDGE MILLER: All right. You will let us
9 know if you adopt any position which has a bearing on
10 it, but Staff will advise us later. Okay.

11 Now is there anything else that would help to
12 -- what we want to do is get the rules of procedure to
13 be what they are intended to be, namely rules that help
14 us to move along at a reasonable pace, as expedited as
15 is reasonable, and to give all parties a fair shot at
16 the substance but not to exalt form over substance.
17 That is our overall objective, both in procedure,
18 scheduling, interrogatories, or other discovery, both
19 requested and responded to.

20 So I would ask you to help us be practical and
21 to do those things that are necessary and I think you
22 understood our philosophy, Mr. Greenberg.

23 MR. GREENBERG: One very minor point, Mr.
24 Chairman, just to clarify the procedure that we have
25 been following in serving answers to interrogatories and

1 requests to produce. We have been hand delivering those
2 to the Staff or the Applicant, as the case may be.

3 We have not been hand delivering them to the
4 Board on the grounds that it was not necessary and the
5 Board had not indicated it was necessary that it receive
6 on the same day the flow of discovery. Is that an
7 accurate --

8 JUDGE MILLER: I think that is generally true
9 unless you anticipate as a lawyer that there is going to
10 be something hit the fan either from you or from the
11 other parties.

12 Now if you expect some action as a result of
13 whatever it is you are doing, then advise us promptly so
14 we have a chance to look at it and be on top of the
15 situation. If, on the other hand, these are more or
16 less responsive, they are not creating any sudden
17 reactions by anyone, then do it at your -- I mean, you
18 do not have to hand deliver it because it will spare you
19 the expense wherever you reasonably can.

20 I think your judgment will tell you, you know,
21 where you are going to have argument, where you are
22 not. If there is going to be an argument, get it to
23 us. If not, mail it to us.

24 Okay. Anything further?

25 MS. WEISS: Before we get on to arguing on the

1 Contentions, Mr. Chairman, I just wanted to let the
2 Board know that we have approached the Applicant and we
3 will approach the Staff about proposed modification to
4 the discovery schedule.

5 I do not want to present it to the Board until
6 I present it to the parties and see if we might reach
7 some agreement, but it is a matter which will come
8 before the Board either as an agreement or as a request
9 on NRDC's part at some point in the next two days.

10 JUDGE MILLER: Okay. That is fair enough.
11 Let us know when you want to take it up or advise us.
12 We would like to hold firm to an evidentiary hearing,
13 say, the last week in August, which is perhaps a slight
14 modification, but we would like very much to hold to
15 that. So when you are talking about schedules, be sure
16 to see what impact, if any, it has on commencing trial
17 the last week of August, which is August --

18 JUDGE LINENBERGER: It begins August 23.

19 JUDGE MILLER: Monday, August 23. We would
20 like and intend to exert every effort possible in order
21 to commence trial at that date. Now have that in mind
22 when you go into these precedent matters which possibly
23 could have an impact or effect on that.

24 Judge Linenberger reminds me what we
25 contemplate is the final pre-hearing conference, which

1 brings all housekeeping and other matters. By that time
2 there should not be too much. They should have all been
3 agreed to or ruled upon -- on Monday, and then
4 commencing probably 9:00 on Tuesday, which would be
5 August 24, with the introduction of evidence.

6 The Intervenors normally go first. I guess
7 there is no reason to vary that, is there, Mr. Edgar? I
8 do not mean Intervenors -- Applicants. They have the
9 burden of proof. They, therefore, would go first with
10 the evidence.

11 MR. EDGAR: I think at this juncture it seems
12 to me logical that we adhere to the normal order, which
13 is Applicants first, then Intervenors, then Staff.

14 JUDGE MILLER: Well, we are not ruling on
15 Intervenors versus Staff. We will have to see where we
16 stand there. Often we do go in that order, but it is
17 not preordained because if the Staff's position is going
18 to be the same as yours, there is no reason in letting
19 you have two or three bites at the cherry.

20 This is a substantive matter. We will see how
21 the positions of the parties develop in the whole course
22 of discovery and filing of testimony and the like. But
23 there is no reason why the Staff, to the extent that
24 they are adopting the same position essentially, should
25 have a pre-rebuttal direct and then followed by

1 Applicant's rebuttal.

2 In other words, we want to be fair and balance
3 this, so we reserve the right to see where the positions
4 of the parties are on the merits or substance rather
5 than any procedural formality. Other than that, well,
6 we -- does Staff want to object now or later?

7 MR. TREBY: Well, we will do both.

8 JUDGE MILLER: Okay.

9 MR. TREBY: We will start off by objecting now
10 in the sense that it has been the policy of the Staff
11 that it is the last party to put on its case because the
12 Staff serves in a slightly different capacity than the
13 other parties, so our interests are somewhat broader.

14 We believe that we have an obligation to make
15 sure that we have a complete record and we can
16 accomplish that mission by being the last party to put
17 on its direct case.

18 JUDGE MILLER: We recognize that as the
19 general principle, but we point out that where you are
20 making the record simply to say me, too, to the
21 Applicant's testimony that it loses an awful lot of
22 force. It depends on the position you are taking, the
23 evidence you file and the like. It may or may not.

24 It does not invariably or, as Federal people
25 like to say, inelectably flow from the fact that you are

1 the Staff, but it may well be.

2 MR. TREBY: We believe the fact that we are
3 Staff is a weighty factor in your determinations, but,
4 of course, we need to await the filing of the testimony
5 and then we will see whether or not we are in fact
6 taking the same position as the Applicants.

7 JUDGE MILLER: Yes, I think that is really
8 what you get down to, because I can see in various
9 issues it would vary too, as a matter of fact, by
10 issue. We well may vary the rules, depending on the
11 nature of the issue and the evidence filed.

12 MR. TREBY: That has been my experience. It
13 is my experience that the Staff is not really a "me,
14 too" to the Applicants case.

15 JUDGE MILLER: In that event we will be glad
16 to consider the appropriate time for you to put on your
17 non-"me,too" evidence.

18 (Laughter.)

19 But we will be concrete about it. We do not
20 want to rule in a vacuum. Anything further?

21 (No response.)

22 All right, let's go, then, with revised
23 statements of Contentions and bases of Contentions. I
24 think we have agreed upon the document which has been
25 furnished to us by the Intervenor and then, since the

1 Intervenor in this respect are the parties setting
2 forth the pleadings and the reasons, we will let you go
3 first insofar as it appears that there is any objection.

4 We can be referring to the Applicant's and the
5 Staff's response as you go along, if you like. Where
6 there are no objections or qualified objections you can
7 meet, you know, do whatever is reasonable to you.

8 MS. WEISS: I think I will, if the -- if it is
9 okay with the Board, what I would propose to do is argue
10 on the basis of the NRDC response to objections to
11 Contentions filed on the 31st, last Wednesday, and that
12 is our response to both the Staff and Applicant's
13 objections.

14 So if a Contention is not discussed in that
15 document it was not objected to, and what that means is,
16 as a practical matter, it was an old Contention or the
17 revision was exceedingly minor because there were
18 objections to every new Contention and almost every
19 revision.

20 JUDGE MILLER: I think we can comply with the
21 spirit of your request. However, this is a rather
22 complex matter where there has been a delay of 4-1/2 or
23 five years, so, therefore, we think it would be well to
24 have the record reflect as we go along with absolute
25 clarity what the present and future Contentions are and

1 pick up whatever revisions there might be, whatever
2 grammatical errors there are, and so forth.

3 So for that reason we would like to either
4 have stated or to have the reporter furnished with an
5 exact copy where all parties agree that the Contention
6 is unobjectionable in that sense, as a pleading, because
7 we want to have -- from the transcript of this we are
8 going to make this your Bible.

9 Now let me point out to you what this means
10 because we have had it come up in a few other cases
11 where people had after-thoughts six months later in the
12 midst of a trial and it makes a difference. It also has
13 a bearing upon discovery.

14 So what we want to do is have one place in
15 this record, this transcript, which is going to be the
16 exact statement of Contentions, whatever their previous
17 history -- four years, five years, 30 days -- whatever
18 Contentions, whatever responses there are. But let us
19 come out with a statement as we go along.

20 I ask you, Ms. Weiss, to take the
21 responsibility to have such a clear statement either
22 orally or in writing to the reporter as we go along,
23 since these are your Contentions, and I want to make
24 sure that we all understand what they are, as refined or
25 whatever, and then a final form for purposes of ongoing

1 discovery, trial and the like.

2 Is this agreeable to you?

3 MS. WEISS: Yes, Mr. Chairman.

4 The Contentions are all stated in their final
5 form as we propose them, at least. Of course, the Board
6 has not ruled on the objections, but they are all
7 stated, the old ones and the new ones and the revised
8 ones.

9 JUDGE MILLER: Is that now the document that
10 we have called the "revised statement of Contentions and
11 bases filed March 5, 1982", which itself, I think, may
12 duplicate something we have previously, but we will not
13 worry about that.

14 The first page is introduction and in
15 accordance with the Board's pre-hearing conference it
16 defines what Intervenor has done. We will regard this,
17 then, as the statement that you will discuss as you see
18 fit, if you will furnish it to the reporter as an agreed
19 final, clarified, updated Contentions, where there are
20 no objections or in accordance with the Board's rulings
21 in the event that we make rulings.

22 Okay. Does everybody understand?

23 (No response.)

24 JUDGE MILLER: All right.

25 MS. WEISS: Okay.

1 JUDGE MILLER: Now Contention Number -- pardon
2 me. Contention Number 1: The application, as
3 submitted, is illegal. All you have is (e). Does that
4 mean all the previously numbered matters have been
5 resolved one way or another?

6 MS. WEISS: Yes, Mr. Chairman.

7 JUDGE MILLER: You do not need (e), do you?

8 MS. WEISS: No. We do not.

9 JUDGE MILLER: Okay. I just want to be sure
10 because I am not trying to be facetious. I do want to
11 have total agreement and you may have a reason, you see.

12 MS. WEISS: It does not need to be there and
13 we talked about whether we should renumber them where
14 certain parts have been withdrawn. We thought that for
15 the sake of trying to follow through where discovery was
16 previously done and where objections were previously
17 raised, issues which might come back again before the
18 Board in connection with various objections, that it
19 might be cleaner to retain original numbering, but --

20 JUDGE MILLER: What we really plan to do, we
21 will have you make such explanation for the record where
22 it is a renumbering. What we plan to do will be to have
23 one, either 1(a) or this one might be the application as
24 submitted is illegal, because I do not even know that
25 you need to have, now, a subparagraph.

1 MS. WEISS: That would be fine.

2 JUDGE MILLER: All right. Well, you state it
3 so that as we go along, then, we will give everybody a
4 chance to comment as they need to and then as we go
5 along let us wind up, then, with an agreed statement.

6 I think Judge Linenberger has something to say.

7 JUDGE LINENBERGER: Also, as we go along --
8 pardon me. Let me introduce this statement a little
9 differently.

10 The Board has had a bit of a problem with
11 respect to this revised statement of Contentions in
12 determining with respect to any given Contention whether
13 the subparagraphs constitute bases for the Contention or
14 whether the subparagraphs constitute portions of the
15 Contention.

16 I think that we would appreciate as you go
17 through your indicating to us which category you
18 consider these subparagraphs to fall into. I do not
19 think it is consistent throughout.

20 JUDGE MILLER: Do you understand what we mean?

21 MS. WEISS: Yes. I was just trying to see if
22 there was some -- there is a Contention that is adopted
23 that allows one to make that discrimination. When we
24 use the words "for the following reasons", those are --
25 that which follows are the bases for the Contention.

1 In all other cases they are parts of the
2 Contention, subparts of the Contention itself, but we
3 can indicate that as we go through, if you would like.

4 JUDGE LINENBERGER: With respect to Contention
5 1, then, did you really agree with the Chairman when he
6 suggested that the paragraph labeled (e) here would be
7 introduced by the phrase "for the following reasons" or
8 "because of" or is paragraph (e) a further statement of
9 the Contention itself?

10 MS. WEISS: I think paragraph (e) is certainly
11 the clarification of the Contention. It represents a
12 statement of the issue.

13 JUDGE MILLER: That is why I used the term,
14 because I felt it was also assumed, really, in your
15 statement.

16 MS. WEISS: It is. I might suggest again to
17 the Board before you -- when you are deciding whether
18 you want to change the numbering or change the wording
19 that it has seemed to us as we have gone back in trying
20 to respond to various objections, for example, it has
21 been necessary for us to go back to your original order
22 admitting or denying Contentions, and in some cases to
23 the way the Board resolved Contentions, you know, five
24 or six years ago.

25 It is much easier, we have found in doing

1 that, if we retain the same numbering, even if that
2 means that subparts (a) through (d) go out. I think it
3 would be easier for all of us if the numbering stays the
4 same.

5 JUDGE MILLER: Well, I do not agree with you
6 ultimately, because when we get down to trial I do not
7 want to decide whether (b) is old, new, in-between, or
8 what the devil we said at any one time. If I see it is
9 (b) I know it is (b) because there is an (a) and know
10 there has been a ruling on it.

11 However, I agree with you also, to this
12 extent, in making our record now I think you should and
13 almost have to refer by the same number to whatever
14 previous rulings or discussions there has been. It is
15 only at the conclusion of each one, and in some of these
16 the Board will indicate what its ruling is going to be,
17 where we can rule provisionally in the sense that we are
18 ruling orally, and that will be picked up at our
19 pre-hearing - in our conference order, whatever we call
20 it.

21 There are certain Contentions we will rule on
22 as we go, so we will know there is no sense in waiting
23 for the other shoe to fall.

24 MS. WEISS: Okay.

25 JUDGE MILLER: At any rate, there is going to

1 be a point where everybody has been heard, if it is a
2 controverted matter. There is going to be the final
3 framing of the Contention as you wish it which is in
4 accordance with whatever arguments you have given heed
5 to, and you have made it. When you do that you can
6 indicate that this Contention now supercedes what was
7 originally known as Contention 1, subparagraph (e), and
8 reads as follows.

9 And then you just either dictate or hand in an
10 exact copy because that is what it will be then in the
11 future. That way I think we can give you the benefit
12 and you are certainly entitled to whatever previous
13 matters have been either ruled or considered.

14 When we get through, then, with each one as we
15 go and if you find upon checking the transcript that we
16 made some error, just advise us by letter -- the parties
17 and the Board -- so that we can all have an agreed text
18 of Contentions which shall thereafter be governing.

19 Okay. On this Contention, which really says
20 that LWA procedures should not be applied to this
21 reactor as a first of a kind and the like, will you
22 state your reasons for that position? I will tell you
23 frankly, so as to save time, I do not believe in winding
24 up.

25 We are inclined to say that. That is not as a

1 matter of law that we will overrule that Contention. We
2 have not had a chance to hear from you in that regard,
3 so we will hear from you.

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1 MS. WEISS: Let me point out first, there is
2 no objection to this contention and it was admitted --

3 JUDGE MILLER: I realize that. That is not
4 what I said. You have to know what we do with this.
5 Bring it to the Board.

6 Now, I realize -- I have the same thought.
7 There is no sense in letting hang contentions, that upon
8 the first time somebody files a motion it is going to be
9 granted. We are trying to get through substance rather
10 than form. We just really do not believe, unless you
11 can persuade otherwise -- our mind is not totally
12 closed, but we have given this some thought most
13 recently as well as previously, and under the present
14 state of the situation as the Board understands it, we
15 do not know of any really good and valid reason why
16 limited work authorization procedures should not apply
17 to this case.

18 MS. WEISS: Our view, Mr. Chairman, is that
19 after the end of the evidence, the evidentiary hearing
20 on LWA-1 issues, we will make an argument based upon the
21 evidentiary record at that stage that the record is not
22 sufficient to allow a finding of whether the reactor of
23 that general type and design can be cited at that
24 location because of particular uncertainties in the CRBR
25 design, and uncertainties in the safety issues related

1 to the CRBR.

2 JUDGE MILLER: Wouldn't that be cognizable
3 under your contentions which do go into safety and
4 design and the like?

5 MS. WEISS: I think it is essentially a
6 summary contention which flows as a matter of law from
7 the factual issues, the other factual issues.

8 JUDGE MILLER: That is sort of what we
9 thought, and it was for that reason that as a matter of
10 law, we were going to overrule it. We do not want
11 summaries that hold things up. We would like to rule as
12 we go along unless you have some point that we have
13 overlooked. That is why I told you what our inclination
14 was, so that you could address it rather than give me
15 your general arguments, because this is a general legal
16 contention.

17 JUDGE LINENBERGER: I would observe, however,
18 at page 25 of the document from which we are working
19 here, NRDC does represent that this contention one
20 comprises a mixed question of law and fact. And you
21 have just characterized it as -- I think I just heard
22 you characterize it as a matter of law. I did not
23 understand what was your basis for considering it to be
24 a mixed question of law and fact?

25 MS. WEISS: Well, as I said, we will present

1 this contention to the Board, or ask the Board to rule
2 upon it on the basis of the factual record on the other
3 contentions that relate to the safety issues on CRBR and
4 the uncertainties in the safety analysis for the CRBR.

5 JUDGE MILLER: It is an ultimate issue, isn't
6 it?

7 MS. WEISS: Yes, it is.

8 JUDGE MILLER: That is why we think it should
9 not be here as a factual contention. We think you will
10 have the right to go into those matters at the end of
11 whatever evidentiary hearing there is, but that is the
12 ultimate decision really.

13 You see, the way your frame this, LWA
14 procedures should not be applied to first-of-a-kind
15 reactors such as this. You are making a generic
16 statement of law. We just think as a plea'ing matter,
17 you will have the benefit of whatever your evidence
18 shows, one way or the other. But we do not think that
19 contentions are properly framed as issues of law.

20 MS. WEISS: I think that we would generally
21 agree, Mr. Chairman, that there is no factual matter
22 raised under this contentions that is not subsumed in
23 one or another of the contentions.

24 JUDGE MILLER: If we understand you correctly,
25 that is true; that is why we asked you to address it. I

1 am telling you what we are inclined to rule so we will
2 make sure we have not overlooked some factual matter
3 that you deemed to be peculiar in this sense. We have
4 not seen it but you are entitled to tell us if there
5 is. We felt it was actually covered by your other
6 health and safety and other contentions; that it would
7 be the ultimate question for the Board following
8 evidence rather than a pleading.

9 MS. WEISS: May I confer just briefly, Mr.
10 Chairman?

11 JUDGE MILLER: Certainly, take your time.

12 (Counsel for intervenors conferring.)

13 MS. WEISS: I am advised, Mr. Chairman, that
14 there is an issue raised by the contention that can be
15 slightly different from the ultimate issue presented to
16 the Board on the LWA.

17 JUDGE MILLER: What is that?

18 MS. WEISS: That is whether the rule by its
19 terms ought to be applied to the CRBR proceeding to the
20 extent that the rule, the LWA rule --

21 JUDGE MILLER: Which rule are you referring
22 to? Do you want to cite the rule to us if you are going
23 to rely on it?

24 MS. WEISS: It is 50.10, I believe. The rule
25 in question, Mr. Chairman, is 50.10, the LWA rule. The

1 questions of its interpretation and whether it ought
2 properly to be applied to this proceeding arise not on
3 the face of the rule, but in the Federal Register notice
4 statement of considerations which accompanied its
5 promulgation, a copy of which we do not have before us.

6 I was not anticipating argument on this
7 because it was not objected to, but basically, our
8 position would be that the rule was not intended to
9 apply to first of a kind proceedings such as the breeder.

10 And we derive that from certain language in
11 the rule which we believe is exemplary, but
12 non-exhaustive. The statement of considerations --
13 excuse me, which is exemplary but not exhaustive which
14 states that one-of-a-kind proceedings like licensing for
15 reprocessing facilities would not be covered by the LWA
16 and our argument would be that the same considerations
17 ought to dictate that this rule not be applied to the
18 breeder.

19 JUDGE MILLER: Well basically, what would you
20 say distinguishes, for instance, identity as far as
21 description goes of this kind of proceeding with a
22 reprocessing plant, for example?

23 MS. WEISS: Well, --

24 JUDGE MILLER: Or distinguishes this from a
25 light water reactor?

1 MS. WEISS: The analogy is lack of experience
2 in prior licensing cases that this rule really was
3 promulgated for use in licensing of LWR's, and the
4 statement of considerations does speak specifically of
5 the years of experience which the Atomic Energy
6 Commission and the NRC have in licensing LWR's, which
7 leads them to believe that they can issue limited work
8 authorizations without prejudicing the ultimate outcome
9 on the safety issues.

10 And our argument would be that that reasoning
11 does not apply to a first-of-a-kind proceeding like the
12 breeder, which raises so many safety issues which have
13 never been resolved in any other context.

14 JUDGE MILLER: Hasn't the matter of liquid
15 metal fast breeder reactor been the subject of
16 discussion and consideration by the Atomic Energy
17 Commission, the courts, your organization and others for
18 some years?

19 MS. WEISS: There has been plenty of
20 discussion about it, but I think that is very different
21 from an adversary proceeding, Mr. Chairman.

22 JUDGE MILLER: That may be, but we know when
23 you had recent arguments, you had recent arguments
24 before the Commission to present positions with regard
25 to the exemption and so forth. Did you take the same

1 position that the Commission should not even be hearing
2 your arguments on exemption because you have a very
3 unique kind of case?

4 MS. WEISS: Yes, we did.

5 JUDGE MILLER: What did the Commission rule?

6 MS. WEISS: The Commission denied the request
7 for exemption.

8 JUDGE MILLER: I think we will do the same
9 thing, frankly, unless you have any further grounds.
10 Does the staff of applicants have --

11 MS. WEISS: The Commission denied the
12 licensee's request for exemption to the rule based at
13 least in part on NRDC's arguments that it would be
14 inappropriate to grant 50.12 exemption.

15 MR. GREENBERG: Mr. Chairman, one of the
16 arguments that was made before the Commission was that
17 it would be inappropriate to grant 50.12 exemption
18 request, and that followed a fortiori from our position
19 that it was inappropriate to grant an LWA. I do not
20 think it is fair to characterize the Commission's
21 decision as ruling one way or the other.

22 JUDGE MILLER: No, I do not consider --

23 MR. GREENBERG: The Commission denied the
24 50.12 request, but on what I would primarily
25 characterize as public interest grounds under the public

1 interest criteria.

2 JUDGE MILLER: The Board would agree. We did
3 not mean to imply or read in anymore than your
4 description of it, Mr. Greenberg.

5 Mr. Edgar?

6 MR. EDGAR: Well, --

7 JUDGE LINENBERGER: I should like to inquire
8 of intervenors about the following point. It would
9 appear to the Board it is certainly the case with
10 respect to light water reactors where LWA proceedings do
11 -- authorizations are occasionally granted; that the
12 granting of an LWA for an LWR does not foreclose a later
13 finding in the health and safety phase that may have an
14 impact upon that LWA decision. It does not happen very
15 often with LWR's because as you say, there has been a
16 great deal of experience, but the possibility of that
17 happening, nevertheless, exists. It will exist here.

18 The Board has difficulty seeing just how it is
19 that this facility, vis a vis the LWA question and
20 ultimate health and safety questions, really differs
21 from an LWR. There is still the opportunity for the
22 health and safety considerations to -- after the fact --
23 to overturn --

24 DR. COCHRAN: Let me take a stab at it and
25 then I will turn the microphone over to wiser people.

1 JUDGE MILLER: Are you an attorney of record?

2 DR. COCHRAN: No, sir.

3 JUDGE MILLER: I do not think this is in your
4 field, that I can see.

5 MS. WEISS: Well, for one thing, Dr.
6 Linenberger, the LWA rules clearly provide that prior to
7 the issuance of an LWA-1 or 2, the Board must make all
8 the NEPA findings which would be required to be made for
9 the issuance of a construction permit.

10 Part of our case will be a large portion of
11 these contentions. A majority, I dare say, come under
12 the NEPA rubric and we will be arguing to the Board that
13 the state of information is so uncertain as to preclude
14 you from making those findings. And I think that is a
15 large part of where the 20 years of experience or 25
16 years of experience in licensing LWR's comes in. They
17 have gotten to where they can crank those EIS's out on
18 LWR's and it is a very different situation.

19 JUDGE MILLER: You are asking them to crank
20 out that which is appropriate to this kind of a
21 proceeding, I assume, if I am reading your contentions
22 correctly. I know that you are.

23 MS. WEISS: Yes. Well, we have a variety of
24 contentions that challenge directly the environmental
25 documents and the findings which the Board will have to

1 make.

2 JUDGE MILLER: Yes?

3 MS. WEISS: But we will also be arguing that
4 the purposes for which the LWA rule was adopted and the
5 reasoning behind the adoption of that rule do not extend
6 to the CRBR proceeding. It may be an issue -- it may be
7 at least that part of the issue, the question of how
8 does one interpret the LWA rulemaking in order to apply
9 it to the breeder. What were the considerations that
10 went into it. That may well be an issue that is
11 disposable by summary disposition.

12 The second part of the issue, what we
13 discussed earlier, will the Board find on the basis of
14 the evidentiary record that it can make the LWA
15 finding. That, it does seem to me, presents the
16 ultimate question. That is something that the Board
17 will have to rule upon, whether or not we have a
18 contention.

19 JUDGE MILLER: We agree with that. However,
20 you have framed this as a matter of law and you have
21 stated that the application, as submitted, is illegal.
22 You want us to keep that in as a pleading. You have
23 chosen to raise it as a matter of law.

24 Mr. Edgar, you wanted to be heard from?

25 MR. EDGAR: We briefed this subject rather

1 extensively prior to the Board's April 6, 1976 order. I
2 think there is a straightforward way of looking at this.
3 All of the facts that are necessary to reach this legal
4 conclusion are subsumed within NRDC's other contentions.
5 This is merely a legal assertion which is appropriate
6 for someone's brief. There is no need to have a factual
7 contention here. In short, it is unnecessary.

8 Secondly, the intervenors urge that
9 application of the rule here would not serve the
10 purposes for which the rule was adopted. That very
11 language is the language which one finds within the
12 context of the waiver doctrine, and more significantly,
13 10 CFR 2.758. And that very language suggests that what
14 we have here is a rule which is clear and applicable on
15 its face. If it is a matter for waiver, then 2.758
16 should apply.

17 In short, we think that the rule is clear that
18 the contention is unnecessary.

19 JUDGE MILLER: Staff?

20 MR. SWANSON: Thank you, Mr. Chairman. The
21 staff did not want its lack of an objection to this
22 contention to be misinterpreted by the Board. We did
23 not object to it at this point because our predecessors
24 on this case had previously stipulated it in.

25 However, the staff's interpretation of this

1 contention is at this point, it raises a purely legal
2 issue and it is one in which we intended to make use of
3 the summary disposition procedures. We do not interpret
4 it as a factual issue.

5 And I believe that there are a number of
6 different matters that the staff could cite, too, in
7 support of the proposition that the LWA procedures are,
8 in fact, contemplated to be used and considered in this
9 proceeding; among which I think we could cite to the
10 Commission's written decision in the exemption
11 proceeding.

12 So our position is it is a legal issue. We
13 just felt constrained not to object to it at this point
14 because of our previously taken position by the staff.

15 MR. EDGAR: I would like to add to that. I am
16 not aware that there was ever any stipulation on 1(e);
17 that that was a matter that went before the Board.

18 MR. SWANSON: Stipulation or otherwise, it was
19 admitted by the Board prior to April 1977. The staff
20 felt because this had not changed, it was not in a
21 position to object at this time.

22 JUDGE MILLER: Yes, that is correct. The
23 Board has adopted the view that inasmuch as there are
24 and have been changes in the whole factual and technical
25 picture of the Clinch River breeder reactor during the

1 last four years, let us say, or five, whatever time you
2 want to look at it, which is the reason that NRDC is
3 asking for updating, for example, which is the reason
4 that the staff and the applicants are doing some
5 updating, and I realize there are certain areas of
6 controversy in the so-called "new contentions."

7 But without getting into that matter, it is
8 our believe that the Board will not hesitate to take a
9 second look at contentions admitted simply because they
10 were admitted in 1976. Not merely because, that is not
11 to say, we are throwing everything up for grabs, but we
12 think on this one it is bound to be the subject of a
13 motion. We are trying at this point to go through a
14 large number of motions, pleadings and contentions in
15 order to strip away all of the technical matters and get
16 down to the substance of the contentions on the one
17 hand, and the positions of the other parties on the
18 other.

19 We think that this is framed to raise a legal
20 question when it says something is illegal. We think
21 further that the substance or merits of what the
22 intervenors, NRDC and the Sierra Club, seem to
23 accomplish; namely, to see whether or not from the
24 factual record as developed from the evidence,
25 submissions and the like, it would be appropriate or

1 proper to consider or to grant an LWA, will be
2 cognizable by the Board as an ultimate issue or at least
3 as an issue for inclusion in the evidentiary hearing.

4 So we do not think that there is any prejudice
5 being done to the intervenors or others by striking this
6 as a legal matter upon legal grounds at this time,
7 leaving open to NRDC the evidence that they may wish to
8 put on or educe on the other contentions which would
9 provide, if they are correct in their belief, a factual
10 basis upon which to ask the Board to make certain
11 rulings, including denial of the LWA procedure.

12 MS. WEISS: The consequence of striking the
13 contention, Mr. Chairman, is that we will have no forum
14 in which to make the argument that the LWA rule ought
15 not to apply because the purposes behind it and the
16 reasoning behind it do not apply to the breeder
17 proceeding. We will have no forum in which to raise
18 that issue.

19 JUDGE MILLER: Well, should you have a forum
20 here?

21 MS. WEISS: Yes, I certainly think so.

22 JUDGE MILLER: Is it a matter of policy
23 cognizable by the Commission or the courts? The first
24 level licensing board is bound by whatever the factual
25 record is in the first place. We are not going to

1 challenge regulations or the reasoning behind
2 regulations; we are not going to permit challenges to
3 the regulations themselves. We do not have the
4 jurisdiction and we would not want to do it if we
5 could. That is why we are deciding that what you have
6 raised is a legal matter, as a legal conclusion at this
7 time.

8 Your are free to pursue whatever facts you
9 want.

10 MS. WEISS: It is not a challenge to the
11 regulations, Mr. Chairman. Nothing in the regulations
12 says that this shall apply to the CRBR.

13 JUDGE MILLER: It does not say it should not,
14 does it?

15 MS. WEISS: That is right. The staff has
16 taken the position that it should. The licensee has
17 taken the position that it should, we take the position
18 that it should not. Their positions are not
19 dispositive. The rule itself does not decide that
20 question.

21 JUDGE MILLER: In that event, the Board
22 applies the rule of regulation as it sees it. The Board
23 applies it in the first instance. You are perfectly
24 free, either directly or indirectly, to take it up with
25 the Commission which you wish, which has the power to

1 say if you believe its rule is or should be something
2 different, take it up with the source of the authority.

3 But this Board looks at the rule as it is written.

4 MS. WEISS: Where does the Board find the
5 authority that the rule ought to apply to this
6 proceeding?

7 JUDGE MILLER: That the rule ought to apply?

8 MS. WEISS: Yes.

9 JUDGE MILLER: Because the fact that the rule
10 is not otherwise limited.

11 MS. WEISS: Without regard to any arguments we
12 may make on the basis of the statement of
13 considerations, how that limits the use of the rule?

14 JUDGE MILLER: We listened to your arguments.
15 We do not think that the statement of considerations
16 addressed one way or the other this kind of proceeding.
17 We do not equate chemical extraction of plutonium in
18 reprocessing, for example, with the breeder reactor
19 where we are directed by the Commission to take as given
20 a certain number of matters.

21 We are cognizant of what the Commission ruled
22 in this case five years ago.

23 MS. WEISS: So then the Chairman is
24 essentially ruling on the merits of the contention.

25 JUDGE MILLER: No, the Chairman is ruling that

1 the contention goes into a legal matter which this Board
2 overrules. The Board rules that the contention seeks to
3 proscribe the application of limited work authorization
4 to a fast breeder reactor case such as this. The Board
5 does not believe that that follows as a matter of law.
6 The Board believes that as a matter of law, it does
7 apply unless and until the contrary is shown.

8 And therefore, as a matter of pleading on the
9 issue that you raised, and as a matter of law, you said
10 something was illegal. We see no justification which
11 would require us to grant your position. This is not to
12 say that the underlying facts now, that we understand
13 you wish to rely upon, will not be in the record and
14 will not be available to you at the conclusion of the
15 evidentiary hearing when this and other matters may well
16 be within the purview of what the Board will then
17 decide. But not as a pleading matter.

18 So therefore, unless you have something
19 further, the Board is going to rule that the contention
20 number one raising the question of the legality of the
21 LWA procedure to this fast breeder reactor proceeding
22 will be denied.

23 Now, number two, which will, if it is viable,
24 will become number one, goes into the matter of the
25 envelope of design basis accidents including core

1 disruption, CDA which is the core disruptive accident,
2 with a number of sub-issues.

3 Now, the Board notes no objection by the
4 applicants. We have read -- and we will give you a
5 chance to respond as necessary to your justification for
6 contention three, Ms. Weiss. The staff, we noticed,
7 suggests it be provisionally admitted, and the
8 clarification of the issues encompassed by it which the
9 intervenors wish to litigate would be stated with
10 specificity at the conclusion of discovery.

11 First of all, there are some questions that
12 Judge Linenberger has with reference to the meaning of
13 some of these subparagraphs. So we will give him the
14 opportunity to discuss that with you, Ms. Weiss.

15 We are going to want to hear from the staff as
16 to the basis, by the way, for their suggestion of this
17 provisional ruling and so forth, but we want first of
18 all to find out what the contentions are. So, Ms. Weiss
19 will explicate them. Which ones do you have?

20 JUDGE LINENBERGER: Again, we will make the
21 assumption here, consistent with the groundrule
22 previously laid down by NRDC a few moments ago, that
23 these subparagraphs comprise portions of the contention
24 rather than bases, is that correct?

25 MS. WEISS: Yes.

1 JUDGE LINENBERGER: Okay. Now in paragraph
2 2(a) we note that NRDC alleges an inadequate data base
3 from which to make a determination of probabilities.
4 Now, the first question here is, is data really the word
5 that the staff -- I beg your pardon -- that NRDC has in
6 mind, or is it analyses, or does data refer to
7 experimental results that you feel the applicants and
8 staff have not availed themselves of, or does it refer
9 to underlying theoretical analyses that they have not
10 availed themselves of?

11 MS. WEISS: 2(a) is intended to raise the
12 issue only of the data base. The analyses are raised by
13 certain other of the subparts of the contention.

14 JUDGE LINENBERGER: So you are referring to an
15 experimental data base of some sort, is that correct?

16 MS. WEISS: Experimental or simply to the
17 extent that there is practical experience in the
18 industry.

19 JUDGE LINENBERGER: All right. Now then, you
20 used the term "sufficiently low" to enable CDA's to be
21 excluded from the envelope of DBA's, and sufficiently
22 low is relatively unquantitative. I look down the road
23 to the time when people are going to be moving to close
24 the record, and the Board is going to come back to this
25 contention and say gee, what does sufficiently low

1 mean? Is it a probability of 10^{-2} , is it a
2 probability of 10^{-10} ?

3 Can intervenors tie this to something
4 quantitative so that intervenors themselves have a
5 target to shoot at when they go into this issue? And so
6 that the parties and the Board have something to judge
7 things by.

8 MS. WEISS: Well, Mr. Linenberger, I think it
9 is fair to say that at this stage, we cannot get either
10 the staff or the licensee to give us quantitative
11 numbers, so what we are referring to is generally
12 statements that appear in the licensing documents, to
13 the effect that with the addition of certain features,
14 the probability of a CDA can be made sufficiently low so
15 that it need not be included in the design basis.

16 And to the extent that those words are not
17 given any quantitative context in the FES or not much, I
18 think there are two open questions. One is what is the
19 probability of a CDA, and two is, is that probability
20 sufficiently low.

21 JUDGE LINENBERGER: Well, if you have not been
22 given probability numbers, what is your basis for
23 alleging that they are not sufficiently low, then, as
24 you do allege in this item 2(a)?

25 MS. WEISS: Well, what we are faced with in

1 the licensing documents are essentially -- at least from
2 the staff's point of view -- assertions that there are
3 possible design features which may reduce the
4 probability of a CDA to a sufficiently low level. And
5 the staff has not yet told us what those design measures
6 are, and how low they will reduce the probabilities.

7 So, although they generally averted to a set
8 of design features, we do not yet know what it is that
9 is being relied upon to bring the probability of a CDA
10 within -- down to some level.

11 JUDGE LINENBERGER: Is this something you are
12 seeking through discovery?

13 MS. WEISS: Oh yes, absolutely. There is a
14 great deal of it.

15 JUDGE LINENBERGER: Does this allow us to
16 infer that by the time discovery -- subsequent to the
17 completion of discovery, you will be able to refine this
18 contention and put some kind of an acceptable or
19 unacceptable quantification to it?

20 MS. WEISS: Well, we can certainly -- it will
21 certainly be possible to modify it depending on the
22 answers. I am not sure whether the answers are going to
23 provide the specificity that will allow us to make the
24 contention more specific, but it may well. We are
25 certainly inquiring into all of the bases for the staff

1 and applicant's claims that they have brought the
2 probability of CDA initiators down to an acceptable low
3 level. Absolutely every part of that is being probed.

4 JUDGE MILLER: Which document is that
5 contained in? A staff-filed document, I suppose?

6 MS. WEISS: The statement --

7 JUDGE MILLER: You do not have to give it
8 exact; just the nature of the document, where one can
9 find it.

10 MS. WEISS: The statement is probably -- of
11 the staff's position is probably best stated in the
12 letter from Richard Denise, Assistant Director for
13 Special Projects, Division of Project Management, to Mr.
14 Lockland Caffey, Director, Clinch River Breeder Reactor
15 Project Office, dated May 6, 1976, and that is the last
16 attachment in the FES of February 19, 1977.

17 JUDGE MILLER: Thank you.

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1 Could the Staff tell us your position
2 regarding this matter?

3 MR. SWANSON: Yes, Mr. Chairman. In addition
4 we would like an opportunity to react to the March 31
5 document that Intervenors filed. In the introductory
6 part they set out some general principles regarding
7 Contentions and the considerations that the Board should
8 utilize in determining whether or not they are
9 admissible.

10 Because this document was filed at the last
11 minute, and it was -- I think it might be appropriate
12 since this is the first one we are discussing to make
13 some general comments in reaction to that before --

14 JUDGE MILLER: Which document is that?

15 MR. SWANSON: That is the March 31 document
16 entitled "NRDC's response to objections to Contentions."

17 JUDGE MILLER: Oh.

18 MR. SWANSON: A document earlier identified by
19 the Board.

20 JUDGE MILLER: What page are you referring to?

21 MR. SWANSON: I wanted to start out by
22 referring to the pages delineated by Roman numeral
23 numbering, where some general comments are made by NRDC
24 that were not made in their bases for the Contentions
25 that they submitted earlier in March.

1 MS. WEISS: Which Contention are you arguing
2 now? We were just talking about 2, not 3.

3 MR. SWANSON: That is right. As I indicated, I
4 thought now would be an appropriate time to get into,
5 since this is the first Contention just at this time and
6 perhaps not have to repeat it.

7 MS. WEISS: There was nothing in my paper
8 about 2. I am just confused what you are talking about.

9 MR. SWANSON: As I was trying to explain, in
10 your introduction in that document, in the pages
11 indicated by Roman numerals, you state some general
12 legal arguments regarding the considerations that the
13 Board should utilize in deciding whether or not a
14 Contention should be allowed in as modified or whether
15 new-filed Contentions should be admitted.

16 Staff, of course, has not had a chance to
17 comment on those general propositions and I was
18 suggesting that the Board now, this being the first time
19 that we have had a chance to talk about specific
20 Contentions, it might be appropriate to also address and
21 react to the general propositions that the Intervenor
22 would have us consider when we go over each Contention.

23 JUDGE MILLER: It is Staff's belief that these
24 general propositions referred to or described by the
25 Intervenor have some application to most or all of the

1 Contentions, including the instant one.

2 MR. SWANSON: I believe that is Intervenors'
3 argument, that these are general considerations that
4 should apply, yes.

5 JUDGE MILLER: All right, go ahead. Go ahead,
6 we want to hear everybody.

7 MR. SWANSON: I just thought if we did it not
8 we would have the arguments out and then we can go into
9 the specifics.

10 JUDGE MILLER: Provided that you will not be
11 redundant in subsequent arguments on Contentions. If
12 you want to cover it now, fine. We will give
13 Intervenors a chance to cover it from their point of
14 view. This is the framework within which the Board
15 should construe or interpret Contentions, especially in
16 regard to admissibility or objections thereto.

17 Is that what you are telling us?

18 MS. WEISS: My only point in interrupting was
19 the paper that we wrote goes to late-filed Contentions
20 and the general standards go to admission of late-filed
21 Contentions and Contention 2 is not a late-filed
22 Contention. It was previously admitted.

23 JUDGE MILLER: All right. We will recognize
24 that since this Contention was not late-filed. Refer,
25 then, to those general statements that you alluded to

1 insofar as they are not peculiar to untimeliness of
2 filing.

3 MR. SWANSON: Yes. But I think Ms. Weiss --

4 JUDGE MILLER: You are saying it applies to
5 everything late, early, in-between?

6 MR. SWANSON: I think Ms. Weiss ignores the
7 fact that the Board asked me to address in my comments
8 on the filing to address the late filing changes
9 Contention 2. I thought I would just respond in general
10 before that because the same principles apply whether or
11 not the Contention has a late file change or the
12 wholesale construction of a new Contention.

13 JUDGE MILLER: Go ahead.

14 MR. SWANSON: The Staff's previous arguments
15 and the general propositions are set forth in its
16 response, it's March 19 response. We indicate --

17 JUDGE MILLER: Since we are having a record we
18 have people here. Go ahead. Lay it out. Tell us what
19 your arguments are. You might just as well get it on
20 the record so we will all know what we are talking about.

21 MR. SWANSON: In general, for a late-filed
22 Contention or we submit a late-filed modification to a
23 previously-admitted Contention, the provisions of 10 CFR
24 section 2.714(a) must be satisfied for the late-filed
25 Contention or modification to be admitted.

1 That regulation sets forth five factors which
2 must be considered by the Board in deciding whether or
3 not the Contention or modification should be admitted.
4 The five --

5 JUDGE MILLER: I think the lady is right so
6 far in this. Let us not take the time now to get into
7 late-filed, when we are talking about a Contention -- a
8 numbered one, because 1 has been ruled upon, unless you
9 are addressing it to some late-filed or late
10 modifications.

11 MR. SWANSON: The Board asked the Staff to
12 comment -- the Board asked the Staff to comment on its
13 position regarding Contention 2. Its position was
14 solely addressed to a modification to the
15 previously-admitted Contention.

16 JUDGE MILLER: Let me follow you now. The
17 Staff's -- you are referring now to page 9 of the Staff
18 document which is headed "Contention 2" and says
19 provisionally admitted, and then make them refine it?

20 MR. SWANSON: That is correct. Now is the
21 Board --

22 JUDGE MILLER: Now tell us why you said
23 "provisionally" rather than say -- rather than say let
24 it in or throw it out. You took a midway position.

25 MR. SWANSON: That is correct, and I just

1 suggested that perhaps now would be the time to get at
2 the general framework which I think influences not only
3 the decision whether or not a modification should be
4 issued or permitted at this time, or whether a new
5 Contention should be admitted.

6 If the Board would prefer to wait until we
7 have a brand new Contention to discuss these general
8 propositions, that is fine.

9 JUDGE MILLER: Or modification, or
10 modification. The point has been raised. We have not
11 studied it in that respect. Ms. Weiss says, look, 2 --
12 former 2 -- is not a new Contention. It has been ruled
13 on and so forth.

14 MR. SWANSON: That is correct, but it has been
15 modified.

16 JUDGE MILLER: Are you talking about a new
17 modification, a modification that raises new matters?
18 Is that what you are talking about?

19 MR. SWANSON: I believe -- well, the arguments
20 set forth in the Staff's response is that the
21 modification raises, specifically referring to the
22 phrase "other CDA initiators" as a matter which the
23 Staff believes needs to be refined before the parties
24 can properly be put on notice as to how to prepare for
25 that issue. It is a matter of vagus.

1 JUDGE MILLER: All right, let us identify it
2 now. You tell me that in the revised Contentions, page
3 3, as set forth here, that there are some revisions
4 which fall within the argument as you see it. Is that
5 right?

6 MR. SWANSON: That is correct.

7 JUDGE MILLER: Identify them.

8 MR. SWANSON: Added to the old Contention 2
9 are the words "probability of anticipated transients
10 without scram or other CDA initiators."

11 JUDGE MILLER: Is that all new?

12 MR. SWANSON: Previously the language referred
13 to CDAs having sufficiently low probability. Now we are
14 talking about anticipated transients without scram or
15 other CDA initiators. The probability of them is
16 sufficiently low.

17 Our concern raised in our response is that the
18 phrase "other CDA initiators" needs to be refined and
19 specified in order to make this Contention a litigable
20 contention, one which parties can have adequate notice
21 of what to prepare for in the hearing.

22 Now this does not raise the specter of all of
23 the concerns or objections that one can raise when a new
24 Contention is raised or when a modification is made. I
25 did not mean to imply that. I just was making the

1 suggestion that perhaps now would be as good a time as
2 any, since we are getting into a discussion, to react to
3 the general provisions, considerations that the Board
4 should utilize in deciding whether or not a modification
5 should be allowed or a whole new Contention admitted.

6 If the Board would like us to stick strictly
7 to this Contention, then the concern would solely be
8 related to one of specificity and if the Board would
9 prefer it --

10 JUDGE MILLER: We want to do whatever is
11 practical. We thought first you were going to discuss
12 some propositions which bore upon not only Contention 2
13 but others, but definitely bore upon Contention 2.

14 The objection was made by NRDC that Contention
15 2 is not timeliness of a pleading question such as she
16 thinks you are going to go into and she has raised the
17 question.

18 Now if you are going to go into the timeliness
19 factors, yes, we would rather wait until it was a matter
20 that was --

21 MR. SWANSON: Fine.

22 JUDGE MILLER: Being taken up by the Board as
23 a decisionmaking matter. If, on the other hand, it
24 applies to this and others, tell us why. Go ahead. You
25 have to be the judge of that.

1 MR. SWANSON: I will restrict myself to
2 specificity because that was the only argument the Staff
3 raised in connection with this modification.

4 Simply put, an objection or, excuse me, a
5 modification such as this or any Contention must be
6 sufficiently specified so that it enables the parties to
7 prepare for and come forward with a specific position in
8 testimony on that Contention.

9 Now in the Staff's March 19 response to the
10 Contentions, at page -- starting at -- on pages eight
11 and nine, the Staff sets forth its argument regarding
12 the required specificity for a Contention at this stage
13 of the proceeding. There is a basis requirement in
14 section 2.71 for, as the Staff indicated, to assure that
15 the Contention in question does not suffer from any of
16 the infirmities that the Appeal Board spelled out in its
17 decision regarding the Peach Bottom Atomic Power Station.

18 Among them, the Appeal Board indicated that a
19 Contention must be set forth with sufficient specificity
20 so that the Board can decide whether or not it should be
21 rejected because it may be, for example, an attack on
22 applicable statutory requirements that are challenges of
23 basic Regulatory Commission processes, that it is
24 nothing more than a generalization, that it seems to
25 raise an issue which is not proper for adjudication in

1 the proceeding or does not apply to the facility in
2 question, or that it seeks to raise an issue which is
3 not concrete or litigable.

4 JUDGE MILLER: Okay.

5 MR. SWANSON: The Staff pointed out that in
6 other decisions the Appeal Board has indicated that
7 generalized delegations are going to be disfavored,
8 particularly in a proceeding which is in the latter
9 stages. In other words, the Contention has to be
10 further specified, that there have to be more concrete
11 bases as you get farther along in the proceeding because
12 the parties at that time have the benefit of discovery
13 and other filings to further educate themselves
14 regarding the nature of the Contention and the aspects
15 of it so that it can be specified.

16 The Staff's concern regarding Contention 2, as
17 it previously existed and the words that are proposed
18 here -- "other CDA initiators" -- is that they are
19 sufficiently broad in scope that the same thing could
20 happen that Judge Linenberger raised concern about, and
21 that is we can get to the end of the proceeding and find
22 out that we perhaps did not address all the specifics of
23 the Contention that Intervenors would have us do.

24 All the Staff is indicated in its response is
25 that this is one case where we think the discovery

1 process should be used to further refine the Contention
2 and that at the conclusion of the discovery process that
3 Intervenor should be required to specify what exactly
4 they mean by that Contention and the specific reference
5 in our response, they should indicate what CDA
6 initiators they are concerned with so that the parties
7 have, in fact, an adequate opportunity to prepare for
8 hearing on that issue.

9 JUDGE MILLER: Aren't you confusing a pleading
10 of evidence with a pleading of issues? What you say is
11 perfectly true after discovery in the form of, among
12 other things, a motion for summary disposition, but why
13 in the world do you require them to plead with what you
14 say you want in the way of specificity when they have
15 given you pleadings that raise issues and certainly
16 alerts the Staff and the Applicants to the basis?

17 How do you distinguish this from Allens Creek
18 and other cases where you are not required to -- aren't
19 you asking for concreteness in an evidentiary sense
20 which is not required at a pleading stage?

21 MR. SWANSON: The Staff, unlike Allens Creek,
22 is not arguing that the general concern of anticipated
23 transients without scam or CDA initiators is
24 inappropriate for this proceeding, that it is a
25 frivolous argument. Rather, the concern is that we have

1 sufficient specifics, in other words, we know what kind
2 of accidents we are talking about.

3 JUDGE MILLER: I am repeating my question.
4 Isn't that a matter to be resolved by the Staff's use of
5 discovery and, if appropriate, the filing of a motion
6 for summary disposition rather than raising it now as a
7 pleading matter?

8 MR. SWANSON: I think the concern that the
9 Chairman just expressed is in the motivation for the
10 Staff not coming out with an outright objection at this
11 point.

12 JUDGE MILLER: The Staff does not object to
13 Contention 2 formally, that DBA should include the CDA,
14 accompanied by all the subparagraphs. The Staff does
15 not object to that at this time as a matter of pleading,
16 is that correct?

17 MR. SWANSON: That is correct, provided that
18 the Board at the close of discovery require Intervenors
19 --

20 JUDGE MILLER: Do not bargain with us. This
21 is pleading. We are looking at it now. If you want to
22 file a demur or something of the nature of it, that is
23 one thing, as a pleading, but we do not have to bargain
24 with you as to what is going to happen at the end of
25 discovery.

1 You come in then. So far I do not think the
2 Staff has stated an objection, nor does it intend to, is
3 that correct?

4 MR. SWANSON: Staff indicated on page nine
5 that they had no objection to the Board provisionally
6 admitting Contention 2 with its revised language for the
7 purpose of discovery.

8 JUDGE MILLER: From there on out you are
9 trying to get yourself, I think, a little bit of an
10 edge. You object or you do not as a pleading matter, if
11 I am following you correctly, and I think you are
12 stating it reasonably.

13 What you are saying is not cognizable now as a
14 pleading matter. It may well be when you appropriately
15 have the bones fleshed out by discovery and then you,
16 the Staff, decide what you want to do procedurally,
17 which you are well aware of. But to do or not before us
18 now is just the pleading.

19 MR. SWANSON: If we had to go to hearing
20 tomorrow based on this Contention, it is the Staff's
21 contention that it would be impermissibly vague.

22 JUDGE MILLER: Because you would not have done
23 your work in discovery. That is not saying anything.
24 We know that you are going to find out what the factual
25 and underlying evidentiary bases are. We know that the

1 Staff does competent, professional work. Hence, you
2 would not go to hearing tomorrow with just this
3 Contention and no discovery, so you are giving me an
4 impossible hypothesis.

5 MR. SWANSON: Is the Board then indicating
6 that there will be an opportunity at the close of
7 discovery to entertain motions that the discovery
8 process has not provided the parties with sufficient
9 clarity to refine the Contentions in their own minds, if
10 not on paper, in the Contention itself, and at that time
11 entertain a motion to either strike or modify
12 Contentions?

13 JUDGE MILLER: Why don't you just file
14 yourself a motion for summary disposition supported by
15 appropriate affidavits or whatever facts you have and
16 make your showing? If you cannot do that, what is the
17 point of coming back to refine a pleading which has
18 served its function six months from now?

19 MR. SWANSON: My only concern is that we may
20 not know what to file a motion for summary disposition
21 on in terms of factual supporting bases. That is the
22 concern that we have an opportunity in areas -- I think
23 we only raised this concern in a couple of areas where a
24 Contention is sufficiently broad that there be an
25 opportunity to refine the Contention somewhere down the

1 road, giving the Intervenor a fair opportunity to try
2 to follow up the kind of information they need to refine
3 a contention.

4 JUDGE MILLER: The information, the
5 evidentiary basis, is firmly directed by way of a motion
6 that attacks the showing factually, either in advance of
7 trial by summary disposition, as you are well aware, or
8 -- lord knows, there are enough interrogatories flying
9 around. There probably will be more.

10 You are not going to be in ignorance nor taken
11 by surprise, I would not believe, and you will certainly
12 at that point be filing your own written direct
13 testimony which, if you disagree with the factual bases,
14 you will be going into them.

15 I think, let me put it this way, I think you
16 are right to raise the question now while we are looking
17 at pleadings, which is what we are doing now, when they
18 are attacked by motions. We are looking at mass
19 pleadings. Do they stay? We know the breadth of the
20 rules that the Appeal Board has set forth in Allens
21 Creek and Gulf Stream and so forth, so that is the way
22 we are looking at it at this point.

23 And in the pleadings they do set broad
24 parameters of discovery. We cannot decide now what is
25 admissible. In a trial sense we do not know what the

1 record will be. So we, therefore, take a reasonable,
2 liberal or broad view of discovery by everybody, find
3 out what the facts are. That is what the opportunity is.

4 Then, when you get through, go through. If
5 you think a motion is appropriate on the evidence or
6 whatever, you will do that.

7 Mr. Edgar, did you have a different point?

8 MR. EDGAR: No, sir. I do not have anything
9 to add here. We have not objected to this Contention.

10 JUDGE MILLER: I noticed that. Well, we see
11 no basis for this not being renumbered as drafted in the
12 revised Contentions, pages three, four -- I guess it is
13 three and four formerly, and in that document
14 denominated Contention 2. Now, because of the action
15 taken on the preceding Contention, it will be known in
16 the record as Contention 1, and Ms. Weiss, on behalf of
17 the Intervenor, will supply the authenticated copy.

18 I take it you would rather do that than read
19 it into the record, Ms. Weiss, is that true?

20 MS. WEISS: I am sorry, Mr. Chairman.

21 JUDGE MILLER: I say, would you rather
22 undertake in a reasonable fashion to supply the reporter
23 with the wording of the new Contention 1 in view of all
24 of the discussion and have it physically incorporated
25 into the record?

1 MS. WEISS: Yes, I guess I would rather do
2 that since we have so much on the agenda. Why spend
3 time reading?

4 JUDGE MILLER: Okay, fine. I think that would
5 probably be easier. If you will do that on all, then we
6 will wind up with a series of Contentions that are ruled
7 upon where rulings are possible at this time by the
8 Board, revised if discussions indicated, but anyway they
9 are going to be, then, the Contentions which will
10 filed. And those that we cannot rule on, the Board will
11 undertake, then, to supply those, perhaps with a
12 different numbering in order to go sequentially to the
13 reporter so they may be bound into the record and we all
14 have in a certain transcript the Contentions so we know
15 what we are working on and so we know what the scope of
16 discovery is and maybe avoid a lot of motions.

17 MR. EDGAR: Could I make another suggestion?
18 Maybe we could just hold the transcript for a little
19 while and have this as an appendix to the transcript or
20 something separate. I would hate to leaf through each
21 page.

22 JUDGE MILLER: Yes. We want them in one
23 place. However, we do not want to drag it around and
24 where we are ruling we would just as soon have Ms.
25 Weiss, at her convenience, turn it in. We will wind up

1 with a transcript which will have an appendix or
2 following pages so-and-so will have 1, 2, 3, 4 of the
3 newly renumbered and perhaps revised Contentions which
4 will govern from there on out.

5 All right. The next one is former number 3 --
6 hold it, too fast -- number 2.

7 JUDGE LINENBERGER: The Board would like to
8 find out from Intervenors with respect to paragraph
9 2(b), or it is now Contention 1, for this discussion let
10 us refer to them the way they are.

11 Paragraph 2(b) talks about the capability of
12 eliminating CDAs as DBAs. Now the meaning of the word
13 "eliminating" is not clear in the Board's mind. Does
14 that mean reduce the occurrence, the probability of
15 occurrence of a CDA to a very low number, or does it
16 mean -- do you mean that you want it demonstrated that a
17 CDA absolutely cannot occur?

18 MS. WEISS: The former, Mr. Linenberger, means
19 reducing or showing evidence such that the Board can
20 conclude it has reasonable assurance that the
21 probability of CDA is so low as to justify its exclusion
22 from the design basis.

23 JUDGE LINENBERGER: Okay. At paragraph 2(b)
24 there are subparagraphs 1 and 2 and although they do not
25 contain very many of the same words, it is not clear to

1 the Board what is the difference in intent of those
2 two. And it is also not clear to the Board why those
3 two should not be consolidated. That is on page four,
4 Arabic numbers 1 and 2.

5 The Board reads those as both arriving at the
6 same punch line, if you will.

7 (Pause.)

8 MS. WEISS: I will try this one, and if I make
9 some egregious error I am sure Dr. Cochran will let me
10 know. I think the distinction that is intended to be
11 there -- I know the distinction is intended to be there
12 between subparts 1 and 2.

13 Subpart 1 goes to the fault trees and event
14 trees that appear, actually appear, in the analyses and
15 it says that those are not properly done. Subpart 2
16 raises the question of the scope of the analysis. In
17 other words, you have not done all the fault trees and
18 event trees that you should have done, that there are
19 certain failure modes which are not included within the
20 analysis that should be.

21 So, in other words, 1 kind of takes the
22 analysis as it is and it says that you have not got
23 sufficient data to justify what you did, you know, and 2
24 says your analysis did not go far enough, that there are
25 certain failure modes that simply are not included in

1 there at all that should have been

2 JUDGE LINENBERGER: And you consider this to
3 be distinctly different allegations, I gather.

4 MS. WEISS: Well, they are conceptually
5 different. It is not inconceivable that one could
6 phrase a Contention in a way to include both. In fact,
7 I am sure we could.

8 JUDGE LINENBERGER: All right.

9 MS. WEISS: I think it might be more rather
10 than less confusing.

11 JUDGE LINENBERGER: Paragraph 3, same page,
12 has the term "sufficiently low", again quite
13 unquantified. Is this something that Intervenors intend
14 to attempt to quantify as a result of discovery before
15 this Contention is finally refined or is sufficiently low
16 to endure as it is and go into hearing on?

17 MS. WEISS: We are attempting to learn via
18 discovery what the Staff and Applicants' bases are for
19 claiming that the CDAs are of low probability and to get
20 exactly information on what that probability is, you
21 know, give some quantitative definition to "sufficiently
22 low".

23 In other words, we are trying to define that
24 term and to seek the technical bases behind that term.
25 Of course, part of -- and we will use that information

1 as we develop our evidence or our cross examination.

2 Of course, part of the argument that we will
3 ultimately be bringing to the Board is that there is not
4 sufficient technical bases presented by the Staff or
5 Applicant to reach a judgment as to what the probability
6 of such accidents are, so that will be part of the case.

7 JUDGE LINENBERGER: Okay. I think in the
8 interest of saving you time here, I will just say that
9 this document contains numerous examples of phrases such
10 as that -- "sufficiently low", "inadequate", and so
11 forth. That seems to me represents a situation where
12 Intervenor himself is going to have difficulty knowing
13 what his target is and the Board is certainly going to
14 have difficulty knowing how wide the target was missed
15 if we do not even know what the target looks like.

16 So I will not bring each of these up, but keep
17 in mind that the Board is going to be very unhappy
18 ultimately admitting Contentions that have such
19 unquantitative language in them.

20 MS. WEISS: Let me just say, Dr. Linenberger,
21 that each time that phrase is used or a phrase like that
22 is used, it is because of the absence of any
23 quantitative content to the assertion of the adversary
24 party which we are challenging.

25 We would be a great deal happier if we could

1 appear before you today and we knew that the Staff was
2 claiming that they brought the probability of CDA down
3 to one in 10⁻⁶ per reactor year. It would give us a
4 number to nibble over and to probe.

5 But the essence of this case is those numbers
6 have not been made available yet.

7 JUDGE MILLER: We assume, then, that by the
8 process of discovery NRDC does intend to render more
9 concrete some of these terms, such as "reasonable" or
10 "as much as" or whatever?

11 MS. WEISS: We certainly intend to find out
12 what the Staff means by them, yes.

13 JUDGE MILLER: Yes. You have ongoing
14 discovery directed in part to those matters.

15 MS. WEISS: Yes.

16 JUDGE MILLER: All right. In that event,
17 former Contention 3 is now renumbered as Contention 2.
18 That is as set forth -- I am sorry. Former Contention 2
19 is now renumbered 1. It starts on page three and
20 continues through page four. It consists of
21 subdivisions (a), (b), (c) -- wait a minute. Sorry.
22 (a), (b), (1), (2), (3), (4), and in the form it will be
23 filed with the reporter by Ms. Weiss.

24 Anything further on that one?

25 (No response.)

1 We will now go to former Contention 3, which
2 appears on page five of NRDC's revised statement of
3 Contentions, and we note that there are objections to
4 certain portions, at any rate, by both the Staff and the
5 Applicants.

6 Would it be faster, therefore, to us to have
7 one or the other counsel representing those parties to
8 go forward with their objections? I take it you have
9 had a chance to read the objections, haven't you, Ms.
10 Weiss?

11 MS. WEISS: We have provided a document, the
12 response to those objections, yes.

13 JUDGE MILLER: Yes, I have it.

14 Okay, go ahead.

15 MR. EDGAR: Mr. Chairman, we have two
16 objections on Contention 3. The first deals with
17 Contentions 3(d) and 3(h). Those are on page five of
18 our March 19 response to the Intervenors revised bases.
19 We have the two Contentions quoted.

20 Our objection is a simple one, that the
21 Contentions are duplicative. They are redundant and,
22 therefore, they are unnecessary. If they are necessary,
23 then we have a real problem because we have a hidden
24 agenda. So all we are suggesting is that one of the
25 Contentions should be ruled out, i.e., Contention 3(d).

1 Our other objection is of a similar kind. It
2 relates to Contention 3(e). We address it and quote the
3 Contention at page six of our March 19 filing.
4 Contention 3(e) is duplicative of Contention 8(d). It
5 is, therefore, unnecessary -- if it is necessary then e
6 have, again, a hidden agenda and we think that
7 Contention 3(e) should be ruled out.

8 JUDGE MILLER: Okay. Staff?

9 MR. SWANSON: The Staff had a similar
10 objection to the introduction of the subparts referenced
11 by the Applicant. We might mention that Intervenors, I
12 think, concede that this is true, that they do duplicate
13 but wish to set them forth as part of a logical argument
14 which we think it is fair to do in their ultimate
15 findings, but I do not see the need for adding duplicate
16 Contentions in the list of Contentions that we have to
17 prepare for and perhaps prepare testimony for.

18 And since there is the real possibility that
19 something perhaps unforeseen at this time could at a
20 late date be interpreted into those sections. The Staff
21 also objected to certain phrases in the introduction and
22 in section (c) of that Contention.

23 The Staff objects in the introduction to
24 adding the phrase "performing the NEPA cost-benefit
25 analysis." The Intervenors in -- the basis for that is

1 set forth in our March 19 document. We set it as a
2 scope which was not originally in Contention 3.

3 We believe that as previously admitted the
4 Contention was limited to a consideration of whether or
5 not the consequences of CDAs, as contained in the PSAR,
6 was adequate. We now have that element of the
7 Contention and, in addition, we have a NEPA cost-benefit
8 analysis consideration to be concerned with.

9 Intervenors, in response to our objection, in
10 their March 31 document at page one, I think engage in a
11 nice bit of circular reasoning. They point to the
12 language for the purposes of licensing in their
13 Contention and argue well, that obviously include NEPA.
14 Well, that language for the purpose of licensing, did
15 not exist in the original Contention.

16 If you look at the March 12 submission --
17 excuse me, February 12 submission by NRDC of their old
18 Contentions, Contention 3 you do not see that language
19 for the purposes of licensing in the Contention. That
20 was added in the new one and we do not object to adding
21 that language provided that there is an explicit
22 determination by the Board that the modifying language
23 -- "performing the NEPA cost-benefit analysis" -- is not
24 added so that this Contention remains as it was before.

25 Consideration of the safety analysis contained

1 in the PSAR is adequate and the Staff, of course, would
2 concede that the Staff analysis of that same aspect is
3 relevant as well. So we do not object to adding the
4 reference to the Staff, but the expansion of the
5 Contention to include a NEPA cost-benefit analysis we
6 believe impermissibly expands the scope of that
7 Contention for which no good cause has been raised.

8 Similarly, the addition of the term "pathway
9 analysis" at the end of sub-contention 3(b) -- excuse
10 me, 3(c), creates the same problem. It expands the
11 Contention, we think, in a manner which was not
12 encompassed in the original Contention.

13 I might just add parenthetically the Staff
14 believes that there are other aspects -- that is has no
15 objection to the addition of parts 3(a), 3(b) or the
16 rest of 3(c), which is a rewording of the old
17 Contention, but we believe it is not objectionable.

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1 JUDGE MILLER: Ms. Weiss.

2 MS. WEISS: Mr. Chairman, I will respond to
3 the objections sort of as they chronologically appear
4 through the document. As far as the Staff's complaint
5 about adding the language "performing the NEPA
6 cost-benefit balance," we went through a process of
7 negotiating these contentions for a couple of weeks, and
8 to some extent we get whip-sawed now because we provided
9 greater specificity in response to one party's
10 objection, and the other party claims it impermissibly
11 exanded the scope.

12 But in any case, the language, "The analyses
13 of CDAs and their consequences by Applicant and Staff
14 are inadequate for the purpose of licensing the CRBR"
15 was the language proposed by the Applicant. I think to
16 some extent it is a tempest in a teapot. I do not
17 believe it expands the scope of the proceeding at all to
18 specifically add the language "for purposes of
19 performing the NEPA cost-benefit balance." It is
20 something the Board is going to have to do, it is going
21 to have to do before it issues an LWA, and if the
22 analyses show that CBAs have been impermissibly excluded
23 for purposes of the safety analysis, that is going to
24 change the way you task the cost-benefit balance whether
25 we have a contention in or not. So this really adds to

1 the specificity of the issue rather than expanding the
2 scope of the hearing in any way.

3 I think the vagueness objection which the
4 Staff raises is really frivolous in light of the
5 specificity contained in 3(a) through (h). I think they
6 have rarely had the basis for a contention spelled out
7 in such specificity. We laid out precisely why we
8 believe the analysis of CDAs and their consequences are
9 inadequate, and I will point out that the Applicants do
10 not object to that aspect of the contention.

11 The Staff objects to the addition of the
12 language "pathway analysis" to 3(c). Again, this is
13 specifically language that was suggested by the
14 Applicant in order to add specificity to the contention.

15 Both the Staff and Applicants object to 3(e)
16 on the grounds that it is duplicative of Contention 8(d).

17 JUDGE MILLER: What about the duplicative part?

18 MS. WEISS: We concede it is. It raises no
19 factual issues not contained in 8(d). We laid out
20 Contention (d) with its subparts in such a way as to
21 provide a logical and coherent progression to the
22 arguments that we believe support the contention, and we
23 would simply ask the Board to permit us sufficient
24 latitude in drafting these contentions so as to enable
25 the Board to follow their logical thread. That is what

1 we have attempted to do here, even if there is some
2 overlap. But we assure the parties and the Board that
3 there is no intent to raise a new issue secretly or to
4 mousetrap anybody.

5 The Applicant also claims that 3(d) and 3(h)
6 are duplicative and he worries about a hidden agenda.
7 There is no hidden agenda. 3(h) is intended to pull
8 together all of the arguments under 3 into the ultimate
9 conclusion, essentially. It does not raise anything
10 new. But again, we do not believe that any NRC rule
11 should prevent us from presenting the contention in its
12 logical flow even if each subpart is not without
13 overlap. I do not see that as a question of
14 admissibility but a question of organization.

15 JUDGE MILLER: Having set it forth in terms of
16 the logical flow, as you described it, why is that not
17 sufficient for your purposes to have the issue one that
18 will be addressed by all the parties and ultimately the
19 Board?

20 MS. WEISS: Are you referring to the
21 additional language "the NEPA cost-benefit balance"?

22 JUDGE MILLER: Yes.

23 MS. WEISS: Well, I suppose so long as it is
24 understood at this point by all parties that that is an
25 issue which flows, that is a licensing question. The

1 issues this contention raises are the adequacy of the
2 analysis of CBA for purposes of licensing the breeder
3 and that performing the cost-benefit analysis is part of
4 licensing the breeder.

5 You know, I suppose you could take it out, but
6 I do not see what good it would do. It is a heck of a
7 lot clearer if it is in. It is not going to change the
8 scope of anybody's responsibility.

9 JUDGE MILLER: What about the other
10 duplications that are referred to and that you refer to
11 also, 8(d), for example?

12 MS. WEISS: Well, essentially, Mr. Chairman,
13 we are at your pleasure. We concede that they overlap.
14 While we concede that 8(d) and 3(e) raise the same
15 issues, and we concede that 3(h) raises no issues not
16 raised by 3(d) or other subparts, we would prefer that
17 the contention remain stated as it is because we think
18 that presents the arguments in their logical
19 progression. We do not see that there is any rule that
20 requires this Board to strike every last overlap between
21 contentions. We think we ought to have that latitude.
22 But, you know, it is essentially at the Board's pleasure
23 how they want to handle it.

24 [Board conferring.]

25 JUDGE MILLER: Why do you seek to have it in

1 the flow of argument? You do not want contentions to be
2 argumentative, do you?

3 MS. WEISS: It is not always clear, I do not
4 think. It is not always self-evident, I will not say it
5 is not always clear. It is not always self-evident how
6 particular factual findings support conclusions or how
7 they work together to lead to conclusions, in this case,
8 what is the basis for the source term, for example.
9 There are a lot of parts that go into how one reaches
10 that conclusion, and we just think as a matter of
11 clarity this is how we will argue the issues.

12 JUDGE MILLER: All right. I think we will
13 just leave it as it is. We recognize the objections and
14 the bases for them. We have a feeling that it does not
15 really harm anyone. If it promotes a little more
16 clarity, fine. We do not see that it could really be
17 harmful to either the Applicants or the Staff. So in
18 that event, we will overrule the objections to formerly
19 Contention No. 3, which will thereupon be renumbered
20 Contention 2.

21 MR. SWANSON: Could I get a clarification from
22 the Board? Could the Board explain their basis for
23 allowing in the two subparts that were duplicates? I do
24 not understand the Board's interpretation of the first
25 part, the introduction of the contention or the one --

1 JUDGE MILLER: We do not think it really
2 matters much. We think that in any event we are going
3 to have to make those findings and that determination
4 ultimately, and therefore for the purposes of licensing
5 to licensee's CRBR, the Staff knows very well what the
6 findings have to be.

7 MR. SWANSON: I understand that. I agree. The
8 problem is that language was not in the original
9 contention. I just wanted to make sure I understood.

10 JUDGE MILLER: We are raising something of
11 significance initially, and to prejudice the Staff or
12 someone secondly, then we would be inclined to give more
13 weight to it. But we are adopting now contentions which
14 phrase as they are ultimately going to be tried. If
15 they are reasonably clear and they do not harm the Staff
16 or anyone in terms of either discovery or trial
17 preparation of presentation, clarity is always to be
18 desired. We have enough words anyway. We do not see
19 that it is harmful. Now, if it could really hurt you
20 somewhere, you had better tell us, but we have not
21 really discerned that from your argument.

22 [Counsel for NRC Staff conferring.]

23 MR. SWANSON: The Staff has nothing further to
24 add.

25 JUDGE MILLER: Very well. Contention 2 is

1 admitted.

2 JUDGE LINENBERGER: Before we leave Contention
3 2, Judge Miller, I should like a clarification. This is
4 what is now Contention 2, subparagraph (b) on page 5. It
5 starts with -- that subparagraph begins with a premise
6 or an assumption which really relates to something which
7 was previously alleged in the Contention 2. Now, I note
8 this only because so far as the mechanics of the hearing
9 are concerned, it would appear to this member of the
10 Board that before going into subparagraph (b) there is a
11 logical harkening back to whether the thrust of
12 Contention 2 that forms the premise for this
13 subparagraph has indeed been met. I make that
14 observation for whatever guidance it offers you.

15 MS. WEISS: You are absolutely right, Dr.
16 Linenberger. We feel if we prevail on Contention 2,
17 that we have prevailed, ergo, on Contention 3, and the
18 other way around. If we lose on 2, we have lost on 3.

19 JUDGE LINENBERGER: That is all I have.

20 JUDGE MILLER: All right.

21 There being nothing further --

22 MS. WEISS: I am being asked to modify that
23 last statement.

24 JUDGE MILLER: Okay.

25 [Counsel for Intervenors conferring.]

1 MS. WEISS: They decided I was not wrong.

2 JUDGE MILLER: I'm glad.

3 [Laughter.]

4 This might be a convenient point, but
5 remember, the clock is five minutes fast. It is 12:25.
6 We will recess until 2:00. We realize you have certain
7 chores you might be able to get around to as well as
8 having lunch.

9 We will resume at 2:00.

10 [Whereupon, at 12:25 p.m. the prehearinag
11 conference recessed, to reconvene at 2:00 p.m. the same
12 day.]

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AFTERNOON SESSION

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(2:00 p.m.)

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JUDGE MILLER: All right, we will resume the
4 conference with parties and counsel. First of all,
5 Judge Linenberger has an announcement with regard to the
6 classified or security matter.

7

JUDGE LINENBERGER: Well, I was just contacted
8 a few moments ago by Mr. Whipp from the NRC Security
9 Division who advised us that the Department of Energy
10 has confirmed that the documents in question that we had
11 discussed at the opening this morning have, indeed, been
12 declassified, albeit they were not so marked, which was
13 an error. But nevertheless, they are declassified so
14 there is no need for any special handling of them.

15

Furthermore, I asked Mr. Whipp to give us
16 something in writing for the record on that so that it
17 is formally documented. Thank you.

18

JUDGE MILLER: I take it that we can proceed
19 to re-attach this formerly classified material to our
20 respective pleadings. That is the closest I have ever
21 gotten, since I have been with NRC to classified or
22 Secret information. I feel a little flattered, but as
23 much as it has been declassified, we will not have to
24 worry about it anymore in that sense.

25

Let me also have the record show that Judge

1 Caiet Hand, the third member of the Board, is involved
2 in a matter that is going to take him a month or so at
3 the University of California, at the Bodega Bay
4 laboratory. He therefore has asked us to proceed in
5 this matter by quorum, which is what we are doing.
6 Judge Linenberger and I are proceeding by quorum, which
7 is permitted under our regulations.

8 Now, I believe we are ready to take up, are we
9 not, contention four, as originally numbered. Is that
10 where we are?

11 MS. WEISS: Yes.

12 JUDGE MILLER: What are the staff's
13 objections? Maybe you do not object. Human error?

14 MR. SWANSON: The staff's concern was related
15 solely to subpart (d)(4), that dealing with human
16 error. It is the same type of concern we expressed
17 earlier in connection with contention two; that is,
18 there was a term that we felt was vague. It was -- in
19 this case I think it suggests an area which is almost
20 boundless in its potential scope. We think it needs to
21 be refined for it to be a contention suitable for
22 litigation. We are confining our remarks to the new
23 phrase "human error."

24 JUDGE LINENBERGER: Excuse me, Judge Miller.
25 To help my own thought processes here, I should like to

1 have intervenors explain something. Contention four is
2 the first contention where we have the phrase "for the
3 following reasons," and therefore, I personally have
4 inferred from that that subparagraphs (a) through (d)
5 constitute bases rather than formal elements of the
6 contention. Is that correct?

7 MS. WEISS: That is how it was intended, Judge
8 Linenberger.

9 JUDGE LINENBERGER: Thank you.

10 JUDGE MILLER: The applicants?

11 MR. EDGAR: We have a similar objection to
12 that of the NRC staff. Essentially, our position
13 revolves around the fact that we think that this
14 contention, insofar as it involves human error, gives
15 insufficient notice to determine how we might respond.
16 We think that it lacks specificity and in particular, to
17 the extent that it refers or makes reference to Three
18 Mile Island documents, and in particular, those on page
19 28 of NRC's revised basis for its contentions.

20 We have a vacuum, in fact, here. There is no
21 nexus of those documents to CRBR or the contention
22 itself. We cannot read NRC's mind as to their view of
23 human error and how it relates to the contention. Thus,
24 we think absent more specification of the particular
25 type of human error and how it relates to the

1 contention, we find ourselves at a loss to respond or to
2 prepare to respond to this contention.

3 MS. WEISS: Yes, Mr. Chairman. Lack of
4 specificity and lack of nexus, as I understand it, and I
5 think that the two are interrelated. So I will just try
6 and explain what the basis for having this issue was and
7 how we think it is connected to the breeder.

8 The basic point of the references that we gave
9 in our basis for the contention is that one of the basic
10 lessons learned from the TMI accident was that human
11 error plays an important role in causation, aggravation
12 and mitigation of accidents, and that that role has
13 previously been overlooked generally in the licensing of
14 reactors, and we have given citations on page 3 of our
15 pleading to document and support both of those
16 assertions.

17 Let me tie it -- provide the nexus at this
18 point. The draft environmental impact statement of
19 December 1981, DOE draft EIS, on pages 120 to 121 notes
20 that a major open question is the quantitative
21 reliability of plant shutdown and decay heat removal
22 systems for the breeder, and that the reliability
23 analysis model, the computer codes which one uses to
24 determine that reliability, have recently been improved
25 by the incorporation of capabilities to handle such

1 elements as "human error" and dependency, and the
2 document goes on to claim that these improvements are
3 claimed to increase the confidence in the modeling
4 results.

5 In our mind, this establishes clearly that
6 human error has a potential to have an important impact
7 on the reliability analysis models used for the
8 breeder. And, of course, that directly implicates the
9 lessons learned from TMI.

10 As for --

11 JUDGE MILLER: The Board is inclined to
12 believe that there is enough matter here to be
13 considered. We will overrule the objections to
14 contention four and ask that intervenors supply that
15 contention as phrased, along with the others, to the
16 reporter.

17 All right. That will be, then -- will now be
18 newly-numbered contention 3, by the way. We will now
19 take up contention five as numbered in the NRDC's
20 Statement of Contentions, page 8, and we will ask for
21 the applicants and staff to state the bases of their
22 objections.

23 Was there an objection by the applicant?

24 MR. EDGAR: We have not objected to contention
25 five as it is stated.

1 JUDGE MILLER: Well, since we have been pretty
2 broad today, do you want to state an objection so that
3 you have the matter resolved by the Board?

4 MR. EDGAR: No. I think you will find,
5 though, within the ambit of our discussions, which we
6 will have over the next day or perhaps tomorrow on
7 discovery, that we have some fundamental disagreements
8 about what the scope of this contention, in fact, is.

9 JUDGE MILLER: Of this particular contention
10 now designated as number five?

11 MR. EDGAR: That is correct. Now, -- and so I
12 want to be sure that I draw the distinction. I am not
13 quibbling with the language and the admission of the
14 contention as a matter of pleading. I am strongly
15 opposed to the construction placed on the contention in
16 the discovery process.

17 JUDGE MILLER: When do you wish to take that
18 up?

19 MR. EDGAR: Well, at such time as the Board
20 wishes to address our two pending motions.

21 JUDGE MILLER: All right, which would follow
22 our review of contentions unless you want to bring them
23 out especially.

24 MR. EDGAR: My feeling would be that it would
25 be a little more orderly if we went through contentions

1 first.

2 JUDGE MILLER: All right. Because then we
3 have established parameters. You may then discuss their
4 applicability. All right, then. I do not believe that
5 the staff really objects to it as a pleading matter
6 either, is that correct?

7 MR. SWANSON: No, we do not.

8 JUDGE MILLER: All right, then, contention --
9 pardon me.

10 JUDGE LINENBERGER: Mr. Chairman, before we
11 rule, I should like to ask intervenors for an
12 explanation of certain language which appears at page 9,
13 item (b), which says that plutonium in an easily-usable
14 form will be available in substantial quantities at the
15 CRBR and supporting fuel cycle facilities.

16 Now in the first place, I should like to
17 understand what intervenors mean by the word
18 "available". Do they mean that quantities of material
19 will exist at these facilities, or do they mean that
20 quantities of material are available in the sense that
21 somebody can drop by and walk in and pick it up at their
22 leisure or at their whim? What does the word
23 "available" mean?

24 MR. GREENBERG: Well, let me put it in my own
25 words what I construe the term to mean. What we mean by

1 available is that plutonium will be present at the
2 facility, and there is some risk associated with that
3 presence. The risk of theft or sabotage.

4 JUDGE LINENBERGER: So the word "available" is
5 not a characterization on your part of --

6 MR. GREENBERG: To the public, that sort of
7 thing.

8 JUDGE LINENBERGER: All right. Now, that goes
9 to the word "available." Now the phrase "at supporting
10 fuel cycle facilities" gives me a bit of pause here. It
11 is not entirely clear to me at this point how this
12 material is managed from a security point of view at
13 fuel cycle facilities, how that comes within the purview
14 of this proceeding.

15 Does the staff have a position on that? Does
16 the staff consider that the handling of plutonium at
17 fuel cycle facilities is within the purview of this
18 proceeding?

19 MR. JONES: As part of the environmental
20 review, the staff will be looking at the environmental
21 effects of safeguard programs that could be attributed
22 directly to Clinch River. However, it is not the
23 staff's intention to get into the adequacy or details of
24 safeguards at those facilities, so I guess to that
25 extent, we would not be getting into the actual

1 safeguards details at the fuel cycle facilities.

2 JUDGE LINENBERGER: All right, sir. Now, one
3 other point here with respect to this contention, Mr.
4 Chairman.

5 Paragraph (a) at the top of page 9, it seems
6 to me does nothing more than state that weapons can be
7 built, nuclear devices can be built, if you have enough
8 plutonium to do it. That seems to me to be almost a
9 truism that the parties ought to be willing to stipulate
10 to. I do not understand its role here as a contention.
11 Perhaps intervenors can enlighten me.

12 MR. GREENBERG: Well, we were -- Judge
13 Linenberger, we were trying to describe the risks and
14 consequences of the use of plutonium at this facility.
15 It seemed to us necessary to state it even though it may
16 be obvious that small quantities of plutonium can be
17 converted into explicit devices, and that those devices,
18 if actually detonated, would cause substantial
19 destruction.

20 There has been a debate, as you may be aware,
21 in the past about how much destruction plutonium -- a
22 crude plutonium device might or might not cause, and in
23 fact, that issue has been addressed by the staff in the
24 final environmental statement. There may be some
25 dispute during the course of the proceeding about the

1 nature and extent of damage that could be caused, and
2 there also has been debate in the past about how
3 difficult it is to manufacture a crude explicit device.

4 JUDGE LINENBERGER: Well, sir, I guess my
5 problem is, does the thrust of this paragraph (a) go to
6 whether plutonium can be used in this way, or does it go
7 to whether the Clinch River breeder reactor project will
8 in some way make it more readily possible for somebody
9 to do this kind of thing?

10 MR. GREENBERG: I think we are necessarily
11 limited to the Clinch River breeder project and
12 supporting fuel cycle facilities, and I want to
13 emphasize the point that when this contention was
14 initially admitted it was our position and the staff's
15 position that we were not limited to the reactor plant
16 itself. We were discussing the impacts associated with
17 the use of plutonium throughout this particular fuel
18 cycle for this particular project.

19 JUDGE LINENBERGER: I guess I missed the
20 answer to my question, somehow. Is the contention
21 alleging that material handling procedures,
22 accountability, security and so forth, are inadequate --
23 and here I am using a word that I fussed at you for
24 using -- are inadequate to protect plutonium? Or is the
25 thrust of this paragraph (a) that somebody can do that

1 with plutonium if they get their hands on it?

2 MR. GREENBERG: This contention as admitted is
3 focused on risks and benefits on the NEPA cost-benefit
4 analysis, and it seems to us essential to look at the
5 risks even under current regulations that small
6 quantities of plutonium could be converted into a
7 nuclear explosive device. That is necessarily, it seems
8 to me, one of the foci we will have in the hearing.

9 JUDGE LINENBERGER: All right, sir, thank you.

10 (Board conferring.)

11 JUDGE MILLER: The Board is considering the
12 discussion we just had eliminates the meaning of the
13 parties in their interpretation of this contention. The
14 Board therefore holds that the former contention five,
15 renumbered contention four, is admitted and will be
16 supplied for the record.

17 We turn now to originally numbered contention
18 six, Alternative Site Meteorology and the like. Staff
19 and applicants have both filed objections. Do you wish
20 to be heard?

21 MR. EDGAR: We, the applicants, have three
22 objections to this contention. They are set forth at
23 pages 9 through 15 of our March 19 filing. There are
24 three separate objections. The first has to do with
25 six, generally. The second has to do with 6(b) as in

1 baker, and the third has to do with 6(c) as in Charlie.

2 As to the first objection which goes to the
3 form of the contention, I note at page 5 of NRDC's
4 Response to our objections, that NRDC is willing to
5 reinsert the language for the following reasons, in
6 which case I think the objection is moot.

7 JUDGE MILLER: Is that correct?

8 MS. WEISS: Yes, Mr. Chairman.

9 JUDGE MILLER: Let us make that correction
10 right now. We will not have to bother with it further.
11 Dictate or tell us what the new -- or, what the revision
12 will be, please, Ms. Weiss.

13 MS. WEISS: The contention which is now
14 numbered six and if admitted would be number five, would
15 read under this agreement as follows: Neither
16 applicants nor staff have established that the site
17 selected for the CRBR provides adequate protection for
18 the public health and safety, the environment, national
19 security and national energy supplies; and an
20 alternative site would be preferable for the following
21 reasons: -- and then there is (b) with subparts 1, 2
22 and 3, and a letter (c).

23 JUDGE MILLER: All right, we will consider the
24 contention as now revised. All right. Your next
25 objection, then, Mr. Edgar.

1 MR. EDGAR: Turning to our objection as to
2 contention 6(b), our argument on that point appears at
3 pages 10 through 13 of our March 19 filing. In essence,
4 what we have here is an attempt by NRDC to inject the
5 term "and concept of population density" into the old
6 contention six.

7 Now, in a word, our position on this one is
8 that they cannot have it both ways. NRDC's revised
9 basis -- and if you look at page 11 of their revised
10 basis here, you will see -- or if you look at page 11 of
11 our pleading, we quote from their revised basis, -- you
12 will see that the concept of population density in
13 regard to this contention arose from the fiscal year
14 1980 NRC Authorization Act.

15 Now, in fact, the fiscal year 1980 NRC
16 Authorization Act grandfathered Clinch River. So if
17 that is the source of the concept and the source of
18 inserting the population density idea into the
19 contention, it is irrelevant to Clinch River.

20 Now, if on the other hand -- and I would call
21 your attention to NRDC's response to our objection at
22 page 6 -- if, in fact, as they state that NRC has a
23 pre-existing obligation to examine site suitability on a
24 case-by-case basis, and as compared with alternatives,
25 if that is true and indeed, that is their position, and

1 that the injection of population density can be done
2 independent of the FY1980 Authorization Act, then the
3 point is if that is a pre-existing obligation, then why
4 was it not pleaded before?

5 If this is not a new idea, then it should have
6 been in the contention in the first place. So I would
7 submit to you that they cannot have it both ways. If
8 this arises from the remote siting concept, which was
9 generated by the FY1980 Authorization Act, then it does
10 not apply to Clinch River, it is irrelevant and it
11 should not be admitted.

12 JUDGE MILLER: All right, does staff have
13 anything further on that point?

14 MR. SWANSON: Relating solely to 6(b), we just
15 noticed that there are, I think, four different times
16 when word or words similar to that are inserted in 6(b),
17 including 6(b)(3) at the very end where they have
18 changed the wording from "more favorable meteorology" to
19 "more favorable characteristics", a broader term. So
20 that in each of the four cases, population density is
21 mentioned, plus favorable characteristics at the end of
22 Section (b). We have the same objection.

23 Just one final comment in rebuttal to the NRDC
24 argument on page 5. They explain that it is apparent
25 that the language "population" simply makes what was

1 implicit in the issue and that is the relevance of doses
2 that the population -- it could be that that is what
3 they would like to ultimately argue or wish they had
4 argued, but the word "doses" did not appear in the
5 original contention.

6 So to insert a meaning of doses into the old
7 contention and then to argue that population was an
8 implicit factor in determining doses, that again is going
9 into a pattern of circular reasoning. The population
10 factor was not an element of the original contention
11 six, and there simply has not been good cause shown for
12 inserting it at this time.

13 JUDGE MILLER: Ms. Weiss?

14 MS. WEISS: I find that last argument
15 strange. What do you look at meteorology for? It is
16 not because you do not want to license a plant where it
17 rains a lot. It is because you do not want to license a
18 plant where the meteorological characteristics are such
19 that people that live around there might get large
20 doses. That is the reason why you look at meteorology.
21 That argument is peculiar, at best, to me.

22 I do think it was implicit in the original
23 contention. The only relevance of meteorology is how it
24 affects doses of radiation to people, and I am quite
25 sure that the staff, at least the technical people,

1 understand that that is why they go through that exercise.
2 Nonetheless, if the Board thinks that adds
3 something new, we point to post-TMI developments and, of
4 course, they do not show that -- the point of raising
5 the post-TMI developments is not that for the very time,
6 one looks at population in siting. One always looked at
7 populating in siting. The issue is what weight do you
8 give to that factor, and we think that the citations
9 that we have given -- and we have offered quite a few of
10 them on page 6 of our response to the objections to the
11 contention -- make it clear that TMI was an accident
12 which threatened to release an amount of radiation
13 greatly in excess of those previously expected, and that
14 raised questions in many aspects of licensing about
15 whether population had been adequately considered in
16 siting, in emergency planning, et cetera.

17 The fact that pending applications including
18 the CRBR application were grandfathered is irrelevant.
19 This Board will have to determine site suitability. It
20 will have to look at population density as part of that,
21 and we argue to you that new developments since this
22 case was closed -- i.e., TMI -- affect the weight that
23 one gives to population density, and that that provides
24 good cause for us to add that as a factor if the Board
25 feels it necessary to rule that it was not already

1 implicit in the contention.

2 There is an additional objection by the
3 licensee to the addition of a reference to the Y-12
4 plant.

5 JUDGE MILLER: Let's do that separately.

6 MR. EDGAR: That is the next one.

7 (Board conferring.)

8 MR. EDGAR: I wonder if I might add one thing
9 to this.

10 JUDGE MILLER: Yes.

11 MR. EDGAR: I think it is important that the
12 Board focus -- we tried to set it out at page 11 of our
13 response, but if you go to page 29 of NRDC's revises
14 bases and let's look at the reality --

15 JUDGE MILLER: What page was that?

16 MR. EDGAR: Page 29 of NRDC's March 5th
17 revised bases and let's talk about the realities of what
18 we are trying to get into here.

19 On page 29 under 6(b) it says, the basis for
20 this addition is new information relating to the
21 appropriateness of remote siting. And then it goes down
22 the list, five items, all of which are TMI-type siting
23 items. But significantly, there is a footnote number 2
24 attached to item 5 on page 30, and you read down into
25 that footnote, and it says that the proposed rules

1 referred to above arose from the requirements of the
2 Authorization Act.

3 This is an attempt to take a whole series of
4 siting, -- of possible siting changes and bootstrap them
5 into these hearings. The fact is by statute, by
6 congressional act, these provisions are outside the
7 scope of these proceedings. The Congress has expressly
8 made a negative finding here. These things do not apply
9 to Clinch River.

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1 MS. WEISS: Of course, we do not say that they
2 do apply. We only cite them as new developments which
3 provide good cause for looking at population as one
4 looks at site suitability for the CRBR, and we cite
5 additional ones in our most recent papers.

6 [Board conferring.]

7 JUDGE MILLER: What happened to the (a) there
8 under old 5, now new 5? "We have the following
9 reasons:" then we swing right into (b), then (c).

10 MR. EDGAR: Mr. Chairman, in your April 6th
11 order you ruled out 6 (a) on the grounds that it was too
12 vague and lacked in specificity. It was basically a
13 legal conclusion.

14 JUDGE MILLER: Okay. Then we will consider
15 that the old 6 is renumbered 5, and we are still hearing
16 arguments, but we just heard the argument on the
17 meteorolog and population density question, which will
18 become subparagraph (a). Now, subparagraph (b) is one
19 that we asked you to discuss separately. That is the
20 Y-12 plant. That is subparagraph (b) of revised 5.

21 JUDGE LINENBERGER: Mr. Edgar, could you
22 perhaps restate what it is you said the congressional
23 action excised from the purview of this proceeding?

24 MR. EDGAR: Yes. Look at pages -- the bottom
25 of page 11 through the top of page 12 of our March 19

1 filing.

2 JUDGE MILLER: Yes, we have it.

3 MR. EDGAR: This is the fiscal year 1980 NRC
4 Authorization Act. The language is quoted at the top of
5 page 12. The essence of it is a conscious congressional
6 decision to exempt any facility from the requirement,
7 these remote siting requirements which NRDC says give
8 rise to all of the cited documents on siting if there is
9 an application for a construction permit filed before
10 October 1, 1979.

11 Clinch River construction permit application
12 was filed in October of 1974. Congress expressly
13 exempted this class of facilities, which includes Clinch
14 River, from examination of the remote siting issues.
15 Remember, I am trying to -- I have listed on page 11
16 four types of things that they are trying to drag in.
17 Those all have their genesis in the FY 1980
18 authorization bill.

19 JUDGE MILLER: Well, what was the purpose as
20 you understand it of the grandfathering provision of
21 that clause in the authorization bill?

22 MR. EDGAR: Well, it was a prospective
23 change. That was the essence of it.

24 JUDGE MILLER: As of what date?

25 MR. EDGAR: October 1, 1979, which is the

1 effective date of the Act.

2 JUDGE MILLER: In 1979 they were going to make
3 it prospective in operation. They did not want to have
4 it affect pending matters.

5 MR. EDGAR: That is right, applications had
6 already been filed.

7 JUDGE MILLER: Do you think that they really
8 had it in mind, that Clinch River liquid-metal fast
9 breeder reactor matter?

10 MR. EDGAR: By necessary implication. I
11 cannot tell you, Judge Miller, that each member of the
12 Congress had that in mind or that it was an explicit
13 thing, but it clearly applies. It is a class decision.

14 JUDGE MILLER: Well, does it factor in also
15 the fact of this case that there is now a five-year gap
16 and at one point strenuous efforts were being made
17 completely to eliminate the Clinch River matter? Is
18 that sufficiently peculiar to exempt the exemption?

19 MR. EDGAR: No, sir, because Congress acted
20 and there is no exemption for the exemption. This is an
21 act of Congress and it is what it is. Now, on the
22 second point --

23 JUDGE MILLER: You do not think that
24 construing statutes is that simple, do you?

25 MR. EDGAR: I may have overstated something in

1 a general sense, but in this particular case it clearly
2 applies. This project is authorized and has remained
3 authorized since its inception, so I do not see any
4 distinction there.

5 MR. SILVERSTROM: To extend your reasoning,
6 Judge Miller, precisely because this particular project
7 is so much on the Congress' mind, you would think that
8 they meant to exempt this project from the exemption,
9 they would have said so. Having in mind as they did
10 this project so often, nevertheless they did not exempt
11 this project from the exemption, so the exemption
12 applies.

13 JUDGE MILLER: What was the status of this
14 project at that time in the mind of Congress?

15 MR. SILVERSTROM: The application had been
16 filed. It was a pending matter and in a suspended
17 proceeding.

18 JUDGE MILLER: How long? That would have been
19 2 or 3 years, I suppose, wouldn't it?

20 MR. SILVERSTROM: No question whatsoever that
21 it had been in a proceeding where the application had
22 been filed.

23 MS. WEISS: Mr. Chairman, can I respond? This
24 is a major attempt to obfuscate what NRDC is trying to
25 raise before this Board. NRDC is not seeking to have

1 this Board apply any new rules on remote siting. We do
2 not disagree that any new rules on remote siting --
3 whether they have or have not been grandfathered to us
4 is totally irrelevant. All that Congress did was say if
5 one assumes that they included the breeder in their
6 thinking, the most one could argue that Congress said is
7 that the new rules mandating remote siting do not
8 apply.

9 It certainly did not exclude population
10 questions from the site review which this Board has to
11 make. They are both a part of NEPA, and as a part of
12 the site suitability review you have to do that
13 analysis. No one has told you not to look at
14 population. Population is already an issue.

15 Now, all we cited this document and others for
16 was to establish that there have been developments since
17 1977 which justify us in explicitly adding the language
18 "population density" to a contention which has to do
19 with site selection from the standpoint of doses to
20 individuals. We do not ask you to look at any new
21 remote siting rules. That is just not part of the
22 issue.

23 All we are trying to argue is that there is a
24 justification for adding the language "and population
25 density" in the contention if you believe that it was

1 not already implicit, and we argued in the alternative
2 that it was.

3 MR. SWANSON: Simply to restate our position,
4 the first step is clearly that it was not implicit,
5 population density, in the old contention. The old
6 contention is strictly related to meteorology. It did
7 not go the extra mile the NRDC would have it go. It did
8 not mention doses. So if you take as a starting point
9 that good cause has to be demonstrated to add that
10 matter now, the staff would agree that population
11 density is a factor, it always has been.

12 It could have been raised when the contention
13 was first raised, but the new information cited by NRDC
14 is not relevant to Clinch River and thus is not a factor
15 which would provide the good cause that they would have
16 to demonstrate to raise it as a factor.

17 Just one final point on the legislation. The
18 statute, Section 108(b), does not use terminology such
19 as "pending proceeding" or "proceedings before a
20 hearing." It uses a very specific term, that is, for an
21 application for a construction permit filed on or before
22 a date certain, and in the Staff's view, that clearly
23 exempts Clinch River from that legislation.

24 JUDGE MILLER: I did not get the last part.
25 The Staff believes what?

1 MR. SWANSON: The Staff believes that Section
2 108(b) does not -- would exempt Clinch River from the
3 terms of that section. In other words, Clinch River, as
4 a class of proceedings for which a construction permit
5 application was filed before a date certain, would be
6 exempted from those requirements.

7 JUDGE MILLER: Would be exempt?

8 MR. SWANSON: That is correct, would be
9 grandfathered.

10 [Board conferring.]

11 JUDGE MILLER: All right. The Board has
12 decided. Applying the rule of reason, we think that in
13 fairness the contention should be admitted. We do not
14 want to get into the technicalities of grandfathering or
15 not because we do not think that it really should be
16 dispositive. We recognize the arguments. There are
17 some serious questions about it, as Mr. Edgar has said,
18 but we prefer not to grant our decision upon determining
19 that one way or the other.

20 We do believe it is a close call, but we think
21 it is sufficiently within the contention it should be
22 admitted. In fairness to all the parties, we should
23 allow former Contention 6 as present Contention 5
24 consisting of subparagraphs (a) and (b), and the text
25 will be supplied by our friend from NRDC.

1 Okay, the next one is -- what happened to 7?
2 I know something happened to it. Oh, we did hold it
3 over. I am sorry, we did hold over the Y-12 plant,
4 which is the subparagraph (b). All right, we will hear
5 from you on that. Who wishes to go?

6 MR. EDGAR: On the Y-12 plant, our position is
7 that there is no new information that constitutes good
8 cause for amending this contention. We do not think
9 this is a matter of form; it is a matter of real
10 substance. We are advised by NRDC that they were not
11 aware until the progressive litigation of the degree of
12 importance or significance of this facility. The fact
13 is that Y-12 is a national security facility. This fact
14 has been known and it has been public. The brochure
15 that we have attached shows that very fact.

16 Interestingly, the environmental report,
17 Section 2.2.1.3, mentions Y-12. Figure 2.2.2.2 shows
18 Y-12 on a map within the region of the facility. We
19 think here that this is a belated attempt to bring in an
20 additional facility and expand the analysis under this
21 contention and to create some avenue to get into the
22 Y-12 facility itself.

23 Now, we do not see that this is in any way
24 related to the thrust of the contention, that it is not
25 important to know the precise role of Y-12. The

1 brochure, as one example, indicates that it was a matter
2 of public knowledge that Y-12 was a national security
3 facility, as was K-25.

4 We think that there was sufficient information
5 available at the time, that with reasonable diligence a
6 party could have added that to the contention. There
7 was no absence of information upon which one could draft
8 a contention, and we urge the Board to take this for
9 what it is. It is an attempt to expand the proceedings
10 to add the additional complication of another facility
11 even though there was ample opportunity to raise this in
12 the first instance.

13 JUDGE MILLER: Staff.

14 MR. SWANSON: Staff objected to the inclusion
15 of the additional facility for the same reasons, that
16 knowledge was known at the time of the contentions, or
17 certainly prior to the suspension of the proceedings in
18 1977, and we have as an example, which is in addition to
19 those given by the Applicants, the reference to the Y-12
20 plant in the Staff's final environmental statement where
21 we indicated that the Y-12 plant employed some 6500
22 people, providing engineering, fabrication support to,
23 among other things, the nuclear weapons effort.

24 One can certainly draw from that that there
25 was some substantial effort there involved in the

1 national weapons effort and it could easily have been
2 included in this contention prior to the suspension of
3 hearings.

4 MS. WEISS: Mr. Chairman, we have never made
5 the argument that one could not have known about the
6 Y-12 plant. It is mentioned in the FES. What we said is
7 that there is nothing in that document or any
8 attachments provided by the parties to suggest the
9 significance of that facility to the nuclear weapons
10 program, and that information as far as NRDC is
11 concerned was provided to us only in connection with
12 material that is part of the progressive case.

13 But I do not think it is necessary for the
14 Board to try and resolve the question of whether parties
15 are required to put into contention anything that anyone
16 could have known as of 1975. In my view it is almost
17 dispositive that Y-12 is just about on the ten-mile
18 line.

19 Had we included Y-12 in 1975, we would have
20 been objected to because one was not permitted to look
21 at emergency planning out to ten miles in those days.
22 We were still standing -- NRC was still standing on the
23 proposition that accidents requiring emergency planning
24 out beyond a very limited periphery around the plant
25 were incredible. There was no requirement for emergency

1 plans out to ten miles. So is that, but certainly it is
2 the extension of emergency planning to ten miles minimum
3 by a rule which draws Y-12 into the scope of the site
4 suitability issue.

5 MR. SWANSON: Mr. Chairman, I just wondered if
6 we could react to that because I think that is a new
7 interpretation of this subcontention. It is new to me,
8 anyway. The contention certainly contains the word
9 "evacuation," but as I read the contention, they are
10 talking about the consequences of a long-term evacuation
11 of those facilities, not whether they could be evacuated
12 or whether the emergency plan could accommodate those
13 facilities, but the effects of the long-term evacuation
14 on the facilities.

15 MS. WEISS: Your response in 1975 would have
16 been we will never have to evacuate this facility
17 because we do not go out to ten miles. Now, you need to
18 show that you can evacuate out to ten miles. That makes
19 it a probable event that Y-12 is a highly significant
20 national security facility and it may have to be
21 evacuated.

22 MR. EDGAR: I never understood that to be the
23 essence of the contention. This is not an emergency
24 planning contention. This contention reads in terms of
25 the effects on national energy supply or national

1 security. This is long-term evacuation and this
2 ten-mile business here has nothing to do with this
3 contention.

4 The question is simple here. We have
5 facilities listed in the contention, K-25, and the Oak
6 Ridge National Laboratory. We are now trying to add
7 Y-12 for the apparent reason that NRDC did not know its
8 precise role in the weapons program. Well, you never
9 have to know the precise role in the weapons program,
10 and certainly we would not think that the contention
11 would get into that in these proceedings. Otherwise,
12 you are talking about a very major expansion, and in our
13 judgment there is nothing here in the way of new
14 information that would constitute good cause for
15 amending the contention.

16 JUDGE MILLER: What about the ten-mile zone?

17 MR. EDGAR: The ten miles has nothing to do
18 with it, Judge Miller. The ten miles is an emergency
19 planning criterion. The contention itself does not
20 relate to emergency planning. It talks about long-term
21 evacuation, not evacuation for the purpose of emergency
22 planning, long-term evacuation and its effects on
23 national energy supply or security. That is a much
24 different thing, and the EPZ ten-mile requirement is
25 just irrelevant.

1 JUDGE MILLER: What about the first portion?
2 You are reading the last part about national security
3 and the like, but the first part states that you have
4 not established the site selected for Clinch River
5 provides adequate protection for the public health and
6 safety. Why wouldn't 10 miles versus 15 or 8 have some
7 potential significance?

8 MR. EDGAR: That is not what he is saying.
9 Right here in the contention it says they are in close
10 proximity to the site such that an accident at CRBR
11 could cause a long-term evacuation of the facilities.
12 That is the point. You are talking about an indirect
13 effect from Clinch River.

14 MS. WEISS: I would just point out, Mr.
15 Chairman, that a long-term evacuation begins with a
16 short-term evacuation. The response by them would have
17 been the same. We will not ever have a short-term
18 evacuation, we will not ever have a long-term evacuation
19 out to ten miles.

20 And also, we do not intend by this contention
21 to litigate emergency planning. That is in another
22 contention. This contention raises the question that
23 now that one must contemplate short-term or long-term
24 evacuation of the facilities, including Y-12, that
25 raises the question of the suitability of the CRBR site.

1 [Board conferring.]

2 MR. SILVERSTROM: I think the last statement,
3 Judge Miller, is especially important. If I understood
4 what was just said, NRDC recognizes that this particular
5 contention is not the emergency evacuation contention.
6 Thus, in this contention what they are really talking
7 about is the loss of Y-12, the importance of losing
8 Y-12, and there is absolutely nothing new in the public
9 domain.

10 JUDGE MILLER: Would it be a matter of
11 significance to lose or not to lose Y-12?

12 MR. SILVERSTROM: It certainly might be very
13 important for the Department to lose Y-12, but there is
14 absolutely nothing new --

15 JUDGE MILLER: If it is important for the
16 Department to lose Y-12, since we are looking at the
17 public interest, why do you object so strenuously to a
18 matter that you have just indicated to us could have
19 potential significance, as indeed it would seem to be
20 apparently.

21 MR. SILVERSTROM: There will be a lot of
22 things important to the Department of Energy about its
23 programs which have absolutely nothing to do with this
24 proceeding, Judge Miller.

25 JUDGE MILLER: Well, that may be, but you have

1 the Y-12 and you have the Clinch River Breeder Reactor
2 that you are seeking to license, and there seems to be a
3 lot of potential nexus there if something happened, am I
4 correct, for all adjoining facilities, including Y-12.

5 MR. SILVERSTROM: Yes, but the importance of
6 Y-12 to the defense program reflects absolutely nothing
7 new since this contention was in fact admitted.

8 JUDGE MILLER: If it is new, if it is old, if
9 it is a matter of potential significance, why should it
10 not be heard? We are not trying to go into pedigree or
11 age, especially when we have had a five-year gap here
12 that was not caused by these Intervenor, certainly, so
13 why are we so technical now, that it possibly could or
14 should have been referred to then, and now it admittedly
15 could have some impact. Why not look at it? What is
16 the harm to DOE?

17 MR. SILVERSTROM: We had understood the Board
18 throughout this time to indicate that with respect to
19 any new information, with respect to any changes in
20 contentions, that the Board would look at why a
21 contention was changed and would look to what, if any,
22 new information suggested the appropriateness of that
23 change, but the Board was not looking --

24 JUDGE MILLER: Let's assume that they should
25 have, could have put it in but overlooked it. If now it

1 has some significance potentially, why shouldn't we?

2 MR. SILVERSTROM: Then normally one looks at
3 the good cause for adding it late.

4 JUDGE MILLER: Lawyers do; I do not know about
5 other people. Aren't you being a little technical is
6 what I am suggesting when we look at the substance of
7 the matter?

8 MR. SILVERSTROM: No. What I am really
9 looking at downstream, Judge Miller, is that the very
10 proper legal approach of looking for good cause before
11 you add something new also obviates some very important
12 substantive problems downstream if this suddenly gets
13 let in.

14 JUDGE MILLER: We would like to know what
15 those substantive problems are.

16 MR. SILVERSTROM: The problem is we are
17 opening up a whole new, very large area of concern.

18 JUDGE MILLER: Possibly so, but if it is a
19 legitimate concern, why not? Who dawdled five years? I
20 don't know if "dawdle" is the term, but who caused the
21 hiatus? It was not the Intervenor. Now you are going
22 to penalize them, in a sense.

23 MR. SILVERSTROM: No. I think the importance
24 is that if we go down this road we start opening up a
25 whole new category of debate --

1 JUDGE MILLER: We only open up what we open
2 up. If you want to show me what else is opened up, this
3 is the time to do it.

4 MR. SILVERSTROM: -- which I think we are
5 going to have in connection with a number of things,
6 namely, programmatic importance to the Department but
7 not other licensing importance vis-a-vis Cinch River.

8 JUDGE MILLER: We are not going into
9 programmatic matters. We know we are not supposed to.
10 The Commission said we are not supposed to. We are not
11 going into programmatic, let's set that aside, unless
12 it comes in some other guise, and we will hear from you
13 then if you have some horrible effect that we have not
14 anticipated.

15 What is next?

16 MR. SILVERSTROM: I think it is the
17 programmatic effect that we are really starting to open
18 up.

19 JUDGE MILLER: We will handle program effects
20 when we get into the programmatic discussion. We know
21 there are problems. As far as the Board is concerned --
22 we have enough on the plate with what you are presenting
23 to us. When we get to the programmatic matters, unless
24 we are persuaded otherwise by some of your contentions
25 or arguments here, we are certainly not desirous of

1 going into programmatic matters and thereby extending
2 the scope of our inquiry. That is a different
3 discussion.

4 We do not see that our ruling here, if we
5 should rule to permit this additional Y-12 plant, would
6 bring that about. If we are overlooking something, we
7 would be glad to hear from you.

8 MR. EDGAR: Can I respond to the one point you
9 raised, Judge Miller?

10 JUDGE MILLER: Yes.

11 MR. EDGAR: I do not think it is important as
12 to who caused the delay. We take this thing as we find
13 it. We do not think that that is the question.

14 JUDGE MILLER: Let's hear from you in
15 specifics. Let me tell you what I mean by that.

16 MR. EDGAR: All right.

17 JUDGE MILLER: These matters could have been
18 thrashed out five years ago when we were on the verge of
19 a limited work authorization and probably would have
20 been. You were all very much on the ball. You have
21 some people here that you did not have then. Now, that
22 five years certainly does not help the memory of man or
23 woman. It does not help to bring into issue now matters
24 that perhaps could and should have been raised then, but
25 for some reason, and you can assign any reason you want

1 to, we do not think that should itself mechanically
2 foreclose consideration if indeed this is a matter that
3 has a potential significance.

4 MR. EDGAR: We are not talking about a
5 mechanical foreclosure. The other thing to be said here
6 is there is a substantial amount of preparation and
7 effort put into this proceeding back then.

8 JUDGE MILLER: Be realistic, Mr. Edgar. You
9 are talking about a proceeding set for what, hearing in
10 June 1977? Are you totally ignoring the fact there was
11 an election in 1976 and a campaign and statements made?
12 You and me and everybody knew after that election that
13 there was serious question about the ongoing Clinch
14 River breeder reactor proceeding.

15 I do not say what we knew or whether we knew
16 definitively, but certainly there were some very serious
17 questions then raised, discussed in the paper and
18 elsewhere about the attitude of the new administration,
19 which culminated as you know.

20 Now to reason as though this were an ongoing
21 case and that five years had not elapsed and that you
22 were on the verge -- there was a lot to be done before
23 we actually got to that evidentiary hearing. We had
24 scheduled it. We had ruled upon a number of
25 contentions. There had been appeals, as you recall,

1 that tied everything up in various ways. But I suggest
2 to you that it was not as clear-cut a picture then as to
3 what the Board and the parties were to look at as it may
4 now appear to you with the benefit of hindsight.

5 That is the respect in which I suggest that
6 you cannot just wipe out five years, and you cannot by
7 wiping out the five years say they should have done this
8 five years ago.

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1 MR. EDGAR: I am not trying to wipe out the
2 five years.

3 JUDGE MILLER: Suppose five years ago they had
4 put in this Y-12 plant; would that have made such a big
5 difference to you then?

6 MR. EDGAR: Well, they would have put -- my
7 question is a different one. It is, why didn't they put
8 it in there.

9 JUDGE MILLER: It is a different one, but it
10 would not have made much difference to you one way or
11 the other. In going to that hearing you are now telling
12 me about in 1977, had you had these three or four words
13 included, really would it have made a difference?

14 MR. EDGAR: Well, I would guess, Mr. Chairman,
15 that we would have been able to respond to it. But I
16 think there is another point here that we are missing,
17 and that is --

18 JUDGE MILLER: If you give me that point -- I
19 am going to give you a shot at it. Go ahead.

20 MR. EDGAR: Thank you. All I am suggesting is
21 this. We had a proceeding and everybody had a lot of
22 time invested in it. What we are trying to do is to
23 move this proceeding as we filed it forward as
24 expeditiously as possible. We are trying to make use of
25 what work was done before, and I do not think we are

1 talking about a technicality here. We are talking about
2 good cause, we are talking about the diligence of
3 parties. Certainly, back in 1977 NRDC was not lacking
4 for qualified people in support of their case.

5 Dr. Cochran is still with NRDC. We had Mr.
6 Roisman at the time. Certainly if this had been a
7 matter of significant concern to them, they had every
8 basis to raise it. And I think it is, in a sense, --
9 one has to look at the broader picture. We have got to
10 get to a hearing here, and we have to exercise some
11 practical limitations. And that is what we are
12 suggesting to the Board; that you make use of the record
13 and the effort that was put in before, and I think
14 parties have to be held accountable for diligence in
15 raising contentions.

16 JUDGE MILLER: We are willing to make use of
17 the record. That is what we announced to you down in
18 Oak Ridge. We intend to use the record as affirmatively
19 as possible, to have it updated, revised where
20 necessary, but you are asking not to make use of the
21 record, but to make use of a non-record. You are asking
22 us to absolve a negative. It was not there five years
23 ago; therefore, do not look at it now. That sounds like
24 tunnel vision.

25 Provided that there is something of potential

1 significance, which I think it now begins to appear that
2 there might be, and that is all we are suggesting at the
3 pleading stage. This does not open up a whole chamber
4 of horrors. I have asked you to delineate all these
5 horrendous things that would flow from allowing this,
6 and so far you have told us programmatically we will
7 regard that in a different way and probably with a
8 different result.

9 We cannot say that allowing this is going to
10 let in programmatic and a whole progeny that will flood
11 everybody. We do not see that. We think that is an
12 exaggerated argument. Do you have anything else that
13 would show us that by allowing this, you are being --

14 MR. EDGAR: Am I reading the word correctly in
15 the Board's last statement, that the Board would not
16 contemplate a substantial inquiry into the role of Y-12
17 and the weapons program, and the significance of Y-12 in
18 the programmatic sense?

19 JUDGE MILLER: In the programmatic sense, yes,
20 because we have no intention or desire nor necessity as
21 we see it of going into programmatic matters. We think
22 that everybody who dealt with this, the Appeal Board,
23 the Commission and the Licensing Board, were not going
24 to go into programmatic. We have enough fairly
25 specific concrete matters relating to this application.

1 We will go into those, but we do not see that
2 the question of the programmatic matter in any way
3 affects our present inclination, which is to allow the
4 addition of the Y-12 plant. If you want to take the
5 position that it is beyond the scope of what was pleaded
6 then, and it well may be, it is matter of argument. It
7 probably was not sufficiently pleaded in a specific
8 sense, but if it so has some potential, we think we
9 would save time by looking at it. We do not think it is
10 a great bit matter in evidentiary terms, and we are not
11 using it as an entering wedge on programmatic.

12 Now, with those limitations frankly, what is
13 your next objection?

14 MR. EDGAR: Well, you have heard from us.

15 JUDGE MILLER: Does the staff want another
16 shot at it?

17 MR. SWANSON: Well, one last factor and that
18 is basis for the contention. Intervenors have asserted
19 that -- in one reference they cite that the plant has
20 some relation to national security. Well, we have known
21 that, but what is the basis for asserting at this time
22 that this is a valid contention? In other words, that
23 evacuation of this facility because of an accident at
24 Clinch River is in fact a matter of national security
25 which needs to be considered at this proceeding?

1 At this point, it is a national security
2 facility but really all we have is just a shot in the
3 dark that maybe if there is an evacuation this will, in
4 fact, be a national security issue, and I think we need
5 to have -- we have a certain burden which has to be
6 overcome. That is, to provide a basis for a contention
7 regardless of the timing.

8 JUDGE MILLER: Isn't this the beginning stage
9 -- isn't this a matter of whether or not the site or
10 alternative sites have been adequately examined from the
11 standpoint of public health and safety? And then for
12 the following reasons -- but you cannot just ignore the
13 first paragraph, can you? That does not say national
14 security necessarily. I suppose national security might
15 be subsumed, but I find it a little difficult to
16 understand why we are having such a problem with a
17 matter involving public health and safety in terms of
18 alternative sites being preferable. And the Commission
19 has stated the substantial nature of the alternative
20 site consideration. It is not just a flimsy or trifling
21 thing.

22 So I therefore do not quite understand why the
23 reference to the gaseous diffusion plant and other
24 energy fuel cycle facilities and the Y-12 plant, Oak
25 Ridge Laboratory, all in close proximity. What is so

1 difficult about that? If you are concerned that we are
2 going to get into a full-fledged inquiry of the nature
3 of the national security and secret documents and so
4 forth of Y-12, I think you cannot be unduly apprehensive
5 on that score. We really do not intend to. I do not
6 think NRDC intends to, I do not think anybody intends to.

7 Now, if that is really the basis of your
8 objection, I think we can protect you there, and would.

9 MR. SWANSON: Well, that is the concern.
10 Everytime we add a new topic to the --

11 JUDGE MILLER: Not every time. This time,
12 this topic where it is.

13 MR. SWANSON: This is a factor which obviously
14 could become quite involved. Certainly, the extent of
15 the involvement of this plant in --

16 JUDGE MILLER: Isn't there a Y-12 plant there?
17 Doesn't it have some significance?

18 MR. SWANSON: Certainly.

19 JUDGE MILLER: Isn't that about the end of
20 it? You are only showing why you look at evacuation
21 long term or even short term. Short term I guess is a
22 part of long term. Kennedy's favorite statement, the
23 longest journey starts with a single step. I mean, I do
24 not understand really, unless there is something that is
25 not being made apparent to the Board, to myself, what

1 the big hullabaloo is.

2 MR. SWANSON: Okay, I guess our concern is if
3 that were the end of it, I doubt very much it would be
4 pushed at this time as a contention. Obviously, there
5 is something to be litigated and there is a concern that
6 it could be rather involved.

7 JUDGE MILLER: All right. We are going to
8 admit it but we are going to have a discretionary note
9 which our transcript will reflect and will have to go in
10 the order. We are going to keep this inquiry -- I think
11 you understand, Mr. Greenberg, and your fellow counsel
12 or whoever is going to be calling the shots on this, --
13 that we do not want to get into a long, involved
14 examinatio and detail of the Y-12 plant as such.

15 Is there any thought that by allowing this,
16 Ms. Weiss, that we are opening the door to 10,000
17 interrogatories and so forth? I mean, if you have
18 something you are going to hit with me later, tell me
19 now.

20 MS. WEISS: No. I do not think we are going
21 to open up -- I know we are not going to open a huge,
22 big area. We do think there is some requirement to
23 inquire into the significance of the facility, but I do
24 not think that that will require a whole lot of factual
25 --

1 JUDGE MILLER: Is it going to require much
2 more to show connection between the other facilities,
3 the Oak Ridge Laboratory? Is it something qualitatively
4 different? Is it going to take a lot of time and
5 evidence to go into? If it is, tell us now because
6 later on we will have to reverse ourselves.

7 MS. WEISS: No, no, it is in the same general
8 category.

9 (Board conferring.)

10 JUDGE MILLER: We do not like to try to rule
11 in a vacuum. We do not like to try to anticipate. We
12 want it clearly understood by NRDD, however, we are not
13 going to permit a wide-ranging scope of inquiry into
14 Y-12. In fact, we understand it is not significantly or
15 qualitatively different from the alleged possible
16 interruption because of the gaseous diffusion plant or
17 Oak Ridge National Laboratory. Is this understood by
18 the parties?

19 MS. WEISS: Yes.

20 JUDGE MILLER: Okay. Because the result will
21 be, if you have a whole series of interrogatories that
22 start going into depth and this is a national security
23 matter rather than as a potentially-affected facility,
24 someplace in the proximity, we will just have to sustain
25 the objections. We are trying to rule now as we go

1 along in order to get the parties to go ahead with
2 meaningful, significant discovery with a minimum of
3 motions to the Board and a maximum of cooperation
4 between and among themselves.

5 So it is in that sense now that we are
6 approaching this. If we are not correctly perceiving
7 the intentions of the parties, we do request you to tell
8 us now while we are about to rule on it.

9 MS. WEISS: There is no problem with that, Mr.
10 Chairman.

11 JUDGE MILLER: All right. Former contention
12 six is renumbered contention five, consisting of the
13 addition of "for the following reasons" in the
14 introductory paragraph and with the renumbered
15 subparagraphs (a) and (b) will be held to be a
16 cognizable issue and the test will be supplied, as in
17 the case of the other contentions.

18 Anything further?

19 (No response.)

20 I was about to ask -- I know there is an
21 obvious answer -- what happened to 7, because I seem to
22 go 6 and to 8 in the old numbering.

23 MS. WEISS: Seven got dropped out somewhere
24 along the way.

25 MR. EDGAR: It got combined.

1 JUDGE MILLER: If we are all satisfied it is
2 dropped out and we will never see it again --

3 MR. EDGAR: There was an old seven. I had
4 better be careful how I use old and new. As of April of
5 1976 there was a contention 7 and a contention 8. All
6 right. This 8 is a combination of the April 1976 7 and
7 the April 1976 8. It combines the two subjects.

8 JUDGE MILLER: I see. As NRDC pointed out at
9 their page 31 for purposes of clarification with
10 mechanical corrections, old contentions 7 and 8 are
11 combined. Is that the explanation?

12 MS. WEISS: Yes.

13 JUDGE MILLER: All right. And I see you
14 deleted the old 7(c). All right. And the
15 presently-numbered contention 8 will be considered as
16 potential contention 5. Anyway, the health consequences
17 to the public. I take it this is what, a residual
18 impact? All right, we will see what it is. The
19 objections here have been filed by what, applicants?
20 Yes, and staff. Okay, we will hear from you, Mr. Edgar,
21 on your objections.

22 MR. EDGAR: When we originally objected to
23 this contention our objection was an extremely narrow
24 one, and if you will look at pages 14 through 15 of our
25 filing, --

1 JUDGE MILLER: Of your filing?

2 MR. EDGAR: Yes, sir, our March 19 filing.

3 JUDGE MILLER: Yes.

4 MR. EDGAR: Pages 14 and 15, you will see the
5 statement of contention 8(d) as in dog, and our
6 objection is confined to that contention. And our
7 concern was whether or not the basis for the contention
8 was limited to ICRP reports 26 and 30, or whether there
9 was some broader, unknown basis.

10 In essence, if you look at the wording of the
11 contention, it says, for example, recommendations of the
12 ICRP and its reports 26 and 30 and we were looking for a
13 more precise definition. And that is how we filed our
14 pleading.

15 Now, beyond that we did not see a problem.
16 But when we see NRDC's response which appears at pages 9
17 through -- excuse me, -- pages 9 through 13 of their
18 response to our objections, we think there is a real
19 sleeper in this contention. We think, in essence, what
20 is being stated here on pages 9 and 10 is that NRDC is
21 seeking to challenge the whole body and thyroid dose
22 guidelines in 10 CFR Part 100.

23 If you go back to the original basis for these
24 contentions, what we had in 1976 for contentions in the
25 dose guideline area was a question as to whether the

1 those guideline values that the applicants have selected
2 and the staff had recommended for the plutonium
3 component under Part 100 for lung and bone -- you know,
4 what was the validity there.

5 All right. Now we are going to look at it in
6 a little different way. NRDC is advancing new knowledge
7 based on ICRP 26 and 30, but the challenge or attack is
8 not confined to plutonium lung and bone. If you look at
9 page 10 you will see that what NRDC is doing is going
10 beyond the whole body and thyroid guidelines and
11 questioning whether lung and bone should be selected as
12 representative organs or whether whole body and thyroid
13 should. And in essence, you have broadened the
14 challenge now. It is not only lung and bone which are
15 at issue, but it necessarily takes issue with the whole
16 body and thyroid.

17 Now, if you go back to the original
18 contention, the question was what is the basis for the
19 lung and bone. That is how we originally read the
20 contention when we filed our March 19 pleading. And if
21 it is not that and I am overstating the case, I would
22 like to hear that. But we think that this contention,
23 as it is expressed in NRDC's response, contemplates a
24 much broader challenge and indeed, a challenge to the
25 whole body and thyroid provisions of the regulations in

1 Part 100.

2 JUDGE MILLER: Do you wish to respond at this
3 time, Ms. Weiss?

4 MS. WEISS: I can wait until after the staff
5 is done or go now, if you wish.

6 JUDGE MILLER: He has asked rather directly
7 which interpretation. That may affect the position of
8 applicants, I do not know about the staff.

9 MS. WEISS: Let me just read the contention
10 because I do not think -- it is certainly not crystal
11 clear on its face, but I do not necessarily think it is
12 subject to the interpretation that the applicant gave.

13 JUDGE MILLER: If you think it is going to
14 eliminate confusion or ambiguity, great.

15 MS. WEISS: The contention reads, guideline
16 values for principal organ doses used by applicants and
17 staff have not been shown to have a valid basis. One,
18 the approach utilized by applicants and staff in
19 establishing once in a lifetime organ dose equivalent
20 limits corresponding to a whole body dose of 25 rem is
21 inappropriate because it fails to consider important
22 organs; e.g., the liver, and because it fails to
23 consider new knowledge; e.g., recommendations of the
24 ICRP in reports 25 and 30.

25 And the objection was primarily on vagueness

1 grounds, the objection of the applicants. What I would
2 like to do -- I have tried to articulate this about four
3 times, and I am not really not the best person to
4 interpret these ICRP documents. If the Board would
5 permit Mr. Cochran to do it.

6 JUDGE MILLER: He may.

7 DR. COCHRAN: The original Part (d) was a
8 challenge to the lung and bone dose limits that both the
9 applicant and the staff had together determined were the
10 appropriate choices given, that no such limits appear
11 explicitly under 10 CFR 100.11. It has really not just
12 challenged the limits, but also how one calculates the
13 doses to which those limits are applied, which really
14 goes more to the subparagraph (2) Part (d).

15 But there has been new information since the
16 determination or suspension of the licensing of the CRBR
17 in 1977. Namely, the approach by which one establishes
18 limits for internal organs is no longer -- is not the
19 same as it used to be. And in the earlier periods, it
20 was an approach based on ICRP II.

21 That is the report, ICRP II, and the concept
22 of a critical organ. And the limiting dose to these
23 critical organs would, in effect, ensure the protection
24 to other organs and the whole body, and it was this sort
25 of critical organ approach that the applicant and staff

1 were utilizing in determining the previous limits for
2 the bone and lung.

3 And since that period we have had a
4 recommendation by the ICRP in report 25 that we change
5 the approach, and they laid the approach out in ICRP 26
6 and then there was some additional supplemental
7 discussion in ICRP Report 30.

8 JUDGE LINENBERGER: Dr. Cochran, excuse me,
9 but help us here by tagging dates to those reports 26
10 and 30, if you would, please.

11 DR. COCHRAN: I am not sure I am going to be
12 able to help you. I believe ICRP 26 came -- it was
13 adopted in 1977, I believe it was February 1977,
14 although as anyone who has ever ordered an ICRP report
15 from the United Kingdom can attest, one does not always
16 get the report on the same day that it is published.
17 The ICRP 30 was adopted in 1979.

18 Now, what is -- subsequent to those two
19 reports, both the EPA and the NRC, which had ongoing
20 rulemaking proceeding with regard to establishing the
21 occupational exposure standards, are folding in this new
22 procedure into those rulemakings, and you can see that
23 in some of the draft reports that have been circulated
24 by EPA. They had some hearings on this last year, I
25 believe it was, and you can see that also in the NRC

1 drafts of the occupational exposure standards. That is
2 just by way of letting you know that this approach is
3 being incorporated in other -- with respect to other
4 rules in the NRC.

5 Now, we would propose that this sort of
6 approach be adopted in establishing an appropriate
7 standard for lung and bone, but under this new approach
8 that is recommended in ICRP 26 it does not single out
9 lung or bone as critical organs, but you are looking at
10 the whole -- at the doses -- you are considering the
11 doses to all the organs together, and using --
12 establishing the limit.

13 So in effect, when you are establishing what
14 dose -- what the dose is that could be exposed to lung
15 and bone, you are also establishing limits on the lung
16 and whole body at the same time. So you are in sort of
17 a problem area where in order to do the lung and the
18 bone appropriately, you have to consider the whole body
19 and the thyroid. And then the question is naturally
20 going to be raised, are you challenging the whole body
21 and the thyroid standard when you are using the right
22 approach for the lung and bone.

23 And my feeling is that you ought to look at
24 the way it is being recommended now to do it properly
25 and see if it makes a difference. And furthermore, I

1 would also point out the reason it says, for example,
2 ICRP 26 and 30 is not that we are opening up a hidden
3 agenda. It is that the EPA and the NRC when applying
4 their approach as laid out in ICRP 26 to the
5 occupational standards, uses slightly different
6 weighting factors, slightly different data in its
7 application.

8 And I do not want to preclude not using the
9 appropriate weighting factors, and that is what I -- I
10 am not endorsing the specific numbers in the ICRP 26,
11 but only that the approach that is taken.

12 JUDGE LINENBERGER: All right, sir. Before we
13 go further here, what I think I have heard you say is
14 that you think you have a reason for favoring an approach
15 to evaluating dose effects. That is one that seemingly
16 is embraced by ICRP reports 26 and 30. And that that is
17 an approach that -- and here I realize I am putting
18 words in your mouth, but this is what I think I hear --
19 that is an approach that you do not see the NRC
20 routinely using under its present evaluation system and
21 that you think that should be used. Is that --

22 DR. COCHRAN: That is correct.

23 JUDGE LINENBERGER: Excuse me. As long as we
24 have established that I am interpreting you correctly,
25 then I need to ask you until or unless NRC chooses to go

1 the route of evaluation consistent with ICRP 26 and 30,
2 until or unless NRC chooses to take that path, how do
3 you feel justified in having NRDC challenge the Clinch
4 River project for doing something in accordance with the
5 way NRC has indicated they want things done?

6 In other words, you are finding -- and I do
7 not question the reasons at all - you are finding there
8 may be a better way to do it. I do not know, there very
9 well could be. But until or unless NRC is convinced
10 there is a better way or imposes a different way on
11 applicants, what basis do you have for making the
12 challenge? That is my question?

13 DR. COCHRAN: The problem is under 10 CFR
14 100.11, there is no specified way for handling dosages
15 due to actinide release and internal exposure to organs
16 other than the thyroid. Therefore, one has to establish
17 a procedure. That procedure is not set forth and we
18 were, the last time around in the early 76, we were
19 debating what the appropriate procedure was in that case
20 for establishing a limiting dose to the lung and the
21 bone, and that is not in Part 100.

22 That is, how do we shape the CRBR problem into
23 the light water reactor mold where plutonium releases
24 are controlling and bone and lung doses were thought not
25 to be controlling. Once you establish this is a unique

1 facility and you have to protect against those types of
2 exposures, then you are confronted with what is the best
3 approach to take.

4 JUDGE LINENBERGER: All right, sir. I still
5 hear you saying that they thyroid and whole body
6 approach to deciding whether one is living legally or
7 not as sketched in Part 100, I still hear you saying
8 that that approach, looking at thyroid and whole body
9 exposures, is inadequate to deal with the situation
10 where plutonium is potentially available in the
11 environment.

12 DR. COCHRAN: I think we can get a stipulation
13 from the staff, applicant and NRDC to that effect.
14 Everyone agrees with that statement.

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1 JUDGE LINENBERGER: Excuse me. That is not my
2 point. How many people will agree with it? A vote will
3 not help us here.

4 Have I characterized correctly what you have
5 said, that you think there is a better approach than the
6 thyroid whole body dose control in those situations
7 where plutonium may be involved.

8 DR. COCHRAN: I think you have to look to the
9 purpose of 10 CFR Part 100.11, which is how do you
10 protect the public in these accident situations. And
11 let me give you a hypothetical case. Suppose there was
12 no whole body exposure and no iodine release, and
13 therefore thyroid exposure, but there were massive
14 amounts of say plutonium release. Should you apply the
15 standard 10 CFR -- the specific test limits for whole
16 body and thyroid and walk away from the other effects.
17 And everyone agrees you do not, so you need to establish
18 something that is more or less equivalent, which was the
19 intent of the this regulation.

20 JUDGE LINENBERGER: Well, I think I heard you
21 agree with me that you are saying that the thyroid whole
22 body approach to dose assessment is inadequate in those
23 situations where there may be exposure to plutonium.

24 DR. COCHRAN: Yes, sir.

25 JUDGE LINENBERGER: And I do not understand,

1 irrespective of the technical merits of what you said, I
2 do not understand how you can present that as anything
3 other than a characterization of Part 100 being
4 inadequate in that respect.

5 MS. WEISS: Well, because, Judge Linenberger,
6 if I can interject, the licensee and staff have already
7 conceded that in order to do the Part 100 analysis one
8 must go beyond the whole body and thyroid limits. The
9 applicant proposed to look at lung and bone dose limits
10 in order to make an attempt to account for the
11 actinides. We are saying that does not sufficiently
12 account for them. They have gone beyond the
13 regulations. And we are saying to the extent that you
14 concede you must go beyond the terms of the regulation,
15 you have not done it properly.

16 JUDGE LINENBERGER: I have taken up enough
17 time here. I would like to hear the extent to which
18 applicant and staff have indeed agreed to and stipulated
19 to this point.

20 MS. WEISS: If I can just have your indulgence
21 for one more moment just to point out to you the
22 language in Section 100.2(b) of Part 100. That says
23 that the site criteria contained in this part apply
24 primarily to reactors of the general type and design on
25 which experience has been developed. It goes on and

1 states further limitations.

2 So I think that, (a) that Part 100 is sort of
3 in a different category from other rules considering all
4 the qualifications on it, but we do not really need to
5 get into that fundamentally because all parties have
6 conceded that in order to account for actinides, for the
7 presence of actinides, you have to go a step beyond Part
8 100.

9 MR. EDGAR: Let me make it clear in terms of
10 our view Part 100 in the footnote, Part 100.11 has two
11 guideline values that are used for the purpose of
12 assessing suitability of the site. There is a 25 rem to
13 the whole body and a 300 rem to the thyroid number. All
14 right.

15 The NRC staff early on in the review process
16 recognized that there should be some consideration given
17 to plutonium components of dose as an analog to the
18 whole body and thyroid; and thus, there were guideline
19 values developed for lung and bone to deal with
20 plutonium. Okay.

21 We are consistent to that point. To the
22 extent that Intervenors have characterized applicants'
23 position in that regard, that is correct. But where we
24 fall out is on the following point. And you have to
25 read very carefully when you look at this transcript

1 what Dr. Cochran said. He said when you use their
2 method, the ICRP 26 and 30 method, to do the lung and
3 bone, you must also incidentally challenge the whole
4 body and thyroid. And that is the point. We do not
5 have a problem with a contest over lung and bone.

6 But you have to ask him this question, and
7 that is, you have to ask Dr. Cochran whether or not it
8 is true that NRDC does not intend to take issue with the
9 25 rem whole body and the 300 rem thyroid in Part 100.
10 That is the question to ask.

11 JUDGE MILLER: Well, let's ask the staff first
12 to see if we can get a way station here.

13 MR. SWANSON: I think the staff is finding the
14 discussion enlightening because the real problem we had
15 was understanding the contention. I venture to guess in
16 our negotiations we have spent more time on this one
17 than any other one because it was a difficult one to
18 understand.

19 I think there was an honest attempt to try to
20 explain it, but apparently the staff came away with a
21 misunderstanding, and that was the main basis for
22 objection. We just could not tell whether or not a
23 challenge to the regulation was in order.

24 Now, if in fact the Intervenor's are seeking to
25 depart from the standards in 100.11 by virtue of a

1 Section 100.2, that it is a novel plant, of course we
2 need to go to the basis for raising this departure at
3 this time.

4 As we stated in our pleading, the primary
5 reliance is on ICRP 26. That is a document which we
6 indicated at page 17 of our response was adopted in
7 January '77.

8 Now, perhaps that is not a winning argument
9 today, but the staff position is that it was an approach
10 which was available long before this hearing was
11 suspended; that the mechanism for departing from Section
12 100.11 -- that is, utilizing the language in Section
13 100.2 -- also was available and has not been changed
14 since 1962; that in fact the cause simply has not been
15 provided for raising this argument at this time. But I
16 think it is very helpful, though, to get the answer --
17 it would be helpful to get the answer to Mr. Edgar's
18 question. I think we are getting this contention
19 clarified much more so at this time.

20 JUDGE MILLER: All right. Are you ready to
21 put it out, whoever is the spokesman for this matter
22 from the Intervenor's?

23 DR. COCHRAN: This can be framed so that it is
24 not a challenge to the whole body or thyroid dose
25 standard in 10 CFR 100.11, but bear in mind that in the

1 process of establishing the allowable exposures to other
2 organs which would be exposed due to the releases of
3 plutonium -- for example, the bone, the liver and the
4 lungs -- that one must sum dosages to those organs times
5 some appropriate weighting factors, and also sum the
6 whole body dose times some appropriate weighting factor,
7 and ensure that that weighted sum does not exceed a
8 specified limit.

9 Now, in effect, when I go through that
10 procedure I can, if it would satisfy George, I can say I
11 am not challenging the existing standards, but you may
12 never exceed those standards if you meet the limiting
13 dose as I have so specified by these weighting factors.
14 So in that sense when we are looking at these other
15 organ dosages, his standard for thyroid may be a
16 limiting cap that is never permitted to reach because of
17 the way you do the calculations to ensure that you do
18 not overexpose the lung and the bone and the liver.

19 MR. EDGAR: That just tells me that we are
20 changing the thyroid and whole body values. Now, you
21 have been told by Dr. Cochran that it is possible to
22 frame it in such a way that it does not constitute a
23 challenge, but it is, it is an attempt to change the
24 values in Part 100 on whole body and thyroid. You have
25 to ask that question.

1 (Board conferring.)

2 JUDGE MILLER: I will tell you what we are
3 going to do. We are going to pass on this one.

4 (Laughter.)

5 And if it should be ultimately admitted, it
6 will be given a new number which will be at the tail
7 end, because there are a lot of things we are going to
8 have to look at here.

9 Now, if there is any more information that
10 anybody wants to bring to the Board's attention, we will
11 welcome it because we want to consider this overnight.

12 Now, have you all had your last word?

13 DR. COCHRAN: No, sir.

14 JUDGE MILLER: All right, Dr. Cochran.

15 DR. COCHRAN: Under the old approach we were
16 still challenging the lung and the bone limits that were
17 agreed to by the staff and the applicant. Now, what you
18 are proposing is that we can continue to challenge those
19 on the basis of what we admittedly believe is the best
20 of two erroneous approaches; you know, whether our
21 erroneous approach is better than the staff and
22 applicants' erroneous approach for determining the
23 limits. I mean they are erroneous in my view because
24 they are not the preferred one. The preferred one we
25 are still holding judgment on.

1 (Board conferring.)

2 JUDGE MILLER: Let the Board inquire, is it
3 possible to have the parties, especially those who are
4 sufficiently expert at this matter, to know what you are
5 talking about, to get together and attempt to devise an
6 approach which would obviate the objections which had
7 been forthcoming and which the Board does attach some
8 weight to, although we have not come to a conclusion on
9 it?

10 MR. EDGAR: I can say this. The first
11 objection we had, which was as to -- really as to the
12 specificity, that is, tying the whole thing down to ICRP
13 26 and 30, if you look on page 16 of our filing on the
14 19th of March you will see that we suggested a rewrite
15 here.

16 Now, Dr. Cochran made a statement in the
17 transcript here that he did not want to pin it down that
18 precisely because NRC and EPA were making some
19 adjustments to the numbers. So with that understanding,
20 you know, we are not so troubled by the form of the
21 contention; you know, we accept his representation as
22 confining the contention. That is fair.

23 But on the other point we can sit down and try
24 to talk. I am not so sure that we could guarantee a
25 result for you. We could try to talk it out. If we

1 succeeded we could report back to the Board within a
2 short period of time.

3 JUDGE MILLER: Like in the morning?

4 MR. EDGAR: Well, I would be glad to talk to
5 Dr. Cochran after the hearing today or the meeting today
6 and see if we can come up with something.

7 JUDGE MILLER: All right. Why don't you try
8 that? The Board does want to give it some further
9 thought. We definitely are going to look at the
10 transcript. We will probably have it first thing in the
11 morning so --

12 MR. EDGAR: I will give it a try. I would
13 really like to have a chance, you know, if Dr. Cochran
14 comes up with some other formulation, I would like to
15 have a chance to get it reviewed, and I cannot assure
16 you that I would have it reviewed in the morning.

17 JUDGE MILLER: Well, when?

18 MR. EDGAR: Well, I cannot get up and make a
19 call right now, but, you know --

20 JUDGE MILLER: What good would making a call
21 right now do you? You said you could not go make a call
22 right now. Do I infer that if you could --

23 MR. EDGAR: I need to do two things. I need
24 to talk to Dr. Cochran and find out more of his
25 thinking. Secondly, once we get a formulation I would

1 like to have some time to contact the project person who
2 is knowledgeable in this area and run it by him. That
3 is all -- I am not sure I can do that between now and
4 tomorrow morning.

5 JUDGE MILLER: Could you do it in the morning?

6 MR. EDGAR: I can certainly try. I can sure
7 give it a try.

8 JUDGE MILLER: I think you know the Board
9 would like to get these contentions in whatever
10 cognizable form they are going to be -- good, bad,
11 indifferent. We want you to get rolling on discovery.

12 MR. EDGAR: Sure.

13 JUDGE MILLER: All right. We will defer
14 ruling until tomorrow after we have gone through the
15 other matters, which should give you hopefully the
16 morning at any rate, Mr. Edgar, to see what your
17 negotiations or discussions with Dr. Cochran are. Run
18 it by whoever you have to run it by. Then we will see
19 what we can do.

20 In the alternative we will rule, so we prefer
21 you do it that way, because we think it would be
22 sensible. But we are not going to leave it hanging in
23 the air.

24 Okay. We defer then ruling upon former
25 Contention 8, which if in some form or other it remains

1 or becomes a cognizable contention, it will be
2 renumbered and will have a higher number because it will
3 go at the end of the remaining contentions that we are
4 going over ad seriatim.

5 The next contention is that which is numbered
6 9, originally page 12 of the NRDC revised statement. Is
7 there an objection filed to this one?

8 MS. WEISS: No.

9 JUDGE LINENBERGER: On page 13 of the
10 Intervenor's 5 March submittal, subparagraphs Arabic 1,
11 2, 3 and 4 offers some options to the reader as to
12 whether something is or is not included, or if included
13 is or is not adequately assessed.

14 Now, the Board chooses, I think, not to have
15 the reader determine those options. What is the
16 Intervenor's position let's say in paragraph Arabic 1,
17 impact of reprocessing is not included or is
18 inadequately assessed, which is the situation; and
19 similarly with 2, 3 and 4 for the same language. Don't
20 let us choose it. You will not like our choice.

21 MR. GREENBERG: Judge Linenberger, I am not
22 sure it is possible to give a precise answer, but that
23 is an issue that has been the subject of discovery by
24 the staff. The staff has asked questions in order to
25 determine which impacts Intervenor's believe are or are

1 not adequately assessed. And it seems to me the answers
2 to the discovery -- I cannot repeat them all here,
3 although it is on file -- to help clarify those specific
4 items which we believe either are not included or are
5 inadequately assessed.

6 JUDGE LINENBERGER: Are you saying as you sit
7 here you do not know what the case is?

8 MR. GREENBERG: What I am saying, Judge
9 Linenberger, is there are a number of specifics, and I
10 would have to refer back to the answers to
11 interrogatories which go on for some 15 pages.

12 (Board conferring.)

13 MS. WEISS: Mr. Chairman, may I be excused
14 please for five minutes?

15 JUDGE MILLER: Yes.

16 The question in Judge Linenberger's mind and
17 mine is the matter of pleading. Now, we realize this is
18 not common law pleading. It is not pleading under the
19 Federal Rules of Civil Procedure; but nonetheless, it is
20 your pleading in the alternative. The impact is not
21 included or is inadequately assessed. And at this
22 semi-late stage in the proceeding we wondered why you
23 cannot come down on one or the other as a basis for the
24 contention.

25 Maybe the staff can help us. We have not

1 heard from them. Have you addressed this point? I
2 notice that the staff says that the contention as
3 revised is appropriate. Did you take into consideration
4 this particular point?

5 MR. SWANSON: Well, we certainly recognize
6 that is new language. In 1 and 2 the words
7 "inadequately assessed" is new. It is not in the
8 original document, nor is the reference to our
9 supplement -- excuse me, to the programmatic supplement
10 or our supplement or our FES. It just did not look like
11 it would be probably an argument worth pursuing.

12 MR. GREENBERG: Perhaps if I can clarify this
13 matter, Judge Linenberger, the problem is conceivably
14 found in the use of the word "impact" rather than
15 "impacts," and what we are talking about is a series of
16 impacts, some of which are discussed in the ER and the
17 FES but discussed inadequately, and some of which are
18 not discussed at all.

19 And we have tried in responding to the
20 interrogatories to clarify to the maximum extent
21 possible precisely where we feel these deficiencies in
22 analysis are, and they are deficiencies in analysis.
23 Either there is no discussion in these environmental
24 documents or the discussion that is found in those
25 documents is inadequate.

1 JUDGE MILLER: This is the FES you are talking
2 about now, the one that was filed in 1976 or '77?

3 MR. GREENBERG: Correct.

4 JUDGE MILLER: What does that FES have to say
5 about the impact of waste disposal of spent fuel for the
6 Clinch River breeder reactor?

7 MR. GREENBERG: There is a section, as I
8 recollect, in the FES, and Dr. Cochran is looking that
9 up.

10 JUDGE MILLER: It is either not included or it
11 is inadequately assessed. That seems to be kind of a
12 broad area of distinction. That is a subject everybody
13 has something to say something about, good, bad or
14 indifferent.

15 MR. GREENBERG: I am trying to refresh my
16 recollection. I am looking at answers to
17 interrogatories, Judge Miller. The fact is there are a
18 number of specifics which we have pointed out. Perhaps
19 I could give you one example. This maybe perhaps will
20 help by way of illustration.

21 JUDGE LINENBERGER: Perhaps -- excuse me. The
22 question really comes down to whether or not the
23 language of this contention ought to be refined
24 somehow. Your giving me examples will not accomplish
25 that. If, for example, the example you are about to

1 give causes you to wish you had written these words a
2 little differently, then maybe you should tell us how
3 you wish you had written them. If it has caused you to
4 say you are happy with these words as they are, then say
5 you are happy with these words.

6 MR. GREENBERG: I am happy with the words as
7 they are.

8 JUDGE LINENBERGER: You are happy with the
9 words the way they are.

10 (Board conferring.)

11 JUDGE MILLER: So the record is entirely
12 clear, there is no doubt that this is pleading in the
13 alternative, but we understand that neither the staff
14 nor the applicants' objectives are correct

15 MR. EDGAR: I am sorry. I was conferring.

16 JUDGE MILLER: I say the record certainly
17 shows that Contention 9, which will be renumbered new
18 Contention 6, pleads in the alternative as to those
19 matters for subparagraph (b)(1),(2), (3), and (4).

20 Now, the Board has raised the question, and we
21 have noted it for the record. We are now inquiring
22 whether it is our understanding that neither the
23 applicants nor the staff object.

24 MR. EDGAR: We have not objected. This was
25 matter of stipulation.

1 JUDGE MILLER: If you don't, you don't. That
2 is all right.

3 Staff?

4 MR. SWANSON: No, we don't.

5 JUDGE MILLER: No, we don't care. If you
6 don't care, we don't care.

7 (Laughter.)

8 Therefore, former Contention 9 is being
9 renumbered Contention 6, will be admitted, period.

10 Now, the next contention is 10 which would
11 become new 7 if admitted. That is the alternatives to
12 the Clinch River and for the following reasons: pages
13 14, part of 16 of the revised statement of contentions
14 by NRDC.

15 First of all, are there objections to former
16 10?

17 MR. EDGAR: We have no objections. Just as a
18 matter for the record, the Board's October 5, 1976
19 decision made the rulings admitting is contention.
20 There have been a few changes to it. We had objections
21 to certain portions of Contention 10 which the Board
22 overruled. We are obviously not waiving those
23 objections, but felt that at this point it makes little
24 sense to reassert them.

25 JUDGE MILLER: All right. And I believe that

1 the staff has stated that it does not object to the
2 admissibility of Contention 10 as presently revised, is
3 that correct?

4 MR. SWANSON: That is correct

5 JUDGE LINENBERGER: On page 15, subparagraphs
6 Arabic 2 and 5, at the top half of page 15 will
7 Intervenor please advise the Board how those are
8 different? They seem to me as though they are
9 relatively similar and could perhaps even be
10 consolidated. I do not understand why not or how they
11 are different. And I recognize that that is the way we
12 admitted them previously, but I will still ask the
13 question.

14 (Counsel for Intervenors conferring.)

15 MS. WEISS: Judge Linenberger, 5 is a broader
16 issue. They could be consolidated in the sense that one
17 could write one subpart that expressed all of the
18 thoughts, but they are not identical thoughts. Subpart
19 2 is really going specifically to the design of the
20 plant, claiming that that is not sufficiently similar to
21 any commercial design that it is likely to demonstrate
22 anything with respect to the program. And 5 is a
23 broader contention that raises all of the aspects of the
24 program and the likelihood that the CRBR will meet those
25 objectives; that being that it will demonstrate the

1 reliability, maintainability, economic feasibility,
2 technical performance, environmental acceptability or
3 safety.

4 JUDGE LINENBERGER: Yes. Excuse me. I can
5 read it. But isn't 2 subsumed within the thrust of 5?

6 MS. WEISS: Yes. I think 2 could be seen as a
7 subpart of 5, yes. It is the specification. It is a
8 further specification.

9 JUDGE LINENBERGER: Okay. But I presume you
10 are happy with it as it is. I just needed clarification
11 here.

12 Now, again on that same page and at the top of
13 page 16 we have subparagraph small (g) at the bottom of
14 page 15, subparagraph Arabic 1 at the top of page 16
15 both dealing with alternate sites, and it is not
16 entirely clear to me how the alternate site
17 considerations differ from the thrust of Contention 6 as
18 numbered when you published this document.

19 Is the answer in part that 6 deals with
20 meteorology whereas this contention is broader than
21 meteorological considerations?

22 MS. WEISS: I think it is really just a matter
23 of focus. It is a focus of 6, and the subparts go
24 primarily to an analysis of the CRBR site. And the
25 focus of subpart (g) of Contention 10 is to the

1 alternative sites.

2 JUDGE LINENBERGER: If I understand correctly,
3 those are bases rather than subparts since they are
4 introduced by the phrase "for the following reasons."

5 MS. WEISS: Yes.

6 JUDGE LINENBERGER: Okay. Thank you.

7 JUDGE MILLER: All right. We will admit,
8 therefore, former Contention 10 as now renumbered
9 Contention 7 which will consist of subparagraph (a)(1),
10 (2) and (3), the 3 being a renumbering of the former
11 orphan 5, and subparagraph (b), formerly (d), and
12 subparagraph (c), formerly (g), which itself has one, in
13 parenthesis, subparagraph.

14 Any question?

15 (No response.)

16 All right. Seven will be admitted and the
17 text will be supplied as usual by Ms. Weiss.

18 We come now -- somehow the next number seems
19 to be 14. Does that mean we have had some casualties?

20 MS. WEISS: Yes. Eleven, 12 and 13 never
21 survived the first round of Board rulings on the
22 admissibility.

23 JUDGE MILLER: Six, 7 -- 7 was our last number.

24 MS. WEISS: This would be number 8, yes.

25 JUDGE MILLER: Former 14 will be number 8.

1 Staff does not object. As presently revised it finds
2 the modifications minor. In reflecting current
3 information applicants have one objection apparently to
4 14(c).

5 Do you want to be heard on that, Mr. Edgar?

6 MR. EDGAR: Yes. Our objection is fairly
7 straightforward. It merely says that we would like the
8 contention reworded as it is stated on the bottom of
9 page 17 of our March 19, 1982 filing.

10 In this regard what we have done is merely
11 reworded so that it is clear that the two isotopes which
12 NRDC is advancing as significant are nickel-59 and
13 niobium-94.

14 Now, there are two points the Board ought to
15 consider here by the way of background. NRDC at page 14
16 of its pleading states that Contention 14(c) in the form
17 previously admitted clearly called for a systematic
18 analysis of all neutron activation products, giving
19 nickel-59 as a non-exhaustive example.

20 That is not an accurate portrayal of what
21 happened when Contention 14 was admitted. The first
22 thing to remember is that Contention 14 was a late-filed
23 contention. The basis for the contention was a study by
24 a man by the name of Reskinoff, and the thesis there was
25 that cobalt-60 was no longer the limiting isotope but

1 rather nickel-59 was the correct limiting isotope for
2 analysis at decommissioning.

3 Everybody understood clearly that the issue
4 was nickel-59, and I believe that the Board understood
5 that because the Board's March 9, 1979 order, which
6 admitted Contention 14, states in the first sentence
7 that NRDC alleges that inadequate consideration has been
8 given to the effect of the radionuclide nickel-59.

9 Now, we have been advised by NRDC that there
10 is a Science Magazine article that indicates in addition
11 that niobium-94 is a significant isotope. We think
12 under the principles related to notice pleading, tell us
13 what your problem is and we will answer the question.

14 All we are asking for is clear notice.
15 Nickel-59 has always been the problem. If it is now
16 niobium, fine, we will answer that. What we do not want
17 is an open-ended, all neutron activation products
18 contention when in fact the history was rather specific.

19 JUDGE MILLER: The Board order you referred to
20 was 1977 rather than 1979.

21 MR. EDGAR: Pardon me. You are correct.

22 JUDGE MILLER: I just know we weren't not
23 doing anything in '79. I have a '77 order which I think
24 is the one you are referring to, but I just wanted to be
25 clear that our record is accurate.

1 MR. EDGAR: I was correct the first time.

2 JUDGE MILLER: '79?

3 MR. EDGAR: 3-9-76.

4 JUDGE MILLER: The first time you said 1979.

5 That is what troubled me, because I thought somebody was
6 surreptitiously --

7 MR. EDGAR: I was wrong twice.

8 JUDGE MILLER: No problem. We have the
9 document.

10 MR. EDGAR: I mean March 9, '76.

11 JUDGE MILLER: Now, let me inquire about the
12 response to the concerns of Mr. Edgar. Does NRC want to
13 go or do you want to hear from the staff first?

14 MS. WEISS: I think it is difficult for me to
15 respond to arguments about what may have been in
16 people's minds in 1976 because I was not here in 1976.
17 I look at what the contention states and what we stated
18 to the Board, what is on paper. Clearly, the language
19 of the contention is the applicants and staff must
20 systematically analyze all neutron activation products
21 that may be produced in the proposed CRBR for purposes
22 of decommissioning. Neither applicants or staff have
23 adequately analyzed the implication of the neutron
24 activation products such as nickel-59.

25 So it seems to me it is clear on the face of

1 it --

2 JUDGE MILLER: Have you changed the wording?

3 MS. WEISS: All we have done --

4 JUDGE MILLER: If so, where?

5 WEISS: Where it says "such as nickel-50"
6 we simply added "and niobium-94." In other words, we
7 have given further specification to the contention, but
8 we have in no way expanded the scope since the scope as
9 it was admitted extends to all neutron activation
10 products. And I know that is what we intended to have
11 the scope of it be, because I can tell that from the
12 papers we filed back in '75 and '76.

13 MR. SWANSON: I think we need a clarification.

14 MS. WEISS: Let me go back to the original
15 contention.

16 JUDGE MILLER: Okay.

17 MS. WEISS: 14(b) said -- and I am sorry for
18 the confusion -- "Petitioner believes the NRC must
19 systematically analyze all neutron activation products
20 that may be produced in the proposed CRBR to determine
21 the potential isolation period following
22 decommissioning, and then provide a comprehensive
23 analysis of the cause, both economic and societal, of
24 the decommissioning."

25 JUDGE MILLER: And then there was a

1 qualification the Board admitted to the extent that the
2 alleged issue potentially bars any cost effective
3 methods of alternate decommissioning, in particular at
4 the specific site in question and in the context of the
5 NEPA balancing of risks and benefits cited by NRDC, is
6 that correct?

7 MS. WEISS: Yes.

8 JUDGE MILLER: Okay.

9 MS. WEISS: So that the nickel-59 showed up
10 originally in what was then contention 14(c), and that
11 has essentially been merged.

12 JUDGE MILLER: We should look now at 14(c)?
13 It says "recent reports and various things" I see under
14 (c) as you are citing it.

15 MS. WEISS: We had essentially merged the old
16 (c) and (d) and added further specification by
17 specifying niobium-94, which recent developments suggest
18 is also a significant neutron activation product.

19 JUDGE MILLER: To see what you have done we
20 have to look at the old (c) and (d) of 14 and see what
21 you have done in the way of merger, see what the effect
22 then is of adding the niobium-94.

23 MS. WEISS: I think it is clear that when one
24 looks at what was admitted under (d) that the effect of
25 adding niobium-94 in no way expands (d) which really

1 defined the scope of the contention and went to all
2 neutron activation products.

3 MR. EDGAR: We take exception to that
4 characterization. You have to go back to the original
5 14(c) which is now merged with (d) into a unified
6 14(c). The old 14(c) talks about the fact that the
7 isolation period following decommissioning of power
8 reactors has been based on the time required for
9 cobalt-60 to decay to safe levels and so forth. We
10 believe the previous analyses are in error because they
11 have underestimated the significance of the radionuclide
12 nickel-59. That contention had as its basis new
13 information. The radionuclide nickel-59 people have
14 always assumed that cobalt-60 was going to be the
15 limiting isotope; so here is an analysis of nickel-59,
16 and in essence the contention asks for an incremental
17 analysis of the effect of nickel-59. That is neither
18 here nor there, but it is not a terribly significant
19 incremental effect.

20 Now, we have (c) and (d) combined and merged
21 and niobium-94 added, but this time 14(c) says isotopes
22 such as nickel-59 and niobium-94. All we want to do is
23 know what the issue is. We will be prepared to address
24 it if you will tell us what it is. So all we are asking
25 for is a rewrite of the contention so it is specific to

1 nickel-59 and niobium-94.

2 JUDGE MILLER: Period. Nothing else. Is that
3 correct, Mr. Edgar? I say you want those two elements
4 and nothing else, is that correct?

5 MR. EDGAR: That is right. And we have
6 rewritten it at page 17 of our March 19 pleading. It
7 accurately reflects what the real basis for this
8 contention is. They do not have any other isotopes that
9 are significant here.

10 JUDGE MILLER: What do you say to the rewrite
11 proposed on page 17 of the applicants' statement of
12 objections?

13 MS. WEISS: Mr. Chairman, we would prefer to
14 have the contention as originally admitted by the Board,
15 the original 14(d).

16 JUDGE MILLER: And to strike out all these
17 additional letters?

18 MS. WEISS: Than to have a rewrite -- no,
19 14(d) as admitted by this Board raised the issue of all
20 neutron activation products. That is a direct quote
21 from it. And we have not expanded the scope of that.
22 We could not expand the scope of that. We provided
23 further specificity.

24 We would prefer to go back to the original
25 language of the contention as admitted rather than limit

1 it in the way that the applicant suggested to the Board.

2 JUDGE MILLER: Mr. Edgar, what do you say to
3 that?

4 MR. EDGAR: We read the Board's March 9, 1976
5 order as expressing not some disinterested parties' view
6 of the matter. We read that first sentence as saying
7 what the Board understands the issue to be. And at that
8 time the Board understood the issue to be nickel-59. If
9 we go back to that original formulation, we are back to
10 nickel-59 and no other.

11 JUDGE MILLER: Well, nickel-59 was in (c),
12 subparagraph (c), wasn't it?

13 MR. EDGAR: The Board admitted the entire
14 contention. The Board did not parse it. The Board
15 treated it as a question involving nickel-59, and the
16 Board's order is explicit in the first line there. So
17 if you go back to that formulation you are back to a
18 nickel-59 contention, and niobium-94 does not have
19 anything to do with it.

20 JUDGE MILLER: I must not be reading -- what
21 is the Board's language then that you are referring to?
22 I guess I do not have it.

23 MR. EDGAR: Let me read it.

24 JUDGE MILLER: Okay.

25 MR. EDGAR: This is from the Board's

1 memorandum and order dated March 9, 1976, entitled
2 "Memorandum and Order Regarding Contention No. 14 of
3 NRDC, et al." This is the first line. "Intervenors
4 NRDC, et al. by this proposed contention dated February
5 9, 1976 allege that inadequate consideration has been
6 given to the effect of the radionuclide nickel-59 as it
7 might impact and complicate the decommissioning of the
8 CRBR reactor facility. Cause for untimely submittal of
9 this contention is alleged to be the January 1976
10 availability of a report on this subject that brought
11 supposedly new information to the attention of
12 Intervenors."

13 Now, if you go to 14(c) --

14 JUDGE MILLER: You are still reading the
15 order, aren't you? Tell me when you stop.

16 MR. EDGAR: I just stopped reading the order.

17 Now, if you go to 14(c) and look at the report
18 to which the Board referred, you will see that that
19 deals with nickel-59, and that is a common understanding.

20 JUDGE MILLER: So where do you wind up?

21 MR. EDGAR: So where I wind up that what did
22 the original contention allege. It alleged that
23 nickel-59 must be considered. All right. We are not
24 objecting to the admission of the new element
25 niobium-94. We are objecting to an absolutely

1 open-ended, undefined specification of radioisotopes.

2 It is simple.

3 JUDGE MILLER: Wasn't that contained in the
4 original (d) that was admitted?

5 MR. EDGAR: It was indeed, but that certainly
6 was not the history or the intent of the contention.
7 The contention read as a whole was nickel-59.

8 JUDGE MILLER: Well, what is the difference
9 between (c) and (d)? Didn't the Board admit both of
10 them?

11 MR. EDGAR: The Board --

12 JUDGE MILLER: (c) and (d), (d) is the present
13 open-ended thing that you are objecting to, isn't it, or
14 is it?

15 MR. EDGAR: Well, I am objecting to the
16 contention as it is now advanced which talks about
17 isotopes such as --

18 JUDGE MILLER: All right. I understand that.
19 Now, going back to what the Board ruled before it
20 admitted (c), which definitely did refer to nickel-59.

21 MR. EDGAR: Yes.

22 JUDGE MILLER: And I am looking at (d) which
23 also goes into the question of the systematic analysis
24 by NRC of all neutron activation products that may be
25 produced in the Clinch River to determine and so forth.

1 If we go back, we have them both in.

2 MR. EDGAR: You have them both in.

3 JUDGE MILLER: Now, you have the nickel. You
4 have the specificity that you want to limit it to (c),
5 but (d) seems to have a little broader context, doesn't
6 it? But that does not bother you.

7 MR. EDGAR: On its face it does. It bothers
8 me in terms of the history of how this contention was
9 admitted, and what the Board's ruling was, and what the
10 understanding of the parties was.

11 JUDGE MILLER: If the Board's ruling is
12 something different than you read to me, tell us.
13 Otherwise, the Board admitted both (c) and (d) and you
14 are looking at (c) and (d), aren't you?

15 MR. EDGAR: Yes.

16 JUDGE MILLER: One was specificity, the other
17 much broader. Which do you want, (c) and (d) or the
18 reworded?

19 MR. EDGAR: Well, I am asking for fair notice
20 of what the issues are. That is exactly what I am
21 asking for. And I honestly think that if you ask Dr.
22 Cochran what information he has that is new here to
23 warrant amendment, he will tell you it is niobium-94.

24 JUDGE MILLER: He will tell us what?

25 MR. EDGAR: It is niobium-94 and none other,

1 and I do not see any point in having this need for
2 pleadings that are vague when we know full well what the
3 issue is.

4 JUDGE MILLER: We are trying to get the
5 vagueness out of it.

6 MR. EDGAR: Well, if we are, then we should
7 pin it down to those two isotopes.

8 JUDGE MILLER: We should pin it down to what
9 we did before. What was that contention? Was that the
10 Board's order of April 6, 1976?

11 MR. EDGAR: It was the Board's order of March
12 9, 1976.

13 JUDGE MILLER: I do not seem to have that.
14 The oldest order I have dealing with pleadings is that
15 of -- dated April 6, 1976, a prehearing conference
16 licensing board panel, 76-14.

17 MR. EDGAR: We have a copy here. We could --

18 JUDGE MILLER: Admissibility of NRDC
19 contentions 1(a) and so forth.

20 MR. EDGAR: Would you like -- we have the file
21 here.

22 JUDGE MILLER: Do you have a copy of that
23 order?

24 MR. EDGAR: Yes.

25 (Counsel handing document to Board.)

1 JUDGE MILLER: The order was entered March 5,
2 1976.

3 Ms. Miller, we will ask you to check that for
4 us so we can have it in the morning. It consists of
5 three pages and dated in Bethesda the 5th of March
6 1976. We will get that file.

7 That time apparently the Board weighed the
8 then four factors. Since then we have five. Apparently
9 we found that the four factors weighed in favor of
10 admitting the contention as I presume framed before us
11 now as the old Contention 14 or whatever it was, is that
12 right?

13 (No response.)

14 It was admitted for the limited purpose of
15 considering the specific site in the context of the NEPA
16 balancing of risks and benefits, is that correct?

17 MR. EDGAR: Yes.

18 JUDGE MILLER: And on that basis it was held
19 not to be a challenge to the regulations and was
20 admitted for that limited purpose as thus defined.
21 Okay. Thank you.

22 Well, there is no point in spending a lot more
23 time on this. That contention as admitted with the
24 limiting language has now apparently been modified, at
25 least in two respects: one, the nickel --

1 MS. WEISS: The nickel really results from the
2 merger of (c) and (d).

3 JUDGE MILLER: Nickel-59 and the niobium-94.

4 MS. WEISS: Right. That is the only addition.

5 JUDGE MILLER: That has been added to it. And
6 if I understand you correctly, Mr. Edgar, you do not
7 want it in there unless something is added, is that
8 right?

9 MR. EDGAR: We are not making an objection to
10 adding niobium-94. We have been directed to a Science
11 Magazine article that says that is new information, a
12 new outlook on this contention.

13 All we are asking for is that insofar as the
14 contention says that neither applicants nor staff have
15 analyzed or adequately analyzed the implications of, we
16 want it confined to certain radioisotopes, not an
17 undefined list of isotopes.

18 So if it reads as we have stated it on page 17
19 of our March 19 filing, we have no objection.

20 JUDGE MILLER: Your filing simply reads,
21 "Neither applicants nor staff have adequately analyzed
22 the implications of nickel-59 and niobium-94 for the
23 decommissioning of CRBR."

24 MR. EDGAR: That is correct.

25 JUDGE MILLER: And you have removed therefrom

1 the neutron activation products such as.

2 MR. EDGAR: That is correct. And the "such
3 as" is the offending phrase. If it said, "Neither
4 applicants nor staff have adequately analyzed the
5 implications of the neutron activation products,
6 nickel-59 and niobium-94," we do not have a problem.

7 MS. WEISS: Mr. Chairman --

8 JUDGE MILLER: The Board is inclined to
9 believe that if you had others in mind it should have
10 been disclosed prior to this time, and it should
11 properly, if you are going to be permitted to expand or
12 to add one additional, it should be limited to the
13 additional matter.

14 MS. WEISS: You know, I think that the
15 applicant is trying to argue a point that it lost in
16 1976 when the contention was admitted. The contention
17 goes to all neutron activation products, and the
18 argument, I presume, after conferring with my
19 colleagues, that was made at that point was that the
20 scientific evidence with respect to nickel-59
21 constituted good cause for adding the contention, but
22 there was no cause to limit the contention to nickel-59.

23 The new concern is as broad as the neutron
24 activation products that can come from decommissioning
25 of a breeder, and that is not an unlimited number. It

1 depends on the content basically of the cladding, the
2 steel. In any case, it is not an unlimited number. It
3 is CRBR specific.

4 I do not want to bore you with repetition, but
5 it is clear that the addition of niobium does not expand
6 the scope of the contention that was admitted. It does
7 not expand the scope. And if they prefer the old
8 wording, we will go back to the old wording. We thought
9 it was an effort to be more specific, but it in no way
10 expands the scope of the old Contention 14(d).

11 JUDGE MILLER: That would appear to be true,
12 Mr. Edgar, because the scope of the old Contention 14
13 did not specify anything.

14 MR. EDGAR: 14(d) did not, but it was preceded
15 by specific language.

16 JUDGE MILLER: They are co-equal, (c) and (d).

17 MR. EDGAR: Mr. Chairman, I really beg to
18 differ with you on that, because the context here was
19 that it was standard practice to look at cobalt-60 in
20 decommissioning prior to that time and here was a paper
21 that said let's look at another isotope that may be a
22 more limited case. And so --

23 JUDGE MILLER: Are you talking about (d)?

24 MR. EDGAR: I am talking about --

25 JUDGE MILLER: I wish you would look at (d).

1 I do not see why under (d) they would not be able to put
2 in both nickel and whatever else they could make come
3 within the context of the neutron activation product.

4 MR. EDGAR: They can do it in isolation, if
5 you read that portion of the contention without regard
6 for the context of the whole.

7 JUDGE MILLER: Well, now we are having to do a
8 lot of interpretation. It seems to me when you have
9 (a), (b), (c) and (d) you have only one unavoidable
10 adverse environmental consequence; that is in the
11 decommissioning of CRBR. Then you have
12 (a), (b), (c), (d). They are not mutually dependent. They
13 are not hierarchical. One does not depend on the other.

14 MR. EDGAR: But there is one very significant
15 fact here: what prompted the late-filed contention,
16 what fact prompted it. And the fact that prompted it
17 was the apparently new information that nickel-59 was
18 significant.

19 JUDGE MILLER: Are you talking now about (d)?

20 MR. EDGAR: I am talking about the contention
21 as a whole, what motivated the late filing of the
22 contention.

23 JUDGE MILLER: Does it really matter?

24 MR. EDGAR: Yes, because that is what the
25 Board pointed to as the new information that warranted

1 filing or acceptance of the contention.

2 JUDGE MILLER: Some new information. We did
3 not say it is written in concrete for all time. There
4 was some new information. We admitted the contention.
5 You did not then make the argument you are making now
6 about the open-endedness of it.

7 MR. EDGAR: We had no need to do it at that
8 time because it was clear where they were coming from,
9 which was nickel-59. It was a new theory.

10 JUDGE MILLER: That is not what it says. Who
11 was it that told me a while ago that you do not have a
12 right to take the top off the skull and look at the
13 motivation? You look at the document itself.

14 MR. EDGAR: I am asking you to look at the
15 surrounding circumstances, the total context; and I
16 think that is fair. We are not mind reading. We are
17 talking about actual history and what was pleaded at the
18 time. And also let's take one other --

19 JUDGE MILLER: I find (c) where there is
20 somewhat specific reference to recent reports and the
21 like, (c). I look at (d) which is not so limited, and
22 under (d) it seems to me that they could perfectly well
23 bring in both of the elements that are set up here and
24 whatever else they could legitimately bring within the
25 scope either of the pleading or the proof.

1 MR. EDGAR: I am trying to look at this in the
2 context of notice pleading. The applicant has the
3 burden of proof here. The applicant has to come forward
4 and prove a negative.

5 JUDGE MILLER: Aren't you starting to get into
6 evidence? You do not prove a negative.

7 MR. EDGAR: No, sir. I am talking about the
8 practical consequences.

9 JUDGE MILLER: The practical consequences, we
10 have been told there are only two elements, nickel-59
11 and niobium-94, that they are really -- you could very
12 well establish, it seems to me, by appropriate
13 interrogatories, depositions or whatever discovery that
14 you want. Having done so, you would then have the
15 limitation if you want it as to what they intend to do.
16 What more do you need to go to trial?

17 MR. EDGAR: Well, do I understand that there
18 is a representation from NRDC that these are the two
19 isotopes they have right now and no others?

20 JUDGE MILLER: You heard it stated by
21 counsel. Is that correct, Ms. Weiss?

22 MS. WEISS: Well, if we were asked the
23 interrogatory now to state each and every one of the
24 isotopes that you claim might fit under 14(d), I think
25 we would have to sit down and do a little further

1 research. As of now, though, nickel-59 and the niobium
2 are the only two isotopes that we have seen addressed in
3 the scientific literature.

4 JUDGE MILLER: You are changing a bit. I
5 understood you to say before those were the only two
6 that were brought w. in this as a matter of pleading.
7 And we were willing to accept that and to let counsel
8 have the benefit of the limitation. Now you are trying
9 to leave it open.

10 So now I think we are just going to deny your
11 rewording, and we are going to go back to what was
12 admitted. We will just go from ground one, you know,
13 the 14(a), (b), (c) and (d) set forth in our order of,
14 what was it, April 6, 1976, whatever the date is. We
15 will have it as read in 1976. If anybody wants to do
16 anything further than that, you will have to get
17 together or you are going to have to assign more
18 reasons, because we are not going to spend a lot of time
19 on these nickels and dimes.

20 Okay. So 14, which is now renumbered as 8,
21 will read as it read in 1976, period. Okay.

22 I guess, Ms. Wiess and others, I did tell you
23 that we would consider recessing at this time because we
24 know you have commitments, family and otherwise. So
25 unless there is something real urgent for 30 seconds, we

1 are about to recess for the day.

2 Hearing none, we will see you at 9:00 in the
3 morning, and if you have an opportunity, whether it be
4 this evening, which is doubtful, but in the morning
5 perhaps prior to 9:00 to get together on some of these
6 matters that counsel were going to confer upon, we
7 encourage you to do so and report to us when we convene
8 at 9:00.

9 We stand in recess.

10 (Whereupon, at 4:35 p.m., the hearing was
11 recessed, to be reconvened at 9:00 a.m., the following
12 day, Tuesday, March 6, 1982.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

ATOMIC SAFETY AND LICENSING BOARD

in the matter of: United States Department of Energy Project Management
Breeder Reactor) Corporation Tennessee Valley Authority (Clinch River
Date of Proceeding: April 5, 1982

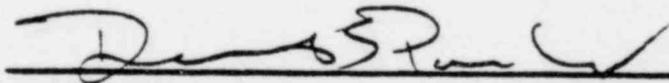
Docket Number: 50-537

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

David S. Parker

Official Reporter (Typed)



(SIGNATURE OF REPORTER)