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Oral Arguments

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U.S. NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:	: Docket Nos.
	: 50-352-LR,
EXELON GENERATION COMPANY,	: 50-353-LR
LLC	:
(Limerick Generating	: ASLBP No.
Station, Units 1 and 2)	: 12-916-04-LR-BD01
	:

Tuesday,

February 21, 2012

Norristown, Pennsylvania

BEFORE:

WILLIAM J. FROEHLICH, Chairman, Administrative Judge

WILLIAM E. KASTENBERG, Administrative Judge

MICHAEL F. KENNEDY, Administrative Judge

APPEARANCES:

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9:00 a.m.

CHAIRMAN FROEHLICH: Good morning. Please be seated.

MS. LEACH: Good morning.

CHAIRMAN FROEHLICH: Good morning. It's Tuesday, February 12, 2012, just a little bit after 9:00 a.m. Eastern Standard Time, in Courtroom A of the Montgomery County Courthouse, Norristown, Pennsylvania.

Today's proceeding concerns the application by Exelon Generation Company to renew the operating licenses for the Limerick Generation Station, Units 1 and 2, for an additional 20 years.

The operating licenses for Units 1 and 2 are currently set to expire on October 26, 2024 and June 22, 2029, respectively.

For the record, the Docket Number for Exelon's applications are 50-352 LR and 50-353 LR.

On November 22, 2011 the Natural Resources Defense Council, and we'll refer to them today I guess as NRDC, filed a number of challenges to Exelon's license renewal application, and requested a hearing.

The Atomic Safety and Licensing Board was created on December 15, 2011 to adjudicate these

challenges, which are the subject of today's oral argument.

My name is William Froehlich. I am an Administrative Judge and serve as Chairman of this Board. To my left is Judge Michael Kennedy. Judge Kennedy has been a full-time member of the Atomic Safety and Licensing Board Panel since 2008.

Judge Kennedy received his BS in Physics from Canisius College and his Master's and PhD in Nuclear Engineering from the University of Virginia.

Prior to joining the ASLBP, he spent over 35 years performing and reviewing licensing and safety analysis of nuclear facilities.

To my right is Judge William Kastenberg. Judge Kastenberg has served as a part-time member of the Panel since 2007.

He received his BS and MS in Engineering from UCLA and a PhD in Nuclear Engineering from Berkeley.

Judge Kastenberg was a Professor for over 40 years, teaching courses such as risk assessment, management and nuclear reactor analysis and safety, first at UCLA, then at Berkeley, where he retired as the Daniel M. Tellep Distinguished Professor of Engineering.

As I mentioned, my name is William Froehlich. I'm an attorney by training. I've had about 35 years of Federal Administrative and Regulatory Law experience. I joined the Panel in 2008. I serve as a Legal Judge and as Chairman of this Board for procedural matters.

I'd also like to introduce our Law Clerk, Matthew Flyntz. Mr. Flyntz is an attorney and assists the Board with legal research, and last but not least, we have our Administrative Assistant here, Ms. Karen Valloch, all the way in the back.

At this point, I want to thank the Judges and the staff of the Montgomery County Courthouse for allowing us to use this beautiful Courtroom, especially the Honorable William J. Furber, Jr., the President Judge, and Judge Bernard Moore, whose Courtroom we are using now, along with Ms. Gina Eberhardt, Assistant to the Court Administrator, and Officers Austin and Sisca from the Montgomery County Sheriff's Department.

Our Court Reporter today is Tony Porreco. There will be an electronic transcript made of this entire proceeding, and copies will be available to the public. The transcript will be posted on the NRC website in about one week.

I'd also like to mention that members of the media and the public are welcome to attend, to observe today's proceeding. Ms. Diane Screnci, in the back with her hand up, from the NRC Office of Public Affairs is present, and you can contact her if you have any questions about anything that you hear today.

At this point, I'd like to have the parties introduce themselves. I'd like for the lead representative to introduce yourself, state the name of your client and the name of any Counsel who may be participating with you in oral argument today.

Let's start with the Applicant.

MR. POLONSKY: Good morning, Your Honors. Alex Polonsky, Morgan, Lewis and Bockius for Exelon Generation Company.

To my right, arguing as well today, is Brooke Leach from Morgan, Lewis and Bockius, and to my left is a representative from our client, Exelon Generation, Jay Bradley Fewell.

CHAIRMAN FROEHLICH: Okay, thank you, and for the Petitioner.

MR. ROISMAN: Good morning. My name is Anthony Roisman. I represent the Natural Resources Defense Council, NRDC and with me today for the moment, is Chris Paine, who runs the nuclear program

at the NRDC, and he's sitting back over there.

My other technical people will be coming, once they manage the traffic problems in this area, and one of them will sit here with me, depending on the questions that you're asking, just to give me advice.

CHAIRMAN FROEHLICH: Okay, thank you, and for the NRC staff?

MR. SMITH: Max Smith, arguing for the NRC staff, and I'm joined today by Ms. Catherine Kanatas and Ms. Lauren Woodall, who will -- Lauren Woodall, who will both be arguing with me today.

We also have several NRC staff members here. Leslie Perkins and Rob Kuntz are the Environmental and Safety Project Managers for this case, respectively, and Bruce Stuyvenburg and Jerry Dozier are also with us.

CHAIRMAN FROEHLICH: Thank you. Just a few pieces of housekeeping, before we begin.

As a reminder, it's the policy of the Montgomery County Courthouse that the photography is not permitted in the Courtroom.

In addition, the Courtroom doesn't permit cell phones, so that shouldn't be an issue, but if you were somehow able to get a cell phone in here, please

make sure you've shut it off or set it to 'stun', so that we don't hear it.

I'd also like to explain a little bit about the rules of the Atomic Safety and Licensing Board, maybe a little background for this proceeding, just a little bit about the purpose of today's argument.

The Energy Reorganization Act of 1974, a law passed by Congress, created the NRC, which is tasked essentially with the regulation of civilian uses of nuclear materials.

The Commission itself is comprised of five Commissioners, who are appointed by the President and confirmed by the Senate. The Commission has a large regulatory staff of several thousand professionals and they are represented today by the attorneys of the NRC's Office of General Counsel.

We, as the Atomic Safety and Licensing Board, are a separate entity. Judges of the ASLBP are appointed to adjudicate these types of cases, and while we are employees of the NRC, we're not part of the Commission's regulatory staff. We don't talk with the staff or with the Commissioners regarding the proceedings before us.

The only communications we have with the

staff, or with the other parties for that matter, are through the documents they have filed and public sessions like we are at today.

The Commission is an Appellate body and may overrule our decision. Likewise, the Commission's decisions are appealable to the Federal Courts.

As I mentioned, this proceeding arises from an application dated June 22, 2011, filed by Exelon to renew its operating licenses for the Limerick Generating Stations, Units 1 and 2.

That application was noticed in the Federal Register on August 24, 2011, and that Hearing Notice also stated that any person who has an interest that may be affected by that proceeding, who wishes to participate as a party, must file a petition for leave to intervene, in accordance with 10 CFR 2.309.

On November 22, 2011, the NRDC filed four contentions, challenging the adequacy of Exelon's license renewal application for the Limerick Generating Station.

The first three contentions challenge in various ways, whether or not Exelon's analysis of severe accident mitigation alternatives, which we'll refer to as SAMA's during today's proceeding, satisfy the Commission's regulations regarding license

renewal.

The fourth contention challenges Exelon's analysis of so-called -- of the so-called no action alternative, to the proposed renewal of the licenses for the two units.

On December 28, 2011, Exelon filed an answer opposing NRDC's petition to intervene, and on the 21st of December, the NRC staff filed its answer, opposing the petition.

NRDC filed a combined reply to the Exelon and the NRC staff on January 6, 2012. Motions to Strike portions of the NRDC's combined reply were filed on January 17th by Exelon and the NRC staff.

The NRC -- NRDC filed a combined opposition to these Motions to Strike on January 27, 2012.

To be granted a hearing in one of our proceedings, a Petitioner must demonstrate that it has standing and must submit at least one admissible contention. This Board will decide whether that request for a hearing should be granted.

We will decide whether the NRDC has standing, although we do note at the outset, that neither Exelon nor the NRC staff has challenged standing, and whether they have submitted at least one

admissible contention.

A number of regulations in CFR govern the conduct of this Atomic Safety and Licensing Board and the parties before us. In particular, 10 CFR Section 2.309(f)(1) governs the admissibility of contentions.

It provides that a Petitioner must provide a specific statement of the law or fact to be raised or controverted, must provide a brief explanation of the basis of their contention, must demonstrate that that contention is within the scope of the proceeding and that it is material to the conclusions or decisions that the agency must make.

Must provide a concise statement of the alleged facts or expert opinion which support their position, and on which they intend to rely at hearing, and must show that there is a genuine dispute with the Applicant on a material issue of law or fact.

As a reminder, the purpose of today's oral argument is to allow the Board to ask questions of the parties, to help us in our determination of whether the NRDC has met the burden under 10 CFR Section 2.309 (f)(1).

Specifically, the focus today is whether or not the four proffered contentions meet the criteria for admissibility.

After oral argument, we'll return to Rockville, where we'll draft our initial decision and it will be issued within approximately 45 days.

At this point, I'd ask if Judge Kennedy or Judge Kastenberg has anything to add?

JUDGE KENNEDY: Nothing to add.

JUDGE KASTENBERG: Nothing to add.

CHAIRMAN FROEHLICH: As we stated in our notice, scheduling -- our notice of January 31, 2012, scheduling this oral argument, we'll begin with an opening statement of no more than 10 minutes from each party.

The Petitioners will go first, followed by the Applicant, and then the NRC staff. We'll then turn to our questions regarding the admissibility of the Petitioners four proposed contentions and then finish up the day with the Motions to Strike.

After we finished asking our questions, each party will be given five minutes at the end of the day, to make a closing statement.

We're now ready to hear the opening statement from Petitioners, Mr. Roisman.

MR. ROISMAN: Thank you, Mr. Chairman, Dr. Kastenberg, Dr. Kennedy.

This hearing is a strange item, if you

consider that this plant still has years to go before its initial operating license will expire.

So, we're here about future events. Inherently, we're trying to predict the future, and the basis of the Natural Resources Defense Council's arguments here have to do with what we could now do, to anticipate what will happen 13 and 18 years from now, when these licenses will expire, if they are not extended.

The essence of the case depends upon whether the Applicant, Exelon, is able to meet its burden of proof. They must establish that they meet all of the requirements, environmental and safety requirements, related to the proposed extension of their license for an additional 20 years. Basically, a 50 percent extension of their operating license.

We here have the burden to demonstrate that we have raised valid challenges to that, but our burden is merely to demonstrate one that the Chairman has explained, that we have a specific contention, that it raises a legitimate legal and factual question, that we have provided bases which in normal parlance, really means have we given reasons why our legal arguments are provided, and finally, have we provided sufficient technical information to

demonstrate not that we're wrong, but only that there is a dispute between what the Applicant has said and what we believe should be included in this proceeding.

In that regard, I think that the Supreme Court's decision in Robertson versus Methow Valley Citizen's Council, which we cited in our opening petition, perhaps lays out better than any other thing, the basic legal principle that we are pressing for in this case.

In that decision at pages 51 to 52, the Supreme Court said, "Omission of a reasonably complete discussion of possible mitigation measures would undermine the action forcing functions of NEPA."

"Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects and later," on the same page, "recognizing the importance of such a discussion in guaranteeing that the agency is taking a hard look at the environmental consequences of proposed Federal action."

"SBQ regulations require that the agency discuss possible mitigation measures when defining the scope of the environmental impact statement, in discussing alternatives to the proposed action and consequences of that action, and then explaining its

ultimately decision."

Now, we are in this anomalous position created by the regulations, that basically we are asking this Board to allow us to challenge compliance with the National Environmental Policy Act.

However, as the Board is probably aware, the Applicant is not technically bound by that Act. It's an Act that applies to Federal agencies.

None the less, under the Commission's regulations, particularly 2.309(f)(1) and (f)(2), a party that wishes to challenge environmental matters must start by challenging the environmental report, and that is what we have done.

So, where we claim that the environmental report is deficient for not being in compliance with NEPA, we're basically saying that for the moment, you are to think of the environmental report as though it were an impact statement by the staff.

Any or all of those concerns that we have could, in theory, be eliminated when the staff produces its draft or final environmental impact statement. But the rules say we must raise the issue now, and so, that is what we are doing.

Our first three contentions, and I'll leave off the 'e', if that's all right, they're all

environmental contentions.

One, two and three really deal with the question of severe accident mitigation alternatives, and as the Board is aware, the Applicant had such a study prepared by the NRC staff in 1989, and there is a legal question as to whether or not that document was itself, that required evaluation of mitigation alternatives, that NEPA, that the Methow case indicates is required, and that the Commission's regulations require.

Our view is, it is not, and there are three separate views. First, there is important new and significant information that was not part of that initial analysis, some 20+ years ago, and that needs to be considered, in order to fully evaluate the mitigation measure possibilities for this plant.

Secondly, that if that original analysis is to be deemed an analysis of mitigation alternatives, not of SAMA, you know, you could say that were SAMA, for the Commission's specific reference to SAMA in Part 51, but beyond its reference to SAMA in Part 51, the Commission has obligated the Applicant to do certain things, to evaluate alternatives. Mitigation measures are alternatives.

Instead of approving the application as

the Applicant submits it, this Board could approve it, subject to various mitigation measures, being the document.

So, what we're talking about here in Contention 2, is that the general requirements for how alternatives are to be evaluated, have not been met by the Applicant.

In Contention 3, we directly take on Applicant's assertion in its environmental report, that the 1989 analysis meets an exception that the Commission created to the requirement that plants seeking license renewal must obtain and have a SAMA analysis conducted, and there, we take a look at what would be a legally sufficient SAMA analysis, compare it to the 1989 SAMDA analysis, as they used a slightly different name, and argued that it does meet it.

The second major contention that we raised, Contention 4, also deals with alternatives, and this is the so-called no-action alternative, and it's an alternative without alternatives, if you will.

In other words, it doesn't encompass some determination that some other thing ought to be done, instead of re-licensing the Limerick facility. It merely asks a very straight forward question, what would be the consequence if this Board were to

determine that license renewal was not appropriate?

Now, obviously, that question has to start to be answered with looking at 2024, because between now and 2024, no matter what this Board decides on license renewal, nothing will be changed unless the Applicant itself chooses not to continue to operate, or for other reasons, the Commission orders the plant shut down.

So, we start with requiring that there be a look at the likely consequences of this event, and we claim that the Applicant has failed to look, or even consider, likely consequences.

Their analysis of alternatives to the plant, which is a different issue, that is, instead of allowing the plant to operate for 20 years, let's build a solar facility, or let's buy power from an outside utility or other alternatives.

Those options are not what we're discussing here. We're saying, what is likely to happen? Is it likely that they would take thousands of acres to put in a solar facility? Is it likely that they would put in a wind project, with again, thousands of acres?

Is it likely that they would see energy demand side management, that would reduce the

generating need that this plant had been meeting up until 2024, and we believe the Applicant has not examined that question.

To the extent that they've looked at the no-action alternative at all, they have said explicitly in their environmental report, that what they are doing is comparing no action to the need for the generating capacity of this plant, its full power generation.

That is not what the no-action alternative is suppose to do. There is no assumption that the generating capacity of the plant needs to be met by the generating capacity of some other plant, and so, that failure is also a part of our contention.

Thirdly, that in looking at what the likely consequences would be of such an event, the Applicant has ignored a wide range of things that are likely to evolve over the next 13 to 18 years, in trying to figure out what would happen if this plant didn't get its license renewal.

In sum, we believe that we've presented the Board with the necessary elements for admissible contentions, and request that the Board grant our petition and allow us to proceed to the merits of these contentions over the next several months. Thank

you.

CHAIRMAN FROEHLICH: Thank you, Mr. Roisman. I'd now like to hear opening statement from the Applicant, Mr. Polonsky.

MR. POLONSKY: Thank you. Good morning, Your Honor. Thank you for this opportunity to provide an opening statement on behalf of Exelon Generation, the company that has safely operated for decades, the two nuclear plants located at Limerick Generating Station, and the company that is seeking a 20-year extension on the current operating license for these two plants.

Limerick Station generates 2,340 watts -- megawatts of electricity for the grid. The station is a safe and dependable source of base load electrical power. It's been operating for years on end, with only periodic breaks for maintenance and refueling.

Exelon submitted its license renewal application for Limerick Station last June, and the NRC will spend thousands of hours conducting a technical and environmental review of the application, regardless of whether there is a hearing on the application.

The NRDC has filed a petition to intervene, to challenge the application, but the NRDC

does not allege a single safety issue with the operation of the plants during the renewed term of operations.

Rather, NRDC raises, as we have heard from Mr. Roisman, four environmental contentions, framed as legal deficiencies with the environmental report that Exelon submitted to the NRC in support of its license renewal application.

The first three contentions are framed around an allegation that the NRC granted Exelon a "inappropriate exemption", which allows Exelon to rely on a 1980's era severe accident mitigation study, and that there is new information, including the accident in Japan last March, that now should be considered.

That 1989 study was included in a supplement to the final environmental statement that the NRC staff issued in 1989, during the Limerick Station's construction and operating licensing phase.

These three contentions are not admissible in this licensing proceeding, because they are direct challenges to a rule in 10 CFR Section 51.53, that specifically accepts Limerick and two other nuclear stations, from submitting an analysis of SAMA's with a license renewal application.

The Commission created this exception

because Limerick and these two other nuclear stations had already performed a SAMA or SAMDA analysis at their construction and operation phase.

The Commission regulations in 10 CFR 2.335 are crystal clear, that an existing NRC regulation cannot be challenged in a license renewal proceeding, absent a waiver approved by the Commission itself.

The NRDC did not seek that approval. Accordingly, these contentions are simply not admissible here.

This is a perfectly fair outcome. If the NRDC thought that the 1989 final environmental statement for Limerick was not adequate, then it could have challenged the FES shortly after it was published. That was the first bite at the apple.

If the NRDC did not like the Commission's regulations, that accepted Limerick and these two other nuclear power stations from submitting an analysis of SAMA's with the license renewal application, then it could have submitted comments when that rule was finalized in 1996.

That rule was published in the Federal Register and was opened, and then reopened for receipt of public comments. That was the second bite at the apple, and there is no bar to the NRC today, filing a

petition for rule making, seeking to have the rule changed.

But Section 2.335 soundly rejects any attempt by the NRDC to its third bite at the apple in this licensing proceeding.

The NRDC claims that the plain language of the regulation in Section 51.53 does not specify that it includes Limerick and that therefore, the NRDC is allowed to challenge whether Limerick falls under 51.53's protective umbrella.

But the Commission's very intent in establishing the exception in Section 51.53 was to place Limerick and these two other nuclear stations under that umbrella. That language is indisputable. The NRDC's argument to the contrary is unsupported.

What these three contentions boil down to is the NRC's disagreement with a long standing NRC regulation, that the NRDC apparently only recently realized, applies to Limerick Station.

The NRDC cannot use this licensing proceeding as a forum to challenge their new found concern. It's as simple as that, and this is not an outcome that Exelon mandated. It's an outcome that the Commission itself has mandated, leaving no discretion to the Board to find otherwise.

The first three contentions also include a claim that NRDC can challenge, in this license renewal proceeding, Exelon's evaluation of new and significant information that was included in the environmental report.

Exelon included NSI in its environmental report and the NRC staff will review the adequacy of that information, as part of its review of the license renewal application.

However, the Commission has already ruled, and a Court of Appeals has already affirmed, that a Petitioner like NRDC cannot litigate in a licensing proceeding, the adequacy of the discussion of new and significant information on matters that are resolved by regulation.

The fourth and last of NRDC's contentions argues that Exelon's evaluation of the environmental impacts of not issuing a renewed license for Limerick Station, called the no-action alternative, is deficient because it does not include certain renewable energy alternatives and reductions in the use of electricity called demand side management that could, hypothetically blossom in the shadow of the loss of 2,340 megawatts of power from Limerick Station.

Yet Exelon included, in its environmental report, the very renewable energy alternatives and demand side management possibilities that the NRC claims is missing -- NRDC claims is missing.

Exelon included a discussion of renewable solar and wind resources with a supplemental nature gas fired plant for when the sun is not shining or the wind is not blowing.

Exelon also included a discussion of renewable wind energy with a compressed air energy storage facility, and Exelon included a discussion of demand side management.

Exelon not only included the discussion of these possibilities, but it presented a discussion of their environmental impacts. Because the environmental report contains the very information that the NRDC alleges is missing, this fourth contention also is not admissible.

Exelon and the NRC staff explained all of this in their answers to the petition to intervene. In response, the NRDC filed a reply that creates a moving target for the parties and for this Board.

The NRDC crafted brand new arguments and submitted new interpretations about what their experts really meant to say in the petition to intervene, but

a Petitioner cannot use a reply to support vague and unsupported arguments originally presented in the petition to intervene.

NRDC tries to shield its actions by saying that it was providing "supporting evidence", and that this is not the same as elaborating on the basis for a contention. This semantic gymnastics ignores the fact that the scope of a contention is defined by its legal citations and the breadth of its factual allegations.

Any new theories about why the environmental report is not adequate go beyond supporting evidence. They change the scope of the contention, and Commission regulations and precedent require that the scope of the contention be defined with specificity in the petition to intervene.

NRDC justifies its response in part, by claiming that Exelon sought to demonstrate that NRC was wrong "on the merits". That is not the case.

The Board has an obligation, at the admissibility stage, to evaluate whether the contention contains sufficient information to demonstrate that there is a genuine dispute. That is what the regulation in Section 2.309 (f)(1) requires, and Mr. Roisman, in his opening, stated that he has

presented experts that demonstrate that there is a dispute. We would agree with that, but that is not the legal standard.

The standard is that it has to raise a genuine dispute, and Exelon has demonstrated in its answer, that the factual arguments raised by NRDC do not contain sufficient information to raise a genuine dispute. Exelon's arguments, therefore, don't go to the merits.

For example, NRDC's employees say that the wind patterns have changed over the past decades, such that disbursement of radiological impacts from an accident at Limerick might be different today than decades ago.

It's entirely appropriate for Exelon to point out that NRDC's employees, as they're experts, provide a objective data which actually shows the opposite.

The Board is not a robot, mindlessly accepting any arguments that are submitted simply because they're in a signed declaration. The Board is support to evaluate the arguments for what they do and do not say.

NRDC says it's not obligated to inform the Board and the parties, every time it identifies some

new supporting evidence. That may be true, but there is a big difference between new documents that support an already well articulated argument and new arguments, supported by already identified documents.

For the Board to rule otherwise, would be giving an incentive for a Petitioner to hide the ball, regarding the bases for a contention, including to provide legal cites in its petition to intervene.

The Petitioner could always justify later, expanding the contention, by stating that it was merely providing supporting evidence. That is akin to notice pleading, which the Commission has soundly rejected, as not being the standard for admissibility of contentions in the license renewal proceeding.

For all these reasons, the Board should deny NRDC's petition to intervene in its entirety. We look forward to answering the Board's questions. Thank you.

CHAIRMAN FROEHLICH: Thank you, Mr. Polonsky. Mr. Smith?

MR. SMITH: Thank you, Judge Froehlich, Judge Kastenberg, Judge Kennedy.

The NRC staff opposes the Natural Resources Defense Council's petition to intervene.

As the parties have explained, and the

Board has too, a petition to intervene must both establish standing, as well as proffer of one admissible contention.

Under the Commission's contention admissibility standards, an admissible contention must demonstrate that it is in the scope of the proceeding, material to the issues to be resolved and also, supported by an adequate factual basis.

The NRC staff believes that NRDC has established standing, but at that none of the four contentions meet the Commission's strict standards for contention admissibility, and because all four contentions focus on the environmental review, I'll take a minute to briefly explain the scope of the NRC staff's environmental review in license renewal proceedings.

The National Environmental Policy Act requires the NRC to consider the environmental impacts of renewing the operating license for an additional 20 years.

When it promulgated its license renewal regulations, the Commission found that based on its experience with the existing reactors, and the misunderstanding of their impacts, it could draw some generic conclusions on the environmental impacts of

renewing operating licenses. Prepared a generic environmental statement to support those conclusions and then the NRC and the Commission embodied those conclusions in its regulations.

However, the Commission also realized that some issues could not be determined generically and need to be resolved on a site specific basis.

For those issues, the NRC staff prepares a supplement to the generic environmental impact statement called a supplemental environmental impact statement, and in preparing that, the NRC staff relies on environmental reports submitted by the Applicant, that the NRC staff uses at the starting point for its own independent review.

Importantly, issues the Commission has resolved generically are outside the scope of adjudications and NRC's proceedings.

All three contentions -- the first three contentions, Contentions 1, 2 and 3, and I'll drop the 'e' also, raise challenges to treatment of the -- the environmental report's treatment of severe accident mitigation alternatives.

The Commission's regulations clearly specify that if the staff has previously considered severe accident mitigation alternatives, in either an

environmental impact statement or a supplement to an environmental impact statement, or in an environmental assessment, then license removal phase for that facility, severe accident mitigation alternatives need not be considered in the environmental report.

The staff considered serve accident mitigation design alternatives to the Limerick facility and a supplement to the environmental statement at the operating license phase -- licensing phase.

Therefore, under NRC regulations, all three of the first three contentions are outside the scope of this proceeding and immaterial because they challenge an analysis that the regulations do not require be in the environmental report.

Moreover, the Commission explained its intent when it promulgated this regulation in the accompanying statement of considerations, which was published in the Federal Register.

The Commission stated, "NRC staff considerations of severe accident mitigation alternatives have already been completed and included in an EIS or supplemental EIS for Limerick, Comanche Peak and Watts Bar."

Therefore, severe accident mitigation

alternatives need not be reconsidered for these plants for license renewal.

Like all generic determinations, the NRC regulations provide avenues to challenge those, both in NRC adjudications and elsewhere, to the petitions for rule-making or petitions to waive the applicability of a rule in a given proceeding, but NRDC has not chosen to pursue either of those avenues.

Importantly, the NRC staff's consideration and the Commission's consideration of severe accidents and severe accident mitigation alternatives did not end when it promulgated the license renewal regulation.

Rather, the Commission and the staff continue to look at severe accidents and ways to mitigate those severe accidents, both through site specific studies and through generic studies across the entire industry, most recently, the response to the incidents of September 11, 2001, the Commission's planned proposed response to the incident of Fukushima and the state-of-the-art reactor consequence in this analysis and other studies, just to name a few, have continued to look at those issues in an evolving way.

The last, Contention 4e, has, as the other parties have noted, challenges the Applicant's

treatment of the no-action alternative in the environmental report.

Now, a no-action alternative considers what would happen if the NRC were to deny the license renewal application, both the environmental impacts of decommissioning and as well, the environmental impacts of the likely sources of power to replace Limerick generating capacity.

NRDC alleges the no-action alternative should consider additional alternatives, but NRDC did not provide any evidence to show their technical feasibility or commercial viability in its petition to intervene.

NRDC's reply brief attempted to cure this deficiency by providing additional facts to support the contention, but Commission's precedent is very clear that Petitioners cannot use a reply brief as an opportunity to re-invigorate and thinly supported contention in the first instance, both for reasons of fairness and efficiency.

Moreover, in this case, the additional information in the reply brief is not supported by a citation to any expert declaration or other technical document, and therefore, it constitutes the types of assertion and speculation that the Commission has also

found to be insufficient bases for admissible contentions.

Finally, I think it's worth noting that however the Board rules today, the NRC staff will conduct its own independent review of the Limerick license renewal application, both from a safety and from an environmental perspective.

The NRC staff's environmental review will consider the no-action alternative, as well as whether or not new and significant information impacts any of the generic determinations the Commission has previously made, including the determination to plants such as Limerick need not conduct a second SAMA analysis, if one was already completed.

The public has had an opportunity to participate in this process, by submitting the scoping comments for the staff's preparation of the supplemental EIS for this proceeding, and the public will have further opportunities to participate by submitting draft comments on the NRC's draft supplemental environmental impact statement.

Therefore, the NRC staff opposes NRDC's petition to intervene. We believe they have shown standing, but not submitted a contention that meets the Commission's strict admissibility standards.

None the less, the NRC staff will continue to look at these issues in an ongoing fashion, as it prepares its environmental impacts statements for Limerick. Thank you.

CHAIRMAN FROEHLICH: Thank you, Mr. Smith. From the opening statements and from our review of the pleadings that have been filed with the Board, much of our discussion today, I think, will deal with SAMA's and SAMDA's, and the relevance and the importance of the SAMDA that was conducted in 1989, and what efforts will be conducted to analyze severe accidents going forward.

I would like to start our questioning, I guess, with reference to, I guess the Commission's most recent statement on SAMA and SAMDA's in the Pilgrim decision, the CLI 12-01.

There, the Commission stated that a SAMA analysis is part of the NRC's license renewal review under NEPA. It's a NEPA mitigation alternative analysis and to date, has been conducted as a quantitative analysis to identify if there are additional mitigation measures, procedures or hardware that may be cost beneficial to implement a nuclear power plant, to further reduce severe accident risk, probability or consequences.

The SAMA analysis is a probability weight of assessment of the benefits and costs of mitigation alternative that can be used to reduce the risks, again, probability or consequences or both, of potential severe accidents at nuclear power plants.

Various computer codes are used to calculate the accident sequence, probabilities and consequences, page two of CLI 12-01.

The Commission, in that Pilgrim decision, said that with respect to a SAMA analysis in particular, unless a contention submitted with actual -- with adequate factual documentary or expert support raises a potentially significant deficiency in a SAMA analysis, that is a deficiency that could credibly render the SAMA analysis all together unreasonable under NEPA standards, a SAMA related dispute will not be material to the licensing decision, and is not appropriate for litigation in an NRC proceeding, page 25 of CLI 12-01.

The Commission in Pilgrim closed with the final observation that ultimately, the ER serves to inform the SAMA analysis in the first -- in the final supplemental environmental impact statement prepared in the Pilgrim license proceeding, while the Board's decision in that case focused on the adequacy of the

ER, NEPA compliance is determined by the adequacy of the SEIS, not the Applicant's ER.

Therefore, the ultimate issue in determining NEPA compliance is the adequacy of the staff's environmental review, not the Applicant's ER, pages 29 to 30 of CLI 12-01.

As part of the notice scheduling today's oral argument, the Board sent out a preliminary list of topics to be addressed. I propose that we move through those questions in order, and the Board has a series of questions to follow up, the ones we gave you, as sort a sneak-peek of.

I guess I'd start with the broad first question in our notice of January 31st, where we said, "Considering the 10 CFR 51.53 (c)(3)(4) requires an environmental report to contain any new and significant information regarding the environmental impacts of license renewal of which the Applicant is aware, and that 10 CFR 51.53 (c)(3)(2)(L) requires an ER to consider alternatives to mitigate severe accidents if the staff has not previously conducted severe accident mitigation alternative for the Applicant's plant, please discuss how these two sections of the Commission's regulation should be applied in the Limerick license renewal proceeding."

I think I'd like to hear first from the Applicant, and you touched on that in your opening. Mr. Polonsky?

MR. POLONSKY: Thank you, Your Honor. Looking at the overall structure of 10 CFR Section 51.53 (c)(3), there are these four sub-sections, 1, 2 and 3, or i or f, 1, 2 and 3 we'll call them -- 1, 2, 3 and 4, sorry.

Four is the new and significant information section and two is the section that has certain requirements that must be met and creates exceptions. We don't call them exemptions, but exceptions to others.

There is not question in Exelon's mind, that there is an obligation to provide a discussion of new and significant information.

However, Section 2L specifically says that if the staff has not previously done a SAMA analysis, and here they have, there is no requirement to submit a SAMA analysis.

So, the 1989 SAMDA analysis that was part of the supplement to the final environmental statement for Limerick, as part of its construction and operating phase, was not incorporated by reference, was not brought in at all into the environmental

report.

There simply was an analysis of new and significant information, or I should say new information to determine if it was significant, in the environmental report, and the specific rationale for doing that was to determine if there was going to be a change in the severe accident consequences, and on page 5-4 of the environmental report, if I can just quote to you.

"For purposes of this review," talking about new and significant information, "new information is defined as information indicating a potential change in consequences of severe accidents from those considered by the NRC in the GEIS, or generic environmental impact statement."

So, there is no discord between Sub-Section 2L and Sub-Section 4. Sub-Section 2L says we do not need to include a SAMA analysis. We did not. Section 4 says we do need to look at new information to determine whether it is significant, and we have done that, and the conclusion was that none of the information that we looked at, that was new, was in deed, significant.

CHAIRMAN FROEHLICH: It's your position that because the SAMDA was conducted by the staff, in

August of 1989, you need not include that, make reference to that, as part of your application, relying on the exception or exemption in the regs, is that correct?

MR. POLONSKY: That is correct, Your Honor.

CHAIRMAN FROEHLICH: And that is the position that staff shares, is that correct, Mr. Smith?

MR. SMITH: That is correct, Your Honor.

CHAIRMAN FROEHLICH: Okay. Now, I guess I turn to the Petitioners.

JUDGE KASTENBERG: May I ask just a question?

CHAIRMAN FROEHLICH: Sure, go ahead. You know what my question will be.

MR. ROISMAN: I think I do.

CHAIRMAN FROEHLICH: All right.

JUDGE KASTENBERG: But you brought up this whole question about little 4, as new and significant information.

The fact that that is included, an analysis is included in the ER, is that challengeable?

MR. POLONSKY: Under normal circumstances, as the Board knows, yes, once information is

presented, it is challengeable.

However, we have a line of case law that applies here, which says, for whatever curious result it is, it is not challengeable.

In the Pilgrim and Vermont Yankee proceedings for license renewal, the Judges of those Licensing Boards grappled with that very same question, Judge Kastenberg, and they came to the conclusion that -- and let me back up.

The sections that were relevant to that analysis was (c)(3)(i) and Section 4, for new and significant. Little i, or 1, covers Category 1 information and says that if it's a Category 1 it does not need to be included, frankly, because it's covered by the generic environmental impact statement and therefore, has already been incorporated as part of a rule-making to Appendix B of 10 CFR Part 51.

So, with that background, the Boards then looked at Section 1 and 4 and said, does 4 trump 1, and the answer was no, even though you don't need to provide information about Category 1 issues, because they've already been included in the GEIS, you still need to look at new and significant information.

But any challenge of whether that information is there or whether that information, for

our case which is most important, is adequate, is not challengeable in the license renewal proceeding.

Those decisions went to the Commission. They went to the Circuit Court and they were affirmed. That does not mean that there is no avenue for a Petitioner, like NRDC, to challenge.

They can file a petition for rule-making. They can, as the staff mentioned, comment on the draft and final SEIS, but that litigation of the adequacy of that new and significant information, the Commission has already said, cannot be done in a license -- in any license renewal proceeding.

JUDGE KENNEDY: Can you help us maybe expand on that a little bit more?

It seems to me, and there is a constant theme between the Applicant's filing and the staff's filings, does this rely on the fact that this is a Category 1 issue? I mean, are we to the point of saying that severe accident mitigation alternatives are a Category 1 issue?

I mean, I think we've got to be careful. I'm trying to look for the thread of when we're talking about severe accidents, which I would agree with you, is a Category 1 issue, and mitigation alternatives, which at least is not resolved

generically, and then we -- we'll grapple with the exception/exemption issue.

But in my mind, when it comes to new and significant information, I think I'm looking for some clarification. The scope of that new information should go as broad as the mitigation alternative, and I guess I'm trying to understand how the case law takes that off the table.

I mean, the information is in there, and I understand what you're saying. If you put it in there, the adequacy could -- challenge could be raised. Now, whether it would be accepted or not, is pointed in the case law.

But I -- somehow, the bridge gets broken to me, somewhere between this Category 1 issue and where we are with mitigation alternatives, so -- and this is going to come up a few times. I mean, I think we've got some constant questions on Contentions 1, 2 and 3, of how this all works.

We'll get to it, but I'm thinking, what if all the new and significant information led you to do -- what if it was significant? What is the outcome? Do you just say in the application that it's significant? Do you not have to deal with the SAMDA analysis, at that point? Is it the staff's issue to

deal with? Does the Applicant have -- I'm sorry, this is too many questions, but let's start back with the Category 1.

We're going to get to all of these. I mean, I think this is going to come up time and again, and if we can nail down some of it earlier, it would be helpful. I've sort of got a broken bridge on my road to success here.

MR. POLONSKY: Well, let me work with that analogy and either make sure it doesn't break in the first place, or it fixes it for you.

Let me answer your question in two phrases. The first is that Exelon's approach was not to look at new and significant information for mitigation alternatives. The analysis has to start with severe accident consequences, and is there any new and significant information that would make a change in the -- make a significant change, because it's new and significant information, a significant change in the accident consequences?

And the NRC has -- well, I won't even go to the NRC. The 1989 supplement to the FES uses language in its conclusion that the consequences of severe accidents are -- let me get the exact language for you, reasonably low.

And so, the analysis that Exelon performed was to determine whether there was any information that was significant enough to change this conclusion. I'm on page VI of the supplement to NUREG-0974, which is that 1989 SAMDA document.

I'm at the top, and the first full paragraph, just the first sentence, "In summary, the risks and environmental impacts of severe accidents at Limerick are acceptably low."

Once the GEIS was issued, severe accidents had a Category 1 designation of 'small'. So, the review was to determine, was there any new and significant information that would change that category of 'small', to something more -- a greater impact, moderate or large?

If the result of that was yes, the new information is significant, then there would have been a next step to look at mitigation alternatives, and that did not happen.

But regardless, that wouldn't have been challengeable in this license renewal proceeding, and let me try and make the connection for you, between this Category 1 issue, and it not being challengeable.

The ultimate take-home message, I hope you're looking for is, you don't need to find -- the

Board does not need to find that the SAMDA or SAMA issue is a Category 1 issue for Limerick.

We think there is sufficient information in the record for you to conclude that SAMA's for Limerick are a Category 1 issue. That would clearly connect the Pilgrim and Vermont Yankee case law through to new and significant information.

However, even if the Board did not find that, we argued in our answer that that case law stands for the principle that any issue that is accepted by regulation, accepted by law, Category 1 says you don't need to include it, 2L says you don't need to include a SAMA if you're Limerick. It's excluded -- accepted by law, then that is the new and significant information associated with that, and is not challengeable in the license renewal proceeding.

Otherwise, it eviscerates the whole -- the whole exception in the first place. Did that help?

JUDGE KENNEDY: So, when the bridge has been joined, there is the -- two sides of the river have been joined, in the world of severe accident mitigation alternatives, not just severe accidents.

I mean, so, whether we argue whether it's a Category 1 or Category 2, if you combine the exemption in this picture, then you view it as being

at least by law, ruled out, even though you would go through -- again, in the hypothetical world where there was significant information, it ultimately led to a re-analysis of mitigation alternatives.

Would that all go into the ER, as new and significant information, and is not challengeable?

MR. POLONSKY: Again, it would not be challengeable, regardless of what the result is.

JUDGE KENNEDY: And that is because severe accident mitigation alternatives are ruled out by law?

MR. POLONSKY: For Limerick.

JUDGE KENNEDY: For Limerick?

MR. POLONSKY: Yes, Your Honor. The contention -- the result would be no different, if you had a Category 1 issue, we think, if you had new and significant information.

JUDGE KENNEDY: Right.

MR. POLONSKY: New information that turned out to be significant, you would have to do a further analysis of what that significance means for whatever Category 1 issue it was, and the NRC staff would review it, and the public could comment on it, but they could not litigate it.

JUDGE KENNEDY: Could not litigate it? That is -- that is the point you're making?

MR. POLONSKY: Yes.

JUDGE KENNEDY: So, if I -- and again, I think to Mr. Smith, what I heard you say is that the staff will do its own analysis of mitigation alternatives and provide possibly, information within an environmental impact statement, supplemental environmental impact statement for Limerick.

I mean, assuming that it all -- I mean, again, it may support what is currently on record, but I thought I heard you say that the staff will also be doing work on its own, to look at kind of whether new and significant information is already -- or whether new information, possibly leading to changes or material within the supplemental environmental impact statement, and is it your position that that's not challengeable, you know, in a legal proceeding, in a hearing?

MR. SMITH: Thank you, Your Honor. You've raised several points, and I'll try to address them.

JUDGE KENNEDY: I have a tendency to do that. Please make me back up and repeat if, if you need it.

MR. SMITH: The NRC staff understands that it has to look for new and significant information to comply with NEPA, against all of the Commission's

generic determinations, those in the GEIS, those that are labeled as Category 1 issues and also, this regulation that excuses facilities that have already completed one SAMA evaluation and are conducting another one.

The NRC looks at that information and under -- in the statement of considerations accompanying the Commission's environmental regulations, it was in 61 Federal Register 28467, if the NRC staff ultimately concludes that there is significant new information, then it, itself, has to go to the Commission to seek a waiver to consider that new information in the draft and final supplemental environmental impact statements.

And as the staff reviews this application and they look at it, we will look at the new information, evaluate its significance, and if we do find that it does rise to that level, then we'll ask the Commission to -- for the Commission to consider it in our environmental documents.

I think there was a part two to the question.

JUDGE KENNEDY: Well, maybe I'll re-ask, because if I understand where this is all going, let's say the information does show up in the draft

supplemental environmental impact statement, that would not be available for new contentions to the Petitioner, and is not litigable?

MR. SMITH: Thank you. I think as a general matter, we might have a slight disagreement with the Applicant, we think, that all of the Commission's generic determinations could be litigated in an individual proceeding, on the condition that the Petitioner submitted a waiver petition, to seek Commission approval of the challenge of that determination, in the proceeding.

In that sense, the determination in 51.53 (c)(ii)(L) is not different than any other one, and you can submit a petition on that and challenge whether or not there was new and significant information as related to the Commission's previous consideration about severe accident mitigation alternatives.

JUDGE KASTENBERG: I would like -- I want to come back to something over here, but we can take -- I can hold it.

CHAIRMAN FROEHLICH: Well, finish, but just let -- we want to hear from Mr. Roisman.

JUDGE KASTENBERG: Yes, just maybe a fine, yet important point, you quoted the NUREG, about that

if new and significant information changed the risk, is the way I think you characterized it, then it might be -- that it might be challengeable.

My understanding, in reading what the Commission has said, that it's not that it's the risk, because they've already determined that the risk is small, but it is the balance between the cost and the benefit that might change, and I say that may be a subtle point, but it is a -- to me, at least, it is a significant point, that it's the change in risk, balanced against the cost of the mitigation, or some new mitigation device, or what have you, that would be permissible in a proceeding.

Again, you might argue, that well, because of this Sub-Part L, they're exempt even from that. I'm not so sure. That's what I would like to try to get a sense of, in that sense, that it's really the cost benefit that you have to look at.

MR. POLONSKY: Judge Kastenberg, you're right, for that Pilgrim decision, that CLI 12-01.

JUDGE KASTENBERG: Right.

MR. POLONSKY: But in that case, that was an admitted contention -- contentions, related to severe accident mitigation alternative analyses and the adequacy of those analyses, and once you get into

the analysis itself, the ultimate arbitrator for whether or not a mitigation alternative is justifiable to add, is that cost benefit analysis.

We are three steps removed from getting all the way down into the details of that. We are looking at severe accident consequences, and we don't even get into the SAMA analysis, in our view, until we have determined that there is new and significant information that would change the outcome of that severe accident consequence analysis from "small", as defined under Part 51 and 52, to moderate or large, and if I could quickly clarify.

I tend to simply and say it's not litigable. It's not litigable. But clearly, 2.335 exists to everything I am saying, and if there is a waiver that is submitted and granted by the Commission, then of course, it could be litigable, but we don't have those circumstances here.

CHAIRMAN FROEHLICH: Mr. Roisman, let's go back to two, and your view -- your view of the role of the 1989 SAMDA analysis played vis-a-vis raising Contentions 1, 2 and 3, at this point.

MR. ROISMAN: So, I must say you're a little bit, I think, Shakespearean, after we've been sitting here playing Hamlet without Hamlet, and I was

glad to see that Mr. Polonsky decided to bring Hamlet on the stage, by quoting to you from the 1989 SAMA.

It is a myth to say that the SAMDA, the 1989 SAMDA is not in this case. In fact, if it's not in this case, and Exelon fails to meet its burden of proof that it claims would give it an exemption under 51.53 (L), because that requires proof that there has, in fact, been a prior SAMA analysis.

That is the condition for the exception to be applied.

CHAIRMAN FROEHLICH: That requires proof, that there was a SAMDA analysis in 1989? Can't we all agree that a SAMDA analysis was prepared by the staff in 1989?

MR. ROISMAN: They could offer that as a stipulation. We would not agree to it, because it's not a SAMDA analysis that 51.53(L) applies its exemption to.

It's a prior analysis of severe accident mitigation alternatives, and as we've argued in our Contention 3, we think that has some meaning, and the meaning is not actually in 51.53. It's in all the other regulations that the Commission has written about what has to be done with alternatives, and it's in the case that I cited in my opening statement.

It is a requirement that you take a hard look at mitigation alternatives. I submit that any review of this document, the 1989 supplement, could not tell what was done by giving a hard look.

On at least two occasions, the staff explicitly says there are potentially cost beneficial SAMA mitigation measures.

But they say, Applicant has submitted some documents to us that suggest that the risk analysis is overly conservative, and the staff goes onto say, "We haven't evaluated that yet, but we're going to use the fact that they submitted it to us, to say therefore, these things that look like they might be cost beneficial aren't."

Now, any other definition of hard look, that's not a hard look, that's a duck, and that's what is happening here.

So, number one, and by the way, in a different Pilgrim decision, the Commission made the observation that we don't take the Applicant at its word.

The Applicant has told us that there is an adequate SAMDA -- excuse me, severe accident mitigation alternatives analysis that needs to come, but they have to prove it first. We don't take them

at their word.

But let me step back from that for a moment, because in a way, that really only gets us to Contention 3, and now, for the moment, I want to focus where I think you started with Contention 1, new and significant information.

Let's identify what we know we agree about. Applicant, NRDC and staff agree that new and significant information exists, at least new information, excuse me, new information that bears on the 1989 SAMDA analysis, and that it's required to be included in the environmental report.

We disagree about whether it's significant. We also disagree about whether all the new information that bears on that report has been produced in the ER, but we don't disagree that if it is new, it belongs in an analysis and an environmental report, and the Applicant has provided one in its report.

We also agree that the test of whether it's significant or not depends upon the consequences test, and I think the Commission -- and we quoted this in our -- in our brief, in the petition at page 29, the Union Electric Callaway Plant case, in which the Commission said, this is their slip opinion at page

31, the new information must present "a seriously different picture of the environmental impact of the proposed project, from what was previously envisioned".

Now, we submitted a declaration and by the way, Dr. McKinzie has joined me to help -- we submitted a declaration that describes in some detail, all of the ways in which new information would be significant here from looking at different accident scenarios, looking at a broader range of potential mitigation consequences, looking at the effect of population, looking at the effect of meteorology, a whole range of items that we claim, represent significant, not just new, but significant information because -- and the experts that prepared that technical declaration, take you through comparable plants, look at other plants and see what did those plants find were severe accident mitigation alternatives, and how are those different than what we now see, in looking at the 1989 SAMDA?

So, I think we've met a burden that is at least showing that there is a genuine dispute with the Applicant about how much information is new and what of the new information is significant, but we don't disagree with them, that it is a consequences test.

It has -- can't just be an abstract, that is a very fine point, but it doesn't make any difference.

Where we disagree, and disagree substantially, is whether or not we're entitled to challenge the new and significant information that they have put into their report, the environmental report, and now, that the staff says might conceivably show up in the draft environmental impact statement, even arguably, a broader range of new information.

And they touched on it, in their own argument, that have -- that says that something that they assert in the environmental report is not challengeable here, is a line of Commission decisions that said when new and significant information is challenge in order to move a Category 1 generic finding to a Category 2 site specific finding, that has to be done by rule-making, by challenge under 2.335, a variety of -- 2206 petition.

In other words, the generic findings are sacrosanct, because they were made in a GEIS, and if you want to change them for generic, you have to go through one of the generic processes. We don't disagree with that.

CHAIRMAN FROEHLICH: Your argument is that they are Category 2?

MR. ROISMAN: They're Category 2, and the Commission has said they're Category 2, even when it gave the exemption that Exelon is relying on here, they call it a Category 2.

They don't say it's a Category 2, unless the exemption applies, and then if exemption applies, it's Category 1, nor could it be a Category 1, because the Commission again, in the regulation, not in the statement of consideration that went with the regulation alone, not in the GEIS, the body of that document, but in the regulation itself, tells us that in order to be a Category 1, it has to be generic. It's the whole -- that's why they call it generic environmental impact statement.

We are not talking about a generic problem. We are talking about a site specific issue related specifically to this plant. There is no way, short of the Applicant filing a 2.335 petition, which they have not yet done, to seek a waiver of the Commission's regulation on what constitutes a generic finding. There is no way for them to take the 1989 SAMDA and turn it into a Category 1 issue. It's Category 2.

There is no Commission case law that suggests that new and significant information related

to a Category 2 issue is beyond the scope of a hearing.

More importantly, when you read the Commission's decisions, the Commission's position that said, we can't challenge new and significant information in an individual licensing proceeding, was all based upon the fact that what you are challenging it about, had to do with moving something from generic to non-generic, from Category 1 to Category 2, and we aren't doing that.

We are talking about what is already a Category 2 issue. Therefore, we believe the new and significant information issue is more than legitimate in the proceeding. We've joined issue with the Applicant about it, depending upon what the staff does in the DSEIS, we're likely to join issue with them on it, as well.

Now, there is another aspect of this, that 51.53(L) is not a prohibition. It doesn't say, "You may not do a SAMA analysis, if you've done one previously." It says you're not required to do one. Fair enough.

What does that mean in the context of what the Applicants did with its new and significant information analysis in the analysis that it has

presented in the environmental report?

Well, if you look at that analysis, it reads like a SAMA analysis. They take a look at risks. They take a look at the consequences. They balance them. They calculate, this is how much more it would save in the way of, you know, some benefit to the public, and this is much it can cost, in terms of some damage to the public.

They've done, admittedly, a very inadequate SAMA analysis, as part of their environmental report, in order to explain to you, why this new information is not significant, as it's related to the 1989 SAMDA.

So, we aren't really in the territory in which the Applicant shows us, takes this document, hands it to the Board and says, "This meets the 51.53(L) requirement," and sits down.

They said, "Well, there is some new information we've got to look at," and they pick through this document and they pick through the new information and they give you an analysis.

What other name would you call it, except an analysis of severe accident mitigation alternatives?

So, we're already here. The only question

is whether or not we're going to get an opportunity to challenge what they said, or whether that is going to be shown here. I think that's it.

CHAIRMAN FROEHLICH: Staff or the Applicant care to respond to what you've just heard from the Petitioner?

MR. POLONSKY: Yes, Your Honor.

CHAIRMAN FROEHLICH: Okay.

MR. POLONSKY: Two points is I'd like to first point out that the argument that Mr. Roisman raised, I don't recall that being raised either in the petition or the reply.

So, that is a brand new argument we're hearing for the first time here, that our discussion of new and significant information was not something to meet the requirements of Section 4, but was actually at SAMA analysis, and I'd like the Board to note that.

The other is whether or not this a Category 1. I had answered Judge Kennedy's question by saying the Board did not need to find that it was a Category 1, but I would like to walk through what we think is the evidence that for Limerick, SAMA's are Category 1, and I'll start with the GEIS, the generic environmental impact statement NUREG-1437 on page 4-

122.

There is a discussion about those plants that have -- with cooling ponds located in salt marshes, and there are specific plants called out, South Texas and Turkey Point, saying that ground water quality is not a significant concern there because ground water quality beneath salt marshes is too poor for human use.

This issue is raised in Section 2, as an exception, and these plants don't need to address ground water.

A few sentences below, it says, "Therefore, for plants with cooling ponds located in salt marshes, this is a Category 1 issue."

So, clearly, there is precedent that when something is accepted under Section 51.53(2), even thought it's not L, it's a different provision, but that is a Category 1 issue.

That is consistent with the page 5-116 of the GEIS, which talks specifically about SAMA's, that says, "Consequently, severe accidents are a Category 2 issue for plants that have not performed a site specific consideration of severe accident mitigation," and submitted that analysis for Commission review.

The inference is, if it's already been

submitted, it's not a Category 2. Well, there are only two categories. So, it has to be Category 1.

Then in the June 1996 Federal Register notice, which issued these regulations, on page 28480, in the third column on the right, it says, "Because the third criterion required to make a Category 1 designation for an issue requires a generic consideration of mitigation," as Mr. Roisman points out, "the issue of severe accidents must be re-classified as a Category 2 issue, that requires consideration of severe accident mitigation alternatives provided this consideration has not already been completed."

Again, it's Category 2 for those who haven't, because the Commission has made a generic determination that there are three plants out there that already have done it, and they don't need to address it again.

MR. SMITH: Judge?

CHAIRMAN FROEHLICH: Yes.

MR. SMITH: Is that for our response too?

CHAIRMAN FROEHLICH: Of course.

MR. SMITH: Thank you, very briefly. I think that in this case, the issue of whether or not SAMA's for Limerick are a Category 1 or Category 2

issue is a distinction without a difference, and that, I think, goes to the nature of what a Category 1 issue really is.

In Category 1 issues, a generic determination is not challengeable in NRC proceedings, not because of the call Category 1, and that has some magical effect on the issue. It's Category 1 because it's embodied in the Commission's regulations, referring to the generic determination by the Commission on the environmental impacts of that issue, across all of the plants.

Likewise in this case, the SAMA regulation 51.53 (c)(3)(2)(L) represents a generic determination by the Commission that if one SAMA analysis was done, then a subsequent one need not be done at the time of licensing renewal, and of course, the Commission singles out Limerick, Watts Bar and Comanche Peak in the statement of considerations, as examples of that.

But from the plain text of the regulation, they're also applied to three reactors of the license, such as Watts Bar Unit 2 or Vogtle, when they come into license renewal down the road, or even a subsequent license renewal.

So, it is a generic determination test and applicability across potentially, many plants and for

that reason, the generic determination in the regulations does not put it challengeable at proceedings, not without its call to Category 1 or call to Category 2.

JUDGE KENNEDY: And I guess, and maybe this is more of a semantics questions, but I'd like to start with you, Mr. Smith.

The regulations really provide an exemption of does not need to be submitted, as opposed to does not need to be performed, and I think when I have in my mind, the word performed, I'm back to new and significant information and what goes into Section 5 of the ER.

I mean, on one hand, if there is no new information, then probably 1989 is a technically very sound document. If there is lots of that information and it has a merit of -- a measure of significance, I start to wonder, I do point out, the staff at least, will take a hard look at it, and potentially refresh the mitigation alternatives analysis in the draft supplemental environmental impact statement.

I think, you know, I -- when the -- the bridge was built, and I can walk across the bridge. I'm okay with not submitting a SAMDA analysis on the Limerick document -- docket. I think that seems to

me, to be clear, and when we get to Contention 2 and 3, which really challenges the 1989 SAMDA, I think we'll have additional discussion.

But right now, the bridge is still in tact for me, on whether the Applicant had an obligation to submit a SAMDA analysis, and we'll talk more about, down the road, whether there is any criteria we can apply to whether that exemption is invalid for Limerick.

But I mean, at least on the plain reading of the regulation, it seems to me, they don't need to submit it, but I'm all hung up on this new and significant information, the scope of the new information.

How did we select -- how did the Applicant select the range of information, and I know I'm looking at you and asking you this question, but this is where the Board, I think, has got additional questions on Contention 1, that -- how do we get to what's in the application, and I'll turn to your right quickly, but I think that is the question that sticks foremost in my mind.

I mean, an honest attempt to assess new information was made by the Applicant and submitted as part of their ER. I think I'd like to entertain some

discussion, as to how the scope of that was determined.

The basis of its significance on consequence, I think Mr. Roisman has already agreed that that is a good test. It seems like a good test, to me.

So, I have no issue with, you know, using that as a test for significance. But I do have some questions about the breadth of new information. How did we get to what is in the application today, and now that I'm looking at you, I think I'd like to turn possibly to Mr. Polonsky, and see if we can -- if I can rewind and try to summarize.

I'm really looking for some clarification on the breadth of the material that's in the ER Section 5. How did we get to those specific items?

I'm willing to agree that testing out significance through consequences is okay, but I think if I look across the petitions from NRDC, there looks to me, to be additional new information that they have raised questions on, that I don't see in the ER, things like additional mitigation alternatives, and I know you've been trying to help me understand why we never get to that phase, but if we open up the door a little wider, until we get to some things of

significance and does the ball start rolling down hill a little bit.

MR. POLONSKY: Well, I am hoping to unburden you with this concern, but --

JUDGE KENNEDY: The bridge is still in tact.

MR. POLONSKY: -- by suggesting that there is no need to go here, and in fact, the Commission has said you're not allowed to go here, NRDC, that there is no litigation of these, or the adequacy.

They can certainly submit comments on the draft -- I mean, the final SEIS, but they cannot litigate it.

As to exactly how these particular ones were selected, you know, if I could -- if we're going to be taking a break, I can confer with my client, and get you a concise response on that.

JUDGE KENNEDY: I think in the vain of humoring the Board, it would be appreciative if you could at least give us a bit of a view into how the scope was -- the breadth or the range of what new information was assessed.

MR. POLONSKY: We'll do that.

JUDGE KENNEDY: And to give you a hint, you may want to focus a little bit on some of the

material that's in Contentions 2 and 3, that start, to me, to look like new information that wasn't considered, or is not present in the ER, as it's written today, and then we'll decide some other time, whether we can litigate it.

But help us get through that part of that part of the discussion.

CHAIRMAN FROEHLICH: Perhaps, since it is about 10:30 a.m., we'll take a 10 minute break, and we can come back, and I think when we come back, the Board will like to focus on the concept of new and significant information, how the Applicant chose the four elements that they looked at.

Staff, I'd like to hear, when we get back, how the staff will look for or determine what our new -- putting aside significant at this point, what are new information, and also, from the Petitioner. I think that is where we'll pick up 10 minutes from now. Okay, thank you.

(Whereupon, the above-entitled matter went off the record at approximately 10:30 a.m. and resumed at approximately 10:40 a.m.)

CHAIRMAN FROEHLICH: Please be seated. The preparation of an environmental report requires that new and significant information regarding the

environmental impacts of license renewal be discussed, any environmental impacts of which the Applicant is aware.

Mr. Polonsky, have you had a chance to meet with your folks, to determine how the company approaches the new information that may have arisen in the course of the preparation of the ER?

MR. POLONSKY: Yes, Your Honor.

CHAIRMAN FROEHLICH: Thank you.

MR. POLONSKY: In the environmental report in Section 5.3 page 5-4, specifically Section 5.3.1, there is a section entitled 'process to identify new information', and I did ask my client for some clarification about what exactly happened here behind the scenes, to give you a flavor for how this process to identify new information proceeded.

I was informed that experts in the field of risk management were asked to review the three documents that are cited here, on page 5-4, a review of the supplement to NUREG 09.74, a review of the June 1989 PRA update, which is a -- lists here as PECO document, and review of the Limerick Generating Station probabilistic risk assessment PRA model and updates to that model since publication of the supplement in 1989.

So, a series of documents that exist since 1989 in PRA space were reviewed.

The review was not focused on every risk item, but those that would be low-threshold, and that is what then percolated into the items that were looked at for new information, to determine whether they were significant, and the thought was if they were low-threshold, then they didn't meet a significance determination, then all the others ones that were not low-threshold clearly, didn't need to be looked at, and that was the approach.

Clearly, it relies on expert judgement, which is why they used these experts in risk management.

JUDGE KENNEDY: So, the context of the environmental report, the way it's written, there is the process that was gone through, and that was described, which you pointed out.

CHAIRMAN FROEHLICH: 5.3.1.

JUDGE KENNEDY: And the stuff that percolated as new information was assessed and then discussed in the ER.

I guess, there is no discussion of pleadings that weren't looked -- and I'm not quite sure how to ask this, but some of the things that NRDC

has raised seem relatively logical to me, that would have been looked at as part of a review of new and significant information for the Limerick SAMA analysis.

I guess I'm really probing to see if there are things that were looked at, that were not viewed as important, but not documented as not important, and I mean, are we crossing in the night here? Has NRDC raised issues that Limerick has looked at and chose not to document, or is it a case of, it hasn't been looked at, and of course, part of the record, it's not in front of us, so, I can't --

I mean, I think we're looking for things like mitigation alternatives. Are there other mitigation alternatives, that would have had a different threshold, that could have been looked at? Why isn't that considered new information?

They've raised questions on methodology. The overall methodology is different today than it was in 1989. Why isn't that new information?

Was it looked at? I mean, it may have been looked at, and you know, Exelon shows to the staff, the approach that was taken in 1989.

So, those are the kinds of things that I'm thinking about.

MR. POLONSKY: Judge Kennedy, the vocabulary, the nomenclature that you're using, I think is inconsistent with what Exelon did.

JUDGE KENNEDY: Okay.

MR. POLONSKY: We were not looking at severe accident mitigation alternatives.

As I mentioned before, the initial focus of new and significant information is on severe accident consequences, and whether there is new and significant information for that analysis.

If there was significant information to change the severe accident consequences, then hypothetically, the next step would have been to look at potential severe accident mitigation alternatives.

But that was not done here, because there is no -- the experts identified low-threshold items that they thought would change the -- could be possible -- could possibly change the outcome, and since those did not result in significant information, all the other ones that you're concerned about, that aren't documented here, were never laid out.

JUDGE KENNEDY: Yes, I guess and that -- you're right, that the terminology I'm using, or the perspective I'm coming from is different than the way the environmental report is drafted.

I'm taking a very broad view of what is new information. I mean, in some ways, it's a way to refresh something that had been done in the past with new information, since the time that it's performed, to in essence, make it current and make it, as I'm hearing it, in line with what the staff is going to attempt to do, in looking at new information.

So, I see a disconnect there. I mean, they're not focused on severe accidents. I hear them focused on severe accident mitigation alternatives.

MR. POLONSKY: That is correct, and we hear the Petitioner talking about that, but we don't believe that is the obligation of Exelon to perform.

In addition, all of this is -- should be viewed through the lens of NEPA, which is not a safety analysis, but an environmental analysis, that is subject to a rule of reason, and you know, we'll get to that more, when we talk about Contention 4, but even within this space of having experts in risk management, review probabilistic risk assessments that have been performed for the plant from, you know, day one until today.

The concept of them identifying low-threshold items to look at, to see whether there would be a change -- significant change in all consequences,

that is perfectly within the rule of reason, and there is no requirement to identify with a 95 percent certainty or two orders of magnitude, none of that comes into play in NEPA.

That would be looking at worse case scenarios, which frankly, the Supreme Court has said, you are -- do not need to look at.

JUDGE KENNEDY: So, again, we're back to, the bridge is starting to develop a crack. We're back to severe accidents, is the way I'm hearing it.

Maybe I'm -- I don't want to put words in your mouth, but I am hearing severe accidents, and that the new information is only relevant to severe accidents, and so, we're focused back on the Category 1 issue, yet, there is a Category 2 issue looming out there, which is severe accident mitigation alternatives, albeit you've been granted an exemption for submitting one as part of the application, but I'm struggling, the bridge is breaking in the obligation to look at new information relative to the SAMA analysis, as opposed to the severe accident analysis.

I guess I see it as two obligations, or a two-part obligation, and that is why I'm really curious about the breadth of the new information. I'm feeling it should be broader, but you're bringing it

back to, it's okay the way it is, because it's severe accident.

MR. POLONSKY: It's looking at the severe accident consequences, because if the consequences are not -- are acceptable, as they are, you don't need to go into mitigation alternatives.

I mean, let's take an analogy of something completely unassigned to severe accident space. You know, let's look at Methow Valley and the facts of that case.

I think it was a downhill ski resort, that was looking to be expanded and some animal that was trying to be protected, and that you need to mitigate the way the runs would be designed, or whatever it was, to protect the animal.

Well, if the animal wasn't there, we wouldn't need to do a mitigation analysis. We would simply look at the runs and you would -- maybe it's a bad analogy.

JUDGE KENNEDY: Yes.

MR. POLONSKY: It is a bad analogy.

JUDGE KENNEDY: That doesn't convince us of anything.

MR. POLONSKY: Okay, the concept of mitigation only comes into play when you already have

a identified problem, and the severe accident consequences are the analysis to say, do I have an issue or do I not have an issue? Do I have a problem or do I not have a problem?

If I have a problem, I have to look at mitigating that problem. But our analysis is suggesting, there isn't a problem. So, I don't need to go further. I don't have anything of significance. So, I don't need to go and look at mitigating that problem.

JUDGE KENNEDY: Let's take it a little step further. Let's -- severe accidents is yet only one of the Category 1 issues. What about all of the other stuff, all sprinkled through that table, is -- how was -- where does that fit in this picture?

I mean, you -- we've gone quickly to the one element of that table.

MR. POLONSKY: Yes.

JUDGE KENNEDY: Where are the other guidance? Where is the rest of the stuff?

MR. POLONSKY: We could use an example of endangered species.

JUDGE KENNEDY: Yes.

MR. POLONSKY: If, at the time the plant was built, we had no endangered species and we

concluded that the risks to endangered species were small, now, at the license renewal phase, someone has said, "Hey, there is some protected bird," that's new information. We hadn't considered it before, and we would evaluate for significance, even though that issue might be a Category 1 issue.

Then we would say, "Do we need to -- is it a significant issue," yes? Do we need to put in any mitigation to protect that species? We would be doing that at the license renewal phase, even though it might be a Category 1 issue.

JUDGE KENNEDY: Would that go on Section 5 of the environmental report or is that somewhere else in the environmental report?

MR. POLONSKY: It would go in Section 5, which is assessment of new and significant information.

JUDGE KENNEDY: So, when we look at Section 5, we're seeing the final digestion of all of Exelon's review of information?

MR. POLONSKY: Yes, and we've -- and we quote the obligation in C34, at the very beginning, saying any information of which we are aware. It's not limited to SAMA's, or severe accident consequences.

JUDGE KASTENBERG: Just coming back to your question, so, in Section 5, 5-2, one of the choices was to look at radiological ground water protection, okay.

Now, that is -- I don't believe that is covered by Section L, what we've been calling Capital L.

So, would 5.2 be challengeable, in your view?

MR. POLONSKY: If it were a Category -- I haven't studied this particular section, I can't -- if it were a Category 1 issue, it would not be challengeable in the license renewal proceeding, absent a waiver, because it's new and significant information on a Category 1 issue.

JUDGE KASTENBERG: So, is ground water protection Category 1 or Category 2?

MR. POLONSKY: I have to look at Part 51 in Appendix B. I believe it's Category 2, but I will confirm that.

JUDGE KASTENBERG: So, it's Category 2. If NRDC would have challenged that, would that --

MR. POLONSKY: We would not have been able to use the defense of the Pilgrim and Vermont Yankee license renew cases.

JUDGE KASTENBERG: You would find some other defense for it?

CHAIRMAN FROEHLICH: They would try very hard.

JUDGE KASTENBERG: Or you would at least attempt to find a defense for it?

MR. POLONSKY: I certainly would try, Your Honor.

JUDGE KASTENBERG: Yes.

CHAIRMAN FROEHLICH: And just to wrap up Judge Kastenberg's question.

The reason you'd have to look for a different defense is because it shows up in the Sub-Part A of Appendix B table as a Category 2 item, is that correct, Mr. Polonsky?

MR. POLONSKY: If it is in -- as a Category 2 item, then it would not be subject to the exception language in the case law that we've been discussing this morning.

CHAIRMAN FROEHLICH: Okay.

JUDGE KASTENBERG: And just one last thing, I just want to make sure I understand your argument regarding new and significant information and the exemption.

We went through this before, I realize,

but just to kind of step through it again.

As I understand it, and you cited two other -- I think two other cases where there was a challenge to a Category 1 versus new and significant information, we went all the way up to District Court, and the Court ruled that it was not challengeable because it was Category 1, even though it was new and significant information, is that right?

MR. POLONSKY: Yes, Your Honor, it was the Court of Appeals, but yes, it was a Category 1 issue related to spent fuel pools.

JUDGE KASTENBERG: Right. So, it seems to me, at least at the moment, there is a leap between that and the Sub-Part L, which is the exemption.

So, how do I -- using Judge Kennedy's analogy, what is the bridge? What is -- what gets me that leap from a Category 1, when we know that -- and I think everyone agreed, that SAMDA analyses are Category 2 except for the exception. But how do I make that leap?

MR. POLONSKY: Okay, there are two ways you could make the leap.

JUDGE KASTENBERG: Could make it, yes.

MR. POLONSKY: The first is, you could conclude, as we've argued, that for Limerick, this

issue is a Category 1 issue, and I've cited you provisions of the GEIS and the 1996 rule-making, which support that argument.

However, you don't need to find that it's a Category 1 issue. We argue in the alternative, in our answer, that the nomenclature is irrelevant, as the staff has also articulated, and that is that once the NRC has issued a rule, that the general principle is, you can't challenge that rule in a licensing proceeding, and this line of case law with Vermont Yankee and Pilgrim stand for the proposition that new and significant information submitted about an issue that is accepted by rule, whether Category 1 or in Section 2, is not challengeable in a license renewal proceeding, absent the waiver from the Commission under 2.335.

JUDGE KASTENBERG: And do you have a response to that, because to me, this is a pivotal point, in the question that we -- that is at stake here.

MR. ROISMAN: First, you can read this Section 51.53L all you want, and you will not find a statement in there that categorizes this as Category 1, that's number one.

Number two, this provision that we're

talking about is talking about an obligation that's imposed on the Applicant to perform something.

Ultimately, this issue, as you well know, is going to morph into an issue about what the staff does, and the staff does, traditionally, rely on the Applicant's SAMA analysis, but it's the staff and the staff's obligation to do it.

There is nothing that says, that if the staff has new and significant information that relates to severe accident mitigation alternatives, that it is not suppose to deal with that in the DSEIS, and I'm sure we reference that.

We approve -- if we disagree with what they do in challenging this, that is the nexus of it.

The third point is that what is new and significant information is not allowed to be challenged where there has been a prior generic finding for the -- in an individual licensing proceeding, because it would be inappropriate.

This is not 51.53L, is not a generic finding with regard to Limerick or Comanche Peak or any other nuclear plant.

So, there is no generic finding. So, let's step back for a minute and ask the question, what reason would the Commission have had for wanting

to preclude someone from challenging new and significant information if it related to SAMA or SAMDA analysis, that could fit within the logic of the cases, and there isn't.

There is no reason why this issue, the very questions that Judge Kennedy raised, about alternative mitigation issues, shouldn't be subject to challenge, just as alternative ways of dealing with other issues at the plant, would be subject to challenge.

Their only policy reason would be, "Well, we've already looked at that question substantively, and we put it to bed," and if you want to question our putting it to bed, with new information, you have to go through our regulatory process, to ask us to change the regulation.

No one has put this to bed. The 1989 SAMDA has never been mitigated as applied to licensing renewal. The Commission, in its statement of consideration that went along with the 1996 license renewal rules made reference to the Limerick 1989 SAMA. There is no analysis. There is no record in front of the Commission. It was not part of any notice that was given to the public, that, "Oh by the way, along with all the other things we're doing in

the rule-making, we're also going to rule on the adequacy of significant mitigation alternative analysis done for three plants."

So, nobody had a chance or was charged with, "Why didn't you show us then, and complain?" Well, there was no notice that that was going to be considered. No one said, "We're going to decide on the merits of the Limerick question."

Now, before we get to Contention 3, which is where this is more relevant, it bears on the new and significant information question in Contention 1, because it gets us, once again, to the question, if you don't challenge it here, where would you have your hearing, with regard to this question?

Why would the Commission have cut them out, if you will, and I want to add one note, that goes to Judge Kennedy's question about, well, how did we end up with only looking at this piece of new information and not these other ones, and I think that Counsel pointed it out, in the section of the ER, Section 5.3.1, the Applicant says, "For purposes of this review, new information is designed as information indicating a potential change in the consequences of severe accidents."

When we talk about consequences, and when

I think the Commission talks about consequences of Callaway, they mean when it changed the outcome, not when it changed the outcome in just one respect.

So, the addition of these mitigation measures that our experts have identified, that now would apply to be looked at for BWR of this type, that were not looked at in 1989, is new information and we believe significant consequences, because if the accident consequences remain exactly the same, new ways to reduce those consequences.

I thought Mr. Polonsky's use of Methow and the analogy was a good one. The endangered species that we're talking about that was present in 1989 are the eight-million who live within 50 miles of the plant. It's going to be more like 10-million people. But the endangered species is still going to be there.

So, the mitigation alternatives analysis says, accept this level of consequences you do -- we challenge the level of the consequences, all of them, accept this level of consequences and then see if it's cost beneficial to mitigate those consequences, even further than the safety requirements that the Commission would say, by doing certain things, that end up costing you only this amount, and gaining that amount in economic effects.

So, when we talk about consequences, we're talking about both aspects of those, and the new information that the Applicant looked at was, as this points out, and as we pointed out in our petition, narrowly limited, only to accident consequences, and we discussed those, and there are some of our points, which say the accident consequences could be greater than what the value is, and also, based on the issue.

But there is a separate piece that says, also that expanded alternatives that would mitigate those consequences shouldn't be assumed.

JUDGE KASTENBERG: Is there any -- as Mr. Polonsky did, is there any case law or regulations that would support the technical and the logical arguments that you give?

MR. ROISMAN: That support the view that new and significant information should be subject to the review?

JUDGE KASTENBERG: Yes.

MR. ROISMAN: Only in the sense that the case law that says it isn't is limited to a situation that doesn't fit here.

I don't think the Commission has explicitly addressed, to my knowledge, the question of whether new and significant information about a

Category 2 issue would be litigatable in the licensing proceeding if someone disagreed with the Applicant's treatment of that item, in their environmental report. To my knowledge, that has not been litigated.

However, if you go back into the NEPA case law, then cases like Methow Valley, that say that you must do a thorough evaluation of severe accident mitigation -- I'm sorry, of mitigation alternatives, not severe accident, of mitigation alternatives, that case law would say that if the mitigation alternatives or consequences that weren't adequately looked at previously, then they have to be looked at now.

So, NEPA and case law under NEPA would say, you have to take a look at it. So, that would be the law, like the specific application of that to an NRC proceeding by the NRC, I'm not aware of.

CHAIRMAN FROEHLICH: Perhaps the NRC staff could address both the last comment and also, the approach taken by the NRC staff, in their review of new and significant information, and the preparation of the DSEIS, or the EIS process.

MR. SMITH: Thank you, Judge Froehlich. I think the NRC staff disagrees with both the Petitioner and the Applicant, in some respects.

First off, we view the Commission's

regulation and determination of 51.53 (c)(2)(L) as being a generic determination, that applies to Limerick facility, as well as other facilities, and the reason for this goes back to the 3rd Circuit's holding in the Limerick case.

In that case, the 3rd Circuit, as we've discussed in our briefs, held that severe accident mitigation alternatives are a necessary component of NEPA consideration for reactor license application, such as this one, and NEPA applies to every major Federal action, including license renewals.

Therefore, when the Commission has permanently excused facilities from conducting a second SAMA analysis if one had already been completed, they were, in effect, making a generic determination that must meet the -- NEPA's hard look requirement.

Now, therefore, we view that encompassing a generic determination, which of course, I think goes into the second point.

The new and significant information in Federal case law, only really applies to prior environmental determinations and environmental impact statements, and that originated with the Marsh case, and what you're looking at in those cases is, whether

or not new and significant prior to the supplement in existing environmental impact statement. It sort of gets thrown around a lot in NRC license renewal proceedings, because there is several environmental impact determinations in the GEIS that must be looked at, and if necessary, updated in the supplemental environmental impact statement for a given facility.

So, in that sense, it only really has meaning to talk about new and significant information if you're talking about a previous determination of an environmental impact.

Now, as the staff goes forward and looks for new and significant information with respect to Limerick, we disagree with the Applicant.

We don't think the relevant inquiry, and we explained this in our brief, is whether or not information applies to 1989 SAMDA analysis, but rather, we think the important inquiry is whether or not new information applies to the Commission's generic determination in the regulations, as explained in the accompanying statement of considerations.

In that sense, as we've explained, that determination rested not only on the prior 1989 SAMDA analysis, but also, a series of studies the Commission had undertaken, including the individual plant

examination, including the individual plant examination for external events, and including the containment performance improvement program.

So, we'll be looking for new and significant information with respect to the understanding of severe accident mitigation contained in those studies. So, not just in 1989 SAMDA analysis, but also, those studies, as well as the Commission's understanding of severe accident mitigation, in general at the time, found in that regulation, both, I guess, on a slight Limerick basis, as well as an across the board basis, to see if the regulation is still valid.

As we're looking for new and significant information, we'll be guided by several sources of law and precedent to define and determine that -- in terms of that, and most importantly, as other Counsel has pointed out today, the Commission itself has defined the scope of that test in Callaway, saying that it presents a seriously different picture of the environmental impact of the proposed action from what was previously envisioned.

The Commission has provided a little more explanation for that, in the private fuel storage case, CLI-603 is the case number for that one, and

said that information is new and significant, and I quote, "when it raises a previously unknown environmental concern, but not necessarily when it amounts to mere additional evidence supporting one side or the other of the disputed environmental impact".

I think significant for our purposes here the Board has recently struggled with a similar issue, in the Pilgrim cases, the Board has considered how the re-opening standard applies to a SAMA contention, and one element of the re-opening standard is that the issue must raise a significant issue, and the Commission has stated that on environmental contentions, the test for significance is akin to the test for supplementing the environmental impact statement, which is, it must present a seriously different picture of the environmental impacts of the proposed action.

The Board, in that case, did apply it to the SAMA analysis and I think the best take-away from those cases for the Board is, that the -- the Pilgrim Board, Judge Abramson, who was for the majority, and Judge Young, was that it can't just be speculation, that under the SAMA rules, somehow become cost effective.

Of course, as Mr. Roisman pointed out, there has been considerable Federal case law, most notably the Marsh case, that further defines the scope of new and significant information and the staff has guidance, as well.

Reg Guide 4.2, which covers the preparation of SEIS for applications to renew the power plant operating licenses, explains that new and significant information is information that identifies a significant environmental issue that was not considered in the GEIS, and consequently, not codified in Appendix B, Sub-Part A of 10 CFR 51, or information that was not considered in the analysis summarized in NUREG 1437.

Therefore, as the staff goes forward and tries to -- I guess I should also point out too, that when it's looking for actual sources of information, that staff consider what's in the ER and will also consider what's in the petition to intervene, and as well as the scoping comments that I alluded to earlier today, would consider those, as well as any other information that comes to our attention, to determine if it meets what is, frankly, a very high standard of new and significant information, that presents a seriously different picture of the environmental

impacts of the proposed action.

I'm not sure that the staff would go as far as the Applicant has, to say that only information that calls into question the Commission's determination, that a severe accident impact would be small, would qualify as new and significant information, as the SAMA analysis, but I think also, the Commission's precedent in EFS, as well as how the Board approached the issue in Pilgrim indicates that in the staff's view, it would be something that went beyond simply identifying the other cost beneficial SAMA, as to a more serious -- a more serious picture than the consequences than just demonstrating what is essentially materiality of the SAMA contention.

So, as to how the staff is going to approach it, we haven't published our DSEIS yet. So, we can't say. I think categorically, what information would be or would not, be that is the frame work we intend to use.

CHAIRMAN FROEHLICH: I think I hear you saying that you'll apply a rule of reason as you go through this, and I think you also imply that it's generally broader than just the consequence of that, is that fair?

MR. SMITH: Yes, Your Honor, we certainly

will apply a rule of reason.

JUDGE KENNEDY: But your starting point is broader than the Applicant has communicated here. I don't want to put words in your mouth, but I thought that is what I heard you say.

You're going to start from the -- the current environmental impact statement, as your starting point, to consider new information.

MR. SMITH: Yes, Your Honor, sort of to borrow Mr. Roisman's analogy, in the staff's view, the 1989 SAMA isn't -- might be Hamlet in the play, but Hamlet is not a one act -- a one person play.

There is many characters in the play and we're going to look at the other studies the Commission relied on in its statement of considerations that support the regulation, including the IPE, the IPEEE, and we think those apply.

JUDGE KENNEDY: Which is, sounds to me like more information than Limerick has considered, in their environmental report.

MR. SMITH: In the staff's view, it is more -- it's later information. The question is not 1989 or 1996 for us, and we'll look at how the Commission's understanding of those studies, 1996, as described in the statement of considerations, would be

impacted by new and significant information, and that is described in great deal in our brief.

MR. POLONSKY: Your Honor, if I could clarify. In Section 5.2.1, it's identifying new information.

What the experts looked at was more than just the 1989 document. There are three bullets here, three bulleted documents and the first is the 1989 document, but the third, although it actually has a NUREG 0974 in 1989 language in it, it says, "Review of Limerick Generating Station PRA, probabilistic risk assessment model and updates to that model since publication of that document."

So, there are much more recent documents that were looked at, for purposes of new and significant information, for severe accident consequences.

JUDGE KENNEDY: Again, only through the lens of severe accident consequences.

MR. POLONSKY: That is because this Section 5.3 is severe accidents. The prior sections talk about new and significant information for other areas.

JUDGE KENNEDY: Okay, now, I am getting confused, because in the answer to Judge Kastenberg's

question, about the ground water mitigation, that would go in Section 5.

MR. POLONSKY: Yes, five is four --

JUDGE KENNEDY: And it's actually in --

MR. POLONSKY: Oh, I'm sorry.

JUDGE KENNEDY: So, it's beyond severe accidents.

MR. POLONSKY: Yes.

JUDGE KENNEDY: Okay.

MR. POLONSKY: Section 5 is assessment of new and significant information, generically.

JUDGE KENNEDY: Okay.

MR. POLONSKY: Section 5.1 is a background discussion, 5.2 is radiological ground water protection, 5.3 is severe accidents.

JUDGE KENNEDY: No, I clearly mis-heard you.

MR. POLONSKY: Okay, I'm sorry, I am glad we cleared that up.

JUDGE KENNEDY: What goes in Section 4, then?

MR. POLONSKY: What was in?

JUDGE KENNEDY: Section 4?

MR. POLONSKY: I wasn't quoting to Section 4. I was quoting to page 5-4.

JUDGE KENNEDY: Oh, I see, okay. Maybe I should draw that. What I heard is that in response to my question, you said that would go in Section 4, because this section is new and significant, okay.

MR. POLONSKY: I'm sorry, but hopefully, we're on the same page now.

JUDGE KENNEDY: We're still focused on consequences, in Section 5, for severe accidents.

MR. POLONSKY: Yes.

JUDGE KENNEDY: So, in spite of, yes, you did the -- the Applicant did look at more information than just the 1989 SAMDA, it did not consider, for argument sakes, additional mitigation measures.

MR. POLONSKY: Correct, individual mitigation measures was not the focus of the analysis.

JUDGE KENNEDY: Because that is not new information?

MR. POLONSKY: No, because our view is, you don't get there unless you have identified a significant change.

JUDGE KENNEDY: But we're back to what is new information. Why isn't that new information?

MR. POLONSKY: Well, it is --

JUDGE KENNEDY: For argument sake, you could come up with an alternative that has a lower

threshold, than the alternatives that were visited in the 1989 SAMDA analysis.

I think that is what is troubling you, is that by not looking at it, your threshold is where it was in 1989.

MR. POLONSKY: Okay.

JUDGE KENNEDY: I think that I what is bothering you. I don't see why that isn't new information.

MR. POLONSKY: There are -- the 1989 SAMDA document, which is a supplement to the FES, is Exhibit-A, but there is also Exhibit-B and Exhibit-C, and those are the other bullets in Section 5.3.1, and under Exhibit-C, which are all of the risk assessment model and updates since 1989, are a whole host of analyses, since 1989.

And so, the experts are looking not just at the 1989 document, but looking at these other PRA updates and they may already include mitigation alternatives.

I mean, we could look at what other things were implemented at the plants over time, but that doesn't necessarily mean that they need to be roped into or retro-fitted back to a 1989 SAMDA.

JUDGE KENNEDY: Yes, I guess that is what

is troubling me. That is an example of information that may have been looked at and considered under those two bullets. It doesn't become visible at the ER level, and that goes back to a previous question.

There may be information that was looked at, that was -- that, through the process, is excluded from documentation in the ER, and again, if what you're telling me is one of those bullets has additional mitigation measures in it, I'm struggling to know how I would know that.

MR. POLONSKY: Well, it's -- it's a two-step process. The focus -- the first step is on whether there is a change in consequences.

If there is a change in consequences, then you move to, how do I mitigate that change in consequence?

JUDGE KENNEDY: As opposed to a change in threshold?

MR. POLONSKY: A change in threshold?

JUDGE KENNEDY: A different mitigation alternative?

MR. POLONSKY: Well, that would be starting at the end of the process and trying to work your way back, and the rule of reason, I mean, if I were a Petitioner, I could come up with 1,000

mitigation alternatives that I say you should be looking at but --

JUDGE KENNEDY: Well, I think it suggested a few, under the GEIS of new information.

MR. POLONSKY: Right, but the rule of reason says that we don't even get to additional mitigation steps unless we have a change in the consequence of what was previously analyzed, and that that new and significant information is not challengeable in the license renewal proceeding.

JUDGE KENNEDY: But let's try it a different way. I mean, you've made a very convincing argument, that the SAMDA A) is not in the application, there is many reasons it's not challengeable.

So, we're kind of focusing in on the pathway through new information, and we'll deal later with whether something arises out of that new information, but ultimately, would be litigable.

But it just seems to me that the glue that pulls this together is what constitutes the scope of new information, and I'm not hearing a compelling argument, as to what limits that range of information.

You've certainly done -- there are certainly instances that you've pointed out, that I think are very clear to us, that yes, that is new

information. The assessment appears to be adequately performed and there is no additional consequences.

It lead, begging the question of what wasn't looked at, and at least from our perspective, the Petitioners raised a few, that don't seem to see the light of day within the environmental report, under new and significant information.

That is how I -- I mean, again, I keep coming back to that.

MR. POLONSKY: The definition that the Commission has set forth for new and significant information is something that presents a "seriously different picture of the environmental impact, of the proposed project from what was previously envisioned". So, that is --

JUDGE KENNEDY: For significant, but what about for new?

I mean, new seems to me, to be time based. It's new, since something else. Again, I'm struggling with the way the staff is viewing new. I mean, they're looking at a range over time, of things that have occurred, and even the bullets in the ER, that is an evolution of analyses and refinement of analyses that was performed for Limerick. That clearly sounds new to me. That is new stuff.

JUDGE KASTENBERG: Let me just see, if this helps, just a bit.

I think in your answer, and I think you spoke to it a few moments ago, the fact that the regulatory process is dynamic, there being IPE's and IPEEE's, and containment performance and all of these things that have taken place, and on the other side, as someone who is regulated, they do their due diligence and they follow what -- the course of events, as the regulatory process unfolds.

I think what Mike is getting at, at maybe another way is, why isn't all of that reflected, or should it have been reflected in the ER? In other words, it doesn't tell us, other than you guys are doing a good job of regulating perhaps, and you guys are doing a good job of following the regulator, but what does that have to do with the proceeding and the contentions that have been raised?

I think that is what Mike is getting at, it isn't -- what Judge Kennedy is getting at, he doesn't quite see how that brings it forward. Is that a better way of saying it, or another way of saying it? Does that make sense?

JUDGE KENNEDY: Yes, I'm struggling with the scope, and I keep hammering on the example of,

could additional mitigation measures be new information, and I understand the process, at least as I understand you're explaining it to me, we don't get that far.

But I'm saying, why can't that be at the front end? Why wouldn't that even be considered as new information, of things that could have been looked at, even in 1989, and it's just that we didn't think about that, or they didn't present themselves.

It's just the newness of the information since 1989, assessed against the consequences that are in the current SAMDA analysis.

MR. POLONSKY: Your Honor, one of the concerns from a legal perspective is that the Commission created the exception, and that there not be some backdoor to a eviscerate the exception, and to on the one hand, say there is no need to submit a SAMA analysis, and then on the other hand, to say but anything I come up with that is new information, ought to be evaluated for its significance, such that we're now turning this new and significant information analysis into a SAMA analysis.

JUDGE KENNEDY: I guess, but I don't understand why five is there, then? Why is it focused on new information that could impact the severe

accident consequences? Why is that even there, if you don't have to -- if that is in conflict with L? I mean, wh is it even there?

MR. POLONSKY: Because for Category -- even a Category 1 issue, which doesn't have an exception, is, you know -- it's exempted, because it's -- you still need to look at new and significant information for a Category 1 issue.

JUDGE KASTENBERG: You need to look at it, but it's not challengeable.

MR. POLONSKY: It's not challengeable.

JUDGE KASTENBERG: And that is basically --

MR. POLONSKY: And in the license renewal proceeding, and Your Honor, we'll spend all the time it needs and issue RAI's, if it seeks additional information, but it's just not litigable here.

CHAIRMAN FROEHLICH: Does the staff agree that the Petitioner has no right to challenge new information chosen by the Applicant in its ER?

MR. SMITH: I think, Your Honor, to point out earlier, is that the staff does not agree that is the case.

The Petitioner has an opportunity to challenge new and significant information, with

respect to previous generic determinations, but it must do so in compliance with the Commission's regulations, which require the filing of a waiver petition, and NRDC is not likely to file a petition, in this case.

JUDGE KENNEDY: Going back to new information, again, Mr. Polonsky, I'll ask you, new information is relative only to Category 1? I mean, I'm sorry, that is what I heard.

MR. POLONSKY: Yes, new and significant information -- well, I was using that as an example.

JUDGE KENNEDY: Just as an example?

MR. POLONSKY: But new and significant information, I think the staff raised it, well, was if an analysis has already been performed, you are looking at new and significant information for what has previously been performed.

JUDGE KENNEDY: So, does that open the door to the SAMDA?

MR. POLONSKY: No, because the SAMDA is itself, just a spring-board. There were so many other analyses and updates since the SAMDA analysis, that have informed risk management and severe accident of the site.

For example, I mean, I think in the ER,

and I'll have to locate it, there is a discussion of core damage frequency decreasing over time. Well, how is that possible?

Because they've gotten better at doing these analyses and have more information now, than they did before. But that doesn't mean that we look at core damage frequence from 1989 and say, "That is what we're comparing new and significant information to," because we have these more recent analyses to compare to.

JUDGE KENNEDY: Now, you compared it, as I understand it, to the consequences, and --

MR. POLONSKY: Right.

JUDGE KENNEDY: -- it would have lowered the consequences.

MR. POLONSKY: It would have lowered the consequences, that's right, which is why when the NRC -- when the Commission says new and significant information means it's in -- seriously different picture than the environmental impact, it's not just a slight increase. It's a seriously different picture. Those are significant words, for lack of a better term. This is a high threshold.

MR. ROISMAN: Mr. Chairman, could I respond?

CHAIRMAN FROEHLICH: Sure.

MR. ROISMAN: Let me just say something. First of all, we've found in both types of new information, we offered information that suggested that the consequences could be worse, and we suggested that mitigation alternatives would be broader than what was done before, and some of these mitigation alternatives are outlined for you on page 7 and 8 of the declaration of our experts.

And contrary to Mr. Polonsky's statement, you don't start -- jump at the consequences, unless the consequences have gotten worse, you don't have any new information.

First of all, there is nothing in the regulation to suggest that that's the standard -- the standard for significant is, would it make a big environmental difference?

We agree, but we submit that these various mitigation measures that have been looked at in other plants, some of which are like Limerick, and that were not part of the 1989 analysis, have been shown to be potentially cost effective. Meaning that their implementation would make a substantial reduction in the offsite economic or human exposure risk and/or that their cost is relatively minor, compared to that.

We gave you -- we cited to you, the Indian Point decision on SAMA, in which the Board provided a list taken from the Applicant's analysis, it's a PWR, and one of the examples that they list there involves a $200,000 expenditure and a $5 million mitigation.

Whatever other definition one might have of substantial or significant, that certainly would meet it.

So, we think that these all, whether they're changes in the consequence of the accident or changes in mitigation of the consequences of the accident, constitute new and significant, and we offer, are the basis for this.

The second -- and I think the heart of the question is, whether or not the Board is precluded from hearing and whether we are precluded from raising in this proceeding, a challenge to the new and significant information, as applied to this particular plant.

Counsel for staff pointed out that new and significant information applies to updating an environmental impact statement. That's what we have here. We have a 1989 supplement to the environmental impact statement, and that supplement is now out of date, and we've described ways in which we think it's

out of date.

The Applicant has looked at it and said, "We don't think it's out of date." We've joined issues.

So, there, only with this very, tiny, little way, that the Applicant believes and the staff believes, they've found namely that the Commission has a line of cases where people are challenging Category 1 and generic findings, and trying to argue those generic findings are wrong.

No one is arguing here that any generic finding is wrong. The 1989 analysis is a site specific analysis. No rule-making would have been needed to have challenged that. How did we file the rule, in which you said, we want you to change your licensing impact statement with regard to one particular plant?

It's inherently not generic. This is the place where one should be able to challenge, and it doesn't depend upon whether or not the Applicant is required to do a new SAMA analysis. We're not asking that. We're not even asking that in Contention 3.

It does turn on whether or not the analysis of mitigation alternatives is adequate and represents a hard look at this case law, as required.

The Supreme Court's decision that I cited to you before, that Methow case, makes clear that looking at the mitigation alternatives is a key component of this.

In Marsh versus the Oregon Natural Resources Council they -- which is sort of a case that everyone goes to, when they're looking for new information, the Court said new and significant information is information showing that a proposed action would affect of the human environment in a significant manner or to a significant extent, not already considered.

We've offered you a number of things that were not already considered, the population issues, meteorological issues, evacuation time issues and mitigation measures, and for preconceived issues, as well.

So, we've -- and we've supported those with an expert conclusion. So, the bottom line is the mitigation part of the severe accident in play.

Mr. Polonsky kept referring to Section 5.3 of the ER, as the severe accident discussion. With due respect, I'd like to quote the title of the section, "Severe accident mitigation". That is the title of the section.

Applicant made no effort to explain how or why they would not look at changes in mitigation alternatives, under the whole consequences.

So, even their own document doesn't support the view of this sort of narrow salami slicing of the issue, and both are on the table, and both are challenged in Contention 1, and both are legitimate site specific concerns and frankly, if not here, they cannot be heard, and that means that the public's due process rights is protected the Atomic Energy Act and by NEPA, and would be violated.

CHAIRMAN FROEHLICH: That gets me back to staff. Could I ask, Mr. Smith, does the Petitioner have a right to raise any new information regarding environmental impacts of license renewal, which it believes are significant?

MR. SMITH: Thank you, Your Honor. Yes, I think the Petitioner's description of their claim, what it's revealing to me, about where the staff thinks their contention has gone wrong.

They describe their contention as raising the challenge to 1989 SAMDA analysis, and whether or not new information updates that analysis, but in the staff's view, that analysis isn't at issue in this proceeding.

That was only an analysis for operating licensing. The issue in this proceeding is license renewal. The regulation provides the analysis for license renewal, and as the staff has pointed out, that regulation relies on more than just 1989 SAMDA analysis, but in NRDC has not shown how the totality of those studies provided an insufficient basis to the Commission's determination in the regulation.

Commission's regulations don't suggest that what we should do is just incorporate the old analysis and bring it into the proceeding and leave it at that.

The Commission's regulations, I think, reflect the study of severe accidents and severe accident mitigation and the study relies on a finding that if you've done one SAMDA analysis, you don't need to do another one, at the time of license renewal.

Of course, NEPA has a continuing obligation on the agency, before its final action, to always look at conclusions that have been codified in environmental impact statements or finalized in environmental impact statements, to see if any new and significant information impacts those findings, and of course, the Petitioners have a way to challenge that, and the Commission has been clear, the way to do that

in NRC proceedings, for I think reasons of efficiency and fairness, that if they want to challenge the determinations and codify it in NRC regulation, is to file a labor petition and NRDC didn't do that in this case.

CHAIRMAN FROEHLICH: If a Petitioner had a concern that it became aware of, or it tied to an Applicant's ER, on a subject that will appear later in the DEIS or EIS, isn't that Petitioner under an obligation to raise it at the ER stage, to preserve it for when the DEIS is issued?

MR. SMITH: That is correct, Your Honor.

CHAIRMAN FROEHLICH: Can a Petitioner raise a contention that new information was overlooked in a license renewal application or in an Applicant's ER?

MR. SMITH: What do you mean by new information?

CHAIRMAN FROEHLICH: There is something, there is new information that would -- that would be significant, or perhaps, change the perspective of the Applicant in the first instance, in the ER or the staff, in its preparation of the EIS, that they believe is significant, would they be able to raise that, or aren't they obligated to raise that now, at

the ER stage?

MR. SMITH: That is my understanding, Your Honor. The Petitioners must challenge the ER, that sort of stands in for the staff's draft SEIS.

But to the extent that the Petitioners are challenging an issue that the Commission has resolved generically, such as SAMA's for facilities that have already completed the SAMA analysis, then they would need to submit a waiver petition, because they are, in essence, challenging a regulation of the Commission.

Now, I think the Commission's quote from the Vermont Yankee and Pilgrim case, although it's tied to the Category 1 issue, is helpful to also, this case, because it's a generic determination.

The Commission said, "Adjudicating Category 1 issues site by site, based merely on a claim of new and significant information, ellipses, would defeat the purpose of resolving generic issues in the GEIS."

CHAIRMAN FROEHLICH: I think I would agree with you, as to Category 1 issues. Would your answer be exactly the same as to Category 2 issues?

MR. SMITH: Your Honor, a Category 2 issue, as I alluded to earlier, it's sort of meaningless to talk about new and significant

information with respect to a Category 2 issue, because under the Commission's regulations, a Category 2 issue must be considered fresh for that licensing action.

Under NEPA, we have to take a hard look at the Category 2 issue, and that hard look goes beyond just looking for new and significant information, which as we talked about, is a higher standard which requires showing some kind of a seriously different picture of the environmental impacts.

Now, so, if there is no reason to apply new and significant information to Category 2 issues, which we're already looking at, as part of the licensing renewal process, which is why because the Commission has made a determination in their regulations, that we don't need to look at SAMA's here, that we are applying this higher new and significant information standard to the question of the SAMA's, and seeing about any of this information, which I think the -- to get back to the point Judge Kennedy was raising earlier.

When we look for new information, with respect to the prior determination, which in the staff's view, was 1996 rule-making, and then evaluate significance after that, and seeing if it meets that

high standard. So, that is the approach that staff is taking.

CHAIRMAN FROEHLICH: I assume, Mr. Polonsky, you agree with staff's perspective on this issue? Did you want to take it further?

MR. POLONSKY: I would like to comment on the 1996 rule, if I could.

CHAIRMAN FROEHLICH: Sure.

MR. POLONSKY: And address a comment about some concern of lack of due process, which I assume the Board would take seriously, and hope to allay the Board that there is no violation of due process here.

NRDC has raised a concern that the first time that the Commission, in its statements of consideration, mentioned that Limerick would fall under this exception was in a final rule, and therefore, there was no opportunity or announcement to the public that they could challenge this, and that therefore, it was not somehow adjudicated, and therefore, we cannot rely on it for purposes of interpreting Section 51.53 and Section 2L.

The June 5, 1996 final rule is certainly listed as a final rule, and that is in 61FR28467, is the first page.

But the Commission acknowledged that it

had changed things, or changed positions for the first time in the final rule and opened that up for a 30-day comment period, in that's explicit on this page.

Not only did they open it up for a 30-day comment period, but in the final final rule, if you will, issued in December 1996, they respond to comments that were submitted on the original final rule in June, and those comments include the fact that three industry commenters had disagreed with the designation of severe accidents as Category 2, in the final rule, and the requirement that SAMDA's must be addressed by the Applicant and the staff, etcetera, etcetera.

So, clearly, there were members of the public who not only were aware of the final rule in June, but commented on the changes to the SAMDA categorization, that had been raised in June, and that was embodied in December 1996.

So, there is no rationale for saying that this was not "adjudicated", whatever that means, and there is no due process violation, with respect to the 1996 rule.

There is also no due process violation for the inability of a Petitioner to challenge new and significant information, for an issue that has been

resolved by rule.

The way to get around that, it's not even to get around that, 2.335 allows the avenue to request a waiver petition, or you can file a petition for rule-making, if you don't agree with the rule itself.

Again, those are -- or you can comment on the draft SEIS. So, these are all ways that members of the public can participate, and so, there is no concern about a violation of due process.

CHAIRMAN FROEHLICH: Go ahead.

JUDGE KASTENBERG: Are you saying that public comment and adjudication are at the same level, an adjudication process, such as this, and public comment are equal, in terms of what the public can bring forward?

MR. POLONSKY: Well, a petition for a waiver is the way --

JUDGE KASTENBERG: No, first -- you started to talk about the fact that there were ample time for public comments and industry people commented and they iterated on then comments and so on, that you would equate that to an adjudication process, is that what you're saying?

MR. POLONSKY: In the rule-making context, yes, Your Honor, I think it has to, because the

argument that NRDC has raised is that there was no opportunity for the public to comment on the change in the rule, which added Limerick and changed SAMA's from the draft rule of Category 1 to Category 2 in the final rule.

So, there was a public comment process, and that is what is called for under the administrative procedure act.

So, for this purpose, commenting on a rule-making is the way to satisfy public due process.

CHAIRMAN FROEHLICH: Was there anything in that statement of consideration, or in the final rule or final, final rule, or anywhere to the regulation that will tie or bring a Category 2 becoming a Category 1 event because of the exemption in the L?

MR. POLONSKY: Yes, Your Honor.

CHAIRMAN FROEHLICH: What is the cite into that, please?

MR. POLONSKY: On page -- this is 61 Federal Register 28480, and it is the final rule, June 5, 1996, and I believe I quoted this before, it's the right-hand column, towards the bottom.

It says, "Because the third criterion required to make a Category 1 designation for an issue requires a generic consideration of mitigation, the

issue of severe accidents must be re-classified as a Category 2 issue, that requires a consideration of severe accident mitigation alternatives provided this consideration has not already been completed."

And so, the only natural inference from this is that Category 2 is applied to those plants who have not submitted a SAMA, and those plants that have, remain in Category 1, and I cited two other provisions, not in rule-making, but in the GEIS, which strongly suggest that an exception in 51.53(3)(c)(2), yes, is -- if it's an exception, essentially, a Category 1 issue, for those plants that have been accepted because of a generic determination that has been made.

CHAIRMAN FROEHLICH: Care to be heard, Mr. Roisman?

MR. ROISMAN: Yes, a couple of things. First of all, this is not a rule, identifying the Limerick SAMA and meeting the requirement of 51.53(f) does not appear in any rule.

The Commission is very careful in what it calls regulations and rules, and what are not, and that statement, that Applicant and staff are relying on, does not adhere to rule, if the intent of the rule had been to explicitly move that the -- the SAMA 1989

analysis of Limerick and the one done for Comanche Peak and the one done for the third time, whose name I forget now, were intended to be within the scope of that, and remember, there were only three.

Why didn't they say so in the rule? Why didn't they say that?

What they did was, they said, if a SAMA -- is a severe accident mitigation alternative analysis has been done, then the Applicant doesn't need to perform a new, without telling us that this particular plant's 1989 SAMDA meets that. That is the first point.

The second point is, Category 1 issues have to be generic. It's a -- it is a misuse of the English language to say that a site specific environmental impact statement, the 1989 supplement, is generic.

The example that was used of the salt water marsh, which I think is an excellent example, here is an exception of plants that are on the salt water marsh, and don't have to do an analysis of the ground water impacts of their cooling pond.

The basis for that is that salt water marsh impacts have been generically determined. There was already, a generic determination of what the

impact would be of salt water marsh use as a cooling source of a power plant.

So, whether you had your salt water marsh on the ocean, or it was inland, you were exempt. This is perfectly okay, because it relates back to generic, and I would agree that we had an issue here of the salt water marsh pond, but I would not agree that just because an Applicant asserts that what they have is a salt water marsh cooling pond, and a reasonable intervener says, "No, that is not a salt water marsh cooling pond. That is something different," and presents sufficient evidence and bases and so forth, they would be able to challenge that, because the Applicant has to prove that they meet the regulatory exception standard.

This Applicant wants to say, "We don't have to prove that. We don't have to give you the 1989 SAMDA, even though we quote from it, even though we analyze it, even though we rely on it, we don't have to give it to you," so, you don't get to see it. It's not part of this record, and number two, you don't get to challenge whether or not that document complies with whatever the Commission intended when it wrote 51.53(L), and we all agree that 51.53(L) gives us no definition of what is an analysis, a legal

sufficiently analysis of severe accident mitigation alternatives.

We would have to go to the other sections that we cite, primarily in Contention 3, but also, in Contention 2, that tell us what would be an adequate analysis?

What the Applicant and staff are arguing is, is that the Commission is giving a license renewal to use any document that an Applicant called a severe accident mitigation alternative, done before license renewal, as an automatic free-ride on having to do one in a licensing proceeding, and of course, as an -- no opportunity for the kind of adjudicatory hearing that we're having here. There is no support for that.

CHAIRMAN FROEHLICH: Is the basis of your argument, that document was published in 1989, and titled 'staff's SAMDA analysis', is not a SAMDA?

MR. ROISMAN: In Contention 3, that is our argument. In Contention 1, our argument is, it doesn't even matter, because new and significant information related to non-generic findings that are part of the GEIS, even if we imported this into the GEIS, have to be considered as part of the environmental report, the DSEIS and FSEIS, and are subject to challenge by an intervener.

CHAIRMAN FROEHLICH: So, you further would contend that when the Commission created the exception or exemption for the three plants, they weren't referring to Limerick or the 1989 staff SAMDA?

MR. ROISMAN: The Commission didn't create an exception for three plants. The Commission created an exception for any plant that met whatever that exception meant. It wasn't three. It might have been 30.

There is nothing that would have stopped all the plants that are now presenting SAMDA's, as part of their license renewal, from trying to do one before license renewal ever came up.

Submitting it to the staff, getting it approved and then arguing, it's outside the licensing renewal.

But the Commission doesn't say three, in there, and I submit that there is nothing in the statement of consideration or in the GEIS that justifies the conclusion that what was done in 1989 constitutes a legally adequate consideration of severe accident mitigation alternatives.

Most notably, forgetting about any of the other deficiencies, they never even look at the economic consequences of a severe accident. How could

they possibly have determined which mitigation measures would be useful, if they left off, even by Applicant's declaration, 70 percent of the possible impacts?

Looking at only the consequences side, we think that number is way low for these plants, putting that aside.

So, it would be, it seems to me, that it's injustice to imply, much less define, that what happened in 1989 constituted sufficient information to meet NEPA's requirement for evaluating mitigation alternatives to severe accidents, the Commission's intent, when it said, if you have done that, we'll let you do it, without having to do the work, and by the way, we're not arguing that they should do the work. We're arguing they should update an old one.

And the staff points out that when the staff does these analyses, it's trying to deal with the updating of prior environmental impact statements.

This Applicant, when it applied for its license to operate the Limerick plants, did an environmental report. The staff did a draft and a final environmental impact statement. Many of the issues that are addressed in the new ER were the subject of the old FSEIS, DSEIS and ER. Why were they

done all over again? Because context, Applicant didn't even try to cite, "Oh, that old one is done and we don't have to do it again."

Maybe the -- I think Mr. Polonsky acknowledged that new and significant information just gets automatically rolled into the updated analysis.

So, we have an old analysis. It needs to be updated. The Applicant has acknowledged that it needs to be updated. They haven't done it properly. We've challenged it. We should have a hearing.

CHAIRMAN FROEHLICH: I'm trying to get the chronology of when the Commission issued the L -- the change to the reg, to put in the L, and trying to gather from the timing of that, what they could have been referring to, when they carved out this exception, if not, the three plants that had done or the staff had done the SAMDA for.

MR. ROISMAN: Well, I think some of that, we've heard. The Commission had ongoing in 1996, and you'll see it in the statement of consideration. The IPE's, the IPEEE's, it was certainly possible that, as staff now argues with regard to this case, that that work would have completed the analysis of severe accident mitigation alternatives sufficiently, that the SAMA wouldn't have been required for any plant.

I think all the Commission wrote in there was that if that has happened, then we're okay with it.

In 2001, the NEI filed a rule-making petition with the Commission, saying, just as staff has argued here, the IPE and the IPEEE are going to take care of this issue. We will know then, what the consequences are of severe accidents, we'll look at mitigation alternatives, we have back-fit rules. You don't need to keep this in there, and the Commission rejected that.

They turned down that rule-making request because they said, "This isn't done right. There's a lot more to be done," and the staff, by the way, supported the Commission and the rule-making was turned down.

So, all in all, there has been the possibility that you wouldn't have to do the SAMA because it would have already occurred. I don't think the three that are talked about -- I mean, where is the -- where is this support in this document, in the statement of considerations, that there was any look at these SAMA's, to see whether or not they were what the Commission had in mind, when it was considering what should be severe accident mitigation

alternatives. It's not there.

There is a couple of lines in the GEIS, which is the staff's document, and the staff's document is merely saying, "Look what we did," I mean, it's self-serving. I don't mean to demean it by that, but it wasn't like an independent evaluation, and therefore, we don't have -- we don't even have a record in the statement of considerations, and again, I submit if it had been what you're asking for, Mr. Chairman, I think the Commission would have said something in L, that made reference to that, to the ones that are already done, or to something.

They didn't, and we are bound by the rule. The rule did not adopt the statement of consideration. It did not adopt the GEIS. It adopted only the portion of GEIS that put things in Category 1 and Category 2, and as we've discussed, the SAMA analysis into Category 2.

CHAIRMAN FROEHLICH: Staff Counsel?

MR. SMITH: Thank you, Judge Froehlich. I think one I wanted to respond to first is that staff has a different view of the NEI provision for rule-making in the denial that the Petitioners, and in the rule-making first and foremost, document any challenge to the -- the rule-making with any challenge, the

Commission regulate that if you've done one SAMA analysis, a subsequent one need not be done for license renewal. That wasn't the issue.

Also, NEI petition for rule-making raised a limited challenge to Commission determination that basically brought forth two points.

First, it said that you're asking to be remote and speculative, and therefore, it need not be in the consideration of ways to mitigate this.

Second, NEI said that the scope of the NRC's environmental review should be limited to the scope of the safety review, which is managing the effects of aging, and the Commission soundly rejected to both of those principles. Nothing in the staff's argument is contrary today, first and foremost, that severe accidents are not remote and therefore, must be considered in the scope of license renewal, and second, the scope of our environmental review is much -- in a way, much larger than our scope of our limited safety review and it -- the environment review must consider the environmental impacts of operating from another 20 years, not just the impacts of aging -- managing the defects of aging over that time period.

The Commission did briefly talk about categorizing severe accident mitigation alternatives

as a Category 1 issue, at the end of that document, and talked about the IPE and IPEEE programs, but said at that time, didn't -- the Commission's view and the staff's view of those programs weren't sufficiently developed to the point where we would be certain that the result of that analysis would lead to the classification of SAMA as a Category 1 issue.

Therefore, it's been determined it wasn't worth the time at that point to consider the issue, but the Commission didn't consider itself, the question of whether or not SAMA's were properly categorized as Category 1 and Category 2, just the issue wasn't worth visiting at that time, in light of the staff's analysis.

Let's see, also I guess probably worth pointing out too, is the statement of considerations is not a regulation and it's not a rule, but it is helpful in explaining what the Commission meant when it promulgated the rule, and to the extent we're looking at the meaning of 10 CFR 51.53 (c)(3)(ii)(l) is, it's helpful in explaining that that language is meant to apply to the rule-making.

CHAIRMAN FROEHLICH: In your mind, it was intended to apply to Limerick?

MR. SMITH: Limerick specifically, but

also as I pointed out earlier, the language was expansive enough to also encompass licensing applications for other facilities, like Watts Bar II or the new generation combined operating license reactors that will have had a SAMA analysis done in the initial operating phase, as well, or even if a facility were to come in for a second license renewal, who would have completed a SAMA analysis at the first license renewal stage.

So, the Reg Guides wouldn't apply to those facilities, as well. So, it could have a very large class of facilities, conceivably.

CHAIRMAN FROEHLICH: Mr. Polonsky, anything to add?

MR. POLONSKY: Yes, one, wasn't Limerick listed, is a question, and is Limerick mentioned in the June 1996 statement of considerations due any deference?

I think we did just hear why Limerick wasn't listed, because it would be a significant burden on the Commission to every time a new plant had performed a SAMA analysis, to then go in and revise the rule to add that plant.

So, to have added Limerick and Comanche Peak and Watts Bar at the time, that would then

constrain the Commission to having to amend it every time a new plant was licensed, such that it did not have to submit a SAMA as part of its license renewal.

And then is Limerick mentioned in the June 1996 due any deference? Well, the Commission, in the Pai'ina, Hawaii decision, we think is very on point. It's CLI-08-3. That was an underwater reactor -- I'm sorry, radiator proceeding, under Part 36, and there was an issue about citing and the limitations on citing requirements, and the rule is silent on citing, and the Commission goes into great length to discuss that the statements of consideration lay out why it is silent on citing, and provide those citing qualifications.

On page 163, as the Commission then delves into the statements of consideration analysis under Part 36, despite the fact that the concerned citizens group says that it's not proper to consider the statements of consideration, which is very similar to here, there is a footnote 46, which says, and it's quoting a prior Commission, Duke Energy Corp., CLI-0411, "The Commission often refers to the statement of considerations as an aide in interpreting our regulations."

It also says then, "See also," and cites

to a decision from the D.C. Circuit, again, also in footnote 46, it says, "We regularly rely upon the preamble in interpreting agency rules, given that the purpose of the preamble, after all is to explain what follows."

CHAIRMAN FROEHLICH: And that page 163 and footnote 46 comes from the Pai'ina CLI-08-03?

MR. POLONSKY: Correct.

CHAIRMAN FROEHLICH: Okay.

MR. POLONSKY: And if we then go to the June 1996 statement of considerations, we think it is unambiguous on page -- this is 61 Fed Reg 28481, in the middle column, towards the bottom of the only full paragraph.

It says, "NRC staff considerations of severe accident mitigation alternatives have already been completed and included in an EIS or supplemental EIS for Limerick, Comanche Peak and Watts Bar."

"Therefore, severe accident mitigation alternatives need not be reconsidered for these plants for license renewal." That is essentially the language of the exception language in 51.53(f).

CHAIRMAN FROEHLICH: Last word, Mr. Roisman.

MR. ROISMAN: At most, at most it might

get them over Contention 3, although I still think we have a dispute. It doesn't help them at all with regard to new and significant information in regards to Contention 1 or Contention 2, which says that forget about -- remember 51.53 has not standards for what is a severe accident mitigation alternative analysis.

So, in Contention 2, what we have said is, you are obligated by earlier regulation cited in -- by Supreme Court precedent which cited it, to do an adequate severe accident alternatives mitigation analysis. You haven't done it for this plant. You have to do it, based upon the information that is currently available.

So, both of those, Contentions 1 and Contention 2, don't really depend, even if this were correct, which I disagree with, and we can argue when we get to three, more about that, but even if that were correct, it wouldn't change the fact that the Commission can write all the exceptions it wants, but if at the end of the day, it doesn't have the legally required mitigation alternatives analysis, and admittedly, this is the staff, not the Applicant, it cannot sustain its decision on whether to re-license the plant.

CHAIRMAN FROEHLICH: I note, we are approaching the noon hour. I would ask my colleagues of they have any further questions on Contention 1, and then suggest we take our luncheon break, and when we return, do Contentions 2, 3 and 4 and the Motion to Dismiss.

JUDGE KASTENBERG: Motion to Strike.

CHAIRMAN FROEHLICH: Motion to Strike, I'm sorry, Motion to Strike.

All right, then we'll stand in recess until 1:15 p.m. and take up Contention 2 when we return.

(Whereupon, the above-entitled matter went off the record at approximately 12:05 p.m. and resumed at approximately 1:00 p.m.)

AFTERNOON SESSION

1:15 p.m.

CHAIRMAN FROEHLICH: Please be seated. In this afternoon session, I'd like to go through Contentions 2, 3, and 4 and the Motion to Strike. But over lunch, as we talked through this, it might be helpful to as a general question and I'll start with Roisman, a question that we had propounded in regard to Contention 3. The question simply was what's the difference between Contention 2 and Contention 3?

MR. ROISMAN: Contention 2 is based on requirements of NEPA and the Commission's environmental regulations. Those are conditions that are not waived by or replaced by anything in 51.53(l). But rather, inform as to what the words in that provision mean when the analysis of severe accident mitigation alternative. So a severe accident mitigation alternative has to be one that complies with the guidance of Methow Valley and complies with the requirements of 51.453 of the Commission's regulations, and 51.103(a)(4). Those two regulations imposed upon the Commission in the case of (d)(3) the discussion of alternatives should be sufficient to complete and aid the Commission in developing and exploring pursuant to Section 102(e) of NEPA,

appropriate alternative to recommended courses of action in any proposal which involves unresolved conflicts concerning the alternative uses of available resources. And then 103(a)(4) says state whether -- this is when the Commission is now doing its final decision on the license application, state whether the Commission has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selective and if not to explain why those measures were not adopted.

So Contention 2 says the applicant does not meet those requirements. Admittedly, 103 applies to the commission, but we've already talked about that fiction. So Contention 2 says that Subpart L does not grant, nor could it legally grant, an exemption from the requirements of NEPA. The Commission cannot grant itself an exemption from the statute, and therefore the requirements of NEPA is still applicable.

So let's just look at what we have on the table. We have a 1989 SAMDA. We have the analysis of new and significant information in Part 5.3 of the ER. And (c), does the applicant provide the information that's required for a hard look at the mitigation alternatives for severe accident, yes or no?

So in that sense, it's not tied to whether

you call it a SAMA, a SAMDA, or just an accident mitigation alternatives analysis, whatever you want to call it. That's what Contention 2 is about. And you'll see there are a couple of issues in 2 that don't appear in 1 because some of those issues are not new and significant information. They're old and significant information, but we still have to know whether or not these requirements are met. And that's a fundamental point that NRDC is pressing, that at the end of the day the Environmental Review for this plant must meet the requirements of NEPA and the Commission's regulations.

And you don't need to get to the question of whether a new SAMA has to be done and the old SAMDA analysis is equivalent of the new SAMA. All you have to do is evaluate the adequacy of that.

Nothing in the regulations excludes consideration of the adequacy of the analysis by the applicant of severe accident mitigation alternatives. So 2 just says they don't meet those statutory and regulatory requirements. It doesn't ask them to do a new SAMA. It just says you don't need it. They might choose to come in, if they thought we were right and they were wrong on that, and do a new SAMA. They might do something different. It might not look at

all like a SAMA, but it might meet the statutory and regulatory requirements.

Contention 3 deals with the very narrow question and that is can an applicant assert compliance with the exception provision of 51.53(l) without proving something about the document that it claims meets the exception requirement. This applicant has said we don't have to bring it in. We're not bringing it in. It doesn't have to be made part of the application.

Our position is it's true, you don't have to do it, but if you choose to do, that is, if you choose to rely on the exception as they do here and if you choose to evaluate new and significant information against that whole document, you have to bring the document here. And we have an opportunity to evaluate whether or not that document is what the Commission had in mind.

The applicant and staff position is it does not matter what is in the document. If the applicant and staff call it a previous SAMA analysis, it automatically qualifies. There's no substantive evaluation of its merits.

Now they say well, the Commission has done that for us. They issued the regulation and they

reference Limerick to Watts Bar and Comanche Peak and therefore they determined that those were adequate. What I submit is where is the record that would support such a determination? If the Board is to treat it as collateral estoppel or res judicata, however you want to treat it, there was to be some record. There has to be a process that has gone through in which the pros and cons, the merits and demerits of that were available to be evaluated. No such process is listed.

So in Contention 3, we ask you for the first time to take a look a the SAMDA of 1989 and make a judgment based upon any criteria that you can find and its only guidance criteria, I admit, in the Commission's guidance document, staff guidance document, as to what would be a proper SAMA, what kind of PRA analysis would you need, what kind of mitigation alternatives do you have to look at, how would you select what they were, how would you do the balance between the cost of the mitigation alternative with the cost of the accident and how much would you save by all of that.

We're not trying to lay down some rule as to what we say it has to be. All we're saying is that any fair evaluation of the 1989 SAMDA cannot meet the

requirement the Commission had in mind. The Commission did not intend, no matter how you want to read the SOC, to say no matter how bad we've done it, an analysis is done, and regardless of the label that's put on it, it automatically qualifies for the exemption. So 3 challenges the applicant's assertion that it's entitled to the exemption.

Now you might decide that's a legal question. If it is, then we join the issue on a legal question and that contention should be stayed for a determination in a full-blown briefing that you would do. The applicant would file for summary disposition or we would file for summary disposition. At this stage, there is a dispute. The dispute is whether or not the applicant complies and meets the exception. That's the dispute.

JUDGE KASTENBERG: Could you elaborate on what you consider old, but significant in the declarations?

MR. ROISMAN: Oh yes, they are included in the declarations.

(Pause.)

So if you look at our petition on page 20 where the bases of Contention 2 are mentioned, the number 3, the updated meteorological data, I believe

that that is not one of the new and significant, but old and significant. It's an issue that could have been raised, but then 1989, there's not an event that happened, although we do note meteorological condition information is available since that time. But we think it was a bad choice.

Also, the consideration of the evacuation time which is number 5 on page 20 of the petitioner's grievance. It's another example of an issue which is not new in the way that we use the term new. It's potentially significant. I think those are the two principal ones, Judge.

JUDGE KASTENBERG: Thank you.

CHAIRMAN FROEHLICH: Mr. Smith --

JUDGE KASTENBERG: Before we do that, just one for the staff. Do you know what was the SAMDA of 1989, was that peer reviewed?

MS. KANATAS: I'm not sure. I'm not sure, Your Honor. This is Catherine Kanatas. I can check with the staff and see what type of peer review, if any, it received.

CHAIRMAN FROEHLICH: Contention 2, as Mr. Roisman just explained, talks about an obligation of the applicant to meet the requirements of NEPA, separate and apart from the argument that revolves

around the applicability of L, as I understood your answer.

From the staff's perspective, is there an obligation for the Agency staff to perform a SAMA analysis as part of this license renewal proceeding?

MS. KANATAS: Thank you, Your Honor. No, the staff does not believe that it is obligated to perform a SAMA analysis in this proceeding. As we've discussed, Exelon does not need to include a SAMA analysis in its Environmental Report and Table D-1 which defines the scope of the staff's environmental review for license renewal states that alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives.

Here, as we've discussed, the staff has considered alternatives to mitigate severe accidents in the NEPA document for Limerick and so SAMA need not be considered in the Limerick SEIS. A contrary reading of the regulation would render the statement that have not considered such alternatives meaningless which, as a result, courts try to avoid when reading regulations.

So I'd also like to point out that the staff explained in the 1989 final environmental statement that the severe accident program which

includes the containment performance improvement program, the IPE, and the IPEEE, was the proper vehicle for further review of severe accidents at nuclear power plants including Limerick. That's on page 15 of the FES.

And the Commission cited to these same studies as well as the Limerick SAMDA in the 1996 Statement of Considerations when it made its determination that another SAMA need not be done for Limerick at license renewal.

CHAIRMAN FROEHLICH: So even working in Mr. Roisman's argument that aside from L, NEPA would require some type of a SAMA analysis, you don't buy that?

MS. KANATAS: No, Your Honor. Part 51, including 51.53(c)(3)(2)(l) are the Commission's regulations implementing NEPA and NRDC has not shown has been following the Commission's regulations implementing NEPA do not meet NEPA. It's staff's position that in following Commission's regulation in not submitting a SAMA analysis in its ER, Exelon complied with our regulation.

JUDGE KENNEDY: So the strength of your argument is if the exemption and the fact that IPEs and IPEEEs have been performed is just supplementary

to that? I'm not sure -- that's come up a couple of times today.

MS. KANATAS: Certainly, the Commission did determine that it could not make generic determinations for all plants based on IPE and IPEEE and that's not what we're arguing here. We recognize that SAMA is a Category 2 issue, but based on the consideration that was done in the SAMDA that was done in 1989, as well as the IPE, IPEEE that was done specifically for Limerick, and the other studies that have been done and continue to be done, the Commission made the generic determination that another SAMA did not need to be done for Limerick license renewal. So it's not trying to say that we're trying to apply Limerick's IPE generically to anyone else. As NRDC pointed out, the SAMDA that was done was site specific to Limerick as well as the IPE and IPEEE.

JUDGE KENNEDY: So the important consideration is that it is an Environmental Impact Statement?

MS. KANATAS: Correct, which the regulation 51.53(c)(3)(2)(l) does explicitly state, but the previous determination was in a Environmental Impact Statement, but yes, it may not be submitted for license renewal.

JUDGE KENNEDY: Are there, just to keep going with that, are there other facilities outside of the three that have been mentioned that qualify for the exemption that have a SAMA analysis or SAMDA analysis within the Environmental Impact Statement outside of license renewal?

MS. KANATAS: I believe my co-counsel, Mr. Smith covered that there could be other potential cases that the rule would apply to, whether it be for COL applicant that had or other -- another license renewal, a second license renewal.

JUDGE KENNEDY: So that would be going forward?

MS. KANATAS: That would be going forward.

JUDGE KENNEDY: Line in the sand at the time Limerick submitted their application, the three that had been -- the three facilities that had been granted the exemption are they the only ones that have a SAMDA analysis or SAMA analysis within the Environmental Impact Statement?

That's not coming out right, because I can see Mr. Smith is thinking there's license renewal applications that have already been granted?

MS. KANATAS: Right, right.

JUDGE KENNEDY: I guess I'm trying to get

at are those three that were granted the exemption the only ones that qualified for the exemption? I guess I'm trying to get at that point in time in '96 were they the only three that were granted an exemption based on having a SAMA analysis?

MS. KANATAS: I can confirm that with my staff. I believe that there might have been for systems 80, but I would need to -- I believe that at that time those were the only plants, but I can confirm that.

JUDGE KASTENBERG: And just to kind of round this out, is there anything in L, I'm just going to call it L, that precludes the staff when they're doing the review of the ER from raising questions regarding severe accident mitigation analysis?

MS. KANATAS: Thank you, Judge Kastenberg. No, there is nothing that precludes the staff from asking additional questions about the information provided in the ER related to any new and significant information. The staff is doing its own independent analysis of whether there is new and significant information related to the generic determination in L, as you say, and so we will be following up based on what's in the ER, what's in the petition, any other information that we have, the reviews that have

already gone on, the SAMAs that have been done, other things to determine whether there's anything that needs to be followed up on, absolutely.

CHAIRMAN FROEHLICH: Mr. Roisman mentioned some new old items or old new items.

MS. KANATAS: Yes.

CHAIRMAN FROEHLICH: Will those items or those type of things, will they be looked at as part of the staff evaluation for the DEIS?

MS. KANATAS: Thank you, Judge Froehlich. The meteorology --

CHAIRMAN FROEHLICH: Right.

MS. KANATAS: And other concerns? The staff's review is ongoing and without binding the review and saying what exactly they will or won't be looking at, certainly any information that would paint a seriously different picture of the environmental consequences that were considered in the 1996 rulemaking would be looked at by the staff. That may or may not include things like meteorology.

CHAIRMAN FROEHLICH: In that regard, how does that NEI 0501, how does that play into what you look at and the type of issues Mr. Roisman was saying that you must look at?

MS. KANATAS: Thank you, Judge Froehlich.

A couple points on the NEI guidance. First, it relates to a SAMA which is not at issue in this proceeding. What is at issue is the regulation. So any guidance --

CHAIRMAN FROEHLICH: We're back to L.

MS. KANATAS: Back to L. Any guidance on the SAMA analysis really doesn't apply here because there is no SAMA analysis submitted in the LRA which NRDC notes on page two of their expert declarations.

In any event, the NEI guidance does not, like all guidance documents, does not have any requirements. And the Commission actually in the 1996 Statement of Considerations specified that it did not intend to prescribe by rule the scope of an acceptable consideration of severe accident mitigation alternatives and that it would review each severe accident mitigation consideration provided by a license renewal applicant on its merits and determine whether it constituted a reasonable consideration of SAMA. That's at 61 Fed. Reg. 28482. There's an LPD 55 NRC 49 at 127, citing that.

So frankly, not only is it not an issue in this proceeding because the SAMA is not at issue, it's guidance and not binding requirements and the Commission didn't intend to have any kind of bright

line, this must be done for a legally adequate SAMA.

CHAIRMAN FROEHLICH: Is there somewhere -- this sort of latches into Contention 3, is there any definition of severe accident mitigation alternatives in the Commission's regulations or somewhere that explained, perhaps, how it's intended to be used in L?

MS. KANATAS: Thank you, Judge Froehlich. The term is not defined in the regulations. In a 1980 policy statement, the Commission indicated that SAMAs were additional features or other actions which would prevent or mitigate the consequences of severe accidents. The cite for that is 45 Fed. Reg. 40103.

The Commission's case law describes SAMAs as safety enhancements such as a new hardware item or procedure intended to reduce the risk of severe accidents. That's CLI 10-11, slip. op. at 3. And the Statements of Consideration for the '96 license renewal rules do not explicitly define SAMAs, but they do state that Limerick's SAMDA was a severe accident mitigation alternatives analysis for purposes of the rule.

(Pause.)

CHAIRMAN FROEHLICH: Mr. Polonsky, do you have a view on the difference, if any, your approach to Contention 2 vis-a-vis Contention 3, same question

as I began with with the petitioner?

MR. POLONSKY: Yes, Your Honor. It's like a game show with two contestants who appear on the outside to be different contestants, but in effect, are the same contestant trying to get to the same prize. Contention 3 says the exception doesn't apply. Contention 2 says well, I may lose on that so I want another bite to see what's behind Curtain 3 as part of our game show, and so I'm trying to create a reason why I can get around the exception in 3. We think that's simply a camouflaged argument to do a runaround and go through the back door to challenge a Commission regulation which cannot be done absent a waiver in this proceeding.

There's another reason for that outcome and that is the citations that the petitioners have provided are general citations under NRC's interpretation of NEPA. And the general principles of regulatory history construction or regulatory construction period are that specific rules trump general rules and here we have a specific rule that says for those three plants that it already performed a SAMDA analysis and they do not need to submit one now. So to simply point to a general rule and say that trumps the specific rule goes against these

general principles of regulatory construction.

And then finally, I think what the staff said about their obligation, also flows through equally from those general rules to this specific rule. And if I could map that out, I think it's very clear that the provisions that have been cited don't link back and the provisions that I'm going to cite do link back to the exception.

So in 10 CFR Section 51.95(c), that's the provision that governs the staff's obligation to issue a Final Environmental Impact Statement, to issue a Supplemental Environmental Impact Statement at the license renewal stage. And it says that you must address the issues that are required under 51.71. We then turn to 51 -- if I'm going too fast, let me know Judge Froehlich.

CHAIRMAN FROEHLICH: Okay.

MR. POLONSKY: So we're at 55.95(c) which is entitled the Operating License Renewal Stage. And it says that the Commission shall prepare an Environmental Impact Statement which is a supplement to the Generic Environmental Impact Statement. And then (c)(1) says the Supplemental Environmental Impact Statement for the operating license renewal stage shall address those issues as required by 51.71.

We then turn to 51.71 because we want to know what it is that they're supposed to address. 51.71 entitled Draft Environmental Impact Statement Contents provides that the NRC staff must address the matters specified in several sections and then at the top of the page of the following page it says as appropriate and to the extent required by the scope, the draft statement will address the topics in paragraphs B, C, D, and E below and the matters specified in -- and they list a couple of sections including 51.53.

So we then go to 51.53 and you know the answer to where this is going. The exception is written into 51.53(l) provision which says you don't need to include it here. So we think there's a very clear path that says no, this isn't included and it's not simply that the Commission forgot that this exception was there and that it somehow violates the requirement to do a hard look under NEPA. No, the entire construct of 51 sets out what the NRC staff is obligated to do and it clearly leads you down a path of not doing an analysis for SAMA for Limerick.

CHAIRMAN FROEHLICH: It sounds very logical and direct.

Mr. Roisman, care to comment?

MR. ROISMAN: Yes, Your Honor. What the applicant and staff would argue is that -- they're saying that because the applicant is excused, their term, from doing a new SAMA analysis under 51.53, it therefore follows that staff which doesn't have to do anything more than the applicant did is also excused from doing it. And therefore, the NRC is excused from complying and that is inconsistent not only with the statute. It's inconsistent with the Statement of Considerations. The Commission, through the 1986 Statement of Considerations, makes clear that its goal is to comply with NEPA. That's what it was trying to do. It's not setting up something separate and ignoring it, it's trying to comply with NEPA.

So the question on the table is whether looking at 2 and 3 is whether or not what has happened as of 1989 complies with NEPA. This language that Mr. Polonsky points to says that the staff's review needs to include what's in 51.53. It doesn't say it's limited to that and I believe staff counsel has conceded that the staff may go beyond what the applicant puts in the Environmental Report. This is the applicant's point of view. Staff can have a different point of view. They may find new information the applicant didn't look at. They may

reject some of the applicant's analysis. They could even say to the applicant your 1989 SAMDA review reliance is unwarranted in light of everything that's happened in the last 23 years. Any of those things are possible.

So the staff, just like the applicant, is not prohibited from doing an analysis. It's told it doesn't have to. And what 2 raises is if you don't do it, can you still comply with NEPA and the most that they can say is if we don't do it, we'll still comply with A. But that isn't the question that's on the table, at least not in Contention 2.

Contention 2 just says is this an adequate analysis that will even show alternatives? So I think their framing the question by assuming the answer. I would agree. If L was a declaration by the Commission that they had made a generic determination that the impact of mitigation alternatives and analysis of severe accident mitigation alternatives at Limerick were substantively adequate. And there was a basis for that statement. In other words, it wasn't just a throwaway line in the SOC. We would be in a very different position, but we do not have that.

You can go through the SOC from top to bottom and you will not find, or the GEIS for that

matter, any attempt to compare the 1989 SAMDA analysis for Limerick or any of the other plants against any criteria for what you would do to adequately consider severe mitigation alternatives, severe accident mitigation alternatives.

We suggest in Contention 2 and to some extent Contention 3 also things that you would have to look at if you wanted to know the answer to that question. That question is not answered in the 1989 SAMDA analysis. It's not answered because a whole category of consequences, mainly economic consequences are totally ignored. It's not answered because a whole series of things that we've learned from 1989 and now are not part of the analysis. It's not answered because there are specific things that were done in 1989 which are demonstrably wrong in our judgment. We presented expert opinion for it.

So we think that the fact that the applicant and the staff think that they can duck this responsibility at most, at the very most what you could say is the applicant in its ER didn't have to do more than the 1989 SAMDA.

Now we don't agree with that, but I don't think you can say more than that. When you get over to what the staff's obligations are, then we really

are in NEPA territory and the language that I quoted at the beginning this morning from Methow Valley seems to me is sufficiently important.

And with your indulgence I'll read a part of it again. Omission of a reasonably complete discussion of possible mitigation measures would undermine the actual enforcing function of NEPA. Without such a discussion neither the Agency nor other interested groups of individuals can properly evaluate the severity of the adverse effects. Now that's not said in the SOC. It's not even said by the Commissioners. It's said by the United States Supreme Court. It is the law.

So Contention 2 is based upon the fact that a fair reading of the 1980 SAMDA analysis shows that it does not meet that requirement. It does not have a reasonably complete discussion of possible mitigation measures. And there has been no cure, no determination, no record, no opportunity for a record to be made with regard to the 1989 SAMDA's relevance to a 2012 license renewal application. Contention 2 says this is on the shelf, this is on the shelf.

Now as to 3, the staff often quotes to you from the SOC to say that the Commission does not have any standards for what is a proper set up. I agree,

they don't. It's not in the regs. It doesn't appear to meet it in the Statement of Considerations and in the Statement of Considerations they say we're not going to do that.

Contention 3 says we've got to know whether you've done an adequate job. We believe you offered, you say you, the applicant, that you're entitled to the exemption. We have a right to check on that assertion that you make in the ER. That's what Contention 3 does. It challenges that assertion. And we point to, because we can't point to regs. We point to staff guidance, primarily NEI 05-01 as at least illustrative of what we think would need to be done to do a proper SAMDA. But we go back to the declaration of our experts which say how could you possibly say that you've done a proper evaluation mitigation alternatives for Limerick when you have left out mitigation alternatives that are in other similar plants across the country as part of their SAMA analysis? You haven't even considered them under new and significant information much less as part of your analysis of mitigation alternatives.

So that's where Contention 3 comes into play.

CHAIRMAN FROEHLICH: Staff counsel.

MS. KANATAS: Certainly. Sir, a few

points that I want to raise regarding Mr. Roisman's argument. First, both Contention 2 and 3, as explained just now, challenge the 1989 SAMDA and claim deficiencies in that analysis and claim that the Environmental Report for license renewal incorporates or adopts that analysis as a SAMA analysis. And that is not accurate.

The Environmental Report references the 1989 SAMDA as a citation to a previously done severe accident mitigation alternative and then says it is not -- the exact quote -- accordingly, no analysis SAMA's for Limerick Generating Station is provided in this license renewal Environmental Report as none is required as a matter of law, citing to L.

So the adequacy of the 1989 SAMDA analysis is not at issue. It's not part of the license renewal application. The relevant question is not whether new and significant information related to that analysis is related to that analysis. The new and significant information is related to the Commission's generic determination in the rule which is supported by several studies, the CPI, the IPE, the IPEEE, the previously done SAMDAs including Limerick. And NRDC does not indicate in its petition how its challenges undermine that finding and certainly have not sought

a waiver to challenge the regulation. So that's my first point.

The second point that I wanted to make is in terms of these additional mitigation measures. I believe Judge Kennedy, you have some concern about how could that not be new information that needs to be addressed. And I just want to point out that the Commission's Statement of Considerations at 61 Fed. Reg. 28481 explicitly recognized the possibility that future SAMA analysis could identify cost beneficial SAMAs. But the Commission went on to conclude that future SAMAs were unlikely to identify major plant design changes or modifications that would be cost beneficial and that any identified cost beneficial SAMAs would tend to identify procedural and programmatic fixes with any hardware changes being only minor.

Given those conclusions, the Commission reasonably determined to exercise its discretion under NEPA to only consider one SAMA. The NRC, as I've said, has to determine whether there's any new and significant information which would paint a seriously different picture, the consequences of realizing same than what were considered by the Commission. But certainly they explicitly recognize that additional

cost beneficial mitigation measures were a possibility. So I don't -- the staff position is that that is not new and significant in and of itself.

JUDGE KENNEDY: My head is rotating.

MS. KANATAS: Sorry.

JUDGE KENNEDY: Did you just agree with Mr. Roisman that there is no SAMA for Limerick?

MS. KANATAS: I agree that there's no SAMA submitted for license renewal in the license renewal Environmental Report because the 1989 FES contained a SAMDA for Limerick which is for the operating license and that that SAMDA was a severe accident mitigation alternatives analysis within the meaning of L and that because of that no SAMA was submitted for the license renewal.

JUDGE KENNEDY: Okay, so we're all in agreement that none was submitted.

MS. KANATAS: For the license renewal.

JUDGE KENNEDY: Are we in agreement there is one or there isn't one for Limerick?

MS. KANATAS: The staff's position is that there is a SAMA for Limerick that was done in support of the operating license and it's contained in the 1989 final environmental statement.

JUDGE KENNEDY: Okay, that helps. Now

let's go to new and significant information and mitigation alternatives. I think you went through a fair bit of discussion about whether any would be identified, whether -- that doesn't imply we're not going to look, does it?

MS. KANATAS: Absolutely not, Judge Kennedy. We certainly are going to look at all the information submitted by the petitioner, by any scoping comments which actually NRDC provided scoping comments that were very similar to the issues raised in the petition any other information that comes in that we --

JUDGE KENNEDY: We have from the petition from NRDC at least a suggestion that there are mitigation alternatives that have been explored since 1989 that haven't been looked at as yet for Limerick and I guess I'm looking to see is that true? You say the scoping comments and other material -- is that in that mix of information?

If I understand the applicant, mitigation alternatives -- my recollection is that they don't need to be looked at because there's no significant consequence changes. I guess I'm struggling. To me, it just seems what's been maybe looked at over the last -- since '89, there could very well be some new

information that could rise to significance and I'm just struggling with how that doesn't -- I guess I'm struggling first, doesn't raise it in the mix. And then we can discuss if it's not in the mix, why it would not be?

MS. KANATAS: I will try to answer your question and if I don't, please let me know.

Certainly we recognize that it's new information. Whether or not it's significant gets back to as my co-counsel, Mr. Smith, laid out, it would have to paint a seriously different picture of the environmental consequences that were not from 1996.

Now whether or not that is the case, the staff is doing its evaluation now. But certainly my point was just to note that the Commission recognized back in 1996 that future SAMA analysis could identify other cost beneficial mitigation measures, but that they still made the determination. They drew the line and made the determination that if a SAMA had been done for a plant, another one need not be for license renewal given the other generic and site specific studies that had been done and would continue to be done for that plant.

JUDGE KENNEDY: Do you think it's the role

of new and significant information to make that whole picture whole to connect all the dots and make something -- I mean if we keep going out in time when Limerick chooses to renew its license 20 years from now again, I mean we've now got a SAMA that goes back 40 years. Something has to keep this to medium place other than just a regulatory exemption. There's something illogical about it.

I think Mr. Roisman makes a compelling logical argument. I'm not sure yet if he makes a compelling legal argument, but from a logic standpoint, there's something here that just doesn't seem to be gelling for me and that is we had this, yes, there's an exemption.

Yes, I agree that Exelon did not have to submit one as part of this application and we can come to the staff obligations and you've gone through some of that. How do we get -- how does this all work as we move out in time? As things are discovered, uncovered, revealed? We're still operating these plants. Stuff happens. Improvements get made. There are smart people out there. Things get suggested, get reviewed, get looked at.

How does that piece together? I'm hoping it pieces together. I'm just not sure how it gets

pieced together.

If you don't have an obligation to do it. They don't have an obligation to do it.

CHAIRMAN FROEHLICH: And the petitioners are prevented from doing it.

JUDGE KENNEDY: I just don't know how it works. I think I'm hearing they don't have to submit it. You're not obligated to do it. They're concerned that it's not being done. It all sounds wrong.

MS. KANATAS: In terms of them not submitting a SAMA and NRDC's -- for license renewal -- and NRDC's concerns with that, that is a challenge to the regulation. So while that could be something litigated, if a waiver was submitted and granted by the Commission, that is how that could be brought.

Certainly, too, as has been recognized a petition for rulemaking could be sought if NRDC did not believe that the current regulations implementing NEPA that are in part 51 do not meet NEPA's requirements. But it's not what was pled, does not undermine the Commission's determinations and does not constitute something that would meet the waiver standards in this case. So the NRC staff does recognize its independent duty to evaluate the information as well as identify any new and

significant information in relation to all generic determinations in the regulation.

So I certainly understand your concern for the on-going nature of the review and the events and of things, and the staff is very aware and cognizant of their duties to evaluate our response to Fukushima, to September 11, to all the events that happened, unfortunately. We do recognize our duty to react and respond accordingly.

MR. ROISMAN: Mr. Chairman?

CHAIRMAN FROEHLICH: Sure.

MR. ROISMAN: Counsel seems to have touched on something that may help at least clarify what we're saying. If this were not Limerick, if this were any plant that had not previously done what was called SAMDA or something like that, the applicant, we all agree, under 51.53, submit a SAMA analysis. There's no question that we would be able to challenge the SAMA analysis. We could make the same kind of arguments that we've made here in terms of the substantive deficiency and their admissibility would not be in question assuming we agree, we would be stating the basis for the specificity and the supporting arguments.

So what is different about the applicant's

submittal of a statement in its Environmental Report that says we don't have to do a SAMA analysis because we did one before, the 1989 SAMA. And they say this in 4.20. NRC has explained that severe accident mitigation alternatives for LGS do not need to be analyzed at the license renewal stage because the NRC previously completed such a site-specific analysis in its supplement to the FEIS, and they repeat the same concept in paragraph 5.3 of their Environmental Report.

So the question is is there no place a member of the public could challenge the correctness of that assertion? Their position is that's right. You have no place that you can challenge the correctness of the assertion. We can't challenge whether or not we meet the exemption. We can't challenge whether or not that document itself was adequate to fulfill NEPA obligations this issue. You can't challenge whether that document needs to be updated with new and significant information. That is such a remarkably different result for something that was done 23 years ago would then occur if this very same plant had never done that 1989 analysis assuming they did a SAMA now.

Why wouldn't the Commission have said any

time an applicant completes a SAMA, any time they do a SAMA, you don't have the right to challenge it or to bring in new and significant information because the Commission knows that there is a public right of due process to challenge an assertion that's made by an applicant. This applicant asserts that the 1989 SAMDA meets the exemption, complied with NEPA, does all it's supposed to do. We believe we have an absolute right to challenge that assertion. It's in the Environmental Report. They rely on it. This really is happening without Hamlet. If the SAMDA is here, if you get a chance to see it, there it is without the table disaster.

If you get a chance to see it and look at it, you can draw your own judgment. You can make a conclusion about does this look like what the Commission meant when it said do an adequate evaluation of the severe accident mitigation alternative looked at through the 2012 lens that we were using. That's all we're asking to do in this matter.

CHAIRMAN FROEHLICH: Mr. Polonsky.

MR. POLONSKY: If I may, Your Honor, what Mr. Roisman has said is simply not true. There is a way that they can challenge the 1996 rule in Section

L. There is a way that they can challenge all the other provisions that they suggest won't meet NEPA if L is implicated here and that is -- and it's already in the regs and it's been there for a long time, Section 2.335 which says if they want to in this kind of proceeding and like many other petitioners before them who have wanted to challenge new and significant information for a Category 1 issue or anything else accepted by rule, when there's a rule, you can't challenge it in the license renewal proceeding absent a waiver from the Commission. They simply haven't applied. So to sit over there and way due process has been violated, we've not had an opportunity, that's frankly the regulations allow them that opportunity.

In addition, to suggest that a 1989 document of any kind is challengeable in a proceeding 20 plus years later as a NEPA document would wreak havoc for license renewal applications across the board because those documents are challengeable at the time that they are issued. In fact, there have been many challenges in the courts where the Army Corps of Engineers or any other federal agency issues an environmental document and it's litigated at the time it's issue. You simply can't wait 20 plus years later and try and challenge it then.

CHAIRMAN FROEHLICH: Can they raise challenges such as we've seen in the petition when the staff issues the Supplemental EIS?

MR. POLONSKY: No, Your Honor. The issue of category, you must use the Category 1 issues. New and significant information raised on Category 1 issues are not challengeable. It doesn't matter whether the applicant had that new and significant information or the staff in its independent review adds 150 other things that it thinks ought to be new and significant information. Comments can be filed, but if you want to challenge a rule and in this case, the example we're using is a Category 1 issue, you want to challenge a Category 1 issue which has already been decided in the Generic Environmental Impact Statement, you need a waiver from the Commission.

CHAIRMAN FROEHLICH: How about Category 2 issues that show up in the Supplemental EIS.

MR. POLONSKY: If it were a Category 2 issue that was not accepted by rule, then yes, that is clearly challengeable. But once it's accepted by rule and it's gone through a rulemaking process, we're now back into Section 2.335 and the only way to get out of that box -- and there is a way to get out of that box, is to request a waiver from the Commission.

MR. ROISMAN: Mr. Chairman?

CHAIRMAN FROEHLICH: Yes.

MR. ROISMAN: Just one thing. Appendix B of --

CHAIRMAN FROEHLICH: I beg your pardon?

MR. ROISMAN: Appendix B of part 51, this contains a table for Category 1 and Category 2. It is a regulation. It's not a Statement of Consideration. It's not guidance. It defines Category 1, footnote 2 at the very end of the document and it says -- the environmental impacts associated with issue to determine the quality of all plants if there's some issue with plants a specific type of cooling system, a single significance level has been assigned, and mitigation of adverse impacts associated with the issue has been considered in the analysis to determine additional plant's specific mitigation measures and not sufficiently beneficial to warrant implementation which a generic analysis of an issue may be adopted in each plant's specific review. There is no generic determination of a plant specific -- one plant, not even these three plants that we've been talking about. One, Limerick. So it's not -- they have another name. Whatever the name is, it's not Category 1. It might be Category 2A. It might be Category 3. It might be

Category 0. But it's not Category 1 because the Commission defines what a Category 1 is and this report, SAMDA 1989 analysis.

So I don't think you can have a really bad issue, if we're going to follow the regs, we're going to stick to what the regs say. And they have other arguments and as Mr. Polonsky said it doesn't matter whether you call it Category 1 or Category 2, we think we're entitled to it for a different reason. And I'm only addressing just this one, this narrow reason, is it a Category 1? It's not.

CHAIRMAN FROEHLICH: Staff counsel.

MS. KANATAS: Thank you, Judge Froehlich. Yes, staff agrees with NRDC that SAMA is a Category 2 issue. SAMA is a site-specific issue and the Commission has stated that it cannot expand generic conclusions resulting from plant-specific IPEs, IPEES, for example, to draw a generic conclusion.

And the staff -- I'm sorry, the Commission did recognize that NEPA's regulation and the Limerick decision required a consideration of mitigation alternatives in its EIS and supplements. So the Commission stated that a site-specific consideration of SAMA is required of license renewal for those plants for which the consideration has not been

performed.

As we've said repeatedly here, the site specific Category 2 site specific consideration of SAMA has been done for Limerick in a NEPA document and as NRDC actually points out in their reply the SAMDA was a site-specific analysis applicable only to Limerick and is what NRDC calls a completed Category 2 analysis. That's at page 12 of the reply. So we agree that SAMA is a Category 2 issue, but it's site specific and here there was a site specific consideration done.

CHAIRMAN FROEHLICH: Do you have any other questions on 2 or 3?

JUDGE KASTENBERG: Is it appropriate to just add on to what you said, however, there is an exemption in this case? That's basically the argument. I --

MS. KANATAS: That another one not be done, that another SAMA need not be done for license renewal because a SAMA has previously been done.

JUDGE KASTENBERG: And that's not challengeable?

MS. KANATAS: That is not challengeable absent a waiver because it's a generic determination in the Commission's regulations.

CHAIRMAN FROEHLICH: I think it's safe to move on to Contention 4.

(Laughter.)

JUDGE KASTENBERG: When is it environmentally appropriate?

CHAIRMAN FROEHLICH: Our broad question to the parties on Contention 4 is does the ER address the impacts of denial of the proposed license renewal? And if so, where? I guess applicant we'll hear from first and then the petitioners.

MS. LEACH: Thank you, Your Honor. Brooke Leach on behalf of the applicant. I'm going to be answering questions on Contention 4.

CHAIRMAN FROEHLICH: Okay.

MS. LEACH: And to address your first question whether or not the EER addresses the impacts of denial of the license renewal. The ER does address the consequences of denial of license renewal.

Section 7.1 of the ER defines the no action alternative as denial of license renewal and then goes on to address two categories of impacts. The first category of impacts is decommissioning and those impacts are discussed in Section 7.1 on pages 7-2 and 7-3.

The ER also addresses a second category of

impacts and those are energy alternatives. Section 7.21 of the ER starts out by identifying a comprehensive list of possible energy alternatives and this list includes new generation capacity, renewal energy alternatives, power purchases from the wholesale market, and energy savings through demand-side management.

This comprehensive list was then narrowed done under NEPA's rule of reason to a reasonable scope of alternatives. And Exelon generally defined reasonable, a reasonable alternative as one that's capable of generating base load power in the region of interest at the time that the first unit operating license would expire and that's in 2024. And the second unit then would expire in 2029.

In using that general standard, Exelon came up with a group of seven reasonable alternatives and if Your Honors will bear with me I'll go through the pages on the ER that identify and discuss these reasonable alternatives.

The first is fossil fuel fire generation capacity and that includes both natural gas and coal and that's discussed on page 7-10 and 7-11 of the ER. The next is purchase power from the wholesale market and that alternative is discussed on page 7-11. The

third is new nuclear generation capacity and this alternative is discussed on page 7-11 to 7-12. And then we move into the renewable energy alternatives. The first is wind energy as a stand alone and that is discussed on page 7-12. Next is solar energy discussed on page 7-13. And then contrary to NRDC's argument in the petition the ER explicitly states that in crafting its reasonable alternatives, Exelon looked at more than just single generation resources and that's where we took a look at combinations of various resources.

The ER next goes into those combinations and the combinations are wind and solar energy combined with gas-fired generation and wind energy combined with compressed air energy.

The corresponding environmental impacts of these reasonable alternatives are considered in detail in Section 7.2.2. There's about a 25-page discussion about the environmental impacts of those alternatives that were deemed reasonable. These environmental impacts are then cross referenced into the no action alternative in accordance with Commission precedent that holds that the no action alternative discussion can be cross referenced with adverse impacts from other discussions.

The reasonable alternative impacts are then depicted in the role of comparison table in Section 8.0. In addition, even though Exelon ultimately did not consider demand-side management as a reasonable alternative, Exelon took the extra step of evaluating environmental impacts of demand-side management and ultimately concluded that they were small and cross referenced those impacts into the no action alternatives as well.

In follow-up questions, I can break it down.

CHAIRMAN FROEHLICH: Mr. Roisman, could you address that same question, does the ER address the impacts of denial of proposed license renewal?

MR. ROISMAN: Yes, to an extent.

CHAIRMAN FROEHLICH: I guess we want to talk about that "to an extent."

MR. ROISMAN: Yes. I don't disagree with the page citations of counsel. That's where they purport to do it. It is what we criticized in our Contention 4 and forms the basis for the disagreement, the dispute that we have about the adequacy of their consideration action.

I can expand on that if you want, but I thought maybe you wanted to just know that answers it.

CHAIRMAN FROEHLICH: We'll come back to you.

MR. ROISMAN: Good, okay.

CHAIRMAN FROEHLICH: Staff.

MS. WOODALL: The Staff agrees that the Environmental Report addresses the impacts of the denial of the proposed license in Section 7.2 in addition to the citations provided by the applicant just now. I could go through them as well, but I'll spare you.

The no action alternative is a little different from the consideration of the alternative, but in this case, it actually comes to be the no action alternative. The alternatives to generation are also part of the no action alternative. There are consequences of the no action alternative. So while separately addressed in the Commission's Statement of Considerations and the DEIS, there are necessarily also consequences of the no action alternative. Therefore the applicant correctly represents and as the GEIS states that the no action alternative or refers to the scenario in which the NRC has not remanded LGS operating licenses and as the DEIS recognizes that there are several ways that fulfill the generational alternatives that results in that.

CHAIRMAN FROEHLICH: So are you saying that the no action alternative is the same as the denial of the license renewal?

MS. WOODALL: Yes. That's what the GEIS says and that's what the staff would use going forward.

JUDGE KENNEDY: Does the no action alternative then include the denial of the license plus the consequences of replacing the generation?

MS. WOODALL: The no action alternative considers the impacts of what happens, the NRC role is to consider the environmental impact of what happens if the license is denied. So we consider decommissioning which takes place at the plant and generally impacts have already been determined whether decommissioning happens in 20 years. The Commission generally believes that that's not necessarily discriminatory to the environmental impacts of that. But what happens now if we consider the environmental impacts to what happens if the license renewal is not denied.

JUDGE KENNEDY: Is denied

MS. WOODALL: Is denied. I apologize.

JUDGE KENNEDY: If I compare the environmental consequences of the proposed action

against the decommissioning only option and if you look -- if I look at Table 80-1, they seem to have the same environmental impact. So decommissioning only and the proposed action seem to have the same environmental impact. And then the table goes on to look at the consequences of the decommissioning option. So the replacement power environmental consequences are added on to the decommissioning only.

It seems to me that there's some significance to comparing the proposed action and the base case decommissioning only option that should shed some light on this whole question of whether the right options are looked at, the wrong options are looked at, not enough of this, not enough of that. Maybe I'm misunderstanding Table 8-0 and we may have to go up and down the table here to help me understand 8-0. But if I compare the first two columns of Table 8-0 so the proposed action underneath the first column of the no action alternative, it seems to speak to a lot of information, at least to me it does.

Now I'm beginning to wonder, since every one of us have discussed the combination alternative, no action and the consequences of decommissioning as a combined action, it just seems to me that the base case plus the proposed action, if you compare those

two, yes, I don't dispute going through the rest of it, but doesn't that speak a lot to whether the first two columns? They're identical, the environmental impacts, of whether you implement the proposed action or decommission the plant.

What you're suggesting is they can't just decommission a plant. The region needs the power, so you've got to add some other stuff. So all of those work in favor of the proposed action. And what we're debating is whether the proposed actions for generation have a different environmental benefit. I keep wondering why the base case compared to the proposed action just doesn't tell the whole story. Anything else is just a bunch of discussion.

No one talks about just the base case. You've explained why, but there's -- to me, there's a mountain of information in those first two columns, unless I don't understand this table.

MS. WOODALL: Correct me if I'm misunderstanding you --

JUDGE KENNEDY: I'm probably making it much more confusing than it is.

MS. WOODALL: The ER analyzes the proposed action in each of these determinations in the table from the small R, the result of other analyses in the

ER resulting in that. And the base case decommissioning small -- the commission's determinations on decommissioning which generally have been determined to be small. And so those are the sources of both of those.

But in the GEIS, the staff recognizes and this is our guidance for determining how we analyzed the no action alternative under NEPA is that the decommissioning actions that take place at the plant are one part of what happens if we deny the license. If we deny the license, we continue obviously to have jurisdiction and will require them to decommission. Hence, the impact of decommissioning, but those impacts are generally, but not entirely, have been determined generically already. And so that's that part of that table.

But then at the same time if we deny the license, GEIS recognizes as part of 8.2 of the no action alternative, that there are other environmental impacts that result from that and those environmental impacts are resulting generally from the fact that you are removing power that is currently being used from the grid. And what are the impacts of replacing that power?

It's not the same as the purpose and need

necessarily, but it happened that if you take off in this case, 23 megawatts, that there will be alternative impact from replacing that power. And so we're adding that.

JUDGE KENNEDY: I think we're in agreement. I guess we can sit here and we can debate the columns of this table. I guess in my mind anything you add to the base case works in favor of the proposed action. So I mean we may get argument from petitioners that say well, you didn't do enough of this and you didn't do enough of that. You picked the wrong combinations, but it appears that any combination on top of the base case is going to work in favor of the proposed action.

But yet no one -- it just seems to me that's the obvious answer to this question, alternatives to the proposal -- the base case is equivalent to the proposed action. And anything you do in addition to the base case is going to be a negative environmental impact or is not in favor of implementing anything but the proposed action.

So whether we debate whether there's a 1,000 megawatts of DSM or 10 megawatts of DSM, it doesn't seem to me to be relevant because it's going to have an effect on the balancing that would push you

to selecting the proposed action. That's the way I interpret the table. I'm looking for agreement.

I think when you communicated it back to me, I read the table the same way you do. You would have to take these in combination. But if you take a step back from that whole table, anything you pick in addition to decommissioning works in favor of the proposed action. It doesn't say you shouldn't go through the exercise, but I mean if we drop this, doesn't take this up to a high level, anything you do but decommissioning seems to weigh in favor of the proposed action.

I guess I'm looking to see if I'm reading this table right.

MS. WOODALL: I believe you're reading the table right. I'm a little confused on the chronology you're using and maybe I'm just not understanding. But essentially these are possible result of a no action alternative which if we do not verbalize them, these things could happen, these are the environmental impacts that we are evaluating of denying the license. Whatever those impacts, do they range all across the table depending on exactly what quantifier you're looking at, and they're analyzed. But I'm not sure if I can go further than that.

JUDGE KENNEDY: You're exactly right. To me, I just cut to the quick, doing nothing else but decommissioning is equivalent to the proposed action. So anything you do in addition to decommissioning works in favor of the proposed action. That doesn't mean you don't go through the exercise, but I don't see anything here that it doesn't --

MS. WOODALL: No, I mean the no action alternative is simply it's required under NEPA. The Commission requires us to include it. There's no dispute that the staff will consider it and that the applicant has considered the no action alternative as part of the base line, but generally it is a brief discussion and it is there to provide a base line for information in this analysis that provides, you know, what would happen.

JUDGE KENNEDY: Mr. Polonsky -- I mean Ms. Leach.

MS. LEACH: Thank you, Judge Kennedy, I just wanted -- we agree with your assessment that comparing the two columns, we're only going to add on more impacts the more alternatives we add on. But we did want to note that the first column under proposed action that reads small, all of those impacts, those are not generic determinations and they could be

different for other plants. It could be large for another plant and we believe that under NEPA's rule of reason we have provided sufficient information in this table and in the corresponding text in Section 7.1 and 7.2 for the Commission to take a hard look at the environmental impacts of preserving the option of license renewal for energy planners.

JUDGE KENNEDY: Okay.

MR. ROISMAN: I can certainly understand why you reached that conclusion when you read this chart and I confess that if I had written the chart, you'd have reached the opposite conclusion. It's all in the writing of the chart, of course. One column, specifically is the DSM column. You'll remember that in the alternative discussion, which is incorporated by reference, is that it was disregarded as a reasonable alternative for this plant because it won't achieve what Exelon wants to choose to be able to sell, 2300 megawatts of power daily for 20 more years.

And I can understand that, but that's not what NEPA requires and it's not what the Commission's regulations require. And so the heart of our challenge is why, to answer the question that's in there, the kind of quote, tricky question, is this an omission or an inadequacy? It's an omission and it's

an inadequacy. It omits a proper consideration of the likely consequences of the no action alternative.

Let me give you an example. First of all, there is no discussion of what the world might look like in this energy region thirteen years from now, or even ten years from now. These are the likely consequences. That might be true in terms of this afternoon.

So to begin with, we have to think about what the world would be like in 13 years. I admit there's a certain amount of, I'll use the term speculation. But as you probably know, utilities, Exelon included, have been engaged in speculating with 20-year plans for decades. It's how you do planning in the industry because you don't instantly get a power plant on line the moment you have the power. You have to plan. So you're looking at what it would be like in five years, ten years, fifteen years.

So the first thing that's missing is that there's no look at what are the likely possibilities. The second thing that's missing is that in looking at what the consequences are, forgetting about for the moment whether these are the likely ones or not likely ones, the test was would it meet the 2300 megawatt generation the plant currently meets? The regulations

say, and surely we both agree, that the need for power is not an issue in the licensing rules. That's a sword that cuts both ways. We don't argue that there is a reduced need for power. And they don't get to argue that there's an automatic need for power.

So we don't assume that there will be a 2300 megawatt demand capacity. So all the columns to the right of decommissioning, with gas fire generation, coal fire, all of those, are all meeting a standard which Exelon wrote into its ER. We're only concerned about things that will happen that will replace all of this generating capacity. That's the second problem.

The third problem is that they have not done an evaluation of the costs and benefits of these various consequences that might ensue. So for example, they could have done an analysis in which and I think this would be supported on this issue, that if things just remain exactly as they are today and 13 years from now you just turned off one of these plants, and in 18 years you turn it off the other, that there would be black outs and brown outs and people would suffer and there would be huge adverse consequences.

But there's another side. If you told

everybody that 13 or 18 years from now these plants would not be operating, it's possible that what you would have is a completely changed way of dealing with energy. Instead of trying to deliver from large, central generating sources you might have dispersed or diversified energy sources. People might not look for solar energy in a 1,000 acre lot. You might look for solar energy on their roof. They might not worry that they need 2300 megawatts of electricity because they might have found more than 2300 megawatts of electricity that they can save by using more energy efficient items which would save them money, would be a benefit.

So a true analysis under the no action alternative is supposed to look at both the end of this plant's operation and the relevant time period. And what are reasonably likely things to happen if that were to occur? And our criticism is with their failure to do that. That's why it's a contention of omission. They don't look 13 to 18 years out, they look at essentially today. They don't put the alternative analysis into the context of what would be real consequence, but they assume that the consequence would be the need to provide 2300 megawatts of generating capacity which we reject. I think the

Commission's regulation also says you should reject.

I submit to you that that is the flaw in the analysis which they have done. Did we then go on, to sort of touch a little bit, on what's coming next. Did we go on and lay out all of the different scenarios that we thought were likely consequences? No. We weren't required to do that. That's not the obligation of the intervener to write the Environmental Impact Statement. Our job is to point out the deficiencies, and the deficiencies of this analysis are well illustrated by Table 8.0-1 which summarizes all the wrong things. There are no benefits listed of many of the alternatives. It's only disadvantages. And there may be some benefits.

What would be the benefits of filling of the gap with purchased power? I don't know. It might mean that utilities in some other state would make more money and might end up being able to use that money in better ways to improve demand side management and their jurisdiction. They might be under a Public Service Commission that requires them to reduce their rates under certain circumstances. I mean, there are a lot of possible benefits.

So it doesn't automatically follow that if all is Column 1 and 2 proposed action in basic

commission, anything after that is out. The GEIS recognizes that there could be benefits on demand side management that would actually be subtracted so that you could have in front of you a record that would enable you to say on balance it looks to us like it makes much more sense to not leave this option open, but to let these likely consequences which we think by saying no in 2012, if these consequences come into existence and end up better than it would be if you let this plant operate for another 20 years.

Finally, this idea that what is small or the proposed action was small decommissioning or what is small for gas-fire generation, that all those smalls mean the very same thing quantitatively, of course you know that's not true. The small designations don't provide a quantification that would allow you to make a real judgment if we had both pluses and minuses on the table, whether or not saying no would be better than saying yes. So because you don't have the pluses at this point there isn't any point in arguing the minuses.

As it stands, as the table stands, what Judge Kennedy said is absolutely right. Anything after you've looked at the decommissioning consequences is added, and therefore if it still works

with just the decommissioning, everything else won't make any difference. But we contend the charge, the premise on which the chart is guilty, the nature of the analysis is wrong. Therefore, it doesn't include the proper analysis because it's omitted.

JUDGE KENNEDY: Can you help me understand the pluses? We'll be of the record.

(Whereupon, the above-entitled matter went off the record at 2:41 p.m., and resumed at 2:42 p.m.)

CHAIRMAN FROEHLICH: We'll be back on the record.

Judge Kennedy?

JUDGE KENNEDY: A couple of follow-up questions.

MR. ROISMAN: Sure.

JUDGE KENNEDY: I'll start with the harder one first, at least for me. You talk about pluses. Could you give me an example of what you're talking about in the world of pluses? Are these negatives? The environmental impacts, are they construed as negatives?

MR. ROISMAN: Yes. What is listed in Table 8.0-1 summarized there are all negatives. And what I mean by -- let's take) demand-side management as an example. If you at your home can reduce your

energy consumption by 1,000 watts a month, and I don't even know if that's a reasonable number, unfortunately my utility charges me for the plant that got shut down because I said it wouldn't shut down eventually and now I'm paying for it. But if you could reduce your electric bill and still have all the amenities that you had before, you still had your air conditioning. You still had your TV and all that sort of stuff and you save $50 a month that's a plus. We view that across all the customers of the region, that's a big plus.

JUDGE KENNEDY: So it's an economic plus.

MR. ROISMAN: It could be an economic plus. The second plus could be that if you use distributed generation, that is instead of large facilities with long power lines that crisscross through the country, you have generation much closer to the source. Walmart had its own energy source from its own solar panels on its roof. The parking lot had solar panels. In the old, old days, farmers used to have wind mills at their farms to generate electricity that they used at the farm before rural electricity came in.

You would then have eliminated all of the disadvantages of the power lines, large industrial

sites, a site like Limerick could be returned to something that was more rural and pastoral instead of a central generating facility with large commercial, industrial development. So that's another plus that wouldn't necessarily translate into an economic --

JUDGE KENNEDY: I guess I can understand the plus in the environmental context. You reduce the need if you move away from base load generation into more distributed. How does the economic benefit get into this context here under NEPA?

MR. ROISMAN: Ultimately, NEPA has to a large extent tried to translate environmental values into economic factors, even to the point of what's the environmental value being able to go to the Grand Canyon and see that extraordinary thing. And so they started to look at well, how much do tourists pay to go and that sort of thing. But in a way, they are intangibles that they're making into economic.

So at the end of the day, you would take all these economic pluses, and all the economic disadvantages, and you would balance them up and you'd see where you came out and if it was an economic advantage to not relicense, there would then have to be a rational basis for choosing not to turn it down. I mean that's how the system works. For better or for

worse, our system tends to put rational into economic terms.

JUDGE KENNEDY: In the context of the NRG regulatory process have you see this economic back and forth? Do you have an example you can --

MR. ROISMAN: Outside of the SAMA analysis, no. But it's very prevalent. In fact, it is the touchstone with the SAMDA analysis.

CHAIRMAN FROEHLICH: So Mr. Roisman, I understand your argument. You're saying that the applicant's environmental impact study is somehow deficient or lacking because it doesn't factor in economic benefits and other alternatives or combinations of alternatives beyond what they've done in Table 8, 8.0.1?

MR. ROISMAN: Yes and no. It says even more fundamentally than that that the way in which they chose how to do this analysis resulted in that consequence, but our attack is on the way they chose to do the analysis, ignoring the gap between now and 13 and 18 years from now; failure to look at likely consequences; and the failure to look at anything that wasn't going to simply replace 2,300 megawatts of generated power.

CHAIRMAN FROEHLICH: Isn't the factor that

when you're looking for alternatives as part of a NEPA analysis that you are to look at alternative ways of securing what is not being renewed?

MR. ROISMAN: Absolutely.

CHAIRMAN FROEHLICH: That's appropriate.

MR. ROISMAN: That's right. And that's really where the applicant's ER makes its most fundamental error. That's the discussion of alternatives in Section 7 of the ER is doing just that. It starts with the premise we are a generator. We make money selling electricity. Any alternative has to fulfill the same goal that we have here which is to continue selling electricity 2300 megawatts worth and in the context of alternatives that's what you do.

In the no action alternative, you do something very different. And that's where Exelon is falling down. When it decided to import some of the data from the analysis of alternatives into the no action alternative it neglected to look at whether the consequences of that transfer was likely or not. In other words would anybody really be likely to go with the coal-fired generation? Candidly, I don't think so.

Would anybody really think about building

a massive solar unit that they are talking about? I don't think so, but what's missing is they don't tell us why that is a likely consequence. They just tell us it's possible. So the flaw is that when you get over to the no action alternative, that is the alternative.

There aren't alternatives. The alternative is turn it off, 13 and 18 years from now. Then look at what the consequence would be of that and decide whether those consequences are preferable, the same as going ahead with this action, or clearly less preferable. They haven't done that.

So we have a deficient analysis.

When they said to us in their answers, oh wait, we've done all of this over here in the alternatives. We then did -- maybe that's just sort of the lawyer in me -- someone who lays out the bait and you always go out and take a bite. We decided all right, we're going to take you on on your claim that your analysis of alternatives in Section 7 fulfilled the kind of analysis that you should have done in Section 8. And so we were more specific in our answer than we had been previously because that wasn't our contention. Our contention was you should have looked at these things in the first instance and you didn't.

They tried to say they did. We showed why they hadn't.

CHAIRMAN FROEHLICH: Ms. Leach?

MS. LEACH: I will try to respond in turn to a few points that Mr. Roisman made. The first point that I want to make is that the no action alternative is governed by NEPA's rule of reason. And we're going to keep going back to that point in all of my points. The no action alternative, it's limited by the rule of reasons. The rule of reason does not require that the applicant look at economic costs and benefits of the no action alternative or the NEPA power.

Essentially, NRDC is arguing that DSM was considered in combination of other alternatives that the NEPA power would be less and the Commission's regulations are clear that an ER for license renewal application does not need to address the NEPA power.

MR. ROISMAN: I'm sorry, I didn't hear the last --

MS. LEACH: I'm sorry, does not need to address the NEPA power.

MR. ROISMAN: Thank you.

MS. LEACH: And with respect to NRDC's argument that Exelon did not take into account the

planning time in between the potential denial of the license renewal application and the shutdown of the first unit in 2024, that assertion is plainly wrong. First of all, we're not required to look at that under NEPA's rule of reason.

NEPA's rule of reason requires that the ER provide sufficient information to the NRC so that it can take a hard look at the environmental impacts of alternatives including the no action alternative to the proposed action. It does require us to do an exercise in power planning and we did look at the current portfolio of energy in PJM in our discussion of the reasonable alternatives and in this discussion we even included a discussion of emerging technologies. For instance, wind energy in combination with compressed air energy storage, that's not a possibility today.

There's only two compressed air energy storage facilities in the world right now and there's one planned in Ohio some time in the future, but hypothetically, these could be possible. So we were over-inclusive in what we considered could be reasonable at the time of the first unit expires in 2024. So we did consider the planning time in between.

And finally, NRDC's argument that DSM should have been included in the table was not a material dispute. We had a discussion of the environmental impacts in Section 7 in the narrative and it would be -- this Board would be flyspecking the ER to determine that we needed to just roll over those small conclusions into an extra column on the Table 8.0 and that wouldn't make -- that would still not make any difference, but there's still adequate information in the table to allow the NRC to take a hard look at the environmental impacts of no action and compare those to the environmental impacts of the proposed action.

CHAIRMAN FROEHLICH: Thank you. Ms. Woodall.

MS. WOODALL: I would like to make a few points in response to Mr. Roisman and the applicant's response.

First, to the extent that we're talking about future production or speculation, the point that needs to be considered in this case is the 2024 date. What can be implemented that's reasonable by 2024? I mean we can think about a lot of things that can happen in 2050 or 2400. Hopefully, we'll have an energy solution, but that's the relevant date for

considering what needs to be reasonable. And the applicant addressed that and projected to 2024 and alternatives and that's what we consider to be reasonable, even though we're taking major federal action now.

The other point I would like to make and we went through quite a bit on this is the cost and benefits, but the NRC has conclusively determined that 51.53(c) that the cost and benefits are not to be analyzed in license renewal as part of the ER 50.51(c). Basically, the ER for license renewal application is not required to include either the discussion of the NEPA power or the economic cost and benefits of the proposed action or alternatives unless we get to mitigation measures which is what we see discussed in mitigation measures, but it's not required to be included and we do not consider it as part of the ER unless it meets the next part of that sentence.

The other point I would like to make is that in terms of NEPA's rule of reason, the Commission has pointed out specifically and the point of no action alternative and hydro-resource, in fact, CLI-11, CLI-0104, that even where the intervenors may prefer -- intervenors in that case -- may prefer the

no action alternative, and NEPA imposes no obligation to select the environmentally benign alternatives and it does not dictate Agency policy or determine the fate of the contemplated action.

And the final point I would like to make is that many of these arguments regarding CSP, whether based on solar power is an option, whether we can implement DSM, these are all factually-based arguments that were not included in the petition. The petition simply referenced distributable renewable energy, combined TM power, all forms of DSM and basically the only references to any basis that these could be viable alternatives by 2024 or that they should be analyzed. All of the information in the reply that substantively addressed things like battery storage and those things, those were not included as part of the petition.

And the staff opposes the admission of Contention 4 because it was not adequately supported. If the petitioner wishes to challenge the no action alternative, they need to point to something that shows that there is actually a predictable consequence and an actionable alternative other than what was already presented in the no action alternative. And the petitioner failed to do that.

In the reply, neither the NRC staff nor the applicant, had the opportunity to respond to that. So that's the reason we opposed the contention as it is pled because in order to challenge the no action alternative analysis which is applied in the ER, you must actually point to some viable no action alternative, rather than just pointing to some various deficiency when that is provided.

CHAIRMAN FROEHLICH: Mr. Roisman, can you point to some minimal factual or legal foundation to support this fourth contention that was in the petition, putting aside the additional information that came in in the reply?

MR. ROISMAN: Sure. In the petition, in the declaration from Mr. Paine, in paragraph four which is on page two of his declaration, it says "Exelon submitted an environmental report in conjunction with its license renewal application, but did not adequately consider the environmental consequences of the no action alternatives. Specifically, the ER unreasonably misapplies NRC guidance from the 1996 GEIS that limits the set of reasonable alternatives for meeting a defined generating requirement to analysis of single, discrete electric generation sources. As a consequence of his

misapplication, the ER arbitrarily limits and unfairly conflates consideration of the no action alternative with the same set of alternatives that it deems reasonable for analysis as single, discrete electric generation sources."

So one support is the applicant's ER itself. It specifically says we are looking at the no action alternative by only considering discrete generating sources, leaving DSM completely out of the analysis. So that's one factual statement.

CHAIRMAN FROEHLICH: We're on a roll. Show me some more of this argument in the petition.

MR. ROISMAN: All right, so in number seven, still in the Paine declaration at page three at the bottom, "Unlike consideration of reasonable alternatives to meet defined generating requirement represented by a particular base load nuclear power plant, mandatory consideration of the environmental impacts of the no action alternative defined as a decision to not be licensed LGS Units 1 and 2 necessarily involves making an informed projection of the likely portfolio of PGM electricity system resources available in the region served by LGS beginning 13 years and 18 years hence that could reasonably be expected to supply the energy services

currently supplied by LGS. These reasonably foreseeable system resources include all forms of DSM, waste heat co-generation, combined heat and power, and distributed renewable energy resources in addition to the 'single discrete electric generation sources' viewed by the applicant."

So there we've identified both the absence of consideration of certain kinds of consequences and a failure to include an analysis of what are the likely consequences. The ER does not have that analysis in it. So until we see that analysis, it's not our obligation to say well, if you did do that analysis this is what you should have found. That's not our obligation. Until the ER or if the ER doesn't, until the DSEIS comes up with some analysis that purports to meet that obligation.

So the contention stands or falls on whether the Board agrees that it's a mistake to look only at one large generating source and whether it's a mistake to not have an analysis of the likely consequences of the shutdown of this facility 13 and 18 years hence.

CHAIRMAN FROEHLICH: Ms. Woodall, would you like to be heard on Mr. Roisman's response?

MS. WOODALL: Thank you, Your Honor. The

no action alternative, the Commission has been clear, as well as other licensing boards that it cannot merely -- petitioner challenging an actionable alternative cannot merely say that any no action alternative would be acceptable. The GEIS recognizes that there are thousands of possible combinations that could be elected to replace a generating station.

And to step back just a second, I do want to point out that the GEIS at 8.2 does recognize that in terms of our discussion of base load power and whether 2300 megawatts would be appropriate. At 8.2, the GEIS recognizes that denial of renewed license of power generating capability may lead to a variety of potential outcomes.

In some cases, denial may lead to the selection of other electric generating sources to meet energy demands as determined by appropriate state and utility officials. In other cases, it may lead to conservation measures and/or decisions to import power. But in all of that, we're assuming that the environmental impacts resulting from denial require at least some consideration of replacement of that power.

The applicant acknowledges that the no action alternative in this case is denial of the renewed license. Therefore, what we're looking at in

terms of what are the impacts of denial of the license are going to be at least in some form or fashion how that power is going to be replaced and the environmental impacts of replacing that power. That doesn't speak to the applicant's purpose and need as they might look in a COL or an ESP proceeding. It's a different theory. But at the same time, that's what we're looking at in this case.

Otherwise, as a petitioner inclusively is reading from the Paine declaration, the points that they make are not supportive. In the no action alternative, other boards have said that petitioner must show that the proposed alternative put forth are predictable consequences in no action alternatives and that's in USCC 62 NRC 585. In another case, in private fuel storage where the petitioner did not specify any environmental effects, the ER failed to consider or did not specify any advantages of the no action alternative at CLI 0404.

Those are examples of where the Commission has required a petitioner challenging the no action alternatives which could include many different things to point to something other than this mere list of possibilities to show that these are viable. And that's also supported in federal case law supporting

the no action alternative specifically Association of Public Agency Customers BVPA, 9th Circuit 1997 which we've also cited in our brief where as part of the no action alternative they require them to point to what makes your no action alternative viable.

JUDGE KASTENBERG: Slightly different --

CHAIRMAN FROEHLICH: Hold it for a second. Ms. Leach, did you want to respond?

MS. LEACH: Yes. If I could just add on to what staff counsel was just stating, arguing regarding the unsupported allegations in the petition and in the Paine declaration. The first section of the Paine declaration that Mr. Roisman cited for us this afternoon is the paragraph four that alleges that we only considered single and discrete resources in the no action alternative. In making that assertion, NRDC is misinterpreting our ER. We explicitly state in our ER that we are considering more than single discrete resources. We look at combinations and we also look at demand-side management.

With respect to paragraph seven, it has the one sentence that identifies certain system resources, waste heat co-generation, combined heat and power, distributed renewal energy resources and demand side management. None of these terms are defined.

They're not supported and NRDC simply has not met its pleading obligations under the contention admissibility standards. This is not notice pleading and NRDC has given us no support or definition for any of these terms that are in the Paine declaration.

JUDGE KASTENBERG: Unless there was something, Mr. Roisman has something he wanted to respond to here.

MR. ROISMAN: Yes. I wanted to add one thing here. Both counsel seem to start from the premise that the ER addressed what we said they didn't address and then say well, once the ER addresses it you have a bigger obligation. I don't quarrel with that.

When the ER says that it's looking only at generating sources that will replace all the power, it makes a mistake. It makes a mistake under the no action alternative analysis that's required. You don't have to go beyond that. We don't have to say here are all the alternatives that you could have looked at, but you didn't look at any of the alternatives except this narrow group and the regulations and Commission's rules say you can't limit it to that. So that's number one.

Number two, when we talk about the absence

of a consideration of likely consequences, we say ER does not attach to its analysis either in the alternatives portion or in the no action alternatives portion any analysis of the likelihood of these being real. So why would we have an obligation at that point to offer things that we think are likely until the applicant first meets its initial burden to take a shot at that question. Maybe we'll agree with them. Maybe they'll say oh, you know, when you really sit down and look at this, DSM looks like the most likely thing that will happen. Demand-side management is growing.

All we've heard from the applicant is well, it's true we didn't put it in the no action alternative, but we could have. Well, we're here about what you could have, but didn't do. That's why we're here.

The third thing we're hearing, rule of reason, rule of reason, rule of reason. It sounds like the perfect solvent. It dissolves everything, but actually the rule of reason means that you must be reasonable in what you do. Is it reasonable for an applicant to come up with the set of alternatives that they look at by assuming that all the power they currently generate will have to be generated later?

No, I don't think that's reasonable. We're not asking them to get fanciful. We're asking them to get real. They have a planning program. This isn't a utility that makes it up every morning. They've got a plan. They know whether they want to build more capacity of the PJM system. They didn't share any of that in the licensing application, in the ER, because they didn't want to talk about likely consequences. They didn't want to tell you what they thought was going to happen 13 and 18 years from now. So we said that's not appropriate.

So it's not reasonable for them to ignore and it's reasonable for us to ask them to do it without giving them our own version of what we think the world might look like 13 to 18 years from now if you turn down the plant. It's not our obligation to prove the ER. It's their obligation to produce a legally sufficient one. Our position is that they have not done that. We would note that in the GEIS, specifically, the GEIS says that DSM is a reasonable consequence of the no action alternative. Where is that in the applicant's discussion of no action alternative? Nowhere.

The GEIS talks about distributed solar capacity as a reasonable possibility if you didn't

have a big nuclear generating facility operating. Where is that discussion here? It's not discussed. Those are in the GEIS which in other contexts today they pointed to and said here's the bible, here is what you have to go by. So yes, this is a contention of omission and we think they have omitted those considerations.

JUDGE KASTENBERG: That's what I wanted to get at. When I first read Contention 4, one of the first things that came to me well, is there guidance? Does the NRC have some guidance with regard to what actually should be in the no action alternative?

And Mr. Flyntz came up with NUREG 1555 which is environmental standard review plan. This is the plan that the staff is supposed to use in evaluating the no action alternative. And my cursory reading of it is that in some ways they satisfy it because it specifically says you have to look at decommissioning and you have to look at some alternatives and so on.

What I'm gathering from what you said today is that you're questioning and see if I'm right, you're questioning the whole concept at a more conceptual stage of what would really in your view constitute a no action alternative, rather than at the

content level which is what they're required to review and what apparently the applicant has given them to review in accordance with the Standard Review Plan. Would that be correct?

MR. ROISMAN: I think it's fair to say that our view of NRC internal guidance document that you referenced is a view that presumes from the idea that no one would ever say no to a nuclear power plant. And if you start with that premise, then you come to that guidance.

If you, however, are willing to have an objective evaluation of particularly here, I mean if we're talking about a plant that is going to end its 40-year license in 2 years, we'd be in a much different situation, but here with this much lead time and to Exelon's credit they've provided that. There's a lot that could be done to look at this question and come up with a reasonable resolution. The ER doesn't do that in our judgment.

JUDGE KASTENBERG: Any comment on either side.

MS. WOODALL: Your Honor, I would just like to make a quick point regarding the DSM issue addressed earlier and the need for power. The NRC presently does not consider need for power in license

renewal. When we consider DSM as part -- as the GEIS indicates that consideration of conservation measures is appropriate. We're considering the impact of such conservation measures. We're not considering the need for power whether DSM drops enough to remove a nuclear generating plant from the group.

I want to specify that when we're considering those under NEPA even under the no action alternative, we have produced a list of environmental impacts resulting from that no action alternative. And that's a distinction in the DSM. To the extent that the petitioner is challenging the need for power and whether Limerick needs to be on the grid, essentially, as I understand it here, they're not allowed to challenge that in this particular instance precluded in license renewal.

The other point that I would like to make is that the petitioner continues to emphasize that the ER does not feel that the likelihood of any -- the likely consequences of the renewal. Well, the alternatives presented in the ER and in the no action alternative are looking at things that are reasonable alternatives up to 2024 and the issue with this particular contention is the petitioner has not put forth any reasons why, what the ER chose are not

likely. There's no supporting factual basis to show that what is presented is unreasonable and not a total reply.

CHAIRMAN FROEHLICH: Ms. Leach, do you have a comment?

MS. LEACH: If I could just add on to that comment. Each of the reasonable alternatives presented in the ER is a possible or likely consequence of no action. That is what we have said from the very beginning. The no action alternative has denied the license renewal and we look at two categories of impacts, number one, decommissioning; number two, energy alternatives. Therefore, Exelon's alternative analysis is reasonable under NEPA. NEPA doesn't require infinite study. We don't -- we could come up with infinite possibilities of what the power portfolio is going to look like in PJM in 12 years and how DSM can be combined with 15 other energy sources, but that's not what NEPA requires. NEPA only requires the ER to provide sufficient information so that the Commission can take a hard look at the environmental impacts of no action compared with the proposed action.

And as we've stated today, we have very over-exclusive set of alternatives and we've even

looked at DSM and all of these impacts are incorporated in the no action alternative and therefore it's sufficient under NEPA.

JUDGE KASTENBERG: Just one last question. Suppose Exelon management came to the conclusion that for various reasons, economic, regulatory, other reasons, they wanted to shut the plant down. They decided not to go ahead with the license. Do you think that this review of no action quote unquote would be the same in that case in terms of their planning? I think that's what NRDC is asking is to put on the other hat and say what would we actually do? What's the most likely thing we as plant management would do once we've decided we're not seeking license extension?

MS. LEACH: We do believe that we've presented the possible impacts of denial of the license renewal which would ultimately result in the plant shutting down in 2024. Unit 1 will shut down in 2024 and then 2029 would be Unit 2. We don't -- we are not energy planners and we're not required under NEPA to consider the need for power.

We have taken a reasonable analysis and looked at the possibilities and presented what we believe is reasonable and could occur in the next 12

to 17 years in looking at emerging technologies and looking at the power market as it stands now and we believe that the analysis is reasonable under NEPA. And also Exelon is a merchant generator -- we generate electricity and sell it into the wholesale market. We're not energy planners, merchant generator.

MR. ROISMAN: That says a lot.

JUDGE KASTENBERG: Hm?

MR. ROISMAN: That tells you a lot right there. This regulation tells them that they have to think like energy planners. And if their excuse is well, we don't do that, it only confirms what we're saying. This ER is deficient. If they weren't agronomists and they were looking at farm issues, they'd go out and hire an agronomist. If they were looking at radiation effects issues and they're not radiation specialists, they'd go and get a nuclear physicist. So if they have to look at the likely consequences of shutting this plant down and I would say the ER approves, even if counsel hadn't conceded that they're not energy planners, then they go to an energy planner.

There's an independent system operator down here. There's an energy plan for PJM. This thing doesn't just manufacture itself. That's what

we're asking for. That's what's missing. That's the dispute between us and them.

CHAIRMAN FROEHLICH: And the basis for that is you believe such an analysis is required under our regulations or under NEPA?

MR. ROISMAN: Yes, the likely consequences analysis it requires, yes.

CHAIRMAN FROEHLICH: What I'd like to do is take just a ten-minute break. We've finished up with all the questions that we have come with for the four contentions and after our break, I'd like to address the motion to strike and the answer. Take ten minutes.

(Whereupon, the above-entitled matter went off the record at 3:17 p.m., and resumed at 3:30 p.m.)

CHAIRMAN FROEHLICH: Please be seated. The applicant and the staff contend that a reply can't raise new arguments, new contention bases, or new issues. And I'm asking of the staff and applicant, are you arguing that the NRDC has raised a new contention? Is there a new contention that showed up in the reply that you didn't see or had no notice of in the original contention? Does it rise to that degree of over reaching or misuse of a reply?

Staff?

MS. WOODALL: Thank you, Your Honor. The staff heavily considered whether to file this Motion to Strike when it received the reply. And based on the information presented in the NRDC's petition and in addition to the declaration of Mr. Paine provided in support of Contention 4, the staff believes that the 11 points that it put forth in its Motion to Strike for new issues, new factual bases, that completely change the character of the contention and that we were not provided an opportunity to reply to or set forth essentially could be viewed as constituting an entirely new contention based on the four passing references to possibility and then end of reply it receives substantive factual bases for challenging the CSP analysis, for example, battery storage which absolutely never appeared in any form or fashion in the petition or in the declaration. And that all these factual bases were also not supported by any expert support and mostly did not reference even back to Mr. Paine, much less any other factual support.

So whether I actually think it's a new contention or not, I'm not sure, but these are all completely new factual bases.

CHAIRMAN FROEHLICH: So the thrust of the

staff's objection is that we have at the reply stage new bases that change the character of the initial contention as you read it and understood it.

MS. WOODALL: I actually do think it could rise to the level of a new contention because it's much more than what the initial contention alleged. And some of these are not even linked to what the initial contention was. And to the extent that that is true, then it is a new contention. For example, battery storage.

CHAIRMAN FROEHLICH: How about a quick list of those things that aren't even linked to the initial contention?

MS. WOODALL: I would have to -- battery storage plan, the refit work, and number 11 to start with.

CHAIRMAN FROEHLICH: Okay.

MS. WOODALL: Is not linked. That's impossible because there was nothing there. The fact that we're challenging hypotheticals, whether these are hypothetical or rather they're impractical, uneconomic. None of that was referred to in the initial petition. That was not part of the challenge as to whether what the applicant put forth in the ER, whether any of those things -- the initial petition

nor the declaration, neither of them challenge whether what the applicant put forth was actually unreasonable or uneconomic. They simply said that more things needed to be included.

So any of these challenges, as put forth in ten, those were not included in either the petition or the declaration.

I have to go through this slowly --

CHAIRMAN FROEHLICH: That's okay. I want to focus on that. And then I'm going to ask the petitioner if there was something in the reply that justifies or is a grounds for them to add these new surprising new bases. So that's where we're going with this.

MS. WOODALL: Okay, my point, too, is that the staff -- to the extent that the petitioner's reply to our Motion to Strike said that the staff cited the GEIS and that petitioner can respond to that. That is true. The staff extensively cited the GEIS. It's also called the document. It also referred to the ER.

The difference and the point that I want to make is that when we cite the standards of the GEIS, it's a guidance, but it's what we use to guide us and how we're going to evaluate it. We pointed out that what the petition put forth was inadequate to

show a material dispute with no standards. But what the petitioner cannot -- the petitioner can say that we put forth in the petition is adequate to meet those standards. That's an acceptable response to our answer. But what the petitioner cannot do is add support to make those things adequate when they were not initially adequate.

And what we're arguing is that's what the petition is doing. That is, it's adding factual bases to the staff and the applicant pointing out that what you initially pled was inadequate.

CHAIRMAN FROEHLICH: Understood.

MS. WOODALL: And as to nine, the NRDC notes that they're technically feasible, commercially viable and reasonable for the region. There was no indication in either the petition or the declaration that there was any of the four things that they put forth were technically feasible, commercially viable. They said that they noted that before which they have not noted that before. So we raised that in nine.

Then eight, the NRDC says that they challenge essentially the DSM energy savings scenarios, but before all they said is the applicant needs to analyze all forms of DSM. They did not substantively challenge the DSM analysis provided at

7.2 of the ER and here for the first time they're providing a substantive challenge to that adequacy. That's different than alleging all forms of DSM should be analyzed nor did they put forth what those all forms should be.

And seven, NRDC alleges that they have various combinations that could plausibly evolve. This claim was never put forth because the combinations of resources was never previously challenged. So they said that you should put forth, you should analyze renewable. You should analyze combined heat and power. You should analyze all forms of DSM, but they never challenged the application alternatives nor that they were unreasonable. That's a first time challenge.

And six we're seeing new factual information challenging technical feasibility and commercial viability of the solar plan. That was never challenged before. The four things that they've requested to be put into the application, those things -- this is now a substantive challenge and providing practical information that is unsupported, I might by anyone as to whether this is technically feasible or commercially viable.

On five, we are pointing out that their

CSP challenge to the infusibility. We also did not see any challenge to the substantive analysis of CSP or anything else of that nature in the ER. Also, whether anyone would propose the CSP. That was not put forth for the PJM, whether that was a reason that that was insufficient.

Number four, the PV generation challenge that the analysis is a sham. This highly implausible rendition. Once again, this is a substantive challenge to the analysis in the application. It did not appear before. This is different than the four claims put forth by Mr. Paine in his declaration of things that should be added.

And three, we're also looking at new challenges to the reasonable alternatives in the ER, basically that they're unreasonable and that another substantive challenge essentially.

And two, the NRDC reply contained three brand new issues pointing out substantive challenges for why the no action alternative is wrong. Basically, three is about why these issues are basically unreasonable but none of these three factors were provided in the petitioner's reply and I think you'll not find any cross reference to Mr. Paine or anyone else for that.

And also number one, as I go backwards, I apologize --

CHAIRMAN FROEHLICH: It's okay.

MS. WOODALL: Is that they are basically adding support to the idea that before we identified the decision was inadequate because they did not provide support for any of these possibilities being a viable alternative, and so now they're backing -- they're trying to add support for that, pointing out the inadequacy.

The entire point of this reply, as I iterated before, the entire point of us filing the Motion to Strike which we did not take lightly, was to point out that these are entirely new bases, that we did not have an opportunity to reply to and that we could not consider as part of Contention 4 in our reply because this is all new and substantive challenges to the application and very different than what was presented in Contention 4E.

CHAIRMAN FROEHLICH: Okay, Mr. Roisman, the Palisades decision says that the parties must focus narrowly on the argument first presented in the original petition or raised in answers to it. The staff has just gone through those items, those issues which it says it saw for the first time in your reply.

Would you care to go back and now tie in for me each of these elements to the initial contention or the declaration of Mr. Paine that accompanied your petition?

MR. ROISMAN: Yes.

CHAIRMAN FROEHLICH: Thank you.

MR. ROISMAN: I think in a reduced time line we've really done this in the attachment to our opposition to the Motion to Strike. That's Attachment 1 to the Motion to Strike.

CHAIRMAN FROEHLICH: I have that.

MR. ROISMAN: I'm not going to prolong the discussion by reading all the sections of it, but let me put it into context.

As we explained when we were discussing a few moments ago what the essence of the contentions, our contention was one of omission. You didn't look at likely consequences. You didn't think about 13 to 18 years out in the future. And you compared the viability of alternatives against their capacity to generate as much electricity as Limerick generates. Those were three failings.

In the responses, both from the applicant and from the staff, we were cited portions of the ER. Portions we do not believe fulfill those criteria. We

didn't have the duty to go through them. There are huge sections of the ER that don't even address alternatives and we didn't have any duty to point out all the sections that didn't address what we said and proper answer from them that would not entitled us to say anything more would have been an answer that said you have not adequately demonstrated that we failed to do what you say we failed to do. That's not what they did.

They went through and they discussed why, in effect, our disagreement with what they did was wrong. We came back and said your disagreement with what we did is a basis for hearing. It's a dispute and here's the basis for the dispute. You said that when you talk about DSM and the alternatives analysis without ever mentioning it in the no action alternative, that you have addressed it. Well, what should we do? If they just said that we would have ended it. But they went on and talked about all the things they said about DSM, to try to explain why the way they discussed it in the alternatives analysis was adequate to fulfill their obligation to discuss it under the no action alternative.

So we responded on the merits to that. If the Board wants to keep what we set out, take what

they set out, and let's just go on the basis of what we filed in our petition and the narrow answers that they give. The rule is not that we have to stick to narrow petitions and they get to have broad answers and we do not get to have broad replies. That's not the rule.

CHAIRMAN FROEHLICH: I'm not suggesting that it is. I'm merely suggesting that if you are going to have the broad reply, that you have to tie that to something that was opened up in the answer.

MR. ROISMAN: Right, and so if you go to the table -- well, let's take the references to the GEIS. First of all, this is on page 23 of our combined reply to the Motion to Strike.

CHAIRMAN FROEHLICH: Page 23, okay. Are the pages numbered?

MR. ROISMAN: Probably not. It's the third page from the end. It's a total of 25 pages. It's when you're in the chart format.

CHAIRMAN FROEHLICH: I'm in the chart.

MR. ROISMAN: It's the one -- the item on the left location, new information and NRC's combined replies to Contention 4E.

CHAIRMAN FROEHLICH: 4E, okay.

MR. POLONSKY: Tony, just a question for

you. There are three pages that start with that. Could you be more specific, please?

MR. ROISMAN: Okay, just a second. It's the first one.

CHAIRMAN FROEHLICH: Okay, the first of the 4Es.

MR. ROISMAN: Of the 4Es. So the charge is well, we shouldn't have been able to reference any specific sections of the GEIS. Now the first thing that we said was well, we did reference the GEIS. We did it on page seven in Mr. Paine's declaration and he lists it as a reference. So it's not as though the GEIS was unheard of.

The second thing we pointed out was that the Exelon answer referred to Section 8.2 of the GEIS and quoted some language that it believed that the Board in the Indian Point case had looked at in the context of the no action alternative. And the staff quoted extensively from the GEIS. I think it's fair for us to point out all the things that the staff failed to quote from what they were trying to draw out of the GEIS in support of the arguments that they were making. And that's what we did.

CHAIRMAN FROEHLICH: So it's the middle column on your attachment that will provide the Board

with the --

MR. ROISMAN: View of the rationale.

CHAIRMAN FROEHLICH: The rationale.

MR. ROISMAN: And the last two columns, columns four and five describe where either in the applicant's answer or the staff's answer, or both depending on the case, of something that was said that required us to reply or authorized to reply. In a few instances, but not related to Contention 4, we didn't have to look at their answer because we had explicitly raised the issue in our petition to intervene. But those relate to Contentions 1 and 3. And we're talking about 4 here.

CHAIRMAN FROEHLICH: Now I would ask the staff and the applicant, did you mention a case or a particular regulation in your answer, does that provide an avenue for petitioner to cite to us contrary case holdings or other regulations?

MS. WOODALL: Yes. What I alluded to before, the staff extensively cited the GEIS and I also want to point out that in some places that the table in this reply conflates the staff's Motion to Strike the applicant's Motion to Strike.

So in some places, the applicant challenged parts of the reply that we did not. And

specifically, we did not challenge the GEIS, the portions that I just went through with you. We did not challenge and very implicitly did not lay out anything that said you cannot cite the GEIS. You didn't challenge any of this in the reply. You cited them. And it's absolutely appropriate. They're a logical outgrowth of the answer. What the staff says is inappropriate is the new substantive challenges, new bases, and new reasons that did not appear in the initial petition.

And so I just do want to make clear that there is some distinction and it's not entirely clear in this reply. But we did try to make it clear there's the distinction that I want to make sure that is not missed going back and forth with this.

CHAIRMAN FROEHLICH: Okay.

MR. ROISMAN: Do you want me to go on? That was just the first sort of major tack.

CHAIRMAN FROEHLICH: Okay.

MR. ROISMAN: The second one was the discussion of combinations of alternatives.

CHAIRMAN FROEHLICH: Right.

MR. ROISMAN: And we point out this is on the very next page. We point out in the middle column that it's really semantic. Mr. Paine referred to it

as an informed projection of the likely portfolio PGM electricity system resources available in the region served by.

Now is that the functional equivalent of saying you need to look at the combination? I think it does. And there's no difference between referring to the portfolio system resources and the combination of alternatives given that we're not really talking about alternatives, we're talking about consequences. We're not talking about alternatives. We're talking about consequences.

But in its answer, Exelon, the next column, in its answer Exelon evaluated the -- it says that it evaluated the environmental impacts of combination of generation sources including combinations of new energy sources as reasonable alternatives by 2024. So now they are asserting contrary to our contention that they really have looked at this issue substantively. I think we're entitled to substantively say no. We say you didn't do it. We think it's obvious on its face that you didn't do it. You think you've got an argument that says you did do it, okay, we'll respond to that argument.

With that, we're already into the merits.

We're not talking about whether we have a disagreement. In fact, this motion points out the magnitude of the disagreement that exists on Contention 4 between the applicant, the staff, and NRDC.

And then NRC staff, in its answer, says because denial of the license renewal as a power generating capability may lead to a variety of potential outcomes, the GEIS states that the no action alternative should include selection of other electric generating sources to meet energy demands of conservation. And it goes on from there. So they seem to be using the GEIS to argue that it doesn't matter what the combination is.

As long as there's more than one that it's put together, that's enough. We had said no, that's not enough. You need to look at a likely portfolio of what is available in the PGM system within the relevant time frame.

So again, they wanted to argue about the merits. We responded about the merits.

The next piece of this that is challenged deals still on that same page.

MR. POLONSKY: Your Honor, if I may -- I think it's going to be very difficult for us to then

go back and recreate each of these responses. Is there any way we could do sort of tit for tat for each of these so we don't lose the thread?

CHAIRMAN FROEHLICH: I was going to go through yours separately, but I don't mind if you respond now on this item. And we'll keep it all in the same place in the transcript.

MR. POLONSKY: Okay, thank you. On this particular issue, Exelon was pointing out that this was a contention of omission. It was alleged as a contention of omission and even in the reply they've asserted very strongly that it's a contention of omission. On page 50, they say however, on page 28 -- in the 28 pages of briefing, Exelon and the NRC staff failed to refute any part of the essential argument advanced by NRGC which is simply and clearly stated as a contention of omission with respect to the no action alternative.

So when we saw this originally in the petition we said well, that's incorrect. Because a contention of omission is not admissible if the information that is alleged to be missing is in the ER. So we responded that this information is here and that there are these combinations and why do we address combinations because the Paine declaration

says renewable energy, vaguely refers to renewable energy sources. So we provided combinations of renewable energy resources in the ER.

And we're simply pointing out that those combinations are there. I don't see how that opens the door then to all of this other discussion that wasn't properly pled and was vague and unsupported in the petition to intervene.

CHAIRMAN FROEHLICH: Mr. Roisman?

MR. ROISMAN: Yes, the word that keeps getting missed because it doesn't appear in the ER is the word "likely." Yes, they had some combination of resources there that in our judgment were completely fanciful. What we were criticizing them for, what the contention criticizes them for is not providing an analysis that shows therefore omitting an analysis that the combinations that they are relying on are likely.

So they come back in their reply and they say we did know to do that. Here it is, here it is, here it is. And then that calls for us to then respond to say you didn't demonstrate that any of those are likely and here's why they're not likely. But we start with the fact that they never tried to show that they're likely. They just show that they're

out there. And that's not enough.

So again, if you want to take out of their answer the allegation that they do show a combination of alternatives, we'll take out of our reply that you've not shown that they're likely because we're willing to stand on our initial argument that what's missing in the ER and what's still missing in the answer is any analysis that something was a likely combination. That's the crux of the contention. That's why we're not changing the contention or the basis. We're still talking about the same contentions and the bases.

CHAIRMAN FROEHLICH: Mr. Polonsky.

MR. POLONSKY: We'd be happy with that settlement if the original contention is limited as such as pled.

CHAIRMAN FROEHLICH: Okay.

MR. POLONSKY: In the petition to intervene.

CHAIRMAN FROEHLICH: Do you want to address the next item, please?

MR. ROISMAN: Yes, okay. The next one talks about -- bear with me.

(Pause.)

Okay, this again, it's really a variation

on the likely argument. In other words, the contention starts by saying you've not demonstrated in the ER what are the likely scenarios and they've come back again this time in their argument in opposition, attempting to say that they did look at the likely alternatives, but we specifically identified what they've violated, which sections of the CQ regulations they violated in 10 CFR Part 51 they violated.

And we pointed out on page four of the Paine declaration the ER's analysis of the no action alternative fails to consider the environmental impacts of the reasonably foreseeable portfolio PGM system resources and thus fails to make the required comparison between the environmental impacts and no action and the continued operation of LGS for an additional 20 years. So we're sort of back again to the same point.

Don't misunderstand me. I'm not saying that the applicant doesn't have an argument. They do. That's why we're going to have a hearing, we hope, to resolve this disagreement. But for the moment, we have an ER that doesn't defend or justify the choices that were made of the alternatives that -- or of the consequences that would flow from the no action alternative.

And as I suggested back when we were talking about Contention 4, the problem was that when the applicant transferred their alternatives analysis in Section 7 which does not require looking at a likely question specifically, over to the no action alternative, they neglected to include an analysis of the likely consequences. Their counsel has told us why, because this utility is not an energy planner. Okay, I can understand why they didn't do it, but that doesn't mean that they're allowed to not have it in there. It just means that they needed to get a consultant. They didn't. So that's what we pointed out.

So every time they came back and tried to say we did it, we had to respond on the merits, but our basis contention is still the same, you didn't ever do it in the first instance. And therefore, we have a valid contention.

MR. POLONSKY: Paragraph four of the declaration of Mr. Paine says that the ER is deficient and says specifically it unreasonably misapplies NRC guidance from the 1996 GEIS. It limits the set of reasonable alternatives for meeting the defined generating requirement to analysis of single and discrete electric generating storage and sources.

That's the allegation of the deficiency and this argument.

And I think we're talking about the one about hypothetical scenarios and whether or not what we did looking out to 2024 was adequate, was nowhere to be found is our position in the petition to intervene and only was somehow articulated as a basis in the reply.

Again, it was a contention of omission and it never said you didn't look at hypotheticals if you focused on single discrete resources. And we pointed out that we did not.

CHAIRMAN FROEHLICH: I understand. Mr. Roisman, back to you.

MR. ROISMAN: Well, this particular response to that response.

CHAIRMAN FROEHLICH: Oh, okay.

MR. ROISMAN: I think we ought to have a racquet in our hands since this is the way we're doing this.

CHAIRMAN FROEHLICH: That's how it is often done when you're ruling on Motions to Strike.

MR. ROISMAN: Right. Petition intervene, the initial petition on page 24, the last paragraph of the bases for Contention 4E says the ER violates

51.53(c) by failing to thoroughly consider the environmental impact and likely consequences under the no action alternative of denying relicensing now 13 years before the existing license for Limerick 1 will expire, and 18 years before the existing license for Limerick 2 will expire, including expected growth in demand-side management and renewal energy resources and fails to quantify and balance the environmental costs of those consequences against the environmental cost of relicensing the Limerick reactors including the properly analyzed cost of a severe accident.

So the basis is there. The applicant disagrees with the basis and then goes on to say and here's the substantive information that's contained in the ER that we think disagrees with it. So we point out to you then after they challenge that they have put in a discussion of the likely consequences for the 13 to 18 year lead time, if you will, we put in our response to that. It's just a continuation of the basis that we made in a response to their challenge to what we said.

CHAIRMAN FROEHLICH: Counselor.

MR. POLONSKY: The contention admissibility criteria which I hope we won't argue over is in 2.309(f)(1) and even before you get to the

little Roman numerals you are told that you need to set forth whatever it is that follows with particularity.

And then when you get down to Roman numeral V, to provide a concise statement of the alleged fact or expert opinions, you're told you need to do this -- it's on which the petitioner intends to rely adhering together with references to the specific sources and documents on which the request or petitioner intends to rely to support its position on the issue.

We don't think this requirement was met here simply by saying likely consequences, and that the Paine declaration is sufficiently vague and unsupported and that it does not support an admissible contention. So to raise these issues now is to -- Mr. Roisman would say it's supporting evidence. We would say it clarifies the contention beyond what the contention was stated in the petition to intervene making it a new contention subpart or a new contention in its entirety and in addition to factual issues, they have done the same with legal citations which each arguably could be their own contention.

CHAIRMAN FROEHLICH: Safe to move on?

MR. ROISMAN: Yes, I would just remind the

Board that in Mr. Paine's declaration he goes to great pains, no pun intended, to identify the paragraphs of the ER and quote from them with which we disagree. So I think we did the particularity thing just fine.

So then we have at the top of the next page that begins with Contention 4E --

CHAIRMAN FROEHLICH: And is that the last page of 4E?

MR. ROISMAN: Yes.

CHAIRMAN FROEHLICH: Okay.

MR. ROISMAN: A challenge to the whole idea of the decentralized power sources as opposed to central generating facility power sources and the applicant objects that these are all things that we didn't talk about in the original petition.

First of all, we recognized and acknowledged that the ER contained an analysis of discrete replacement sources for Limerick, but does so without providing an analysis that demonstrates those resources of combinations are reasonably likely, talked about that. At page three of his declaration, Mr. Paine says "unlike the applicant's section of individual utility-scale power plant alternatives." Keep in mind that's another one of the fundamental bases of the contention that they look at the no

action alternative in terms of utility, scale, power plant alternatives, that it subjectively deems reasonable and appropriate to its own business purpose of generating and selling electricity to replace LGS. They say that in the ER. They say explicitly that's what they're looking at and they say it in the no action and they say it in the alternative analysis. We say that's wrong.

The GEIS says you're not to do that. Common sense says you should not do that. NEPA says you cannot do that and we said that is a mistaken way of looking at the issue.

So when they start to join issue with us on the merits of that question of whether or not all the individual sources were the proper combinations and whether they looked at the things that we thought they should look at, we answered. We responded to that.

Then at page four of his declaration, Mr. Paine says "in addition to the single discrete electricity generation sources reviewed by the applicant as reasonable alternatives to extended operation of Limerick's base load capacity," pointing out there was more you had to look at, not just those. And then his declaration highlights the omission in

the ER, the failure to demonstrate that the scenarios discussed are reasonable and only consideration of alternatives that will meet Limerick's current generating capacity.

So we put the issue in play. We said it's missing. They come back and say it's not missing. What are we to do, but to say to them your interpretation of your own document fails to demonstrate what you claim is wrong with our contention. So we have a dispute. They say it's in. We say it's not in. When they cite to what they believe supports that, we challenge it.

CHAIRMAN FROEHLICH: Mr. Polonsky.

MR. POLONSKY: This is at the very heart of how this contention was submitted as a contention of omission. In the very language that Mr. Roisman has just cited, suggests that we did not look at something other than the output from Limerick Generating Station. Well, there's a section on the demand-side management and that section on the demand-side management includes a discussion of DSM. Looks at a study from I think New Jersey about human behavior on demand-side management and then makes an environmental impact conclusion about demand-side management and concludes that it's small. That is

then cross referenced into the no action alternative.

It was certainly reasonable for us in our answer to assume they perhaps had missed the cross reference and didn't realize that it was in the no action alternative because they say it can't be equated with replacing the generating capacity. Well, we didn't entirely replace the generating capacity. We looked at conservation measures, consistent with the GEIS in demand-side management.

So our answer is simply saying you have articulated this unambiguously as a contention of omission. Here is where that information is that you have said it's not. To then attack the adequacy of that creates a new contention about the adequacy of that information and converts this contention of omission into something that was not originally pled in the petition to intervene and that is impermissible.

CHAIRMAN FROEHLICH: Mr. Roisman?

MR. ROISMAN: First of all, as we pointed out before whether by reference or otherwise, the summary table produced in the ER that compares the no action alternative and its consequences does not have a column for DSM. But what are we to do with that? We said it didn't include DSM in the no action

alternative. They want to come back and say well, we talked about it in this other place. We incorporated by reference. We've just been excoriated for not being precise, for not being specific.

Can we not at least use the same logic to look at what they have done. If they wanted to say the DSM has a role to play in the no action alternative, it should have been included in the discussion. When they deal with it on the merits which they then raise and say ah, see, we did look at it. We then point out that first they dismiss the DSM because they say it won't replace all the generating capacity which we say that's the wrong test. That's not the test you're supposed to use. And then we point out all of the problems with the way they examine the DSM including the failure to look at what it might look like 13 or 18 years into the future. So we're responding to what they're saying.

CHAIRMAN FROEHLICH: The next one, if we could?

MR. ROISMAN: And the last one -- okay. This is the one that said we never specifically referenced 51.103(a)(4) as a legal standard for the analysis of the no action alternative. It's true we didn't use the section, but we used the words. We

used the concept, the ER violates because of unreasonably and arbitrary 51.45(c) and unreasonably and arbitrarily limits its analysis of the no action alternative in a manner that fails "to the fullest extent practicable to quantify the various factors considered and neglects discussion of important qualitative considerations or factors that cannot be quantified." And that was in our petition at page 23 and part of Mr. Paine's declaration.

If that's not specific enough, if that's how it's out -- take it out, but I tell you that's flyspecking. Anybody who has ever read Part 51 and remember, that section 51.103 applies to the staff. The language that we quote which we took from that without putting that reference in is in the context of 51.45(c) which basically says the applicant is supposed to produce an environmental report that will provide the staff with what it needs to write its DSEIS and FSEIS.

So I don't think that we've really caught them by surprise. If the Board thinks we have, take reference.

CHAIRMAN FROEHLICH: Mr. Polonsky?

MR. POLONSKY: We see this as the same as the first issue that is raised that only Exelon raises

which is there's an allegation in a footnote in the petition to intervene that says that the statements of consideration haven't been adjudicated. Well, there's no citation. It's not defined. And then we make our arguments in our answer and they come back and they reply and provide a two-page legal discussion with citations and quotations from various sections of the Administrative Procedure Act telling us where that argument can be found for the very first time in the reply.

And again, we think it's just crystal clear that if you are citing to any legal authority in a petition to intervene, the same way you're citing to a document in a petition to intervene, that you need to tell the other parties and the Board what it is you're citing to and provide that citation with specificity. I mean we've had boards where you just cite to the application or cite to a regulatory document and they say this thing is 340 pages long. We're not going to go through -- it's not our obligation to go through and find where that is.

It's not my job to hunt down and find out where the citation is to why the Statements of Consideration were not adjudicated. And so it is perfectly fair game for us to say and it's not

flyspecking. It's part of the pleading requirements for admissibility that you provide the legal citations to what you are doing. And that simply wasn't done here and it wasn't done on the first argument and it wasn't done on the second.

MR. ROISMAN: Okay, let me -- since that's the first one that goes away for 4, let me just talk about that very briefly. If you read the ER, you will see that the applicant has no pinpoint citation to anything that identifies either the Statement of Considerations in support of the 1996 regulations or the GEIS language that in its answer relied upon as the basis for the statement that the subpart L issue that had been dealt in.

What we said in the footnote in the petition to intervene frankly was gratuitous. We didn't even need to have said that because there was nothing using Mr. Polonsky's own standard. There was no guidance. We were -- if you take a look at reference in the ER is to NRC 1996A. That reference is you go back to it simply references the GEIS, all 500 or 600 pages of it. So sauce for the goose is sauce for the gander.

But on top of that we said it hadn't been adjudicated. They didn't come back and say oh yeah,

it's been adjudicated. They came back and said it's been adopted. It's a regulation because the SOC said that it was okay and the GEIS said it was okay, now giving the specific references. That was the first chance that we would have had if we were going to do proper pleading to respond to an assertion that does not appear anywhere in the ER.

So we responded by pointing out that you cannot have an adjudication of an issue if there's no notice that you're getting ready to adjudicate it either in a rulemaking or in a more formal proceeding in an adjudicatory context. And of course, that's a major point that we've made about Contentions 1, 2, and 3. And that's all discussed on the first page of this attachment, the very first block of documents there.

CHAIRMAN FROEHLICH: Did you want to respond to that last comment, Mr. Polonsky?

MR. POLONSKY: Yes, Your Honor.

CHAIRMAN FROEHLICH: Just to notify the public.

MR. POLONSKY: Mr. Roisman knew full well how Exelon got from the L exception to applying that to Limerick even though Limerick wasn't mentioned. And that's why he put it in the footnote just so to

somehow feign that he didn't need to raise that because that is why it was relied upon in the ER to us is just incredible and to any extent if he wanted to raise that as an issue when he specifically cited to it in his footnote, the issue that we had was the term adjudicated.

We're in a licensing board proceeding. We're scratching our head trying to figure out what it is that he needs. And we don't say it wasn't adjudicated. We basically say there's no requirement that it be adjudicated. What is he talking about and we point to 2.309(f)(1) and say that's vague and unsupported. And he comes back and says oh, let me provide the support. That to us is ripe for a Motion to Strike.

CHAIRMAN FROEHLICH: Okay. Any questions? Okay. All right. It has been a long day. I think that's all the questions at least I have on the Motion to Strike.

We will take the charts and the individual elements, go through them one by one, if need be, in our decision.

At this point I think we can move to a closing argument where you're free to address the contention admissibility issues as well as the Motion

to Strike if you wish to. And if you could limit yourselves to five minutes each we may get out of here today.

We'll start with the applicant.

MR. POLONSKY: Thank you, Your Honor. Exelon ZER for the Limerick Station does not include a new SAMA analysis because the Commission has excused Exelon from including one. The language in Section L specifies this outcome. And if there's any question that that regulation applies to Limerick, the Board need only look to the June 1996 Statements of Consideration which unambiguously answer that question.

So we know that Exelon need not submit a second SAMA analysis. This disposes of Contention 3 which alleges to the contrary. But it also disposes of Contention 2. Just before the lunch break, Mr. Roisman characterized Contention 2 as follows: that NEPA obligates Exelon and ultimately the NRC staff to perform an adequate SAMA analysis regardless of what Section L says. This is nothing more than a camouflaged attack on the text of Section L which does not require Exelon to submit a second SAMA analysis as part of license renewal.

And general rules of regulatory

construction would tell you that a general rule is trumped by a specific rule. The general rules regarding the Commission's NEPA obligations that the NRDC cites do not trump the specific regulation that excepts Exelon from submitting a second SAMA analysis as part of license renewal.

As for Contention 1, yes, there is consideration of new and significant information required by 51.53(c)(3)(4). And Exelon included a discussion of new and significant information in the Limerick ER. However, the adequacy of that information cannot be litigated in this proceeding because either SAMAs for Limerick are a Contention 1 issue or alternatively SAMAs for Limerick, Comanche Peak and Watts Bar and any other plant that may in the future perform a SAMA analysis at the construction and operating phase are a generic finding that is accepted by rule. As such, the Pilgrim and Vermont Yankee decisions are binding.

In any event, Exelon's consideration of new and significant information is consistent with NEPA's rule of reason. NEPA requirements tell you to evaluate environmental impacts. That's in NEPA Section 102. If the impacts are significant, then NEPA requires you to evaluate mitigation alternatives.

New and significant information looks for new information that could result in a seriously different picture of the environmental impacts from what was previously envisioned.

In this case, the impacts were consequences of severe accidents are defined as small. Therefore, only that information that would change the consequences to moderate or large, the other definitions are provided in the rules, would be new and significant. NRDC doesn't like the 1989 SAMDA. Well, it's too late, 20 plus years too late to challenge that analysis. And the chaos in license renewal proceedings and prior NEPA documents from the construction and operating stage to be litigated in this proceeding would be significant. And the Board should not allow it.

NRDC also does not like the exception in NRC regulations in 51.53(c)(3)(2)(L) or the regulations in 51.95 or 51.71 that flow the NRC staff's requirements down into that exception. It can bring its grievance in a waiver under 2.335 or through a petition for rulemaking. But what it cannot do absent a waiver is bring that challenge here in this license renewal proceeding.

As for Contention 4, it appears that the

NRDC is challenging the need for power after all. They've argued today that under the no action alternative, there is no need for the power from Limerick. Thus, the no action alternative can look at something other than replacing 2,340 megawatts the Limerick station will provide. That is a veiled challenge of the need for power. That's outside the scope of this proceeding.

NRDC has a number of concerns about how the no action alternative will be defined and handled by the NRC. This is best handled as a policy concern and comments, for example, on the draft revision to the GEIS or through a petition for rulemaking. NRDC's concern is apparently also with the staff's Standard Review Plan in NUREG 1555 and how it applies to all plants. This licensing proceeding is not the place to litigate NRDC's policy concern applicable to all plants.

NRDC does not specify the combinations of alternatives that would make the ER adequate. Rather, they rely on a single sentence talking vaguely about "waste heat co-generation, combined heat and power, and distributed renewable energy resources" as if we know what that meant. Would 10 percent waste heat, 70 percent combined heat and 20 percent distributed

renewable energy be adequate? Or how about 20, 50, 30 percent or 33 percent for each?

The combinations are innumerable. And how much solar panels on rooftops should we incorporate or windmills in farmers' backyards? It's a nice academic exercise and more appropriately it's speculation. NEPA doesn't require either and it also doesn't require worst case scenarios. It requires a rule of reason which Exelon met. And even before you get to NEPA, the admissibility standards require specificity which is not present here.

Finally, this is clearly and unambiguously and repeatedly stated as a contention of omission. NRDC's statements today that it is a combination of both is belied by its pleadings. NRDC fails to recognize even today that the ER does contain energy alternatives and combinations of alternatives, solar, wind and natural gas combinations were included in the ER. Wind, compressed air energy storage as a combination were included in the ER, and all of those impacts were flowed through to Table 8-0.

To the extent that the conclusion of environmental impacts on demand-side management which were identified in the ER as small were not lifted and carried into a summary table which frankly is merely

a roll up of what is in Section 7 is itself flyspeck. For all of these reasons we urge the Board to deny the petition in its entirety and on behalf of Exelon, we thank you for the opportunity to have this candid discussion with you. Thank you.

CHAIRMAN FROEHLICH: Thank you, Mr. Polonsky, for the Commission staff.

MR. SMITH: Thank you, Judge Froehlich. Before I get started we do have a couple items of homework I would make in terms of Judge Kastenberg's questions on the 1989 Limerick SAMDA.

First, it was not peer reviewed, but the NRC staff reviewed it and also contractors reviewed it, too. We submitted the SAMDA analysis to contractor labs and they looked at it as well. So different sets of eyes did review the 1989 SAMDA beyond just the NRC staff. But it was not a formal peer review.

Second, we're not aware of any other SAMDA or SAMA analyses that have been completed beyond the ones we stated earlier at the time of 1996 when the Commission promulgated its license renewal rule. I hope that's responsive.

CHAIRMAN FROEHLICH: Thank you.

MR. SMITH: Second, the NRC staff noticed

a concern that the 1989 SAMDA analysis by itself doesn't adequately consider severe accident mitigation alternatives at least for this license renewal proceeding conducted over 20 years later. But the NRC staff and since, there could be some kind of a gap or a hole in the Commission's regulations if you read Section L to say what it says it does.

The NRC staff's position is that Section L doesn't just rest on the 1989 SAMDA analysis. Rather, a careful reading of the 1996 Statement of Considerations indicates that the Commission was considering not just the prior SAMDA analyses of the facilities in question, but also considered the extensive study of the NRC staff and the applicants in licensing were taking to consider severe accidents and ways to mitigate those risks of severe accidents.

In fact, as we point out in our brief, the Commission thought that that analysis was so thorough that it would be unlikely that any more future SAMA analysis would uncover cost beneficial SAMAs beyond the procedural and programmatic changes, for minor plant modifications.

In that sense, the Commission reasonably used its discretion in the 1996 rulemaking to not require applicants to consider severe accident

mitigation alternatives beyond the ones reviewed at either the operating license phase or if necessary, the license renewal phase. But unless there would be a thought there was a gap there, that determination like all determinations in 1996 Statement of Considerations, regulations, and GEIS is a subject of NEPA's new and significant information obligation and the NRC staff as well as the applicant has to consider whether or not the new and significant information impact submissions of determination in 1996 SOC codified in the regulations that essentially one SAMA is enough.

And turning to Contention 4, the staff's final thoughts on that and since they could be argued that NRDC's petition to intervene is based on a new philosophy or new way of looking at a no action alternative and in that sense, the NRC staff agrees that it might be. The NRDC is asking you to look at no action in a way that we haven't considered previously and nonetheless, if they were to do that, the petitioner would still need to provide adequate basis or factual demonstration for why their way of looking at it was a reasonable way under NEPA.

And as the Board held in Monticello license renewal proceeding, a simple allegation of

different renewable alternatives should be considered isn't enough to meet the admissibility standards. And in this case, the NRC staff read the Paine declaration as well as the initial petition to intervene, the facts stated in there don't provide any indication for why the things they are saying should be looked at in a no action alternative are commercially viable, technically feasible, more appropriate for consideration otherwise.

In any event, if the Board were to consider in the statements we argued about recently in the reply, the NRC staff knows that the Board would consider all of them and even the bases for the contention, none of the statements at least the staff would move to strike are provided by citation to either a technical document or a expert declaration. In that sense, they constitute the types of allegations or speculation the Commission has previously found and cannot support in this contention.

For those reasons, the NRC staff opposes the position that NRDC requests. Thank you, Your Honors.

CHAIRMAN FROEHLICH: Thank you. Mr. Roisman?

MR. ROISMAN: Thank you, Mr. Chairman. Well, one message is clear. The applicant and staff agree that there's anywhere that we can challenge what we want to challenge, but not here. We can challenge it in 2.335 which we might do should the Board agree with their view of these regulations which we don't agree with. We could do it by rulemaking. We could have done it before anybody thought to apply for license renewal. We could do it before the applicant used it as a basis for its Environmental Report here.

Our position is we're in the right place. We're in front of the right Board. This is the right time. And we have the right issues. Let me go over them briefly.

We are not claiming that an applicant needs to do a new SAMA analysis. That is not one of our claims. Our claim is that they need to do an adequate analysis of mitigation alternatives, whether it's called a SAMA, a SAMDA, or something else altogether. They say that the 1989 SAMDA is that adequate analysis either because the Commission blessed it without really thinking about or because it is a generic finding or because it is in some way or another represents a good starting point and the staff says then you have to look at the IPE and the IPEE,

incidentally, also not offered in evidence in this proceeding, but referenced only.

We believe that NEPA requires an adequate consideration of mitigation alternatives in order to answer that question. You have to take a look at the SAMDA, the 1989 SAMDA. How can you tell whether the new information is new or whether the new information is significant if you don't look at the 1989 SAMDA that the applicant says is considering new and possibly significant information for it. So Hamlet is here. Hamlet is in the play. The applicant keeps taking him offstage every time we try to have a conversation with him, but he's here. We're going to play his play.

Secondly, the new and significant information is not a Category 1 issue problem because whatever the 51.53(1) is, it didn't convert a site-specific issue to a Category 1 issue. The Commission defined Category 1. It doesn't fit that category. It's also not a generic finding. By definition a generic finding would be a finding that applies to lots of other plants. This they claim is a finding that applies to Limerick. So it can't be a generic finding and they're certainly not trying to assert that they did exactly the same analysis that was done

for Watts Bar and Comanche Peak and therefore we have a three party generic finding. It's site specific. It's specific to this case.

It's significant, those new information are significant just because of the consequences of the accident, but also because of the mitigation alternatives that could come into play if we used the new and significant information that NRDC has pointed out in its report. Those consequences are the heart of an evaluation under NEPA under the Commission's own regulations.

And Subpart L does not purport to decision the question of whether or not any particular document offered by an applicant is or is not an adequate mitigation alternative analysis. It simply says that if there is one, the applicant is excused from doing a new SAMA analysis. We don't want them to do a new SAMA analysis. We want them to do a mitigation analysis that's adequate. When they give us one, we'll tell you whether we think it's adequate or not, but it doesn't get into this question of a new SAMA analysis.

Finally, with regard to Contention 4 we're told that this is a challenge for the need for power. This is a strange contention. On the one hand we have

the applicant asserting that if you don't have these plants running, you will need to meet 2300 megawatts of generating capacity. In my simple world they are asserting that there's a need for the power from the plant. We're not challenging whether there is a need for the power. We're asking them to evaluate what the consequences would be if 13 or 18 years from now you shut it off, you turn off the plant, what happens? They don't give us that analysis. They keep referring to it in summary fashion. We've given you a reasonable analysis. We said it's not a reasonable analysis because it assumes you have to supply all the generating capacity that would be gone which is an assumption which is wrong. And it doesn't look at likely consequences. It just looks at some possible consequences.

Are we asking for worst case? Are we asking for the edges of speculation? No. We're asking for some discussion in the ER of why a set of consequences that the applicant wants to say will occur are likely. That conversation does not occur anywhere in the ER.

We are not arguing that specific alternatives should have been considered. We're arguing that the way of looking at whatever

alternatives the applicant wants to look at are wrong. They look at it from a wrong perspective. That's the error. That's the omission in the analysis. When they look at it in the right way, they might expand the alternatives. They might get consequences. They might narrow. I don't know. It's their job to do it right. It's our job to point it out to them.

Finally, what we're doing in this petition to intervene is attempting to have our day in court for our members and for our organization to raise with the Board what we think are significant deficiencies in the applicant's Environmental Report. All of these will come back again if the staff decides to simply repeat what the applicant has done. If they change, if they improve, we may tell you we're dropping the contention. They've dealt with our problem. If they address the problem head on, but do it in a wrong way, we may file a new contention based on that. But for now what we have is a deficient Environmental Report. We ask the Board to give us the opportunity to make our case with regard to that. Thank you for the time you've given us today.

CHAIRMAN FROEHLICH: On behalf of the entire Board I want to thank all the participants, counsel, for your time and thoughtful arguments. I

assure you the arguments will be helpful to the Board in coming up with a decision and as I mentioned in my opening, we'll try to have that decision published within 45 days. I know the rules say 45 days from the reply, but I read them to be 45 days from the end of this oral argument. Again, I want to thank the officers of the Montgomery County Court for their perseverance and for their attendance all day and the parties for their helpful arguments. We stand adjourned. Thank you.

(Whereupon, at 4:35 p.m., the oral arguments were concluded.)

CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission

Proceeding: Limerick Generating Station
Oral Arguments

Docket Number: 50-352-LR and 50-353-LR

Location: Norristown, Pennsylvania

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken and thereafter reduced to typewriting under my direction and that said transcript is a true and accurate record of the proceedings.

Neal R. Gross

Official Reporter
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