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Oral Arguments

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 * * * * *

4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 ORAL ARGUMENTS ON CONTENTIONS

6 * * * * *

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8 IN THE MATTER OF: || Docket No. 50-293-LR
9 ENTERGY NUCLEAR GENERATION || ASLBP No. 06-848-02-LR
10 COMPANY AND ENTERGY ||
11 NUCLEAR OPERATIONS, INC. ||
12 (PILGRIM NUCLEAR POWER ||
13 STATION) ||
14

15 Thursday,

16 July 27, 2006

17 Teleconference

18 The above-entitled matter came on for
19 telephonically, pursuant to notice, at 10:00 a.m., Ann
20 M. Young, Chair, presiding.

21 BEFORE:

22 ANN M. YOUNG, Chairman

23 RICHARD F. COLE, Administrative Judge

24 NICHOLAS G. TRIKOUROS, Administrative Judge

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P R O C E E D I N G S

10:03 A.M.

JUDGE YOUNG: All right, let's go on the record.

This is Judge Young and Judge Colin, Judge Trikouros are also here, along with Jered Lindsay.

Let me just ask everyone to identify yourself. Let's start with the Staff.

MS. UTTAL: This is Susan Uttal, U-T-T-A-L. I'm representing the NRC Staff. I have with me Robert Palla, Alisha Williamson, Ram Subbaratnam and Robert Shaw from the Staff.

JUDGE YOUNG: If the Court Reporter needs any name spellings, we can do that at the end, I guess.

And Mr. Gaukler, you're going to be arguing on behalf of Entergy. Mr. Lewis is on the line, but at a remote location.

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

JUDGE YOUNG: Then Ms. Lampert, you're present for Pilgrim Watch.

MS. LAMPERT: That's correct. Not being a lawyer, I'll just have comments.

JUDGE YOUNG: And Ms. Curran and Mr. Brock are present for Massachusetts Attorney General.

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1 MS. CURRAN: That's right.

2 MR. BROCK: Yes, Your Honor.

3 JUDGE YOUNG: Did I leave anyone else?

4 MS. HOLLIS: This is Sheila Hollis.

5 JUDGE YOUNG: I'm sorry, thank you.
6 Sheila Hollis.

7 MS. HOLLIS: And Your Honor, we may have
8 comments, but we will not be participating in the
9 argument per se.

10 JUDGE YOUNG: Okay, and actually, we may
11 not need to spend too long this morning based on the
12 information that was provided in the briefs and
13 responses now.

14 I did have one question. We got Mr.
15 Gaukler's letter and we got the Massachusetts Attorney
16 General's response. We didn't get anything from the
17 Staff and I wanted to make sure that was not a
18 mistake.

19 MS. UTTAL: I'm sorry. I didn't file
20 anything and I didn't think to send you a letter
21 saying I wasn't going to file anything.

22 JUDGE YOUNG: Okay. Just wanted to make
23 sure we weren't overlooking anything.

24 COURT REPORTER: I'm sorry. Who was that
25 just speaking?

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1 JUDGE YOUNG: Susan Uttal just spoke right
2 before me. Okay, we're going to be talking about the
3 Massachusetts Attorney General contention and Pilgrim
4 Watch contention four to the extent that we have any
5 questions this morning.

6 Judge Trikouros, why don't you go ahead,
7 first, with any questions?

8 JUDGE TRIKOUROS: Yes, I thank you very
9 much for the responses. They were very good, very
10 helpful.

11 I just want to make sure that I understand
12 the big picture. So since we're here, I'll just
13 pursue that.

14 When the Massachusetts Attorney General
15 says that the failure probability would be much higher
16 than evaluated in the reference documents, namely, the
17 GEIS document, referenced in the GEIS document, NUREG
18 1353, is the basis for that statement solely the
19 argument that 0.25 conditional zirconium fire
20 probability is too low?

21 MS. CURRAN: That's one of the bases.
22 Another is that partial drainage is a more severe
23 condition than complete and instantaneous drainage.

24 JUDGE TRIKOUROS: Right, but is that -- so
25 let me understand, that is not included in what the

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1 quote unquote correct value for what the condition
2 failure probability is? In other words, if the
3 condition failure probability were one, that would
4 encompass what you're saying now, right?

5 MS. CURRAN: Yes, I think so. You know,
6 maybe I should have had Dr. Thompson on the phone to
7 answer with technical precision, but you know, in
8 essence, yes.

9 JUDGE TRIKOUROS: Okay.

10 MS. CURRAN: Whether he says it's one or
11 something, close to one, that's slightly off one, but
12 it's certainly approaching one.

13 JUDGE TRIKOUROS: And if it were not one,
14 it would cover all possibilities. All right --

15 MS. CURRAN: I'm not sure I understand --
16 yes, well, there are also -- all possibilities?

17 JUDGE TRIKOUROS: What I mean is that in
18 the -- if the conditional probability of observed fire
19 were one, given an uncover, then really whether it's
20 partial uncover or a total uncover or anything in
21 between, there's -- there would be a zirc. fire. So
22 I just want to make sure we're on the same page with
23 that.

24 MS. CURRAN: Yes. I think that what NUREG
25 1738 said was that the NRC had not done enough

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1 technical work to say with confidence that it wasn't
2 one.

3 JUDGE TRIKOUROS: Right.

4 MS. CURRAN: That's a little different.

5 JUDGE TRIKOUROS: Right, I understand. So
6 however, if one assumes a value of one, then the
7 conclusion of -- with respect to say the category one
8 status of on-site spent fuel storage would rest with
9 the determination of the probability of the fuel
10 uncovering.

11 That's really where I want -- and I think
12 that's kind of a given, but I just want to make sure
13 that we're on the same page.

14 MS. CURRAN: I guess I'm not sure what the
15 connection is. Category one is a category that rests
16 on the conclusion that there's no significant impact.
17 And so the category one finding depends on the
18 conclusion that if there is uncovering of the fuel, it's
19 that there is not a significant risk of a fire.

20 Is that --

21 So we are questioning the category one
22 finding because we think there is significant evidence
23 that that's wrong. And it's new evidence that has not
24 been addressed in a previous EIS.

25 JUDGE TRIKOUROS: Okay, I really I don't

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1 want to get into a long discussion on this, but I
2 think that the probability of the uncovering is somewhat
3 important in this whole determination.

4 MS. CURRAN: Well, yes, that's true. And
5 one part of our contention is the part that there's an
6 analysis that reactor accidents that are considered
7 within the realm of what should be analyzed in an EIS
8 could cause uncovering of the fuel.

9 JUDGE TRIKOUROS: Right. Okay. Let's
10 just move on then.

11 I only had one other area that I just
12 wanted to get confirmed.

13 MS. CURRAN: This is Ms. Curran.

14 JUDGE TRIKOUROS: By the way, if anyone
15 has a -- wants to chime in here, feel free to do that.

16 The next area that I wanted to just
17 confirm was that if one looks at all of the events
18 that were assumed, that might lead to an uncovering of
19 the fuel, the argument that's being made by the
20 Massachusetts Attorney General is that there's one
21 event, if you will, or class of events, that was not
22 considered, namely, the conditional probability of a
23 zirc. fire given a reactor severe accident. Is that
24 correct?

25 MS. CURRAN: Well, okay, neither the NRC

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1 hasn't looked in an EIS, hasn't looked at the
2 conditional probability of a zirc. fire and also
3 hasn't looked -- because the NRC has in various
4 studies concluded that that is not a significant risk.
5 The NRC hasn't looked at overall accident sequences
6 that could lead to a fire because they basically, in
7 a nutshell, said this really isn't going to happen.
8 So we don't need to do the big analysis, the kind of
9 analysis that say the NRC do a NUREG 1150 for reactor
10 accidents.

11 We don't need to do that for pool
12 accidents because if the fuel is uncovered, it's
13 probably not going to burn.

14 I mean that's an oversimplification, but
15 that's what's happened.

16 JUDGE TRIKOUROS: All right.

17 MS. LAMPERT: May I say something from
18 Pilgrim Watch that also not looked at in the previous
19 studies were in the new information that was mentioned
20 in the Attorney General's brief was the consideration
21 of acts of malice and also the interplay between the
22 reactor and the spent fuel pool which is particularly
23 important for both Vermont and Pilgrim because the
24 spent fuel pool is located in the main building, in
25 the attic, if you will. And both of those two factors

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1 were not looked at in the study that the EIS relied
2 upon.

3 MR. GAUKLER: Your Honor, Paul Gaukler.
4 I'd like to make the point that NUREG 1353 and 1738
5 looked at the wide range of circumstances of events
6 that could cause a spent fuel pool fire including
7 drain down, etcetera.

8 The only thing not explicitly considered
9 was the potential for a severe accident, reactor
10 accident to cause a severe drain down and as we
11 pointed out that was -- even if you want to assume
12 that probability as following the Harris case, it
13 would be very small and as set forth in the Harris
14 case, the likelihood of a loss of cooling, even if you
15 have a severe reactor accident is very small.

16 So therefore, basically the same
17 probabilities that are set forth in NUREG 1353 and
18 1738 would apply, even under those circumstances.

19 MS. CURRAN: This is Diane Curran. I'd
20 just like to add something to that, because I think it
21 illustrates earlier I was saying that the -- that one
22 of the pieces of new information was that partial
23 drying down is a more severe case than instantaneous
24 drain down and Judge Trikouros asked isn't that just
25 a part of the ultimate conclusion that the probability

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1 of a fire was .25.

2 But I think what Mr. Gaukler is saying,
3 Judge, to this other point that I wanted to make which
4 is that if you start out with the assumption that the
5 most -- the thing you have to worry about is total and
6 complete -- total and instantaneous drainage of the
7 pool, then what the analyst is going to look at is
8 very severe accidents that could cause that.

9 The analyst isn't going to look at
10 accidents that are less severe and may be more
11 probable, but that would only cause partial drainage.
12 So that is a separate and independent problem with the
13 analysis.

14 When you say okay, the worst thing that
15 could happen to this pool is a very severe earthquake
16 that would rupture the pool and cause it to drain
17 immediately, and that's such a low probability, we
18 don't need to worry about it. What the analysts would
19 be overlooking is all the accidents that might lead to
20 cracking of the pool which might be more probable
21 accidents.

22 JUDGE TRIKOUROS: Okay.

23 MR. GAUKLER: I would make the point, Your
24 Honor, as we set forth in our pleadings at length that
25 1353 does consider partial drainage and that's clear

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1 from when they talk about the loss of cooling and
2 makeup in NUREG 1353. And with respect to the case
3 law that we've got, Your Honor, you are certainly free
4 to go look at those NUREGs and make the determination
5 yourself whether you believe that the NUREGs support
6 the Attorney General's contention.

7 COURT REPORTER: I'm sorry. Who was that
8 just speaking?

9 MR. GAUKLER: Paul Gaukler. Sorry.

10 MS. UTTAL: This is Susan Uttal. I just
11 wanted to point out one thing about the Harris case
12 and the holding letting the contention in. The
13 Intervenors were required to come up with a specific
14 scenario that lead to the spent fuel fire. The
15 specific reason why, what kind of accident there was
16 in the reactor and the specific steps about how it
17 occurred.

18 So even to me everything else, they
19 haven't come up with a specific scenario and the
20 contention is not admissible for that point.

21 JUDGE YOUNG: Let me just clarify
22 something before we move on. You said that the
23 interveners were required to come up with a scenario.
24 Are you saying that at some point in the process that
25 requirement was imposed or that the ruling encompassed

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1 a determination that their original contention had to
2 include that?

3 MS. UTTAL: I believe that the ruling of
4 the Board regarding the admission of the contention,
5 not the final decision, talked about the fact that
6 they needed a specific scenario leading up to the
7 uncovering of the fuel in the fire. I think that is
8 borne out by the Vermont Yankee case that preceded it,
9 I think in the early 1990s.

10 MS. CURRAN: I'm sorry. Were you
11 finished, Susan?

12 MS. UTTAL: Yes, I'm finished.

13 MS. CURRAN: Judge Young, this is Diane
14 Curran. First of all, we do not think that to get
15 admission of a contention one needs to present
16 scenarios. But in any event, we did. It's just not
17 correct to say that they we didn't provide a scenario.
18 We did provide a scenario for illustrative purposes.
19 The goal is to get a comprehensive analysis of the
20 potential for a fuel pool fire including various
21 causes such as severe accidents in the reactor,
22 intentional attacks, accidents involving just the
23 pool. But we did provide a sample, an example
24 scenario. It's discussed in Dr. Thompson's report, so
25 whether you know the fact is that if there is such a

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1 requirement, we did satisfy it.

2 MS. LAMPERT: And so did Pilgrim Watch.

3 JUDGE YOUNG: Okay, I do have one question
4 and want to sort of switch gears here for a minute.
5 This is Judge Young and my question will probably
6 reflect the difference in our questions will probably
7 reflect the technical judge versus legal judge
8 background.

9 And I want to sort of preface my questions
10 by speaking to an issue that seems to relate to
11 various, the various sort of sub-issues involved in
12 these contentions, one being whether an issue can be
13 raised at the contention of admissability stage where
14 in this, with these facts, without petitioning for a
15 waiver or requesting a waiver or petitioning for
16 rulemaking.

17 And then there's the interpretation of the
18 new and significant, or the definition of that in the
19 Reg Guide which refers to codification of issues.

20 And then third, there is the issue of the
21 SAMAs and whether the rule on spent fuel pools, or
22 storage of spent fuel and how that rule interacts with
23 the rule on severe accidents and some SAMAs.

24 And I think in a way what we've got with
25 all three of those situations is we've got rules that

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1 say, that contain certain words and then there are
2 additional documents including case law and various
3 guidance documents that have been posed or that
4 provide what could be argued to be additional
5 interpretations of what the actual rule means.

6 I guess that was, well that was part of
7 the question I had on the part of the Reg Guide
8 definition that referred to codification. In other
9 words, we looked at the words of the rule. But my
10 question has to do with the first issue which is
11 whether issues can be litigated that would call into
12 question category one subject based on asserted new
13 and significant information.

14 And my question is this: on page five of
15 Entergy's brief, Entergy refers to the SECY paper and
16 the statement near the bottom of that page that says
17 "litigation of environmental issues in a hearing will
18 be limited to unbounded category 2 and category 3
19 issues, now combined as category 2 issues unless the
20 rule is suspended or waived."

21 Now, I don't find that language in the
22 final Statement of Considerations and rule in the
23 Federal Register, Sixth Volume 61. And I don't find
24 it in the actual language. But I think as Entergy
25 pointed out, the Commission approved that SECY

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1 document and that would be the kind of guidance
2 document that could be looked to for some guidance on
3 how a rule might be interpreted, for example.

4 In addition, in the Turkey Point case, the
5 Commission discussed the need to request a waiver or
6 more generally for more generic issues to petition for
7 rulemaking. I also think there's some reference and
8 I don't, I'm sorry I don't have it right in front of
9 me. But there's some reference in one of these
10 documents that seems to suggest that a rulemaking
11 could cover -- actually, it may be in 61 Federal
12 Register.

13 Yes, it is. It is on page 28, 470 under
14 subsection A, about halfway down. It is talking about
15 the changes, the major changes adopted as a result of
16 the discussion with the CEQ. Under Section A,
17 subsection A it says NRC's response to a comment
18 regarding the applicability, the analysis of an impact
19 caused by in the rule, to the plant in question may be
20 a statement and explanation of its view that the
21 analysis is adequate including, if applicable,
22 consideration of the significance of new information.

23 It goes on to say if commenter is
24 dissatisfied with such a response may file a petition
25 for rulemaking under 10 CFR 2802. If the commenter is

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1 successful in persuading the Commission that the new
2 information the new information does indicate that the
3 analysis of an impact codified in the rule is
4 incorrect in significant respect, and then there's the
5 parenthesis, either in general or with respect to the
6 particular plant, a rulemaking proceeding will be
7 initiated.

8 Okay, that is a long preface to the
9 question. Here's the question and it is for you, Ms.
10 Curran, and anyone else who wants to add anything
11 after she speaks.

12 In light of the information in the longer
13 SECY document now provided by Entergy Counsel --

14 MS. CURRAN: Are you referring to SECY 93-
15 032?

16 JUDGE YOUNG: Right, because the reference
17 to litigation in a hearing will be limited to the
18 category 2 and 3 issues unless the rule is suspended
19 or waived. I don't think we had that when we were in
20 oral argument before and I didn't find, and tell me if
21 I'm wrong, reference to that in your reply brief. So
22 can you address that in terms of what we should do
23 with that, how we should consider that?

24 MS. CURRAN: Yes, and we did address it in
25 our reply brief and we addressed it in the oral

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1 argument on September 6th. And I'm sorry I don't have
2 the page numbers handy, but I'd just like to point out
3 a couple of things and just ask the Board to go back
4 and look at our reply, look at the discussion in the
5 transcript of the argument.

6 JUDGE YOUNG: Let me ask --

7 MS. CURRAN: This was the reply on the
8 contention, the admissability of the contention.

9 JUDGE YOUNG: Okay, well let me clarify a
10 little bit then. You gave some regulatory history
11 which was actually I don't think I had heard that
12 before and it is very persuasive in some ways. But
13 what I don't think we had is the quotation that
14 Entergy provided on page five of the more recent, the
15 July 21st brief.

16 Now maybe I missed that. I know when we
17 tried to find 93-32, the SECY document, first we found
18 a one page document, or a two page, and then we
19 subsequently found the I guess 23-page document. And
20 I know you had argued at oral argument that those were
21 proposals of the staff and that the final rulemaking
22 didn't include those.

23 And I think at oral argument, Entergy
24 counsel had said well, that the Commission had
25 approved the SECY document and so that represented the

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1 Commission's actual statement.

2 Now maybe we went over this and maybe just
3 the fact that I had not at the point seen the longer
4 SECY document approved by the Commission. But I guess
5 to sort of focus the question a little bit, even
6 though, I mean obviously it's better if rules contain
7 all requirements and give notice to the public in that
8 way and that sort of more clear way about what the
9 standards are going to be with regard to any subject.

10 But as it was argued by Entergy at the
11 oral argument, agencies can regulate through
12 adjudication, so to speak. And the quotation provided
13 on page 5 of the July 21st Entergy brief is something
14 that I had at least had not focused on when we were
15 together before.

16 So I guess what I would ask you to do is
17 address how you would have us overlook the
18 Commission's statement in Turkey Point on this and
19 this quotation on page five of the brief.

20 MS. CURRAN: Okay. First of all, I think
21 it is important that SECY 93-032 is discussed in the
22 final rule. The SECY paper was written in 1993 and it
23 may have been approved by the Commission, but it was
24 apparently circulated to these other agencies and that
25 if you look at page 28470 in the preamble to the final

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1 rule, which is dated 1996, June 5, 1996, the
2 Commission talks about SECY 93-032 and how they have
3 gone further.

4 They have, in a sense, reconsidered it.
5 And so I think what's really important is to look at
6 the preamble to the final rule. And in that the
7 Commission talks about its requirement that license
8 renewal applicants address if there is new information
9 about category 1 impacts, that they have that new
10 information has to be addressed in the ER. And we
11 quote that language on page seven in our reply.

12 JUDGE YOUNG: Let me see if I can just
13 sort of focus this a little bit further along. You do
14 that and that is definitely persuasive on the issue of
15 the responsibility of the applicant. What I'm not
16 finding in the 1996 Federal Register final rule, or
17 the preface to that, the Statement of Considerations,
18 is much of anything with regard to adjudication.

19 MS. CURRAN: Right, and I agree with that,
20 Judge Young.

21 You know, our situation, the Attorney
22 General situation is that we are coming into a
23 proceeding where it is -- our guide has to be the
24 NRC's admissability regulation in 2.309F2. And so if
25 you were -- it really -- what we need is we need to be

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1 able to raise this issue before the NRC.

2 Whether it belongs before the Licensing
3 Board or the Commission is not 100 percent clear. But
4 we know that under NEPA we're entitled to raise it.
5 You may rule that is not the appropriate for us to be.
6 We think we had to file a contention before you that
7 we had no other choice under 2.309F2. If we had not,
8 we would have risked being told that you have not
9 satisfied the regulations for raising your concern and
10 you have missed your chance.

11 Our main concern is getting this issue
12 before the Agency in a timely way using the best
13 possible interpretation we can make of these
14 regulations. I agree with you that there isn't a
15 statement in the 1996 preamble that says Category 1
16 issues are subject to a hearing. But it certainly is
17 clear from our perspective that if we want to
18 challenge any NEPA issue, if we want to raise any NEPA
19 issue in a license renewal case, there's only one door
20 and that is to challenge the Environmental Report with
21 a contention. That's what we've done.

22 Now because it is a category 1 issue, you
23 may say I think -- I think you have a basis to rule
24 that the contention is admissible. But I think it is
25 not 100 percent crystal clear. What is really

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1 important to us is to get the issue before the Agency
2 in an appropriate and proper way. What we want is a
3 ruling from you that we have done what we needed to do
4 to raise this issue, that we gave a reasonable
5 interpretation, used a reasonable interpretation of
6 the Agency's regulations and that we have preserved
7 our concern.

8 MR. BROCK: This is Matt Brock of Mass.
9 AG. I'd just like to add to that. We do not think
10 that we should have additional burdens put on us to
11 get this issue before the Agency. We have in our
12 filings indicated why we think we meet the contention
13 standard for issues to address the Pilgrim Plant.

14 And whether or not this issue, the Agency
15 determines this is "generic", applying to all plants.
16 I'm looking at the quote in Entergy's filing on page
17 five. It says "Petitioners with evidence that a
18 generic finding is incorrect for all plants may
19 petition the Commission".

20 We don't assume that burden nor do we
21 think it is fair to put it on us whether the issues we
22 are raising apply to "all plants or not". It applies
23 to Pilgrim. We raised it. We think we meet the
24 contention standard and we think it ought to be
25 admitted on that basis.

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1 JUDGE YOUNG: Let me just follow up with
2 one more question on this. Let's assume that for
3 argument's sake that you meet the contention
4 admissability standard. Then you have the Turkey
5 Point case that says in addition to that, there's a
6 requirement I think it is fairly longstanding in NRC
7 law that you cannot challenge a rule. And the
8 argument that has been made by the Massachusetts's
9 Attorney General -- sort of essentially I'll
10 paraphrase it to the effect that the language at
11 5153C3iv, I think it is, sort of provides an exception
12 to the category 1 rule which sort of distinguishes
13 this situation from others, for example, that we're a
14 rule that doesn't contain sort of an exception, so to
15 speak, cannot be challenged.

16 MS. CURRAN: That is true, Judge Young.
17 It doesn't appear that Turkey Point interpreted that
18 regulation.

19 JUDGE YOUNG: But Turkey Point did talk
20 about the possibility of new and significant
21 information, I believe, and say that had to be raised
22 through a request for waiver or a petition for
23 rulemaking. And so we have the Commission's decision
24 in Turkey Point.

25 Given the assumptions that I have just

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1 stated, what is your argument on how we should
2 interpret and apply the Commission's Turkey Point
3 decision.

4 MS. CURRAN: Well, as I said earlier, the
5 Turkey Point decision did not interpret 10 CFR
6 51.53c3iv. And so therefore we're asking the Board to
7 rule on the admissability of our contention under that
8 standard.

9 I had mentioned earlier that the Attorney
10 General is planning to file a rulemaking petition, but
11 Mr. Brock is right that we don't think we should have
12 to do that. We think we have met the admissability
13 standard and that our contention should be admitted.
14 We're only doing it out of caution.

15 JUDGE YOUNG: Okay. Does anyone have
16 anything to add on that sort of line of thought?

17 MS. HOLLIS: Your Honor, this is Sheila
18 Hollis on behalf of Plymouth. Just sort of
19 observationally here, it seems like if the issue is a
20 legitimate issue that should be considered by the NRC
21 whether in an individual plant setting or in a group
22 of plants having similar characteristics for every
23 plant in the country, however it gets to the NRC and
24 however it is considered whether before the Licensing
25 Board or by referral from the Licensing Board to the

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1 Commission or by the Commission in response to a
2 rulemaking or on its own volition.

3 It seems like it is a significant enough
4 issue that at some place in the very sophisticated
5 arena of the NRC's technical capabilities, legal
6 capabilities, that it is an issue that should be
7 analyzed and understood before outright dismissal by
8 the NRC.

9 I think that is our plea although we are
10 not interveners in this case, just as an entity that
11 is affected very directly by the existence of a
12 nuclear plant in the confines of the town would seem
13 just like logically that would make sense. I think
14 Ms. Curran has identified whether it should be handled
15 here in this context or in a broader context. In any
16 event, it needs to be handled.

17 MS. CURRAN: Judge Young, I would like to
18 maybe help offer something that might help. Whatever
19 you -- you can sort of separate this into two issues.
20 One is has the Attorney General filed an admissible
21 contention under the standard in 2.309f2. And the
22 other is what is the appropriate procedural way to
23 resolve the Attorney General's concerns ultimately.
24 It's important to us, we think it is essential that
25 the Board rule on the admissability of the contention

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1 because that is legally the way that petitioners are
2 required to raise their issues before the Commission.

3 If the Commission decides that this is not
4 an issue that should be before the Licensing Board,
5 that is a different question. But we are asking the
6 Board to make a ruling on the admissability of our
7 contention.

8 MS. UTTAL: Judge, can I say a few things?
9 This is Susan Uttal.

10 JUDGE YOUNG: Go ahead.

11 MS. UTTAL: I don't think that the
12 Commission could have been clearer either in the rule
13 or in the Federal Register notice cited or in Turkey
14 Point that the issues being raised by the
15 Massachusetts Attorney General are not permitted to be
16 raised in a hearing and without a waiver. To say that
17 they didn't consider the regulation as cited by Ms.
18 Curran would just obviate everything in the rulemaking
19 and in Turkey Point because they're saying that if
20 there is new and significant information that an
21 intervener seeks to raise, they must bring it before
22 the Commission either as a waiver or a rulemaking.

23 I don't know how else they could clearer.
24 And regarding what has to be decided in this case, I
25 don't think the Board can get around the fact that the

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1 information, the issues being raised are not
2 appropriately brought before this Board. Therefore,
3 it must be, the contention must be dismissed. There
4 is absolutely not reason to rule on its admissability
5 because on its face it should not be here.

6 MS. CURRAN: This is Diane Curran. You
7 know, the citations that the Staff and Entergy give to
8 the idea that we're not allowed to raise our
9 contention under 5153c34 are all statements from SECY
10 papers. There's statements in preambles to rules or
11 in the EIS that are not put into regulations. It
12 seems to us that our first obligation is to comply
13 with the regulations and that suggestions in SECY
14 papers are really trumped by the regulations
15 themselves.

16 MS. UTTAL: But the rule itself in
17 Appendix B and in the rule states that Category 1
18 issues are not appropriate for a hearing and that a
19 waiver has to be fought. So it is in the ruling.

20 MS. CURRAN: But in the rule there is also
21 a way to consider new and significant information
22 which is a very important requirement.

23 MS. UTTAL: New and significant
24 information -- excuse me. It is in the explanation.
25 It is written the Commission's hands that you have to

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1 go before the Commission.

2 MR. GAUKLER: Judge Young, Paul Gaukler
3 here. I just would like to make a couple points.
4 First, it is clearly a rule that the Massachusetts
5 Attorney General is challenging in terms of that
6 Category 1 issues are not to be litigated in NRC
7 proceedings.

8 Furthermore, the process by which the
9 Attorney General or anyone could bring this issue
10 forward is set forth both in the SECY paper and in the
11 Statement of Considerations of the rule, the portion
12 of the Statement of Considerations that you
13 identified, specifically discussed one type of
14 situation where a commenter raises an issue and it
15 sets forth the other process that if the commenter
16 doesn't link the way the NRC staff resolves it, then
17 it goes to the Commission by waiver or by petition for
18 rulemaking.

19 MS. UTTAL: Let me interrupt you.

20 MR. GAUKLER: And as we set forth in our
21 brief, the process, the standard process for treating
22 the EIS, etc. is the same and must be applied in the
23 adjudicatory proceeding.

24 MS. UTTAL: One more thing, Judge. If
25 there was any question about it, it was all put to

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1 rest Turkey Point, where the Commission was specific
2 that the issues have to raised before them.

3 MS. CURRAN: Judge Young, I just wanted to
4 point out -- this is Diane Curran.

5 JUDGE YOUNG: Hold on for just a second.
6 If I could just clarify before we move on. Ms. Uttal
7 referred to something in the rule and then Mr. Gaukler
8 referred to something in the Statement of
9 Considerations and I want to make sure that I
10 understand what you're referring to.

11 Ms. Uttal, when you said that there was a
12 place in the rule that said that the hearing -- that
13 in a hearing you couldn't consider --

14 MS. UTTAL: Judge, I misspoke. I meant to
15 say in the Statement of Considerations. What it is in
16 the rule is that Category 1 issues are not to be dealt
17 with in the EIS.

18 JUDGE YOUNG: You're talking about the
19 part that says "No such consideration is required for
20 Category 1 issues in appendix B to subpart A of this
21 part under C33".

22 Is that what you're talking about?

23 MS. UTTAL: Yes, I believe so.

24 JUDGE YOUNG: Okay, and then the next
25 question was and I'll go ahead and address it to you

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1 since you just now said it was in the Statement of
2 Considerations was what you and Mr. Gaukler are
3 referring to there -- the reason I'm asking is because
4 I think what Mr. Gaukler may have been saying is that
5 all the discussion about what happens in the EIS
6 process should be applied to the hearing process
7 procedurally, that the same procedure is followed
8 which I guess my only question there is that in the
9 SECY paper, and I think there was also an earlier
10 transcript of a meeting with the Commission and its
11 lawyer at the time in which the Commission asked
12 "Well, what happens with regard to hearings". And
13 then the SECY paper makes a specific reference to
14 hearings and the Statement of Considerations doesn't
15 seem to make a specific reference to hearings unless
16 I'm missing something.

17 What I want to hear from you is am I
18 missing something? Is there a specific reference that
19 I'm not finding and, if so, can you point me to the
20 place?

21 MR. GAUKLER: Judge Young, I will speak
22 for myself. Paul Gaukler here. I was referring to
23 the points that you make on page five of the brief
24 where specifically we refer to I believe the same
25 portion of the Statement of Considerations that you

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1 just read us in terms of what a petitioner, or
2 commenter, must do with respect to a comment that
3 provides new and significant information.

4 JUDGE YOUNG: Okay, so what page? On page
5 28470, there's reference to commenters in the EIS
6 process. What I'm trying to find is are you saying
7 that there's some specific reference to the
8 adjudication hearing context in the Statement of
9 Considerations? If there is, I'd appreciate being
10 pointed to it.

11 MR. GAUKLER: I'm not saying that, Your
12 Honor. What I'm saying is they set forth clearly the
13 process for EIS and as set forth in the case law we
14 cite in our brief the same process must be applied to
15 the adjudicatory process.

16 JUDGE YOUNG: And Ms. Uttal, are you
17 finding something there that I missed?

18 MS. UTTAL: No, I'm reading through the
19 Statement of Considerations now. But I think that the
20 question -- I have a discussion of it in my initial
21 response and I believe that if you look at the
22 Statement of Considerations and what was said in
23 Turkey Point, it's clear that the same process that is
24 laid out in the Statement of Considerations is
25 applicable to the hearing process as Mr. Gaukler just

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1 pointed out.

2 JUDGE YOUNG: Do you know, you may not
3 know, but do you know why the more specific reference
4 to hearings was not included in the Statement of
5 Considerations and how we should interpret that?

6 MS. UTTAL: I do not know why it was not
7 included, but it was certainly made clear in Turkey
8 Point by the Commission.

9 JUDGE YOUNG: Okay. Anything else on this
10 issue? We appreciate your filing these additional
11 briefs and being available this morning to answer our
12 questions. We have one final thing, or Judge
13 Trikouros has one final thing, a statement that he
14 would like to make before we adjourn. Am I cutting
15 anybody off? Okay, go ahead.

16 JUDGE TRIKOUROS: Yes, I would like to
17 read a disclosure statement into the record. I'm
18 doing this --

19 MS. LAMPERT: Who is speaking, please?

20 JUDGE TRIKOUROS: This is Judge Trikouros.

21 MS. LAMPERT: Thank you.

22 JUDGE TRIKOUROS: I would like to read the
23 disclosure statement into the record and the reason
24 I'm doing this is because specifically because both
25 the Massachusetts Attorney General and Pilgrim Watch

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1 reference the National Academy of Sciences report.
2 And in my career, I've had an intersection with that
3 report and I wrote this statement with regard to that.
4 So I'll just proceed to read it.

5 The disclosure statement of Judge Nicholas
6 Trikouros regarding the Pilgrim License Renewal
7 Application. I'm placing this in the record of
8 Pilgrim Boiling Water License Renewal Proceeding in
9 order to provide full disclosure of certain
10 information that may be perceived to be a conflict of
11 interest in this proceeding.

12 Early in 2004, Panlyon Technologies of
13 which I was a principal, was commissioned by Entergy
14 Northeast to provide best estimates separate effects
15 of valuation of the time available for recovery action
16 given the loss of coolant from potential malicious
17 acts in an Entergy-owned pressurized water spent fuel
18 pool.

19 Scenarios considered included various
20 degrees of partial uncovering of spent fuel as well as
21 complete drainage of the pool. While I was not the
22 principal investigator, I did provide a management
23 overview of the project and was consulted regarding
24 modeling assumptions and the viability of the results
25 as they progressed. Work was completed in 2005.

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1 Entergy provided preliminary results from
2 this work in a presentation to the National Academy of
3 Sciences in Washington, D.C. on May 10, 2004, in which
4 I participated as one of several presenters. I have
5 had no other communications with the National Academy
6 prior to or since that day.

7 As it turned out, statements regarding
8 these presentations were included in support of the
9 findings in Section 3 of the subsequent NAS report
10 entitled "Safety and Security of Commercial Spent
11 Nuclear Fuel Storage: Public Report" which has been
12 referenced in the contentions of the Massachusetts
13 Attorney General and Pilgrim Watch in this case.

14 I've evaluated the impact of my
15 involvement in the technical effort described above
16 and I have concluded that a reasonable person knowing
17 all of the relevant facts and circumstances about my
18 work for Entergy would have no reasonable basis to
19 question my impartiality in this case.

20 The work was not associated with the
21 Pilgrim Nuclear Plant nor with any other boiling water
22 reactor. The study was performed in an independent
23 manner using a commonly accepted methodology. We had
24 complete freedom to choose the methodology, the
25 modeling inputs, and the analysis assumptions. At

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1 Entergy's request, the final documentation of this
2 work was provided to the NRC staff.

3 This was just one of many technical tasks
4 regarding spent fuel pool pooling that I have been
5 associated with throughout my career. The background
6 understanding that brings my current adjudicatory role
7 was generated in part by carrying out consulting work
8 for more than a dozen clients in the nuclear industry,
9 including Entergy.

10 This work put me in a better position to
11 fulfill one of the responsibilities as a Licensing
12 Board Judge, i.e. to review and to question the
13 material presented from a knowledgeable, technical
14 perspective. The above circumstances will not affect
15 my impartiality or independence of judgement in this
16 case, but I have concluded that disclosure was
17 necessary to avoid the possibility of any
18 misunderstanding or misperception.

19 JUDGE YOUNG: All right.

20 MS. CURRAN: May I ask a question? This
21 is Diane Curran. Judge Trikouros, are you going to
22 send that statement out to the parties? I would
23 appreciate it because I don't know when the transcript
24 is going to be available.

25 JUDGE TRIKOUROS: Sure, I have no problem

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1 with it.

2 MS. CURRAN: Thank you.

3 JUDGE YOUNG: Okay. If there is nothing
4 else, again we appreciate you making yourselves
5 available today and we'll be issuing a decision
6 containing our ruling as soon as possible and is there
7 anything else? Thank you, I think that concludes this
8 conference unless anyone else has anything else?
9 Thank you very much.

10 (Whereupon, at 10:58 a.m., the
11 teleconference was concluded.)
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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of:

Name of Proceeding: Entergy Nuclear Vermont
Yankee, LLC and Entergy
Nuclear Operations, Inc.

Oral Arguments

Docket Number: 50-293-LR and
ASLBP No.06-848-02-LR

Location: via teleconference

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
direction of the court reporting company, and that the
transcript is a true and accurate record of the
foregoing proceedings.



Eric Hendrixson
Official Reporter
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