

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Vermont Yankee Nuclear Power Station

Docket Number: 50-271-LR

Location: Brattleboro, Vermont

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USNRC

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 * * * * *

4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 ORAL ARGUMENTS

6 * * * * *

7
8 IN THE MATTER OF: || Docket No. 50-271-LR
9 ENTERGY NUCLEAR VERMONT ||
10 YANKEE, LLC, and ENTERGY ||
11 NUCLEAR OPERATIONS, INC. ||
12 (Vermont Yankee Nuclear ||
13 Power Station.) ||
14

15 Tuesday,

16 August 1, 2006

17 Brattleboro, Vermont

18 The above-entitled matter came on for oral
19 argument, pursuant to notice, at 8:00 a.m., Alex S.
20 Karlin, Chair, presiding.

21 BEFORE:

22 ALEX S. KARLIN, Chair

23 THOMAS S. ELLEMAN, Administrative Judge

24 RICHARD E. WARDWELL, Administrative Judge

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17 Also Present From the NRC:

18 Marcia Carpentier, Law Clerk

19 Jonathan Rund, Law Clerk

20 Karen Valloch, Administrative Assistant

21 Cynthia Harbaugh, Security

22 Diane Screnci, Public Affairs

23

24

25

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P R O C E E D I N G S

9:02 a.m.

CHAIR KARLIN: Good morning, my name is Alex Karlin. I'm one of the Judges with the ASLBP and I'd like to call this meeting to order, this pre-hearing conference to order.

Is the microphone working? I'll try to get a little closer. Is that better? Okay.

I'd like to call this meeting of Vermont Yankee License Renewal, Atomic Safety and Licensing Board Prehearing Conference to order. This matter is in the U.S. Nuclear Regulatory Commission's Docket No. 50-271-LR and ASLBP No. 684903LR. The LR stands for license renewal as opposed to uprate which is a separate proceeding as some of you are aware of.

Pursuant to a memorandum and order that we issued on July 18th, we're holding this meeting. That order was published in the Federal Register on July 24th and lays out how we would like to proceed with this meeting and the sequence of the oral argument we'd like to hear.

For the record, today's date is August 1, 2006 and we're located in the Brattleboro High School in Brattleboro, Vermont.

First, I'd like to introduce the Atomic

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1 Safety and Licensing Board. On my right is Dr.
2 Richard Wardwell, a Ph.D. in Civil Engineering,
3 specializing in geotech groundwater issues. Dr.
4 Wardwell was formerly the chair of the Board of
5 Environmental Protection of the State of Maine.

6 To my left is Dr. Thomas Elleman, Ph.D. in
7 Physical Chemistry, formerly the head of the Nuclear
8 Engineering Department of North Carolina State and
9 formerly a Certified Health Physicist.

10 As I mentioned, my name is Alex Karlin.
11 I'm a lawyer and one of the Judges here and I serve as
12 the chair. Because I'm a lawyer, I serve as the chair
13 for procedural issues.

14 Also, I'd like to introduce a few other
15 people from the Atomic Safety and Licensing Board
16 Panel. To our far right here are two lawyers who work
17 for us. They are our law clerks. To the far right
18 Marcia Carpentier and next to her is Jonathan Rund.
19 They help us with many of the legal issues we have to
20 work with here.

21 Also, we have Karen Valloch, who is in the
22 back table and if anyone has any questions -- Karen,
23 if you could raise your hand. She might be able to
24 help us in logical questions if anyone has those.

25 I'd also like to thank the Brattleboro

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1 School District for making these facilities available.
2 They seem to be quite good and hopefully if the air
3 conditioning holds, we'll all be able to get through
4 these two days here. Ms. Kathy Roleau was very
5 helpful and Mr. Putnam is the building and maintenance
6 manager who helped us with this.

7 I'm glad at least there were some people
8 who were able to come out here today. I know it's a
9 hot, summer day and I appreciate your interest in
10 these proceedings.

11 At this point, perhaps we could ask the
12 parties to introduce themselves, the counsel and who
13 is here.

14 Maybe we could start with our far right
15 here. If you could introduce yourself and anyone else
16 in your party.

17 MR. SHEMS: This is Karen Tyler. My name
18 is Ron Shems. We're with the law firm of Shems
19 Dunkiel Kassel & Sounders of Burlington. We're
20 representing the New England Coalition.

21 CHAIR KARLIN: Thank you. Are we picking
22 that up? I think we -- are we?

23 (Microphone adjustments.)

24 MR. SHEMS: I'm sorry, I'll start over.

25 CHAIR KARLIN: Yes, please.

1 MR. SHEMS: To my left is Karen Tyler. My
2 name is Ron Shems. We're both with the law firm of
3 Shems Dunkiel Kassel & sounders in Burlington,
4 Vermont. We're representing the New England
5 Coalition. Our client representative for the New
6 England Coalition is in the front row behind me.

7 CHAIR KARLIN: Good morning. Thank you,
8 Mr. Shems.

9 MR. SHEMS: Thank you for having us.

10 CHAIR KARLIN: Welcome. Vermont?

11 MR. ROISMAN: Good morning, Mr. Chairman.
12 My name is Anthony Roisman. I represent the
13 Department of Public Service which is the official
14 representative of the State of Vermont. With me is
15 the Public Advocate for the Department of Public
16 Service and the Nuclear Engineer, Sarah Hofman and
17 Bill Sherman.

18 CHAIR KARLIN: Good morning, welcome.

19 MR. ROISMAN: Good morning.

20 CHAIR KARLIN: Massachusetts.

21 MS. CURRAN: Good morning. My name is
22 Diane Curran. I'm here representing the Commonwealth
23 of Massachusetts in the person of the Attorney
24 General. With me today is Assistant Attorney General
25 Matthew Brock on my right and our expert, Dr. Gordon

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1 Thompson on my left.

2 CHAIR KARLIN: Good morning, welcome.

3 MS. YOUNG: Good morning, my name is Mitzi
4 Young representing the United States Nuclear
5 Regulatory Commission Staff. With me on my right is
6 my colleague, Steven Hamrick, also of the Office of
7 the General Counsel and seated behind me is the
8 plant's project manager, safety project manager, Mr.
9 Jonathan Rowley. Seated beside him is Mr. Robert
10 Palla, who is one of the technical experts for the
11 Staff. And to the right of him is Mr. Richard Emch
12 who is the environmental project manager for Vermont
13 Yankee license renewal.

14 CHAIR KARLIN: Thank you, Ms. Young, good
15 morning.

16 MR. LEWIS: Good morning, my name is David
17 Lewis. I'm with the law firm of Pillsbury Winthrop
18 Shaw Pittman. With me is Mr. Matias Travieso-Diaz,
19 also from the same firm and we're representing Entergy
20 Nuclear Vermont Yankee and Entergy Nuclear Operations,
21 the Applicant for the renewed license in this
22 proceeding.

23 CHAIR KARLIN: Great, good morning, Mr.
24 Lewis.

25 I am not sure whether the Town of Marlboro

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1 has its representatives here? Yes, please. If you
2 would perhaps come to one of the mics. We do want to
3 acknowledge that you're here and will have a chance to
4 speak.

5 MR. MacARTHUR: Thank you. My name is Dan
6 MacArthur and I'm here representing the Town of
7 Marlboro.

8 CHAIR KARLIN: Great, Mr. MacArthur, we're
9 glad you're here.

10 Will Ms. Newton be here as well?

11 MR. MacARTHUR: No.

12 CHAIR KARLIN: Okay, so you'll be speaking
13 for the Town of Marlboro. All right, fine.

14 If that's all right, perhaps he could
15 share that table with you for at least the opening
16 statement section. Great, thank you.

17 Okay, thank you for introducing
18 yourselves. Now a few words of housekeeping and a
19 little bit of introductory material before we start.
20 Housekeeping matters, first turn off your cell phones,
21 put them on vibrate and if you have any conversations,
22 please take them outside, either cell phone or
23 otherwise, out in the hall, please.

24 The media is welcome. I'm not sure
25 whether any of their representatives are here. We

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1 think it's an excellent way to inform the public of
2 what's going on and there are rules regarding using
3 ambient light and that sort of thing and Ms. Valloch
4 in the back has those regs, if you want to see them.
5 But welcome to the media.

6 There will also be a transcript, just for
7 the public to know, is being taken of this proceeding
8 by Mr. Holland, off to our left here and that
9 transcript will be made available on the NRC's public
10 website in about two weeks probably. So a verbatim
11 transcript and the public is welcome here, but will
12 not get the opportunity to speak because only the
13 parties, the litigants who have filed pleadings here
14 today will have -- are going to speak on those
15 pleadings.

16 For the benefit of the public and any
17 media, I thought it would be useful to talk, as I
18 always try to do, a little bit about the three points,
19 the role of the Atomic Safety and Licensing Board, the
20 history of this proceeding and the purpose of this
21 proceeding. So with that, I will cover those three
22 topics.

23 The nature and role of the Atomic Safety
24 and Licensing Board, there's a handout in the back on
25 the table where Ms. Valloch is sitting that explains

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1 a little bit of what the Board is about, but the
2 basics are that the federal law, the Atomic Energy Act
3 creates a Nuclear Regulatory Commission. There are
4 five Commissioners on the NRC. They're appointed by
5 the President, confirmed by the Senate. So the
6 Commissioners have a large regulatory staff working
7 for them, a large staff, several thousand
8 professionals and they are represented here at this
9 table, the NRC Staff. The Board is a third entity
10 whose role is very different. The Atomic Safety and
11 Licensing Board Judges are appointed, basically for
12 life. We are not part of the Staff. We are not part
13 of the Commissioners. We are asked and instructed and
14 our responsibility is to hear cases that are brought
15 before us by litigants, parties who raise questions
16 and we try to address and rule on the legal and
17 factual issues that come before us.

18 The only communications that we receive
19 about the case in front of us is what's been filed by
20 the parties. We don't sit and talk with the Staff
21 about it. We don't sit and talk with the
22 Commissioners about it. That's entirely prohibited.
23 Nor do we talk with any of the other parties, the
24 State of Vermont, State of Massachusetts. This is
25 just an ex parte communication which is not

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1 permissible. We may say hello, good morning, nice
2 weather, is there a nice restaurant in town, but
3 beyond that, there's no discussion of the substance of
4 the case and that's as it should be to keep us
5 separate from the matter.

6 Ultimately, we'll have to render a
7 decision on the matters that are brought before us and
8 when we do if anyone is unhappy with that decision
9 they can appeal it to the Commissioners. The
10 Commissioners are an appellate body, as it were, who
11 can overrule us if they want, but they don't talk with
12 us about our ruling and we don't talk with them about
13 it. We write our decision. We do our best and then
14 it can be appealed and reversed, either by the
15 Commission or by the Courts, if someone wants to
16 appeal it even further.

17 I just want the public, the main point is
18 the public to understand that when we talk about the
19 NRC, there are really three entities to keep in mind
20 for purposes of this proceeding. There are the five
21 Commissioners. There is the NRC Staff. And then
22 there is the Atomic Safety and Licensing Board and our
23 Board is independent. The Commission can't hire us.
24 They can't fire us. They can't give us a raise. They
25 can't give us a performance review. There's very

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1 little they can do to us in terms of influencing our
2 decisions. We call them as we see them and hopefully
3 it's good enough and if it's not, you can appeal it to
4 the Commission or the Courts.

5 A brief history of this proceeding, some
6 of you may know more about it than we do, but I think
7 it's worth summarizing that on January 25th of this
8 year, Entergy filed an application to the NRC Staff
9 for a renewal, a license renewal to extend the time
10 period of its license for the Vermont Yankee Nuclear
11 Power Station by 20 years, to go from 2012 to 2032, if
12 it's granted by the Staff. The Staff is currently
13 reviewing that application. They have technical
14 people. They have legal people who are reviewing that
15 application in detail.

16 In March, March 27th, the Commissioners
17 issued a notice in the Federal Register saying --
18 announcing that the application for the license
19 renewal had been filed and giving any interested
20 person 60 days within which to file a petition with
21 contentions challenging or raising issues concerning
22 the proposed license renewal.

23 So 60 days later, four entities filed
24 requests, formal requests with the Commission and
25 ultimately this Board, challenging the license

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1 renewal. Vermont Department of Public Service
2 requested a hearing and raised three issues. New
3 England Coalition filed its petition and has raised
4 six contentions. Attorney General for the State of
5 Massachusetts has one contention that they have filed.
6 And the Town of Marlboro has also filed a letter which
7 we will take to be a contention. So those are the
8 four petitioners and we will hear from them today.

9 In addition, there's Entergy who is the
10 Applicant and we will hear from them and the Staff
11 also.

12 In order to deal with this dispute, the
13 Commissioners set up this board and asked us to rule
14 on it. We've read all the pleadings. They're
15 voluminous and generally helpful and good. So we're
16 going to try to hear arguments today on them.

17 Final point regarding history is just to
18 recognize that this is not the uprate. Entergy has a
19 separate proceeding where they've requested an uprate.
20 That's been pending for a couple of years and that is
21 not what we're dealing with here today.

22 The purpose of today's proceeding, third
23 major point, is for the Board to decide whether any of
24 the requests for hearing should be granted, whether or
25 not the Petitioners, any of the four Petitioners have

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1 filed what's known as admissible contentions. We
2 have, NRC has a regulation that we are bound to
3 follow. It's 10 Code of Federal Regulation
4 2.309(f)(i) and that provision 309(f)(i) has six
5 criteria, six elements that every contention must meet
6 and we've got to go through each contention and see
7 whether they meet those six criteria.

8 The criteria include things like "provide
9 a brief explanation of the basis for the contention."
10 Another requirement is that the contention the
11 Petitioner has to "provide a specific statement of law
12 or fact to be raised or controverted." So we will be
13 talking today and probing the Petitioners about each
14 of their contentions and try to figure out whether
15 they really met these requirements. And if they did,
16 we will rule that the contention is admissible. And
17 if they didn't, we are obliged to rule that the
18 contention is not admissible.

19 After we hear the oral argument here
20 today, we'll go back and we will issue a written
21 decision or ruling. We won't rule today from the
22 bench on these contentions because they're probably
23 too complicated for us to do that at this point.

24 If we find that some of the contentions
25 are admissible, admissible contentions, then we will

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1 schedule an evidentiary hearing to hear the
2 contentions and people will put on evidence. That's
3 more like your witnesses will testify. They may be
4 examined or cross examined by the Board and we will
5 have an actual trial in terms of evidentiary hearing.
6 You're not going to see any witnesses testify today.
7 This is just a day for the lawyers to argue about the
8 admissability of the contention.

9 And so, as I said, one of the elements is
10 the public doesn't, as in many of these proceedings,
11 some of them held by the Staff, where the public gets
12 to give a presentation, members of the public can
13 speak, this is just for the litigants to argue about
14 the admissibility of their contentions. But the
15 public is entitled to file limited appearance
16 statements, written limited appearance statements.
17 And in our order that we sent out on July 18th laid
18 out how you could do that and who you would send it
19 to. You can send it by email. You can send it by
20 letter. And there may be a session for oral limited
21 appearance statements later, if contentions are
22 admitted.

23 At this point, I'd like to ask my two
24 colleagues up here if there's anything more they think
25 we need to add or raise at this point?

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1 JUDGE ELLEMAN: No, sir.

2 JUDGE WARDWELL: That's fine.

3 CHAIR KARLIN: Okay. All right, before we
4 start, I want to talk a few things about format and
5 logistics. This next two days breaks down to the two
6 main sort of segments. First, we'll hear opening
7 statements or presentations by each of the four
8 Petitioners by the Staff and by Entergy. I would
9 propose that we go in the following order: Vermont,
10 Massachusetts, NEC, Town of Marlboro, Entergy and then
11 the Staff. Each one will get 10 minutes to give an
12 uninterrupted opening statement to us.

13 Then we will turn to reviewing the
14 admissability of individual contentions. As a general
15 rule, we've allocated 45 minutes for each contention.
16 Petitioner will get 20 minutes. Entergy will get 15
17 and the Staff will get 10. For some contentions where
18 we think we have more questions we have allocated a
19 bit more time such as the Massachusetts contention.
20 For some contentions where we don't have any questions
21 such as the Town of Marlboro, we have not allocated
22 time for that particular contention. We just don't
23 have any questions. The purpose of the 45 minutes or
24 hour is not to hear speeches from you all, but for us
25 primarily to ask questions and if we don't have any

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1 questions we just didn't schedule something.

2 The Law Clerk, Marcia Carpentier, will
3 keep the time and we'll try to keep this relatively
4 crisp. She'll give you a one minute warning and then
5 she'll call time and then at that point, please finish
6 your sentence and that will be the end of the
7 presentation. We're going to try to keep it
8 relatively crisp if we can.

9 The sequence of the hearing of the
10 contentions or logic for what it's worth is that we
11 thought that the State of Massachusetts has only one
12 and they could get done and leave this morning if they
13 want to go home. Same with the Vermont Department of
14 Public Service. They have three and they might
15 finish, hopefully finish up today and they might go
16 home if they need to. NEC has six. We thought that
17 would overlap over two days period, so we thought we
18 would ask you to go essentially third on this. That
19 was our sequence and particularly because we think the
20 Massachusetts contention and the Vermont contention
21 No. 2 are related. We want those to go in sequence.
22 So that was our theory there.

23 There are some subjects which we really
24 don't anticipate we will have any questions on and we
25 would suggest you not spend any time on, unless we ask

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1 you a specific question. Those would include
2 standing, motions to adopt contentions. We don't need
3 to hear anything on that. Motions to strike portions
4 of the replies, we don't need to hear anything on
5 that. Vermont's motion under 274L of the Atomic
6 Energy Act and the right to cross examination, we
7 don't need to hear that. Selection of hearing
8 procedures, inasmuch as no one has -- none of the
9 Petitioners have spent a whole lot of time on any of
10 that, we're not going to hear argument on that either.
11 And the backfit petition of the State of
12 Massachusetts, as we understand it, is not something
13 they intend to be before us anyway, so we're not going
14 to hear anything on that, unless we ask a specific
15 question. We really don't need to focus on those.

16 Finally, I think we would note that on
17 Friday afternoon at 2 p.m. Entergy filed some hundred
18 pages of materials in a letter and submitted it for
19 our information. We also note, I think it was Mr.
20 Shems filed an objection in a letter form. We're
21 going to strike that submission. We are not in the
22 business of receiving FYI letters from any party with
23 attachments of any length. If you've got something to
24 say to us, file a motion, file a request for
25 supplemental pleadings, file something formal. We are

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1 not here to receive FYI submissions.

2 We'd like to complete this by 3 p.m.
3 tomorrow. We're not sure. We intend to go to 5 or
4 maybe 6 this evening, depending on where we are and
5 start tomorrow, I guess at 9.

6 At this point, I want to ask if the
7 parties have any questions before we proceed to
8 opening statements. But does any party or litigant
9 have any urgent matter that needs to be raised at this
10 point?

11 MR. BROCK: Judge Karlin, just for
12 clarification, Massachusetts would like to divide its
13 time --

14 JUDGE WARDWELL: Speak into the mic.
15 There's a fair amount of white noise. Of course, I'm
16 not speaking into the mic.

17 (Laughter.)

18 MR. BROCK: Is that coming through? Okay.
19 Massachusetts would like to divide its time on the
20 opening statement. I would make a few introductory
21 comments and then turn to co-counsel, Attorney Curran
22 to complete the opening statement if that is
23 satisfactory to you?

24 CHAIR KARLIN: As a general rule, for any
25 given matter or contention, only one attorney or

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1 representative to speak, but for the opening statement
2 that's okay, so long as you're not breaking it into
3 two parts. You're both going to do it sequentially?

4 MR. BROCK: That is correct, Your Honor.

5 CHAIR KARLIN: That will be fine. Ten
6 minutes.

7 Okay, with that, let's see, what did we
8 say? I think Vermont, Mr. Roisman, Ms. Hofman, 10
9 minutes and we'll give you a one-minute warning before
10 your time is up and then we'll call time.

11 OPENING STATEMENT OF ANTHONY Z. ROISMAN, ESQ.

12 ON BEHALF OF THE STATE OF VERMONT

13 MR. ROISMAN: Mr. Chairman, given the
14 nature of the microphone, with your permission, I'd
15 like to remain seated for my presentation, rather than
16 holding a mic in my hand.

17 CHAIR KARLIN: Yes, please, go ahead.
18 Everyone can remain seated.

19 MR. ROISMAN: Thank you. First, we'd like
20 to welcome the Board to Vermont. Notwithstanding
21 today's weather and the weather that's expected for
22 tomorrow, it's still a beautiful state. We are proud
23 of the natural beauty of this state and we'll be
24 talking about that substantively as we discuss our
25 second contention later on.

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1 This site that we're at is only a few
2 miles from where the nuclear power plant sits on the
3 banks of the Connecticut River, one of the most
4 important and beautiful rivers in this nation. And it
5 is, in part, because of our concern as representatives
6 of the State of Vermont that Vermont Yankee is
7 proposing to extend by 50 percent the time that it
8 intends to use that site for a nuclear power plant and
9 to extend indefinitely the time in which it intends to
10 use that site for the storage of nuclear fuel that we
11 are here today.

12 We are also here today because the
13 principal concern of the state is that this Board and
14 the Commission and the Staff have a full evidentiary
15 record before they make this most important decision
16 about this nuclear power plant.

17 Historically, when Vermont Yankee was
18 proposed to be built in this state, it was a matter
19 that was ultimately decided by the Vermont legislature
20 and by a vote in which there was only a one vote
21 majority of where Vermont Yankee was accepted by the
22 state legislature as an acceptable proposal for the
23 state. So the State of Vermont has always maintained
24 a special interest in the Vermont Yankee plant. It's
25 proud that the plant is here. It's proud of the

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1 record that the plant has exhibited. It is concerned
2 that the plant maintain that level of integrity, if it
3 is to be allowed to operate now at an uprated level of
4 20 percent for an additional 50 percent of its life.

5 In order for the Board to have all the
6 information, we have framed our contentions primarily
7 within the framework of 2.309(f)(1)(iv) which provides
8 in relevant part that if the Petitioner believes that
9 the application fails to contain information on a
10 relevant matter as required by law, the identification
11 of each failure and the supporting reasons for the
12 Petitioner's belief are the principal bases for the
13 contention that is offered.

14 And as we go through our contentions,
15 you'll see that each of them is addressed to the
16 failure of the Applicant to provide relevant
17 information; first, relevant information regarding new
18 and significant information that bears on land use at
19 this particular site. We are not raising a generic
20 concern. We are raising a site-specific concern. How
21 much longer beyond the proposed 20-year extension will
22 the Vermont Yankee plant site be a nuclear site and
23 will those impacts be on the surrounding land uses?

24 Secondly, we have been and we remain
25 concerned about the security of the plant site. We

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1 were always concerned with it like all Americans after
2 9/11. The level of that concern has been heightened
3 significantly. And so one of our contentions is
4 focused on the security question.

5 And finally, we are concerned that the
6 long-term operation of this plant have the level of
7 heightened maintenance that is mandated by the Nuclear
8 Regulatory Commission for extending the life of
9 facilities that were originally believed to have at
10 most a 40-year useful life. And therefore, we have
11 raised a contention regarding the failure of the
12 Applicant to submit information as to how it will
13 engage in the relevant maintenance activities for
14 critical portions of the plant, particularly the
15 concrete that surrounds the reactor containment.

16 Those are what our principal concerns are.
17 Those are what our focuses will be. If the Board will
18 allow at the end of the hearing an opportunity to
19 close, I would like to reserve what time I have left
20 for a closing statement at the end of the day
21 tomorrow.

22 CHAIR KARLIN: We're not currently
23 planning on closing statements.

24 MR. ROISMAN: Okay, well, I have nothing
25 further to say in my opening.

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1 CHAIR KARLIN: We may change our minds.

2 MR. ROISMAN: You can add that on to some
3 other time of mine, if you wish.

4 CHAIR KARLIN: All right.

5 MR. ROISMAN: Thank you.

6 CHAIR KARLIN: Although we're not going to
7 allow reservation of time between different
8 contentions.

9 MR. ROISMAN: I understand.

10 CHAIR KARLIN: State of Massachusetts, Ms.
11 Curran? Mr. Brock?

12 OPENING STATEMENT OF MATTHEW BROCK, ESQ.

13 ON BEHALF OF THE STATE OF MASSACHUSETTS

14 ATTORNEY GENERAL

15 MR. BROCK: Yes, thank you, members of the
16 Board. My name is Matt Brock, an Assistant Attorney
17 General for the Commonwealth of Massachusetts. The
18 Vermont Yankee plant is located in close proximity to
19 the Massachusetts border and that is why the
20 Massachusetts Attorney General has filed a contention
21 in this proceeding because decisions by this Board
22 will affect citizens in Massachusetts.

23 I want to say on behalf of the
24 Massachusetts Attorney General, that he does not
25 oppose nuclear power and in general, has not opposed

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1 the application by Entergy for a license extension.
2 However, before that license extension is granted, the
3 Massachusetts Attorney General is requesting that the
4 NRC and Entergy first comply with federal law that
5 requires them to address the safety and environmental
6 concerns surrounding the storage of spent fuel at the
7 Vermont Yankee nuclear power plant. This includes an
8 evaluation of the risks of a serious accident at the
9 Vermont Yankee fuel pool and an examination of the
10 ways to reduce those risks.

11 As part of that evaluation, the
12 Massachusetts Attorney General also is requesting that
13 the NRC address the environmental impacts of
14 intentional destructive acts against the Vermont
15 Yankee plant as required by the National Environmental
16 Policy Act. While such events are unlikely, they are
17 foreseeable and the NRC needs to address this issue as
18 part of the NEPA process.

19 Moreover, as this Board is aware, the
20 Ninth Circuit recently held that the NRC should
21 consider as part of the NEPA process the potential
22 impacts of an intentional attack on a fuel storage
23 facility. We think that issue is relevant to this
24 proceeding and we are asking this Board to apply the
25 Ninth Circuit decision here.

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1 Finally, the Attorney General is engaged
2 in this process in an effort to ensure that the
3 Vermont Yankee plant operates both in a safer manner
4 and complies with applicable law.

5 Thank you.

6 MS. CURRAN: I'd just like to add that our
7 contention specifically addresses Entergy's failure to
8 fulfill the requirement of 10 CFR 51.53(c)(3)(iv)
9 which requires it to identify new and significant
10 information of which it is aware that could bear on
11 the environmental impacts of its proposed action in
12 this case, the 20-year renewal of Entergy's license.
13 We have presented the Licensing Board with new and
14 significant information showing that assumptions made
15 in the license renewal GEIS, particularly that aged
16 fuel will not burn and that the most severe case,
17 accident case is the total and instantaneous drainage
18 of the spent fuel pool, that those assumptions are
19 incorrect and that in fact, that fuel of any age can
20 burn and that the most severe case is partial drainage
21 of the pools. This affects the ultimate estimate of
22 probability of a pool accident.

23 And we are asking the Licensing Board to
24 admit a contention which challenges the adequacy of
25 Entergy's environmental report to address this new and

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1 significant information. We also ask the -- as Mr.
2 Brock was saying, we ask the Licensing Board to
3 consider the fact that intentional attacks on the
4 Pilgrim pool are reasonably foreseeable and should be
5 included in the range of accidents that is examined in
6 the environmental report and in a supplemental EIS for
7 the facility.

8 The Attorney General's ultimate goal here
9 is to obtain a supplemental environmental impact
10 statement regarding the risk of pool fires in the
11 Vermont Yankee pool and that also examines reasonable
12 alternatives for avoiding or mitigating those impacts.
13 And such alternatives are available and feasible to
14 Entergy, including a combined low-density storage and
15 dry storage of the spent fuel.

16 Thank you.

17 CHAIR KARLIN: Thank you. New England
18 Coalition, please.

19 OPENING STATEMENT OF KAREN TYLER, ESQ.

20 ON BEHALF OF NEW ENGLAND COALITION

21 MS. TYLER: New England Coalition would
22 emphasize, as a preliminary matter, that the standard
23 its required to satisfy for admission of its
24 contentions is not an excessively demanding one. NRC
25 is only required to show what prior NRC decisions have

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1 termed a minimal showing, quote unquote, that material
2 facts concerning issues within the scope of the
3 proceeding are in dispute and that an inquiry of depth
4 into those issues is therefore appropriate.

5 NEC has submitted six contentions, one
6 environmental contention and five that concern safety
7 and aging-management issues. And it has satisfied
8 this minimal showing standard with respect to each of
9 them.

10 NEC's first contention, an environmental
11 contention, concerns whether or not Entergy has taken
12 the hard look required under NEPA concerning the
13 cumulative impacts of increased thermal discharges
14 into the Connecticut River that result from the
15 extended power uprate of plant and whether Entergy has
16 evaluated the impact of those discharges over the full
17 20-year term of the renewed license.

18 Entergy has taken the position on this
19 issue that the attachment of an expired state permit
20 that remains only temporarily in effect to its
21 application is adequate to satisfy NEPA requirements
22 and NEC disagrees.

23 NEC's contention 2 disputes whether
24 Entergy has submitted an adequate program to monitor
25 and manage reactor components that its own analysis

1 indicates are vulnerable to environmentally-assisted
2 metal fatigue over the extended license term.

3 NEC's contention 3 disputes the adequacy
4 of Entergy's strategy to monitor the -- monitor and
5 manage the aging of the plant's steam dryer.

6 NEC's contention 4 disputes the efficacy
7 of Entergy's plan to monitor and manager aging of the
8 plant piping due to flow-accelerated corrosion over
9 the extended license term.

10 NEC's contention 5 disputes Entergy's
11 assertion that it is not necessary to monitor and
12 manage aging of the plant's condenser which mitigates
13 the off-site release of radioactive gas in the event
14 of an accident at the plant and Entergy's contention
15 that it's unnecessary to manage this plant component
16 over the extent of the license.

17 And finally, NEC's contention 6 disputes
18 Entergy's plan to manage aging of the primary
19 containment boundary and to address moisture and
20 corrosion issues in the dry well shell.

21 Thank you.

22 CHAIR KARLIN: Thank you, Ms. Tyler.

23 Mr. MacArthur?

24 OPENING STATEMENT OF DAN MacARTHUR

25 ON BEHALF OF THE TOWN OF MARLBORO

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1 MR. MacARTHUR: Thank you. I'd like to
2 clarify that the Town of Marlboro will have this
3 opening statement and this is the sum total of our
4 hearing today is that -- today and tomorrow -- is that
5 correct, there will be no further time for Marlboro to
6 interact?

7 CHAIR KARLIN: That's right.

8 MR. MacARTHUR: Okay, given that situation
9 then and thank you for doing that, that allows me to
10 go home fairly soon here, thanks for taking the time
11 to hear all of these contentions here. It is
12 meaningful to the people of this region to have our
13 concerns heard. And thank you for considering what
14 you take to be a contention and we appreciate that,
15 that Marlboro should be included in an amended
16 license, if it should be extended.

17 Our original request for hearing spells
18 out our case for including Marlboro in the EPZ and we
19 believe that it complies with all the facets of
20 2.309(f). Our arguments for this inclusion are based
21 on common sense and are based on the current situation
22 in the region. Our arguments represent the financial,
23 social and spiritual well-being of the citizens of the
24 Town of Marlboro today as well as for many years into
25 the future as others have already pointed out.

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1 Marlboro's inclusion in the EPZ of the VY
2 plant is not an evacuation issue. It is an issue of
3 being able to live comfortably with this reactor and
4 its radioactivity, both within the reactor and in the
5 stored waste as others have pointed out, for our lives
6 and the lives of all of our children and
7 grandchildren.

8 I looked through the legal precedence as
9 much as I've been able to find access to and found no
10 replicas of Marlboro's situation, no precedent of
11 legal decisions based on conditions exactly similar to
12 Marlboro's, so we hereby request that this Board
13 require that the Town of Marlboro, Vermont be included
14 in the EPZ of the Entergy Vermont Yankee Nuclear Plant
15 when and if the license is extended and we further
16 request that under 10 CFR 2.315(c) Marlboro requests
17 that we be given status to participate in the hearings
18 of each of the contentions when the hearings are held
19 that are coming before the Board today, that we be
20 granted status to be participants in each of those
21 areas, not only our contention, but the other ones as
22 well.

23 I will be the representative during that
24 time and I thank you for time.

25 CHAIR KARLIN: Thank you, Mr. MacArthur.

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1 Entergy, Mr. Lewis.

2 OPENING STATEMENT OF DAVID R. LEWIS, ESQ.

3 ON BEHALF OF ENTERGY

4 MR. LEWIS: Thank you. Entergy would also
5 like to welcome you to Vermont and thank you for
6 presiding over this proceeding.

7 As you mentioned, Entergy has applied for
8 a 20-year license extension for the Vermont Yankee
9 Nuclear Power Station. That application is based on
10 and includes a comprehensive evaluation coded
11 "Integrated Plant Assessment" that examines the aging
12 of all important systems, structures and components as
13 defined in the NRC rules and demonstrates that those
14 components can be managed such that the aging will not
15 prevent those components from performing their
16 credited function.

17 Our application is also based on and
18 includes an environmental report which addresses those
19 environmental issues that the Commission has specified
20 require examination by an applicant.

21 We are opposing the contentions in this
22 proceeding and do not do so lightly, but we do so
23 because we think it's appropriate under the NRC rules.
24 For example, the NRC has resolved a number of
25 environmental issues, generically, in the generic

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1 environmental impact statement and they've codified
2 their findings on those issues in a table in the NRC
3 regulations.

4 We are opposing contentions that seek to
5 raise those issues in this proceeding, not because
6 they're unimportant and not because they've been
7 ignored, but rather because they've been addressed
8 fully and resolved generically and therefore there is
9 no further role in this proceeding for a site-specific
10 consideration.

11 There are other issues that we've opposed
12 based on a failure of the Petitioners to demonstrate
13 a genuine material issue, one that makes a difference.
14 I won't argue those now. We'll have plenty of time
15 during the arguments on individual contentions, but we
16 have fully addressed those matters which the NRC
17 regulations requires to be addressed and I look
18 forward to your ruling on this matter.

19 CHAIR KARLIN: Thank you, Mr. Lewis.

20 Ms. Young or Mr. Hamrick?

21 OPENING STATEMENT OF STEVEN C. HAMRICK, ESQ.

22 ON BEHALF OF THE NUCLEAR REGULATORY COMMISSION

23 MR. HAMRICK: This is Steve Hamrick for
24 the NRC Staff.

25 The Staff stands on its pleadings

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1 regarding the admissability of the contentions filed
2 by all four of the Petitioners: NEC, Massachusetts
3 Attorney General, the Vermont Department of Public
4 Service and the Town of Marlboro. Other than that, we
5 have very little to say at this point.

6 We look forward to providing answers to
7 any questions the Licensing Board may have with
8 respect to these issues. That's all we have at this
9 point, thank you.

10 CHAIR KARLIN: Great. Thank you.
11 Everyone gets an A for being short and sweet for the
12 first 10 minutes. This is helpful.

13 All right, now we're going to proceed to
14 the oral argument on the individual contentions. We
15 will start with the State of Massachusetts and its one
16 contention. Before we start, two things, one, having
17 read the pleadings, I was struck by -- troubled by the
18 -- let me put it this way. When I look at the
19 admissability of contentions, I go by the regulation
20 2.309(f)(1) through (6) and it would be very helpful
21 to me when you focus your arguments, you tell me how
22 you have met or have failed to meet each of those six
23 elements. Rather than using words, let us cite the
24 regulations in reference to the words of the
25 regulations in cases which interpret them.

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1 Some of the briefs on these issues failed
2 to cite the regulation more than once or twice in
3 dozens and dozens of pages. It really helps me if you
4 can ground your arguments on those specific regulatory
5 provisions. For example, the word "basis" is used in
6 many different ways and I'm not sure which subpart
7 you're referring to, but there's only one subpart that
8 is used in and that is 309(f)(1)(ii) and many other
9 uses confuse me. So if we could focus on that, that
10 would be helpful.

11 The other point is that we have in each of
12 the Petitioners' cases, I think an automatic
13 reservation of five minutes of time for rebuttal. If
14 you wish to change that, please let me know at the
15 outside.

16 Ms. Curran, you have 30 minutes, as I
17 understand it. How much do you want to reserve for
18 rebuttal?

19 MS. CURRAN: I'd like to reserve half the
20 time.

21 CHAIR KARLIN: You said a maximum of 10
22 minutes for rebuttal.

23 MS. CURRAN: I was hoping since you'd
24 given us 30 minutes that you were going by
25 proportions.

1 CHAIR KARLIN: No. Ten minutes?

2 MS. CURRAN: Okay.

3 CHAIR KARLIN: Okay, great. So you have
4 20 minutes. Please proceed.

5 ORAL ARGUMENT OF DIANE CURRAN, ESQ.

6 ON BEHALF OF THE MASSACHUSETTS ATTORNEY GENERAL

7 MS. CURRAN: There's three issues I'd like
8 to address. The first one is is the Attorney General
9 in the correct forum. The second is is their
10 contention admissible? Have we satisfied the standard
11 in 10 CFR 2.309(f). And the third is the
12 applicability of the Mothers For Peace decision.

13 Entergy argues and the NRC Staff both
14 argue that the Attorney General has brought its
15 concern to the wrong forum, that we were under the
16 Turkey Point decision cited in their responses, that
17 we were required to go to the Commission with either
18 a waiver petition or a rulemaking petition.

19 We believe that we were required by 10 CFR
20 2.309(f)(2) to address the sufficiencies of the
21 environmental report and that is what we have done.
22 That's an iron clad obligation with the Intervenors
23 and we did not feel we had the luxury of picking
24 another door to go in, but I would like to say that --

25 CHAIR KARLIN: Are you suggesting that

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1 2.309(f)(2) requires you to file this contention?

2 MS. CURRAN: Well, it requires that if we
3 want to raise a contention under the National
4 Environmental Policy Act, we must start by criticizing
5 the environmental report. In the preamble to the
6 final rule in 1989, when the Commission promulgated
7 this rule, it said that it wanted to increase the
8 efficiency of these proceedings by requiring that the
9 environmental report should be the initial focus of
10 all contentions, that if the draft environmental
11 impact statement were to change what was in the
12 environmental report, the Petitioner would be required
13 to amend its contention, but that Petitioner is
14 required to start by challenging the environmental
15 report or risk being deemed to have waived its
16 opportunity to participate in the proceeding.

17 So we believe that we were not only
18 entitled, but essentially required to raise our
19 concerns with respect to the environmental report in
20 the first instance. Because the Turkey Point case
21 indicates that the Commission thinks that issues that
22 are generic should be addressed in the rulemaking
23 petition, we are also planning to file a rulemaking
24 petition with the Commission out of an abundance of
25 caution. As stated in our reply brief, however, we

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1 think that we have brought our concern to the correct
2 forum and we're asking the Licensing Board to make a
3 ruling on the admissability of our contention.

4 It's also clear to us that a waiver
5 petition would be completely inappropriate here and
6 that we couldn't satisfy one of the basic elements for
7 a waiver petition which is that the circumstance needs
8 to be unique to the particular plant.

9 While the consequences of accidents in
10 spent fuel pools may vary from plant to plant, the
11 design of the BWR reactors that the Attorney General
12 is concerned about, Vermont and Pilgrim, are common to
13 all BWRs and many of the issues are also common to all
14 nuclear plants including PWRs.

15 CHAIR KARLIN: May I ask this, Turkey
16 Point on page 12, everyone cited us to page 12 many
17 times. And that's the section that talks about the
18 options that are available to a citizen's group or a
19 citizen who is unhappy and thinks there is new and
20 significant information that requires consideration.

21 Do you consider that list exhaustive? Is
22 that an exhaustive list of the options available to
23 the Petitioner?

24 MS. CURRAN: I'm sorry, I don't have the
25 case in front of me. There are two options, to my

1 recollection, of Turkey Point cases that offers -- or
2 three options. And we did discuss those in our reply.
3 One is a petition for a waiver. The other is a
4 petition for rulemaking, and the third is to comment
5 on the draft EIS. And we think that -- I'm not
6 certain and if one were to go the commenting group
7 that one would preserve one's right to go to Court.
8 I don't know the answer to your question and I
9 wouldn't count on it.

10 CHAIR KARLIN: Does Turkey Point -- seems
11 to require -- let me read on page 11, no one seems to
12 be citing page 11 enough. At the bottom, it says in
13 addition, even where the GEIS has found the particular
14 impact applies generically, i.e., category 1, the
15 Applicant must still provide additional analysis if
16 new and significant information may bear on the
17 applicability of the category 1 finding.

18 Do we understand your position to be the
19 Applicant is obliged to provide any new and
20 significant information concerning a category 1 issue
21 under the part 51 regs?

22 MS. CURRAN: Yes, that's correct and if
23 you look at the history of the rulemaking, in the
24 proposed rule the Commission proposed to only require
25 the licensee to address category 2 and 3 issues in its

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1 environmental report. But after receiving comments
2 from the Counsel on Environmental Quality, the
3 Commission changed the rule to broadly require the
4 Applicant to address any new and significant
5 information.

6 CHAIR KARLIN: But what do you do about in
7 the Statement of Consideration on page 28470? Do you
8 have that? They refer to SECY 93032. Doesn't that
9 tell us that the Commission has decided that this
10 cannot be litigated before Boards?

11 MS. CURRAN: Well, I'll get that and look
12 at it but I can see the page --

13 CHAIR KARLIN: You haven't looked at it?

14 MS. CURRAN: No, I've looked at it so many
15 times, I remember what it says. It seems to me that
16 the Commission circulated SECY 0392 and that was what
17 provoked the comment from the CEQ --

18 CHAIR KARLIN: That's not correct. The
19 EPA and the CEQ raised the comments in SECY 93032 was
20 the Staff's and the Commission's response and
21 discussions with CEQ and EPA regarding their concerns.

22 Middle of the page, about halfway down
23 there's a reference to SECY 9332.

24 MS. CURRAN: I'm sorry. You know, this
25 sound system in here so strange I almost hear every

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1 other word you're saying.

2 CHAIR KARLIN: I'll try to speak into the
3 mic more closely.

4 Well, let's go back to Turkey Point.
5 Turkey Point on page 11 and I want to ask the
6 Applicant and the Staff to address this says that in
7 the ER, the Applicant is obliged to address new and
8 significant information regarding category 1 issues.
9 It then says on page 12 that the Staff is obliged to
10 address new and significant information regarding
11 category 1 issues. That's an interpretation of 5195C.

12 Are we to understand that although both
13 the Environmental Report must include new and
14 significant information and the Staff must address new
15 and significant information on category 1 that this --
16 and if they fail to do so, you would have no remedy,
17 Massachusetts would no remedy except to file a
18 rulemaking petition?

19 MS. CURRAN: Well, the Turkey Point
20 decision doesn't specifically address that question.
21 But 10 CFR 2.309 --

22 CHAIR KARLIN: Well, it does address that.
23 It does hold to exactly that it seems to me that the
24 Petitioners have no right. If you go to page -- let's
25 see, 23 -- it says that we hold the GES precludes the

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1 litigation of these issues.

2 Aren't we bound by that?

3 MS. CURRAN: Well, in Turkey Point it is
4 not clear to me that the contention itself addressed
5 51.53(c)(3)(iv). So there isn't a discussion, it's
6 not the situation we have here where the Petitioner
7 comes in and claims under the regulation a failure to
8 satisfy this particular section. And so I don't find
9 --

10 CHAIR KARLIN: I think you're right. I
11 think you're right on that that the --Mark Onvcavage -
12 - he's the Petitioner there.

13 MS. CURRAN: Yes.

14 CHAIR KARLIN: He did not say -- he did
15 not seem to raise I am presenting new and significant
16 information. He seemed to be raising information
17 that he never characterized as new and significant.
18 So perhaps the formal holding of Turkey Point may be
19 indistinguishable on that basis. But it seems that
20 the dicta is pretty strong against you, if that's what
21 it is.

22 MS. CURRAN: We realize that this is new
23 territory for the Commission. This particular
24 instance, the challenge to a category 1 finding under
25 51.53(c)34, there isn't another case that addresses

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1 that to my knowledge.

2 CHAIR KARLIN: Well, Turkey Point
3 addresses it, you just may say it's not the holding.

4 MS. CURRAN: Yes, and Turkey Point is not
5 clear on that question. It doesn't address that
6 particular question.

7 If you find that we are in the wrong
8 forum, then we would accept that ruling but we need a
9 finding that we appropriately challenged this
10 environmental report in all other respects.

11 JUDGE WARDWELL: So what you're saying is
12 you don't necessarily disagree with Turkey Point in
13 regards to our inabilities to litigate the lack of new
14 and significant information. You're trying to
15 establish a basis that, in fact, you've recognized
16 that this is a deficit and then can proceed from there
17 as far as your ultimate goals.

18 MS. CURRAN: We don't think Turkey Point
19 controls this particular case. But if the Licensing
20 Board disagrees with us on that question, we ask the
21 Licensing Board, nevertheless, to make a ruling that
22 we appropriately challenged a failure to comply with
23 NRC environmental regulations by an environmental
24 report and that we have not -- that were this the
25 appropriate door to go in, would have done it

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1 correctly. That's important to us.

2 JUDGE WARDWELL: Isn't your burden here to
3 demonstrate for us to adjudicate it, that we, in fact,
4 have authority to litigate it, and then your second
5 part is you have to show that there is new and
6 significant information in your assessment.

7 MS. CURRAN: Right.

8 JUDGE WARDWELL: I assume you'll be
9 getting on to your discussion --

10 MS. CURRAN: That's right and I would like
11 to move on to that part of the argument.

12 Our obligation in this contention is to
13 show a specificity and basis that there is new and
14 significant information not considered in the license
15 renewal GEIS which bears the environmental impacts of
16 renewing the Entergy license. And we believe that we
17 have more than met the admissability standard for that
18 by citing a variety of technical reports showing new
19 information that was not previously considered in a
20 license renewal GEIS. Those are the Thompson Report,
21 NUREG 1738, the NRC Staff's technical study of
22 decommissioning plants and spent fuel pool accidents
23 at decommissioning plants and the National Academy of
24 Science's study done in 2005.

25 JUDGE WARDWELL: Of all your arguments,

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1 I've kind of boiled it down to this and comment on
2 whether I've boiled it down correctly or too
3 simplistically in my mind, but I viewed your new and
4 significant information to really have four
5 components, that you're talking about a partial loss
6 of water, rather than a full loss of water; you're
7 talking about it associated with high-density reacts
8 as opposed to normal reacts. You're saying that it's
9 potential fire with any age, not necessarily new fuel.
10 And I gleaned out of this as I condensed this that
11 this would take place during operations.

12 That's what I considered, as I read
13 through this as the heart of what you considered to be
14 new and significant information. Is that a fair
15 assessment or did I miss something?

16 MS. CURRAN: I'm sorry, do you mean by
17 during reactor operations, is that what you're --

18 JUDGE WARDWELL: Yes.

19 MS. CURRAN: In contrast to NUREG 1738
20 which looked at decommissioning of plants?

21 JUDGE WARDWELL: Correct.

22 MS. CURRAN: I would add two things to
23 that. One is that we show that a range of accidents
24 that are considered worthy of consideration in the EIS
25 by the NRC could lead to the uncovering of fuel and the

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1 spent fuel pool fire. And also, that intentional
2 attacks should be included in the range of accidents
3 that is examined in the EIS.

4 JUDGE WARDWELL: Let's talk about that a
5 bit. I had trouble envisioning how we might see a
6 partial loss as opposed to a full loss because as I
7 gather from the heart of your argument that it's this
8 partial loss that's so new and that everything
9 previously had really looked at full loss in your
10 contention.

11 Can you explain some triggering mechanisms
12 to have only a partial loss that wouldn't, in fact, be
13 addressed during normal operations?

14 MS. CURRAN: Well, for instance, an
15 earthquake -- if you look at say NUREG 1353, they were
16 looking at very, very severe earthquakes that would
17 crack and basically destroy the pool so much so that
18 the pool would drain immediately.

19 One can imagine earthquakes of less
20 severity that would have the effect of draining the
21 pool more slowly.

22 CHAIR KARLIN: Well, may I ask this --

23 JUDGE WARDWELL: Can I ask their technical
24 expert, rather than just whisper in her ear, if they
25 want to they can go ahead and speak directly.

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1 CHAIR KARLIN: No, no, no. Just the
2 attorney. He's not here to give testimony.

3 MS. CURRAN: Also boil down accidents,
4 there's a variety of ways that the pool could lose
5 water in a boil down. And those accidents, one of our
6 concerns here is that one of the reasons the NRC has
7 said that a pool fire is so very unlikely is that it
8 has only looked at accidents that are severe enough to
9 cause total instantaneous drainage and those accidents
10 are less probable than ones that would cause less
11 damage, partial drainage of the pool.

12 CHAIR KARLIN: Didn't the Sandia report in
13 1979 acknowledge that partial drainage could be more
14 severe? Didn't your own experts says that? So what's
15 new? This is 25 years old.

16 MS. CURRAN: If you look at the history of
17 the NRC's consideration in its NEPA study, the NRC did
18 not fully consider --

19 CHAIR KARLIN: Aren't you just saying the
20 NRC -- I mean, as I hear it, it's more Dr. Thompson
21 disagreeing with the NRC, but there's nothing new
22 here. You're just saying you didn't fully consider
23 it, you didn't consider it well enough, you didn't
24 consider it the way I consider it and therefore you're
25 wrong and I'm right.

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1 What's new other than Dr. Thompson has an
2 opinion?

3 MS. CURRAN: New means anything that was
4 not considered in the EIS for spent fuel pool storage.
5 If you go back to the 1979 EIS that basically cited
6 the Sandia report in a footnote; go to the license
7 renewal GEIS that didn't cite the Sandia report at all
8 --

9 CHAIR KARLIN: I mean, if I may --

10 MS. CURRAN: I'm sorry.

11 CHAIR KARLIN: The spent fuel fires and
12 high density racking has been around for 25, 30 years,
13 every since Carter eliminated reprocessing and we've
14 been analyzing this dozens of times. I just don't see
15 anything new other than is every time a new expert
16 issues a new opinion, is that new and significant
17 information?

18 MS. CURRAN: We have much more than one
19 expert's opinion.

20 JUDGE WARDWELL: Did you see any reference
21 in regards to looking at partial loss of high racks,
22 partial loss of fluid with high racks in the GEIS?
23 Was there any reference or indication that that was
24 one of the situations that they evaluated in the GEIS?

25 MS. CURRAN: No, because the GEIS -- just

1 let me point out that the GEIS relied primarily on
2 NUREG 1353.

3 MS. CARPENTIER: Sorry, one minute.

4 JUDGE ELLEMAN: Ms. Curran, it appears to
5 me in looking at the contention that most of the new
6 and significant information relates to what happens to
7 the fuel after it's uncovered. It relates to the
8 oxidation of the zircaloy. Is there anything in the
9 new and significant information that alters the
10 calculation of the probability of the fuel being
11 uncovered in the first place?

12 MS. CURRAN: Yes. Uncovered to the extent
13 that fire is initiated, yes.

14 JUDGE ELLEMAN: I'm sorry, I have the same
15 trouble with the sound system you're having. Could
16 you repeat that?

17 MS. CURRAN: Yes, uncovering --

18 MS. CARPENTIER: Time.

19 JUDGE ELLEMAN: Go ahead and finish your
20 sentence.

21 MS. CURRAN: Uncovering to the extent that
22 initiates fire.

23 CHAIR KARLIN: Okay, thank you.

24 JUDGE ELLEMAN: I'm not sure I followed
25 that. Are you saying that there is a change in our

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1 perception as a result of this new and significant
2 information on the likelihood of the fuel being
3 uncovered in the first place?

4 MS. CURRAN: Well, the new and significant
5 information demonstrates that the probability of
6 uncovering of the spent fuel leading to fire is greater
7 than the NRC has considered in its previous EIS
8 because the NRC was only looking at the probability of
9 total and instantaneous drainage.

10 So yes, there is no significant new
11 information on that point.

12 CHAIR KARLIN: All right, thank you. Time
13 is up. You'll have 10 more minutes for rebuttal.

14 I think do we have 25 minutes for Entergy
15 on this one?

16 MR. LEWIS: Twenty.

17 CHAIR KARLIN: Is it 20?

18 MR. LEWIS: Twenty.

19 CHAIR KARLIN: Okay, 20, 2-0. Mr. Lewis.

20 ORAL ARGUMENT OF DAVID LEWIS, ESQ.

21 ON BEHALF OF ENTERGY

22 MR. LEWIS: Thank you, Judge Karlin. This
23 issue concerning how significant new information is
24 considered in a license renewal proceeding involves
25 the Commission's attempt to balance finality against

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1 the need to supplement when appropriate.

2 The Commission promulgated the rules in
3 51.53(c)(3) specifically to resolve issues generically
4 and it made that very clear during the rulemaking. It
5 stated the environmental impacts that can be evaluated
6 generically will not have to be evaluated for each
7 plant.

8 The rules specifically state that there's
9 no requirement that the environmental report include
10 analyses of category 1 issues.

11 CHAIR KARLIN: Wait a second. I'm not
12 sure whether they say that or not. What do we do with
13 -- I understand there is 51.53(c)(1), but what about
14 51.53(c)(4) which says the environmental report must
15 include new and significant information? And the
16 decision in Turkey Point which holds that includes new
17 and significant information concerning category 1,
18 isn't that directly contrary to what you just said?

19 MR. LEWIS: No. It's not directly
20 contrary because the Turkey Point decision does not
21 explain the procedure that applies when an Applicant
22 indicates that he's aware of some significant new
23 information.

24 What the Commission did when it
25 promulgated this rule --

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1 CHAIR KARLIN: But the Turkey Point
2 decision says the ER must include new and significant
3 information regarding category 1 issues on page 11.
4 You didn't cite page 11 in your brief very often.
5 What are we going to do with that?

6 MR. LEWIS: What you need to recognize is
7 that the Applicant does have an obligation to identify
8 significant and new information of which it's aware.
9 That is a subjective requirement is if we believe
10 there's significant and new information, we should
11 disclose it to the Commission. That doesn't mean that
12 we have to revalidate category 1 issues or that we
13 have to address information some other party thinks is
14 significant and new. And we have addressed that
15 requirement in our environmental report. We have
16 stated in I believe it's Section 5 that we are aware
17 of no new and significant information.

18 CHAIR KARLIN: So you agree then if you
19 were aware of new and significant information
20 regarding a category 1 issue, you would be obliged
21 under 51.53(c)(4) to include it in your ER?

22 MR. LEWIS: Yes. We would have to
23 disclose that information. What the Turkey Point
24 decision does not address is what is the procedure
25 that happens when an Applicant does that. And I

1 submit it's the same procedure that happens if a
2 commenter raises it or if an intervenor raises it or
3 a state or interested municipality raises it.

4 The Commission explains what happens in
5 these circumstances. The Staff is meant to look at
6 the information and determine whether it warrants a
7 waiver of the rule. If it warrants a waiver of the
8 rule, the Staff then takes it to the Commission --

9 CHAIR KARLIN: No, now wait a second. Let
10 me stop you there. Doesn't the regulation say that if
11 the Staff is aware of new and significant information
12 regarding a category 1 issue, that the Staff has to
13 include that in its draft supplemental EIS and final
14 supplemental EIS, whether or not you brought it up or
15 not?

16 MR. LEWIS: What I believe is missing from
17 that Turkey Point decision, but is very clear in the
18 Statement of Consideration and in the SECY paper is
19 the intermediate step that the Commission intended and
20 that intermediate step is essential in order to
21 balance finality against the need to supplement.

22 What the Commission said is we're going to
23 have a safety valve. It may be that a generic finding
24 does not survive the test of time and needs to be
25 supplemented. So we're going to have these methods

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1 where persons including the Applicant, including
2 members of the public can tell us if they think that
3 there's something new. In those cases, the Staff will
4 then take the issue to the Commission and get a waiver
5 and by that means the proceeding will be broadened.
6 It is true the information will then be analyzed, but
7 the clear intent from the Statement of Consideration,
8 from the SECY paper, from the Turkey Point case is
9 that when this information is identified, the
10 appropriate course is to bring that information to the
11 Commission. If it is generic, the Commission has said
12 the appropriate course is a rulemaking petition.

13 CHAIR KARLIN: That does seem to be one
14 interpretation, but it's troubling to me in the sense
15 of here we have an obligation in the regs, let's say,
16 for the Applicant to include in its environmental
17 report any new and significant information that it's
18 aware of regarding category 1 issues.

19 MR. LEWIS: Which we've done.

20 CHAIR KARLIN: Let's posit for a moment
21 that you are aware of new and significant information
22 regarding a category 1 issue and you failed to include
23 it in your environmental report. So there would be a
24 noncompliance, as it were, with that regulatory
25 requirement should we say or that Turkey Point

1 requirement.

2 The Petitioners are powerless to do
3 anything about it in this proceeding? This Board is
4 powerless to do anything about it, except to go
5 through the waiver or rulemaking process which is
6 outside of this proceeding?

7 MR. LEWIS: I believe that's correct. If
8 we have indicated that we're subjectively not aware of
9 any new and significant information, we fulfilled our
10 obligation to alert the Commission whether we think
11 there should be any expansion of this proceeding. If
12 another party wants to expand the proceeding, they
13 should follow the proper avenue and take the matter to
14 the Commission through a waiver or for a petition for
15 a rulemaking. That is consistent with what the
16 Commission said in the SECY paper. That is consistent
17 with what the Commission said in the Statement of
18 Consideration.

19 As an example --

20 CHAIR KARLIN: Where did it say in the
21 Statement of -- I see they reference the SECY paper,
22 but they don't really discuss it. You have to read
23 the SECY paper to have any idea of what they're
24 talking about. I don't see it flatly said in the
25 Statement of Consideration. Can you give me a quote

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1 on that?

2 MR. LEWIS: They give one scenario in the
3 Statement of Consideration. They don't go through all
4 the possibilities, but the scenario they give is that
5 if a member of the public submits a comment asserting
6 that there's new and significant information, the NRC
7 Staff will evaluate that information and --

8 CHAIR KARLIN: Where? Can you give me a
9 -- probably 28470.

10 MR. LEWIS: It's 28470. If a commenter
11 provides new information that demonstrates analysis is
12 incorrect --

13 CHAIR KARLIN: What column are you on?

14 MR. LEWIS: Third column, down in C.

15 CHAIR KARLIN: B or C?

16 MR. LEWIS: Staff will seek Commission
17 approval to waive the application of the rule with
18 respect to that analysis.

19 CHAIR KARLIN: Well, okay, let me stop you
20 there. I mean we've read that page. It lists three
21 options, A, B and C. Likewise, on page 12, 12 of the
22 Turkey Point that you quote so many times or cite so
23 many times, it says if there's new and significant
24 information, the generic findings need to be
25 revisited, that the Commission can do the following

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1 things in the hearing process, and then it goes on to
2 say, for example, Petitioners can seek a waiver or the
3 Petitioner may ask the Commission to issue a fresh
4 rulemaking or they can ask the Staff and the
5 Commission, but they don't say that's an exhaustive
6 list. They don't say and that's all that you can do
7 and they don't say and you cannot file a contention on
8 it.

9 It's a little bit frustrating to this
10 Board to see, to assume for a moment that there is a
11 noncompliance with an obligation to include new and
12 significant information in your ER and they raise it
13 and this Board says sorry, we can't do anything about
14 that.

15 MR. LEWIS: First, I would respectfully
16 submit there's been no noncompliance and --

17 CHAIR KARLIN: I understand. I was just
18 assuming that for our discussion.

19 MR. LEWIS: But I do believe that you need
20 to try and balance the Commission's clear intent to
21 provide finality for generically resolved issues.
22 There is no doubt the Commission can resolve issues
23 generically. There's been two Supreme Court cases
24 that held that they have that authority and resolving
25 issues generically specifically means they're resolved

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1 by rule and therefore cannot be waived. That was
2 manifestly what the Commission intended to do in this
3 proceeding.

4 When CEQ raised the issue that perhaps the
5 GEIS down the road might be stale and there might be
6 some mechanism for these issues to be brought to the
7 Commission's attention, the Commission came up with
8 this carefully structured compromise where it
9 indicated, yes, people can bring this information to
10 our attention and we will direct the Staff to
11 determine whether there is grounds for a waiver. Or
12 an Intervenor could bring it, state to us. But what
13 they could not do is back off from the finality that
14 they intended to provide. There's no statement
15 anywhere in the rulemaking record that the Commission
16 indicated that generic category 1 issues can now be
17 litigated freely, simply on a mere allegation.

18 CHAIR KARLIN: But there's no reg that
19 says they can't. There's no reg that says they can't.

20 MR. LEWIS: There is a regulation that
21 says an Applicant is not required to provide analysis
22 of a category 1 issue.

23 CHAIR KARLIN: There is a reg that says
24 you're required to provide new and significant
25 information on category 1 issues.

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1 MR. LEWIS: It doesn't mention
2 specifically category 1 issues, but those two
3 regulations need to be reconciled. How do you
4 reconcile those two regulations? And also reconcile
5 the generic category 1 findings in Table (b)1 of part
6 51 which are generic findings that can't be
7 collaterally attacked under the Commission's rules.

8 The only way that you can reconcile these
9 provisions is to recognize that new and significant
10 information is the standard for a waiver and that is
11 all it is. And therefore it a party, if a commenter,
12 if an Intervenor or if the NRC Staff believes that
13 there is new and significant information, the
14 appropriate course is to take it to the Commission so
15 that the Commission can expand the proceeding by a
16 waiver. Without such a waiver the category 1 issues
17 resolve with finality.

18 Let me just address the new information
19 assertion and what is addressed in the generic
20 environmental impact statement. The generic
21 environmental impact statement concluded that the risk
22 of accidents that might result in a pool fire is
23 highly remote. That's at page 6-75 of the GEIS.

24 JUDGE WARDWELL: Can you point us to where
25 NUREG 1437 or the GEIS itself specifically says that

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1 a valuated partial loss of a high density rack fuel
2 storage?

3 MR. LEWIS: Yes, but it's not direct. On
4 this page, on page 6 --

5 JUDGE WARDWELL: So your answer is no, but
6 I can give you indirect?

7 MR. LEWIS: I can show that they
8 considered it, but they did not explicitly discuss it.

9 At page 6-75 of the GEIS where they make
10 the statement that the likelihood of fuel cladding
11 fire is highly remote, they cite 55 Federal Register
12 38474. That is the 1990 Waste Confidence decision.
13 That is where the analysis is and that is what they
14 relied upon.

15 JUDGE WARDWELL: And you're saying the
16 Waste Confidence rule specifically addressed partial
17 loss of high density rack?

18 MR. LEWIS: If you look at this Waste
19 Confidence decision, September 18, 1990 at page 55
20 Federal Register 38480, you'll see in the third column
21 that public citizen raised the comment. They stated
22 that the danger posed by an accident in which enough
23 pool water escaped to uncover the irradiated fuel
24 assemblies would be greater than the operational
25 incidents described above.

1 So public citizen raised the scenario that
2 you might have a drain down situation in which the
3 fuel is uncovered. They then referred to the fact
4 that the natural air flow permitted by high density
5 storage racks is so restricted that the potential for
6 self-sustaining fighting fire exists, so they
7 specifically raised in the Waste Confidence decision
8 the possibility that high density racks would restrict
9 the cooling of the racks in the event of a drain down
10 situation.

11 JUDGE WARDWELL: And what was the response
12 to that comment?

13 MR. LEWIS: The Commission noted that its
14 dominant accident sequence was the severe seismic
15 drain down event because the probability of that event
16 was two chances in a million per year of reactor
17 operation. This is at page 38481. And it stated that
18 the probability of other accident scenarios such as
19 risks of pneumatic seal failure is inadvertent
20 drainage, loss of cooling or makeup water or
21 structural failures during missiles, aircraft crashes
22 or other heavy load drops or at least an order of
23 magnitude smaller.

24 So what they said is the risks of this
25 severe seismic event is 2^{10-6} which they called

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1 extremely rare and these other scenarios, including
2 the partial drain down scenario is at least an order
3 of magnitude smaller. That is, in fact, supported
4 very precisely by NUREG 1353 and when you look at the
5 waste confidence decision, they cite to that NUREG
6 extensively in addressing this specific comment. In
7 NUREG 1353, the Commission looked at boil down due to
8 loss of cooling or makeup. This was not a
9 catastrophic immediate drain down scenario. It was a
10 slow, boil off scenario of the type that the State of
11 Massachusetts is positing could result in a partial
12 drain down. And they determined that the probability
13 of that event, including these loss of cooling or
14 makeup from a seismic event was on the order of 10^{-8} .
15 That's at pages 4-22 through 4-28 and 4-36 of NUREG
16 1353.

17 In NUREG 1738 which is the --

18 CHAIR KARLIN: If I may, let me ask
19 2.309(f)(1) says that all the Petitioner has to do is
20 make -- provide a concise statement of the alleged
21 fact or expert opinions which support their position,
22 their position that there is new and significant
23 information in this case, I guess.

24 They don't have to prove that there's new
25 and significant information. You don't have to

1 disprove that there's new and significant information.
2 This is not the issue here.

3 Haven't they at least achieved that
4 minimal threshold or are we to get into the merits of
5 whether there really is -- how do we avoid -- this is
6 our question. How do we avoid getting into the merits
7 of whether there is new and significant information?
8 They've given us a pile of materials, NAS report. We
9 don't want to get into whether there really is new and
10 significant information. We just want to decide
11 whether they met their minimal showing of providing a
12 concise statement of the alleged facts or expert
13 opinions which support their position. And they seem
14 to have done that, haven't they?

15 MR. LEWIS: No, they haven't. Not
16 remotely. There's two aspects of this. One is it
17 underscores the need for a waiver, because if you're
18 going to open a category --

19 CHAIR KARLIN: That's a legal argument, I
20 understand there's a legal argument.

21 MR. LEWIS: There should be a substantive
22 determination, but in looking at whether an accident
23 scenario is sufficiently foreseeable to be evaluated
24 further under NEPA, the Board can look at the
25 documents that the Intervenors cite, to see whether on

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1 their face they show that these accidents are
2 sufficiently probable. And I refer you to the Yankee
3 Atomic Electric case, LBP 96-0243 NRC 61, a decision
4 written by Judge Bollwerk where he said specifically
5 that the documents that the Intervenors provide as
6 their basis can be and should be scrutinized by the
7 Board to see --

8 CHAIR KARLIN: We know that.

9 MR. LEWIS: -- on their face supported.

10 CHAIR KARLIN: Okay.

11 MR. LEWIS: What I am saying is when you
12 look at NUREG 1353, you'll see a 6 times 10^{-8}
13 probability of this drain down scenario. When you
14 look at NUREG 1738 which is the information of the
15 document they cite as now being new, you see a 1.8
16 times 10^{-7} probability --

17 CHAIR KARLIN: How about 9/11 and how
18 about San Luis Obispo Mothers for Peace, aren't they
19 both pieces of new information?

20 MR. LEWIS: Yes, but that's a very
21 different argument all together. That is an instance
22 where the Commission has determined in a series of
23 cases, including license renewal proceedings that NEPA
24 does not require the consideration of terrorism, and
25 it has made that whole link.

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1 San Luis Obispo has challenged that in the
2 context of an ISFSI, but that decision is not yet
3 effective. The mandate of that decision has not been
4 issued. And I submit to you that on that legal point
5 until that mandate is issued and the Commission
6 provides some direction --

7 CHAIR KARLIN: So if we wait until
8 September 1st, then we can use it?

9 MR. LEWIS: I think that you should rule
10 on this contention currently and apply the NRC
11 precedent.

12 CHAIR KARLIN: But surely your whole point
13 is not just simply that the mandate hasn't issued.
14 San Luis Obispo Mothers for Peace doesn't challenge
15 it. It demolishes it, doesn't it? I mean if it's a
16 good law, then that's the end of the Commission's
17 position.

18 MR. LEWIS: It may not be good law though.
19 I understand that the Commission is seeking
20 certiorari.

21 CHAIR KARLIN: We don't know. Maybe the
22 Staff will address that.

23 MR. LEWIS: There is a separate point to
24 be made on the San Luis Obispo case and that is in the
25 GEIS, in fact, the Commission states that if it had to

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1 consider a terrorism, in fact, the consequences of a
2 terrorist event wouldn't be any different from a
3 severe accident caused by other consequences.

4 The GEIS therefore has something that San
5 Luis Obispo doesn't have. It has a determination of
6 that even if we had to consider it, here are the
7 bounding consequences and in fact, when you look at
8 the documents where the Commission has looked at spent
9 fuel pool fires in the past, the Commission has said
10 that those consequences for spent fuel fire are, in
11 fact, comparable to severe reactor accidents. That
12 finding --

13 MS. CARPENTIER: One minute.

14 MR. LEWIS: -- has not been challenged at
15 all by the decision in the San Luis Obispo case.

16 I guess my very last statement, if I can
17 make is the assertion that a reactor accident can
18 cause a spent fuel pool fire. I just wanted to point
19 out that at Vermont Yankee in the FSAR, Vermont Yankee
20 has a safety-related environmentally qualified,
21 seismically qualified, standby fuel pool cooling
22 system. So in addition to having two trains of long
23 safety-related spent fuel pool pooling system, it also
24 has two trains of a safety-related and environmentally
25 qualified, seismically qualified spent fuel pooling

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1 system. Beyond that, it has the ability to inject
2 makeup and do so with a reactor building entry.

3 So the possibility that a severe reactor
4 accident is going to cause a drain down of the fuel
5 pool is truly remote.

6 MS. CARPENTIER: Time.

7 CHAIR KARLIN: Okay. Thank you.

8 JUDGE ELLEMAN: Ms. Curran, you quoted a
9 number of 2 times 10^{-6} as a probability from the GEIS
10 of a severe pool fire. And in your contention, Ms.
11 Curran, I believe you have a number of 2 times 10^{-5} as
12 your claim for that probability.

13 Can you give us the basis --

14 CHAIR KARLIN: We're not going to be able
15 to hear from Ms. Curran at this point.

16 JUDGE ELLEMAN: We can't clarify what the
17 difference is?

18 CHAIR KARLIN: No. We'll wait for her
19 rebuttal for that.

20 JUDGE ELLEMAN: Okay, all right.

21 MR. LEWIS: Could I just say --

22 CHAIR KARLIN: No. Dr. Elleman, do you
23 have a question for him?

24 JUDGE ELLEMAN: No.

25 CHAIR KARLIN: You have a question for Ms.

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1 Curran.

2 JUDGE ELLEMAN: I will wait.

3 CHAIR KARLIN: Let's do it on her
4 rebuttal.

5 JUDGE ELLEMAN: Okay, sure.

6 CHAIR KARLIN: Thank you. Sorry for that.
7 What do we have 20 minutes for the Staff?

8 MS. CARPENTIER: Yes.

9 CHAIR KARLIN: All right, great.

10 ORAL ARGUMENT OF MITZI YOUNG, ESQ.

11 ON BEHALF OF THE NRC STAFF

12 MS. YOUNG: Thank you, Judge Karlin. The
13 Staff also agrees that information regarding partial
14 drain down of spent fuel pools has already been
15 considered in documents related to the generic
16 environmental impact statement. The GEIS specifically
17 references the 1990 revision of the Waste Confidence
18 rule. That rule cited NUREG 1353 and NUREG 1353, as
19 you're aware, has references to the Sandia Report,
20 1979, which talked about the partial drain down
21 situation.

22 The Staff's position is that there has
23 been no information raised by this Petitioner that
24 indicates that there is both new and significant
25 information with respect to the likelihood of spent

1 fuel pool accidents of the nature they allege. So to
2 that extent the Staff would not on its own file a
3 petition seeking waiver of the rule.

4 The Intervenors, if they persist in their
5 position and Ms. Curran has indicated that she
6 believes that this is a generic concern applicable to
7 reactors other than just Vermont Yankee and Pilgrim,
8 they should file their petition for waiver and she's
9 indicated that they plan on doing -- excuse me,
10 petition for rulemaking, and she's indicated that they
11 plan to do that.

12 So if there's anything else you want to
13 hear from the Staff on this point --

14 CHAIR KARLIN: Well, yes. We're hoping
15 you could clarify all of this for us, set the record
16 straight.

17 (Laughter.)

18 But we grapple with -- I'm grappling with
19 Turkey Point and you cited page 12 of that decision,
20 the Commission's decision which talks about the -- if
21 generic issues, new and significant information
22 arises, you can file a petition for waiver, you can
23 file a petition for rulemaking, blah, blah, blah.

24 But let's back it up a little bit. I mean
25 do you agree that on page 11, as stated on page 11 of

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1 that decision at the bottom that the Applicant has a
2 duty in its environmental report under
3 251.53(c)(3)(iv) that to raise any new and significant
4 information it has even concerning a category 1 issue.

5 MS. YOUNG: Certainly the Staff would
6 agree with that, but as Mr. Lewis pointed out, that is
7 of which the Applicant is aware, and that could be
8 interpreted as a subjective standard.

9 CHAIR KARLIN: Right.

10 MS. YOUNG: I mean we have controversy
11 where between the Staff, the Applicant and Petitioners
12 with respect to what's the significance of this
13 information.

14 The Staff's position is that it's very
15 similar to things that the NRC has been considering
16 over the past 25 years.

17 CHAIR KARLIN: Right.

18 MS. YOUNG: Now granted the NRC has not
19 specifically highlighted in every turn what aspects of
20 various analysis of spent fuel pool accidents it chose
21 to emphasize, but the scenario that they are alleging
22 here, this new and significant information has been
23 considered generally.

24 CHAIR KARLIN: Right, well let me -- let's
25 posit for a moment that there is new and significant

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1 information. That's a separate issue which we'll
2 probably have some questions about.

3 But assuming that there is new and
4 significant information of which the Applicant is
5 aware, Staff acknowledges that the reg and page 11
6 says that the environmental report needs to include
7 that new and significant information.

8 MS. YOUNG: Correct.

9 CHAIR KARLIN: And that the Staff also
10 under the regs, if there is new and significant
11 information that it needs to address that new and
12 significant information in the final SEIS. Do you
13 agree with that?

14 MS. YOUNG: That's correct. That's
15 correct, if we were to take that position. In other
16 words --

17 CHAIR KARLIN: If there is new and
18 significant information.

19 MS. YOUNG: If we see the world the same
20 way Petitioners do.

21 CHAIR KARLIN: Now the next jump is
22 assuming there is new and significant information,
23 then the Applicant has the duty and the Staff has the
24 duty, is it not troubling that the Staff can fail or
25 I'm sorry, the Applicant, one assumes in this

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1 scenario, could fail to meet that requirement and yet
2 in every other case contentions come into us and they
3 say the environmental report is not adequate because
4 it doesn't include this and it doesn't include that.
5 And we admit the contention.

6 Here, the environmental report is not
7 adequate because it doesn't include the new and
8 significant information regarding a category 1 which
9 you and the Applicant both agree it must include. And
10 we say yes, that's all true, State of Massachusetts,
11 but you don't get this contention admitted because
12 it's verboten and we need to have some law which says
13 and it's verboten because -- I'd like to cite a reg,
14 but I don't find one. Why isn't it admissible?

15 MS. YOUNG: Well, I think the reg that you
16 would cite is 2.335 with respect to how you weigh the
17 applicability of a rule in a proceeding.

18 CHAIR KARLIN: No, no, no, no. 2.335 just
19 says you can't challenge a regulation. What
20 regulation prohibits them? In fact, the reg is on
21 their side. They're right. The environmental report
22 is supposed to include this new and significant
23 information which they posit exists and they say
24 doesn't. And if they're right, then there's no reg
25 that says you can't challenge that.

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1 MS. YOUNG: But every contention has to be
2 redressable within the scope of the proceeding and the
3 only way that that concern could be redressed is by a
4 ruling on the Commission that the rule should not be
5 applied.

6 What prohibits litigation on spent fuel
7 pool storage issues is the license renewal rule. So
8 if you're going to have a concern where the Applicant
9 has failed to include information in the environmental
10 report, or the Staff has failed to analyze which we
11 haven't come to that point since the environmental
12 impact statement hasn't been prepared, it has to be
13 redressable and the only way to address that is to get
14 over the hurdle of the rule that proposed
15 consideration in this proceeding.

16 CHAIR KARLIN: That's assuming the result.
17 You're saying it's not redressable because you can't
18 handle it because it's not redressable. Well, if we
19 took it, it would be redressable.

20 MS. YOUNG: But again --

21 CHAIR KARLIN: Let me ask this, is there
22 a difference -- some Petitioners, perhaps it was in
23 the Turkey Point case and I think there's a
24 distinction perhaps to be made. Sometimes a
25 Petitioner will come in and say I don't like those

1 GEIS determinations. I don't like the category 1
2 determinations or classifications. They were wrong.
3 I don't like them. I have a different opinion. I
4 want to challenge that. And we say oh no, no, no.
5 That's not permissible. But under NEPA and Marsh and
6 those sort of things, is it a different scenario if
7 the Petitioner comes in and says I'm not trying to
8 challenge that original interpretation. I'm just
9 saying there's new and significant information now and
10 under Marsh and regs, that has to be included.

11 Is that different than simply frontally
12 challenging the original interpretation versus saying
13 I'm not challenging that. I'm just saying you need to
14 take into account new and significant information?
15 Is that different, vis-a-vis the admissability of a
16 contention?

17 MS. YOUNG: I see those issues as the
18 same. Basically, you have here a Petitioner who
19 believes that there's information that would warrant
20 a reconsideration of whether these issues are category
21 1 and should not be treated in individual proceedings.

22 So basically the information that they're
23 raising is whether the generic findings should be
24 applicable to this facility and to other facilities.
25 So no matter how you slice it, there's a direct

1 challenge to the Commission's regulation here.

2 I mean sure they've identified a partial
3 failure that they allege for information being absent
4 from the environmental report, but what relief can you
5 get from that? How is that redressable? You've got
6 to be able to get over the hurdle of the rule which
7 would include consideration of spent fuel storage
8 issues in this proceeding.

9 CHAIR KARLIN: I don't understand the
10 relief question that assumes the result. The question
11 is can we accept the petition? If we could, we'd
12 grant some relief unless the Commission overruled us.
13 The relief would be we'd have a hearing on whether or
14 not there is new and significant information. If we
15 said that there was or found that there was, then we'd
16 tell the Applicant to amend its environmental report
17 to include the new and significant information. I'm
18 not sure how much relief that is, but that's kind of
19 the way these things work, it seems.

20 MS. YOUNG: But even the Applicant at this
21 point could take the information that Petitioners have
22 posed, including the environmental report and there's
23 no contention if you're going to look at it from the
24 strict standpoint is it a contention of omission.

25 CHAIR KARLIN: Right.

1 MS. YOUNG: So you know, I don't know --

2 CHAIR KARLIN: That's what happens to all
3 contentions of omission. They immediately disappear
4 as soon as --

5 MS. YOUNG: I don't know what -- I think
6 that the Petitioners' concern is deeper than that
7 though. I don't think it's simply the information is
8 absent. I think it's that this information is
9 important. They have a concern about the risk of
10 spent fuel pool accidents and they have a perception
11 on the likelihood of those accidents that's different
12 than rulemaking and Waste Confidence rule findings
13 done by the Commission over the last 20 some odd years
14 and currently the Applicant's view of what's a
15 significant hazard that's posed at its site. So again
16 --

17 CHAIR KARLIN: So what are you going to do
18 with San Luis Obispo and Mothers for Peace? Are you
19 going to petition for cert., petition for
20 reconsideration?

21 MS. YOUNG: Unfortunately, the Commission
22 has special lawyers which don't include myself and Mr.
23 Hamrick. We're not privy to those discussions.

24 CHAIR KARLIN: Yes.

25 MS. YOUNG: I assume that the Commission

1 will analyze that decision, decide on what its impact
2 is for NRC licensing activities, including whether
3 there's any concern about its current rules and
4 regulations and what other changes should be made.

5 Until we get a guidance like that or a
6 directive, we have to maintain addressing petitions
7 raised in individual proceedings in the context of the
8 existing rules.

9 And yes, September 1st may be the magic
10 day.

11 JUDGE WARDWELL: In addition to addressing
12 these legal issues of whether or not we can adjudicate
13 this particular contention, we have the second
14 challenge is new and significant information.

15 I'd like to, as I heard you speak, it's my
16 impression or -- not impression, I think you stated
17 that the Staff is comfortable and in fact, this issue
18 of partial loss has been addressed in the GEIS, is
19 that a correct interpretation of what you said?

20 MS. YOUNG: Yes. In other words, there
21 have been spent fuel pool accident scenarios that the
22 Staff has considered and included among those as
23 partial drain down events of the type that Petitioners
24 alleged.

25 JUDGE WARDWELL: So you're saying that in

1 your review of such things as NUREG 1353, 1437, the
2 Waste Confidence rule, let me rephrase this.

3 In my review of 1353, 1437, the Waste
4 Confidence rule, CR 4982 and 6451, I still came away
5 with an uneasy feeling that, in fact, partial loss of
6 water with high density racks of any age fuel during
7 power plant operations wasn't fully addressed
8 potentially. And you reinforce that with a statement
9 you made just before you started this legal dialogue
10 where you said something it wasn't considered
11 generally, just 15 minutes ago, whatever it was.

12 And that's what I pick up a lot on reading
13 these particular documents is this generally
14 evaluated. And it seems to me that raises a doubt of
15 whether, in fact, there's some argument that ought to
16 be aired.

17 How would you comment on that? Even --
18 well, Mr. Lewis was reading today, someone, a
19 reasonable person could come up with a different
20 interpretation of how that applies to their particular
21 contention and said, gee, enough questions there. We
22 ought to talk about whether or not it's really new or
23 significant. And yes, we have a problem because it's
24 not on its merits, but we have to scratch the surface
25 a little bit to see whether or not there's some

1 technical merit in whether or not it's new or
2 significant and I would be interested in your comments
3 on reinforcing why you feel -- apparently to be a very
4 definitive opinion that those issues have been
5 addressed: partial loss of water and high density
6 racks at any age during power plant operations.

7 MS. YOUNG: Judge Wardwell, I believe that
8 information in the Waste Confidence rulemaking of the
9 Commission considered both of those activities or
10 factors in terms of spent fuel accidents. High
11 density racks was specifically referenced in
12 quotations that Mr. Lewis read you from the 1990 Waste
13 Confidence rulemaking and the 1979 Sandia report was
14 specifically referenced in NUREG 1353 and NUREG 1353
15 was referenced in the 1990 Waste Confidence. And the
16 1990 Waste Confidence was referenced in the generic
17 environmental impact statement for license renewal.

18 So again, the thread is not direct in the
19 sense that you will not find a reference to the Sandia
20 report specifically in the GEIS which would conditions
21 of the type that we're discussing, but there is -- you
22 have to look at the whole regulatory scheme.
23 Environmental impact statements can be --

24 JUDGE WARDWELL: Doesn't that make sense
25 then to let's go ahead and look at the whole

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1 regulatory scheme in an adjudicatory hearing?

2 MS. YOUNG: Well, I guess I don't
3 understand what you mean. In terms of the information
4 that the Intervenors have raised, there is information
5 in the reports and various documents related to the
6 generic environmental impact statement and a specific
7 statement in the environmental impact statement on
8 page 5-18 that talks about what the Commission
9 believed or the Commission Staff believed the impacts
10 of spent fuel pool accidents would be vis-a-vis
11 internally initiated events.

12 You have, unlike the Mothers of Peace
13 situation, you have information about impacts of spent
14 fuel accidents here. What we're talking about today
15 though is whether they have identified new and
16 significant information such that there should be some
17 waiver or suspension of the Commission's rule.

18 JUDGE WARDWELL: The date of when anything
19 was published is somewhat irrelevant, isn't it? It's
20 more of a matter of was it truly looked at when a GEIS
21 was prepared, regardless of the date. And that's
22 where it gets a little bit fuzzy in regards to how
23 specifically they technically evaluated that
24 particular scenario in the preparation of it.

25 CHAIR KARLIN: Let's get her saying yes to

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1 that.

2 MS. YOUNG: That's correct. That's
3 correct. I mean, just when Intervenor file
4 contentions, even if it turns to late filing, if they
5 were relying on information that was available at the
6 time they filed their petitions initially, just
7 because someone creates a document later doesn't make
8 it new information. So again --

9 JUDGE WARDWELL: But the corollary is even
10 though the document was prepared in the 1800s, if it
11 hasn't been evaluated than it is new and significant.
12 Is that not fair to say?

13 MS. YOUNG: That's correct, but you know
14 it's not so much whether that specific document was
15 considered but were there conditions in that document
16 or factors in the accident scenario was considered.
17 And the best information that the Staff has available
18 is these things have been considered. Were they
19 articulated in excruciating detail in some of the
20 documents that are relevant to license renewal? The
21 Staff would submit no.

22 But there is information --

23 CHAIR KARLIN: May I ask? I think this is
24 a corollary to what Dr. Wardwell is raising. Aren't
25 we getting into the merits? This is just the

1 admissability, minimum showing admissability of
2 contention. This is awfully deep stuff here at this
3 point.

4 We're not here to hit the merits. Have
5 they not given us a simple factual statement with an
6 expert's support that gets them in? Assuming this is
7 legally admissible, the next question is haven't they
8 supported new and significant information enough to
9 get in on a contention at all?

10 MS. YOUNG: Well, I think the parties have
11 an obligation to look at the documents that they rely
12 on.

13 CHAIR KARLIN: Right.

14 MS. YOUNG: And that the parties who may
15 be evaluating that position in the context of
16 representing their clients have the same obligation to
17 look to other areas of those documents --

18 CHAIR KARLIN: Ironclad, I thought it was.
19 Ironclad obligation.

20 MS. YOUNG: To identify information that's
21 either consistent with that proposed by the
22 Petitioners or inconsistent and I think you're going
23 to find information that's inconsistent with their
24 position to the extent that they allege that this is
25 new information in the very same documents that they

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1 identify that's basic for their contention.

2 So in terms of getting into the weeds on
3 every issue, no, the Staff would agree that's not
4 appropriate at the contention threshold stage. But
5 you have to look at the bases for the contention being
6 raised to see if there is foundation laid for the
7 arguments of the Petitioners.

8 CHAIR KARLIN: Let me ask the Staff's
9 position, interested state 2.315(c), if a
10 Massachusetts contention were not admissible, would it
11 be an interested state?

12 MS. YOUNG: If another party's contention
13 were admitted in this proceeding?

14 CHAIR KARLIN: No, if Massachusetts'
15 contention were not admitted, would it qualify in the
16 Staff's eyes as an interested state under 2.315(c)?

17 MS. YOUNG: Again, another Petitioner's
18 contention would have to be admitted in this
19 proceeding in order to participate.

20 CHAIR KARLIN: Yes, assuming another --
21 assuming that.

22 MS. YOUNG: Yes. If there were another
23 Petitioner admitted, they could participate as an
24 interested state, if they request that from the Board
25 and I assume they would do that today.

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1 CHAIR KARLIN: Okay, I just wanted to
2 understand that.

3 Any further questions for Ms. Young?

4 JUDGE ELLEMAN: A quick one, on the issue
5 of new and significant information, in one of the
6 filings there is reference to NRC writing a submission
7 to the licensees recommending that they take actions
8 to lower the storage of spent fuel in their fuel pools
9 or consider other alternatives.

10 I was wondering if that reflected a
11 perception of new and significant information relevant
12 to hazards on NRC's part?

13 MS. YOUNG: Can you tell me what you're
14 specifically referring to?

15 JUDGE ELLEMAN: I was trying to find it
16 and I didn't. If you don't remember it, I'll have to
17 look for it.

18 MS. YOUNG: Well, I can ask the Staff who
19 is here, they may be vaguely familiar with what you're
20 asking.

21 I can't address what your concern is. If
22 you could let us know that later, we'll try to get you
23 the information.

24 JUDGE ELLEMAN: Okay.

25 CHAIR KARLIN: Anything else?

1 MS. YOUNG: Nothing further from the
2 Staff.

3 CHAIR KARLIN: Thank you.

4 MR. ROISMAN: Mr. Chairman?

5 CHAIR KARLIN: Yes.

6 MR. ROISMAN: I wonder if it would be
7 possible to take a break? We've been at this for an
8 hour and 50 minutes.

9 CHAIR KARLIN: I'd like to finish this up,
10 if we could. We have 20 minutes and I think we can --
11 we've got 10 minutes.

12 MS. CURRAN: I could use even a three-
13 minute break, please.

14 CHAIR KARLIN: Okay, I don't want to
15 impose. We will have a biological break here. Okay,
16 I understand. A lot of coffee this morning. Let's
17 see here. It's about 10 of now, 11. Let's reconvene
18 in 10 minutes. Thanks.

19 (Off the record.)

20 CHAIR KARLIN: Okay, the Atomic Safety and
21 Licensing Board for the Entergy renewal is now back in
22 session and on the record.

23 We are going to proceed with 10 minutes
24 for State of Massachusetts' rebuttal, but before we do
25 that, Judge Elleman has a question for the Staff and

1 I think we could answer this in a minute or so.

2 JUDGE ELLEMAN: Yes, I finally found what
3 I was trying to ask about in my earlier question. On
4 page 16 of Entergy's response, there is the following
5 statement in a footnote. It says that in a July 2004
6 letter, the NRC directed licensees to implement
7 additional spent fuel mitigation measures, as
8 appropriate, including reconfiguration of the fuel as
9 recommended by the NAS study.

10 I was wanting to ask if that doesn't
11 reflect an acknowledgement of new and significant
12 information in this particular issue?

13 (Pause.)

14 CHAIR KARLIN: Your 10 minutes are up.

15 (Laughter.)

16 MS. YOUNG: Well, Judge Elleman, you
17 caught me on something that I'm not intimately
18 familiar with and didn't have much change to discuss
19 it with the Staff, but basically, the NRC is always
20 looking for ways to improve reasonable assurance of
21 facilities. And information of this type with respect
22 to actions taken to decrease potentials for spent fuel
23 accidents is the type of thing the NRC considers to
24 do. I'm not sure that that letter and I haven't read
25 it myself, specifically challenges the Staff's

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1 impression in terms of the likelihood of spent fuel
2 pool accidents although with respect to whether they
3 can be considered remote or highly unlikely.

4 So again, while the Staff may and the
5 Commission may from time to time take additional
6 actions and encourage licensees to take additional
7 actions to ensure that the potential for accidents is
8 decreased, it wouldn't necessarily construe that as
9 meaning that it's new and significant information in
10 the context of environmental impacts with respect to
11 license renewal because it may not change the findings
12 in the GEIS with respect to the low likelihood of
13 those accidents.

14 And you know, you have two things, whether
15 it's new and whether it's significant and the
16 significant has to be with respect to environmental
17 impacts associated with that.

18 JUDGE ELLEMAN: Thank you.

19 CHAIR KARLIN: All right, Ms. Curran, 10
20 minutes for your rebuttal. Hopefully, you'll sort
21 this all out for us now.

22 MS. CURRAN: Oh, I hope so.

23 REBUTTAL ARGUMENT OF DIANE CURRAN, ESQ.

24 ON BEHALF OF THE STATE OF MASSACHUSETTS

25 MS. CURRAN: To follow up on your

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1 question, Judge Elleman, I would just like to refer
2 you to pages 19 and 20 of our reply brief on the
3 admissability of the contention because we talk there
4 about what we think is the significance of these
5 enforcement orders that in fact they do support our
6 position.

7 And we also cite case law for the
8 proposition that by addressing safety issues or
9 security issues under the Atomic Energy Act, the NRC
10 does not fulfill its NEPA obligations which are
11 separate and independent.

12 I'd also like to address another question
13 you raised about our, in our contention we posit that
14 the likelihood of a spent fuel pool fire, an accident
15 involving such a fire is now in the order of 10^{-5} .
16 And if we go back to the factors that Judge Wardwell
17 identified earlier that the partial loss of water, the
18 use of high density racks, the fact that any age fuel
19 can burn, the fact that this is during operation and
20 not a decommissioning plant. If you look at all those
21 factors, then the overall probability of a reactor
22 accident resulting in a fire is higher than previously
23 thought by the NRC.

24 CHAIR KARLIN: On that, may I ask didn't
25 Dr. Thompson address that in the Sharon Harris

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1 decision at some length? Isn't this just a re-hash of
2 that?

3 MS. CURRAN: No, it's not a rehash of that
4 case because the factual -- first of all, that was a
5 PWR. This is BWR. The conditions that could lead to
6 an accident are different. The BWR is more vulnerable
7 because the pool is above ground, the pool is in the
8 reactor building. You cannot make a comparison of the
9 overall probability of the accident, the particular
10 accident that was evaluated in the Harris case. But
11 Dr. Thompson does make a comparison of one particular
12 aspect of that case which is if there is a fire in
13 pools A and B, high level of radioactivity in that
14 building, how does that affect the potential for a
15 fire in pool C and D? And that is addressed in our
16 reply brief.

17 On the issue of new and significant
18 information, there's been several arguments made here
19 about whether or not partial drainage was considered
20 in NUREG 1353, or the Waste Confidence rule or
21 implicitly the license renewal GEIS. I would like to
22 refer the Board to a briefing that was conducted
23 recently in the Pilgrim case regarding some of these
24 vary same arguments.

25 The initial briefs were filed on July

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1 21st, and all of the parties filed reply briefs on the
2 26th. And all of the parties addressed those very
3 same issues in those briefs.

4 I would like to refer to one in
5 particular, the argument that the Waste Confidence
6 rule in response to a comment from Public Citizen
7 discuss the issue of what are the impacts of a partial
8 drainage accident. The rule itself is quite clear
9 that in making this evaluation, the NRC was looking at
10 complete and instantaneous drainage of fuel that was
11 aged.

12 I'm going to read you the language from
13 the Federal Register notice. It should be noted --

14 CHAIR KARLIN: What page?

15 MS. CURRAN: I'm at page 55, Federal
16 Register 38481 through 82. It should be noted that
17 for zircaloy cladding fire in a spent fuel storage
18 pool, an earthquake or other event causing a major
19 loss of cooling water would have to occur within two
20 years after operation of a PWR or six months after
21 operation of a BWR, which simply and completely
22 undermines Entergy's and the Staff's argument.

23 And I also think it is important to bear
24 in mind that I thought Judge Wardwell put it very
25 well. What the standard is here for admission of this

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1 contention, the way he put it was are there enough
2 questions that we really should talk about it.

3 We think we have made a very strong case
4 and that it is time to talk about this issue. It has
5 been delayed for too long. There is a great deal of
6 evidence that has mounted now that this issue needs to
7 be addressed, this issue, which was never addressed in
8 any EIS that involves spent fuel pool storage, not
9 with the degree of care and consideration that is
10 required by NEPA.

11 CHAIR KARLIN: Let me focus on that a
12 little bit. I mean, are you just -- is Dr. Thompson
13 just saying they are wrong? He said they're wrong
14 before. Is he saying they are wrong again or is there
15 something really new here other than him saying it's
16 wrong?

17 I mean, look at his report, his
18 declaration. I tried to read that. I thought it was
19 a very good report, I just was searching for anything
20 new in there.

21 MS. CURRAN: Yes.

22 CHAIR KARLIN: Now on page 11 of that
23 report at the bottom, he refers to neither of the two
24 GEISs nor the September 90 review, the Waste
25 Confidence decision provided technically defensible

1 examination, the statement of each are inconsistent
2 with the findings of subsequent more credible studies.
3 Now it sounds good but it sounds like he's just saying
4 he disagrees and then he goes on to refer to the
5 inconsistent findings of subsequent, more credible
6 studies, as his own studies. The February 2001,
7 there's a study, there's the Alvarez Report, which he
8 was a party to.

9 Is there something new here? What's new?
10 Didn't they know about partial uncovering? Didn't they
11 know about high density racking? Hasn't this been
12 litigated so many times?

13 MS. CURRAN: As we have gone over in our
14 contention and in our reply, in the previous EIS is
15 the NRC did not look at partial drainage, did not
16 examine the consequences of the partial drainage
17 accident. The code that was --

18 CHAIR KARLIN: But they said that they
19 did. They cite things to it.

20 MS. CURRAN: Well, we have material
21 disputed fact and we cite language in NUREG 1353
22 saying the computer code that was used to make
23 probability estimates did not consider partial
24 drainage, emphatically did not. So although the words
25 partial drainage may appear in that report, the

1 computer code which yielded probability estimates
2 which are the ultimate issue here did not do that.

3 CHAIR KARLIN: Okay, let me --

4 MS. CURRAN: And did not consider high
5 density storage for BWR fuel.

6 CHAIR KARLIN: Well, let me switch a
7 little bit. I guess this is what I have as sort of
8 the flood gates question, which is as I see the
9 regulatory structure here for a renewal and
10 environmental NEPA considerations on category 1, there
11 is a strong impetus on the part of the Commission,
12 whether we like it or not, that that on a number of
13 issues are category 1. They're going to be dealt with
14 generically and that's the end of them and they're not
15 going to be able to be brought up in an adjudicatory
16 hearing.

17 MS. CURRAN: Yes.

18 CHAIR KARLIN: Start with that
19 proposition. But you posit there is an exception to
20 that proposition which is ah, but if there is new and
21 significant information under Marsh CQ regs, that has
22 to be considered and it's litigable as a contention.

23 Assuming that's true and we granted that,
24 would that not open the floodgates and basically
25 vitiate the whole category 1 because every time

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1 someone wanted to litigate something, they would just
2 simply say well, we have some new and significant
3 information, the threshold is minimal, let's get in
4 here and litigate it.

5 MS. CURRAN: That's why I'm stuck on this
6 term floodgate because I think the situation here is
7 that we've got a flood building up on the other side
8 of the gate and you can't hold back a flood.

9 CHAIR KARLIN: All I'm suggesting is that
10 thousands of contentions, the whole point of the regs
11 which was to keep it only to category 2 would be
12 vitiated by the exception, the exception would swallow
13 the rule --

14 MS. CARPENTIER: One minute.

15 MS. CURRAN: Two things in answer to your
16 question. NEPA is an action forcing statute is a
17 nondiscretionary statute. The NRC is obligated to
18 consider new and significant information, cannot
19 legislate the refusal to do that.

20 CHAIR KARLIN: And Union of Concerned
21 Citizens indicates that the Commission can handle the
22 NEPA issues on a generic basis and that's what it's
23 done.

24 MS. CURRAN: The Commission has to offer
25 some way for parties to raise that information and we

1 had done that here. No one can argue that we have
2 failed to provide support for our position. This is
3 not somebody that comes in and says I think maybe the
4 Commission should take another look. We have
5 exhaustively reviewed the topic and showed that there
6 is a great deal of evidence which contradicts what the
7 Commission has said for years. And yes, some of this
8 information existed before, but it was never
9 evaluated.

10 MS. CARPENTIER: Time.

11 MS. CURRAN: It's not just a mere
12 disagreement. It's a question of failure to consider
13 factual circumstances.

14 CHAIR KARLIN: Okay. Any other Judges
15 have questions? Okay, thank you, Ms. Curran.

16 MR. LEWIS: Judge Karlin, could I just say
17 a procedural thing?

18 CHAIR KARLIN: No, this is contention.

19 MR. LEWIS: Okay.

20 CHAIR KARLIN: Only contention. That
21 contention is over with. We'll now turn to the next
22 contention which I guess is the State of Vermont
23 contention 2 which has, we believe some similarities
24 and it appears to be an environmental contention
25 raising what it says as new and significant

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1 information on what some categorizes as a category 1
2 issue.

3 Let's see here, you have 25 minutes, Mr.
4 Roisman?

5 MR. ROISMAN: Yes, and I'd like to reserve
6 10 minutes for rebuttal, but I'd like to request that
7 if at the end of my 15 minutes, the Board still has
8 questions, you take that from my rebuttal time.

9 CHAIR KARLIN: That's fine.

10 ORAL ARGUMENT OF ANTHONY ROISMAN, ESQ.

11 ON BEHALF OF THE STATE OF VERMONT

12 MR. ROISMAN: You've covered conceptually
13 much of what is involved with contention 2, but I
14 think it's important and I want to focus on what is
15 the difference in this contention 2 and the contention
16 that the Commonwealth of Massachusetts has raised.

17 First of all, I want to focus because I
18 think that's where the principal dispute is, on
19 Section 2.309(f)(1)(iii). The real question here is
20 is this an issue that is appropriate for Licensing
21 Board?

22 Number one, there's no dispute. We now
23 have the Applicant and the Staff agree that the
24 Applicant has an absolute duty to report new and
25 significant information.

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1 Number two, Section 2.309(f)(1)(vi)
2 explicitly acknowledges that a legitimate contention
3 is one that -- and I quote: "if the Petitioner
4 believes that the application fails to contain
5 information on a relevant matter as required by law,
6 the identification of each failure and the supporting
7 reasons for the Petitioner's belief."

8 So there's certainly no question that we
9 are entitled to make the argument that we have made
10 here, namely that the Applicant has failed to produce
11 new and significant information relating to a matter
12 in contention under the GEIS.

13 Third --

14 CHAIR KARLIN: Could we just ask you to
15 pause for a minute, stop the timer. I just wanted to
16 get some materials, if that's okay.

17 MR. ROISMAN: Okay.

18 (Pause.)

19 CHAIR KARLIN: Okay, please continue. I'm
20 sorry.

21 MR. ROISMAN: Third, I think it's also
22 beyond dispute that if there is new and significant
23 information related to a category 1 matter in the
24 GEIS, it is supposed to be addressed by the regulatory
25 staff in the environmental impact statement.

1 Now we'll get to the question what do you
2 do if they don't do it, but for the moment it's clear
3 and that's the Statement of Consideration, the page
4 that we've all been citing to which is 28470 lists
5 those different things to be done when new and
6 significant information comes up and they all talk in
7 terms of the Staff shall and the Staff will. So it's
8 clear the Staff has a duty if there's new and
9 significant information to do something about it in
10 the environmental impact statement. And to take
11 certain actions with regard to getting Commission's
12 permission to either convene a new generic rulemaking
13 or to make an exception to the generic rule for the
14 purposes of the case.

15 So why is it that we start with the ER?
16 And I think that's an important consideration. I
17 believe that the reason the Commission has been so
18 adamant and has put into the regulations this
19 obligation on an Applicant is to assist the Staff in
20 carrying out its duties. If the Applicant knows new
21 and significant information and doesn't tell the Staff
22 about it, how can the Staff do its job? Keep in mind
23 that this hearing is more the aberration than the
24 norm. The norm would be the Applicant submits an
25 application. The Staff reviews it. Does an

1 environmental impact statement. And the Commission
2 makes a decision.

3 The hearing is the exception. The normal
4 course would be that this would happen without an
5 Intervenor. If the Applicant doesn't fulfill its
6 duty, the Staff can't fulfill its duty. It can't know
7 all things. It has to depend upon an Applicant,
8 particularly whereas here, environmental impact that
9 is the underlying core of contention 2 is a site-
10 specific impact.

11 This respect is different than the
12 Commonwealth because we're not saying that there's a
13 generic cause. That's why I mentioned in my opening
14 that this is a unique and now more beautiful place
15 with the sun out and that this unique place will be
16 impacted in a way that is different than other sites
17 because this area would be indefinitely taken out of
18 use.

19 JUDGE WARDWELL: Isn't that argument a bit
20 precarious for you by stating that the main purpose of
21 this is as a tool for the Staff or usefulness for the
22 Staff to address a particular issue in the EIS? If
23 then we turn to the Staff and they said yeah, we don't
24 need this, doesn't your house of cards crumble?

25 MR. ROISMAN: Well, first of all, I think

1 the short answer is no, I don't think it does, but
2 more importantly, I don't think you have to cross that
3 bridge.

4 We have not made a contention that the
5 draft EIS is defective and we will not assume that the
6 Staff will not do its duty. So at this stage of the
7 proceeding, it's not necessary for the Board to
8 answer, although I understand the temptation and the
9 curiosity that underlies it to answer the question
10 what will we do if new and significant information
11 exists and for whatever reason the Staff decides it
12 doesn't think it's new and significant or it doesn't
13 think that it should do anything about it, even though
14 it acknowledges that it's new and significant.

15 JUDGE WARDWELL: Then we should agree with
16 Turkey Point and the Commissioners, although you may
17 not agree with it, but someone's position of Turkey
18 Point and in fact, this Board can't litigate that
19 particular -- I'm sorry, that's category 1 issues.

20 But if, in fact, the Staff already has
21 been put on notice, why do we have to bother
22 litigating this then, in fact? Because we'll just
23 wait until the EIS has come in.

24 MR. ROISMAN: Because I believe the
25 Applicant probably knows more than we know and that

1 imposing on the Applicant a duty to disclose all the
2 new and significant information that it has about the
3 inability of having a place to put its spent fuel 30
4 years after the license extension expires, assuming
5 that all of that happens, in other words, after 2062,
6 may enlighten all of us.

7 In this great scheme of things, the
8 greatest amount of knowledge is likely to be in the
9 possession of Entergy. They have the largest dog in
10 the fight. They have the most to gain or lose if
11 spent fuel storage is not solved. And they went to
12 Court and we've cited you to that case.

13 JUDGE WARDWELL: We'll determine whether
14 -- you can evaluate that once the Staff comes out with
15 their EIS and determine whether or not they inquired
16 enough into the Applicant in regards to addressing
17 this on-site land use issue and whether they had
18 interrogated in the adequacy of their review at that
19 point. Isn't that the best time to do it?

20 MR. ROISMAN: We don't think that the
21 regulations give us the ability to challenge the
22 manner in which the Staff carries out its duties in
23 that respect. In other words, that we could -- it's
24 sort of like prosecutorial discretion. I don't think
25 we would be able to make a contention. Let's say the

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1 draft EIS comes out, but that's contention time. And
2 we think the Staff did a sloppy job, which I don't
3 think they will do. But if we thought that, I don't
4 think that would be a contention that we could raise
5 with you.

6 What we could raise with you and what we
7 would raise with you is that the Staff has incorrectly
8 determined that new and significant information
9 doesn't exist or that it exists but it doesn't change
10 anything or that it changes anything, but they don't
11 think it warrants going to the Commission and asking
12 that anything be done.

13 JUDGE WARDWELL: What about Turkey Point?
14 Isn't the teaching of Turkey Point the ruling, the
15 holding as it were is that this, we posit, we ask,
16 they answered the ER is supposed to include new and
17 significant information on category 1 issues. The EIS
18 is supposed to include new and significant information
19 regarding category 1 issues. You've reminded that of
20 us and to have acknowledged that. But they say so
21 what? There can be no admissible contention. Your
22 remedy is to file comments on the draft EIS and to
23 seek a waiver or to seek a rulemaking.

24 Your reply on page 17 seems to get it
25 right. The central thesis of the argument is advanced

1 by the NRC Staff and Entergy is that the Commission
2 has contrary to all reason and contravention of well
3 established legal principle declared that no
4 Intervenor might ever present for consideration by an
5 ASLB issue of whether new and significant information
6 not considered in the GEIS exists warranting further
7 analysis.

8 That does seem to be the central thesis.
9 That does seem to be the holding of Turkey Point.

10 MR. ROISMAN: I think first of all let's
11 understand that we were not parties to Turkey Point.

12 JUDGE WARDWELL: No, no. But it's a
13 precedent that we are bound by if it applies.

14 MR. ROISMAN: Yes, but you're also bound
15 by the regulations and I would point you to two
16 regulations that impose duties on this Board that I
17 cannot square with the holding in Turkey Point and I
18 don't know why they were not cited and they may not
19 have been raised by the party in Turkey Point. And
20 we've cited them, first of all, 10 CFR Section 51-
21 95(c)(4) which we cited at pages 35 and 36 of our
22 reply.

23 This is the regulation that imposes on the
24 Board certain obligation. It says and I'm quoting in
25 part from subpart 4 "in order to make its

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1 recommendation and final conclusion on the proposed
2 action, the NRC Staff adjudicatory officers and
3 Commission shall integrate the conclusions as
4 amplified by the supporting information and the
5 generic environmental impact statement for issues
6 designated category 1 with the exception of off-site
7 radiological impacts or collective effects and the
8 disposal of spent fuel and high level waste." We're
9 not raising any of those issues here. We're not
10 talking about disposal of waste. "Or resolve category
11 2 information, developed for those open contention 2
12 issues applicable to the plant in accordance with
13 51.52(c)(3)(iii) and any significant new information."

14 So the duties imposed upon this Board to
15 take into account significant new information
16 resolving then the ultimate question of whether or not
17 the balance supports leaving this as an option for
18 Entergy for the state to then decide whether they
19 approve or not or rejecting it.

20 Secondly, the Board has a duty under
21 Section 51.104(a)(3) which imposes on it the general
22 duties and environmental matters. In the proceeding,
23 the presiding officer will decide those matters in
24 controversy among the parties within the scope of NEPA
25 and its subpart.

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1 So if, as we believe is the case, there is
2 a dispute between us and the Applicant at the moment
3 as to whether or not there's new and significant
4 information and maybe down the line between us and the
5 Staff as to whether there's new and significant
6 information, the regulations require that the Board
7 must address it.

8 Let me step back for a second. Let's take
9 a look at what is the option. Let's assume, as you
10 have indicated in your discussion with the
11 Commonwealth, let's assume that there is new and
12 significant information and it has not been included.
13 What are your options?

14 Well, one option would be to follow the
15 Applicant and the Staff's position which is to say
16 well, this has to be done by rulemaking or by waiver
17 or one of those other special exceptions that are
18 discussed and I agree with your suggestion earlier
19 that the listing on page 28470 of the Statement of
20 Considerations does not purport to be definitive. It
21 certainly lays out some specific actions that may be
22 taken, but it doesn't say and that's it.

23 But putting that aside, one option is you
24 follow what they say. But if you follow what they
25 say, what are you supposed to do? Remember, NEPA is

1 the overarching statute that's controlling here, not
2 the Nuclear Regulatory Commission's Atomic Energy Act.
3 What do you do? I think you have only one choice.
4 You put the hearing into suspension while all those
5 procedures are completed in front of the Nuclear
6 Regulatory Commission. You can't proceed otherwise.

7 In fact, there's a case and I regret my
8 computer needs a power cord. The power cord is in my
9 suitcase. The suitcase is in the system of the
10 Continental Airlines. I have on my computer the
11 citation to this case. It's called Natural Resources
12 Defense Counsel versus NRC. It involved a GESMOF, the
13 general impact statement on mixed oxide fuels. The
14 holding in the case was that the Commission could not
15 proceed to license individual plants while a generic
16 issue that it acknowledged was relevant to that was
17 still unresolved, the generic issue happened to be
18 ironically security and safeguards.

19 So you could not go ahead and license this
20 plant for an extension if you acknowledge that there
21 was new and significant information that might bear on
22 the answer to whether it should be licensed and that
23 new and significant information --

24 MS. CARPENTIER: One minute.

25 MR. ROISMAN: -- now needed to go through

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1 some process.

2 Lastly, I believe just to at least give
3 lip service to your concerns about the other criteria,
4 that our contention is specific and it's site
5 specific, that we've explained the basis I think quite
6 well in our pleadings, that the impacts are obvious.
7 They are going to effect this plant because we're
8 talking about the incremental spent fuel storage
9 problem that will be created by generating 20 more
10 years of spent fuel.

11 We're not challenging whether or not
12 there's a place for the spent fuel to go that is going
13 to be generated and has been generated under the
14 original license. And we presented numerous facts.

15 I would say what we have presented is
16 evidence of a perfect storm. Everything that was
17 believed possibly could happen --

18 MS. CARPENTIER: Time.

19 MR. ROISMAN: -- and evaluated
20 individually, has now come about in the most extreme
21 fashion. And the Applicant knows it and they kept it
22 out of their environmental report and we believe that
23 therefore we have a legitimate admissible contention.
24 Thank you.

25 CHAIR KARLIN: Thank you, Mr. Roisman.

1 We'll have a rebuttal.

2 JUDGE WARDWELL: I'll hold for a rebuttal.

3 MR. ROISMAN: Okay, I don't mind asking a
4 question now and taking it out of the rebuttal time.

5 JUDGE WARDWELL: Okay, let's go ahead with
6 that. Your last statement is referring to the amount
7 of information provided to demonstrate that you have
8 got new and significant information, is that what
9 you're alluding to?

10 MR. ROISMAN: Yes.

11 JUDGE WARDWELL: A couple factors in that
12 regard. One of your statements led to the conclusion
13 that you created that there's potential for indefinite
14 storage now required on site, that in fact with all
15 these potential circumstances coming up, Yucca
16 Mountain will never be cited. I think there was a
17 statement that you made that there will be indefinite
18 storage potential, and therefore has to be addressed
19 in regards to onsite land use.

20 Isn't that a lot of just how the wind
21 happens to be blowing on a given day? I mean, because
22 things have changed since you've submitted your
23 contention. Now there seems to be a better light in
24 regards to how Yucca Mountain is evaluated. Isn't
25 that something that really is out of our control, and

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1 really not a criteria that we should be looking at as
2 in regards to how political winds are blowing in this
3 country?

4 MR. ROISMAN: Well, let me answer that
5 this way. First of all, our point about Yucca
6 Mountain is that we're not doubting that maybe some
7 day they will have a facility there and that it will
8 have -- there's a statute that limits the amount of
9 nuclear waste it can receive, and that amount of
10 nuclear waste will be fulfilled by the reactors that
11 are operating now and that will continue to operate
12 through about 2020, I think.

13 So that the spent fuel we're talking
14 about, even if Yucca Mountain comes on line in
15 schedule, will not have a place to go at Yucca.
16 There's no interim storage facility for spent fuel.

17 The political winds, however, only
18 underscore the inherent uncertainty that was believed
19 back when the GEIS was put together, that inherent
20 uncertainty was not going to be an insurmountable
21 problem. Now we have seen just what you said -- the
22 wind blows this way, the wind blows that way, someone
23 is President, someone else is in charge of the House,
24 someone else is in charge of the Senate. But all
25 we've seen is that that has demonstrated that no one

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1 has ever been in charge who has been able to move the
2 ball significantly forward. That's number one.

3 So the political winds really underscore
4 our concern that this new spent fuel won't have a
5 place --

6 JUDGE WARDWELL: Yes, but that's a weak
7 argument, isn't it? You could present that for almost
8 any contention if you wanted to keep it that generic
9 and say gee, we will never be able to handle anything
10 because Administrations will change and the whole
11 policy of the Commissioners will change, and I think
12 that's awfully broad reaching and based on your
13 conjecture and speculation rather than anything that
14 we can deal with in a concrete manner in addressing
15 whether that is or isn't a potential problem area,
16 especially at Yucca Mountain.

17 MR. ROISMAN: Let me assume for a moment
18 that you're right, that the political argument is too
19 all encompassing. You're still left with the fact
20 that under the current plan, the current statutes,
21 there is no room at Yucca for the new waste that will
22 come from this extension. There is no interim storage
23 facility --

24 JUDGE WARDWELL: Again, I'll interrupt
25 because that's conjecture also because they can, when

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1 in fact, if you interpret it to mean as soon as the
2 second site is sited, you can still go back to Yucca.
3 There is a whole realm of things that are so far in
4 the future that it would be impossible for us to
5 evaluate those in any definitive manner in regards to
6 what is created in the regulation for a viable
7 contention.

8 MR. ROISMAN: What you just described is
9 the classic definition of why the word indefinite was
10 invented. It is indefinite. What do we look at now,
11 at this moment when we decide whether to license this
12 plant. Shouldn't the Board consider the real
13 possibility that this spent fuel will be there long
14 after 2062 and what are the implications of that on
15 land use in a state that values its land very highly,
16 particularly its river front land.

17 JUDGE WARDWELL: What state doesn't value
18 their land highly?

19 MR. ROISMAN: Well, I would suggest that
20 some states value it differently than others do. This
21 state, we have a special act called Act 250 which
22 requires that everything, except nuclear power plants
23 and some other power facilities, must go through a
24 series of steps to demonstrate that their process and
25 their project meets environmental criteria that are

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1 not applicable in other states. So I submit and I'm
2 a New Hampshire, that Vermont is a unique state and
3 that we're talking about a unique --

4 JUDGE WARDWELL: Okay, we'll move on. I
5 suggest you don't fly from New Hampshire to here next
6 time on Continental.

7 (Laughter.)

8 CHAIR KARLIN: Okay, thank you, Mr.
9 Roisman.

10 Marcia, you'll inform how much time
11 remains when we get back.

12 MS. CARPENTIER: Yes, there will be five
13 minutes left.

14 CHAIR KARLIN: Okay, fine. That's great.
15 Let's see. Entergy, Mr. Lewis I guess and you have 20
16 minutes. Is that right?

17 MR. LEWIS: That's right, Judge Karlin.

18 CHAIR KARLIN: All right. Proceed.

19 ORAL ARGUMENT OF DAVID LEWIS, ESQ.

20 ON BEHALF OF ENTERGY

21 MR. LEWIS: Let me address the assertion
22 that this is a unique site specific issue as opposed
23 to a generic issue. The Waste Confidence rule and the
24 findings in that rule are the prototypical generic
25 issues. Indeed, when the Commission explained in

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1 license renewal why it had promulgated the Waste
2 Confidence rule that incorporated it into the license
3 renewal regime, it explained that its purpose was "to
4 address high level waste disposal generically, rather
5 than unnecessarily to revisit the same waste disposal
6 questions license by license when reviewing individual
7 applications".

8 And it did so because it said spent fuel
9 management "is a national problem of essentially the
10 same degree of complexity and uncertainty for every
11 renewal application. It would not be useful to have
12 a representative consideration of the matter". I'm
13 quoting the Oconee decision, CLI 99-1149 NRC at 345.

14 The assertion that there is a site
15 specific issue because there is going to be an
16 definite storage --

17 CHAIR KARLIN: Well,[^] let me ask on Oconee,
18 did that case involve an allegation of new and
19 significant information under NEPA? I don't think so.

20 MR. LEWIS: I don't recall the underlying
21 context. I'd have to go back and look. We did cite
22 it in our answer.

23 CHAIR KARLIN: Yes, okay.

24 MR. LEWIS: I would say though that the
25 assertion that the impact that's not been looked at is

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1 indefinite storage is, in essence, simply a
2 repudiation of the Waste Confidence decision. It is
3 simply a statement that there is no confidence that
4 Yucca Mountain or a second repository will ever be
5 built in this country and those were the central
6 findings of the Waste Confidence decision.

7 CHAIR KARLIN: Well, let me ask on page
8 17, the State of Vermont's reply, what I quoted to Mr.
9 Roisman, is that correct? The central thesis of your
10 argument is that the Commission has declared that no
11 Intervenor may ever present for consideration by an
12 ASLBP the issue of whether new and significant
13 information not considered in the GEIS analysis is
14 litigable?

15 MR. LEWIS: That's not quite correct. I
16 would assert that they can bring it to the Board, but
17 they have to bring it to the Board through a petition
18 for a waiver if it is really a site specific issue.
19 The Board then has the precise procedure to follow.
20 They look at the petition for waiver, determine
21 whether it makes a prima facie showing and if it does
22 they certify it to the Commission. So in fact, there
23 is a very well established policy and procedure for
24 how you expand a proceeding.

25 CHAIR KARLIN: Well, what waiver is not

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1 appropriate? I guess you're saying first, let me
2 understand. No one can ever get a contention in on
3 new and significant information?

4 MR. LEWIS: Only be seeking a waiver.

5 CHAIR KARLIN: And the waiver is
6 applicable when there are special circumstances unique
7 to a particular site? Is there anything --

8 MR. LEWIS: That is correct and that is
9 for a very good reason. As I just read the
10 Commission's intent, was really to address this issue
11 generically by ruling. If there are generic
12 implications, it as a matter of policy does not want
13 to litigate them over and over and over again. So in
14 fact, the reason is taken to the Commission so the
15 Commission can specifically decide is this generic?
16 If there is something new and significant, have we
17 addressed it in the rule to further our policy of not
18 having to litigate this issue every 12 months.

19 CHAIR KARLIN: So okay, it does seem that
20 your position is accurately characterized by -- that
21 it's not litigable before the Board and that may be
22 the position of the Turkey Point Commissioner's
23 decision. Is that comport with NEPA's requirement for
24 doing an EIS?

25 MR. LEWIS: Yes, it does completely. As

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1 I said, there's two Supreme Court cases that hold that
2 the Commission can resolve the NEPA issues generically
3 by rule. That means that they can preclude
4 consideration of an issue absent a waiver and if there
5 is a need to supplement, they can supplement by
6 rulemaking.

7 Supplementing a GEIS by rule is a perfect
8 comport with NEPA's requirements to supplement an EIS
9 if it is necessary. The procedure that the Commission
10 has crafted here of requiring a waiver or requiring a
11 petition for rulemaking allows the Commission to make
12 those determinations when its appropriate.

13 Let me just address one other point and
14 that is the assertion that they're not really
15 challenging the Waste Confidence rule because they're
16 not disputing Yucca Mountain may be licensed. It's
17 the second repository. In our answer we pointed out
18 that part of the Waste Confidence decision is also
19 assurance that if down the road there is a need for an
20 additional repository the Commission has confidence
21 that the nation would do what is appropriate and that
22 is part of the Waste Confidence decision.

23 However, if you are really looking just at
24 the political winds and saying well, Senator Domenici
25 made a statement here and someone has referred to

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1 geomapping, so that's new and significant information.
2 In fact, if you look at those bills, one of the recent
3 bills is a DOE bill that would eliminate the capacity
4 of limitation for Yucca Mountain.

5 I would simply submit to you that trying
6 to reopen the Waste Confidence rule every time there's
7 a political statement or a bill would defeat its very
8 purpose and certainly if the Commission is going to
9 reopen this very generic national, very generic
10 rulemaking and address this national issue, the matter
11 should be brought to the Commission's attention and
12 not decided in each individual proceeding simply based
13 on assertion that there's some new political
14 statement.

15 CHAIR KARLIN: So if were to rule as you
16 propose, what's the best citation you would give us or
17 we should put in there for support for the proposition
18 that this cannot be litigated in a contention? Is
19 there a reg? Is there a case that deals with new and
20 significant information? I mean Turkey Point doesn't
21 really focus on new and significant information. It
22 talks about it, but that was not raised, it didn't
23 seem to me, by Petitioner.

24 What's the best authority we can have?

25 MR. LEWIS: 51.23 is the Waste Confidence

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1 rule. This is a challenge, a collateral check on the
2 Waste Confidence rule that 2.335 prohibits. This is
3 also a collateral check on the category 1 finding in
4 Table B1 which says that the impacts of spent fuel
5 storage and management generically would be small for
6 all plants and it's an attack on 51.23(c)(1) I
7 believe, which says there's no requirement to have an
8 analysis of category 1 issues in an environmental
9 report.

10 CHAIR KARLIN: So this is different --

11 MR. LEWIS: All those rules basically
12 prohibit this issue from being raised absent a
13 petition for waiver and finally, the SECY paper which
14 really is the deal that was struck with DEQ has a flat
15 out statement that says that category 1 issues can't
16 be litigated absent a waiver.

17 CHAIR KARLIN: Did you all argue the SECY
18 paper in your brief?

19 MR. LEWIS: Yes, we cited a portion. It's
20 a clear statement in that SECY paper. I'm not going
21 to be able to find it quickly enough.

22 CHAIR KARLIN: Well, if you did, we'll
23 find it. I don't want you to take up your time.

24 MR. LEWIS: You'll see in our answer
25 there's a reference to the SECY paper and a specific

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1 block quote that says category 1 issues may not be
2 litigated absent a waiver.

3 CHAIR KARLIN: Okay.

4 MR. LEWIS: That's all I have.

5 CHAIR KARLIN: Any questions? Dr.
6 Elleman?

7 JUDGE ELLEMAN: Vermont on there, I think
8 it's in their reply, yes, on page 23, says that
9 neither the Staff nor the Applicant deny and then they
10 list what I categorized as three statements. I was
11 wondering whether you do deny it? The profound
12 potential impacts on local land use for Vermont State
13 resources that can occur, spent fuel remains on site
14 indefinitely following a closure of the reactor. That
15 storage of spent fuel at Vermont Yankee may well
16 extend beyond on any date assuming the GEIS and that
17 stored offsite for any time in the foreseeable future.

18 MR. LEWIS: Let me say several things.
19 First of all, the GEIS definitely looked at land use
20 as an impact and I can give you references to page 6-
21 78 and 6-81 and likewise the Waste Confidence decision
22 49 Federal Register 34665 all looked at land use.

23 What they did not look at land use and I
24 would agree with the state they did not look at
25 indefinite storage as a land use impact because that

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1 is what the Waste Confidence decision was intended to
2 eliminate from consideration.

3 The whole reason the Waste Confidence
4 decision was promulgated was to avoid the need for
5 having to assess the impacts of treating every storage
6 site as a de facto disposal site.

7 So I would agree that land impacts of
8 indefinite storage were not analyzed, but they don't
9 have to be because of the Waste Confidence decision.
10 As far as the length of time that spent fuel will be
11 stored, the Waste Confidence decision is that spent
12 fuel can be stored safely and without any significant
13 environmental impact for 30 years beyond the
14 expiration of the license which may include a renewal
15 term, so if the license is being renewed from -- we've
16 extended from 2012 to 2032, basically the Waste
17 Confidence is that there are no significant safety or
18 environmental impacts associated with the storage
19 through 2062, I believe is the date.

20 And to the extent that there is an
21 assertion there's going to be storage beyond that,
22 first I would assert that that's highly speculative,
23 but second I would assert that it's simply
24 inconsistent with the Waste Confidence decision.

25 CHAIR KARLIN: Any other questions? All

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1 right, I think we'll go to Staff.

2 Mr. Hamrick?

3 MR. HAMRICK: Yes.

4 CHAIR KARLIN: Okay, great.

5 ORAL ARGUMENT OF STEVEN HAMRICK, ESQ.

6 ON BEHALF OF NRC STAFF

7 MR. HAMRICK: I'd like to start by trying
8 to draw page 11 from Turkey Point to page 12 and
9 trying to connect the two ideas. On page 11 of Turkey
10 Point, the Commission states that on many issues the
11 NRC found that it could draw generic conclusions. And
12 then proceeds for a paragraph or two to talk about the
13 category 1 status, contention 2 status of different
14 issues and discusses that. Then when you get to page
15 12, it states clearly that the Commission recognizes
16 that even these generic findings, category 1 findings,
17 contention 2 findings may need revisiting.

18 They need this revisiting when new and
19 significant information arises.

20 CHAIR KARLIN: Could you get to the mic a
21 little closer?

22 MR. HAMRICK: Sorry. And when this new
23 and significant information is available, that's when
24 these generic findings may need revisiting.

25 And so that draws the idea of category 1

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1 and category 2 responsibility on the part of the
2 Applicant.

3 To the page 12 point where it says clearly
4 in the hearing process where a Petitioner is seeking
5 to have a contention admitted and they may seek a
6 waiver. Now the question has been raised of whether
7 the list of waiver rulemaking or comment on the EIS is
8 an exhaustive list. While it certainly does not
9 appear exhaustive from the text that the Commission
10 cites, one would have to ask yourself why a Petitioner
11 would seek a waiver of the rule if they were -- if it
12 wasn't a requirement.

13 The Petitioner seeks a waiver of a rule
14 because otherwise it is in effect, if the rule in this
15 case the Waste Confidence or the category 1 status of
16 high level waste, spent fuel, and land use are not
17 waived, then there is no enforceable obligation on the
18 part of the Applicant in the hearing process to
19 address any allegedly new and significant information.

20 CHAIR KARLIN: Okay, so do I understand
21 you to say on page 12 we have a list that does not say
22 that is exhaustive of options available to Petitioner
23 who thinks that new and significant information is out
24 there. And one of those options is to seek a waiver
25 from the reg, and you're suggesting that the

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1 | implication of that option is that no one would ever
2 | see a waiver if they could file a contention.

3 || MR. HAMRICK: I think that's correct.

4 CHAIR KARLIN: But what if a waiver does
5 not apply because it's not uniquely, you know, the
6 waiver is a specific circumstance for a specific
7 facility, and maybe this is a more generic. So it's
8 a rulemaking certainly.

9 MR. HAMRICK: Then they can petition for
10 a rulemaking.

11 CHAIR KARLIN: So no intelligent
12 Petitioner would seek a rulemaking or seek a waiver if
13 they could file a contention is essentially what
14 you're saying.

15 MR. HAMRICK: Basically, basically.

16 CHAIR KARLIN: I'll grant you that.
17 Sounds reasonable.

18 MR. HAMRICK: Judge Wardwell brought up a
19 question about --

20 CHAIR KARLIN: But let me ask why. I
21 think you have another point here that on page 23 of
22 the decision, if you have that. The footnote 14
23 troubles me and the last sentence, it talks about the
24 Board views our Waste Confidence rule as a generic
25 requirement and then it does not speak to the NEPA

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1 question at issue here, whether Mr. Oncavage may
2 obtain a hearing on spent fuel risk arising during a
3 reactor's operating life. As we hold in the text, it
4 is part 51, it is the underlying GEIS that precludes
5 litigation of that issue. That seems to be a
6 characterization of their holding whether they really
7 said it very well in the text or not that litigation
8 of this issue was precluded. You just say yes.

9 MR. HAMRICK: Yes.

10 (Laughter.)

11 MR. HAMRICK: Correct. The footnote
12 addresses the fact that Waste Confidence rule only
13 speaks to issues after the reactor's operating life is
14 over. The generic environmental impact statement
15 addresses these issues with respect to the 20 year
16 renewal period. The contention as is drafted and
17 proposed discusses indefinite storage which seems to
18 imply, they're discussing periods either during
19 operation and after. That is the -- it's the after
20 period, the 30 years after is covered by the Waste
21 Confidence rule, and then after that they're not
22 required to discuss those impacts by the Waste
23 Confidence rule itself.

24 CHAIR KARLIN: Well, a lot of the, it
25 seems like the Staff's brief here, I was a little

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1 surprised. I don't think you all confronted Draft
2 51.53(c)(3)(iv), you know. And is our analysis of
3 this contention similar or the same as the analysis
4 for the State of Massachusetts and that they're
5 alleging new and significant information and there is
6 a legal question whether that's even permissible. Or
7 is this some very different issue dealing with the
8 Waste Confidence rule?

9 MR. HAMRICK: The issue is similar. In
10 fact, 51.53(c)(4) states that the Applicant is
11 required to provide any new and significant
12 information of which it is aware with respect to any
13 environmental impacts. It would seem that
14 environmental impacts that are encompassed by the
15 Waste Confidence rule would be include in that as
16 they're not expressively excluded from that.

17 CHAIR KARLIN: So the^h Applicant would need
18 to address new and significant information relating to
19 waste confidence issues in its ER and the staff
20 likewise would need to address those in its EIS but
21 it's not litigable here?

22 MR. HAMRICK: Correct. Well, it's not
23 litigable here for the threshold issues that we have
24 discussed. However, if a Petitioner, excuse me, if an
25 Applicant includes new and significant information of

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1 which it is aware, that it believes is new and
2 significant in its application, the Staff then in
3 creating its draft, Environmental Impact Statement,
4 would then have to itself petition for a waiver of the
5 rule. That's discussed in the Statement of
6 Consideration for the part 51 rule.

7 However, again we would state that if you
8 look at the Oconee case, this information is, wouldn't
9 be really characterized as new and significant
10 information. Oconee did not new and significant.
11 What it did state was that the Commission, it
12 recognized that the Commission has been aware of
13 uncertainties with the respect to high level waste
14 disposal for decades and has always acknowledged them
15 but has decided these uncertainties will be overcome.
16 That's the crux of the Waste Confidence rule.

17 Any political or technical issues raised
18 in the petition amount simply to the same sorts of
19 uncertainties that the Commission has been faced with
20 for the past 20 years since the Waste Confidence rule
21 was first promulgated.

22 JUDGE WARDWELL: I didn't see a lot of
23 discussion in your answer in regards to if, in fact,
24 for some reason the Board found a mechanism and found
25 it appropriate to litigate this. There didn't seem to

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1 be response in here in regards to whether or not the
2 information Vermont provided was new and significant.

3 Do you feel that, in fact, if it was
4 appropriate for this Panel to litigate it, that it is
5 new and significant information it provided?

6 MR. HAMRICK: No. In our pleading, we
7 relied mostly on the ideas from the Oconee case that
8 these issues are not new and significant because with
9 them, technical problems, political problems, for at
10 least 20 years. The Staff has a standard that it
11 shares with Applicants for its Reg Guide 4.2 which
12 discusses what should be included in a license renewal
13 application. It includes a definition of new and
14 significant information on page 4.2-S-4 and discusses
15 information that was not considered in the analysis
16 summarized in the GEIS that would lead to an impact
17 finding different from that codified in Appendix B.

18 The impact finding in Appendix B is for
19 land use impacts, for storage of spent fuel, is small
20 --

21 MS. CARPENTIER: Time.

22 MR. HAMRICK: Is small and there is
23 nothing that they've provided that would change that.

24 JUDGE WARDWELL: What is the definition of
25 onsite versus offsite land use?

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1 MR. HAMRICK: I'm not certain of the
2 definition. The GEIS focus is mostly on onsite
3 impacts.

4 JUDGE WARDWELL: They've got a couple of
5 categories on offsite that are category 2 issues. I
6 would delineate between the two.

7 MR. HAMRICK: I don't -- I would believe
8 onsite impacts would be those associated with the
9 reactor operation with the facility itself versus
10 transportation type issues or I suppose high level
11 waste would be offsite eventually as well.

12 JUDGE WARDWELL: In this case the
13 Petitioner is claiming adverse facts on the land, not
14 only as I interpret what they're trying to say and
15 I'll ask them if I have time during the rely, that any
16 spent fuel will be physically residing at the
17 facility, but also the effects[^] of that on the land
18 surrounding that.

19 MR. HAMRICK: Correct.

20 JUDGE WARDWELL: Where do we draw the line
21 between offsite and onsite?

22 MR. HAMRICK: At the --

23 JUDGE WARDWELL: Or would that all be
24 onsite in your view?

25 MR. HAMRICK: The clear delineation would

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1 be the site boundary, just for a -- the plain meaning
2 of what does onsite mean, I would say that.

3 JUDGE WARDWELL: Thank you.

4 CHAIR KARLIN: Mr. Roisman, five minutes
5 for rebuttal.

6 REBUTTAL ARGUMENT OF ANTHONY ROISMAN, ESQ.

7 ON BEHALF OF THE STATE OF VERMONT

8 MR. ROISMAN: First of all, let me talk
9 about the last things that Mr. Hamrick talked about.
10 Reg. Guide 4.2 which had not been previously cited in
11 this proceeding, but he quoted from it and I
12 appreciate that, demonstrates that what we're talking
13 about is new and significant information. That
14 definition, as I heard it, fits to a T exactly what
15 we're claiming exists in this case. The fact that the
16 Staff may not think that it's new and significant
17 information doesn't change the fact that it fit that
18 definition.

19 And remember, our contention here and I
20 want to keep going back to this is not that the Board
21 should at this point decide whether it will litigate
22 the question of whether you need to amend the GEIS or
23 anything else, the only issue before you now and the
24 only issue that could be before you is did the
25 Applicant fail in its duty to present new and

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1 significant information?

2 CHAIR KARLIN: So that takes us back to
3 the issue we talked about with Massachusetts, whether
4 or not there's a requirement if you can litigate that
5 issue at all?

6 MR. ROISMAN: Right, and I believe that
7 it's clear that we can and in fact, if we took their
8 theory of where we go next, we have to litigate it
9 because they say we must make a waiver argument. If
10 you look at the wavier regulation 2.335(b) it says "a
11 party to any adjudicatory proceeding subject to this
12 part may petition that the application of a specific
13 Commission, etcetera, etcetera."

14 We can't be a party if we don't have a
15 contention, number one.

16 Number two, it's clear that the waiver
17 takes place after contentions [^]are ruled on, number
18 two.

19 Number three --

20 CHAIR KARLIN: Have you requested a
21 waiver?

22 MR. ROISMAN: We did not.

23 CHAIR KARLIN: Are you going to?

24 MR. ROISMAN: We'll see what you do.

25 CHAIR KARLIN: No, I mean -- we did have

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1 Massachusetts indicate that they might be filing -- I
2 mean we only have got a few minutes.

3 MR. ROISMAN: And I think that that's a
4 possibility, but again my position is that it's early.
5 I think we're entitled before we file for a waiver to
6 have the benefit of the information the Applicant is
7 supposed to put in its application.

8 We're supposed to frame contentions --

9 CHAIR KARLIN: Let me ask. A couple of
10 points. One, I'm not sure that the Applicant has any
11 great secret information about what Senator Domenici
12 is going to be doing. This is what you assert as new
13 and significant information that the Administration
14 has got a new GNEP program or that Senator Domenici
15 has got a new bill or that various political things
16 are going on.

17 Do they have some [^]inside track as to that?

18 MR. ROISMAN: No.

19 CHAIR KARLIN: That's not new and
20 significant information. That's just political
21 information that is going to be going on as Dr.
22 Wardwell pointed out all the time.

23 MR. ROISMAN: I want us to get off of that
24 because that's only one piece of what we say is new
25 and significant. What's also new and significant is

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1 what the Applicant managed to convince the Federal
2 Court of Claims to rule in 2005, namely, that this
3 aborted effort in 2004 to reinstitute the DCS process
4 signals that no disposal of spent nuclear fuel will
5 occur during 2010, taking into account the 63-month
6 period between designation and collection, and
7 moreover, that disposal may not occur within any
8 foreseeable time in the future, no repository is
9 available.

10 Now the Applicant went to Court and got
11 that ruling. We don't know what evidence they
12 submitted to support that ruling. They sued the DOE
13 over that and this ruling, by the way, that factual
14 finding is collateral estoppel against them in this
15 case because they were a party to it. They had a full
16 opportunity to present it. That was Entergy in that
17 case. So our point is if we're to make a waiver
18 argument we should have the benefit of the
19 environmental report --

20 MS. CARPENTIER: One minute --

21 MR. ROISMAN: -- to be fully completed.
22 This environmental report is noticeably deficient. We
23 believe the Applicant has other information. It
24 doesn't have to be political. And we don't say that
25 it's political. We point out that Yucca Mountain, for

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1 instance, they discovered in-linkage at Yucca
2 Mountain. That's a technical issue.

3 JUDGE WARDWELL: In that regard, what
4 evidence do you have even when the first Yucca
5 Mountain studies were created that said there is in-
6 leakage in Yucca Mountain, whoever assumed that and
7 what's your evidence that someone assumed that when
8 they started those studies?

9 MR. ROISMAN: We've cited starting at page
10 23 of our reply and focusing particularly at page --
11 sorry, 29, from the U.S. Nuclear Waste Technical
12 Review Board's report issued in 2006.

13 MS. CARPENTIER: Time.

14 MR. ROISMAN: What it is that the
15 Technical Review Board believed they found in that
16 one-year period that underlay that report. So --

17 JUDGE WARDWELL: They found some in-
18 leakage, but they never assumed -- do you know if they
19 assumed or went into any studies as far back as when
20 this was first initiated in '85 that said the
21 hypothesis is and the reason we're siting at Yucca
22 Mountain is because there is no in-leakage?

23 MR. ROISMAN: I can't cite you to chapter
24 and verse on that, but it does go to the merits, I
25 would submit.

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1 JUDGE ELLEMAN: Your concern is with
2 spent fuel that's going to be generated many years
3 from now. You're looking to the life extension part
4 of the generated fuel.

5 MR. ROISMAN: That's correct.

6 JUDGE ELLEMAN: Would you not acknowledge
7 that there are a number of potentially very reasonable
8 solutions like a private offsite storage facility that
9 could emerge in that long-time interval that would
10 resolve your concern?

11 MR. ROISMAN: I would agree that there are
12 potentially a lot of ways that we could solve the
13 problem, assuming the waste was generated, but that's
14 very different than taking a look at both the GEIS,
15 the Waste Confidence rule, the S3 Table and
16 discovering that nobody has evaluated the probability
17 of those.

18 Why should it be the case that all of the
19 doubts when we're in the area of uncertainty are
20 resolved in favor of some pie in the sky hope that
21 something will happen when every single deadline that
22 has been implemented and ordered since the date that
23 the Waste Confidence rule was promulgated has been
24 missed. It doesn't seem to me reasonable.

25 So if we get down to the merits, which as

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1 I said, I don't think you need to for purposes of
2 deciding this question, but if you get down to the
3 merits, there's no place in the GEIS, in the Waste
4 Confidence rule, in the S3 Table or anyplace else
5 where the Commission has taken a hard look at the
6 question of whether or not spent fuel might actually
7 have to remain at a site like this well beyond the 30-
8 year period. And for that reason we think that the
9 new and significant information may lead us to seek a
10 waiver or may give us a basis for asking you to decide
11 the question.

12 CHAIR KARLIN: Well, let me -- this is a
13 floodgates question again. If we admit this
14 contention, then on what basis do we admit this
15 contention and every other ASLBP proceeding also a --
16 must also admit this contention? How would it be
17 different? What narrowing factor^A would we apply her
18 and say ah, here it's admissible and it doesn't
19 violate the Waste Confidence rule, but everywhere
20 else, the Waste Confidence rule still is valid?

21 MR. ROISMAN: Because first of all, if
22 there is the volume of evidence that we've submitted
23 suggesting that there's new and significant
24 information including information involving this
25 particular Applicant dealing with this particular

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1 issue, namely spent fuel storage, if that existed, all
2 you would be doing is saying that an Applicant has a
3 duty to put that in their environmental report.
4 That's not much of a floodgate. I would call that at
5 most a trickle.

6 All you're doing is making an Applicant do
7 its duty. The regulation is unequivocal. They are
8 required to produce new and significant information.
9 So the only contention you're being asked to admit by
10 us, at least, is that they be required to fulfill that
11 duty. We can litigate that with them or if I were
12 they and I'm not, I would simply say okay, here's all
13 this stuff that's new. We don't think any of it is
14 significant, now go pound sand.

15 So I don't think there's a bit floodgate
16 issue here. Yes, down the road if we decide to make
17 the argument to you that the[^] draft supplemental
18 environmental impact statement is deficient, and new
19 and significant information should have been
20 considered by the Staff and that we're really talking
21 about the merits of the environmental impacts, then at
22 least we'll have to address the floodgates issue, but
23 we have the option of the waiver. We can't get to the
24 waiver. We couldn't even file for one at this point
25 because we're not a party to the proceeding.

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1 CHAIR KARLIN: Thank you. Any other
2 questions?

3 All right, I appreciate that. I think
4 we've moved pretty efficiently so far. I guess we'll
5 take a lunch break now and return to Vermont
6 Contention 1.

7 Let's reconvene at 1:30. That will give
8 us about an hour and 20 minutes, I think. At 1:30,
9 we'll restart the proceeding. Thank you.

10 (Whereupon, at 12:11 p.m., oral argument
11 was recessed, to reconvene at 1:30 p.m.)
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A F T E R N O O N S E S S I O N

1:31 P.M.

CHAIR KARLIN: Good afternoon, we're back on the record and I think we're now turning to the State of Vermont's two remaining contentions, contention 1 and 3, I guess. And I believe you have 45 minutes for the first one, a total of 45 minutes. You will have 20, 15 and 10. The state would have 20 minutes.

How do you want to allocate that time?

MR. ROISMAN: I'd like to do what I did before, reserve 10 minutes and take from that reserve time, if there are any questions the Board has that extend beyond the first 10 minutes.

CHAIR KARLIN: Okay, fine.

ORAL ARGUMENT OF ANTHONY Z. ROISMAN, ESQ.

ON BEHALF OF THE STATE OF VERMONT.

MR. ROISMAN: If you'll pardon the pun, the first contention is very concrete and specific, I believe, and it meets that requirement. It focuses on the primary containment concrete. The issue is not in my judgment particularly complex at the admissability stage. We have identified what we believe is sufficient evidence to raise a material dispute of fact as to whether or not the concrete that surrounds

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1 the containment is subject to temperatures in excess
2 of 150 degrees Fahrenheit which, if it does, then
3 there should be age management associated with that
4 concrete that surrounds the containment.

5 And we have indicated that the purpose of
6 that is structural. The Applicant has identified in
7 its UFSAR that it takes credit for the structural
8 integrity of the containment concrete. Therefore, if
9 there is a danger that over time the heat from the dry
10 well will cause a deterioration in the strength of
11 that concrete, the Applicant should have to manage it
12 by applying the age management criteria to the
13 concrete.

14 The Applicant's position is no, we don't
15 have to do that. Essentially, they disagree with us
16 on the question of whether or not the potential
17 temperature of the concrete will be, in fact, in
18 excess of 150 degrees which is the sort of cut point
19 for this consideration. They've cited to some facts.
20 We've cited to some contrary facts. I'm happy to go
21 into those, but I think that they are really well
22 beyond what the Board should be concerned with at this
23 stage.

24 We have a factual dispute about whether or
25 not the temperature of the concrete can exceed 150

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1 degrees in a general area.

2 Now there is a definitional problem. No
3 party, including us, I confess, have given you any
4 specific citation to authority to distinguish between
5 localized and general. And I sympathize with the
6 frustration that that creates and I'm going to try to
7 address that in the following manner.

8 I think that the answer has to be that it
9 matters if we look at it from a practical perspective.
10 If there were a spot where the concrete was located
11 and that spot, let's say, a 4-foot square area, was
12 likely to get temperatures in excess of 150 degrees,
13 it would be difficult I think for us to make any
14 argument that that square, having more than 150 degree
15 temperature, would endanger the integrity of the
16 containment concrete itself.

17 What we have identified is a strip of
18 concrete that goes completely around the dry well.
19 It's roughly 20 feet high, so a band roughly 20 feet
20 high where the temperatures, we believe, will exceed
21 150 degrees Fahrenheit.

22 CHAIR KARLIN: Isn't, where, can you refer
23 to your submittals on where someone would glean those
24 particular dimensions from?

25 MR. ROISMAN: Yes. In looking at the

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1 reply, there's a discussion that begins at the bottom
2 of page 14 and continues through the end of page 16
3 that discusses the elevation levels where Mr. Sherman
4 has supported his prior affidavit statement to the
5 effect that the dry well temperatures would be closely
6 matched by the temperatures at the concrete, and he
7 identifies in that discussion on page 15 and 16 and
8 attaches a document that the Applicant had submitted
9 identifying different elevation levels that there is
10 a 20-foot area --

11 CHAIR KARLIN: I remember seeing the
12 elevations. I see you can't find it right off the,
13 immediately --

14 MR. ROISMAN: I'm sorry. it's --

15 CHAIR KARLIN: -- so let's not, let's not
16 go for it.

17 MR. ROISMAN: Okay. ^

18 CHAIR KARLIN: I just remember your
19 submitting that, or someone did at least talk about
20 the evaluations. Well, what wasn't clear was that
21 that entire elevation zone was going to be at those
22 higher temperatures.

23 MR. ROISMAN: Right. And --

24 CHAIR KARLIN: And that's what you're
25 saying is what you meant by that.

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1 MR. ROISMAN: That's correct. If we
2 weren't clear I apologize for that. We intended to
3 indicate that based upon, and we want to be clear that
4 we still have limited information. We're, we believe
5 that the Applicant has or will eventually produce more
6 detailed calculations of the temperature measurements
7 inside the containment.

8 But we had, and again a document that we
9 produced for the Board in which the Applicant gave
10 some average temperatures and the average temperature
11 at the elevation at issue here which I believe was
12 above 270 feet on the bulb was at 170 degrees and so
13 we did our calculation -- I'm sorry, 155 degrees. We
14 did our calculation using that average number from
15 them.

16 So we don't have it down to knowing the
17 exact temperature measurement. We don't even know how
18 many thermacouples they had to produce that average
19 numbers.

20 CHAIR KARLIN: While we're on that
21 subject, Entergy is asserting that your contention,
22 original contention is vague and unsupported by an
23 adequate basis. I'm not sure exactly which subpart of
24 309(f)(1)(i) through (vi) that is, but I will take it
25 that that is subpart 5, "provide a concise statement

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1 of the alleged facts or expert opinions which support
2 the requester's petition position on the issue.

3 Did you do that in your original petition?

4 MR. ROISMAN: Yes.

5 CHAIR KARLIN: Where?

6 MR. ROISMAN: We believe we did. We
7 submitted the affidavit of a mechanical engineer whose
8 area of specialty, it's all disclosed in his résumé
9 and so forth, includes he transferred. So we have an
10 expert opinion of somebody who knows how he transfers
11 and drew that conclusion.

12 In our reply, after challenged about that,
13 Mr. Sherman then laid out what he already knew and
14 didn't feel was necessary to put into his initial
15 affidavit, keep sticking with the concise and brief
16 requirements that relate to bases and supporting
17 evidence, the calculation that showed that his
18 judgment was correct.

19 CHAIR KARLIN: There is a question about
20 whether that's entirely kosher or not. What I would
21 have preferred you to do in your reply was to say oh
22 no, we were quite specific in our original petition.
23 Let us point you to the page at our original petition
24 and the attachment in our original petition and where
25 we addressed that issue. Rather than doing that, you

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1 added an entirely new affidavit or declaration where
2 it would appear you're attempting to rehabilitate a
3 problem.

4 You may have a viable contention just on
5 the original contention. I would prefer you address
6 that rather than get into some band or other issues
7 you raise in your reply.

8 MR. ROISMAN: Let me answer the underlying
9 question. And I think this is an issue which occurs
10 at least with our contentions. The question is what
11 is the standard --

12 MS. CARPENTIER: One minute.

13 MR. ROISMAN: -- the Board is supposed to
14 apply and I believe the standard the Board has based
15 upon what the Applicant and the Staff have submitted
16 is a standard similar to what is pornography. We
17 don't know it, how to define it,[^] but we know it when
18 we see it.

19 I submit that there's a better standard
20 that case law better supports and that is that
21 basically we're looking at summary judgment. A party
22 who is submitting a contention should at least make
23 effectively a prima facie showing, enough evidence
24 that it meets the sufficiency standard to resist
25 summary judgment.

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1 There's well-established case law around
2 the country that the admissible opinion of an expert
3 on a topic is itself sufficient to withstand a summary
4 judgment motion.

5 So we have an expert whose areas of
6 expertise includes the question of heat transfer --

7 MS. CARPENTIER: Time.

8 MR. ROISMAN: -- who offers this opinion
9 that there is a close relationship between the
10 interior temperature and the temperature of the
11 concrete just on the other side of this two and a half
12 inch steel shell.

13 MR. ROISMAN: Okay, thank you. Any other
14 questions? We have a rebuttal here.

15 JUDGE ELLEMAN: Your contention does not
16 in any way imply, does it, that the concrete will
17 deteriorate at this higher temperature. It's simply
18 pointing out a disparity between the ASME standard and
19 the statement in the application.

20 MR. ROISMAN: I think the important part
21 of the contention is that we're seeking that there be
22 management, age management of this particular area of
23 the structure during the extended license operation.

24 Our goal would be that by doing that there
25 will not be a failure, but the Applicant has said we

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1 don't have to do that. We don't have to age manage
2 that because we fall at 150 or lower. So we're not --
3 I guess our position would be that if they don't
4 manage it, if there's no age management, then the risk
5 that there will be a failure is unacceptable.

6 JUDGE ELLEMAN: Okay.

7 CHAIR KARLIN: Okay, thank you. Mr.
8 Lewis, 15 minutes.

9 ORAL ARGUMENT OF DAVID LEWIS, ESQ.

10 ON BEHALF OF ENTERGY

11 MR. LEWIS: Thank you. Let me start by
12 pointing out that in the original Vermont contention
13 there was no basis provided for the assertion that the
14 concrete temperatures will match the ambient
15 temperature inside the dry well.

16 CHAIR KARLIN: Well, wait a second.

17 JUDGE WARDWELL: Besides just a reasonable
18 looking at it, that if it's this high and it's that
19 thin, a reasonable person might conclude that, in
20 fact, they are.

21 MR. LEWIS: They didn't even offer that.
22 They made that assertion in the contention, but Mr.
23 Sherman's affidavit had no expert opinion that support
24 that statement. So the basis --

25 JUDGE WARDWELL: He had his expert

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1 opinion. You may not agree with it, but he had -- he
2 has an expert opinion unless you feel he isn't an
3 expert.

4 MR. LEWIS: No, I'm simply saying that his
5 original declaration did not contain that statement.
6 His original declaration made no assertion about the
7 concrete matching the ambient temperature inside the
8 dry well, it was simply lacking. It was missing.
9 There was nothing offered in support of that assertion
10 of the contention.

11 CHAIR KARLIN: Isn't that a reasonable
12 inference even a non-technical person, lawyer like I
13 could reach that if two pieces of equipment are within
14 two inches of each other and one is 165 degrees, then
15 there's a possibility, a reasonable possibility that
16 the one two inches away may be over 150. Now it may
17 be or may not, but we ought to have a hearing on that.

18 MR. LEWIS: I think as a matter of
19 engineering, it isn't a reasonable supposition and if
20 you look at what has been done in other license
21 proceedings you find that there's quite a significant
22 delta t between the inside of the --

23 CHAIR KARLIN: I think there could be.
24 Let me take you back. You said there is no basis for
25 this?

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1 MR. LEWIS: I'm saying no basis is offered
2 in the original contention for that assertion.

3 CHAIR KARLIN: Let's go back to the reg,
4 2.309(f)(1) basis. Are you using that in the sense of
5 2?

6 MR. LEWIS: No, I'm using that in the
7 sense of 4 and 5.

8 CHAIR KARLIN: Then don't say the word
9 basis because that's in that reg. What are you
10 saying? Based on what you're saying.

11 MR. LEWIS: With respect to prong 5, they
12 did not offer sufficient information to show there was
13 a genuine dispute with the application.

14 CHAIR KARLIN: They didn't provide a
15 concise statement of the alleged facts or expert
16 opinions which support their petition?

17 MR. LEWIS: It's 5 which is failure to
18 provide sufficient information to demonstrate a
19 genuine dispute on a material issue.

20 CHAIR KARLIN: No, I'm reading 5, "provide
21 a concise statement of the alleged facts or expert
22 opinions which support the requester's petition."

23 JUDGE WARDWELL: You're referencing 6,
24 aren't you?

25 MR. LEWIS: I'm sorry, I'm referencing 6.

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1 CHAIR KARLIN: You're referencing 6,
2 "provide sufficient information to show that a genuine
3 dispute" -- certainly they provided an expert's
4 opinion. He has made an inference, it seems not
5 unreasonable, at least litigable. You know, there is
6 a dispute because you certainly hotly disagree with
7 what they're saying. What's the problem?

8 MR. LEWIS: The problem is in the original
9 contention there was no support offered for that.
10 It's only been provided in the reply. In the reply,
11 it's very flawed and by providing it in the reply
12 they've effectively denied us the ability to address
13 it. We're willing to do so now.

14 CHAIR KARLIN: I don't think we need to
15 get to the reply at all to -- I'm ignoring the reply's
16 attachment and just a genuine dispute exists on a
17 material issue. They have an expert. He has provided
18 a declaration. His qualifications are unchallenged.
19 There seems to be an inference that's being made as
20 these things that are two inches apart that there will
21 be a temperature relationship of some sort.

22 MR. LEWIS: Again, I'm saying that there
23 is no such inference in his declaration. When you
24 look at his declaration it's entirely silent on that
25 point. There's no assertion anywhere in Mr. Sherman's

1 original declaration that the concrete is going to
2 match or be anywhere close to the temperature inside
3 the dry well.

4 CHAIR KARLIN: Now why didn't you all
5 produce an expert to tell us that and say there's no
6 possible connection and have an affidavit attached?

7 MR. LEWIS: Because in responding to
8 contentions, you don't address the merits. You don't
9 provide countering affidavits that --

10 CHAIR KARLIN: So we don't get into the
11 merits.

12 MR. LEWIS: I'm simply saying that he
13 never provided the original basis for the contention.

14 CHAIR KARLIN: Okay.

15 MR. LEWIS: I also just heard the state
16 tried to provide for the very first time a definition
17 of what a general area concrete temperature means at
18 a local area temperature means, but again, I heard
19 absolutely no reference to any authority or any
20 standard that supported that assertion.

21 I would note, since this has just been
22 raised for the first time that in other proceedings,
23 the Staff has taken this position. I'm reading from
24 the Brunswick Safety Evaluation Report, NUREG 1856 at
25 page 3-364. And here, by the way, they did that

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1 calculation and showed there was a 19 degree delta t
2 between the steel to the concrete. But they said
3 "because the elevated temperatures are localized and
4 confined in the upper elevation of the dry well, and
5 the actual concrete temperatures on a gradient through
6 the dry well wall, the upper elevation of a dry well
7 is considered a local, rather than general area
8 temperature." It's considered a local, rather than
9 a general area.

10 JUDGE WARDWELL: Do they define local
11 versus general?

12 MR. LEWIS: Only in the statement that I
13 just read.

14 JUDGE WARDWELL: Is that the first and
15 only time "local" versus "general" comes in in regards
16 to the temperatures within the dry well, to your
17 knowledge?

18 MR. LEWIS: Yes. The ASME code itself
19 does not use those terms and does have a definition,
20 but this is the instance that I could find where the
21 Staff had applied it and explained how they applied
22 it. And I would submit unless there was something
23 that the state could offer to suggest otherwise, if
24 you applied this Staff position that means that it's
25 incumbent upon the state to show that those local

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1 temperatures are both 200 degrees before there would
2 be any discrepancy with the ASME code.

3 JUDGE WARDWELL: Do you agree that if, in
4 fact, it can be shown that a general area had
5 temperatures greater than 150 degrees that an age
6 management plan is a prudent thing to be developed?
7 Is that universally accepted?

8 MR. LEWIS: If there were general area
9 temperatures above 150 degrees, we would have had to
10 provide more information explaining why the effect
11 didn't need to be managed or how it was managed, one
12 or the other.

13 This was simply a screening that allowed
14 us to say here's the general standard, if the general
15 area temperature is below 150, there is no need and if
16 the localized area temperature is below 200, there's
17 no need to manage that aging effect.

18 Finally, just in case the reply is
19 considered, the declaration of Mr. Sherman models the
20 gap between the dry well shell and the concrete as
21 being filled with sand, but their own exhibit which is
22 Vermont Reply Exhibit 1, it's our amendment to the
23 application, at the very last page, shows that the
24 sand stops at elevation 238.

25 What that means is instead of assuming two

1 inches of air which is not a good conductor, they've
2 assumed two inches of sand and done a thermal
3 conductivity analysis that greatly skews the result.
4 My only point is if you're going to accept the reply,
5 it doesn't model our plant conditions and if it
6 doesn't model our plant conditions, I would submit to
7 you that it can't possibly provide sufficient
8 information to demonstrate a genuine dispute on a
9 material issue.

10 JUDGE ELLEMAN: To your knowledge, does
11 the ASME code that is referenced give any
12 clarification of the distinction between local and
13 general?

14 MR. LEWIS: To my knowledge, I've asked
15 that question to technical folks at Entergy and I
16 believe it does not, based on the response I've been
17 given.

18 JUDGE WARDWELL: To your knowledge, do you
19 know of any temperatures approaching 200 degrees in
20 the dry well?

21 MR. LEWIS: Yes. What I would like to do
22 if I could, again, if the reply is considered, the
23 state has referred to a 1984 Environmental
24 Qualification Report as providing thermocouple data,
25 but they've already provided a portion of that. I

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1 have the report with the complete appendix that shows
2 where all the data was and what I would like to do is
3 pass out to the Board and the parties so you can see
4 exactly where the temperatures were, where they exceed
5 150.

6 What that reports shows is that there are,
7 in fact, no average temperatures above 150 degrees
8 below the 280-foot elevation which is about where the
9 dry well transitions.

10 JUDGE WARDWELL: You're swamping me
11 already and as I hear you discuss it, it seems like
12 you're supporting the fact that maybe we ought to hear
13 about this from all parties. How do you address this?

14 MR. LEWIS: No, I'm ont. Again, there's
15 no temperatures above 150, no ambient average
16 temperatures in the dry well above 150 degrees,
17 basically below the point where it transitions to a
18 cylinder.

19 Above the transition, in the cylindrical
20 ranges, there are average temperatures that exceed
21 150, but in that area, there is no sand between the
22 dry well and the concrete and there is still no basis
23 therefore for the assertion that --

24 JUDGE WARDWELL: Basis? Basis?

25 MR. LEWIS: There is not sufficient

1 information to demonstrate a genuine dispute on a
2 material issue. There is not sufficient information
3 to show that there is really a genuine contention that
4 that concrete is going to give out at 150 degrees.

5 Is the Board interested in receiving the
6 more complete copy of the reply exhibit?

7 CHAIR KARLIN: No. No, this is not the
8 place for additional information.

9 It seems to me, just taking their
10 contention, it's, in essence, sort of pithiness, what
11 they say in paragraph 1, ASME code says the concrete
12 area, general area temperatures don't exceed 150.
13 Paragraph 2 says, 3 says you've got the dry well area
14 is 135 and 165 and then it says since the concrete
15 surface behind the steel shell will closely match the
16 dry well ambient temperature, the statement, blah,
17 blah, blah is a problem and there's a consistency
18 issue. And then they have an affidavit from Mr.
19 Sherman.

20 MR. LEWIS: There's also a lack of any
21 discussion in that contention or in the declaration of
22 what a general area temperature means or a localized
23 area temperature -- what a localized temperature
24 means.

25 CHAIR KARLIN: Right, they're not

1 asserting anything about the local area temperature.
2 They're talking about the general area.

3 MR. LEWIS: All I'm saying is that if you
4 apply that definition as the NRC Staff has in other
5 proceedings, the fact that that concrete might exceed
6 150 degrees and I'm not conceding it does, would not
7 present any consistency with the ASME code.

8 CHAIR KARLIN: Let me ask you this, Mr.
9 Roisman has posed the standard for thinking about this
10 which is the Motion for Summary Disposition standard
11 and asserts that this would clearly meet the motion.
12 Do you agree with that?

13 MR. LEWIS: No, I don't. I don't believe
14 it even meets the standard for admissability as a
15 contention.

16 CHAIR KARLIN: I would ask the standard
17 for admissability of contention is significantly lower
18 than standard for summary disposition, is it not?

19 MR. LEWIS: Yes.

20 CHAIR KARLIN: So it is a lower standard
21 and it doesn't meet that, you're suggesting.

22 MR. LEWIS: I'm not arguing though that it
23 should be dismissed on summary disposition. I'm
24 arguing that there are a number of important elements
25 that are totally lacking in what they present to show

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1 that there's a genuine issue. One of those elements
2 is the assertion that there are concrete general area
3 temperatures that will see 150 because they have not
4 pointed to any information that defines that term and
5 in fact, when you look at the safety evaluation in the
6 Brunswick proceeding, I pointed to it, it's clear that
7 the Staff has a very different understanding of that
8 term.

9 Without some contrary basis, without some
10 contrary information to support their assertion, this
11 contention does not demonstrate a genuine material
12 issue.

13 JUDGE WARDWELL: Yes, I've learned not to
14 use the phrase "basis" in front of Judge Karlin.

15 (Laughter.)

16 MR. LEWIS: I'm learning.

17 JUDGE WARDWELL: Could you help us in
18 maybe more generic or general terms where you would
19 draw the line between proving your case and raising a
20 sufficient amount of information for a dispute?
21 Because this and other contentions that we'll deal
22 with over the next 24 hours come back to this a lot.
23 And I'd like to probe you a little to see when you
24 would actually see a contention that you would like
25 and admit.

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1 MR. LEWIS: Well --

2 JUDGE WARDWELL: Have you ever seen one
3 that you like and would recommend --

4 MR. LEWIS: Yes, I have. If the expert
5 opinion had been provided in the reply, had been in
6 the original contention, that certainly would have
7 made the original contention --

8 MS. CARPENTIER: One minute.

9 MR. LEWIS: -- stronger. The problem with
10 the expert opinion in the reply is that it simply
11 mismodeled our plant. It assumed that the entire gap
12 up past the transition zone was filled with sand when
13 their own exhibit they attached so that the sand area
14 ceases at elevation 238, so the fact that they say
15 there's higher temperatures at elevation 270 really is
16 immaterial.

17 JUDGE WARDWELL: But your real problem
18 with the reply is that you feel it's additional
19 information, isn't it, that it's new evidence?

20 MR. LEWIS: I do and it really has
21 effectively denied us the ability to present this kind
22 of information I'm now trying to provide on the fly,
23 giving a written answer at the time the contentions
24 originally came in.

25 JUDGE WARDWELL: The three-page exhibit

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1 that you referred to as being incomplete earlier in
2 your remarks, contains in it a table entitled "Dry
3 Well Temperature" and it quotes peak temperatures --

4 MS. CARPENTIER: Time.

5 JUDGE WARDWELL: -- that range from 150 to
6 270 degrees. And there's no further elaboration, but
7 it would suggest that we need further information and
8 further explanation of these temperatures.

9 MR. LEWIS: What that report had was an
10 appendix that had the entire set of data and Vermont
11 did not include that appendix. I have a copy of that
12 report with the appendix that has all the data, but
13 they only included that summary table which is
14 unfortunately very incomplete.

15 CHAIR KARLIN: Okay, any other questions?
16 Thank you.

17 Staff?

18 ORAL ARGUMENT OF STEVEN HAMRICK, ESQ.

19 ON BEHALF OF NRC STAFF

20 MR. HAMRICK: First of all, let me point
21 the Board to 2.309(f)((1)(vi) which I think provides
22 the standard by which this contention should be judged
23 which we have discussed here previously. The
24 Petitioners must provide sufficient information to
25 show that a genuine dispute exists with the Applicant

1 or licensee on material issue of law or fact.

2 Several Licensing Boards have read that
3 phrase to lead to the conclusion that the Petitioners
4 have an obligation to provide the factual information
5 and expert testimony necessary to support its
6 contention. This is their obligation --

7 CHAIR KARLIN: Well, wait a second, wait
8 a second. Aren't you going over to 5 now, provide a
9 statement of the facts or expert opinion? How is that
10 different -- are you talking about 6 or 5?

11 MR. HAMRICK: Parts of them are --

12 CHAIR KARLIN: I think the decisions that
13 deal with concise statement of facts or expert opinion
14 are dealing with 5, not 6. But I don't know, if you
15 can cite me to something.

16 MR. HAMRICK: Well, the point I was trying
17 to make is that if you're dealing with 6, there is a
18 standard that says you must be sufficient which means
19 there must be some level of expert opinion which is
20 insufficient.

21 CHAIR KARLIN: But isn't the criterion for
22 that really found in 5. The key of 6 is to provide
23 sufficient evidence to show that a genuine dispute
24 exists with regard to a material issue.

25 Now clearly, this is a material issue.

1 MR. HAMRICK: Certainly.

2 CHAIR KARLIN: There does seem to be a
3 dispute.

4 MR. HAMRICK: Absolutely.

5 CHAIR KARLIN: Now the question is is
6 there sufficient information. I think the better
7 standard for evaluating that is 5, "provide a concise
8 statement of the alleged facts or expert opinion to
9 support it."

10 How much more is needed? Are we here at
11 a summary disposition stage? Are we here at the
12 merits?

13 MR. HAMRICK: We're not here at the
14 merits. The cases that --

15 CHAIR KARLIN: This is not a bald or
16 conclusory statement, is it? It makes imminent sense
17 to me what they said. This is 165 degrees. This is -
18 - there's a standard of 150. They're close together.
19 There could be a problem here.

20 JUDGE WARDWELL: I'll give you more time
21 to think by interjecting one other thing, although I
22 may just confuse the issue, but and that is just the
23 desire by everyone to submit more of this information.
24 It kind of says there is the proof in the pudding that
25 it needs to be looked at.

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1 MR. HAMRICK: The obligation is to provide
2 that expert opinion. Judge Karlin seems to think that
3 it's not a speculative or a conclusory statement. But
4 I think there's sensitive and detailed engineering
5 evaluations that I certainly am not qualified to
6 discuss or I can't do those calculations. There are
7 several things that from a layman's perspective I
8 cannot explain to you, heat transfer calculation data.
9 So I can't make an inference. Yes, it's close, so
10 therefore the temperatures are going to be the same.

11 There are several examples. A thermos can
12 keep my soup warm in the winter, even though the soup
13 is close to the outside area. So you can't
14 necessarily take that layman's inference. They need
15 to provide scientific data to support the statement.

16 JUDGE WARDWELL: But there are portions of
17 that thermos that are higher than what you feel on the
18 outside of that thermos and so there's portions of
19 that metal that, in fact, will be higher, analogous.

20 MR. HAMRICK: Certainly.

21 JUDGE WARDWELL: Do you know what the
22 purpose of the two-inch gap is above the bulb portion
23 of the dry well?

24 Let me rephrase it. Is there any reason
25 not to believe that that's for thermal expansion and

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1 not for cooling? There's no cooling attributes of
2 that that is used for, is that a fair assessment?

3 MR. HAMRICK: I can't tell you whether or
4 not that's a fair assessment. I know there's air in
5 that gap and I assume the air circulates and has some
6 impact on --

7 JUDGE WARDWELL: It's there for thermal
8 expansion.

9 MR. HAMRICK: I don't know the answer to
10 that.

11 JUDGE WARDWELL: And if so, there's a
12 chance that with that expansion the dry well at times
13 would likely be very close, if not touching the
14 concrete. Is that a fair assessment?

15 MR. HAMRICK: I do not know. Getting to
16 the issue of whether there's sufficient factual and
17 expert testimony, there are cases that have stated
18 that even an expert can't make a speculative or
19 conclusory statement.

20 CHAIR KARLIN: Can you cite me a case that
21 actually holds that? I've seen Fansteel and a number
22 of cases say that. Give me a holding by the
23 Commission. I don't think there are any.

24 MR. HAMRICK: No, that's why I said that
25 Licensing Board cases have stated. I think that's

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1 been the holding of the -- the ultimate holding of any
2 case of which I'm aware. It's guidance, certainly.

3 CHAIR KARLIN: If I remember the origin of
4 the bald statement that there's a dispute is not
5 adequate. This is certainly not a bald statement that
6 there's a dispute. There's a statement, 150 degrees,
7 165 degrees, an expert's declaration is attached.
8 This isn't some vague bald statement that there's a
9 dispute.

10 MR. HAMRICK: The Clinton case which said
11 that even from an expert it seemed to mean to me that
12 just because you attach an expert's affidavit, doesn't
13 get you in the door.

14 CHAIR KARLIN: The Clinton case did not
15 hold that. They were just repeating a pernicious
16 canard, I would say so.

17 MR. HAMRICK: Absolutely.

18 CHAIR KARLIN: Okay.

19 JUDGE ELLEMAN: If I follow your point,
20 you're not saying that the surface of the concrete
21 isn't 165. You're simply saying there's not enough
22 significant information to infer that from the
23 contention.

24 MR. HAMRICK: Absolutely. The Petitioner
25 has an affirmative obligation to provide just the

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1 concise statement of alleged facts and expert opinion
2 under 309(f)(5) and as well, under 6, they must
3 provide sufficient information.

4 The SOC, the Statement of Considerations
5 for the proposed rule states that from -- this 66
6 Federal Register 19623 states that the requirement to
7 have specific contentions where the supporting of the
8 facts alleged or expert opinion that provide the bases
9 for them in all hearings should focus litigation on
10 the real concrete issues and result in a better, more
11 understandable record for decision.

12 So that's what we're talking about here.
13 We will have the bases for them to focus -- I realize
14 that's not the right word --

15 CHAIR KARLIN: No, I think the reason I
16 raise that is I think it's important to distinguish
17 what a basis is and what the other thing is and it's
18 easily slipped over and I have trouble reading the
19 cases and understanding where they're going.

20 Basis to me seems to be provide a brief
21 explanation of the basis for the contention. That's
22 number two. And that's not what we're talking about
23 here and that's really the logic or the rationale, not
24 factual. Whereas here, you're talking about factual,
25 as I understand it, support in the form of an

1 affidavit or a specific calculation or something,
2 right?

3 MR. HAMRICK: It's our interpretation of
4 the rule that all of these parts of (f)(1)(i) through
5 (vi) provide the basis for the contention, the
6 specificity for the contention.

7 CHAIR KARLIN: We want to make sure we
8 have a real concrete issue to litigate that is not
9 just some vague "I hate nuclear plants" type of
10 contention.

11 MR. HAMRICK: Correct.

12 CHAIR KARLIN: This seems to be more than
13 that. It seems to be there's a specific problem here.
14 I don't know.

15 MR. HAMRICK: It's an inadequate statement
16 to simply say that the temperatures closely match. It
17 does not provide the threshold support needed.

18 MS. CARPENTIER: One minute.

19 MR. HAMRICK: And just in closing, I
20 suppose, I would like to second, if I may, the
21 statement that was made earlier about the reply and
22 how heat transfer calculation was provided in the
23 reply, assumes temperatures at an elevation of 280
24 feet and then assumes, performs the calculation
25 through the sand bed region even though the document

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1 provided by the State of Vermont in Entergy's May 15,
2 2006 letter, the very last page states that the sand
3 bed stops at the elevation of 238.

4 So I'm not challenging the performance of
5 the calculation, but the inputs appear to be, based
6 upon what the State of Vermont has provided us, the
7 inputs into the calculation appear to be facially
8 invalid.

9 JUDGE WARDWELL: So you don't believe
10 that's new evidence? You just say it's wrong
11 evidence.

12 MR. HAMRICK: I believe they selectively
13 cite sections from their own submittals.

14 MS. CARPENTIER: Time.

15 MR. HAMRICK: To provide that threshold
16 support.

17 Thank you.

18 CHAIR KARLIN: Thank you.

19 Mr. Roisman?

20 MR. ROISMAN: How much time do I have?

21 MS. CARPENTIER: You have nine minutes.

22 REBUTTAL ARGUMENT OF ANTHONY ROISMAN, ESQ.

23 ON BEHALF OF THE STATE OF VERMONT

24 MR. ROISMAN: Let me start with this first
25 question. Candidly, I don't know how it's happened,

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1 but neither the Applicant or the Staff have found in
2 Mr. Sherman's affidavit attached to the initial
3 petition, page 2, paragraph A that answers the
4 question "Did Mr. Sherman use his expert opinion to
5 conclude that the dry well temperature and the
6 temperature of the concrete would closely match?"
7 I'll read paragraph A.

8 "Since the normal environment maximum of
9 165 degrees Fahrenheit is above the cutoff limit of
10 150 degrees Fahrenheit, and since the concrete surface
11 behind the steel shell will closely match the dry well
12 ambient temperature, the statement at 3.5-8 of the LRA
13 is not accurate and reduction of strength and modulus
14 of concrete structures due to elevated temperature is
15 an aging effect requiring management."

16 So we have a qualified expert offering the
17 precise opinion that Entergy and the Staff say was not
18 offered by anybody in this case, number one.

19 Number two, that's not a conclusory
20 statement when it's made by someone who has mechanical
21 engineering and heat transfer background. It is an
22 opinion of an expert.

23 Number three, 309(f)(1)(iv) says provide
24 a concise statement of the alleged facts or expert
25 opinions. We have provided a concise statement of the

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1 expert opinions. When the issue was raised by the
2 Applicant and the Staff, I believe inappropriately,
3 saying well, you haven't provided enough, we went
4 ahead in the reply and provided the additional
5 information that underlay the expertise opinion. It
6 seems to me, as in any litigation that if the other
7 side opens the door, we're entitled to present the
8 evidence. They opened the door. They said that this
9 statement by an expert has no support. We provided
10 the support. So I think that the reply, if you feel
11 it necessary, is a reliable place to go and look for
12 the information.

13 Number four --

14 CHAIR KARLIN: I question whether that's
15 really the law here in the NRC proceedings. I really
16 think that a reply can respond to actual allegations
17 made in answer. If the answer says something which
18 you say is totally false, that's one thing. If the
19 answer says aha, the Petitioner failed to provide a
20 concise statement of the alleged facts or expert
21 opinions which supports their petition. And you say
22 ah, well, we'll fix that. We'll give you a concise
23 statement of the facts in your reply. That's not
24 kosher. I don't think you can do that.

25 MR. ROISMAN: And I don't believe that's

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1 what we've done. What they said was that Mr. Sherman
2 had no basis for the statement that he made. That was
3 a factual assertion by them. We provided them the
4 basis for his expert opinion, the basis here in the
5 non--

6 CHAIR KARLIN: You provided a concise
7 statement of alleged facts or expert opinion. You
8 provided a supplement and I think that's problematic,
9 but the question is whether the original petition was
10 sufficient.

11 MR. ROISMAN: I would like, however,
12 because it answers the question that Dr. Wardwell
13 asked as well, I would like to point out that looking
14 at the attachment 1 and this factual dispute that's
15 now raised by the Applicant and the Staff about where
16 does the sand level stop, that the chart or the
17 drawing which is a detail, in other words, it's
18 allegedly a representative of something or another and
19 not a comprehensive statement of the sand transition,
20 is at best an ambiguous drawing, the level of
21 information provided with the drawing is thin, but in
22 the text of the very same document at the bottom of
23 the first page, they make this statement: "above the
24 transition zone" about which there's no dispute -- the
25 transition zone is the place where the light bulb's

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1 roundness turns into the straightness, if I can use
2 nontechnical terms. "Above the transition zone
3 between the spherical and cylindrical portions" --

4 CHAIR KARLIN: Could I ask where are we?
5 Are we in the reply?

6 MR. ROISMAN: We're in the reply on the
7 first page of Exhibit 1 to the reply. Reply Exhibit
8 1 and actually when I say the first page, it's the
9 first page of the attachment that goes with the letter
10 that came from the Applicant to the Staff dated May
11 15, 2006.

12 CHAIR KARLIN: Thank you.

13 MR. ROISMAN: So at the very bottom under
14 VNPS primary containment design. Okay?

15 CHAIR KARLIN: Okay, okay.

16 MR. ROISMAN: "Above the transition zone
17 between the spherical and cylindrical portions, the
18 dry well is separated from the reinforced concrete by
19 a two-inch gap." The clear implication of that
20 statement is that it's not separated by a two-inch gap
21 below that point.

22 By the way, Dr. Wardwell, it then goes on
23 to say "this gap allows for dry well expansion."

24 So at a minimum, this document which
25 incidentally came into existence on May 15, 2006, so

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1 it comes into existence relatively late in this
2 process anyway, provides at least a factual issue
3 about whether or not the gap is present where we did
4 the measurement or whether there was sand present
5 where we did the measurement, but we think we had an
6 adequate basis to point to that.

7 Now Applicant then cites to an opinion
8 given by the Staff in another case with the
9 proposition that general area and specific area mean
10 something different than we suggested it means.
11 That's another factual dispute. I would submit that
12 the expert opinion of the Staff is just that, an
13 expert opinion. I would note that it was not
14 mentioned in the response that they had to our
15 contention, although the general area/specific area
16 question was sitting there like a ripe melon waiting
17 for someone to pick it, if they thought it was an
18 interesting issue.

19 And finally, with regard to this entire
20 issue, it seems to us that every one of the criteria
21 that the Commission has laid down for admissability of
22 the contention are met. The statement of our expert
23 was certainly concise. Applicant and Staff wanted
24 more. I do respect, Mr. Chairman, I don't think that
25 what we provided in the reply was a concise statement.

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1 It was a much more expansive statement, brought about
2 only by their challenge to the expert opinion.

3 And I think that the question in 6 which
4 the Applicant and Staff seem to not be sure whether 6
5 or 5 are applicable here, has to do with sufficiency.
6 I go back to the analogy to summary judgment.
7 Sufficiency would mean if we had offered the opinion
8 of someone who was not an expert at all. I think you
9 would be entitled to say well, that's insufficient.
10 Even though it's an expert opinion, it's insufficient
11 because that person has no expertise on the subject
12 that they're offering an opinion on.

13 CHAIR KARLIN: Don't you agree --

14 MS. CARPENTIER: One minute.

15 CHAIR KARLIN: -- with Entergy that the
16 criteria for motions for summary disposition are more
17 stringent than the criteria for admission of
18 contentions?

19 MR. ROISMAN: I do, but I think that in
20 this case even if it were the summary judgment
21 standard that we would have met that.

22 CHAIR KARLIN: Okay.

23 MR. ROISMAN: Lastly, I'm concerned by the
24 Applicant's position --

25 CHAIR KARLIN: I think that's time. Was

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1 that time?

2 MR. ROISMAN: No, she --

3 CHAIR KARLIN: Okay, one minute.

4 MR. ROISMAN: I'm concerned by the
5 Applicant's position that says well, we can't give you
6 an affidavit or submit any documents because that
7 would be challenging on the merits which we're not
8 allowed to do, but what we can do is we can offer the
9 opinion of lawyers who with all due respect went into
10 law because they didn't understand science and at
11 least we have one lawyer from the Staff concede that
12 he's not sure whether this is a thermos bottle or a
13 containment vessel.

14 CHAIR KARLIN: Do you include yourself in
15 that category?

16 MR. ROISMAN: Absolutely, absolutely.
17 That's why I have an expert sitting next to me.

18 CHAIR KARLIN: All right.

19 JUDGE ELLEMAN: Does he pour your coffee
20 also?

21 MR. ROISMAN: Yes, exactly. So what we
22 have is a situation in which the Applicant is trying
23 to hide behind well, we don't want to make a merit
24 statement, but we still want you to accept what we're
25 telling you is true.

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1 Under this record, the only thing that's
2 true is the sworn affidavit of Bill Sherman, an expert
3 on the subject which is this contention. That, I
4 think, trumps anything else on this contention.

5 Thank you.

6 CHAIR KARLIN: Okay, any questions? All
7 right, thank you.

8 Let's move to Vermont contention 3 then.
9 Again, you have 20 minutes, Mr. Roisman. And how
10 would you like to allocate that, the same way?

11 MR. ROISMAN: Yes, I would like to do the
12 same, if I may.

13 CHAIR KARLIN: Okay, so we'll go with
14 what?

15 MR. ROISMAN: Ten minutes, but we can eat
16 into that as much as your questions warrant.

17 ORAL ARGUMENT OF ANTHONY Z. ROISMAN, ESQ.

18 ON BEHALF OF THE STATE OF VERMONT

19 MR. ROISMAN: So the third contention, let
20 me start by saying that I agree there's a problem with
21 contention 3, but I believe it's a problem that we
22 cannot solve sufficiently within the context of
23 contentions and the seriousness of the safeguards
24 restrictions that are imposed by the Nuclear
25 Regulatory Commission and that we take very seriously.

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1 One member of this team that you see in
2 front of you has security clearance sufficient to
3 actually know what are the safeguards of the plant.
4 Neither Ms. Hofman nor I have a security clearance at
5 this point. Therefore, Mr. Sherman cannot even tell
6 me what the specific pieces of the safeguard system
7 are that are vulnerable to deterioration over time and
8 whose failure might lead to the failure of safety-
9 related equipment as a result of allowing a terrorist
10 to get past what should have been a barrier of some
11 kind or a preventive measure and get to a safety
12 system at the reactor.

13 So almost inherently contention 3 lacks
14 the kind of specificity that we would normally expect,
15 that you would have expected and we provided you on
16 contention 1 or contention 2.

17 That said, I think that it would
18 celebrating form over substance if that were to
19 produce an inadmissability of a contention, which
20 cannot be understated.

21 CHAIR KARLIN: let me ask with this
22 problem, are there solutions? I mean isn't there,
23 rather than just sort of saying well, I can't be
24 specific, don't you have options that you should
25 pursue with us or with the Commission?

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1 MR. ROISMAN: We do have options, but
2 we're working under a 60-day time frame. What would
3 need to happen, what we will do, if this contention is
4 admitted or if the Board rules in some way that
5 requires this, Ms. Hofman and I will have to get a
6 security clearance from the Nuclear Regulatory
7 Commission so that we can communicate with Mr. Sherman
8 and then we would have to file all of our
9 substantively specific pleadings with the Board under
10 those kinds of restrictions, serving them only on
11 those people in the proceeding who have demonstrated
12 that they have similar security clearance. I don't
13 even know, for instance, if the Applicant's lawyers
14 have these clearance. I assume that at least some of
15 their technical people do.

16 But some of that detail may be somewhat
17 unnecessary. We don't have to know the specifics to
18 know that there are mechanical pieces of equipment and
19 that there are operating pieces of equipment and that
20 there are physical barriers of various kinds, that
21 must be part of the security system. We can just
22 imagine the security system in our own homes where we
23 have motion detectors, if it is very sophisticated,
24 and we have alarms and we have systems that call the
25 police or call the security company to tell them to

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1 come and so forth and so on.

2 All of those things and things I'm sure
3 vastly more sophisticated than that are vulnerable to
4 aging over time. Which is why you pay someone, if you
5 have a system like that in your home, to come out and
6 do maintenance once a year or so to make sure that
7 everything is in working order.

8 JUDGE WARDWELL: Well, isn't the
9 performance of this security equipment required as
10 part of operational maintenance? I mean, your 73.55
11 says it's got to be maintained. So what is the
12 problem?

13 MR. ROISMAN: Absolutely. 73.55 applies
14 to every single component that is significant in the
15 plant including these. Notwithstanding that, the GALL
16 report extends a special age management review to
17 systems whose aging effects may be impacted by the
18 license extension.

19 So the NRC already recognizes that the
20 normal maintenance that has to be done on every
21 nuclear plant for all of its safety related and some
22 nonsafety related equipment isn't in and of itself
23 sufficient.

24 We have the GALL Report and all of its age
25 management special provisions to deal with these

1 license extensions. Our argument here is that the
2 relevant portions of the security and safeguards
3 systems at this plant should fall under that
4 heightened, more detailed, more specific age
5 management review. We don't doubt that those systems
6 are now meeting 73.55. But so are every other piece
7 of equipment that the Applicant is required by
8 regulation to apply the GALL and age management review
9 procedures to. So that's the crux of the argument
10 that we're making about these pieces of equipment.

11 JUDGE ELLEMAN: Is your concern focusing
12 perhaps on new equipment that has been added given the
13 new security requirements rather than systems that
14 have been operating for decades and checked for
15 decades and monitored on a continuing basis?

16 MR. ROISMAN: Not necessarily. That is
17 some of the older systems, which like the older safety
18 systems in the plant, have been operating under 73.55
19 that now have to meet age management review
20 requirements, so too for safety equipment. So all
21 safety and safeguards equipment that may not be
22 supplemented with newer and sophisticated safeguards
23 equipment is equally relevant to this. I confess it
24 is difficult for me because I'd love to try to give
25 you a specific example, and Mr. Sherman appropriately

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1 has said I can't give you one and you shouldn't have
2 and we shouldn't talk about it in a public setting.

3 But I think that it is a reasonable
4 assumption that is sufficient for purposes of getting
5 the contention admitted that there are going to be
6 some of those systems that are just as vulnerable to
7 aging and requiring the heightened age management
8 review as are safety systems, or nonsafety related
9 systems that may impact safety related systems that
10 are already going to be covered by age management.

11 CHAIR KARLIN: Could you address the issue
12 Entergy has raised, Staff as well, as 50.44(a)(2)?
13 Whether or not these are covered under the scope of
14 the aging management review covers safety related,
15 that's 50.44(a)(1) and then nonsafety related systems
16 whose failure could prevent satisfactory
17 accomplishment of any of the functions. And there's
18 a question there, you know, how direct that must be.

19 MR. ROISMAN: Well, and I agree. There's
20 a question there as to how direct that must be. But
21 we don't have an authoritative answer on that
22 question. I can't imagine anything more direct if I
23 might hypothesize a group of determined terrorists
24 getting through an improperly age managed piece of
25 protection and reaching a piece of safety related

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1 equipment with the clear intent of doing it damage.

2 I don't know anything that would be more
3 direct than that kind of damage. And the way that
4 terrorist is prevented from reaching that piece of
5 equipment is by a piece of safeguards or several
6 pieces of safeguards equipment which have not been
7 properly age managed.

8 And in addition, the recent decision of
9 the Ninth Circuit, Mothers for Peace, that you've
10 already discussed earlier today, says that since 9/11,
11 considerations of safeguards is heightened and needs
12 to be considered in the licensing process. We're not
13 suggesting that the Mothers for Peace decision
14 directly bears on this, but it illustrates a reality
15 which is that after 9/11, the world changed.

16 CHAIR KARLIN: Well, but Mothers for Peace
17 is a NEPA decision. It's not a safety decision. In
18 fact, the interesting thing is the reverse of Mothers
19 for Peace says --

20 MS. CARPENTIER: One minute.

21 CHAIR KARLIN: -- if the Commission is
22 going to take terrorists' threats so seriously on the
23 safety side, then it needs to take them at least
24 somewhat seriously on a NEPA side. And you're going
25 back to the safety side I think here. This is a

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1 safety contention.

2 MR. ROISMAN: Right. Well, and the point
3 is that in this particular instance, at least the
4 Applicant, we don't what the Staff's substantive
5 position on this will be, the Applicant is not taking
6 this security issue seriously by not putting these
7 safeguard measures under the heightened age management
8 review process. And that's what we're seeking, to
9 have them put in that category.

10 Just to summarize, if the contention is
11 admitted and hopefully approved, it's a process -- you
12 don't automatically get it, for security clearance
13 sufficient to see the safeguards material --

14 MS. CARPENTIER: Time.

15 MR. ROISMAN: And we'll be able to submit
16 the information to the Board under the appropriate
17 seals that are dictated in the Commission's
18 regulations for consideration of those kinds of
19 issues.

20 Thank you.

21 CHAIR KARLIN: Okay, thank you. Mr.
22 Lewis?

23 ORAL ARGUMENT OF DAVID LEWIS, ESQ.

24 ON BEHALF OF ENTERGY

25 MR. LEWIS: Thank you. This issue

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1 involves the scope of equipment that must be managed
2 under part 54 and in particular under 54.4 and here
3 we're not working in a vacuum. There's a specific
4 Commission statement when the rule was promulgated
5 explaining that safeguards equipment is not within the
6 scope of license renewal.

7 The Commission stated age-related
8 degradation of safeguards equipment is not a license
9 renewal issue because it's an issue that's being
10 currently experienced and managed. This is at NUREG
11 1412 at page 13-11.

12 And specifically, the Commission said
13 because of the general performance objectives the
14 requirements in 10 CFR 73.55(a) and the site-specific
15 commitments contained in individual security plans,
16 normal inspection activities will force the
17 replacement of the graded equipment or subject the
18 licensee to enforcement action.

19 CHAIR KARLIN: Are you reading from your
20 brief --

21 MR. LEWIS: I was --

22 CHAIR KARLIN: -- that I can follow?

23 MR. LEWIS: The quote, yes.

24 CHAIR KARLIN: Okay. But is it from your
25 brief? Do you have a page?

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1 MR. LEWIS: Yes, it's on page 25 of the
2 Answer.

3 CHAIR KARLIN: Okay.

4 MR. LEWIS: Similar statements were made
5 in the Federal Register notice with the promulgation
6 of this rule. In essence, the Commission has stated
7 that -- and very explicitly -- that security equipment
8 is simply not within the scope of equipment that has
9 to be examined in the license renewal proceeding,
10 because they have confidence based both on the rule
11 and on what they know is in security plans, and I
12 don't.

13 But I go on what the Commission says, that
14 the specific commitments that are required in those
15 security plans, plus the requirements of the rule,
16 provide adequate assurance that security equipment
17 will perform its intended function.

18 Now, the state is trying to use an
19 indirect provision to bring into scope equipment that
20 the Commission has stated has been explicitly
21 excluded. I would agree with the state that there is
22 some question about how direct versus indirect it
23 needs to be, but I would say it's easy to draw the
24 line where the Commission has said, "This equipment is
25 out." And I think it would be inappropriate to use an

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1 indirect provision to bring into scope equipment that
2 the Commission has specifically said is outside of
3 scope.

4 CHAIR KARLIN: Is, for example, the
5 strength of a concrete ballard or other thing, is that
6 covered in day-to-day operational current licensing
7 basis over 40 or 60 years?

8 MR. LEWIS: Are you talking about secure
9 barriers? No. I mean --

10 CHAIR KARLIN: Yes. If there's a security
11 type of barrier made of concrete, it gets old I guess
12 over the years. Can it age? Can it become less
13 strong? Is that covered in the current licensing
14 basis, that the concrete has to be replaced every 10
15 years or something?

16 MR. LEWIS: I don't know what the
17 specifics are. I have asked the security folks at
18 Vermont Yankee. I'm not safeguards cleared, so I
19 don't know the specifics. I am told that there is
20 specific aging management requirements in the security
21 plan for those barriers, but I do not know what they
22 are.

23 CHAIR KARLIN: I mean, these are the
24 passive type of things that are more akin to the aging
25 management area in general. But you're saying it's

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1 covered otherwise by the current licensing basis.

2 MR. LEWIS: Again, I don't know all of
3 what is covered. I --

4 CHAIR KARLIN: Okay.

5 MR. LEWIS: -- for --

6 CHAIR KARLIN: No. I'm not asking you to
7 testify or anything. If you don't know, you don't
8 know.

9 MR. LEWIS: Well, I was trying very hard
10 not to go beyond what is inappropriate to say.

11 CHAIR KARLIN: Absolutely.

12 MR. LEWIS: But what I do know
13 specifically is that the Commission, in excluding this
14 equipment and explaining why it was excluded, said
15 there are specific commitments in security plans, and
16 those, plus the general performance objective, is good
17 enough to manage that equipment. And for that reason
18 they did not include it within scope.

19 They did provide a number of examples of
20 the sorts of things that are included within scope
21 under the 54.482 criteria. This is the class of non-
22 safety-related equipment whose failure could cause a
23 safety-related piece of equipment to not perform its
24 functions.

25 The examples they give are all physical

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1 interactions. They are what's known as seismic two
2 over one. An example where a piece of pipe of a non-
3 safety-related system is located above a safety-
4 related system. And if an earthquake -- it falls it
5 could literally physically impact that safety-related
6 equipment.

7 CHAIR KARLIN: Right. Well, let me ask on
8 that. I mean, that's page 26 of your brief. And I
9 was struck by something, because you quote -- you have
10 a quote there on the Statement of Consideration
11 talking about seismic qualified equipment located near
12 non-seismic qualified equipment, and, you know, how an
13 earthquake could cause a problem that could trigger a
14 problem in I guess the non-safety-related and the
15 safety related.

16 And in the next sentence you say,
17 "Obviously, the failure of a security system has no
18 direct effect on whether a safety-related system would
19 fail. Rather, the effects would be caused by an
20 intervening event." Now, that's what I didn't
21 understand, because in seismic the fact that a
22 structure is seismically in poor shape is not a
23 problem until you have an intervening event, an
24 earthquake. And then, all of a sudden it's important.

25 Likewise, if you have a safety system

1 that's weak in some regard, it's not a problem until
2 there's an intervening event, i.e. some terrorist
3 tries to get in there and break through the window or
4 the concrete. So aren't they both intervening events?
5 Isn't an earthquake an intervening event? Isn't a
6 terrorist attack an intervening event?

7 MR. LEWIS: You can call them intervening
8 events. What I really meant by that statement is if
9 there is a security barrier and it falls down, it
10 fails, it's not going to have any direct automatic
11 effect. It requires, at the same time, that there be
12 some opponent force who right at that moment breaches
13 the plant and then performs an act of malice. And I
14 simply --

15 CHAIR KARLIN: Sort of a subsequent event.

16 MR. LEWIS: It's not analogous to a
17 situation where a pipe falls and directly impacts a
18 piece of safety-related equipment, or where some
19 necessary support system like cooling water fails and
20 causes a safety-related piece of equipment to --

21 JUDGE WARDWELL: Yes, but --

22 MR. LEWIS: -- not perform its functions.

23 JUDGE WARDWELL: -- seismically-designed
24 facilities have aging management plans, correct? The
25 same with fire barrier types of systems and

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1 components, correct?

2 MR. LEWIS: This class of equipment -- the
3 two over one equipment is subject to aging management
4 specifically for that reason, because if it fell it
5 would impact safety-related equipment, yes.

6 JUDGE WARDWELL: But it would only fail
7 if, in fact, an earthquake or a fire occurred. So it
8 has the same type of intervening event, it seems to
9 me, that terrorism does.

10 MR. LEWIS: Well, there are other
11 potential interactions. You could also have pipes
12 that carry fluid, which if they cracked and leaked
13 could drain down fluid on the piece of safety-related
14 equipment and cause it to short out.

15 JUDGE WARDWELL: Yes, I'm not talking
16 about those. I'm talking about the other ones that
17 are required -- the seismically-designed ones are part
18 of aging management. Those seismically-designed SSCs
19 require an intervening event for something to happen.

20 Therefore, to exclude the security ones
21 because it needs an intervening event seems a
22 contradiction between what is at least one or two
23 examples that require intervening events that do have
24 aging management -- that is, fire barriers and
25 seismically-designed.

1 MR. LEWIS: I'm just pointing out that the
2 scenario that the state postulates is different from
3 the types of examples that the Commission gave on this
4 A2 criteria that unlike these other events that, yes,
5 you have an accident initiator, that causes a failure
6 and as a result creates the potential for a piece of
7 non-safety-related equipment to impact the safety-
8 related equipment.

9 In the scenario that the state posits,
10 you're talking about an outside human force coming in
11 and causing acts of malice. And I just think that's
12 a very different situation from all the examples the
13 Commission gave when it described what A2 was meant to
14 cover.

15 Again, I think the most important point to
16 observe is that the Commission has explicitly stated
17 this equipment is outside scope, because it's already
18 adequately managed under 73.55(g) and the commitments
19 in the security plan. And, therefore, when you --
20 when you're trying to figure out where to draw the
21 line under the A2 criterion I get -- there is line
22 drawing, I agree.

23 As I said before, I think there is a
24 question of where you draw the line on this provision.
25 But I think it's easy to draw the line with equipment

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1 when the Commission has said this equipment is outside
2 scope, because we're confident it is already managed
3 and we're confident that it's already managed, because
4 not only in the performance objective in 73.55(g),
5 because of the specific commitments that we, the
6 Commission, know are in security plans.

7 CHAIR KARLIN: All right.

8 MR. LEWIS: That's it.

9 CHAIR KARLIN: Any other questions?

10 (No response.)

11 Thank you.

12 Mr. Hamrick?

13 ORAL ARGUMENT OF HAMRICK, ESQ.

14 ON BEHALF OF THE NRC STAFF

15 MR. HAMRICK: Thank you. First of all,
16 I'd like to reiterate that the Commission has stated
17 on four -- at least four separate occasions that
18 issues with respect to security are not within the
19 scope of license renewal. They stated it in the 1991
20 final rule, in the 1995 final rule. The Commission
21 stated it in the adjudicatory proceedings as well, in
22 the McGwire Catawba renewal, as well as in the
23 Millstone renewal.

24 In the Millstone renewal, they said -- and
25 I quote -- "We want to emphasize that security issues

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1 at nuclear power reactors, while vital, are simply not
2 among the aging-related questions at stake in a
3 license renewal proceeding." The reason for this, as
4 was alluded to earlier, is the existence of 73.55(g).

5 In a 1995 final rule, the Commission
6 stated that where the design bases of systems,
7 structures, and components can be confirmed, either
8 indirectly by inspection or directly by verification
9 of functionality through test or operation, a
10 reasonable conclusion can be drawn that the CLB,
11 current licensing basis, is or will be maintained.

12 And if you'll look at 73.55(g), that's
13 exactly what it does. It requires that all alarms,
14 communication equipment, physical barriers, and other
15 security devices shall be maintained in an operable
16 condition. That meets what the Commission stated in
17 the 1995 final rule.

18 It also -- it goes further than the
19 Commission requires for license renewal purposes and
20 states that they must also take compensatory measures
21 in the event of a failure.

22 The counsel for the State of Vermont
23 brings up the Mothers for Peace case to indicate that
24 perhaps the Commission has -- is -- has this rule that
25 security is not within the scope of license renewal,

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1 just because we don't want to address it, and that's
2 certainly not the case.

3 As we can see by 73.55, the Commission has
4 addressed it, and this is completely opposite of the
5 Mothers for Peace case, where the allegation in that
6 case was that we had not addressed security and
7 terrorism in the guise -- I'm sorry, for that
8 particular spent fuel installation.

9 Here there is no allegation with respect
10 to NEPA, as you've indicated earlier.

11 Counsel for Vermont also used the magic
12 phrase "if I might hypothesize." This hypothetical is
13 exactly what the Commission stated also in the
14 Statement of Consideration from 1995. 54.4(a)(2) that
15 -- is not about -- on page 22467 of Volume 60 of the
16 Federal Register, the Commission stated the same
17 sentence twice, once in the middle column and once on
18 the right-hand column, that the consideration of
19 hypothetical failures that could result from system
20 interdependencies that -- and then it italics "are not
21 part of the CLB, and that have not been previously
22 experienced is not required." That's twice on the
23 same page they say, "We're not talking about
24 hypotheticals here. We're talking about system
25 interdependencies that are part of the CLB."

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1 So you can't just come up with your
2 hypothetical failure of the day and have that provide
3 the threshold support for the contention.

4 JUDGE WARDWELL: On page 20 of your
5 answer --

6 MR. HAMRICK: Yes.

7 JUDGE WARDWELL: -- the last paragraph
8 down, I got a bit confused, and specifically about the
9 third sentence -- full -- one, two, three, four, five
10 lines down, the sentence that starts, "The integrated
11 plan assessment of Section 54.21 only requires that
12 for those SSCs within the scope of 54.4 the applicant
13 -- application identify and list those structures/
14 components subject to aging management review."

15 By terms of Section 54.21 not all within
16 the scope of 54.4 are subject to aging management
17 review. Are you saying that the IPA requires an
18 application to identify those structures and
19 components subject to it, but that 54.21 doesn't
20 require that you actually complete the aging
21 management review? I didn't understand those
22 sentences.

23 MR. HAMRICK: That was probably a little
24 unclear. I apologize for that. The --

25 JUDGE WARDWELL: No, it was a lot unclear.

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1 (Laughter.)

2 MR. HAMRICK: Okay. Well, the point that
3 I unartfully attempted to make was that because the
4 Commission, on four separate occasions, has stated
5 clearly and without reservation that security issues
6 are not within the scope of license renewal, that even
7 if you could make some hypothetical discussion under
8 54.4(a)(2) basically we don't need to go there.

9 JUDGE WARDWELL: I see. Let me ask you
10 this, then. Are the requirements of 73.55(g) on a
11 level comparable to 54.21?

12 MR. HAMRICK: Well, again, that's going to
13 get into a -- if you want specifics, I'm not -- I'm
14 not the one who can --

15 JUDGE WARDWELL: Okay. Thank you.

16 MR. HAMRICK: -- can give to you. But I
17 can say on a general basis what 73.55(g) does is it
18 first requires the licensees to maintain the equipment
19 in an operable condition; and, second, requires the
20 licensees to develop and employ compensatory measures,
21 including backup systems basically, to assure the
22 effectiveness of the security system.

23 And that's basically what any proper plan
24 would include -- maintain it, make sure it works, and
25 provide backup in the event that it doesn't work.

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1 CHAIR KARLIN: How do you decide whether
2 a concrete wall is operable condition or have a backup
3 to it, you know?

4 MR. HAMRICK: I -- there would be testing,
5 I would assume.

6 CHAIR KARLIN: Oh, okay.

7 MR. HAMRICK: But that -- I cannot answer
8 that question.

9 But if -- I don't have anything else at
10 this point other than just to reiterate --

11 CHAIR KARLIN: Okay.

12 MR. HAMRICK: -- our findings. Thank you.

13 CHAIR KARLIN: All right. Thank you.

14 Any other questions at this point? No?

15 (No response.)

16 Okay. Mr. Roisman, rebuttal? Do we have
17 rebuttal now? Okay.

18 REBUTTAL ARGUMENT OF ANTHONY ROISMAN, ESQ.

19 ON BEHALF OF THE STATE OF VERMONT

20 MR. ROISMAN: Yes. Thank you, Mr.
21 Chairman. Where to begin. All right.

22 CHAIR KARLIN: What do we do about all of
23 these cases and these regs that say you can't consider
24 this sort of thing in aging management? It seems like
25 they've got a lot of law to cite there. You'd better

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1 read it.

2 MR. ROISMAN: Yes, they do, and you
3 should. And I think what you will find is that
4 they're not really addressing the specific issue that
5 we're talking about. We are not asking that the Board
6 here make a safeguards review of this plan. We're not
7 challenging the adequacy of the safeguards measures
8 that are in place at Vermont Yankee. We're not
9 challenging the adequacy of the NRC's regulations
10 regarding safeguards.

11 What we are saying is that to the extent
12 there are safeguards systems in place, age management
13 review requires more attention to that piece of
14 equipment than would be required under 73.55. And we
15 discuss that in -- on page 44 of our reply brief and
16 point out the difference between, for instance,
17 73.55(g)(1) that requires only that all alarms,
18 communication equipment, physical barriers, and other
19 security-related devices or equipment shall be
20 maintained in operable conditions, which is something
21 functionally equivalent to say that the applicant
22 shall do good, love mercy, and walk humbly with God.

23 It does not give them any specific
24 guidance, as compared to what you would find if you
25 went to 54.21, for instance under 10 CFR 54.21(a)(3)

1 for vehicle barriers, bullet-resistant enclosures, and
2 other similar equipment, the applicant would have to
3 "demonstrate the effects of aging will be adequately
4 managed, so that the intended functions will be
5 maintained consistent with the CLB for the period of
6 extended operation." Now, we submit that those are
7 two different standards.

8 Assume for a moment that the applicant and
9 staff are right that they're the same standards.
10 Then, what's the problem? Why don't they say in their
11 environment -- in their UFSAR, "We're going to comply
12 with the age management review requirements and 73.55
13 with regard to all of the relevant security
14 equipment"?

15 If there were no difference, why are they
16 wasting your time about this? They acknowledge that
17 there's a difference. It's going to take more work.
18 It's going to take more attention. And we submit that
19 after 9/11 it deserves more work and more attention.

20 Now, most of what they cite --

21 CHAIR KARLIN: Let me focus on that if I
22 may. I mean, I thought the whole point of this
23 license renewal regs as the Commission has written
24 them is to say there is such a thing called the
25 current licensing basis, and this deals with

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1 operational activities that go on from day to day, and
2 that is not the subject of the license renewal
3 proceedings.

4 MR. ROISMAN: Correct.

5 CHAIR KARLIN: And they seem to further be
6 saying I guess that the safeguards issues are part of
7 the current licensing basis. I guess that's what
8 they're saying here, and, therefore, they don't need
9 to be addressed. And you say, "Well, if they've got
10 nothing to hide, why don't they address them here"?
11 And we say, "Well, then they'd have to start
12 addressing everything that's in the current licensing
13 basis."

14 MR. ROISMAN: No, because --

15 CHAIR KARLIN: Just to make you feel
16 better.

17 MR. ROISMAN: No, but that's not the
18 point. Our point is that it's inherent from the way
19 they're conducting themselves that they recognize that
20 if they were under age management review they would
21 have to give more attention to the management and age
22 management of this equipment than they would have to
23 give under the current licensing basis for this
24 equipment.

25 So there is a difference, and that's --

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1 that's my point. In other words, there is a
2 difference here, and we wouldn't be fighting about
3 this if it weren't the case.

4 JUDGE WARDWELL: So the heart of your
5 contention, really, is that 73.55(g) is not on a part
6 with 54.21 in some instances.

7 MR. ROISMAN: Exactly. And the
8 illustration on page 44 is just -- in our reply is
9 just an example of where we see that substantive
10 difference.

11 The second thing is is that the language
12 of 54.4 clearly encompasses the kind of things that
13 we're talking about. The applicant has hypothesized
14 for you a situation in which some security-related
15 barrier falls down, and then a second event occurs --
16 namely, terrorists show up at the plant fortuitously
17 just after the barrier fell down.

18 I submit the better hypothetical is assume
19 the barrier we're talking about is a door, and it's a
20 door that is designed to keep terrorists out. It's
21 got all the special protections, whatever those might
22 be that make it very hard to get through it. But the
23 door has aged in a way that makes it more vulnerable
24 to the terrorist's initial attack, so the barrier is
25 knocked down by the door, much like the barrier is

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1 knocked down by the earthquake.

2 What is the natural direct consequence of
3 that? The terrorist has gained access to a place that
4 they're not supposed to get to.

5 Now, are these threats hypothetical? When
6 the Commission wrote most of the language that was
7 being cited here, and, admittedly, in their subsequent
8 cases, we were all pre-9/11. That was 1991. The
9 probability of these events were deemed remote. The
10 world changed. We all know now that those
11 probabilities were miscalculated then.

12 If we had had today's pressures on 9/10,
13 we might not have had 9/11. So now the question is:
14 what should we do in light of that 9/11 situation? I
15 submit that the Commission's regulation 54.4 includes
16 anything that has a direct impact, and that the only
17 thing that kept security equipment out of it before
18 was the argument that the applicant has made here.

19 It's not direct because it's so remote, so
20 unlikely that the event -- a) the terrorist showing up
21 -- is going to occur that it's not sufficiently in our
22 -- in our can that we should be concerned with it.
23 Now that has changed. Now we know --

24 CHAIR KARLIN: Well, now, wait a second.
25 As we talked about San Luis Obispo's Mothers for

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1 Peace, it seems to me in the safety area that the
2 Commission has done a number of things to respond to
3 9/11. I'm not sure whether they're in everyone's eyes
4 totally adequate, but they have taken quite a few
5 measures in the safety area, not the NEPA area, but
6 the safety area, and they have not said, "Oh, it's so
7 remote it will never happen." It's remote and
8 speculative. It's not something we need to worry
9 about.

10 To the contrary, they've done a lot of
11 things on the safety side, the Atomic Energy Act side
12 of the house, on terrorist issues. Now, maybe they
13 haven't deal with the airplane attack, but they've
14 dealt with ground-based attacks. And so for you to
15 say they've said it was too remote and speculate to
16 worry about on the safety side, I don't think that's
17 quite accurate.

18 MR. ROISMAN: I'm sorry. If I left that
19 impression, I left the wrong impression.

20 CHAIR KARLIN: Okay.

21 MR. ROISMAN: I was talking about the
22 aging question.

23 CHAIR KARLIN: Okay. All right.

24 MR. ROISMAN: Yes. What has happened is
25 is that the Commission has upped these security

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1 systems, and they have now made them more important
2 based upon a recognition that there is a direct
3 relationship between a plausible terrorist attack on
4 the one hand and a failure of safety systems on the
5 other. That, we submit, triggers the language in 54.4
6 that says that you're supposed to be doing your age
7 management under 54.21 for anything that indirectly
8 may impact on the performance of safety systems. So
9 our position --

10 CHAIR KARLIN: So all of the authorities
11 that they've cited are pre-9/11, and so 9/11 changed
12 everything?

13 MR. ROISMAN: No. I would like to say
14 that they're decided either just before or just after.
15 There's a 2001 case -- I can't tell from this cite,
16 and I don't remember whether it's pre- or -- I think
17 that was Millstone, which was reconsidered, but I
18 don't know on what issue, in 2002. And then, there's
19 the Catawba case, which is 2002.

20 So those two cases are decided after, but
21 I believe that those cases do not stand for the
22 proposition which we're urging --

23 MS. CARPENTIER: One minute.

24 MR. ROISMAN: -- which is not that the
25 Board reconsider the probability of a terrorist

1 attack, the adequacy of the safety measures that are
2 laid down in place, but only the narrow question
3 whether or not whatever safety systems are in place to
4 deal with a terrorist attack need to be under age
5 management review. And that's the issue that
6 contention 3 is focused on.

7 We want to make sure that all of the
8 upgrading of security that 9/11 warrants is put into
9 place, including the application of 54.4, and through
10 it the application of 54.21.

11 Thank you.

12 CHAIR KARLIN: Thank you. Any questions
13 from the --

14 (No response.)

15 Okay. I think, if I understand it
16 correctly, we have finished with the State of
17 Vermont's three contentions. And we will take a break
18 right now for about, oh, 15 minutes. Let's reconvene
19 at 10 after. Maybe that's a little less, but 10
20 after, when which we'll take the New England
21 Coalition's contentions, start with Mr. Shems. All
22 right?

23 Thank you.

24 (Whereupon, the proceedings in the
25 foregoing matter went off the record at

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1 2:57 p.m. and went back on the record at
2 3:15 p.m.)

3 CHAIR KARLIN: Please be seated.

4 All right. Now we will turn to the New
5 England Coalition. Mr. Shems, Ms. Tyler, you have six
6 contentions. Our plan I guess -- we might as well
7 talk about it a little bit here -- is to ask you to
8 address two of them this afternoon. That will be
9 about 45 minutes each, total an hour and a half, and
10 then probably adjourn around 4:30, 4:45 for the day.

11 We could go a little bit further, and I'm
12 open to suggestions. But I think we'll have -- be
13 able to finish the four other ones tomorrow in the
14 morning, in the first half of the day anyway,
15 particularly if we convene a little bit earlier
16 tomorrow morning, possibly at 8:30. If that's
17 acceptable to everyone, that's what we would plan to
18 do. Might avoid the heat of the day in the afternoon
19 tomorrow afternoon if we can get it done. Okay?

20 MR. SHEMS: That's fine with us.

21 CHAIR KARLIN: Great. Speak close to the
22 mike. You have, what, 20 minutes on your contention
23 number 1. How do you want to allocate your time, sir?

24 MR. SHEMS: I'd like to have seven minutes
25 for rebuttal, please.

1 CHAIR KARLIN: Seven for rebuttal. All
2 right. Proceed.

3 ORAL ARGUMENT OF RONALD SHEMS, ESQ.

4 ON BEHALF OF THE NEW ENGLAND COALITION

5 MR. SHEMS: Thank you. It's a pleasure to
6 be here. Thank you to members of the Board, Your
7 Honors --

8 CHAIR KARLIN: Speak into the mike,
9 please. It's not very --

10 MR. SHEMS: Please remind me to speak up,
11 because I tend to have a soft voice anyways, and this
12 makes it that much --

13 CHAIR KARLIN: Can everyone hear?

14 JUDGE WARDWELL: I don't think the mike is
15 picking up.

16 MR. SHEMS: I feel like a rock star.

17 (Laughter.)

18 CHAIR KARLIN: Don't worry about it.

19 MR. SHEMS: Do you know "Feelings"? Stop
20 me if I lapse into song here.

21 (Laughter.)

22 Well, again, thank you. I will be
23 handling contention number 1, and my associate, Karen
24 Tyler, will be handling the remaining contentions.

25 Starting with contention number 1, I'd

1 like to remind the Board of the standard that we're
2 dealing with, that it's a minimal showing of the
3 material, factual, or legal issue, and I believe that
4 we amply meet that standard.

5 Going down through the criteria of
6 2.309(f)(1), number 1 is the --

7 CHAIR KARLIN: Please, you're really going
8 to need to speak up, if you would.

9 MR. SHEMS: Okay. Number 1, the specific
10 statement requirements -- are specific statement of
11 the contention is whether Entergy's environmental
12 report sufficiently assesses the impacts of the
13 increased thermal discharges from now through the end
14 of the requested 20-year extended license term. In
15 terms of number 2 -- and that can be found on page 13
16 of our contentions.

17 Criterion 2, a brief explanation of the
18 basis. Our basis derives mainly from deficiencies in
19 Entergy's environmental report. There was no
20 assessment of the cumulative impacts. And the record
21 remains as is; there is no assessment of the
22 cumulative impacts, and that's required.

23 Subpart 3, is it within --

24 CHAIR KARLIN: Well, let me just stop you
25 there. Page 10 -- is it page 10? I don't know. I'm

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1 trying to find your contention. I'm sorry. What page
2 are you on for -- where does your contention begin?
3 What page does the discussion of that begin --

4 MR. SHEMS: On page 10.

5 CHAIR KARLIN: Page 10. All right. I'm
6 sorry. Page 10, you have there: 1) Contention 1,
7 Entergy failed to assess impacts to water quality. Is
8 that your contention?

9 MR. SHEMS: Yes, and it's more
10 specifically stated on page 13, where I run through
11 the criteria and provide --

12 CHAIR KARLIN: Okay.

13 MR. SHEMS: -- a specific statement.

14 CHAIR KARLIN: Okay. But if we were to
15 admit your contention, would -- what would it -- how
16 would it read? It would read, "Entergy failed to
17 assess impacts to water quality."

18 MR. SHEMS: "The cumulative impacts of the
19 increased thermal discharges from now through the end
20 of the requested 20-year extended license term."

21 JUDGE WARDWELL: So what you have written
22 on page 15 is your elaborate -- is your true
23 contention, in that what is printed on page 10 is
24 merely the title of that section?

25 MR. SHEMS: Yes.

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1 JUDGE WARDWELL: That's what you follow
2 all through with all six of your contentions?

3 MR. SHEMS: Some are more specific than
4 others. It depends on whether or not we could fit it
5 into a heading and --

6 CHAIR KARLIN: Well, wait a second. So
7 where is the contention?

8 MR. SHEMS: On page 13.

9 CHAIR KARLIN: Page 13. I see it. Where?
10 I mean, are we supposed to dig out from somewhere in
11 this page what your contention is?

12 MR. SHEMS: I run through the criteria and
13 cite 2.309(f)(1)(i).

14 CHAIR KARLIN: So where is the quote?

15 MR. SHEMS: It's at the top of the --
16 well, the very last section of page 12, "The specific
17 issue of fact and law is" --

18 CHAIR KARLIN: You need to speak into the
19 mike.

20 MR. SHEMS: Turning on to page 13,
21 "Whether Entergy's environmental report sufficiently
22 assesses the impacts of increased thermal discharges
23 over the requested 20-year license extension." 10 CFR
24 2.309(f)(1)(i).

25 CHAIR KARLIN: Are you -- okay. Go ahead.

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1 MR. SHEMS: Okay. Going to (ii), a brief
2 explanation of the basis. The basis, as I mentioned
3 before, is the deficiencies, the several deficiencies
4 in Entergy's environmental report. Also, there's the
5 basis that's provided in the contention and in
6 supporting information, and we can further address the
7 basis as part of subsection 6 which -- where I can go
8 into the material dispute in more detail.

9 Sub (iii), is it within the scope of this
10 proceeding? And it is. It's -- this is a category 2
11 impact. Our contention arises directly from Entergy's
12 environmental report that's specific to this plant.
13 It's not a challenge to a rule, as Entergy claimed in
14 its answer. Simply disagreeing with Entergy as to
15 what constitutes a 316 determination doesn't mean that
16 we're challenging an NRC rule.

17 Further, NRC rules can and have to be
18 reconciled with NEPA's requirement that a hard look be
19 given to environmental impacts. And Entergy's
20 environmental report doesn't come close to this hard
21 look standard in terms of the cumulative impact of its
22 thermal discharge.

23 Sub (iv), is this material to this
24 proceeding? This contention is very material to this
25 proceeding because NEPA mandates consideration, or, as

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1 I said, a hard look at this impact before an extended
2 license -- renewed license can issue. Therefore, it's
3 a finding or a consideration, as studied, that the NRC
4 or the Board will have to give before an extended
5 license issues or is denied. And, therefore, it's
6 material to this proceeding.

7 Sub (v), our concise statement of facts
8 and/or expert opinion. We attach a declaration from
9 Dr. Ross Jones. He cited numerous studies, recent
10 studies, none of which were cited by Entergy either in
11 its 316 demonstration or in its environmental report.
12 There are far more recent studies, like I believe that
13 all of the studies in Entergy's 316 demonstration were
14 relatively old, and the studies we're citing are
15 relatively new. And that provides concise statement
16 of facts and expert opinions.

17 JUDGE WARDWELL: But as I read Mr. Jones'
18 affidavit, it seemed to me he basically said, "Gee, we
19 don't know, and we're not going to know for a long
20 time." He didn't -- wasn't really persuasive in
21 regards to the fact that what are the thermal impacts
22 on specifically the American shad.

23 MR. SHEMS: Well, the literature says that
24 there is an impact. It's just the extent of the
25 impact that's not fully known. But the purpose of

1 NEPA is to find out, and the purpose of NEPA is to
2 have either the applicant or the agency make that
3 determination, so it can be considered as part of the
4 decisionmaking process.

5 JUDGE WARDWELL: Well, it will be the
6 agency, it's not the applicant, that performs the EIS,
7 correct?

8 MR. SHEMS: Well, under -- under NRC
9 rules, the applicant has to put together an
10 environmental report, which is the --

11 JUDGE WARDWELL: They have to provide the
12 information.

13 MR. SHEMS: -- that staff starts with.

14 JUDGE WARDWELL: And if you took the Jones
15 affidavit, it would be, "Here's the information; it's
16 non-conclusive" as I read the Jones affidavit.

17 MR. SHEMS: And here's the information
18 that should have been looked at and wasn't looked at
19 by Entergy, because it's not up to an intervenor, such
20 as NEC to conduct the impact statement or to draft the
21 environmental report for Entergy. NEPA case law is
22 very, very clear on that point, that we just have to
23 raise a reasonable issue, and that's consistent with
24 the standard for a contention being granted.

25 You know, are we making a minimal showing

1 that has some type of factual basis?

2 JUDGE WARDWELL: How do you counteract the
3 statement that 316(b) of the Clean Water Act preempts
4 any NEPA analysis required by the agency that is, in
5 fact, the effective EIS if you will, that the
6 alternatives evaluated under 316 of the Clean Water
7 Act --

8 MR. SHEMS: Well, I guess --

9 JUDGE WARDWELL: -- address those?

10 MR. SHEMS: -- I would have two responses
11 to that question, Your Honor. The first is that there
12 is no 316 determination that has been issued. That's
13 one of the issues, material issues of fact or law,
14 that we're raising. The applicant, in their answer,
15 attached an -- a term that's expired. It's only
16 temporarily in effect until a new permit issues.

17 JUDGE WARDWELL: So there is one in
18 effect, though? I mean, they have --

19 MR. SHEMS: Well, there's an NPDES permit.
20 There's no 316 determination.

21 JUDGE WARDWELL: But they have an NPDES
22 permit.

23 MR. SHEMS: Yes. But that's different
24 from a 316 determination. And there is no 316
25 determination, and that's something we'll be able to

1 prove on the evidence at a hearing.

2 The second answer --

3 JUDGE WARDWELL: Nor will there ever be
4 one?

5 MR. SHEMS: I don't know. Right now, the
6 amended permit is -- has been appealed. It's being
7 reviewed de novo. So whatever issue, it will likely
8 be very different from what Entergy submitted with its
9 answer.

10 Also, there is an application for a new
11 permit that is pending. It has been pending for over
12 a year now.

13 CHAIR KARLIN: Well, I have a question
14 about this NPDES permit stuff. Pending, final, we can
15 debate what status it's in. But if you will turn to
16 51.71, do you have the regs in front of you, in the
17 CFR, page 31 actually of the yellow book -- you have
18 the gray one, but perhaps -- and there is a footnote
19 that deals with the obligation of the staff to do a
20 draft environmental impact statement.

21 And in footnote 3 it says, "Compliance
22 with the environmental quality standards and
23 requirements of the federal Water Pollution Control
24 Act imposed by EPA or a designated state is not a
25 substitute for, and does not negate, the requirement

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1 for NRC to weigh all environmental effects of the
2 proposed actions and to consider alternatives." So
3 why didn't you point that out to us in your reply?

4 MR. SHEMS: I apologize for not, but I did
5 point out that what Entergy submitted isn't sufficient
6 under -- under NEPA.

7 CHAIR KARLIN: Well, assuming they had a
8 NEPA permit. I don't care whether they did. This
9 seems to say that's not relevant. NEPA requires the
10 agency to do an environmental impact analysis, and the
11 fact that you have a NEPA permit does not dispense
12 with or moot that requirement. Section 511 does not
13 change that in one way -- of the Clean Water Act.

14 MR. SHEMS: I have two answers to that as
15 well. Let me -- if I can finish my second answer to
16 Judge Wardwell.

17 CHAIR KARLIN: Okay.

18 MR. SHEMS: The second part of the answer
19 is that NRC rules have to be read consistently with
20 NEPA in terms of requiring that hard look, and
21 shouldn't be read to create a conflict with NEPA
22 requirements.

23 Getting to your question, Judge Karlin,
24 there are two answers to that. The first is that as
25 far as we -- it gets into what Mr. Roisman was talking

1 about earlier, which is that the interface between --
2 where Entergy leaves off and staff picks up in terms
3 of the NEPA process, in terms of drafting the
4 environmental impact statement, is not particularly
5 clear here.

6 MR. RUND: One minute.

7 CHAIR KARLIN: Thank you, Jonathan. Mr.
8 Rund.

9 JUDGE WARDWELL: Be still my heart.

10 MR. SHEMS: The rules seem to be set up so
11 that the environmental report should serve as a clear
12 and relatively comprehensive foundation for the EIS
13 that staff will then draft, and we don't have that
14 here.

15 Quickly going to the material or the
16 genuine dispute of material on material issues, there
17 are numerous issues here. One is whether or not there
18 has been a 316 determination. The second is whether
19 Entergy assesses the cumulative impact, whether the
20 permit attached to Entergy's answer is, in fact, a 316
21 determination, whether a 316 determination exists.

22 We contend that it doesn't. There are a
23 lot of both mixed issues of fact and law regarding --

24 MR. RUND: Time.

25 MR. SHEMS: -- the actual permit itself,

1 the validity of an expired permit, the one that was
2 attached by Entergy.

3 If I could make one more point and have
4 that time taken off from my rebuttal.

5 CHAIR KARLIN: All right.

6 MR. SHEMS: The permit that was attached
7 makes it clear that there is -- that Entergy hasn't --
8 Entergy characterizes its discharge as a one degree
9 increase, but it's a one degree increase in the
10 Connecticut River. And as the permit they attached to
11 their answer makes clear, it's a one degree increase,
12 but it's actually a one to five degree increase, 1.4
13 miles downstream from the discharge.

14 So the thermal discharge -- the increased
15 thermal discharge over the course of 20 years is huge.
16 It's enormous. And that needs to be assessed and
17 shouldn't be minimized as a mere one degree increase
18 the way that it has been characterized both by Entergy
19 and somewhat by staff.

20 CHAIR KARLIN: I mean, the one degree
21 increase, isn't that after the mixing zone, which is
22 apparently 1.4 miles long, and within that mixing zone
23 apparently temperatures are going to be considerably
24 higher than that at various times, but ultimately the
25 limitation is at the end of the mixing zone 1.4 miles

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1 downstream the temperature increases one degree.

2 MR. SHEMS: That's correct.

3 CHAIR KARLIN: So it does not take away
4 from the fact that it's higher upstream. Okay.

5 MR. SHEMS: Absolutely.

6 CHAIR KARLIN: Yes, I understand that.

7 MR. SHEMS: And most importantly, why
8 what's attached to Entergy's answer is not a 316
9 determination is that on its face it requires
10 significant further study in order for the state to
11 make a determination as to whether or not the
12 increased thermal discharge will be allowed in the new
13 permit that it's currently considering.

14 CHAIR KARLIN: All right. Thank you.

15 Mr. Lewis, 15 minutes.

16 MR. LEWIS: Thank you, Judge Karlin. That
17 contention is barred by the NRC's rules. Under the
18 NRC's rules at 51.53(c)(3)(ii)(b), an environmental
19 report is only required to provide an assessment of
20 thermal impacts if the applicant does not provide a
21 316(a) variance. In this proceeding, we have provided
22 the 316(a) variance and the supporting documents
23 that's required by the rule.

24 CHAIR KARLIN: Where? When did you
25 provide that?

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1 MR. LEWIS: We provided it at several
2 different points in time. At the time the license
3 renewal application was filed, the --

4 CHAIR KARLIN: You're not suggesting that
5 the -- are you suggesting the NPDES permit is a
6 316(a)?

7 MR. LEWIS: Absolutely, yes.

8 CHAIR KARLIN: Does it say that?

9 MR. LEWIS: A 316 variance is the state
10 approval of alternative thermal effluent limitations
11 in the permit.

12 CHAIR KARLIN: I used to be an NPDES
13 enforcement attorney at EPA.

14 MR. LEWIS: Okay.

15 CHAIR KARLIN: And we never thought that
16 an NPDES permit was the same thing as a 316(a), the
17 water quality certification or a thermal discharge.

18 MR. LEWIS: The thermal effluent
19 limitations in that NPDES permit are the thermal
20 effluent limitations that have been approved by the
21 state pursuant to 316(a), that the fact sheet which is
22 basically the agent -- permitting agency's explanation
23 of its amended permit, explicitly states that they are
24 approving the 316(a) demonstration that Vermont Yankee
25 provided with respect to the increase in temperature

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1 from June through October.

2 They granted a partial approval of that
3 temperature increase, and in addition that fact sheet
4 makes the 316(a) findings that are required the
5 finding that the thermal effluent limitations imposed
6 are sufficient to ensure a balanced and -- a balanced
7 indigenous population of fish.

8 So when you look at the NPDES permit, the
9 final amended permit that we attached to our answer,
10 and if you look at the fact sheet and the
11 responsiveness summary, which was also included, it is
12 absolutely clear that the state has provided a 316(a)
13 variance, and that we have met the NRC's environmental
14 report requirement in its entirety.

15 CHAIR KARLIN: Well, let's look at the reg
16 you cite, 51.53(3)(b) I guess it is -- (2)(b). If the
17 applicant's plant utilizes once-through cooling water
18 or cooling pond heat displacing systems, the applicant
19 shall provide a 316(b) determination, and, if
20 necessary a 316(a) variance, or equivalent. That's
21 fine.

22 You're suggesting you've done that.
23 You're saying you've done that. Does that mean no --
24 are you saying that that means no -- the environmental
25 report does not need to deal with thermal impacts in

1 the river?

2 MR. LEWIS: That's correct. If you read
3 the next sentence, Judge Karlin --

4 CHAIR KARLIN: If the applicant cannot
5 provide these documents, it shall provide an
6 assessment of the impacts on fish and shellfish
7 resources resulting from heat shock, impingement, and
8 entrainment. Now impingement and entrainment are 316
9 issues.

10 MR. LEWIS: 316 --

11 CHAIR KARLIN: That's not the problem they
12 are raising.

13 MR. LEWIS: That's right.

14 CHAIR KARLIN: Heat shock is only a very
15 limited element of the problem they seem to be
16 raising. There seems to be a great -- much more
17 significant -- not just heat shock but general thermal
18 impact in the river. That does not answer the
19 question of the entire environmental, you know,
20 assessment of the impacts of thermal in the river.
21 It's not just heat shock impingement and entrainment,
22 but that's all that seems to be limited to.

23 MR. LEWIS: The issue that is defined in
24 this regulation, in 51.53(c)(3)(ii)(b), the prime --

25 CHAIR KARLIN: In 51.53(c), okay, (b), the

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1 same reg we're talking about.

2 MR. LEWIS: -- defines the scope of the
3 assessment that the applicant must include in the
4 environmental report. This is the provision that says
5 what we must provide in the environmental report. To
6 have a contention, the intervenors, the petitioners,
7 need to indicate that we have not provided some
8 information required by the regulations to be included
9 in our environmental report. This is the provision
10 that says, "What is the category 2 issue that we must
11 address?"

12 CHAIR KARLIN: Well, I understand, but
13 this says this is required, but it doesn't say that's
14 all that's required. Where do you -- can you cite me
15 something that says "and no other analysis"? I mean,
16 this is a category 2 issue, right? So the
17 environmental report and the applicant needs to deal
18 with the thermal impact on the river. This is part of
19 it.

20 MR. LEWIS: Well, I think this is all of
21 it.

22 CHAIR KARLIN: This is all of it. Is there
23 something that supports that, a statement of
24 consideration that says that?

25 MR. LEWIS: No. If you wanted to go back,

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1 you'd have to go back to the generic environmental
2 impact statement, which looked at thermal impacts more
3 generally to find the additional piece of information
4 that they needed from the applicant in the
5 environmental report and what that generic
6 environmental impact statement said is -- we need a
7 copy of the 316(a) and 316(b) determination -- the
8 316(a) determination with respect to heat shock,
9 316(b) with respect to entrainment and impingement.

10 If we have that information, we can
11 prepare our EIS. If we don't have that information,
12 then we need a further assessment. So we have
13 provided the documents that are required by the NRC
14 rules. An assertion that we have to provide more than
15 this is simply a challenge to the adequacy and
16 sufficiency of the NRC rules.

17 CHAIR KARLIN: Well, let's go to page 31
18 of the CFR. That's the 51.71 footnote 3 I was
19 referring to with Mr. Shems.

20 JUDGE WARDWELL: Before you ask, can I
21 just -- can I ask a clarifying question? Where do you
22 say that would be under -- would that be in the NUREG-
23 1437, that -- what you just said is stated?

24 MR. LEWIS: There is an assessment, yes,
25 in NUREG-1437 of the impacts of operation, including

1 thermal impacts.

2 JUDGE WARDWELL: Okay. Thank you. Sorry.

3 CHAIR KARLIN: No. Thank you. 51.71
4 draft environmental impact statement D, analysis,
5 talks about what's required in the draft environmental
6 impact statement and towards the end, just before E on
7 the left side of page 31 of the yellow book, the
8 version that I start reading, "The environmental
9 impact of the proposed action will e considered in the
10 analysis, irrespective of whether a certification or
11 license from the appropriate authority has been
12 obtained."

13 Footnote 3, "Compliance with the
14 environmental quality standards and requirements of
15 federal water pollution control is not a substitute
16 for and does not negate the requirements for NRC to
17 weigh all environmental effects and to consider
18 alternatives."

19 MR. LEWIS: That's absolutely correct, and
20 that's not in conflict at all.

21 CHAIR KARLIN: So the fact that they've
22 got a certification or not, or an NPDES permit or not,
23 does not substitute for or dispense with the
24 requirement that an environmental assessment or impact
25 statement cover the thermal impacts of the river.

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1 MR. LEWIS: Let me explain what that
2 provision means.

3 CHAIR KARLIN: Okay.

4 MR. LEWIS: The Commission has to weigh
5 all the impacts, so they have to look at all of the
6 costs and benefits to determine whether they should go
7 ahead and issue the renewed license. There are a
8 number of different inputs to that, including the
9 category 1 issues.

10 On the thermal impacts, from a once-
11 through cooling system, the Commission takes let's
12 call it the cost of those impacts, what is the
13 magnitude of those impacts, into account in balancing
14 all of the costs and benefits. The issue, though, is
15 whether they have to do their own independent
16 assessment of the magnitude of those impacts or
17 whether they can adopt the permitting agency's
18 assessment.

19 If you look at footnote 3 on this page, it
20 indicates that where an assessment of aquatic impacts
21 from the plant discharge is available from the
22 permitting authority, the NRC will consider the
23 assessment in its determination for the magnitude of
24 the environmental impacts.

25 CHAIR KARLIN: Sure.

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1 MR. LEWIS: What means is --

2 CHAIR KARLIN: Sure.

3 MR. LEWIS: -- whereas here the state has
4 issued a 316(a) variance and has made the finding that
5 there will be no significant environmental impacts,
6 the Commission is to factor that assessment into its
7 EIS when it weighs the relative costs and benefits.
8 That is why all we need to do is provide the 316(a)
9 variance and supporting documents in our ER --

10 CHAIR KARLIN: Sure the NRC will consider
11 -- where the state has done something, the NRC will
12 consider it, but that doesn't say neither the
13 applicant -- that that's all they'll do, or they can
14 stop their inquiry at that, does it?

15 MR. LEWIS: Well, in fact, we cited our
16 NRC precedent in our answer. I believe it was the
17 Robinson case, and also a Court of Appeals case
18 involving Seabrook, where the Commission -- in the
19 Robinson case it was the Appeal Board, excuse me, it
20 wasn't the Commission level, but it was the Appeal
21 Board, indicated that where a state had assessed the
22 impacts from a cooling water system, the state was
23 obliged -- sorry, the NRC was obliged to accept that
24 assessment at face value.

25 All of this stems from Section 511 of the

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1 Clean Water Act, which is basically an exception to
2 the normal NEPA standard which requires an agency to
3 assess everything again and independently. 511 says
4 that the Commission cannot impose any alternative
5 limitation or review of limitation that's issued by
6 the state under the Clean Water Act.

7 CHAIR KARLIN: Well, I've got in front of
8 me Section 511, the Clean Water Act, (c)(2). Nothing
9 in NEPA shall be deemed to authorize any federal
10 agency authorized to issue a license or permit or
11 conduct any activity to review any effluent limitation
12 or other requirement established pursuant to this act
13 or Section 401.

14 So all that says to me is that NRC -- NEPA
15 does not authorize NRC to impose effluent limitations.
16 And effluent limitations are very specifically defined
17 under the Clean Water Act, and we're not proposing to
18 do that. They're just asking for an environmental
19 impact analysis to be done.

20 MR. LEWIS: I urge the Board to look at
21 the case law that we have cited on our page 14 of our
22 answer, in particular the New England Coalition case
23 where the NRC accepted as dispositive EPA's
24 determinations on -- here it says one aspect of their
25 overall impact. But when you look at this case, in

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1 fact, it is the 316(a) determination that the EPA
2 made. The court said that the NRC was justified in
3 accepting that as dispositive.

4 If you look below at the Robinson case
5 cited at the bottom of the page, it says, "Where an
6 EPA or an authorized state has assessed the aquatic
7 impacts in improving a plant's cooling water system,
8 the NRC must take that assessment at face value."

9 The NRC does not have the ability, and
10 should not get into second-guessing a state when the
11 state has the substantive authority to determine what
12 is an appropriate effluent limitation and --

13 CHAIR KARLIN: We're not proposing --
14 they're not asking for us to -- NRC to impose an
15 effluent limitation. 511 talks about effluent
16 limitations. No one is asking for that. This is
17 Public Service's New Hampshire case. I've read that.
18 The Atomic Licensing Appeal Board, back in 1977, got
19 it wrong. That's not what the law is. 511 doesn't do
20 that.

21 MR. LEWIS: Well, I would --

22 CHAIR KARLIN: Is there any more recent
23 citation you've got for that proposition? Any other,
24 you know, support? I mean, certainly there must be
25 other agencies that deal with 511.

1 MR. LEWIS: Well, I would respectfully
2 submit that that is the law of the NRC. I don't
3 believe I got it wrong. I think that they view a
4 determination -- the NRC's attempt to review the
5 underlying basis for a 316(a) variance as reviewing
6 that variance. And I -- what the NRC has long decided
7 is that they can and should accept as dispositive the
8 permitting entity's assessment. They should factor
9 that into their final impact statement.

10 CHAIR KARLIN: Well, let me ask this. Let
11 me ask this. An environmental -- NEPA requires the
12 agency to do an environmental assessment. Now, let's
13 say NRC is doing the -- is the agency in question. A
14 facility may have to get a RCRA permit for dealing
15 with hazardous wastes. They may have to get an air
16 permit. They may have to get a water permit. They
17 may have to get zoning from the state, or they may
18 have to get some -- dozens of permits or licenses.

19 Does the fact that they get those licenses
20 mean that NRC doesn't have to consider the
21 environmental effects, or do an environmental
22 assessment every time someone gets a license, say,
23 "Well, we'll carve that out, we don't have to include
24 that in our EIS, because we're getting the permit"?
25 No.

1 The obtaining of those permits is a given.
2 That's a requirement. Of course you're going to get
3 the permits. There's nothing amazing about that, but
4 that doesn't dispense with the requirement to do an
5 environmental impact analysis of the project and make
6 a call under NEPA, does it?

7 MR. LEWIS: No. But the difference here
8 is Section 511, which does --

9 CHAIR KARLIN: Right.

10 MR. LEWIS: -- constrain the NRC's and
11 NEPA authority under --

12 CHAIR KARLIN: And says we can't impose
13 effluent limitations.

14 MR. LEWIS: Well, it says more than that.
15 It says that you --

16 CHAIR KARLIN: Or other requirements
17 established pursuant to this Act. And --

18 MR. RUND: One minute.

19 JUDGE WARDWELL: I also heard something
20 else from you that I want to explore a little bit.
21 You started off saying that based on the citations you
22 were quoting us that the only thing NRC requires of
23 you in your ER is in fact a demonstration of the
24 316(a) variance.

25 MR. LEWIS: That's correct, yes.

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1 JUDGE WARDWELL: What is your experience
2 with how the staff then handles that in preparing the
3 SEIS for a license renewal?

4 MR. LEWIS: The NRC will take the
5 assessment that is provided in the permit and 316(a)
6 demonstration and put it in its draft EIS, put it out
7 for public comment, and later finalize it. If they
8 take the information that is provided in the state's
9 assessment as the input to their EIS, as I said, we
10 may --

11 JUDGE WARDWELL: And they don't augment it
12 what -- to any degree in regards to evaluating other
13 impacts or the cost benefits, weighing options, the
14 hard look?

15 MR. LEWIS: They usually --

16 MR. RUND: Time.

17 JUDGE WARDWELL: No, you can proceed.

18 MR. LEWIS: Can I answer the question?
19 Yes, they respond to comments. I have not seen any
20 license renewal where they have had a finding that was
21 different from the state's assessment.

22 JUDGE WARDWELL: But did they raise other
23 options and alternatives in their -- in their EIS?

24 MR. LEWIS: Another option or alternative
25 in that case would be an alternative effluent

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1 limitation. The --

2 JUDGE WARDWELL: Well, that's one. There
3 may be others that deal with this same issue that
4 isn't an effluent standard, wouldn't there?

5 MR. LEWIS: I'm not sure what other
6 alternatives you would have other than if they can't
7 review or impose an -- a different requirement under
8 the Clean Water Act, I'm not sure how they could
9 consider another alternative to address this issue.

10 CHAIR KARLIN: All right. With my -- with
11 the permission of my colleagues, perhaps I can ask
12 another question. On page 16 of your brief, Mr.
13 Lewis, you talk about the NPDES permit is under
14 de novo appeal and the -- the NEC argues that the
15 NPDES permit is under de novo appeal and is not final.
16 And it also argues that it's only valid for five
17 years.

18 You then say the permit is final on its
19 face, and is captioned final, and, therefore, it is
20 effective once issued unless stayed. Under the
21 federal regulatory scheme at EPA, 40 CFR 124.15(b)(2),
22 it is not final unless stayed. It is immediately not
23 final as soon as it's challenged. Is the state
24 regulatory scheme different that that?

25 MR. LEWIS: My understanding --

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1 CHAIR KARLIN: It's not final under the --
2 if it's appealed, then it's not final under the -- in
3 EPA. Is the state different?

4 MR. LEWIS: Maybe we're talking semantics.
5 By "final" I mean it is --

6 CHAIR KARLIN: Not effective.

7 MR. LEWIS: No, it is effective.

8 CHAIR KARLIN: Not effective in the EPA
9 scheme. If you've got a final NPDES permit, "final,"
10 and within 30 days someone appeals it, then it is not
11 effective.

12 MR. LEWIS: My understanding -- and I'm
13 not the state law expert, but my understanding is that
14 this permit is effective. It is in effect. It is the
15 governing permit and that's --

16 CHAIR KARLIN: And that's going to be
17 different than the federal, because I command you to
18 look at 124.15(b)(2). I used to litigate that issue,
19 and it came up a lot.

20 Okay. Thank you.

21 Staff, 10 minutes.

22 MS. YOUNG: I'm not sure I have much to
23 add to the discussion that has been held so far, to
24 the extent that the staff did not object to the
25 admission of this contention on a limited basis.

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1 But I would like to point out, in
2 listening to the exchange between Judge Karlin and Mr.
3 Lewis, the question became whether the NRC would do an
4 analysis of impacts on water quality due to thermal
5 discharges. Certainly, the NRC would do that and
6 would use as a basis for its information any permit
7 that was issued by the state.

8 On 51.71, which Judge Karlin pointed to
9 earlier, that footnote 3 talks about where there is an
10 assessment of aquatic impacts on plant discharges
11 available from the permitting authority, the NRC will
12 consider that assessment as determinations of the
13 magnitude of environmental impacts, the striking and
14 overall cost balance at the various stages, including
15 license renewal -- in other words, whether it would be
16 unreasonable to preserve their license renewal option.
17 So this is information we will consider.

18 I understand that at this stage the task
19 of the petitioners is to challenge the adequacy of the
20 environmental report. That's why the staff's response
21 was only limited to the extent that they had
22 adequately identified an issue as regarding a dispute
23 on whether that environmental report was complete.

24 JUDGE WARDWELL: Could you clarify what
25 your limited admission is and why it differs from what

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1 the petitioner is really requesting?

2 MS. YOUNG: Well, I guess I don't
3 understand how it differs, because in their initial
4 petition they were concerned about the one degree
5 increase in thermal discharges and argued that that
6 permit, given that it was of limited duration -- only
7 for five years -- did not really provide an assessment
8 of impacts.

9 But, again, we have 10 CFR 51.53, which
10 has been cited before by Mr. Lewis and by staff, that
11 indicates you're supposed to provide that discharge
12 permit, which actually controls what the discharges
13 should be. And so if there's a permit that already
14 indicates what the authorized thermal effluents are
15 that can come from a facility, the NRC takes that
16 information and an assessment provided in that permit
17 as its baseline in terms of analyzing impacts for
18 license renewal.

19 And the only obligation the applicant has
20 in terms of submitting its environmental report is to
21 provide the current permit.

22 JUDGE WARDWELL: Thank you. That's what
23 I thought also.

24 CHAIR KARLIN: I had a question. On
25 page 9 of your brief you seem to suggest -- first, you

1 indicate on page 8 that you don't admit -- object to
2 the admission of this contention, and you talk about
3 limiting it to one degree in American shad. I don't
4 really know whether that's really the -- why you would
5 limit it in such a way.

6 MS. YOUNG: Well, basically --

7 CHAIR KARLIN: I mean, the contention --
8 they gave as an example, I thought, American shad.
9 But that wasn't -- that was just a piece of evidence
10 that they presented. Why should -- we don't want to
11 limit the contention to that, only that, do we?

12 MS. YOUNG: Well, understand that the
13 Commission's pleading requirements for its contentions
14 has over the years -- the threshold has gotten higher
15 and higher. Initially, it was just a notice and
16 comment provision. You could generally identify an
17 issue that you had with respect to an application.

18 Then, with the rulemaking in the '89
19 timeframe, you had this additional of the element of
20 having to establish a dispute as to a material issue
21 of fact.

22 CHAIR KARLIN: Right.

23 MS. YOUNG: And the requirement to -- the
24 Commission put more body around its -- its demand in
25 terms of strict pleading requirements, to provide more

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1 basis and specificity for your concerns. When the
2 staff read the petition --

3 CHAIR KARLIN: Right.

4 MS. YOUNG: -- it saw concern about one
5 degree, it saw in the writeup in NEC's petition that
6 the concern was about American shad, and then when it
7 went to the declaration of Dr. Ross the elucidation of
8 potential impacts on American shad were talked about
9 in great detail. Whereas just general statements
10 about water quality and thermal shock were in other
11 parts of the petition.

12 And the Commission, you know, as recently
13 as April of this year, in the USEC decision, CLI06-10
14 at 63 NRC 451, page 72, has indicated that an expert
15 opinion can't really state a conclusion without
16 providing a reasoned explanation for the basis for
17 that conclusion.

18 So when you're looking at a contention
19 being raised by a petitioner, you're looking at the
20 concern, whether it's stated in a title or a phrase
21 that indicates what the issue is the petitioner is
22 trying to raise, and how that concern is supported.
23 And that's the basis and specificity.

24 And so to the extent that the staff read
25 intervenor's --

1 CHAIR KARLIN: No, no, no. Wait a second.

2 MS. YOUNG: -- petition --

3 CHAIR KARLIN: Wait a second. Let's go

4 back --

5 MS. YOUNG: -- the issue with American

6 shad --

7 CHAIR KARLIN: Let's break out basis and

8 specificity, again basis, bases -- which one are we

9 talking about? The contentions are admitted, not

10 bases, right?

11 MS. YOUNG: Yes, but bases --

12 CHAIR KARLIN: Okay.

13 MS. YOUNG: -- articulate --

14 CHAIR KARLIN: And the --

15 MS. YOUNG: -- what the concern is in a

16 contention.

17 CHAIR KARLIN: And the Commission has

18 ruled that in a contention at the outset the

19 petitioner is not obliged to provide an exhaustive

20 list of its bases, right?

21 MS. YOUNG: I would agree.

22 CHAIR KARLIN: And the rule also requires

23 a concise statement of alleged facts or expert

24 opinions, which would support -- it doesn't have to

25 have all the facts. It doesn't have to have all of

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1 the expert opinions, certainly not put all their
2 evidence in. They just have to have enough to get in
3 the door to show there's a dispute.

4 So if they say, "Well, for example, there
5 could be a problem with shad," are we to then say,
6 "Well, your contention is limited to shad"? Maybe
7 they have trout, maybe they have rockfish, maybe they
8 have guppies, I don't know. But because they only had
9 time to get one of them in the door, and maybe it's
10 legit -- let's assume it's legit, I don't know -- then
11 are we to say that's all we can litigate now?

12 MS. YOUNG: Well, I don't think the
13 intervenors here said -- I mean, excuse me,
14 petitioners said that, for example, American shad is
15 a concern. I think the statement in the declaration
16 of Dr. Ross and the arguments in the petition
17 themselves focus on the fate of American shad as being
18 particularly sensitive to thermal discharges.

19 So you have to take a contention pleading
20 on its face. What type of information does it give
21 you about circumscribing the boundaries and parameters
22 of a concern? And so what the staff does when it
23 looks at petitions, you know, even though like NEC's
24 which was a little bit hard to tell what was the
25 contention and what were the bases in terms of the way

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1 they pled their issue, was to try to find out, what is
2 the crux of the concern here?

3 And the concern seemed to be with respect
4 to the impacts of thermal discharges associated with
5 a one degree increase in an NPDES permit -- we're not
6 going to argue the status -- its impact on a
7 particular species in the aquatic biota and that being
8 American shad.

9 CHAIR KARLIN: But the one degree is at
10 the edge of the mixing zone I guess, which is 1.4
11 miles downstream. They also talked in that affidavit
12 I believe of higher temperatures in other parts of the
13 I guess -- they didn't use the word "mixing zone," but
14 I think that's what they're talking about.

15 MS. YOUNG: Well, but they didn't really
16 talk about the 1.4 mile distance until the reply.
17 So --

18 CHAIR KARLIN: Right.

19 MS. YOUNG: -- you know --

20 CHAIR KARLIN: But they did talk about
21 higher temperature.

22 MS. YOUNG: -- if you were just -- it's
23 hard to understand what was the concern without --
24 without trying to do a fair and reasoned assessment of
25 what was the information being pled in the petition,

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1 and how was it supported by the expert opinion and the
2 facts cited by the expert with respect to the issue
3 that they're trying to raise.

4 CHAIR KARLIN: Now, on page 9 of your
5 brief, you seem to say at the end of the first
6 paragraph, it's a partial paragraph, the contention
7 basis that remains, however, is the alleged absence of
8 an assessment of the impacts of the discharge
9 temperature, which can be cured by the submission of
10 an amended permit, amended NPDES permit. Are you
11 suggesting that all they have to do is slap an NPDES
12 permit on the table and this contention goes away?

13 MS. YOUNG: If the NPDES permit contains
14 an assessment of the impacts on the aquatic biota,
15 yes, that's correct.

16 CHAIR KARLIN: Well, the NPDES permit
17 won't contain an assessment of that. I will contain
18 effluent limitations. It will contain -- maybe it
19 will contain a 316 discharge, maybe it will contain a
20 316(b), but it won't contain an assessment. That's
21 what you have to do under NEPA.

22 MS. YOUNG: Well, please understand the
23 staff --

24 CHAIR KARLIN: Isn't that what footnote 3
25 says?

1 MS. YOUNG: -- the staff has seen the
2 NPDES permit that -- the renewed permit, and it does
3 contain an assessment of biota.

4 JUDGE WARDWELL: And if it doesn't, then
5 you won't be satisfied, is that correct?

6 MS. YOUNG: That's correct. We couldn't
7 even rely -- we'd have to do our own analysis.

8 CHAIR KARLIN: It contains an assessment
9 of -- does it contain a NEPA assessment?

10 MS. YOUNG: It contains an assessment of
11 the impacts of an increased thermal discharge on the
12 aquatic biota in the river -- in the Connecticut
13 River.

14 CHAIR KARLIN: It discusses --

15 MS. YOUNG: And it references studies and
16 all sorts of things associated with an assessment.

17 CHAIR KARLIN: And it also requires
18 additional studies to be done, does it not?

19 MS. YOUNG: Well, there's different --

20 CHAIR KARLIN: And it also --

21 MS. YOUNG: -- different monitoring.

22 CHAIR KARLIN: -- lasts five years --

23 MS. YOUNG: I'm sorry. I don't mean to
24 talk over you.

25 CHAIR KARLIN: And it only lasts five

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1 years. How about the 25, 26 years we're talking about
2 here?

3 MS. YOUNG: Well, obviously, the staff,
4 when it does an analysis of impacts, has to take that
5 discharge permit at the baseline for what the
6 operation would be over the 20 years. Until the state
7 changes the effluent limits, the discharges that are
8 authorized for Vermont Yankee, there wouldn't be any
9 difference in terms of the staff's analysis of
10 carrying out the impacts over the 20 years of
11 operation.

12 So the staff -- there is no disagreement
13 here as to what the staff is required to do. What the
14 petitioner has done at this threshold stage is to
15 identify what it believes to be deficiencies in the
16 environmental report. And the staff was addressing
17 that in this petition. It was not getting to what
18 requirement was there for the NRC to do with respect
19 to --

20 MR. RUND: Time.

21 MS. YOUNG: -- analysis of impacts.

22 JUDGE WARDWELL: If that assessment isn't
23 there in the NPDES permit, and you feel an obligation
24 to, you know, elaborate on it in order to meet the
25 requirements of submitting an EIS, will you then go

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1 back to the applicant to augment in essence their ER
2 by providing you with more information to be able to
3 do that, or would you have sufficient information
4 based on what's available between what they did submit
5 in their 316 and any other information that might be
6 in the NPDES?

7 MS. YOUNG: Well, to extent that NRC
8 regulations only require an applicant to submit his
9 current permit, the staff can ask the applicant --
10 excuse me.

11 CHAIR KARLIN: I didn't hear what you just
12 said. I'm sorry.

13 MS. YOUNG: To the extent that the
14 Part 51, 51.53, whatever it is, talks about submitting
15 the primary -- and that's what a licensee needs to do
16 in terms of providing information regarding an
17 assessment of impacts on the aquatic biota, the staff
18 would have that information and would also ask the
19 applicant to provide any additional information on
20 studies it has.

21 But the staff also has resources through
22 contacts with the State of Vermont, and, you know,
23 other studies and things done to determine what is the
24 -- you know, like a literature review, that any
25 scientist or engineer does in terms of their field to

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1 find out what is the information available about
2 impacts on aquatic biota for the Connecticut River.

3 So it would not end its inquiry there,
4 but, you know, again this petition is really focused
5 on what ingredients have to be present in an
6 environmental report submitted by an applicant. They
7 are at the point of challenging the NRC's
8 environmental impact statement, which is yet to be
9 written.

10 CHAIR KARLIN: Okay. Thank you.

11 Any more questions? Go ahead.

12 JUDGE WARDWELL: Well, I don't know
13 whether I should. It details with an issue that I
14 feel is new evidence. I'm sure curious, but I won't
15 ask.

16 CHAIR KARLIN: Okay.

17 JUDGE WARDWELL: Because it's a curious
18 question.

19 CHAIR KARLIN: All right. And we have,
20 what, seven minutes reserved for rebuttal?

21 MR. RUND: Five.

22 CHAIR KARLIN: Five. Five. Could you
23 speak up, Mr. Rund? We couldn't hear you. The
24 mike --

25 MR. RUND: Five. Five minutes.

1 MR. SHEMS: Okay. Thank you. I want to
2 start off by addressing NRC staff's contention that
3 all that's needed is a permit. I'm looking at the
4 regulation, which is 51.53(d), which requires a copy
5 of the current Clean Water Act 316(b) determination,
6 and, if necessary, a variance. Nowhere is the word
7 "permit" mentioned.

8 My second point as to that is that that
9 regulation has to be read consistently with NEPA
10 obligations, and so I'd agree with your earlier point
11 that it can be read to require a broader submittal of
12 information from an applicant.

13 JUDGE WARDWELL: Yes. But doesn't the
14 staff do the NEPA evaluation? The applicant doesn't?

15 MR. SHEMS: Staff is ultimately
16 responsible for the NEPA evaluation.

17 JUDGE WARDWELL: And if they've stated
18 what they need to do that NEPA analysis --

19 MR. SHEMS: What they need is stated in
20 the regulation, which is different from what you just
21 heard here. Staff was just arguing that a permit is
22 all that's needed when the regulation requires a
23 316(b) determination or a 316(a) variance. And that's
24 very different from an NPDES permit.

25 JUDGE WARDWELL: Well, I thought that's

1 what they meant by what they require. I mean, that's
2 also what the applicant -- representative of what
3 their obligations are to submit. So there's agreement
4 there that that has to be submitted as part -- as
5 their ER.

6 MR. SHEMS: Assuming I'm misunderstanding
7 staff's use of the word "permit," absolutely.

8 CHAIR KARLIN: But the question is whether
9 that's exhaustive, right? I mean, yes, they've got to
10 submit that, but is that all they've got to submit?

11 MR. SHEMS: Moving to my next point,
12 Entergy argues that they have a 316(a) variance, and
13 that they argued that the fact sheet that accompanies
14 their amended permit, the one that's expired, is such
15 a variance. Let me read you from this fact sheet.

16 They describe it as a partial approval of
17 a 316(a) demonstration result. And then, on the next
18 page, page 5, they go on to say why it's only partial,
19 because significant further study is required in order
20 to grant a 316(a) variance.

21 So this is not a 316(a) variance, what
22 they have, on the face of the fact sheet. So, again,
23 I think there's significant dispute of material fact
24 here as to whether or not they have submitted what
25 they're supposed to submit. And in the absence of on

1 its face a valid 316(a) variance is -- we go back to
2 the environmental report and is that sufficient.

3 In terms of state law, if it's appealed
4 it's not final. It is, as Mr. Lewis said, in effect,
5 but only temporarily. It's in effect only because our
6 state Administrative Procedure Act allows a permit to
7 remain in effect --

8 CHAIR KARLIN: Do you mean the prior
9 permit remains in effect, but the --

10 MR. SHEMS: The prior permit remains --

11 CHAIR KARLIN: -- new permit is not in
12 effect?

13 MR. SHEMS: The new permit is -- it hasn't
14 issued yet.

15 CHAIR KARLIN: A final permit is issued,
16 but it's been appealed --

17 MR. SHEMS: An amendment to the existing
18 permit issued in March.

19 CHAIR KARLIN: Okay.

20 MR. SHEMS: The amendment has been
21 appealed.

22 CHAIR KARLIN: Okay.

23 MR. SHEMS: A new permit has been pending
24 and has not issued, because the permit that was
25 amended in March expired in March. It was amended the

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1 day before it expired.

2 CHAIR KARLIN: Okay.

3 MR. SHEMS: And so under our
4 Administrative Procedure Act it remains in effect
5 until there is a decision on the new permit
6 application.

7 CHAIR KARLIN: The old permit remains in
8 effect. The new permit has been appealed, or the
9 amended permit has been --

10 MR. SHEMS: The amended permit has been
11 appealed.

12 CHAIR KARLIN: -- appealed, so that permit
13 -- it being appealed, it is not in effect. It follow
14 the same as the federal rules. Its appeal
15 automatically stays the effectiveness of the amended
16 permit. The prior permit remains in effect under the
17 Administrative Procedures Act, state Administrative
18 Procedures Act. So that's like the federal rule,
19 sounds like.

20 MR. SHEMS: I want to address a point made
21 about Section 511 of the Clean Water Act. I view that
22 provision as being fairly narrow and as essentially
23 avoiding collateral attacks on state decisions.
24 Various federal agencies under their own mandates,
25 using informed decisionmaking, which is what NEPA

1 requires, can be stricter than what the state requires
2 following their own mandates, and we see that all the
3 time when other federal agencies issue permits. They
4 can be stricter than what a state requirement would be
5 because of their overall mandate.

6 I just want to close by saying what NEPA
7 requires --

8 MR. RUND: One minute.

9 MR. SHEMS: What NEPA requires is a hard
10 look, and so far the hard look requirement is not met.
11 If it's a per se hard look under the rules, and of
12 essentially a 316(a) variance or 316(b) determination,
13 that's not present, nor will it be present any time
14 soon.

15 Absent that type of a determination there
16 has been no assessment of the cumulative impacts in
17 the environmental reports. Therefore, the
18 requirements that Entergy is supposed to meet under
19 NEPA to get staff started to meet its own NEPA
20 obligations to draft an environmental impact statement
21 just haven't been met.

22 Thank you.

23 CHAIR KARLIN: Thank you.

24 Okay. All right. We'll turn to your
25 contention number 2, I guess. Give us a minute here

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1 before we start, so we can -- I can get my materials
2 organized.

3 (Pause.)

4 MS. TYLER: I'd like to reserve half my
5 time for rebuttal.

6 MR. RUND: How much did you say?

7 MS. TYLER: I'd like to reserve half, 10
8 minutes. NEC's contention --

9 CHAIR KARLIN: Give us a minute before you
10 start --

11 MS. TYLER: Oh. Oh, I'm sorry.

12 CHAIR KARLIN: -- if you would.

13 MS. TYLER: Sure.

14 CHAIR KARLIN: I don't want you to use up
15 your time while we're still fiddling around here.

16 (Pause.)

17 Okay. Ms. Tyler, go ahead. Whenever
18 you're ready.

19 MS. TYLER: Okay. Entergy's -- or NEC's
20 contention 3 is quite straightforward. Entergy's
21 application reports the results of its analysis of the
22 impact of environmentally-assisted metal fatigue on
23 certain plant components. That analysis indicates
24 that several of those components basically won't last
25 for the full term of their renewed license.

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1 This is a safety issue both due to the
2 potential that these components could crack and fail,
3 a failure of the component itself would cause a safety
4 problem. It's also a problem in that when the metal
5 components crack and deteriorate chunks of metal can
6 become loose, migrate through the plant, potentially
7 lodge in other parts of the plant and cause a safety
8 hazard in that manner.

9 Entergy has proposed to address this
10 problem mainly through refinement of its metal fatigue
11 analysis to demonstrate that, in fact, this isn't
12 really a problem. The application does not explain
13 how the initial analysis was done, why it might be
14 reasonable to refine it, and how it would be refined.

15 Our technical expert on the subject, Dr.
16 Joe Habenfeldt, who is a mechanical engineer, has told
17 us that based on what's in the application he can't
18 evaluate this alleged -- this proposal to refine the
19 analysis. He can't say whether it's reasonable or
20 legitimate.

21 In the event that the refinement doesn't
22 eliminate this problem, Entergy proposes to develop an
23 inspection and maintenance program at some point in
24 the future. This program is not described in the
25 application, so we don't know what the criteria would

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1 be for inspection and maintenance, how they'd be
2 determined, how the schedule would be determined, what
3 the schedule would be, so --

4 JUDGE WARDWELL: I got the impression that
5 you objected to the fact that they were reanalyzing
6 things, and that was --

7 MS. TYLER: Yes.

8 JUDGE WARDWELL: -- intuitively
9 uncomfortable to you, but yet now listening to you it
10 sounds like that's okay as long -- but they just
11 didn't provide enough information for you to judge
12 whether it was an appropriate reanalysis or not.

13 MS. TYLER: It could be possible. It
14 could be the refinement of the analysis is legitimate.

15 JUDGE WARDWELL: Okay.

16 MS. TYLER: That that's totally
17 conjectural at this point. Our technical expert can't
18 comment on that one way or the other.

19 So essentially at this point the
20 application isn't complete. It doesn't contain a plan
21 to manage these components that won't last the full
22 term of the -- the full length of the second license
23 term. And that, NEC submits, is inadequate.

24 I would emphasize that this contention is
25 not a pure contention of admission. It's a contention

1 of admission to the extent that the application
2 currently doesn't include this information, and NEC
3 submits that it should be amended to include this
4 information. But NEC's real concern is with the
5 quality and substance of what NEC -- or what Entergy
6 does eventually propose to do.

7 So this contention 2 does encompass NEC's
8 concern with the quality and the substance of what
9 it's going to eventually propose, and its intent to
10 critique that at the time that it's made available.

11 JUDGE WARDWELL: And did I read that you
12 are comfortable with the Class 1 and the CLB non-
13 Class 1 analyses? It's only the environmentally-
14 assisted fatigues that are your concern?

15 MS. TYLER: I think that our contention
16 does encompass -- we haven't -- Entergy hasn't
17 explained how the whole metal fatigue analysis was
18 done. So the metal fatigue analysis was done
19 initially, as I understand it, and then it was
20 adjusted for environmentally-assisted fatigue.

21 So when Entergy eventually explains how
22 this entire analysis was conducted, we potentially
23 would have concerns with the underlying unadjusted
24 metal fatigue analysis as well as with the means by
25 which it was adjusted to account for the environmental

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1 conditions in a plant.

2 JUDGE ELLEMAN: Could you comment a bit on
3 what degree of specificity you feel is appropriate in
4 a proper presentation of a plan? For example, would
5 you want to know the frequency of non-destructive
6 analysis? Where the analyses are to be carried out?
7 What particular techniques are to be used? Where is
8 the boundary between an appropriate outline of a plan
9 and complete detail on the plan?

10 MS. TYLER: That's a difficult question
11 for me to address. That really would be a question
12 for Dr. Habenfeldt to address. All I can tell you is
13 that what he has told us is that based on what
14 information is currently provided, he really is unable
15 to determine whether the initial analysis was
16 legitimate, whether the plan to refine it is
17 legitimate, how the refinement would be done. So
18 should we have a hearing on the subject, we could
19 explore that issue in more depth.

20 CHAIR KARLIN: Another question on that.
21 What regulatory provision -- we're talking about,
22 what, 51 -- 54.21(c).

23 MS. TYLER: Yes.

24 CHAIR KARLIN: I'm sorry to always be
25 going back to the regs, but it's helpful to me as a

1 lawyer, because that's where I ground my thinking.

2 MS. TYLER: I do it a lot.

3 CHAIR KARLIN: And it says (c)(1) -- among
4 other things, it says, "The applicant shall
5 demonstrate that," and then there are these three
6 options. And you point that out in your brief at page
7 15, I think it is, or maybe it's 14. And I guess they
8 attempted, as I understand it, to meet this
9 requirement with regard to metal issues, metal
10 fatigue, by option 1 and option 3, "shall
11 demonstrate."

12 But let's focus on option 3 for a minute,
13 because I think you focused on it. "The applicant
14 shall demonstrate three" -- and these are options, one
15 or the other, they don't have to do both. "The
16 applicant shall demonstrate the effects of aging on
17 the intended functions will be adequately managed for
18 the period of extended operation."

19 So they've got to make a demonstration
20 that it's going to be adequate, that it will be
21 adequately managed. And you suggest that a plan to
22 develop a plan is not sufficient to meet that
23 requirement.

24 MS. TYLER: That's right.

25 CHAIR KARLIN: What -- you know, what --

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1 is there any legal support for that proposition other
2 than just the basic logic there?

3 MS. TYLER: Well, I think that that
4 proposition would allow Entergy and other applicants
5 for license renewal to avoid any public evaluation of
6 their aging management plans by suggesting that they
7 want to develop them later for one reason or another.
8 And I think that that really would undermine the
9 ability of NEC and other organizations like it, and
10 other members of the public to participate in the
11 process.

12 CHAIR KARLIN: So if they just came in and
13 said, "We promise to keep an eye on it and take care
14 of it if something goes wrong," then that that would
15 not be adequate to demonstrate that it will be
16 adequately managed.

17 MS. TYLER: I think that would not be
18 adequate.

19 CHAIR KARLIN: Well --

20 MS. TYLER: That's basically saying,
21 "Trust us, we'll take care of this."

22 CHAIR KARLIN: Right. But every part of
23 this subparagraph is sort of a prospective thing. It
24 says the effects will be adequately managed. How can
25 they demonstrate today that something 10, 20 years

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1 from now will happen without having at least some
2 component of that being a promise or a plan that says,
3 "We can't demonstrate to you today that in 15 years
4 we're going to adequately manage it, so we -- but we
5 will do this, and we'll do this, and we'll do that,
6 and -- and if something else comes up, we promise to
7 take care of it"? Isn't there some promise involved
8 in all of this?

9 MS. TYLER: I think what they have to --
10 I think they have to put forward some strategy for
11 monitoring these vulnerable components, for inspecting
12 them, and for performing maintenance, and they have to
13 explain in more detail than what they've done how
14 they'll do that.

15 CHAIR KARLIN: Okay. So it's a level of
16 detail. And can you give us any guidance or criteria
17 as to how we would judge whether the detail is enough?

18 MS. TYLER: Well, I think --

19 CHAIR KARLIN: How we --

20 MS. TYLER: -- at this point there's no
21 detail at all.

22 CHAIR KARLIN: Okay.

23 MS. TYLER: They've said, "We'll tell you
24 how we plan to take care of this at some point in the
25 future." So at this point we have no detail

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1 whatsoever. I think what we'd like to see is
2 something that explains to some extent how -- why we
3 the public, why NEC's members should feel confident
4 that this problem will be adequately addressed.

5 CHAIR KARLIN: Okay.

6 MS. TYLER: We also would note that we
7 need to have license conditions by which Entergy can
8 be held accountable. So the requirements that are
9 attached to the renewal of the license have to be
10 sufficiently specific to mean something.

11 CHAIR KARLIN: All right. Let me ask on
12 your contention on page 14, you talked about
13 contention of --

14 MR. RUND: One minute.

15 CHAIR KARLIN: -- admission -- omission or
16 -- or not, I mean, the contention as written says that
17 the application does not include a plan to manage
18 aging due to metal. That sounds like a contention of
19 omission. The very next sentence says it does not
20 include an adequate plan to monitor and manage the
21 effects of aging.

22 You need to write contentions that we
23 don't have to rewrite. If we are to accept your
24 contention, it is merely a contention of omission.
25 Are you suggesting it's not just omission?

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1 MS. TYLER: I think it has been difficult
2 to draw that distinction in this case, because what
3 has been included in the application is so general --

4 CHAIR KARLIN: But that's what you
5 alleged. You alleged its omission. All you said is
6 it didn't include one. You didn't say it wasn't
7 adequate until you got to the narrative. I mean, what
8 we have to do is when we admit contentions, we have to
9 know what contention we're admitting. And I don't
10 know which one it is.

11 MS. TYLER: I think what we --

12 MR. RUND: Time.

13 MS. TYLER: Our contention is that the
14 plan is inadequate. And once the plan is more fully
15 explained, we intend to critique its content.

16 CHAIR KARLIN: All right.

17 JUDGE WARDWELL: So, in fact, it would be
18 a contention of omission because they will submit this
19 additional information, and that will meet this
20 contention, and then you will evaluate it and then may
21 or may not come back with whether or not it addresses
22 the issues of your concern once you see this
23 additional information.

24 MS. TYLER: Right.

25 JUDGE WARDWELL: Is that a fair

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1 assessment?

2 MS. TYLER: That's what we contemplate.

3 CHAIR KARLIN: Okay. Entergy, Mr.
4 Travieso-Diaz? Good to hear from you this morning --
5 this afternoon.

6 MR. TRAVIESO-DIAZ: Members of the Board,
7 good afternoon. Can everybody hear me?

8 CHAIR KARLIN: A little closer would
9 probably be good.

10 MR. TRAVIESO-DIAZ: Okay. All right.

11 CHAIR KARLIN: Yes, it's hard.

12 MR. TRAVIESO-DIAZ: I want to begin by
13 touching on the last point that was asked. I'm going
14 to refer to the text of the contention. Contention 2
15 says, "Entergy's license renewal application does not
16 include a plan to manage aging due to metal fatigue
17 during the period of extended operation." That is
18 just wrong.

19 There is a plan that is in Section 4.3 of
20 the application. There is a plan that in Appendix B
21 of Section 4 of the application. So I don't think
22 they mean that, and if they mean that it's wrong.
23 there is a plan.

24 I think where I'm going to go is try to go
25 to where they think it's wrong. But it's not that

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1 there is no plan.

2 JUDGE ELLEMAN: Could you tell us in what
3 detail this is expressed in the application? Since we
4 haven't seen it.

5 JUDGE WARDWELL: Yes. Or is it merely a
6 plan that says, "We will write a plan that will meet
7 CFR blank-blank-blank"?

8 MR. TRAVIESO-DIAZ: If I could go to that
9 point in a logical way. What they are concerned about
10 is something known as cumulative usage factors, CUFs.
11 The CUFs are -- one of the questions -- one of the
12 questions they raised in their reply is that they
13 don't know how the CUFs were computed or where -- how
14 those came about.

15 That is very surprising to me, because
16 both the application and the standard review plan tell
17 you how they are -- how they are obtained. They are
18 -- for Class 1 components they are part of the stress
19 analysis of record for those components. Those are
20 performed under ASME 3. Some of them have been in
21 effect for many, many years, and so they -- the
22 analysis for Class 1 components, you don't need to be
23 told, but, in fact, we tell you in the application how
24 those components were --

25 JUDGE WARDWELL: Do you have any idea of

1 why the staff didn't seem to feel comfortable that
2 there was a full enough description of these
3 cumulative use factors?

4 MR. TRAVIESO-DIAZ: Yes. Because they --
5 for non-Class 1 components, what Entergy, for lack of
6 site-specific information has done, it has taken
7 generic information from NUREG-6220 -- 6260, and in
8 fact it is footnoted in Table 431 how they used that
9 information. I believe that the concern that staff
10 has is that they would like to have a better way of
11 coming up with CUFs for those components that are not
12 ASME Class 1.

13 But that doesn't mean that they don't
14 exist. It's just that maybe they could be computed
15 differently. And so that is -- goes to the CUFs.

16 JUDGE WARDWELL: And is this related
17 directly in this case to the fact of the power uprate
18 and that there isn't a great deal of benchmark
19 information related to the performance of this under
20 the power uprate?

21 MR. TRAVIESO-DIAZ: Absolutely not. The
22 simple -- the simple explanation is because some of
23 these components were designed to ANSI B31.1. The
24 stress analysis under the code that ASME requires
25 wasn't done for that. So they had to use generic

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1 information because there was no plant-specific
2 analysis in existence that dealt with that particular
3 component.

4 JUDGE ELLEMAN: The concern over CUFs
5 appears to be just a part of the contention. The
6 other part is there is not a clear definition of what
7 non-destructive testing is to be used, where it's to
8 be used. Could you speak to those aspects?

9 MR. TRAVIESO-DIAZ: Yes, let me get to
10 that, because the next step in the chain is that due
11 to the resolution and the consent rate by Generic
12 Safety Issue 190, the NRC has recommended, and Entergy
13 has adopted, the concept that you want to modify your
14 CUFs to take into consideration potential
15 environmental impacts on the component. That may
16 result in CUFs whose value is less than one or greater
17 than one.

18 That translation -- again, that NEC says
19 they don't know how it was done -- it is very clearly
20 said in the application how it was done. It was done
21 pursuant to the guidance in what is known as the GALL
22 report, G-A-L-L. I believe it is the Generic Aging
23 Lessons Learned report, NUREG-1801, and NUREG-1801
24 refers you to two NUREGs, NUREG-CR6583 for carbon and
25 low alloy steels and NUREG-CR5704 for austenitic

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1 stainless steels.

2 That is how the environmentally-induced or
3 environmentally-assisted fatigue came about. Anybody
4 who knows how to do analysis knows how to come up with
5 the numbers that Entergy did.

6 See, I think one of the problems with this
7 contention, or perhaps other parts of the NEC
8 contentions, is that they expect or want or require to
9 see a degree of detail in the license renewal
10 application that it is not necessary. Once you tell
11 them how you do your analysis, you follow the guidance
12 from 1801, and 1801 refers you to these two NUREGs.
13 Any competent engineer can compute what the values
14 are, and that's how Entergy did it. There is no
15 mystery to it. Absolutely none.

16 Now, the contention actually deals --

17 CHAIR KARLIN: Mr. Travieso-Diaz, may I
18 ask -- I need to get grounded in your answer a little
19 bit. It would help me anyway. If you go to page 21
20 of your answer, is that what you're talking about? I
21 mean, I understand the CUF issues. You indicate there
22 to account for the effects of environmentally-assisted
23 fatigue, Entergy evaluated limiting locations for
24 environmentally-assisted CUFs by factor blah-to-blah.

25 For each location with a projected

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1 environmentally-adjusted CUF greater than one, the
2 applicant commits -- the application commits Entergy
3 to manage the effects of aging prior to entering the
4 period of extended option by implementing one or more
5 of the following, one, two, three. "

6 One, further refinement of the fatigue
7 analysis to show that the CUF is really less than one.
8 That, I take it, parallels with 54.21(c)(1)(i).

9 MR. TRAVIESO-DIAZ: Correct.

10 JUDGE WARDWELL: And you haven't done that
11 yet, correct?

12 CHAIR KARLIN: You haven't done that.

13 MR. TRAVIESO-DIAZ: Well, actually, it is
14 -- could I go on to explain how the table --

15 CHAIR KARLIN: Let me --

16 MR. TRAVIESO-DIAZ: Okay.

17 JUDGE WARDWELL: But he hasn't done that
18 yet.

19 CHAIR KARLIN: You haven't done that yet,
20 correct?

21 MR. TRAVIESO-DIAZ: Well --

22 CHAIR KARLIN: You're committing to do it,
23 but you hadn't done it yet.

24 MR. TRAVIESO-DIAZ: Okay. Let me just
25 explain it this way. For some --

1 JUDGE WARDWELL: No, wait, you'd better
2 not, because I'm getting the evil eye. He wants to
3 come with --

4 (Laughter.)

5 MR. TRAVIESO-DIAZ: -- for some --

6 CHAIR KARLIN: I'm on a roll here.

7 JUDGE WARDWELL: We'll get back to it.
8 He's on a roll. Let him go on and roll.

9 (Laughter.)

10 MR. TRAVIESO-DIAZ: I will get to your
11 question, but I need to explain.

12 JUDGE WARDWELL: Okay.

13 MR. TRAVIESO-DIAZ: For some components --

14 CHAIR KARLIN: No, no, let me -- let me
15 ask --

16 JUDGE WARDWELL: Let him finish.

17 CHAIR KARLIN: So on page 21 --

18 MR. TRAVIESO-DIAZ: Yes.

19 CHAIR KARLIN: -- number 1, you commit --
20 Entergy commits to manage the effects of aging by
21 implementing one or more of the following. One,
22 further refinement of fatigue to show it's really less
23 than 1 CUF. That's the first -- see 54.21(c)(1)(i).

24 The second, management of fatigue at
25 affected locations by an inspection program that has

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1 been approved by NRC, e.g. period non-destructive
2 examination, blah-to-blah.

3 Three, repair or replacement. Now that
4 sounds -- if that's -- I don't know whether there's a
5 whole lot more in the application, but that sounds
6 pretty vague to me, which is to say, "Look, we --
7 you've got to demonstrate -- you must demonstrate that
8 the effects of aging will be adequately managed." And
9 what you say is, "We commit to either recalculate or
10 to manage the fatigue by an inspection program, and do
11 the right thing if the inspection program finds a
12 problem." That's -- is that all that's in the
13 application?

14 MR. TRAVIESO-DIAZ: Well, that's what the
15 application says, but you have to understand how it is
16 done.

17 CHAIR KARLIN: Is that a demonstration?
18 Does that adequately demonstrate that it will be
19 adequate? Or is it just a plan?

20 MR. TRAVIESO-DIAZ: No, it does
21 demonstrate. It is something that can be inspected,
22 too, by the NRC staff, and they can determine whether
23 they have done it or not.

24 CHAIR KARLIN: But if you said, you know,
25 "We will do an inspection program that consists of

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1 inspecting this frequency, these locations, this type
2 of inspection, and we'll do it, you know, over the
3 following X years, and if something happens then we'll
4 -- if we find something, we'll do A, B, C, or D," I
5 don't know what level of detail is required, but it
6 does seem like a demonstration is more than just a
7 promise.

8 MR. TRAVIESO-DIAZ: Well, it is -- let me
9 explain to you the sequence, and you probably
10 understand better why this is sufficient. This is
11 done -- these are three consecutive, not concurrent,
12 steps. The first step is for those components they
13 are -- not all of them. There are like seven
14 components for which the environmentally --

15 MR. RUND: One minute.

16 MR. TRAVIESO-DIAZ: -- affected CUFs are
17 greater than one. They are going to do a reanalysis.
18 The reanalysis may show that some of the components in
19 fact come back to be less than one. You don't know
20 which are going to remain being greater than one after
21 that.

22 For each component they will have to do an
23 inspection program that is tailored to the type of
24 component you have. The inspection that you do for a
25 nozzle is different than the inspection that you do

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1 for a vessel. So you cannot define how you are going
2 to inspect until you know what you are going to
3 inspect.

4 JUDGE WARDWELL: So why haven't you done
5 these reanalyses for the ones that are over one?

6 MR. TRAVIESO-DIAZ: Well, they're in the
7 process of doing that, but that takes time.

8 JUDGE WARDWELL: So doesn't that -- well,
9 doesn't it say that your application is premature?
10 Why didn't you do it as part of the application before
11 you submitted it?

12 MR. TRAVIESO-DIAZ: Well, they -- because
13 these actions are going to be taken 15 -- actually,
14 the inspection won't have to be taken immediately. It
15 will have to be taken as you are running out of
16 cycles.

17 JUDGE WARDWELL: Yes. But for us to see
18 a demonstration and have any confidence that there is
19 some control over this --

20 MR. TRAVIESO-DIAZ: Well --

21 JUDGE WARDWELL: -- it seems like this
22 would be a logical thing you would do as part of your
23 submittal.

24 MR. TRAVIESO-DIAZ: You do a reanalysis --

25 MR. RUND: Time.

1 JUDGE WARDWELL: You can finish.

2 MR. TRAVIESO-DIAZ: You do a reanalysis.

3 If the reanalysis still shows that your CUFs is
4 greater than one, you define an inspection program
5 tailored to that component. And the NRC has to
6 approve it. If the NRC doesn't approve it, you don't
7 do it that way; you do it some other way.

8 And if that inspection shows that in fact
9 you don't meet -- you're going to have failure of a
10 fatigue, then you do repair and replacement. That's
11 the reason why there's only three steps.

12 JUDGE WARDWELL: Thank you.

13 CHAIR KARLIN: Any other questions?

14 (No response.)

15 Okay. Staff? Who is taking this one?

16 Ms. Young?

17 MS. YOUNG: Thank you, Judge Karlin.

18 Again, this is a contention that the staff thought
19 petitioners had done a minimally sufficient job to
20 identify a potential omission from the application.
21 And to that extent, they identified a dispute with
22 respect to the applicant on how it had satisfied the
23 requirements for license renewal.

24 But, again, looking at the information
25 supplied in the declaration attached to their

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1 petition, and the arguments in the petition, it looked
2 like the scope of that challenge was narrowed to the
3 lack of information on how cumulative usage factors'
4 values were calculated, the frequency of monitoring
5 and inspection, and the criteria for determining the
6 inspection frequency.

7 The staff would agree with the Board, or
8 at least the impression they got from the Board's
9 questions, that some of the elements of an aging
10 management program are prospective and involve
11 commitments about how things should be done. But, you
12 know, it's difficult to assess the adequacy of any
13 inspection program without criteria for what the scope
14 of the inspection would be and what -- the
15 acceptability of the various findings and any program
16 and when you have to repair/replace.

17 So that's the gist of the staff's remarks.
18 And any other questions you have, we'd be happy to
19 answer.

20 JUDGE WARDWELL: Here's a curious question
21 that I will ask, not asking my other curious question
22 I wanted to ask of you. What's the process -- or why
23 didn't you ask for this information during the --
24 before the application of a submittal and your
25 interactions with the applicant? I assume you have

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1 interactions prior to the submittal of the actual
2 application.

3 MS. YOUNG: There were a lot of
4 interactions. And if you looked at that GALL report,
5 it is thick. You know, you could stop two heavy doors
6 with it, keep them from closing.

7 JUDGE WARDWELL: I look at it just about
8 like that.

9 MS. YOUNG: So, you know, we expect
10 licensees to identify their consistency with GALL.
11 This general scheme that's in here in terms of the
12 three-tiered process on how they approach this issue,
13 that is something that is acceptable in GALL, but the
14 staff, in doing its review with respect to each item
15 in GALL, if they believe that it's not sufficient --
16 or the staff believes it's not sufficient information
17 on a particular issue, questions will be raised about
18 inspection frequencies, criterias, and things like
19 that.

20 So that yet remains to be done. Is an
21 application minimally sufficient when it kind of hits
22 the basic foundation of programs like this? Yes, it's
23 sufficient in terms of --

24 JUDGE WARDWELL: So your answer was that
25 the application when it came in certainly had enough

1 information to be deemed complete. Once you're
2 getting into it, you would --

3 MS. YOUNG: And complete enough for the
4 staff to begin a review.

5 JUDGE WARDWELL: Yes.

6 MS. YOUNG: It doesn't necessarily mean
7 complete enough to grant the approval of the action
8 that's requested.

9 JUDGE WARDWELL: Sure. Thank you.

10 CHAIR KARLIN: Perhaps you can give us
11 some further help on this regulation 54.21(c), which
12 calls for the applicant to make a demonstration. And
13 they have these three alternative -- they're not
14 sequential, they're alternative demonstrations,
15 options. They're options, basically.

16 And as I understand it, they are working
17 on -- they assert that they have done the first and
18 the third. But if we can focus on the third just --
19 how should we -- how does the staff or should the
20 Commission evaluate or decide whether the
21 demonstration -- that the effects of aging will be
22 adequately managed? I mean, that's kind of -- there's
23 a future context to that.

24 And are there criteria that you use, that
25 we should use, in evaluating that? What's between the

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1 line of a promise and a full-blown, 30-page inspection
2 program with details as to exactly what they're going
3 to do? Somewhere along that continuum, what are the
4 criteria that can be used to determine -- to
5 distinguish between a promise and a demonstration that
6 it will be -- that compliance will be achieved?

7 MS. YOUNG: Well, I think the staff has
8 review guidance that addresses that. Obviously, there
9 is a certain amount of flexibility from application to
10 application with respect to the detailed criteria.
11 But anytime there is an activity to be taken by an
12 applicant or licensee on a future basis, there is an
13 understanding of what criteria will be used for that
14 activity and what periodicity in terms of the review
15 of the actions of an activity are done.

16 And then, there is an assessment from an
17 engineering standpoint of what's the reasonable nature
18 of the periods and the criteria identified. For this
19 contention threshold stage, however, I don't think the
20 Board has to get into all that level of detail,
21 because again the staff raised this merely as a
22 contention of omission with respect to the information
23 that petitioners believe that should have been in the
24 application.

25 And, you know, to the extent that Entergy

1 may some day provide that information, this contention
2 would be moot.

3 CHAIR KARLIN: All right. Okay. Any
4 other questions?

5 (No response.)

6 Okay. Thank you. You're done for the day
7 I think.

8 Mr. Shems, how much -- oh, I'm sorry, Ms.
9 Tyler.

10 How much time do we have?

11 MR. RUND: Ten minutes.

12 CHAIR KARLIN: Ten minutes.

13 MS. TYLER: I'd like to start just by
14 reading what the license renewal application actually
15 says about the monitoring program. It says, "Should
16 Vermont Yankee Nuclear Power Station select the option
17 to manage environmental-assisted fatigue during the
18 period of extended operation, details of the aging
19 management program such as scope, qualification,
20 method, and frequency will be provided to the NRC
21 prior to the period of extended operation."

22 So that's what it says. I think we could
23 all agree that that's extremely vague.

24 CHAIR KARLIN: And is that all that it
25 says?

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1 MS. TYLER: That is all that it says. It
2 says if they decide to manage they'll develop the
3 program at some point in the future, scope,
4 qualification, method, and frequency.

5 I'd also like to read a section of the NRC
6 practice manual that addresses this type of situation
7 in which an application is arguably somewhat
8 incomplete, and it states that the standards for the
9 admission of our contention are lower in this context.

10 This is citing an NRC decision, Wisconsin
11 Electric Power Company, 14 NRC 853, and it says that
12 when an application for a license amendment is itself
13 incomplete, the standard for admission of contentions
14 is lowered because it is easier for petitioners to
15 have reasons for believing that the application has
16 not demonstrated the safety of the proposed procedures
17 for which an amendment is sought. And I think this is
18 a fairly obvious -- obviously point, really.

19 I'd also like to address the issue of
20 whether this is a contention of omission. I think if
21 it's interpreted as a contention of omission it really
22 has little meaning, because that basically -- whatever
23 they might submit moots our concern. That's
24 definitely not the way NEC views the situation.

25 However, if the Board does choose to view

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1 it in that way, I would note that Rule 2.309 -- it's
2 hard to get all the numbers right -- (f)(2), I
3 believe, provides for the amendment of a contention in
4 the event that new information becomes available. And
5 I would submit that should the Board choose to
6 interpret this contention as strictly one of omission,
7 NEC should certainly be permitted to amend the
8 contention based on the submission of the additional
9 information.

10 And I have nothing further.

11 CHAIR KARLIN: Okay.

12 MS. TYLER: Happy to answer questions.

13 CHAIR KARLIN: Any questions?

14 (No response.)

15 I think that may do it for the day.
16 Appreciate everyone's effort and working hard and
17 responding to our questions. Hopefully we -- I think
18 we've learned something, and this will be helpful to
19 us.

20 What I'd like to suggest or want to --
21 I'll do, is that we will reconvene tomorrow at 8:30,
22 I think, unless someone objects to that. We will
23 convene a little bit earlier and plan to proceed with
24 the NEC's remaining four contentions. And perhaps we
25 can get done by noon or lunchtime and that would be

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1 fine. If we can't, we'll keep going until whatever it
2 takes, but I think with the current -- current
3 efficiencies we're doing okay, we'll get it done.

4 MS. YOUNG: Judge Karlin?

5 CHAIR KARLIN: Yes.

6 MS. YOUNG: The staff doesn't object to
7 starting earlier, but it would note that to the extent
8 that this proceeding was noticed to begin at 9:00 each
9 day, that there are members of the public that might
10 be hardship. Whether half an hour is a big deal, I'm
11 not going to argue, but always keep that in mind when
12 we change the schedule.

13 CHAIR KARLIN: Yes. We're aware that the
14 notice did say 9:00, and we hope that -- that the
15 members of the public can attend at 9:00. They can
16 certainly be there at 9:00, and they probably -- I'm
17 not sure whether they'll miss that much. I think --
18 I hope that will be sufficient.

19 But given the heat here, it's probably
20 better to get things done in a relatively cooler time
21 of the morning if we can. We're not running to catch
22 a plane or anything. Our flight is at 8:00 p.m. or
23 something tomorrow night, so we've got all day as far
24 as that's concerned.

25 With that, unless there is anything

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1 that --

2 MS. HOFMANN: Mr. Chairman?

3 CHAIR KARLIN: -- anyone needs to raise --
4 yes, Ms. Hofmann?

5 MS. HOFMANN: Today at the beginning you
6 did say you wouldn't be taking up any of the motions,
7 and I assume that's true for the second day as well,
8 even if we finish early?

9 CHAIR KARLIN: That's right.

10 MS. HOFMANN: Thank you very much.

11 CHAIR KARLIN: That's right. We're not
12 taking -- are you planning to not attend tomorrow, you
13 think?

14 MS. HOFMANN: No, we'll be attending.
15 It's whether I ask Mr. Roisman to come back as well.

16 CHAIR KARLIN: Oh, okay. I see.

17 MS. HOFMANN: Thank you.

18 CHAIR KARLIN: Fine. All right. Well,
19 with that, we stand adjourned, and we'll reconvene
20 tomorrow at 8:30.

21 Thank you. Thank you.

22 (Whereupon, at 4:42 p.m., the proceedings
23 in the foregoing matter were adjourned,
24 to reconvene at 8:30 a.m., the following
25 day.)

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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: 50-271-LR and

Location: Brattleboro, Vermont

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.



Peter Holland
Official Reporter
Neal R. Gross & Co., Inc.

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