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Title: Long Mott Energy, LLC

Docket Number: 50-614-CP

ASLBP Number: 25-991-01-CP-BD01

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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In the Matter of: : Docket No.

Long Mott Energy, LLC : 50-614-CP

: ASLBP No.

(American Centrifuge Plant): 25-991-01-CP-BD01

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Tuesday, May 12, 2026

Video/Teleconference

BEFORE:

STEPHEN R. WOLFE, Administrative Judge

NICK G. TRIKOUROS, Administrative Judge

DAVID A. SMITH, Administrative Judge

G. PAUL BOLLWERK, III, Administrative Judge

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On Behalf of the Nuclear

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P-R-O-C-E-E-D-I-N-G-S

p.m.

THE COURT: All right. Good afternoon, everyone. This is a status conference and oral argument on two motions that are currently pending before this licensing board. This is a closed hearing because of certain matter that I anticipate we are going to discuss at some length today.

As usual, we will begin with appearances. And with appearances, if each party would state that the observers associated with them who are observing this understand the closed hearing and that no other persons who are not authorized are permitted to observe.

So I will start with Ms. Perales and Waterkeeper.

MS. PERALES: Good afternoon. Marisa Perales and Sidra Hanson here on behalf of the intervener, Waterkeeper. Also joining is Gwyneth Lonergan, who is the legal assistant for our firm, Max Chang, and Tim Judson. And all have reviewed the protective order. All are familiar with the proprietary nature -- confidential nature of the discussions and the motions that are pending before the board today.

1 THE COURT: Okay. Thank you and welcome
2 back.

3 Mr. Lighty?

4 MR. LIGHTY: Thank you, Your Honor. May
5 it please the board. Ryan Lighty from the law firm of
6 Morgan, Lewis & Bockius, LLP, appearing as counsel of
7 record on behalf of the applicant, Long Mott Energy,
8 LLC, which I will refer to today by the acronym LME.
9 My co-counsel, Alex Polonsky, also of Morgan Lewis,
10 along with a few representatives of LME and X-energy
11 are monitoring this proceeding remotely. I can
12 confirm that the observers are aware of the closed
13 nature of today's hearing and that no other persons
14 not authorized to access SUNSI are allowed to observe.
15 And we look forward to answering your questions today.

16 THE COURT: Okay.

17 And Mr. Wilson from the NRC staff?

18 MR. WILSON: Good afternoon, Your Honor.
19 Kristopher Wilson for the Office of General Counsel
20 for the U.S. Nuclear Regulatory Commission. I'm
21 joined here with Attorney Sherwin Turk, as well as
22 Attorney Anita Ghosh Naber. I also have on the call
23 here with us is staff members Adrian Muniz, Shawn
24 Harwell, and Cosmos Lois (phonetic).

25 THE COURT: All right. Thank you, all.

1 So we have two motions to address today. I believe
2 our clerk, Ms. Rock, told you the order that we're --
3 I plan to address them, which is the two -- I guess
4 it's actually three motions, but two subjects. We'll
5 address the motions regarding Contention 3B jointly.
6 We have a motion by Long Mott to dismiss Contention 3B
7 as moot, which the board invited and the parties took
8 the opportunity to also brief the appropriateness of
9 summary disposition. And then we have Waterkeeper's
10 Motion to Amend 3B. And because the overlap of those
11 motions is considerable, I plan on addressing those
12 together. And then separately, we have Waterkeeper's
13 motion for Contention 3C. And so I plan on first
14 addressing 3B, allowing a summation, and then possibly
15 a break, and then moving to Contention 3C.

16 So that we can properly frame this issue,
17 I wanted to begin by -- well, all right. Briefly,
18 I'll summarize. Contention 3B addresses whether Long
19 Mott Energy meets the financial qualification
20 standards under Part 70. The factual dispute that we
21 directed the hearing to resolve was whether the ARDP
22 award constitutes at least 50 percent of the
23 construction costs for building the Long Mott
24 Generating Station. After we admitted the contention,
25 Long Mott Energy supplemented its application and to

1 -- put forth an alternative means of establishing that
2 it has 50 percent funding, which is a financial
3 support agreement which I will probably likely refer
4 to as an FSA.

5 Am I correct, and I think this is mainly
6 directed at you, Ms. Perales, that no party is
7 anticipating a hearing on whether the ARDP award
8 constitutes at least 50 percent funding, that that
9 factual matter is over, that any factual dispute about
10 -- for the purposes of Contention 3B, a factual
11 dispute about the amounts of the ARDP award, how much
12 is attributable to the Long Mott Generating Station
13 is, kind of -- is moot?

14 MS. PERALES: Your Honor, my reading of
15 LME's Motion to Dismiss was that they were no longer
16 relying on the ARDP award for purposes of showing that
17 they have acquired 50 percent of the funding to
18 satisfy its construction cost estimates.

19 There was one filing by LME that appeared
20 to propose a more nuanced position to suggest that it
21 wasn't -- that it was still relying on the ARDP award
22 for some purpose, but it was not relying on future
23 funds under that award for purposes of satisfying
24 70.23. But our understanding from the Motion to
25 Dismiss and from the Summary Disposition Motion at

1 least, is that the ARDP award is no longer being
2 relied upon for purposes of demonstrating compliance
3 with 70.23.

4 THE COURT: And, Mr. Lighty, I assume you
5 agree that no hearing is necessary about the factual
6 basis of the ARDP award for purposes of Contention 3B?

7 MR. LIGHTY: Yes, Your Honor, that's
8 correct.

9 THE COURT: All right. So with that, as
10 I try to wrap my head around these motion -- these two
11 motions, am I correct in saying that the real issue
12 here is whether the board grants or denies
13 Waterkeeper's Motion to Amend 3B? And by that, I mean
14 if we were to grant the motion, we would necessarily
15 deny Long Mott's Motion to Dismiss it as moot, because
16 the amended motion would not be moot, we would have
17 just granted it, and if we deny Waterkeeper's Motion
18 to Amend 3B, there is no factual dispute left to have
19 a hearing on because the ARDP award is no longer
20 exempt and we would've denied the Motion to Admit 3B?
21 Does either side disagree with that framing?

22 Start -- Ms. Perales, we'll start with
23 you.

24 MS. PERALES: We disagree with the framing
25 only in so far as that our petition to intervene

1 included a number of arguments related to how the
2 application was deficient in satisfying the 70.23
3 requirements. And it was not clear and remains
4 unclear, looking simply at the language that was
5 included in Part 1 of the application, what is being
6 relied upon by LME. There -- and that language hasn't
7 changed. So LME has provided Supplement 1 but hasn't
8 revised the language in its application, and we are
9 trying to take cues from the motions that have been
10 filed by LME to determine the extent to which it's
11 relying on Supplement 1, whether it's relying on the
12 agreement -- the intercompany agreements that were
13 actually referenced in the application, whether the
14 ARDP funding is in any way implicated in the 70.23
15 compliance demonstration.

16 All that is to say that our -- based on
17 the way that we presented our Contention 3B and our
18 critiques of whether the 70.23 requirements have been
19 met, we believe that contention, as it was framed, is
20 still alive and applicable here.

21 THE COURT: So I'm not quite following.
22 Are you saying that if we deny Waterkeeper's Motion to
23 Amend 3B, there remains something to have a hearing
24 on?

25 MS. PERALES: The -- yes. I think that

1 the way that the contention is framed, and if we look
2 at the bases in the petition to intervene, then we
3 still -- the requirements to demonstrate financial
4 qualifications under 70.23(a) have not been satisfied
5 under the language that's included in Part 1 of the
6 CPA.

7 THE COURT: In a way, that is separate
8 from your Motion to Amend? You're -- so you're saying
9 that there is something extent in your -- in what we
10 admitted from your initial petition, so what is the
11 genuine dispute that was presented in your initial
12 petition, that we admitted as Contention 3B, that we
13 would have a hearing on if we denied your Motion to
14 Amend?

15 MS. PERALES: Our petition to intervene
16 addressed the ARDP funding, but it also addressed the
17 intercompany agreement, even though we didn't have it.
18 So Supplement 1 provided additional, I guess, targets
19 of criticism or additional bases for critiquing the
20 manner by which LME claimed to have satisfied the
21 70.23 requirements, but the sparse information that
22 was included in Part 1 of the CPA originally, we --
23 criticized our petition to intervene -- critiqued both
24 the reliance on the intercompany agreement and the
25 ARDP funding. And so to the extent that the ARDP

1 funding is not being relied on, then the -- our
2 contention still remains that 70.23 demonstration has
3 not been -- or the 70.23 criteria have not been
4 satisfied.

5 THE COURT: So you're free to point the
6 finger at the board in responding to this next
7 question --

8 MS. PERALES: Okay.

9 THE COURT: -- but we admitted -- our
10 admission -- when we admitted Contention 3B, it was a
11 partial admission of your Contention 3, right? And
12 you may -- and you are free to say we were unclear in
13 our ruling, but what was the -- what did we admit from
14 your contention that was not -- I know you said a
15 bunch of things, but what --

16 MS. PERALES: (inaudible).

17 THE COURT: -- did we admit regarding
18 Contention 3B, other than a factual dispute about the
19 ARDP award?

20 MS. PERALES: Sure. Thank you. So our
21 understanding of the -- of Contention 3B is that we
22 had raised a genuine dispute with regard to whether
23 70.23 had been satisfied. And to the extent that the
24 ARDP funding was being relied on, we had raised a
25 dispute as to whether it was adequate, but I -- it --

1 at least our reading of the discussion didn't exclude
2 or claim to state that the -- that if the ARDP -- that
3 the ARDP funding alone would either demonstrate
4 compliance or non-compliance with 70.23(a). It did
5 not appear that that was the argument that was
6 presented by LME. And so our understanding was here
7 is one aspect of it, you know, does the ARDP award
8 meet -- satisfy 50 percent of the cost estimate, but
9 only insofar as 70.23 is the requirement that's being
10 challenged here and insofar as that was one of the
11 basis for satisfying that requirement.

12 THE COURT: Mr. Lighty?

13 MR. LIGHTY: Thank you, Your Honor. To
14 the extent that the board is asking about whether the
15 decision to grant the Motion to Amend 3B would mean
16 that there still exists a 3B that needs to be
17 litigated, therefore, the Motion to Dismiss would need
18 to be denied, we do agree that there would still be a
19 Contention 3B, but we don't agree that the Motion to
20 Dismiss would need to be denied because the basis in
21 the original Contention 3B is moot. And so to that
22 extent, the basis would need to be dismissed and, you
23 know, we agree that Contention 3B as a label would
24 discontinue, but that basis still should be dismissed
25 as moot.

1 THE COURT: Okay. That seems like form,
2 not substance; is that correct?

3 MR. LIGHTY: I -- no. I would say it --
4 it's substance because it would limit the hearing,
5 right? The hearing wouldn't include that now moot
6 issue.

7 THE COURT: Well, I think everyone -- I
8 heard everyone say we're not going to have a hearing
9 on the ADRDP (sic) award in relation to 3B, so I guess
10 we'll need to check that block to say, yes, that is
11 our decision.

12 Okay. I think I've framed this issue --
13 discussion we're going to have as best I can.

14 Mr. Wilson, I'm only going to look at you
15 because you're more on camera than Mr. Turk. Anything
16 on the -- from the general counsel before we move on?

17 MR. TURK: Your Honor, for the staff,
18 Sherwin Turk. Nothing from us. I do feel constrained
19 because we've declared that we're not a party on 3B,
20 so I do not think we should comment further.

21 THE COURT: Okay.

22 MR. TURK: But I do look at the board's
23 initial decision as pointing to the dispositiveness of
24 the issue. At Page 42 of this opinion where you had
25 indicated what are the bases that you admitted, I

1 think you captured it when you talked about the ADRP
2 (sic) and its relationship to the construction costs
3 as being the issue.

4 THE COURT: I'm probably going to direct
5 most of my questions to the parties, so I'll just
6 invite you to break in when it's appropriate if I
7 don't routinely turn back to the NRC staff.

8 MR. TURK: Okay.

9 THE COURT: All right. So my next
10 approach is I'm going to go through what I think are
11 -- what are the possible amended basis -- bases that
12 I see in Waterkeeper's Motion to Amend. But there's
13 a couple factual issues that I'm not expecting
14 disagreement on, but I just want to confirm with the
15 parties before we move on. And the first is, am I
16 correct, and I'll start with Mr. Lighty, that if Dow,
17 and I'm just going to refer to TDCC as Dow, [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

25 MR. LIGHTY: That is correct.

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[REDACTED]

THE COURT: And because LME is the only applicant for a license and [REDACTED]

[REDACTED]

[REDACTED]

MR. LIGHTY: That's correct, Your Honor.

THE COURT: Ms. Perales, do you have any disagreement with that?

MS. PERALES: I assume that we're discussing Supplement 1, and so I think that that is what Supplement 1 reflects.

THE COURT: Right. And what I'm trying to distinguish is perhaps other applicants in which there are investors who might step in and step out, whereas this is a somewhat unusual -- well, maybe not unusual, but it's different in the respect that the Long Mott Generating Station is being built on Dow land for the purposes of providing power and heat to a Dow facility, and it doesn't really serve anyone else any practical purpose. [REDACTED], we're not going to have -- this isn't a situation where, you know, Amazon drops out and Microsoft jumps in, right? This is -- [REDACTED] -- and I'm seeing nodding heads.

All right. So the next thing before I

1 turn to the individual bases is as I was reviewing the
2 briefs, I had a question as to what constitutes good
3 cause in the circumstances presented by the Motion to
4 Amend 3B, specifically when you have what I'm going to
5 refer to as old information, but I mean, information
6 that is untimely under Section 2.309, but which is
7 made relevant and material based on new information.

8 So you have, you know -- so in this case
9 we have some of the factual matter raised by
10 Waterkeeper are Dow annual reports and 10Ks and other
11 information which wasn't necessarily timely in the
12 strict sense of it became -- they became aware of it
13 within 30 days. And the question is, when did the FSA
14 make this information that was not previously
15 relevant, relevant? And I know you both are going to
16 dispute as to the degree to which it made it relevant
17 or not, but I would like to just forget about that for
18 a moment and see if we all agree that if you had a --
19 if you had old information, which was immaterial,
20 meaning there was no valid basis to form a contention
21 on it, and then a new information comes out that makes
22 that old information relevant, that that would
23 nonetheless -- a contention based on that old
24 information would be based on the new information and
25 would be timely for purposes of good cause. And I can

1 give an example if that was confusing. Would that be
2 helpful?

3 Okay. I see yes. I see a nod yes. So
4 forget this application. Let's see -- let's assume an
5 applicant changes out its reactor type. And let's say
6 they -- instead of building an AP1000, they're going
7 to propose to build an RBNK (sic) reactor. Now, as
8 soon as they did that, a whole bunch of information
9 from 40 years ago becomes relevant, right? It was not
10 relevant until the moment that they made that
11 alteration. And would -- so would a contention based
12 on 40-year-old information about perhaps some problems
13 with RBNK (sic) reactors be nonetheless based on new
14 information and therefore timely for purposes of
15 establishing good cause because it only became
16 material with that recent change.

17 And I'll start with Mr. Lighty on that one
18 because I feel like if I'm going to get an objection,
19 it's from you.

20 MR. LIGHTY: Yes, Your Honor. I certainly
21 think that it is possible to put together an argument
22 to attempt to make a connection between a document and
23 information in that document that somehow raises an
24 opportunity to use other information that's out there
25 because, you know, it was -- it -- there's something

1 new in there that gives rise to it. The problem here
2 is that Waterkeeper didn't attempt to explain that in
3 its motion. Waterkeeper's approach was, we've got a
4 new document and that's enough, and now we get to make
5 any argument we want to based on it. But the burden
6 is on Waterkeeper to explain what claims are based on
7 (inaudible) material (inaudible) --

8 THE COURT: We'll talk --

9 MR. LIGHTY: -- information rather than
10 just --

11 THE COURT: Yeah. We'll talk about all
12 those individually. But as a principle, if a
13 contention was immaterial and therefore not admissible
14 before the new information came out, but the new
15 information comes out and it is now material and you
16 don't disagree in principle that that contention would
17 be timely. You just may have a dispute as to these
18 particular facts in this case?

19 MR. LIGHTY: Right. And the argument
20 would have to be put in the motion. I think that's
21 what we're saying. And we noted in our Footnote 25 in
22 our answer that, you know, even doing that in the
23 reply was too late.

24 THE COURT: All right. So I -- Ms.
25 Perales, I found the following factual bases or

1 possible genuine disputes in your Motion to Amend, and
2 we'll go through them one by one. But first I'm just
3 going to kind of identify them. The first is, and I'm
4 not sure you intended all of these to be factual
5 basis, so I might be over-inclusive. The first is a
6 concern that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] and that therefore the agreement is not
8 valid, which is separate from Dow's capacity to
9 provide funding, meaning your allegation that Dow
10 lacks the financial ability to actually fulfill its
11 agreement [REDACTED]

[REDACTED]
[REDACTED] and the agreement is not
14 enforceable by LME against Dow because it's a
15 wholly-owned subsidiary. So those are three.

16 A basis about Waterkeeper -- what
17 Waterkeeper are claiming that Long Mott has not
18 explained the role of X-energy in this proceeding.
19 From the Motion to Dismiss in response to summary
20 disposition, you made arguments about the construction
21 costs, which is -- so when we're talking about 50
22 percent of funding, we've kind of been focusing on the
23 numerator and this is the denominator of that 50
24 percent. The issue of whether Long Mott's
25 application, it has less information or the -- than

1 the application that was accepted in the Kemmerer
2 application that was accepted, I think that it -- that
3 was it. You can amend your answer later, but are
4 there any other issues that you think are raised by
5 the motion that I did not address?

6 MS. PERALES: I think that captures the
7 arguments. Thank you.

8 THE COURT: All right. So we're going to
9 start with the concern that the agreement, the FSA, is
10 essentially [REDACTED]

11 [REDACTED]. And my
12 question is, since -- [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]? That seems like

16 it's not material to anything we have to decide,

17 meaning a future in which, for whatever reason the

18 [REDACTED], is not a future that this

19 board is concerned about. Do you agree with that?

20 MS. PERALES: I agree that that is

21 certainly one aspect of looking at that issue. But

22 another aspect is that -- and perhaps this kind of

23 weaves into the second point about the capacity. But

24 another aspect is if Dow were [REDACTED]

[REDACTED] --

1 THE COURT: Right. That's clear.

2 MS. PERALES: -- (inaudible).

3 THE COURT: That's down on my list.

4 MS. PERALES: Okay. All right.

5 THE COURT: This is more of [REDACTED] [REDACTED]
[REDACTED].

7 MS. PERALES: To get started. Right.

8 THE COURT: Right. So I -- and if that
9 happens, I don't see that -- anything that happens
10 from that decision I see is beyond the scope of any
11 proceeding we have because there is no plant.

12 MS. PERALES: Right. I think I
13 understand. So to be clear, [REDACTED]

[REDACTED]
[REDACTED],

16 and we agree.

17 THE COURT: Right. Okay. All right. So
18 then let's talk about the construction cost estimates.
19 And am I only saw your -- so you raised concerns in
20 the -- in response to the Motion to Dismiss as part of
21 the summary disposition discussion, whether Dow's
22 construction cost estimates are essentially realistic.
23 And my first question is that is not included in your
24 Motion to Amend. And so I don't see how we're going
25 to get to a hearing on that because you can't amend

1 your contention in response to a Motion to Dismiss.
2 So do we need to address construction costs because
3 how are we going to have a -- how are we even going to
4 get to a hearing on resolving a disputed fact about
5 whether the construction costs are realistic? And
6 again, (inaudible) --

7 MS. PERALES: So --

8 THE COURT: -- intend for that to be part
9 of your motion, but one of the issues I identified.

10 MS. PERALES: Sure. So our -- again, our
11 understanding of the admitted contention was that
12 included within that, in order to determine the 50
13 percent, we first had to determine the -- what the
14 reasonable construction cost was. And we provided
15 some publicly-available information to demonstrate
16 what it could be. But certainly it was not intended
17 to say, this is what it is. And we also included
18 citations, at least to -- at least to one article,
19 indicating that construction costs are likely to
20 significantly increase.

21 -- and so in order to again, the 50
22 percent depends on a reliable or a reasonable
23 construction cost estimate and that seems implicit in
24 the contention and the way it was drafted.

25 THE COURT: But it was not a basis of the

1 contention, right? Meaning it was not -- well, I
2 don't believe it was in your initial petition and
3 certainly we didn't admit 3B based on a concern about
4 construction costs. And if you look at this somewhat
5 painful process where we identify the genuine disputes
6 that are at issue in a -- in application, we determine
7 whether they're material to whether the permit is
8 granted, and then we have a hearing to resolve the
9 factual disputes.

10 You seem to be envisioning a world in
11 which we have the hearing on additional factual
12 disputes that were not part of the basis for where --
13 for which the contention was admitted, and that would
14 seem to undermine the very -- the narrowing process
15 that we've been going through, where we try to
16 identify the factual disputes that are hearing-worthy.

17 MS. PERALES: So in your petition to
18 intervene -- and I understand what you were -- what
19 you're describing, Your Honor. Our petition to
20 intervene, as has been pointed out multiple times by
21 LME, was not based on -- or did not cite to the
22 specific construction cost estimates in the
23 application. We didn't seek access to that
24 information, we weren't provided access to that
25 information, and so what we did provide was not going

1 to be comparable -- directly comparable to what was in
2 the application, obviously.

3 But it did intend -- it was intended to
4 raise questions about the construction cost estimate
5 and whether it was reliable, and that was one of the
6 reasons that we attached documents to our petition to
7 intervene, and we attempted to make that clear in our
8 reply that the -- that it -- that the picture that was
9 presented in the application is not a realistic
10 picture, and that that needed to -- that needed to be
11 part of that equation to determine whether we need to
12 determine whether the demonstration -- the financial
13 qualification demonstration satisfied 70.23(a).

14 THE COURT: Did -- am I correct that in
15 your motion when -- either of the motions when
16 discussing construction costs, you did not identify
17 any specific cost input that you're challenging, such
18 as LME got the cost of cement wrong on the Texas Gulf
19 Coast, or labor or financing or steel, that it's more
20 of a broad concern about these estimates are always
21 under what they end up being?

22 MS. PERALES: That's -- I think that's
23 right. I think that we certainly didn't identify
24 specific inputs into the cost estimate as being
25 unreliable. I'm not sure that we have that type of

1 information to critique. But our critique was with
2 whether the cost estimate presented a realistic
3 picture of the -- of what to expect.

4 THE COURT: All right. So let's take on
5 what I refer to as your issue about Dow's capacity to
6 provide the financing. Broadly, I see a couple
7 factual issues that you and Ms. -- your expert raise.
8 The first is what is the actual amount of CapEx that
9 Dow has, 2.5 versus 2.2 billion, that Dow has publicly
10 committed to spending 1.5 billion a year on the
11 Path2Zero project, which you argue is essentially
12 competing for its annual capital expenditures, that
13 Dow has publicly stated that it is going to -- plans
14 on spending 300 to 500 million less than it has in the
15 past, so it's capital expenders (sic) is decreasing,
16 and then Dow's financial health is generally declined,
17 and you cite to its bond rating and decrease in
18 profits and maybe one or two other things.

19 All right. So the first -- I want to
20 break -- this one is more complicated than the other
21 one, so I'm going to break it into good cause first,
22 and then we're going to talk about contention
23 admissibility. So as to good cause, I believe all
24 those four things I just said are not new information,
25 right? And I understood your argument -- well, what

1 is your argument as to why a contention based on those
2 facts is timely, and therefore is good cause?

3 MS. PERALES: Sure. So the Supplement 1
4 includes a dollar figure, right? It includes a -- the
5 maximum amount that Dow has claimed that the LME can
6 rely on for purposes of this permit application
7 proceeding. That figure was not something that had
8 been provided, or that was even referenced in the
9 original application. This dollar figure is new, as
10 we also -- as we discussed there.

11 Also, there had been representations that
12 the ARDP funding was what was going to be relied upon
13 for purposes of showing 50 percent of funding had been
14 acquired. Now it's -- now we have a dollar figure,
15 and we have a representation that it's this agreement
16 that will be relied upon.

17 And so this new information is -- presents
18 good cause to determine whether in fact Dow has the
19 capacity to provide the dollar amount that has been
20 represented in Supplement 1 in the financial services
21 agreement, and whether Dow is sufficiently reliable
22 for LME and the NRC to look solely to Dow and its
23 commitments in that FSA to satisfy the financial
24 qualification standard in 70.23.

25 THE COURT: Okay. Ms. -- Mr. Lighty, you

1 started to talk about this earlier, but now I'll give
2 you the full opportunity. Why is it your view that
3 this does not constitute good cause?

4 MR. LIGHTY: I would say two things, Your
5 Honor. First, it's that this is the first time I'm
6 hearing this argument. It wasn't presented in the
7 motion about the specific information within the FSA
8 that gives rise to this opportunity, this, you know,
9 sort of clawback to go back to old information. So
10 it's untimely.

11 But second, I would say I -- I'm still not
12 convinced that this gives rise to the opportunity,
13 because although the amount of the support agreement
14 is new information, no doubt about that, I don't know
15 whether or not it's materially different from what
16 could have been, you know, assumed at the outset,
17 right?

18 The application says there is an
19 intercompany agreement in place. It's for
20 construction of a mega project. It didn't give the
21 dollar amount. But would it matter if the FSA was ■
■ [REDACTED] ? I still
23 haven't heard an argument about the materiality of
24 that new information.

25 THE COURT: The -- so I looked back at

1 your answer to the initial petition, right? And part
2 of that answer was responding to some of Waterkeeper's
3 concerns. And although it's not crystal clear, you
4 certainly seem to indicate that a contention based on
5 -- you know, because the original -- the construction
6 application as originally filed mentioned an
7 intercompany agreement, and I believe you said that
8 it's not -- there's not allowed to be an audit of that
9 agreement, and that Long Mott was only required to put
10 forth a description of the anticipated funding
11 methods, not the actual funding methods, both of which
12 seem to say that Waterkeeper can't challenge what was
13 in the application, and so that if Waterkeeper had
14 made an allegation about Dow's financial capacity as
15 part of its initial petition, that that contention
16 would not be material.

17 MR. LIGHTY: I guess I view our original
18 answer a little bit different, in terms of making the
19 argument that Waterkeeper didn't identify a
20 requirement that's unmet to include that information,
21 right, in other words, to attach the document to the
22 application. They certainly, you know, noted the
23 omission of it, but they didn't explain a theory, a
24 legal theory, of why it was required. And so that's
25 how I would frame our original answer.

1 THE COURT: All right. Let's turn to
2 contention admissibility. Ms. Perales, when does the
3 construction application state that the construction
4 is going to be completed? And we dealt with this in
5 Contention 1.

6 MS. PERALES: Well, I believe it was 2030,
7 is when it's supposed to be completed.

8 THE COURT: Are you sure about that?

9 MS. PERALES: No. I'm just going off my
10 memory, and I'd be happy to double check and look for
11 that.

12 THE COURT: That -- that's -- that would
13 give only three years to build it.

14 MS. PERALES: That's -- yeah, that --
15 you're right.

16 THE COURT: Mr. Lighty, do you know the
17 answer?

18 MR. LIGHTY: If I recall, it was 2033.

19 THE COURT: I think that's right.

20 And the reason I'm asking, Ms. Perales, is
21 because -- what does Mr. Cooper say the construction
22 date is?

23 MS. PERALES: That's right, I believe.
24 Yeah. I believe he stated that it would begin this
25 year; is that right?

1 THE COURT: He stated that the
2 construction application -- the construction was going
3 to be complete -- the -- that the Long Mott Generating
4 Station would go commercially operable in 2030. And
5 he had a citation for it, and it does cite the
6 construction application and he cited it correctly.
7 But it's to a section that was calculating the
8 population density of the local area and it said, for
9 purposes of calculating the population density, we
10 assume that the construction will -- the plant will go
11 operational in 2030, and it will last 40 years and
12 it'll go to 2070.

13 But that was -- but that's not the actual
14 construction finish date, and the problem I see here
15 is that his analysis is dependent on Dow not having
16 the CapEx to spend at Long Mott Generating Station.
17 And based on the world as he thought it was, Dow is
18 committing [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

24 for -- of non-committed CapEx for all Dow projects, it
25 leads to -- and I was following this, it leads to a

1 natural conclusion that Dow does not have the ability
2 [REDACTED]
3 [REDACTED], and so this project would
4 exceed Dow's ability to fund based on its own
5 financial statements.

6 But if you look at the construction
7 completion date as 2033, and you then take Mr.
8 Cooper's facts as he laid them out, what you have is
9 the Path2Zero project ends in 2030. So Dow had been
10 committing 1.5 billion in CapEx to the project in --
11 I believe it's Ontario. That's finished. It no
12 longer is, and now it has 1.5 billion a year to
13 allocate to other projects, such as the LMGS. And
14 once I saw this issue, his, you know, professional
15 conclusion about whether Dow has the capital
16 expenditures to actually allocate to Long Mott
17 Generating Station seems to be based on an incorrect
18 assumption. And so -- but I want to give you a chance
19 to address that.

20 MS. PERALES: Well, Your Honor, Mr. --
21 unfortunately, Mr. Cooper could not be available
22 today, and we certainly regret that there was that
23 error in his declaration, and I don't want to speak
24 for him with regard to how that impacts his analysis
25 or what he would -- what he was relying on

1 specifically in making his -- or in formulating his
2 opinions regarding the financial capacity of Dow.

3 But what I would say is that the -- going
4 back to what I understood LME's counsel to say is, you
5 know, whether there were any specific requirements
6 within 70.23 that stated that the -- and the company
7 agreement must be attached. Similarly, are there any
8 specific requirements that state that the parent
9 company must detail how it intends to show that when
10 construction is intended to commence, it will be
11 finished with its other capital expenditures or other
12 capital commitments?

13 The 70.23 is not that specific. 70.23 has
14 a broader language, but the standard is still -- is --
15 it -- it's still a significant standard. It still
16 presents a significant hurdle for LME to meet. And so
17 we have presented -- in our opinion, we have presented
18 in our motions and in our petition to intervene a
19 number of reasons that the standard has not been
20 satisfied, and that's, you know, based on the facts
21 that -- especially now, with the Supplement 1, based
22 on the fact that it seems that LME is relying
23 exclusively on the financial agreement with Dow to
24 demonstrate satisfaction of the financial
25 qualification requirement 70.23.

1 Not just to say we have an agreement that
2 provides that will -- that we can commit 50 percent of
3 Waterkeeper's estimate of the construction cost
4 estimate. Rather, Supplement 1 is the document that
5 LME relies on to show that it can satisfy 70.23(a),
6 and 70.23(a) is not limited to showing of, you know,
7 whether the applicant has acquired 50 percent funding.
8 70.23(a) mandates a demonstration that the -- that
9 there is actually a financially qualified applicant
10 here.

11 And all that is to say that, again, I
12 cannot speak for Mr. Cooper, and we regret that error,
13 but the -- but that error does not make or break our
14 argument regarding whether the standard in 70.23(a)
15 has been satisfied by the Supplement 1.

16 THE COURT: Mr. Lighty, anything on
17 contention admissibility as to the capacity of Dow, as
18 I phrased it, to meet its obligations under the FSA?

19 MR. LIGHTY: Just briefly, Your Honor, I
20 would mention that, you know, Dow's financial
21 qualifications are requirements in Part 50, Appendix
22 C, and those requirements were expressly taken out of
23 the Part 70 standard. So I just don't think that's
24 relevant to the -- you know, to the sufficiency
25 question of satisfying a Part 70 requirement, but

1 that's covered in our brief.

2 THE COURT: Okay. The last basis is
3 Waterkeeper's claim that intercompany agreements are
4 not enforceable, that a, you know, subsidiary would
5 actually have to ask -- essentially ask permission to
6 enforce agreement against its parent, which means it's
7 not really enforceable, and whether or not --

8 So Ms. Perales, why -- explain to me -- so
9 that seemed -- that's a claim directly based on the
10 FSA, so explain to me -- so let's assume that we're --
11 we -- you have good cause to raise this. What is the
12 admissible contention that that basis -- what is the
13 -- give me your argument for why that would form the
14 basis for an admissible contention.

15 MS. PERALES: Your Honor, I think, you
16 know, again, to address the question, I would urge
17 that we zoom out just a little, and that is to look at
18 70.23(a) and what is intended and what the language
19 says and what LME's burden is here. LME's burden is
20 to demonstrate that it has the ability to acquire the
21 financial capital at the time of construction of the
22 facility, and in order to do that, it is now relying
23 on its agreement with Dow exclusively.

24 And so our petition and our Motion to
25 Amend the contention presents a number of reasons why

1 that is a really risky proposition. It's a really
2 risky proposition to rely solely on this one agreement
3 that was only recently executed to demonstrate
4 compliance with 70.23(a). And among those reasons is
5 that LME is a subsidiary that was formed for this
6 project by Dow. And so under -- you know, it --
7 whether LME can enforce or whether it would even be
8 able to attempt to enforce the agreement against Dow
9 is just a factor among a variety of factors that
10 demonstrates that Supplement 1 alone is not what is
11 contemplated as a financial qualification
12 demonstration under 70.23(a).

13 So more to the point, if the Motion to
14 Amend were granted, there would be, in our view,
15 testimony by an expert who would explain why under --
16 why, you know, the Supplement 1 is -- presents a risk.
17 It's not enough to demonstrate financial
18 qualifications of LME. And that expert would include
19 in his testimony or her testimony, among the reasons
20 that it's a -- it remains a risky proposition, the
21 fact that LME is a subsidiary of Dow, and so this
22 intercompany agreement is unlikely to be enforced and
23 is likely not enforceable.

24 And if we look at other documents that
25 have been disclosed or come in through discovery,

1 we'll see that, in fact, it's not what was initially
2 contemplated by -- when FCP or Part 1 of the
3 application was prepared. Again, Supplement 1 wasn't
4 even in existence at the time. And so that's what the
5 -- that's what the evidence would -- we expect would
6 show.

7 THE COURT: So Mr. Lighty, as to whether
8 an interparty -- intercompany agreement is
9 enforceable, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And what is LME's view as to -- [REDACTED]

[REDACTED]

[REDACTED] What is LME's view as to the ability of
16 the NRC to enforce the agreement?

17 Meaning, in a situation in which [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], given the references to the -- that [REDACTED]

[REDACTED]

[REDACTED], what is the recourse
24 against -- by the NRC against Dow, which is not the
25 applicant, in that circumstance?

1 MR. LIGHTY: Thank you, Your Honor. The
2 -- I think the first thing to keep in mind here is
3 that the NRC's job is not to ensure that the project
4 is completed. That's not the purpose of the financial
5 review. So what we're talking about is the NRC's
6 safety regulatory authority, and the NRC retains its
7 regular oversight over all of construction at any
8 point. The NRC could issue a stop work order if there
9 is a safety issue, if there was an underfunding issue,
10 and, you know, that would effectively stop the
11 project.

12 But to the extent, you know, that you're
13 asking whether the NRC could go in and say, no, no,
14 no, Dow, you have to -- you have to fund this so we
15 can complete this project, I think that would exceed
16 the NRC's authority and the purpose of its financial
17 review. But it retains the safety authority to take
18 any action needed.

19 THE COURT: And so if LME, as the
20 applicant, determines that it is not receiving timely
21 -- so the agreement requires [REDACTED].
22 If LME as the applicant determines it is not receiving
23 [REDACTED] [REDACTED] [REDACTED] [REDACTED], is that a mandatory report
24 requirement to the NRC, that part of our construction
25 application which we submitted, which said we are

1 going to have this source of funding, so you may have
2 -- you may have rest assured that this project is well
3 capitalized, well, we now as LME have determined we're
4 [REDACTED]. Does that have to
5 be reported to the NRC so that they can conduct that
6 oversight?

7 MR. LIGHTY: Off the top of my head, I'm
8 not aware of any specific provision in Part 50 that
9 would impose a mandatory reporting requirement for
10 that scenario. But again, I would say that all of the
11 safety reporting obligations are going to be there, so
12 if there is an underfunding issue that is causing some
13 type of a safety issue, then all of the regular
14 reporting requirements would apply. And so I think
15 the NRC would be on notice that way.

16 THE COURT: Okay.

17 Ms. Perales, when I saw this basis, I saw
18 it having two components. The first is a legal
19 question as to whether intercompany agreements are
20 enforceable, with the subsidiary issue of what the NRC
21 can do if, for whatever reason, [REDACTED]

[REDACTED]
[REDACTED]

24 But the second question is, what's the
25 basis for the -- for your concern that Dow would do

1 this, right? So it's an allegation, and I'm treating
2 this separately from Dow's capacity. So now I'm in
3 the circumstance where [REDACTED]

4 [REDACTED] Is there any factual basis
5 in the motion to support that concern so that we would
6 end up in a hearing to resolve that factual concern?

7 MS. PERALES: Well, one basis is that --
8 and I want to make sure that I have the question that
9 you're asking -- that I understand it, and it seems
10 pretty precise. And it sounds like you're asking,
11 under what factual scenario that may have been
12 included in our motion would this risk arise, this
13 risk of Dow not --

14 THE COURT: I'll try to restate it --

15 MS. PERALES: Okay.

16 THE COURT: -- help you out. So you
17 raised that the agreement -- you know, Long Mott
18 really can't enforce the agreement against its parent,
19 and that's a legal question, but for this to matter,
20 we're in a circumstance where Dow [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 And you are afraid -- you are concerned
24 that this will then create incentives to cut corners
25 or, you know, not adequately build the plan up to par,

1 but what is the factual basis -- so there's an
2 allegation there that Dow might engage in this course
3 of action. Is there a factual basis to support it, or
4 is it speculation, is what I'm really getting at.
5 What is -- what cause -- what is the genesis of this
6 concern, and did you put it in the motion?

7 MS. PERALES: Well, one of the -- one of
8 the bases for that concern is what we've talked about,
9 and that is whether, you know, that it has the
10 financial capacity. And setting that aside - so we've
11 talked about financial capacity, but setting that
12 aside, I think the fact that this agreement was
13 submitted -- was executed and submitted just this
14 year, and yet there was a reference to an intercompany
15 agreement in the application when it was -- when it
16 was first submitted to the NRC -- and so that is -- I
17 mean, I think that's at least some evidence that LME
18 is -- and the dollar figure that's included in that
19 agreement was intended to address the estimate that
20 was included in Waterkeeper's petition to intervene.

21 That -- that's -- it's intended to show
22 that 50 percent of the highest estimate in
23 Waterkeeper's petition to intervene was met. I mean,
24 that demonstrates that this agreement wasn't
25 necessarily prepared with any seriousness to

1 demonstrate financial qualifications in the way that
2 the regulations contemplate, but rather it was
3 executed -- was created and executed in order to
4 attempt to meet Waterkeeper's contention.

5 So that's one aspect in addition to the
6 financial capacity, but also, let's just say that
7 there isn't additional ARDP funding, and so there
8 isn't, you know, a mechanism for reimbursement of any
9 investments that are put forward by Dow. Would Dow
10 still be motivated to continue to invest in the
11 project? Those are --

12 THE COURT: Your concern is -- it's a
13 narrow one, because [REDACTED] --

14 MS. PERALES: Yes.

15 THE COURT: -- I think we all discussed it
16 here, there's no issue for this board to decide,
17 right? And I think Mr. Lighty is correct that this
18 board is not concerned with the product complete --
19 being completed. The question is whether it is
20 completed but in a manner that is not safe, right?
21 Because it was underfunded.

22 So is there a -- so if it's not started,
23 there is no issue. If it's not completed, there is no
24 issue. The concern is that middle ground, where [REDACTED]

1 threshold, why does it before this board what the role
2 of X-energy is, right? So they -- I mean, if the --
3 obviously when we say someone's providing 50 percent
4 funding, there's another 50 percent out there
5 somewhere, right? It's only half funded, but the --
6 you know, the -- that threshold is set because if
7 you're at least 50 percent funded, there's confidence
8 that you have sufficient funding that you will build
9 the plant appropriately and that you are on your way
10 to get additional funding. If LME satisfies the 50
11 percent threshold based on the FSA with Dow, what is
12 the basis for admissible contention on the role of
13 X-energy?

14 MS. PERALES: So the difference between
15 the reliance on ARDP and the FSA is that the ARDP was
16 awarded to X-energy. And so X-energy, I mean, there
17 was something in there. There was some information
18 indicating that X-energy was going to have some
19 funding. Now that that LME is relying only on its
20 FSA, we no longer -- there's nothing to point to in
21 that FSA to ensure that X-energy, the builder of the
22 -- or of the facility, is going to have that funding.
23 And that's why the FSA presents new information to
24 raise whether X-energy is -- whether that they're
25 adequately secured with Supplement 1.

1 THE COURT: All right. Mr. Lighty, same
2 topic.

3 MR. LIGHTY: Thank you, Your Honor. We
4 see nothing new here. There was no discussion of, you
5 know, funding commitments to X-energy, including in
6 the original application, and that claim could have
7 been raised at the outset. But here, I think, the
8 more fundamental issue is that there's no obligation
9 to demonstrate, you know, the flow of cash funds to
10 lenders and contractors and, you know, Waterkeeper
11 doesn't point to any obligation. None exists. Many
12 projects, you know, the entire operating fleet has
13 been constructed and the construction permit did not
14 require demonstration of funding to vendors.

15 Again, the NRC has its safety oversight
16 role that will inspect the construction through --
17 throughout the process. The individual entities
18 involved have QA requirements that are NRC enforced
19 and that's how the NRC deals with that piece of the
20 safety relevant piece of construction. The funding
21 obligation demonstration is only required for the
22 applicant and Waterkeeper doesn't share it otherwise.

23 THE COURT: Am I -- I'm just going to
24 summarize what I understand LME's position to be,
25 which is that for purposes of establishing the 50

1 percent funding threshold, LME is not relying on the
2 ARDP award. But that does not mean that you're
3 disavowing some benefit from the ADP award in general,
4 that there may be additional funding flowing from the
5 ARDP award through X-energy towards the construction.
6 But you're not relying on that in this proceeding to
7 show that you meet that 50 percent; is that fair?

8 MR. LIGHTY: Yes, that's absolutely right.
9 And that's why we, you know, included that distinction
10 in one of our pleadings that, you know, we're not
11 throwing the -- that completely out the door. It's
12 certainly relevant to the bigger picture. It's just
13 no longer material to the question of 50 percent.

14 THE COURT: Judge Trikouros, any
15 questions?

16 JUDGE TRIKOUROS: No.

17 THE COURT: All right. So we'll end
18 Contention 3B with a summation starting with Ms.
19 Perales.

20 MS. PERALES: Sure. Thank you, Your
21 Honor. I -- I'd like to start by going back to that
22 last question just very quickly. And I wanted to
23 highlight that the reason that LME is attempting to
24 take X-energy out of the equation is because it has
25 chosen to refer to X-energy as a vendor. But that

1 doesn't mean that the way it has chosen to interact
2 with X-energy renders X-energy's role irrelevant to
3 satisfying the qualifications of 70.23(a). Because
4 the purpose of 70.23(a) is to make sure that the
5 estimated construction costs and related fuel cycle
6 costs are -- that the -- that there's financial
7 capacity to cover those costs. And the fact that the
8 -- that those costs are going to be incurred through
9 some vendor relationship does not make it --
10 X-energy's role irrelevant here. And again, you know,
11 pointing to the Kemmerer application, there the ARDP
12 awardee was involved in the financial qualification
13 demonstration as it should be, and here X-energy is --
14 has simply been pretty much taken out of it.

15 And at its core, Contention 3B challenges
16 LME's financial qualifications. And this is the issue
17 that the board must resolve before issuing LME its
18 requested construction permit and it's the issue
19 that's required to be addressed by the rules. The
20 reason that the instruments referenced in Part 1 of
21 the application are relevant here, that is the
22 intercompany agreement and the ARDP award, is because
23 these instruments are how LME attempts to demonstrate
24 or at least initially attempted to demonstrate
25 compliance with the financial qualification rules and

1 the same is true with the cost estimate.

2 Indeed, LME's financial qualification
3 demonstration, which again is in Part 1 of the
4 application, it's pretty bare bones. It's
5 uncomplicated. It's straightforward and really it's
6 too bare bones to actually address the financial
7 qualification requirements and that is what
8 Waterkeeper argued and presented in its petition to
9 intervene.

10 Now, LME seeks to moot Contention 3B, but
11 not by addressing the arguments or critiques raised in
12 Waterkeeper's petition. That is LME does not provide
13 any documentation in support of the references that
14 are actually in Part 1 of its application. It did not
15 include information comparable to what STP included or
16 what was in the Kemmerer application, but both were
17 cited by LME as support for its exemption request.
18 There's no information really -- there's no
19 supplemental information regarding the qualifications
20 of its team or Dow's experience in constructing
21 nuclear reactors.

22 Instead, LME sought to essentially concede
23 to Waterkeeper's estimate of construction costs, as
24 related in its petition to intervene, and then offer
25 another newly created intercompany agreement that

1 purports to provide 50 percent of that estimate, no
2 other change was made to Part 1 of the CPA. Yet
3 according to LME, this is enough to meet the
4 contention or summarily dispose of it. But as LME
5 claims that this single agreement demonstrates that it
6 is financially qualified and understands the scope of
7 the project and otherwise complies with 7023 without
8 any need for license conditions.

9 LME further argues that there's no -- that
10 no scrutiny into the terms and conditions of the
11 agreement is necessary. The mere existence of the FSA
12 resolves or moots any dispute here. We contend that
13 that is an oversimplification of LME's burden. For
14 LME to prevail, based on mootness or summary
15 disposition, Supplement 1 must address the legal
16 financial qualification requirement, not simply
17 address or check off a box on LME's compacted
18 checklist. Indeed, a Waterkeeper had alleged only
19 that LME failed to attach a copy of its intercompany
20 agreement to its application. Without more, that
21 contention would likely be deemed insufficient for
22 failing to identify a deficiency related to a legal
23 requirement.

24 The Waterkeeper's contention was broader
25 than that. Waterkeeper's contention was that the

1 legal requirement here, 70.23(a), was not satisfied by
2 the sparse information included in Part 1 and that
3 contention remains valid. Supplement 1 provides an
4 additional piece of information related to LME's FQ
5 showing, but it does not ipso facto demonstrate that
6 LME appears to be financially qualified or that its
7 FCP is adequate. In fact, it -- Supplement 1 raises
8 more questions than answers.

9 It is our -- it is our position that LME
10 is opposed to converting its Motion to Dismiss into a
11 Summary Disposition Motion because it seeks to prevent
12 the board from reviewing any summary disposition
13 evidence or meaningfully engaging with LME's purported
14 financial qualifications. Even in its supplemental
15 briefing, when given the opportunity to do so, LME
16 refused to include any summary disposition evidence in
17 support of its request for summary disposition
18 regarding Contention 3B. And its statement of
19 undisputed facts cites to the cost estimate alleged in
20 Waterkeeper's petition and intervention, instead of
21 supporting the cost estimate in its own application.

22 No doubt that if the board were to
23 determine that the construction cost estimate were too
24 low and the Waterkeeper's estimate were also too low,
25 LME would come up with another supplement indicating

1 Dow's intent to supply even more funding, regardless
2 of its inability -- regardless of its ability to do
3 so. And this is the -- part of the problem that
4 reference to a document that was only recently created
5 with no evidence or other information to support the
6 commitments in that document is not what was
7 contemplated by regulate -- the Regulation 70.23(a) or
8 even by the more recently adopted Regulation 53.1306.

9 And so for those reasons, we maintain that
10 Contention 3B is still valid, even with the newly
11 offered and FSA, and that it should be amended to make
12 it clear that that FSA is part of the basis for the
13 contention.

14 THE COURT: Before I go to Mr. Lighty,
15 regarding the -- your reference to the Kemmerer
16 application, I mostly understood that to be his
17 background, but not as a separate -- I don't think you
18 were in -- you intended in your motion that the
19 Kemmerer application was different alone as a basis
20 for an admissible contention. Is that fair or --

21 MS. PERALES: You're right. Yes, that is
22 fair, Your Honor. It was our attempt to demonstrate
23 the type of information that would be relevant to
24 demonstrate compliance with 70.23(a).

25 THE COURT: Okay.

1 MS. PERALES: Again, because as Mr. Lighty
2 stated, 70.23(a) doesn't specifically say, you know,
3 check this box, include the intercompany agreement,
4 make sure it has this type of language, et cetera. It
5 does not -- the 70.23(a) language is not that
6 specific. And so our intent in referring to other
7 applications, such as Kemmerer, was to show the type
8 of information that has been considered relevant in
9 determining whether that standard has been satisfied.

10 THE COURT: All right.

11 Mr. Lighty?

12 MR. LIGHTY: Thank you, Your Honor.
13 Regarding Waterkeeper's proposed amendment of
14 Contention 3B, LME maintains that the motion should be
15 denied. The vast majority of arguments that
16 Waterkeeper seeks to raise are untimely. Those new
17 claims are driven by statements from Waterkeeper's
18 declarant, Dr. Cooper and Mr. Chang, but the
19 declarants may not have understood that the
20 information they wanted to challenge has been
21 available for over a year, but Waterkeeper certainly
22 should have known that.

23 The commission doesn't allow petitioners
24 to raise arguments that simply did not occur to them
25 at the outset. Waterkeeper raised only two comments

1 purporting to challenge the actual content of the
2 financial support agreement, and as noted in our
3 answer pleading, neither provides a basis for an
4 admissible contention.

5 I did want to respond to Waterkeeper's
6 closing comments about X-energy very briefly. And I
7 would simply note that Waterkeeper is demonstrably
8 mistaken that X-energy would be the entity responsible
9 for construction of the reactor or for the fuel here.
10 LME would be the sole entity authorized to construct
11 the reactor and the CPA does not include any request
12 for fuel. So to the extent Waterkeeper wants to
13 challenge X-energy's financial ability to manufacture
14 fuel at its separate fuel fabrication facility, its
15 claims are both untimely and are being raised in the
16 wrong proceeding altogether.

17 So in sum, as we established at the outset
18 of our discussion today, the amount of the ARDP award
19 is no longer a material issue in this proceeding and
20 therefore that basis for Contention 3B must be
21 dispatched. And as to the proposed amendment,
22 Waterkeeper has not carried its affirmative burden to
23 articulate claims that are both new and materially
24 different and that meet all six admissibility
25 criteria. And for that reason, the Motion to Amend

1 Contention 3B should be denied. Thank you, Your
2 Honor.

3 THE COURT: All right. Let's take --
4 we'll go off the record. And if counsel could be back
5 at 3:05 Eastern. All right. Thank you.

6 (Whereupon, the above-entitled matter went
7 off the record.)

8 THE COURT: We're back, everybody. Let's
9 go back on the record. And we'll turn our attention
10 to Waterkeeper's Motion for Contention 3C. Oh, yeah.

11 And, Ms. Cassidy, are you still there and
12 tracking us?

13 MS. CASSIDY: (No audible response).

14 THE COURT: Okay. All right. So we're
15 back on the record dealing with Contention 3C.
16 Contention 3C broadly addresses whether Long Mott
17 meets the requirements under Section 50.12, for an
18 exemption to the financial qualification requirements
19 and specifically whether there's a genuine dispute as
20 to whether it met either of the special circumstances
21 that it identified in its application.

22 And as part of this briefing, I ask the
23 parties to address the relevance, if any, of Part 53.
24 And so I just want to see if I have a correct
25 understanding of parties' views, which is it seems

1 that everyone agrees that, yep, not surprisingly, that
2 the application before the RCE and that this board is
3 concerned with is a Part 50 application. And so Part
4 53 does not necessarily or automatically resolve any
5 dispute that we may have.

6 However, Long Mott raised in one of its
7 briefs that the commission's findings in establishing
8 Part 53 is essentially a fact that the board can
9 consider in determining the appropriateness of the --
10 of whether Long Mott has met the Part 50, Section
11 50.12, requirements for exemption; is that correct?

12 And we'll start with Waterkeeper.

13 MS. PERALES: I think if the question is
14 whether your summation that the parties' arguments in
15 there -- in their written pleadings is correct, I
16 think that is correct.

17 THE COURT: What is your view as to Long
18 Mott's position on the extent that we can consider the
19 commission establishing Part 53 for any purpose?

20 MS. PERALES: I think that LME has already
21 used it to the extent that it -- the extent that it
22 can be used. In other words, they can't rely on it
23 because they haven't elected to move forward under
24 Part 53. And so Part 53, it's just -- it's not
25 applicable here. And LME has referred to it for

1 purposes of presenting an argument, and I think that's
2 the extent of its ability to rely on it.

3 THE COURT: So back when we were
4 addressing Waterkeeper's initial petition, and that
5 was a while ago, so I -- my summary might be off, but
6 broadly, Waterkeeper raised an issue that Long Mott
7 was relying on a rulemaking activity that the
8 commission had engaged in that did not ultimately
9 result in a rule. And I believe you pointed out that
10 that's a nothing burger, essentially, that the almost
11 passing of a rule does not determine anything that is
12 of importance for this board. And so now we have,
13 with Part 53, something a little different. And any
14 additional thoughts in reference to how the -- how
15 that's changed throughout the proceeding?

16 MS. PERALES: So I think the regulatory
17 basis document is what had been cited in the
18 application. And in fact, it's heavily cited in the
19 Motion for Summary Disposition and the list of
20 undisputed facts in support of that motion. It's the
21 regulatory basis document that LME is arguing sets the
22 standard that applies to its financial qualifications
23 demonstration and in a circular way also applies to
24 its exemption request.

25 And so I think that our arguments remain

1 the same. The regulatory basis document does not set
2 the standard. It -- it's -- and for purposes of this
3 particular application, assuming the exemption request
4 were to be satisfied, then 70.23(a) sets the standard
5 if the -- if it's not -- if the exemption request is
6 not granted, then it's 50.33(f). And so now that we
7 have a new rulemaking, that doesn't change the fact
8 that the regulatory basis document does not set the
9 standard. We haven't moved to strike the arguments
10 that LME has made regarding whether the new rulemaking
11 can present, you know, a legal argument, you know, a
12 legal persuasive argument, but it doesn't set the
13 standard and the regulatory basis document still does
14 not set the standard either.

15 THE COURT: Mr. Lighty, anything on Part
16 53?

17 MR. LIGHTY: Your Honor, I think you
18 generally characterized our position well, that's --
19 the Part 53 rulemaking does not obviate the need as a
20 procedural matter for an exemption here, but it
21 certainly provides some relevant information that be
22 -- that can be considered in the special circumstances
23 analysis.

24 THE COURT: I believe your response brief
25 dropped a footnote indicating that you also

1 anticipated a rulemaking change to 50.33, right?
2 Which is the part of the application that Long Mott
3 submitted with a -- and I want to say June 8th was
4 what you referenced. Is there anything on that you
5 would want to address?

6 MR. LIGHTY: I will note that I looked
7 earlier today, and the schedule for that rulemaking
8 has slipped by about a month. It looks like it's
9 anticipated to be published in July, but we do
10 ultimately anticipate that the commission will make
11 the same standard applicable to Part 50 applicants.

12 THE COURT: Is there any public document
13 that the commission has that indicates what that
14 change in June and -- or now, July, would be?

15 MR. LIGHTY: Not that we're aware of.
16 With the new rulemaking process and the (inaudible) or
17 a black box, we're not aware of any public statements,
18 so it is a bit of reading the tea leaves, but that's
19 our anticipation from reading the statements in the
20 Part 53 rulemaking document.

21 THE COURT: We have Mr. Wilson here. I --
22 I'm not sure I anticipate a bountiful answer, but can
23 you tell us, I guess, first, on this specific question
24 about what can you tell us that is public about
25 anticipated changes to Rule 50.33?

1 MR. WILSON: Thank you very much, Your
2 Honor. As of right now, it's not public information.
3 We don't have anything to report on that end for the
4 changes in 50.33.

5 THE COURT: Okay. All right. How about
6 as to Part 53? Does the NRC staff have any position
7 they want to bring to the board's attention?

8 MR. WILSON: If you allow me, I can check
9 with my staff right now, Your Honor, just to double
10 check, to see if there's anything?

11 THE COURT: We'll move on, and if you have
12 something to add, just break in at an appropriate
13 time.

14 MR. WILSON: Absolutely, Your Honor.

15 THE COURT: All right. So turning to, I
16 think, the meat of the issue for Contention 3C, which
17 is whether there's a dispute as to the general -- the
18 special circumstances identified by Long Mott in its
19 application under 50.112, and we'll start with
20 Subparagraph 2. So I'd kind of like to direct this
21 around -- you know, we have a hearing to resolve
22 questions of disputed fact, sometimes disputed law.
23 I think that's a little bit different because you
24 often don't need witnesses or evidence to resolve
25 questions of disputed law, you have judges. But so

1 hearings are mainly for questions of disputed fact.

2 And so I'd like to go through the points
3 that Waterkeeper raises to dispute the first special
4 circumstance raised by Long Mott and try to identify
5 what are the disputed facts that at a hearing we would
6 resolve, right? So there were five broad topics that
7 I saw LME raise and that Waterkeeper -- Waterkeeper
8 pushed back on as to why the special circumstance in
9 Subparagraph 2 applies. They are the -- to summarize:
10 the ARDP award, the FSA between Dow and LME, that Dow
11 is a global company with experience in mega project
12 construction, that the CPA uses the modern licensing
13 modernization product methodology, and that LME is not
14 proposing a complete exemption from the Part 50
15 requirements, but rather is merely requesting the Part
16 70 requirements apply. So it's not a complete
17 exemption from any financial qualification, but it's
18 rather -- it's substituting one part for another.

19 And so Ms. Perales, let's take those one
20 at a time. And working our way back from a -- you
21 know, a hearing, what are the factual disputes that
22 you believe are raised in your motion that we would
23 resolve at a hearing, and then we'll slide those into
24 a contention admissibility framework?

25 MS. PERALES: So going through your list,

1 I think -- oh, we have included a declaration
2 addressing the ARDP award and how that -- how an ARDP
3 award is not unique and it is not -- it doesn't
4 constitute a special circumstance. And so that is --
5 we would present evidence demonstrating that the ARDP
6 award is not a special circumstance.

7 THE COURT: And that would be, for
8 example, as you raised in your motion or one of the --
9 well, not the declarations for this motion, but I
10 believe you did raise in your motion that lots of
11 these -- of similar projects have similar government
12 awards or grants, maybe not labeled ARDP, but similar
13 enough that your argument is that they're not special.
14 And so that would be the factual question you would
15 ask the board to resolve at hearing?

16 MS. PERALES: That's correct.

17 THE COURT: Okay. All right. Next?

18 MS. PERALES: So the next on the list was
19 the FSA.

20 THE COURT: Uh-huh.

21 MS. PERALES: And if --

22 THE COURT: If you need -- I'll tell you
23 the list if you didn't --

24 MS. PERALES: No, I've got it.

25 THE COURT: Okay.

1 MS. PERALES: No, I wrote it down. Okay.
2 So it's the -- I understood the next on the list was
3 the FSA; is that correct?

4 THE COURT: Yeah.

5 MS. PERALES: Yeah? Okay. So I think
6 we've discussed the FSA at length and many of the same
7 arguments would apply in demonstrating why it's not a
8 unique or special circumstance. And that's -- you
9 know, that's particularly true if we're looking at the
10 Supplement 1 to the construction permit application.

11 THE COURT: So would this part of the
12 special circumstance rise and fall with how we deal
13 with the related issue in 3B?

14 MS. PERALES: Well, I think under -- I
15 mean, let me think about that for just a sec. I can
16 see, certainly, how some of that evidence or
17 information would overlap, and anything that perhaps
18 we've discussed related to 3B would likely be relevant
19 to the exemption request as well.

20 The exemption request, however, is, you
21 know -- again, it's really sparse in the way it refers
22 to the intercompany agreement. It mainly says that
23 there's an intercompany agreement in place ensuring
24 that Dow will provide financial support to LME for
25 construction of LMGS. And so the -- you know, I think

1 the question here is slightly different. Does this --
2 does the fact that there's an intercompany agreement
3 in place, alone, demonstrate that the special
4 circumstance exists here?

5 And so an evaluation of that intercompany
6 agreement and evidence presented, or testimony
7 presented by a witness, in our view, would demonstrate
8 that the bare bones intercompany agreement that we've
9 been talking about, more specifically, Supplement 1,
10 does not present a special circumstance that warrants
11 an exemption from the financial qualification
12 requirements.

13 THE COURT: So zooming out slightly, would
14 you agree that when we're looking at the special
15 circumstances, obviously -- and I -- maybe this is
16 just obvious, but it's in light of the exemption that
17 LME is seeking, right? So here it's an exemption from
18 -- to 50.33.

19 So would you agree that, in general, when
20 an applicant is seeking financing -- seeking exemption
21 from the financial qualification standards,
22 demonstrating funding from sources is -- weighs in
23 favor of the exemption? Obviously, if it was
24 completely funded by an outside source that is, you
25 know, with bulletproof credit, the exemption would be

1 seemed -- would seem to be appropriate. Whereas if
2 it's, you know -- and so the -- my point is, would you
3 agree that the ARDP award, the intercompany agreement,
4 weigh in favor of granting the exemption, you're just
5 disputing the amount, the weight, that we give it?

6 MS. PERALES: So I think that the -- it
7 has to serve the underlying purpose of the rule,
8 right? It -- it's -- so the way that the regulation
9 is worded is that application of the regulation in the
10 particular circumstances would not serve the
11 underlying purpose of the rule.

12 So we wouldn't apply 50.33(f) because it's
13 not necessary to assure the safety here. And so we
14 would present evidence indicating that the FSA, for
15 instance, doesn't actually assure that the underlying
16 purpose of 50.33(f) has been met. That it doesn't
17 assure that we are going to end up with a prevention
18 of safety lapses during construction because of an
19 underfunded project. And so --

20 THE COURT: (inaudible).

21 MS. PERALES: -- your -- yeah, I think the
22 answer to your question is, it could be. It --
23 certainly those are pieces of information that could
24 be relevant, but they only weigh in favor of the
25 exemption if they address the underlying purpose of

1 the rule in our estimation.

2 THE COURT: All right. So I -- and I do
3 know we discussed the FSA at length when we're
4 discussing 3B, but one of the specific factual -- if
5 we were going to have a hearing on admitting 3C and
6 we're going to resolve some factual disputes about
7 this particular special circumstance, and we're
8 talking about the FSA, what is the fact that you would
9 like us to resolve in Waterkeeper's favor?

10 And then I'm going to work backward from
11 that as to, is it a genuine dispute, and is it
12 material in the contention of noticeability standards,
13 but I'm approaching it from a backwards point of view.

14 MS. PERALES: The FSA, if we're talking
15 about Supplement 1, then our contention, or our
16 position, is that the FSA doesn't -- that it doesn't
17 provide the type of assurance that addresses the
18 underlying purpose of 50.33(f).

19 That is, it's not sufficient to ensure
20 that sufficient funds are going -- sufficient funds
21 are going to be available to prevent safety lapses
22 during construction of the facility.

23 THE COURT: So is it, again, that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

1 MS. PERALES: It's that [REDACTED]
[REDACTED] It's that it
3 doesn't -- and certainly not to X-energy who's
4 constructing the reactor, enough fuel. It's that it's
5 -- that X-energy can't -- [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] and that there's not -- that there's, you
7 know, I think what LME referred to as the boilerplate
8 language that essentially [REDACTED]
[REDACTED].

10 THE COURT: Okay. All right. Let's move
11 to is there a -- is there a factual dispute regarding
12 LME's claim to -- that Dow is a global company with
13 experience in mega-project construction?

14 MS. PERALES: Yes.

15 THE COURT: All right. What is the nature
16 of that dispute?

17 MS. PERALES: Again, looking back at
18 serving the underlying purpose of the rule, the fact
19 that Dow is a global corporation with experience in
20 general, but unrelated, mega-project construction and
21 financing doesn't serve that underlying purpose. And
22 again, we can look to other examples of other
23 applications to see what type of information has been
24 provided in other situations, such as in Kemmerer.

25 THE COURT: It's not disputing that they

1 do have experience -- you're not disputing that they
2 have the experience claimed, you're making a legal
3 argument as to its relevance for the purposes of
4 establishing a special circumstance; is that fair?

5 MS. PERALES: I think that's fair. I
6 guess, if we have, like, some factual stipulations,
7 you know, because it's not clear. The language is not
8 super specific and so it's unclear what how this
9 language that refers to the extensive experience in
10 mega-project construction and financing, how that is
11 tied to the special circumstance that is being claimed
12 here.

13 And so I wouldn't want to concede that
14 there's no factual dispute. I can envision that there
15 could be some argument about, well, the mega-project
16 that we're referring to is actually related to some
17 sort of energy project, for instance.

18 THE COURT: I mean, I'm correct that
19 Waterkeeper introduced the Path2Zero project, which
20 now is --

21 MS. PERALES: That is correct.

22 THE COURT: -- a billion and a half
23 constructing in Ontario and that would -- well, per
24 year, would seem to qualify as a substantial
25 construction project, for which Dow is gaining some

1 experience in managing.

2 Okay. I suppose -- I'm going to imagine
3 you don't have any factual dispute that LME -- so the
4 fifth issue, that LME is proposing to use the Part 70
5 requirements?

6 MS. PERALES: It -- not a factual dispute,
7 but I think that that that argument got a little
8 muddled with the supplemental briefing on the Motion
9 to Dismiss/Summary Disposition Motion that LME
10 submitted because, in particular, if we look at the
11 statement of undisputed facts in support of the
12 supplemental briefing, it suggests that it's not Part
13 70, or it's not 70.23(a) that sets the standard, but
14 it's 70.23(a) coupled with the regulatory basis
15 document.

16 So we think it's 70.23. That's the legal
17 standard. And I can understand why there is a
18 reference to the regulatory basis document because
19 that the language in 70.23(a) doesn't say that if you
20 have 50 percent of -- if you've acquired 50 percent of
21 the funding for the construction cost estimate, then
22 you have automatically satisfied this rule. And so
23 the reference to the regulatory basis document, and
24 the attempt to incorporate that into the standard, I
25 think is intended to (inaudible) the focus of the

1 inquiry here so that we're only looking at 50 percent
2 -- whether 50 percent of the funding has been
3 acquired.

4 THE COURT: So the reason I'm inquiring,
5 I'm trying to pin down the questions of disputed fact
6 that underline the Motion to Admit 3C.

7 MS. PERALES: Uh-huh?

8 THE COURT: The licensing board's
9 authority to address exemptions is perhaps different
10 than other -- than contentions based on other issues
11 in whether the Atomic Energy Act authorizes licensing
12 boards to address exemption requests and when the
13 commission has allowed it. And there's a case called
14 Carolina Power, and I'll give you the cite so you can
15 look it up, but it's 24NR774.

16 In which the commission appears to have
17 said that licensing boards -- hearings and -- are
18 unnecessary for exemption requests unless there are
19 disputed facts, right?

20 MS. PERALES: Okay.

21 THE COURT: So that this is -- you know,
22 when there's a disputed fact, a licensing board is
23 helpful because we can take testimony, we can hear
24 witnesses, we summarize things nicely, and then the
25 commission can decide, you know, then they can review

1 our work and grade our homework. But if it's not --
2 if there is no underlying disputed fact that the
3 hearing is designed to resolve, perhaps if you -- one
4 way to read Carolina Power is that is not lead to an
5 admissible contention. That was 1986. It's an old
6 case. Rules have changed since then, so there's
7 arguments about that, but I wanted the chance to
8 address a license -- what is the party's position on
9 a licensing board addressing a contention based on
10 whether an exemption under 50.12 should be granted,
11 and does it require a factual dispute or can it be
12 based on a broader legal dispute?

13 So I'll -- Ms. Perales, I'll let you
14 answer that. Then I'm going to have Mr. Lighty
15 address everything we've addressed, and then I'll turn
16 to the NRC staff, whose views I would appreciate on
17 this one.

18 MS. PERALES: Well, I think that to the
19 extent that the exemption request does reference some
20 facts to support it, so there -- you know, there -- to
21 be fair, there are some -- the exemption request does
22 include just some straight legal arguments, you know,
23 the history of the rule, for instance. Does the --
24 you know, does the history of the rule say what LME
25 has claimed it has said or has it summarized it

1 accurately? But there are also some factual
2 statements or factual -- or documents that lend
3 themselves to factual disputes that are cited as a
4 basis for the exemption request.

5 And the intercompany agreement with Dow is
6 one example. Another example is the reliance on ARDP
7 funding to demonstrate that the underlying purpose of
8 the rule is satisfied. These are statements that, in
9 fact, I think that without some sort of support, some
10 sort of evidentiary support, it would be -- it would
11 take a leap illogically says to read the ARDP funding,
12 for instance, award as a special circumstance without
13 more.

14 Because there's nothing here in the
15 exemption request to make that tie to show that you
16 have that in this case, because LME has ARDP funding,
17 a special circumstance presents itself that warrants
18 an exemption from the financial qualification
19 requirements. It's really just a statement. And so
20 without evidence on those types of claims, I don't
21 think that the exemption request as phrased in the
22 supplement could be granted. There's just no
23 information to back up some of those statements that
24 do seem to be factual statements.

25 THE COURT: Mr. Lighty, we can start with

1 the list of factual disputes and then you can address
2 my question regarding Carolina Power. It might be the
3 most appropriate way to get your views.

4 MR. LIGHTY: Sure. Thank you, Your Honor.
5 You know, as to the ARDP, the first item, I think, you
6 know, we're citing that because it is fairly unique
7 circumstance. It's not a singularly unique
8 circumstance, but the commission found it unique
9 enough to credit in a different proceeding. The only
10 other proceeding where the applicant had an award.
11 And so to the extent, even if the Shearon Harris case,
12 you know, says we could, you know, we could have a
13 hearing on a legal question in an exemption, I think
14 it would be, you know, I'm not sure what we would
15 litigate here. The commission has said, just as a
16 general matter, this is unique enough to credit
17 whether it's enough on its own to satisfy the special
18 circumstance criteria is not at issue here because it
19 is one of multiple issues that are raised here.

20 And the notion that it's simply not unique
21 enough to be creditable, I think is disproved by the
22 commission's decision in the Kemmerer case.

23 Second, as to the intercompany agreement,
24 I think, Your Honor, you're onto something that, you
25 know, it tends to establish the fact rather than, you

1 know, the fact of a special circumstance, the
2 existence of one. And so there -- there's not really
3 a dispute about its potential to do that. It's
4 weight, however, you know, is perhaps something
5 someone could argue about. But here, I would also
6 direct your attention to the last sentence. And I
7 think this is more the reason that this is cited in
8 the exemption request and it says, you know, this
9 provides a mechanism for LME to incur project costs
10 prior to receiving federal reimbursement.

11 So regardless of any potential for a
12 dispute about amount and what's going to be provided
13 when, this piece is more about the mechanics of how
14 things are going to work and showing that there --
15 that different pieces of the puzzle are in place and
16 there's no dispute about that.

17 Third, turning to TDCC, again, this is
18 cited here for TDCC's financial and construction
19 experience, right? It's bringing experience to the
20 table. That would be helpful in financial matters and
21 that's what we're talking about here. There's no
22 dispute about that experience that TDCC has in these
23 types of projects. This is a century old blue chip
24 company that knows how to play in financial markets.
25 That's the purpose of citing this information here.

1 That's not in dispute.

2 The licensing modernization project,
3 again, that's -- it also goes hand in hand with the
4 fifth basis, the use of the Part 70 authority. That
5 is to say, when you put all of these pieces together,
6 the NRC has other compensatory means to look at safety
7 issues and to ensure that there's no safety issue.
8 And, you know, to the extent that Part 53, where we
9 started this discussion is relevant, I think it really
10 supports the citation of this Part 50 -- I'm sorry,
11 the Part 70 standard in saying, look, this is good
12 enough to ensure that there's not going to be a safety
13 consequence from underfunded projects. The
14 commission's factual conclusion doesn't appear to be
15 in dispute here. And so I -- I'm not sure what the
16 hearing would be about.

17 Turning to Shearon Harris, specifically,
18 CLI-86-24, I did glance at it quickly and it does
19 suggest that you need a factual dispute rather than a
20 legal equivalent to go to hearing. And it does seem
21 to be pretty clear about that. I'm not sure whether
22 there's been some intervening case law that would
23 change that. I'm not aware -- I'm not aware of any,
24 but, you know, either way, I'm not sure that we've got
25 a demonstration of a true material dispute even on a

1 legal question. You know, we certainly have
2 Waterkeeper saying, no, you can't credit these things,
3 but there's no explanation. There's no theory.
4 There's no citation to support for those propositions.
5 It seems to be a preference more than a supportive
6 legal position. And so I think either way, there's
7 not a hearing issue that's here for us.

8 THE COURT: Okay. All right. Mr. Wilson?

9 MR. WILSON: Thank you, Your Honor. And
10 first, could you repeat the question for me just so I
11 can phrase it properly?

12 THE COURT: Certainly. So the broad issue
13 is NRC precedent in the -- or authorizing statute, the
14 Atomic Energy Act, and its relation to a licensing
15 board's authority to address exemption requests, and
16 it is perhaps narrower than other contentions. And
17 that Carolina Power, although an old case seems to
18 say, because in that case, the petitioner sought to
19 have a hearing and the commission said, no, there --
20 there's no factual dispute to resolve. And so we
21 don't send a case to a hearing.

22 This is my rough summary. We don't send
23 a -- we don't send -- we don't send a case to a
24 licensing board and have a hearing if there's no
25 factual dispute to resolve. And so to the extent that

1 the licensing boards deal with exemption requests, it
2 is perhaps limited or arguably limited to
3 circumstances in which there is some factual record
4 that needs to be developed and that -- and whether
5 exemption requests should be handled differently than
6 other types of contentions that are not based on
7 exemption requests. And so the question is, what are
8 your views on that?

9 MR. WILSON: Thank you very much, Your
10 Honor. I think the NRC staff's position at this point
11 would be that, especially under the circumstances that
12 the licensing board's able to address issues of both
13 law and fact, that there -- the issuance of the
14 exemption request in this case is integral to the
15 issuance of the construction permit application. And
16 in dealing with Section 10 CFR 2.309F1, those deal
17 with both material issues of law and fact in many
18 regards. So in this case, we would say that the
19 licensee board was in their full authority to discuss
20 this aspect.

21 THE COURT: So if we find an admissible
22 contention based on a purely legal dispute, you would
23 say that the correct resolution would be to order a
24 hearing?

25 MR. WILSON: I would say, Your Honor, that

1 the parties would be able to resolve any legal issues
2 on briefings to the board before they have a hearing
3 being called.

4 THE COURT: Well, I mean, the hearing
5 might be briefing only, but we would call it a
6 hearing.

7 MR. WILSON: Yes, Your Honor.

8 THE COURT: Okay. And I guess that's --
9 since Mr. Wilson raises that, if, and I'm not saying
10 this is the case, if we were to find a purely legal
11 dispute, do the parties agree that that could be
12 addressed in a paper hearing? There'd be no -- we
13 would if it's a purely question of law, I'm not
14 anticipating witnesses or experts or evidence. I'm
15 anticipating a legal argument and maybe an oral
16 argument on it. Arguably, we -- we're having that
17 right now, but is this -- or does anyone see the
18 necessity for an actual hearing with witnesses? And
19 if so, why?

20 Ms. Perales?

21 MS. PERALES: Your Honor, the question is
22 purely a legal question. I think you're right. I
23 can't imagine what type of factual testimony or
24 evidence --

25 THE COURT: Okay.

1 MS. PERALES: -- would be required.

2 THE COURT: To ask the question as to
3 answer it, but I'm less asking.

4 Mr. Lighty, same thing?

5 MR. LIGHTY: I -- I'm not sure that type
6 of circumstance would be appropriate for a hearing,
7 Your Honor, because it really gets into briefing on
8 the materiality of the alleged legal dispute and
9 Waterkeeper has an obligation to demonstrate the
10 materiality of the thing it wants to litigate. And it
11 sounds like what we're talking about is whether this
12 legal dispute really matters and that to me sounds
13 like a contention admissibility issue versus --

14 THE COURT: No, I -- I'm assuming we have
15 an admissible contention, you have to -- you have to
16 -- you have to not fight the hypo, an admissible
17 contention on a genuine dispute that is purely legal,
18 not factual.

19 MR. LIGHTY: And yeah, I understand that
20 part of the hypothetical. I'm struggling to
21 understand what, because it's brief -- if it's
22 briefing only, it's legal briefing on the materiality
23 of the claim or what the law is and those seem like
24 things that have to be established to find an
25 admissible contention. That's where I'm struggling

1 why.

2 THE COURT: The rules could have been
3 written that we decide genuine disputes on legal
4 issues at the contention admissibility stage because
5 it seems like we could do that, but that's not what --
6 Mr. Wilson pointed out, that's not what the rules say.
7 So if you -- that -- that's why I went in this
8 direction. All right.

9 I'm going to -- I'm going to move on,
10 however.

11 Okay. I'd like to know parties' position.
12 So turning to Subparagraph 6, the second special
13 circumstance. What is the definition of public
14 interest that you think the board should apply in
15 determining whether there is a dispute as to whether
16 the special circumstance has been met? So starting
17 with Ms. Perales.

18 MS. PERALES: Your Honor, I think that --
19 I can't tell you specifically what the public interest
20 is, but I can tell you what it isn't with regard to
21 the application that's being submitted. And that is
22 that, you know, presenting an application for a
23 project that is intended to serve only LME's
24 affiliated entities is not -- there's nothing wrong
25 with it. It's just that it's not in the public

1 interest. That is not something that serves the
2 public.

3 It -- and so the arguments related to free
4 market competition, the public is not benefiting from
5 any sort of free market participation or free market
6 competition because of the project that's been
7 proposed by LME with this application. And so the way
8 that public interest is discussed or contemplated in
9 the exemption request does not satisfy any definition
10 of public interest.

11 THE COURT: All right. Mr. Lighty, how
12 would you define public interest?

13 MR. LIGHTY: I -- I'm reluctant to provide
14 a definition without doing some research on this to
15 provide something succinct, but --

16 THE COURT: So should I take Ms. Perales'
17 tact and tell me why we should find it in the public
18 interest, whereas she told me why we should not. So
19 just make it make an -- I'll take an argument.

20 MR. LIGHTY: Yes. I think the obligation
21 here to craft an admissible contention is to explain
22 why -- what LME asserts as something in the public
23 interest is not. I, you know, whether it's a factual
24 or a legal argument and to offer something, but that
25 wasn't proffered in the in the motion. And so as an

1 admissibility issue, I think that that falls short.
2 And the fact that we're having a discussion about it
3 now is a pretty clear indication that it wasn't
4 provided at the outset.

5 THE COURT: All right. So Ms. -- Ms.
6 Perales, if we were to have a hearing -- I'm going to
7 ask you the same kind of question we did with
8 Subparagraph 2 as with Subparagraph 6. If we were to
9 have a hearing on the special interest in Subparagraph
10 6, what are the factual disputes that you would like
11 the board to find in your favor at that hearing?

12 MS. PERALES: So Your Honor, for this
13 particular special circumstance requirement, we would
14 take our cues from what's been presented in the
15 supplement to Part 5 by LME. And so LME relies on it
16 -- it's identifying as a merchant applicant. It
17 relies on free market participation. It relies on the
18 history of the regulation.

19 And I think I mentioned a little earlier,
20 I can see how the history of the regulation might be
21 a purely legal issue. But the other assertions that
22 are made by LME in its application, our position is
23 that does present a dispute that is -- that we would
24 present evidence on. So we would present evidence
25 related to how the LME does not satisfy the definition

1 of a merchant applicant as contemplated in the
2 regulatory basis documents.

3 THE COURT: But is there a factual dispute
4 there? Because I don't think you disagree what LME
5 is. You're just saying it doesn't meet the
6 definition, right?

7 No one's arguing about is LME providing,
8 you know -- is the Long Mott Generating Station
9 actually a power plant to provide power to the grid?
10 And there are two sides to that question. Everyone
11 agrees that it's a proposed plant to provide heat and
12 power mainly for Dow's operations. So I don't think
13 -- I don't see a factual dispute underlying that. I
14 think the question is, does that qualify as a merchant
15 applicant? And then again, the next question is, and
16 does that matter? But is there a factual dispute
17 there?

18 MS. PERALES: I would say that the
19 merchant entity is tied to the free market
20 participation, which is tied to the public interest,
21 and so -- I mean, it seems to me that there is no set
22 of facts that could be presented by LME to demonstrate
23 that it is indeed a merchant applicant, that this is
24 intended for the purposes of providing energy to the
25 free market.

1 And so it's -- from my perspective, it
2 seems like it could have some stipulated facts and
3 then that would also mean that the statements that it
4 has included to support its public interest claim are
5 not there.

6 THE COURT: If we agree with you that it's
7 not a merchant applicant, but it's a -- would you
8 refer to it as a self-provider?

9 MS. PERALES: I think so.

10 THE COURT: That it's mainly generating
11 heat and power for its own purposes, why does that
12 matter?

13 MS. PERALES: It -- that's a good
14 question. Thank you. The -- it matters because we're
15 taking our case from what has been provided to justify
16 the exemption request. The information that LME has
17 supplied in support of its exemption request under A2
18 (inaudible) 6, includes this argument that this is --
19 that they are a merchant applicant. That they are --
20 that they are participating in the free market and
21 that this is all a reason that it's -- it should be
22 determined to be in the public interest.

23 And that's why it's relevant. I mean, if
24 those statements hadn't been relied upon by LME in
25 support of its exemption requests, we wouldn't be

1 refuting them.

2 THE COURT: Is it fair to say for both
3 special circumstances that Waterkeeper is taking issue
4 with Long Mott's asserted basis for why the special
5 circumstance applies, but Waterkeeper is not proposing
6 independent reasons why the special circumstances
7 don't apply?

8 For example, you -- you've challenged the
9 reason they're saying it's in the public interest, but
10 I -- I'm -- I don't see, but this is your chance to
11 point it out to me -- you are asserting independent
12 reasons why it's not in the public interest?

13 MS. PERALES: Well, I mean, I could say
14 that if we look at, you know, the arguments that we've
15 presented, they do kind of include the two sides of
16 the same coin. So for instance, if we go back to
17 A22(2), if, you know, in that circumstance under the
18 language there, the standard is whether application of
19 the regulation and the particular circumstances would
20 not serve the underlying purpose of the rule.

21 That one of the factors that has been
22 listed is the ARDP award, which we've talked about.
23 Another factor which we've listed is the agreement
24 with Dow. And in that -- in the -- under A22, we are
25 not only saying -- we're not only pushing back that

1 these statements are enough to satisfy the regulatory
2 requirement for the exemption request, but we're also
3 saying in those two examples that they actually do not
4 satisfy or serve the underlying purpose of the rule.

5 And so under A26, we are pushing back on
6 the statements that have been offered from -- by LME
7 in support of its exemption request under that
8 standard, and also saying that 50.33a and Appendix C
9 were intended to -- in particular, I think Appendix C
10 talks about non-utility companies and why, you know,
11 there are some additional pieces of information that
12 are required. And so removing that requirement
13 through an exemption does not serve the public
14 interest. And that is all -- that's part of our
15 position.

16 I think the same is true with the
17 discussion of the rule history. I think we've
18 included some argument that, in fact, it had been
19 looked at before. The fact that the utilities had
20 become deregulated, that is something that had been
21 reviewed before. And at that time that there had been
22 a review of that circumstance, the -- there was no
23 rule change. The Appendix C and Part 50 were -- they
24 remained the same. And so in that way, we are not
25 only refuting what LME has stated in its exemption

1 request, but we're also saying the opposite of what
2 you're saying is true. In fact, the Appendix C
3 requirements were not changed after the utility was
4 deregulated.

5 THE COURT: All right. So Mr. Lighty, I'm
6 -- I want to give you a chance to respond, but
7 specifically, the supplement states -- and I'm going
8 to quote, but my quote is going to ellipses through
9 part of it.

10 "The success of the ARDP and the
11 production of nuclear energy by a merchant entity
12 facilitating free market competition -- are both in
13 the public interest."

14 Can you just explain your view as to why
15 -- what the success -- why the success of the ARDP
16 program, and why free enterprise or facility --
17 facilitating free market competition is in the public
18 interest?

19 MR. LIGHTY: Sure. Thanks, Your Honor.
20 The -- you know, the success of the ARDP is in the
21 public interest because it's a public program. It's
22 using taxpayer dollars. There are -- those taxpayer
23 dollars were put in a purpose to promote the
24 establishment of advanced nuclear energy. That's --
25 you know, Congress found that that itself is in the

1 public interest. That's why they're devoting tax
2 dollars to the program. It's enabled by the American
3 public. And so we all have an interest in seeing it
4 move forward.

5 And so the assertion, again here, is that
6 it would remove an impediment to that. Not
7 necessarily -- I think the way I read Waterkeeper's
8 pleading was that, you know, it would ensure the
9 success of the program. And we certainly didn't say
10 that in here. But granting the exemption would remove
11 an impediment.

12 And then to the second part of that, free
13 market competition, again, I -- we -- you know, we
14 believe that market competition is broadly in the
15 public interest. That's exactly why antitrust laws
16 exist. And what we're trying to do is, you know,
17 promote open markets. And I know that Waterkeeper,
18 you know, disputed something about, you know, selling
19 power into the market, but this assertion is broader
20 than that. It would enable an entity to self-supply,
21 to -- even to use their term, and that itself promotes
22 competition because it provides other avenues of
23 purchasing electricity other than through a regulated
24 monopoly.

25 And so you know, we see both of those as

1 consistent with the public interest as -- you know, as
2 understood, you know, through congressional
3 enactments.

4 THE COURT: All right. Mr. Wilson,
5 anything from the NRC staff on anything we've
6 discussed?

7 MR. WILSON: Thank you, Your Honor. As of
8 right now, the NRC staff agrees with Attorney Lighty's
9 proposal. The ARDP is a partnership between public
10 and private sectors. It demonstrates a public program
11 serving the public's needs, so we would directly agree
12 with Long Mott's position on that case.

13 THE COURT: Well, not so much that you're
14 willing to tell us whether the staff has approved the
15 exemption request?

16 MR. WILSON: Not at this time, Your Honor.
17 The staff doesn't have a position to take to that end.

18 THE COURT: And are you able to tell us
19 when that might be?

20 MR. WILSON: As of right now, the NRC
21 staff does not have a time that we can provide, but
22 the second we do, we'll be able to provide the board
23 with that directly.

24 THE COURT: Bated breath, Mr. Wilson.
25 Bated breath.

1 Any other questions?

2 All right. So my last question is -- it's
3 based on a case called Douglas Point in which the
4 commission chided the -- a licensing board for acting
5 on a contention pending litigation. And essentially
6 the lesson might be you -- when the rules are changing
7 under your feet, you should wait.

8 There's a lot of discussion about -- or
9 there's a lot of views as to what Douglas Point
10 actually means, but if the parties have a view as to
11 whether the time -- whether the board should take that
12 into account in deciding whether -- when to determine
13 the admissibility of 3C, whether she -- we should wait
14 for the commission to act in adopting new rules, or
15 whether we should forge ahead based on the rules as
16 they are now, and if they change later, we'll, I
17 guess, clean up the mess then.

18 So Ms. Perales, any thoughts as to --

19 UNIDENTIFIED SPEAKER: Can I just make
20 one?

21 THE COURT: Yeah.

22 UNIDENTIFIED SPEAKER: I think it's an
23 appeal board case, but go ahead.

24 THE COURT: Okay. Right. So it's --
25 which is still binding for --

1 UNIDENTIFIED SPEAKER: Right.

2 THE COURT: Right. It wasn't a commission
3 case. It was an appeal board case. So if the
4 commission is going to amend 50.33 in a manner that
5 may affect how we resolve 3C, should this board take
6 a wait and see attitude is essentially what I'm
7 asking?

8 So Ms. Perales, you read Mr. Lighty's --
9 his footnote in which they said that might be
10 happening. What's your views as to whether we should
11 wait and take a wait-and-see approach?

12 MS. PERALES: Thank you, Your Honor. I
13 think that we've also heard that the expected adoption
14 date has changed and so, you know, it could change
15 again, and that's at least one argument that was
16 against waiting for the regulation to be adopted and
17 seeing how it might apply here.

18 And I'm sorry, I'm looking at my notes on
19 Douglas Point quickly, just to re-familiarize myself
20 with it. And so I think, you know, looking
21 (inaudible) point, it does not seem to be directly
22 analogous to the situation that we have here. And
23 based on the fact that their rule has not yet been
24 adopted and that the application that has been -- that
25 is the subject of the hearing relies on an exemption

1 request, our position is that we should not.

2 THE COURT: Okay.

3 MS. PERALES: We should not today.

4 THE COURT: Mr. Lighty, do you have a
5 different view?

6 MR. LIGHTY: I think in general, I -- I'm
7 not sure that the board needs to wait here. The one
8 caveat I would give you is that, if the board thought
9 it was going to go a different direction than what it
10 looks like the commission is going, that may, you
11 know, raise some trepidation in proceeding forward.
12 If the board believes this ruling will be consistent
13 with what we expect in the rulemaking, then there's
14 likely little reason for concern under Douglas Point.

15 THE COURT: But if there is that friction,
16 would you caution -- would you caution delay or would
17 you say, drive ahead, and the commission will then
18 take appropriate action based on our decision at that
19 point?

20 MR. LIGHTY: We would encourage the board
21 to plow ahead and adjudicate the motion.

22 THE COURT: All right.

23 Mr. Wilson, does the NRC staff have
24 thoughts on whether the appeal board's decision in
25 Douglas Point tells us that we should hold our

1 decision until the commission finalizes an applicable
2 regulation or whether we should drive on?

3 MR. WILSON: Thank you, Your Honor. The
4 NRC staff's position would be that the board would be
5 able to move forward with adjudicating the matter.
6 Again, it is speculative to see when the commission
7 may act on rulemaking. We would recommend that
8 aspect.

9 THE COURT: That's the problem with
10 Douglas Point. You -- it only makes sense when you
11 look at it with the benefit of hindsight, but
12 nonetheless, they voted. All right. Thank you.

13 Judge Trikouros, any questions?

14 Apparently not, so we'll finish with
15 summations on the Motion to Admit 3C, and we will
16 start with Ms. Perales. Does anyone want to break
17 before we start, or are we -- are people ready to move
18 forward? Not seeing anyone needing a break, so we're
19 going to go forward. All right.

20 MS. PERALES: So just briefly, Your Honor,
21 the exemption -- the newly revised exemption request
22 submitted by LME can be summed up thusly: LME cannot
23 meet the requirements of Section 50.33(f) and Appendix
24 C. LME got -- has -- or X-energy has been awarded --
25 has received an ARDP award. LME conveys that it

1 believes it can satisfy the requirements of 70.23(a),
2 or at least the discussion in the regulatory basis
3 document, especially if one considers that an
4 agreement with Dow exists, and Kemmerer was granted an
5 exemption, and so therefore, LME should likewise be
6 granted an exemption.

7 And the problem with this is that these
8 arguments don't satisfy the regulatory language in the
9 exemption rule, and more particularly many of these
10 arguments are circular. That is the arguments depend
11 upon a different, more lax standard being applied to
12 LME in its financial qualification demonstration, even
13 though that more relaxed standard was only applicable
14 if the exemption request is granted in the first
15 place. In other words, LME is assuming that the 70.23
16 requirements and the regulatory basis document should
17 be the standard here that it is judged against and
18 that Appendix C and 50.33(f) have no place here, and
19 they assume that for purposes of asking for the
20 exemption. They put the cart before the horse.

21 There's the -- any other arguments that
22 have been presented in support of its exemption
23 requests simply have no factual foundation, and
24 there's no additional information to support the
25 arguments presented, such as the arguments on, you

1 know, whether this serves the public interest.
2 There's just -- there's nothing there. There's
3 nothing there to tie it to the language and the
4 regulation. And for this reason, this -- the
5 exemption requests that have been submitted under this
6 supplement to Part 5 should be -- that they -- we have
7 raised a valid contention regarding whether they are
8 sufficient to allow for an exemption.

9 THE COURT: Mr. Lighty?

10 MR. LIGHTY: Thank you, Your Honor.
11 Waterkeeper's reply pleading at Page 3 argues that,
12 "LME bears the burden of demonstrating a special
13 circumstance warranting an exemption in this
14 adjudicatory proceeding." That assertion is
15 misleading. At this stage of the proceeding, LME
16 bears no burden of persuasion at all. The burden is
17 on Waterkeeper and Waterkeeper alone to provide an
18 affirmative demonstration that all six admissibility
19 criteria are met for its challenge to that exemption
20 request, and it hasn't met that obligation here.

21 Although Waterkeeper declares a dispute
22 with LME's statements in the exemption request, none
23 truly raises a factual issue. We heard none today.
24 And to the extent the alleged disputes could be read
25 as attempting to raise a legal issue, those claims are

1 unaccompanied by other things that are required for an
2 admissible contention. They're not accompanied by a
3 demonstration of the materiality of the dispute, in
4 other words, the safety impact, and they're not
5 accompanied by identification of support or authority
6 for the alleged dispute. This approach overall fails
7 to provide a basis for an admissible contention.

8 And the reason that the identification of
9 support is important in this context in particular is
10 that the Part 53 rulemaking and the Kemmerer
11 precedent, among other things, undermine the claims
12 that Waterkeeper raises in this new proposed
13 contention. Now, to be sure, the Part 53 rule doesn't
14 obviate the need as a procedural matter for a
15 regulatory exemption, and the Kemmerer precedent does
16 not explicitly mean that LME gets the same exemption,
17 but the facts that are at issue in both of those are
18 relevant here, and the fact that Waterkeeper doesn't
19 address them, refute them, and materially distinguish
20 them is dispositive to the admissibility of their
21 contention. And for that reason and the others
22 identified in our pleading, we urge the board to deny
23 the motion. Thank you.

24 THE COURT: All right. Thank you.

25 Mr. Wilson?

1 MR. WILSON: Thank you, Your Honor.
2 Again, pursuant to 10 CFR 2.309(f)(1), it is the -- it
3 is Waterkeeper's burden to demonstrate the contention
4 of admissibility standards at this time. Again,
5 according to 10 CFR 2.309(f)(1)(vi), they must
6 demonstrate that there is a issue of material law or
7 fact that is in question in this case. Further, they
8 must demonstrate under 2.309(c)(1) that the
9 information that they're seeking to rely contentions
10 on is based on new information and not information
11 that was previously available or previously used and
12 timely available upon their submission. At this time,
13 Waterkeeper is intending to rely on ARDP funding, as
14 well as information that was referenced and included
15 in the initial construction permit application. That
16 has no bearing on the materiality of this case
17 currently.

18 Further, according to 2.309(f)(1)(v), the
19 basis for many of the contentions and the admissions
20 that Waterkeeper seeks to raise in this case are based
21 off of declarations by experts that the board in this
22 case has already deemed to be untimely. Waterkeeper
23 seeks to reassert these in their reply. However, as
24 the board is aware, they cannot reassert these alleged
25 arguments or these facts to form contentions in this

1 case. It is for these reasons that, again, according
2 to our pleadings, that the NRC staff believes that
3 Waterkeeper has not raised an admissible contention in
4 this case.

5 THE COURT: Thank you, all. The motions
6 are submitted. Before we depart, is there any
7 administrative matters that any party would like to
8 bring to the board's attention that we can address at
9 this moment?

10 MR. WILSON: No, but thank you, Your
11 Honor. This is Kristopher Wilson for the NRC staff.
12 I wanted to first take time to address your first
13 question about Part 53 that I did not have a chance to
14 address at the beginning of the pleading. But the NRC
15 staff's position is that Part 53 does not apply in
16 this case, that Long Mott will be operating under the
17 existing Part 50 standards.

18 THE COURT: Okay. But do you think it's
19 relevant at all, even if -- even assuming we're
20 applying a Part 50 standard when looking at whether
21 there's an admissible contention, whether they should
22 get an exemption under Part 50.12, do we consider that
23 Part 53 exists, or is it not something that we do not
24 consider at all?

25 MR. WILSON: I would say in this case, the

1 board could consider that LME relies on Part 53
2 partially in their analysis.

3 THE COURT: Okay. All right.

4 Any other administrative matters or
5 anything else that the parties want to address --
6 raise to the board before we depart? All right.
7 Seeing shaking heads.

8 We are off the record.

9 (Whereupon, the above-entitled matter went
10 off the record.)

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