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ASLBP No.: 04-832-02-OLA

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD (ASLB)

+ + + + +

PRE-HEARING CONFERENCE

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IN THE MATTER OF:	:
ENTERGY NUCLEAR VERMONT	:
YANKEE, LLC and ENTERGY	: Docket No. 50-271-OLA
NUCLEAR OPERATIONS, INC.	: ASLBP No. 04-832-02-OLA
(Vermont Yankee Nuclear	:
Power Station Operating	:
License Amendment)	:

----------x

Thursday, October 21, 2004

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

ALEX S. KARLIN	Administrative Judge, Chair
ANTHONY BARATTA	Administrative Judge
LESTER RUBENSTEIN	Administrative Judge

APPEARANCES:

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Also Present:

CHRIS WACHTER, Law Clerk, NRC

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

2 9:02 A.M.

3 JUDGE KARLIN: Good morning, my name is
4 Alex Karlin. I'm a Judge, Administrative Judge with
5 the Atomic Safety and Licensing Board and chair of
6 this Board Panel for the proceeding here this morning.
7 Welcome to all of you, to the
8 representatives of the four parties and to the public.
9 I appreciate your coming.
10 We are here to conduct a pre-hearing
11 conference in the matter of Entergy Nuclear Vermont
12 Yankee, LLC and Entergy Nuclear Operations, Inc.,
13 Docket No. 50-271 of the Atomic Safety and Licensing
14 Board Panel No. 483102-OLA.
15 This pre-hearing conference is being held
16 pursuant to the order of this Board, dated October 1st
17 and also another issued on October 18th. The location
18 here is the Brattleboro Middle School in Brattleboro,
19 Vermont. And before proceeding, we would like to
20 thank the school and the School Board for making this
21 facility available.
22 As most of you will know, we changed the
23 location of this proceeding to provide more ample room
24 for public viewing of the proceeding. So we very much
25 appreciate the school making this facility available.

1 It's sort of a late notice.

2 First, I'd like to introduce the other

3 Judges on this Board. To my right is Dr. Anthony

4 Baratta. He has a Ph.D. in Nuclear Engineering and

5 Physics and is the Associate Chief Technical Judge of

6 the Atomic Safety and Licensing Board Panel.

7 On my left is Lester Rubenstein. He is a

8 Technical Judge with over 20 years of experience in

9 the nuclear field.

10 As I mentioned, my name is Alex Karlin.

11 I'm a lawyer and a Judge and I'll serve as the chair

12 here today.

13 I wanted to make some introductory remarks

14 so that for purposes of the public they can understand

15 the nature of this proceeding, but before I do so, I

16 would ask the parties, I'd appreciate if the counsel

17 for the parties or the representatives could introduce

18 themselves.

19 Let's start with the State, the New

20 England Coalition, the Applicant and then Staff,

21 please.

22 MR. ROISMAN: Good morning, Mr. Chairman.

23 My name is Anthony Z. Roisman and I am the counsel for

24 the Department of Public Service of the State of

25 Vermont. With me this morning on my right is Sarah

1 Hofman. She's special counsel to the Department of
2 Public Service. On my left is William Sherman. He's
3 the State Nuclear Engineer and on his left is Lawrence
4 Becker. He's the State Geologist. We hope shortly
5 that we will also be joined by Commissioner David
6 O'Brien who is the Commissioner of the Department of
7 Public Service of Vermont.
8 JUDGE KARLIN: Thank you, Mr. Roisman.
9 MR. BLOCK: Good morning. My name is
10 Jonathan Mark Block. And I've entered an appearance
11 that may have come when the Board was traveling
12 yesterday. I've left copies of the cover letter to
13 the Secretary, the Notice of Appearance that was filed
14 yesterday and a Motion to Dismiss that was filed as
15 well.
16 I am now representing the New England
17 Coalition. With me to my right is Mr. Raymond Shadis,
18 who you're all familiar with, who has been up to this
19 point the pro se representative. I hope that we'll be
20 able to address developing some kind of temporary
21 working co-counselship just for this proceeding as
22 I've only just come on board to assist him and there
23 are too many things in this proceeding as issues that
24 he is far more aware of than I. So hopefully, after
25 we finish the introductions we can take that matter

1 up.

2 We also have with us one of our experts,
3 Mr. Paul Blanch who is behind us. And is Mr.
4 Gundersen here yet? We are expecting also our other
5 expert, Mr. Arnie Gundersen to come a bit later.
6 Thank you.

7 JUDGE KARLIN: Thank you.

8 MR. SILBERG: Good morning, Your Honors.
9 I'm Jay Silberg. I'm a partner in the law firm of
10 Shaw Pittman. We are here today representing the
11 Applicants, Entergy Nuclear Vermont Yankee and Entergy
12 Nuclear Operations, Inc.

13 With me here at counsel table are Matias
14 Traviesco-Diaz, also a partner in the firm; and
15 Douglas Rosinski, an associate at the firm. Sitting
16 behind me are Travis McCullough, an in-house attorney
17 with Entergy. And representing the Applicants in the
18 audience are Mr. Kevin Bronson, who is the General
19 Manager for Plant Operations; John Dreyfuss, who is
20 the Director of Engineering for Vermont Yankee; Chris
21 Wamser, who is the Operations Manager for Vermont
22 Yankee and Craig Nichols who is the Project Manager
23 for the Power Uprate Project.

24 JUDGE KARLIN: Thank you. Before we
25 begin, I have a couple of administrative items. With

1 regard to cell phones --

2 MS. POOLE: I'm Brooke Poole with the NRC,
3 Office of the General Counsel. Seated with me at the
4 table is Marisa Higgins, also of the Office of General
5 Counsel; and Richard Ennis, a Senior Project Manager
6 with the NRC, Office of Nuclear Reactor Regulation.
7 He's the Project Manager for Vermont Yankee.

8 With us in the audience are Allen Howe,
9 the Section Chief for Vermont Yankee; and Richard
10 Lobel, a Senior Reactor Systems Engineering, also
11 within the Office of Nuclear Reactor Regulation.

12 Thank you.

13 JUDGE KARLIN: Okay, thank you. Sorry.
14 I had you in the wrong order here.

15 Before we begin, please, with regard to
16 cell phones, if everyone would turn their cell phones
17 off or put them on vibrate so that it doesn't disturb
18 the proceeding. And if you have a cell phone
19 conversation, please take it out of the room. That
20 will help us proceed.

21 Also with regard to media, we welcome the
22 media here and their coverage is a better way to
23 inform the public. I think there are rules with
24 regard to the coverage and we welcome the television
25 camera stationed in the back. Artificial light is not

1 allowed, so flash cameras and that sort of thing would
2 not be permitted. And we'd ask that they not enter
3 the well in front of the proceedings.
4 A transcript is being made of this
5 proceeding by Mr. Holland. He will make an electronic
6 transcript and then he will do a written transcript
7 which will be available on the NRC web page, for free,
8 in about 10 days to 2 weeks, depending on the
9 turnaround. People who want to purchase a transcript
10 faster than that can contract Neal Gross and they can
11 get a transcript that way, but it will be transcribed.
12 For the benefit of the public, I thought
13 it would be useful to explain the role of the Atomic
14 Safety and Licensing Board, the nature of this
15 proceeding and a little bit of the history of this
16 proceeding. The Atomic Safety and Licensing Board of
17 which we are a three-Judge Board, is established by
18 federal law. The federal law first sets up the
19 Nuclear Regulatory Commission to regulate nuclear
20 facilities. Right now, it's headed by three
21 Commissioners and those Commissioners are appointed by
22 the President and confirmed by the Senate.
23 On the one hand, the Commissioners have a
24 large regulatory staff working for them and reporting
25 to them. This is what we will call here today the NRC

1 Staff and they are seated here in front of you and are
2 one of the parties, although that's a subject of
3 discussion here, to this proceeding. The people on
4 the NRC Staff, as I understand it, are currently
5 reviewing Entergy's application for a license
6 amendment and so they have a specific role in the NRC.
7 This Board's role is entirely different
8 and separate. The Board Judges are independent of the
9 Staff and entirely separate from them. We're also
10 independent, to a certain extent, of the Commission
11 themselves. We have no allegiance to the Staff. We
12 have no allegiance to Entergy or to the State of
13 Vermont or anyone else at this point. Under the
14 former rules of judicial proceedings, all substantive
15 discussion, there shall be no substantive discussion
16 between ourselves, the NRC Staff or any other party
17 with regard to this matter. And it's prohibited for
18 us to talk to them or them to talk with us and if any
19 such discussion might inadvertently occur, it needs to
20 be put on the record and it will be. So there's no
21 discussion that we have with the Staff. That's
22 prohibited.
23 Likewise, with regard to the Commissioners
24 themselves, we have no substantive discussion with the
25 Commissioners regarding the merits of this matter.

1 They can't talk with us about it. We can't talk with
2 them about it. We hear the facts. We try to apply
3 the law and we try to rule on the issues that are
4 presented to us and render a decision. At that point,
5 if somebody doesn't like that decision, they can
6 appeal it to the Commissioners and the Commissioners
7 will issue a ruling, but we have no discussion or
8 comment with them and they can either affirm our
9 ruling or they can reverse, but we don't have
10 communication with them about this matter either.
11 These rules are out there to try to make
12 sure we are independent and can function that way.
13 The Commissioners do not do performance reviews on the
14 Judges. They don't fire the Judges if they issue a
15 wrong decision and they can't affect our salary one
16 way or the other. So these are also there to try to
17 assure some independence of this Board.
18 So I just wanted the public to understand
19 when we talk about or you talk about the NRC, there
20 are really three entities to think about; one, the NRC
21 Staff, who are reviewing the application; two, the
22 Commissioners, the three Commissioners, who are
23 ultimately in charge of the NRC; and the third is the
24 Atomic Safety and Licensing Board Panel. And this
25 Board is a three-Judge set of that.

1 As to the history of this case, many of
2 you in this room this history much better than I do,
3 but I think it's worth reviewing. In September 2003,
4 Entergy submitted an application to amend is license
5 to allow for an increase in its power and extended
6 power uprate of approximately 20 percent. The NRC
7 Staff is reviewing that application.
8 On July 1, 2004, the NRC published in the
9 Federal Register a notice saying that they're
10 considering this application and anyone who is
11 interested in requesting a hearing or challenging any
12 part of that application had the opportunity within 60
13 days to file a request for hearing and to file
14 proposed contentions, issues they wanted to challenge
15 in this matter. In response to that notice, the State
16 of Vermont, Department of Public Services and the New
17 England Coalition submitted requests for hearing. The
18 State proposed five contentions at that time that they
19 wanted to be heard. The New England Coalition
20 submitted seven. So we have a total of 12 proposed
21 contentions from the two parties at that point.
22 Another has been filed by the State more recently and
23 we'll deal with that perhaps a little bit later.
24 After the requests for a hearing were
25 filed, Entergy filed an answer saying that none of

1 those contentions, proposed contentions were
2 admissible, that they didn't raise legitimate issues
3 that warranted any kind of evidentiary hearing. And
4 so -- and the Staff also filed an answer to those 12
5 contentions, two separate answers, actually. And they
6 said that a number of the proposed contentions were
7 not admissible and the Staff also indicated that a
8 couple of the contentions in the Staff's mind, they
9 did not object to.
10 So we are here really today to deal with
11 and decide whether the proposed contentions submitted
12 by the two Intervenors are admissible under the NRC's
13 rules.
14 And so you'll hear a lot about
15 admissability of contentions today. That's really the
16 focus of this argument and this discussion. And what
17 we're trying to do is listen to each of the four
18 parties and to learn from them and ask questions of
19 them about the admissability of their contentions so
20 that we can decide whether an evidentiary hearing will
21 be granted later where witnesses might testify and we
22 would have a further hearing later if contentions are
23 admitted.
24 Now a couple of the criteria or standards
25 for admitting contentions, it's in the Federal Rules.

1 It's basically 10 CFR 2.309(f) and there's a list of
2 criteria for an admissible contention. For example,
3 the regulation says that a contention must provide a
4 specific statement of the law or facts to be raised or
5 controverted. It also must include a brief
6 explanation of the basis of the contention and the
7 Petitioner is required to file a concise statement of
8 the alleged factors or expert opinion which support
9 his or her position. So the discussion today, the
10 argument today, will focus on whether or not the
11 proposed contentions met those criteria and other
12 criteria. For example, it has to be within the scope
13 of this proceeding.
14 And the parties have filed extensive
15 pleadings. We haven't brought perhaps all of them,
16 but we have many of them and they've briefed these
17 issues quite well and provided a great number of
18 attachments and exhibits. So we have read those
19 briefs.
20 After today and after hearing the
21 arguments, we will issue a written decision where
22 we'll decide and rule whether or not all or some or
23 none of the proposed contentions are admissible. If
24 they are, then a hearing will then be scheduled at
25 some later time. If we rule that they are not, then

1 a hearing would not be scheduled. In either event,
2 whatever we write and rule will be a public document
3 and it will be subject to appeal to the Commissioners
4 themselves. So it won't necessarily be a final
5 decision if some seeks to appeal it.
6 There will also be perhaps some other
7 threshold, what they call, legal issues that we want
8 to talk about or hear about today such as the scope of
9 this proceeding, the type of hearing that might be
10 granted, whether it would be an evidentiary hearing
11 with cross examination or not. So we'll get to that
12 too.
13 And thus, because this is really dealing
14 with the pleadings and the contentions, the only
15 people we're going to be able to listen to today and
16 need to listen to because this is what we're here for
17 is the four parties you see sitting here in front of
18 you who have filed these pleadings and we need to
19 learn and understand more about them.
20 In terms of public participation in this
21 proceeding, there are really three ways it can happen.
22 One is what's called a limited appearance statement
23 can be filed. It can be done in writing or an
24 evidentiary hearing is scheduled later. We probably
25 will and I think if it's up to me, we will allow oral

1 limited appearance statements. Limited appearance
2 statements can be mailed to the NRC at the address
3 specified in the notice. They can also be e-mailed to
4 the NRC and they also come to me. And the e-mail
5 address is hearingdocket@nrc.gov, "hearingdocket"
6 being one word with a copy to me, ask2@nrc.gov. We've
7 already received several limited appearance statements
8 in writing, one from Mr. Blanch, one from Ms. Shaw,
9 and I'm not sure whether we have any others and we'll
10 read them. So we have received those. If anyone else
11 wants to file them, they may.
12 The third way for the public to
13 participate is if a hearing is scheduled later for
14 evidentiary matters, then limited appearance
15 statements will probably be taken at that time and
16 people will have a chance to talk for a limited amount
17 of time and present their key points.
18 At this point, I'd like to ask my fellow
19 Judges if there's anything else that you need to
20 cover?
21 JUDGE RUBENSTEIN: I would only add to
22 what Judge Karlin said that for the general
23 understanding we'll try not to get into the merits of
24 the contentions today, but to examine the basis for
25 the admissability.

1 On the scope of the hearing, the licensing
2 action is for an extended power upgrade, so most of
3 what should be going on in the arguments on the
4 admissability should be focused on that point, as
5 opposed to perhaps an attack or a concern with the
6 Staff's Safety Evaluation Report, if that's issued, or
7 the regulations or some issue which may be of old
8 vintage which has nothing to do with the licensing
9 upgrade issue, unless there can be established a clear
10 nexus to this requirement.
11 Hopefully, everybody would have read the
12 requirements of 24309F and we'll move along
13 expeditiously.
14 Thank you.
15 JUDGE KARLIN: Thank you. In terms of an
16 outline of how we're going to proceed, we have
17 scheduled essentially two days for this pre-hearing
18 conference and oral argument in the order that we sent
19 out and the parties are aware, but for the public our
20 approach will be first to cover in about an hour and
21 twenty minutes preliminary legal issues that might be
22 raised or presented by the pleadings.
23 Then we will go through the contentions,
24 allocating 45 minutes' worth of time amongst all the
25 parties to talk about and to answer our questions

1 about the contentions and they're not necessarily in
2 the one, two, three order. They're organized in some,
3 what we think is hopefully a logical way according to
4 their subject matter because some of the contentions
5 by the State and by New England Coalition relate to
6 one another. And contention 1 by the State might
7 relate to contention 3 by the Coalition and so we've
8 tried to group them that way. So first, preliminary
9 legal issues. Second, contention by contention, we'll
10 go through that. And then third, at the end, we'll
11 have a session as to the type of hearing that might be
12 held, if one is held, whether it's an evidentiary
13 hearing, State's claim for rights under Section 274.L,
14 which I think logically falls into that same category,
15 the type of hearing that's appropriate.
16 We'd like to finish this by mid-afternoon
17 tomorrow, but we'll stay here and I think we'll get it
18 done.
19 We also note that a new contention, before
20 we proceed, a proposed sixth contention was filed by
21 the State of Vermont. Actually, they filed what's
22 known as a Motion for Leave to File a New Contention
23 under 2.309(f). The other parties have not had the
24 chance to file written responses to that. The time
25 frames have not yet run. That was received, I think,

1 on the 18th, just a couple of days ago.

2 Accordingly, we're not going to hear oral

3 argument about that Motion for Leave to File the New

4 Contention today, but we have talked about it here and

5 we thought the fair way to proceed with this thing and

6 expedite and handle it would be any other party to

7 this proceeding who wants to file a response to the

8 Motion for Leave will have 25 days to do so.

9 Likewise, at the same time you should file

10 any substantive response, answer you have to the

11 proposed contention itself, so you can debate the

12 Motion for Leave and you can controvert the proposed

13 contention at the same time within 25 days. Seven

14 days after that, the State will have the opportunity

15 to reply to the answers, if you would, not to the

16 Motion because there's no reply granted to the Motion

17 for Leave to Intervene, but there is certainly a reply

18 granted for the substantive merits of the contention

19 or the admissability of the contention, so 25 days

20 from -- not from today, I'm sorry, if I misspoke, but

21 from the date of the motion itself and then 7 days

22 after that. I'd like to proceed that way. We can do

23 it both at the same time.

24 Before we proceed, let's see, may I ask,

25 do the parties have any stipulations? During a pre-

1 hearing conference call we talked about the
2 possibility that there might be some stipulations that
3 would reduce the areas of disagreement or help this
4 proceeding? No?
5 MR. BLOCK: No, Your Honor.
6 JUDGE KARLIN: Okay.
7 JUDGE RUBENSTEIN: Specifically,
8 contention 5 is in place, so to speak.
9 MR. ROISMAN: We considered that we put
10 the offer out there. We got no calls.
11 JUDGE KARLIN: Okay. It was worth trying.
12 MR. SILBERG: We have been preparing for
13 the pre-hearing conference, and frankly, have not have
14 the opportunity to negotiate or sit down with the
15 Department on that. It may be something we could do.
16 I think it's a simple issue, either to decide on the
17 merits for admissability or a stipulation, but perhaps
18 during some of the breaks we can have some
19 conversations with the Department.
20 JUDGE KARLIN: That would be helpful.
21 Yes, if you have something that would help us on that,
22 that would be great.
23 Also, the Staff, if you would, perhaps you
24 could help give us a little information. We
25 understand that you docketed in this proceeding an

1 October 15th letter from the NRC to Mr. Kansler. I
2 guess he's President of Entergy, regarding the current
3 status and schedule for the safety evaluation. That
4 would be helpful if you could put that in the record
5 here for us this morning.
6 MS. POOLE: Yes, we just wanted to make,
7 to provide information to the Administrative Judges
8 and the other participants in this proceeding. On the
9 NRC website, we maintain a list, pending applications
10 for power uprates in which we have projected
11 completion dates. And on October 15th we informed the
12 Applicant in this proceeding that the completion date
13 for this proposed, for the proposed amendment would
14 not be -- was going to slip from the scheduled
15 completion date of January 31, 2005. No date has been
16 set as yet. We just think it's going to slip at least
17 a couple of months and therefore we provided a letter
18 to the Administrative Judges and the other
19 participants on October 19th in which we forwarded
20 this communication with the Applicant.
21 JUDGE KARLIN: Okay, and do you have a
22 schedule then for when?
23 MS. POOLE: We don't. As indicated in the
24 latter to the Applicant, additional supplemental
25 information is being submitted by the Applicant to the

1 Staff. The Staff has at the present time informed the
2 Advisory Committee on Reactor Safeguards that meetings
3 in connection with this application will be delayed.
4 They have not been rescheduled. And we have not
5 established a new scheduled completion date for the
6 review at this time. But we will endeavor to notify
7 the Licensing Board and the other participants in this
8 proceeding when that has been done.
9 JUDGE KARLIN: Okay, thank you. A couple
10 of other housekeeping matters before we start. Mr.
11 Chris Wachter, our law clerk, sitting to our left here
12 will help us in this proceeding and one way he'll help
13 us is to be a time keeper. He's going to give us the
14 two-minute warning, all of us, both the Judges and the
15 parties when we're talking or asking questions. A
16 certain amount of time has been allocated for each
17 session and matter and he'll tell us when we've got
18 two minutes left and hopefully, it won't go as long as
19 the NFL two-minute warnings usually go which are 15 or
20 20 more minutes.
21 And in terms of the allocations of time,
22 we're going to not -- at this point we're not going to
23 allow someone to say well instead of taking 20 minutes
24 on this contention, I'll take 5 minutes and save 15
25 for some other contention. We've allocated in a way

1 we think would be best for our questions and the
2 discussion, so if you use less than that amount of
3 time, great. Maybe we can proceed a little more
4 quickly.
5 And if at the end of the day, tomorrow or
6 even today, we find that we ought to go back over some
7 issue or hopefully, we'll be able to do that and spend
8 a little bit more time on something where we thought
9 that maybe we could allocate it that way. So we're
10 going to try to keep relatively crisply to those time
11 frames.
12 With that, I would just ask the parties or
13 direct the parties if there are any issues or other
14 questions that need to be raised at this time.
15 MR. BLOCK: Yes. As I mentioned when I
16 introduced myself to the Board, I did file a Motion to
17 Dismiss along with my appearance. I'm sorry to enter
18 that way, but we felt and we consider that there's
19 another issue that's not addressed directly in that
20 motion that should be addressed by the Board as well.
21 And it parallels the issue raised in there.
22 We feel that this application has become
23 a moving target in the sense that the number of
24 supplements that have been filed and particularly
25 filed after the date of the Notice of Hearing

1 opportunity, the number and volume of material, amount
2 of material that's there, raises a serious question
3 about how the public could proceed, particularly when
4 a number of the documents that have been filed since
5 that time that have been available, we now know to
6 other parties such as the Department, were not
7 available to us. They were not placed in Adams. And
8 so it means that we have, so to speak, an initial
9 discovery issue before we even have decided whether we
10 have a hearing opportunity. And we felt that the
11 notice indicated that it was going to be a proceeding
12 on a specific license application and instead, that
13 application has enlarged and enlarged and enlarged and
14 now, in fact, we're confronted with the situation
15 where the letter that the NRC Staff cited to you
16 actually indicates that it will be at least several
17 months before they are able to provide any kind of
18 finality to that review.
19 And so we raise that issue in our motion
20 and I also raise the issue of the availability of
21 material because I think that in order to be fair to
22 the public and the flip side of fairness is to not
23 prejudice an interest, so to be fair to the public, to
24 be fair to an Intervenor who is otherwise qualified
25 under Section 189(a) of the Atomic Energy Act, 42 USC

1 2239, to be fair to the Board itself because the three
2 of you are going to be confronted throughout this
3 process by the information that you have to have in
4 front of you. And if the information isn't in Adams,
5 since you're independent, as you pointed out at the
6 beginning, it must mean that it's not available to
7 you, since it wasn't available to us for that reason.
8 So it raises an interesting issue, at
9 least that we think should be resolved on the
10 discovery side and we felt that it was substantial
11 enough to involve moving the proceeding be dismissed
12 and re-noticed and that's the information I placed
13 before you.
14 There was also a second issue and that is
15 how to deal with Mr. Shadis. I know that in the
16 rules, you can only have one counsel, but in this
17 situation, as I said, I've only just come on in the
18 last 48 hours and so it would be extremely helpful, I
19 think, to the Board and to the other parties, if he
20 was allowed to play more of a substantial role than is
21 usually the case when one is provided, one chooses to
22 have counsel rather than pure pro se. And I guess
23 that would go to whether there are objections to the
24 other parties and to the Board's objection to his
25 being able to, so to speak, in this proceeding co-

1 counsel with me.

2 And those are the two issues that we had

3 up front.

4 JUDGE KARLIN: Okay, I just want to get a

5 clarification. Are you in the Motion to Dismiss which

6 have not read, I haven't read, certainly the other

7 parties have, will have an opportunity to respond to

8 that. There's a time for that and we'll be looking

9 for those responses, but you're not suggesting that

10 this proceeding this morning should not proceed?

11 MR. BLOCK: Yes, that's what I'm

12 suggesting. We have, in a sense, defective notice,

13 that the minimum requirements of due process are not

14 being met by a failure to provide that information to

15 the public that would be necessary to conduct the

16 hearing to which they're otherwise entitled under

17 189(a).

18 JUDGE KARLIN: Do we have any responses

19 from Entergy at this point?

20 MR. SILBERG: We'd be happy to address.

21 We will, of course, respond to due course to the

22 motion. We read it very briefly and believe that it

23 has no merit.

24 Certainly, in every NRC licensing

25 proceeding that I've been involved in for the past 35

1 years, applications after they've been filed and
2 indeed noticed, are almost invariably amended. That's
3 the nature of the process. There's nothing
4 inappropriate. There's nothing in violation of any
5 NRC regulations.
6 To the extent that new information is
7 presented, the Commission's regulations include a
8 specific process for dealing with new information.
9 People can file contentions. Intervenors can seek to
10 intervene on a late basis, based on late-filed
11 intervention. The proceeding -- the process is there.
12 It's been utilized in very consistent fashion for
13 decades. So I simply don't see a problem, but we will
14 respond in due course.
15 Certainly, it would be inappropriate at
16 this point to change in any way this pre-hearing
17 conference based on a motion that was filed last
18 night.
19 JUDGE KARLIN: Okay, thank you. Mr.
20 Roisman, do you have any position or thoughts on this?
21 MR. ROISMAN: No. We just saw the
22 pleading last night and we've not had a chance to
23 formulate any position on it at this point.
24 MR. SILBERG: Excuse me, one further
25 comment. We don't have any objection if Mr. Shadis

1 wishes to share co-counsel responsibilities with Mr.
2 Block today.
3 JUDGE KARLIN: All right. And Ms. Poole?
4 MS. POOLE: Of course, the Staff did also
5 just receive this. We will also respond in due
6 course.
7 JUDGE KARLIN: Could you speak a little
8 closer to the mic? All of you, if we can just try to
9 get a little closer, it would be helpful.
10 MS. POOLE: Yes. Is this better?
11 JUDGE KARLIN: I think so, yes. As close
12 as you can get.
13 MS. POOLE: All right. The Staff has just
14 received this motion. We also will respond in due
15 course. We will take a position at that time. I
16 think generally the comment we would make is we would
17 also agree that the rules provide for addressing late
18 filed and new information in the late-filed context.
19 Also, I would just make a general statement that
20 supplements to the application are routinely made and
21 tend to clarify or tend to clarify the original
22 application or answers questions that have been
23 raised therein, and do not generally constitute an
24 expansion of the scope of an application. But we will
25 address that in due course in our answer. And we

1 don't object to Mr. Shadis participating today.

2 JUDGE KARLIN: Okay, thank you. Mr.

3 Block, we have not had a chance to read this. So we

4 will -- other parties will have a chance to respond in

5 writing, so we're not going to act upon or delay -- on

6 your motion today, nor are we going to delay this

7 proceeding. We've all come some ways to be here and

8 it's been difficult to arrange a schedule and a

9 location. So we are going to proceed to hear the oral

10 arguments today. We'll take your motion under

11 advisement.

12 MR. BLOCK: Just for the record, I note my

13 objection to that decision and I would add that we're

14 in a situation where this is something that should

15 never have been accepted for review, but it was and

16 now in the course of the process we are being

17 prejudiced because information that we should have had

18 to respond to was not placed in the public document

19 room. It's being held and other parties such as the

20 Department have had availability to it because of

21 their particular position versus ours and I think this

22 makes it difficult. It means that the Board itself

23 doesn't really have that application in front of it

24 because you don't have that information either. So I

25 just want to make sure that that's on the record and

1 that you're going ahead over my objection on those
2 issues. Thank you.
3 JUDGE KARLIN: That is on the record,
4 thank you.
5 As to co-counsel situation, we would
6 prefer that there be a lead approach, but if at some
7 point, Mr. Shadis can help address a certain issue, I
8 think we'll try to understand that you're just new on
9 this thing and be liberal in that. So I think we can
10 accommodate the need for that, that situation today,
11 for this proceeding. Later perhaps, once you've
12 gotten fully on board we would perhaps be more
13 restrictive on that.
14 MR. BLOCK: I thank the Board and the
15 parties for that.
16 MR. SILBERG: Judge Karlin, one other
17 thing. We have prepared as the case and many other
18 proceedings, divided responsibility for responding to
19 contentions and discrete legal arguments and we would
20 ask leave of the Board to have my co-counsel address
21 some of the discrete issues.
22 JUDGE KARLIN: It's our preference to have
23 one counsel address all the issues, so I would
24 appreciate it if they could handle it in that way.
25 Any other preliminary matters that need to

1 be raised?

2 All right, well I think therefore we can

3 begin with the formal preliminary legal issues. We

4 have 20 minutes allocated to the State, Mr. Roisman?

5 MR. ROISMAN: Yes, thank you, Mr.

6 Chairman.

7 First of all, Commissioner David O'Brien

8 has arrived and is sitting to the right of Ms. Hofman.

9 I'd just like to introduce him to the Board. We're

10 very pleased that he's here today.

11 Secondly, this speaker on our side isn't

12 worker. We can hear you and the other parties fine,

13 because we're so clear, but we don't know how well

14 people who are directly behind us are able to hear.

15 There doesn't seem to be any sound coming out.

16 JUDGE KARLIN: Thank you for noting.

17 Let's see if we can get audio-visual to help us there.

18 In the meantime can you tell us how much of your 20

19 minutes you will allocate to rebuttal?

20 MR. ROISMAN: With regard to the legal

21 arguments?

22 JUDGE KARLIN: Preliminary legal issues.

23 MR. ROISMAN: In light of what Member

24 Rubenstein said, my rebuttal will be short, I think.

25 I can read the handwriting on the wall and my opening

1 statement will also be much shorter than the 20
2 minutes. I don't think I'll need more than three or
3 four minutes at most to respond.
4 JUDGE KARLIN: So you're going to reserve
5 four minutes for rebuttal?
6 MR. ROISMAN: Yes, but I won't use all of
7 the remaining 16 in the opening.
8 JUDGE KARLIN: That includes our
9 questions, you know.
10 MR. ROISMAN: I understand. And I'll be
11 here to answer your questions all the way up to 16
12 minutes' worth.
13 JUDGE KARLIN: Okay.
14 MR. ROISMAN: Thank you. We're very
15 pleased, the State of Vermont is very pleased that the
16 Board has come here to hear these arguments. We know
17 this is not always done. Sometimes you hear them back
18 in Washington and the State is very grateful. You may
19 notice even our trees got dressed up for you.
20 JUDGE KARLIN: Very nice.
21 MR. ROISMAN: So we consider this very
22 significant. This hearing and what we hope will be
23 the subsequent hearing that the Board orders on the
24 admitted contentions is extremely important to the
25 State of Vermont. The State has raised very serious

1 questions about the proposal and we believe that the
2 only way to adequately address those questions is
3 through an evidentiary hearing held pursuant to the
4 rules and regulations of the Commission. The State
5 believes that that is the most efficient and effective
6 way to deal with these serious questions.
7 And obviously, the first step in the
8 process is to determine whether or not the contentions
9 are admissible. As Member Rubenstein has pointed out,
10 this is not a hearing for determining the merits of
11 the contentions, but with due respect, the issue of
12 what constitutes determining the merits and not
13 determining the merits is quite controversial as the
14 Members are aware because it was Judge Young who just
15 recently wrote a dissent, in which Member Rubenstein
16 was in the majority, in which she said that the
17 majority -- and this is in the matter of Duke Energy
18 Corporation, the McGuire and Catawba case, LBP 03-17,
19 October 7th of 2003 in which she was critical and felt
20 that the two Technical Members had gone beyond that
21 scope.
22 My point is not to say to Mr. Rubenstein
23 that I know that she was right and he was wrong, but
24 merely to point out that this is a difficult line to
25 draw and I want to suggest what I think is the

1 touchstone that may help guide the Board in making
2 this decision.
3 First, is the contention specific? I
4 think, as you will see, as we discuss through here,
5 that there's not an issue about whether or not the
6 State has made specific contentions within the meaning
7 of the regulation. The controversy has been whether
8 or not the State has provided the bases that are
9 supported, that would indicate that there's a genuine
10 issue to decide with regard to the contention. And
11 that's where the problem can come in and that's where
12 I think the touchstone that I'm going to suggest would
13 apply.
14 First thing is the basis must make sense.
15 It must be a rationale -- basis, almost by definition,
16 incorporates the idea of rationality. So if a
17 contention is made and someone gives as a reason for
18 it something that doesn't logically hook up, then
19 that's not a good basis. And it shouldn't be
20 considered as an adequate basis to support the
21 contention. So the first thing is it should be
22 logical.
23 And the second thing is there should be
24 some evidence that it's correct. Not conclusive
25 evidence. Not that when you weigh the evidence

1 presented by the proponent of the contention against
2 the evidence presented by the opponent of the
3 contention, you think that the proponent is likely to
4 win or lose, but just have they put up evidence which
5 is correct, will end up supporting that basis which
6 rationally supports the contention.
7 Now again, the evidence has to have itself
8 some basis. It can't just be made up. The party
9 can't assert that something is correct and provide
10 nothing that would support that. In the case of the
11 State, as you know, we have included extensive
12 references, attached a lot of documents to our
13 pleadings, but on top of that, all of the factual
14 statements that are contained are supported by the
15 State's Nuclear Engineer.
16 In most Courts of law, which admittedly
17 this is not, the general rule is that if there is an
18 expert witness who gives an opinion with regard to a
19 matter in controversy, that opinion, by itself, meets
20 the prima facie requirements for that issue. So in a
21 Court of law, summary judgment would not be granted in
22 the face of an expert opinion.
23 So we submit here that what we had
24 submitted to the Board is an adequate supporting
25 evidence, by no means all the supporting evidence, an

1 adequate basis, by no means all the bases, that
2 support the specific contentions that we will put
3 forward.
4 Now the case law that supports this view
5 that the Board, in effect, should be biased in favor
6 of the admissability of a contention where there is a
7 rational basis and some supporting evidence includes
8 --
9 JUDGE KARLIN: May I stop you for a
10 minute?
11 MR. ROISMAN: Yes.
12 JUDGE KARLIN: In terms of basis, yes, the
13 rule requires basis now. If you have a contention
14 that's supported by basis A and say it's admitted, at
15 some point can you then add basis B, C and D to try to
16 argue that, if it's not new, not something that comes
17 up new and later, that is, fits the criteria of newly
18 discovered or available information, but some other
19 pre-existing that you don't put out on the table right
20 now for us to understand, but later bring in and seek
21 to bring in.
22 Are you arguing that that's permissible?
23 MR. ROISMAN: Yes. Yes, we do. The case
24 that probably best illustrates that and I might add
25 that we have found extraordinarily helpful,

1 particularly for someone like myself who --

2 [P.A. system failure.]

3 JUDGE KARLIN: Stop the time clock.

4 (Pause.)

5 JUDGE KARLIN: I think we're back. All

6 right, go on ahead. I'm sorry.

7 MR. ROISMAN: An odd place to get stopped.

8 I was about to complement the Staff.

9 (Laughter.)

10 So I assume they had nothing to do with

11 this electrical failure. Anyway, what I was going to

12 say is that these compilation of Commission decisions

13 that the Staff has put together and made publicly

14 available, are extremely helpful and in that regard,

15 the Staff has in that summary cited the Georgia Power

16 Company case at 40 NRC 37, and they state this

17 principle which I think is the principle that we

18 believe is appropriate. "Once a contention has been

19 admitted, Intervenor may litigate a new basis for the

20 admitted contention, falling within the scope of the

21 contention without meeting the five-prong test for a

22 late-filed contention. The test for admitting the new

23 basis is whether it is timely to consider the new

24 basis in light of its seriousness and of the

25 timeliness in which it has been raised. The more

1 serious the safety implications of the proposed new
2 basis, the less important delay in presenting the
3 basis."
4 JUDGE KARLIN: Right, and you cited that
5 in your brief, if I remember correctly or it was cited
6 somewhere in the reply.
7 MR. ROISMAN: That is correct.
8 JUDGE KARLIN: Okay, I took that to be
9 more of a -- dealing with newly identified information
10 that came up later because of the timeliness issue
11 that they raised there, but okay, that's the best
12 we've got in terms of that issue.
13 MR. ROISMAN: Yes.
14 JUDGE KARLIN: Is that the best we've got?
15 MR. ROISMAN: But I think that the
16 Commission's regulations which call for a very brief
17 statement of bases and nowhere calls for a statement
18 of all the bases --
19 JUDGE KARLIN: Well, it does say a
20 statement of the basis, not a basis, the basis. So
21 how do we deal with that language?
22 MR. ROISMAN: Yes. Well, I think the
23 problem arises in the context of what is the
24 Commission, what is this Board doing when it rules on
25 the admissability of the contention. If we lay out a

1 contention, as we have, and we list three or four or
2 five bases and you all decide that you don't think two
3 of those are very good, that is, they alone wouldn't
4 be sufficient to sustain admitting the contention, but
5 the other three do, I think all you're doing is you're
6 saying, keeping in mind that the issue is not
7 admissability of bases. There's nothing in the regs
8 to say that you're to be ruling on admissability of
9 bases. You're saying the contention now is
10 admissible, because you've given us three reasons that
11 we consider to meet whatever test has been laid down
12 for that. That seems to me to imply that the focus is
13 on the contention coming in.
14 Now I don't have any problem with the
15 proposition that trivial bases that don't have any
16 serious implications shouldn't be considered just
17 because someone raises them later, but I think that
18 once the Board has decided that this issue, let's take
19 the issue being whether or not there are too many
20 uncertainties associated with the debris blockage such
21 that containment over pressure would not be
22 appropriate to use, once you've decided that that's an
23 important safety question that needs to be resolved,
24 it would be counter to the mission of the Board and
25 the Agency to say well here's an important

1 consideration that enters into that, but you could
2 have raised it back when you first made your
3 contention, therefore you can't raise it now. You
4 would be substantively blinding yourself to something
5 that you would acknowledge is relevant and pertinent
6 to the question.
7 So I don't think the timeliness question
8 is as critical as it would be about bringing in a
9 whole new contention where we acknowledge, as we've
10 done when we filed this sixth contention has to be
11 made.
12 JUDGE KARLIN: May I ask another question?
13 You raised issues about the status of the Staff,
14 whether they're a party or not. Why is that important
15 to you?
16 MR. ROISMAN: Okay, because we take
17 seriously these words that the Commission wrote in its
18 Statement of Considerations adopting the current rules
19 of practice, the ones that we're operating under.
20 They said that the purpose of these were improving
21 management and the timely completion of proceedings.
22 So we ask ourselves the question, how does the Staff's
23 participation in the proceeding fulfill that goal? If
24 the Staff has a position, that is, if it's taking a
25 part in the proceeding as a party, then it has every

1 right to come in and state its position, the same as
2 we do and the same as the New England Coalition does
3 or anybody else who has a position that they want to
4 take.
5 If, however, the Staff says well, we're
6 not a party, therefore we're not subject to any of the
7 requirements that apply to parties, but we would like
8 to kibbutz. We'd like to give you our thoughts on
9 different issues, that I think is disruptive in delay
10 because we have to respond to it.
11 JUDGE KARLIN: Well, let me ask this,
12 isn't that exactly what the State wants to do insofar
13 as participate as an interested state and at the same
14 time raise contentions that the Staff and the
15 Applicant argue you can't do both, it's either or?
16 MR. ROISMAN: Number one, the State is
17 given the right to do that by statute. Staff is given
18 no such right anywhere in the statute to the
19 regulation.
20 Number two, the State's position doesn't
21 have to be and we've not indicated that it would be
22 that if we exercised our rights under Section 274.L
23 that we would not come in and take a position, in
24 other words, that we would come in only as a kibitzer.
25 In fact, in our initial pleading we indicated that if

1 we came in under 274.L we would voluntarily identify
2 the contentions that we cared about which we've done,
3 and subject ourselves to the requirement that we
4 submit cross examination plans and do all the other
5 things that a party would have to do.
6 Now the way the Commission's rules are set
7 up, we haven't yet reached the rubicon of deciding of
8 whether we come in under 274.L or under 309, because
9 the process says the State doesn't announce its
10 position, at least under the Commission's regulations,
11 until the Board has ruled as to whether there's going
12 to be a hearing and has decided what the contentions
13 are. So we haven't really even reached that point,
14 but I can assure you that when the State, if it
15 chooses to do that, it will not be in a position as
16 the Staff was here.
17 If you look at the Staff's answer and
18 remember what they said during our telephone
19 conference a few days ago, they said we've not taken
20 a position on the admissability of the contentions.
21 We didn't say that we agree that contention 2 or
22 contention 3 are admissible. And I went back and I
23 looked and there's some ambiguity there, but I'll give
24 the Staff that they didn't say that in so many words.
25 But they did say that contention 1 and contention 4

1 and contention 5 were not admissible.

2 Now I submit no good is served by allowing

3 the Staff to take a position whenever it's opposed to

4 an Intervenor, but never to take a position when it

5 might support an Intervenor. And it's that kind of

6 disruptiveness that I think is caused by the Staff.

7 I would welcome the Staff in the hearing. I think

8 they have a lot to offer, but I want them to stand up,

9 raise their hand and say we want to be a party.

10 JUDGE KARLIN: I understand that.

11 MR. ROISMAN: If they want to do that,

12 that's fine with us.

13 JUDGE KARLIN: I understand part of your

14 argument is that the regulation prescribes that any

15 party may file an answer to the proposed contentions

16 and that by filing an answer the State has made itself

17 a party?

18 MR. ROISMAN: The Staff.

19 JUDGE KARLIN: Yes, the Staff, I'm sorry.

20 MR. ROISMAN: That's correct. Yes.

21 JUDGE KARLIN: Okay, two minutes.

22 MR. ROISMAN: You, through your questions,

23 have covered everything that I was going to cover,

24 unless other Members of the Board have questions.

25 JUDGE KARLIN: No. Okay, thank you.

1 MR. ROISMAN: Thank you.

2 JUDGE KARLIN: Where do we go next? New
3 England Coalition.

4 MR. BLOCK: Thank you, Mr. Chairman. We
5 concur with Mr. Roisman's introductory remarks as well
6 as his substantive remarks. I'm not going to waste
7 time by repeating the arguments that he's made so well
8 to the Board. We certainly agree. I wanted to add
9 a point here and there, however.

10 One thing I think supports his argument
11 about the bases is the fact that the Board has sua
12 sponte authority to take up matters that it finds that
13 perhaps have not been properly addressed by the party
14 but are contained in the material before the Board
15 when there is an issue that would be outcome
16 determinative on the Atomic Energy's requirement that
17 the Commission act in a way that will make decisions
18 that assure that there is adequate protection for
19 occupational and public health and safety. And so
20 that sua sponte authority, I think, is a parallel to
21 the fact that when there is a basis provided, that may
22 have additional support in the record materials that
23 are there that were not brought up at the time, that
24 that should be something that is properly available.
25 Because if it weren't, why would you then provide the

1 authority to the Board to be looking at that entire
2 set of material and, in fact, while there is, I
3 recognize, some limitation on the Board's authority to
4 do that and the Commission has been clear, it's also
5 been clear about the parameters that I've described
6 for guiding the Board in exercising that authority.
7 So I think that's a support.
8 I also think that the issue of the Staff
9 and the way in which they participate is something
10 that has concerned us as well, although we hadn't
11 raised it as a separate issue. Among the things that
12 concern us are the amount of time that the Staff has
13 to look at this process in reviewing it and the fact
14 that they're actively involved in reviewing the
15 application. They have some 10 months to do this.
16 The public has a couple of months and we're wondering
17 about the long-term effect. They've just told the
18 Board that they're going to have the application under
19 an extended review. And yet, they're here. What
20 would they be defending if they haven't made a
21 decision yet? What would their position really be?
22 And we too, welcome them, but I too, like Mr. Roisman,
23 would like to see them assert themselves as a party or
24 else absent themselves and I find it anomalous that
25 they are continuing to process the information,

1 theoretically objectively and I'm sure the Applicant
2 hopes that's the case and yet they're here. And may,
3 in fact, be swayed by the brilliant arguments that we
4 offer and that Mr. Roisman offers so that they would
5 tend to prejudice their review of that application.
6 So it seems to me that it's an odd
7 situation at best that they be present in the way they
8 are.
9 I'm also concerned that they continue to
10 be present as adversaries of the public and we've yet
11 to be in a proceeding where that wasn't the case. And
12 the fact that they dane to support a contention here
13 and there or part of a contention or whatever is very,
14 very little solace for the overall hostility that we
15 find from the Staff when they're out representing the
16 Staff's interest in contradistinction to the public
17 and the public's interest which we feel that we're
18 representing in the proceeding.
19 I think that's all I had on this point.
20 Thank you.
21 JUDGE KARLIN: All right, thank you. Mr.
22 Silberg?
23 MR. SILBERG: Thank you, Your Honor. In
24 many ways I agree with Mr. Roisman's characterizations
25 of the standards for contentions. There are a couple

1 of key areas where I differ significantly. Clearly,
2 they are intended to deal with serious questions.
3 Clearly, one is not required at this stage of the
4 process to set forward all your evidence as basis for
5 a contention. Clearly, there must be some evidence
6 supporting a basis.
7 However, I strongly disagree with the
8 factual predicate that Mr. Roisman stated which is
9 that there is no question as to whether a contention
10 or a contention that's presented here are specific.
11 We would respectfully disagree and believe that none
12 of the contentions taken by themselves are specific.
13 Indeed, the Commission's rules are quite
14 clear that one looks to the bases to determine whether
15 a contention is specific enough. As the Commission
16 stated in the Baltimore Gas decision, CLI 9825, the
17 bases provide the specificity necessary for a
18 contention's admission. And coincidentally, in a
19 Vermont Yankee Licensing Board decision, LBP 88-25,
20 the Board said that the scope of the contention is
21 determined not only by the literal terms of the
22 contention, but coupled with its stated bases and as
23 the Appeal Board said in the Public Service of New
24 Hampshire case, there's no good reason not to construe
25 a contention and its bases together to get a sense of

1 the precise issue that the Petitioner wants to raise.
2 If we read the contentions by themselves,
3 we simply can't tell what the issues are and in fact,
4 that was one of the reasons that we went through the
5 effort that we did to try to restate the contentions,
6 to make them specific enough so that we could
7 understand them. We recognize that that was a
8 voluntary effort on our part. It was certainly
9 voluntary on the part of the other parties as to
10 whether they wished to participate in that effort or
11 not and we respect their views that they did not seek
12 to participate.
13 JUDGE KARLIN: May I ask, with regard to
14 the basis versus contentions, surely you agree with
15 Mr. Roisman that what we are here to do is evaluate
16 the admissability of the contention, not the
17 admissability of the basis and that all is really
18 needed is a brief statement of the basis for the
19 contention.
20 MR. SILBERG: I think it's more than that.
21 If one looks at 2.309(f) there are perhaps 10 or 11
22 tests that the contentions must meet.
23 JUDGE KARLIN: Yes.
24 MR. SILBERG: You've described some of
25 them.

1 JUDGE KARLIN: Right.

2 MR. SILBERG: It's more than that, but

3 basis is one of them and that's what we're focusing on

4 now.

5 And it also needs to include facts or

6 expert opinions, it has to specify sources and

7 documents. It has to reference the parts of the

8 application. It has to set up a genuine dispute. But

9 there must be some basis to the basis. We can't just

10 say -- well, take for a statement and it's not an

11 evidentiary presentation, there has to be something

12 there there. And in many of the cases as we'll

13 describe as we go through the contentions, there are

14 documents that are described that purport to support

15 the basis, but when one looks at the documents they

16 don't, in fact, support, or they don't reflect the

17 entire picture.

18 The Commission has made it very clear that

19 an Intervenor has an ironclad obligation to reflect

20 what is in the documents that it reviews. When a

21 party has access to the documents and possession of

22 the documents and cites the documents, certainly an

23 adequate basis is not one that takes a half a loaf and

24 ignores the rest of the story.

25 When you cite a document that says there's

1 a problem, problem X and you set that forth as your
2 basis or as supporting your basis and then the rest of
3 the document says that problem has been solved, that
4 problem is no longer relevant, certainly that does not
5 constitute an adequate basis.
6 JUDGE KARLIN: Right. I agree if there's
7 something in a document which negates and resolves an
8 apparent issue at the beginning, but certainly the
9 basis doesn't have to be dispositive on the merits or
10 even close. It just has to be some evidence, some
11 basis that would support it.
12 MR. SILBERG: That is correct and we made
13 it very clear that the purpose here was not to argue
14 whether our evidence was better than their evidence
15 because at this point in the process there really is
16 no quote evidence.
17 What we're here to look at today is the
18 quality of the submission that the parties have made..
19 Have they met the standards in the Commission's
20 regulations as explained by the decisions of the
21 Licensing Board, the former Appeal Board and the
22 Commission itself? We have here a situation and Mr.
23 Roisman referenced it whereas a statement by a person
24 described as an expert in and of itself is enough to
25 provide a basis. We don't think that that's correct.

1 We think the case law that we cited in our
2 brief is clear that even an expert, an unsupported
3 opinion by an expert is not adequate. And in this
4 case where we have, in essence, a one sentence
5 statement in an affidavit that says everything in the
6 pleadings is true and correct, unless there's some
7 basis, some support set forth, that in itself is not
8 enough.
9 JUDGE KARLIN: Let me ask you on that,
10 I've seen that practice occur, a one sentence
11 affidavit saying I endorse everything that's in the
12 request for a hearing.
13 Is there any case law that says that
14 that's not permissible?
15 MR. SILBERG: I think the case that I
16 referenced which says an unsupported statement, even
17 by an expert is not enough to allow the admission of
18 a contention, that's the Grand Gulf --
19 JUDGE KARLIN: Right, but there's no sort
20 of generic decision that says this practice of single
21 sentence endorsement of a pleading --
22 MR. SILBERG: I don't have a problem with
23 that, but a single sentence endorsing an unsupported
24 statement, I don't think meets the test and that's the
25 point that I was making.

1 JUDGE KARLIN: Okay.

2 MR. SILBERG: If you have a single
3 statement that supports a well-defined basis and
4 contention, I think that would be acceptable. But
5 here, where we're talking about a specific contention
6 and you have to have a specific contention with a
7 supporting statement that provides the basis and that
8 was in the Statement of Considerations the Commission
9 issued in 1989 when it revised the contentions rules.
10 And those rules were intended to be more specific and
11 more restrictive than what had been the practice
12 before.

13 The Commission was very explicit that it
14 wanted to tighten up the proceedings and I believe the
15 Commission has used similar terminology in some of its
16 decisions in terms of the strictness.

17 Here we think that the Board needs to
18 determine whether the petition, taken as a whole,
19 meets those standards. I think when you look at the
20 individual contentions, you will find that the
21 contentions standing by themselves do not meet the
22 standards that are set forth in the regulations. The
23 only chance that they have as you read it together
24 with the basis and supporting evidence and we've gone
25 into some length to describe why that combination is

1 not enough.

2 With respect to your question about can

3 they add late bases, again, the contention that's

4 admitted has to be specific enough. If an Intervenor

5 were to propose a contention that says the plant is

6 unsafe and then he had 90 bases after that talking

7 about specific technical problems, and the Board were

8 to throw out all but one of those, the contention we

9 believe would be limited to that one admitted basis.

10 Because the contention that said the plant is unsafe

11 is simply by itself too broad, too unspecific, too

12 unparticularized to be admitted.

13 If you were later to come in with another

14 basis, if that basis is related, has a close enough

15 nexus to the contention and its basis, as admitted, we

16 don't have a problem. But if one takes a new basis on

17 a late-filed -- in a late-filed fashion, and seeks to

18 broaden the scope of what has been admitted and what

19 has been admitted in our view is the contention as

20 defined by this specificity of its basis, then we

21 think that that filing must meet the standards for

22 late-filed contentions. Those are laid out in the

23 regulations. They're well understood by the parties.

24 And we don't think we can use a late-filed basis to

25 broaden the scope of what the Board has admitted.

1 JUDGE KARLIN: Okay.

2 MR. SILBERG: One other point. On the

3 Board's sua sponte authority, raised by the Coalition,

4 the Board clearly has sua sponte authority. That

5 authority is spelled out. It is clear the Board

6 determines that it needs to exercise that authority.

7 The mechanism for doing so to refer the matter to the

8 Commission. We think that's the appropriate course of

9 action. We think that's what the regulations call for

10 and nothing more.

11 JUDGE KARLIN: May I ask a question? Have

12 you taken the position in the pleadings? I thought

13 you did with regard to the State's participation qua

14 State versus participation as a party.

15 MR. SILBERG: Yes, we have. I thought we

16 were going to deal with that at the end. I'm happy to

17 deal with that now.

18 JUDGE KARLIN: Yes, certainly the type of

19 hearing that we have is a separate issue, 274.L. I

20 was focusing more and perhaps on an argument that the

21 State can either participate as a state or they can

22 raise contentions and the moment they raise

23 contentions, it's alleged their status as a state

24 disappears and they're just like any other party.

25 MR. SILBERG: That's correct. And we

1 think --

2 JUDGE KARLIN: Where is it written? Where

3 is there a reg or a case that says that?

4 MR. SILBERG: The uniform practice of the

5 Commission since I started practicing before 1969 has

6 been that a state may seek to participate as a state,

7 or that it may seek to participate as an Intervenor.

8 I'm not aware of a regulation that deals with that,

9 but I am unaware of any case in which a state has

10 tried to straddle the fence and be in two places at

11 once.

12 JUDGE KARLIN: Okay, there's no law or

13 cases that you're citing to me and maybe other parties

14 can, but what's the reason for that? It seems to me

15 that the State would have an interest in participating

16 and a right to participate under the statute and under

17 the regs and then let's say the State wants to raise

18 a few contentions because they have some points they'd

19 like to make. Let's say there's a hearing going to be

20 granted anyway. Does the State suddenly lose its

21 status as qua state? Why? What's the reason for

22 that? Why should they?

23 MR. SILBERG: I think it could certainly

24 seek to convert its status from that of an interested

25 state under 2.7315(c) to an Intervenor. However, it

1 would have to play by the same rules that anyone else
2 does.
3 JUDGE KARLIN: Let's assume they play by
4 the proper rules with regard to their contentions and
5 with regard to the rest of the proceeding they play by
6 the proper rules by being a state. Is there some
7 problem I'm not seeing as why it can't work that way?
8 MR. SILBERG: Well, one of the
9 requirements that they would have to make in playing
10 by the same rules is to file as a late party and show
11 why their late participation was justified. They
12 would be coming in as an Intervenor, untimely. They
13 would be raising contentions, untimely.
14 JUDGE KARLIN: Well, they've raised
15 contentions here in this case.
16 MR. SILBERG: That's correct, but I
17 thought what you were postulating was that they come
18 in as an interested state and then seek to convert
19 their role from interested state to full participant.
20 JUDGE KARLIN: Well, that's kind of what
21 the State seems to have said here. Look, we're an
22 interested state. We want to participate, and oh, by
23 the way, just to be nice we're going to let you know
24 we're interested in these five contentions, but we're
25 not giving up our status as a state.

1 MR. SILBERG: I don't think they can have
2 it both ways because as an interested state, they
3 don't get the chance to specify contentions.
4 JUDGE KARLIN: Yes, but I look for the law
5 --
6 JUDGE BARATTA: Yes, but what's the basis
7 for your statement in that regard? You said there was
8 nothing in the regulations that precluded that.
9 MR. SILBERG: The regulations say what an
10 interested state does.
11 JUDGE BARATTA: But there's nothing that
12 says what they can't do, is there?
13 MR. SILBERG: Three -- the requirements to
14 be a party to raise contentions are the requirements
15 in 2.309(f). The requirements to be an interested
16 state are in 2.315(c). And 2.309(d) says that
17 providing that a state seeks to become a party, must
18 file a petition to intervene that meets the
19 requirements of 2.309(f).
20 JUDGE KARLIN: What was that reg you just
21 cited?
22 MR. SILBERG: 2.309(d).
23 JUDGE KARLIN: D. Okay, (d) as in dog.
24 D as in dog.
25 MR. SILBERG: 2.309(d).

1 JUDGE KARLIN: Okay, so state does file
2 pleadings and it meets all the criteria for
3 contentions. Does that mean it's no longer able to
4 participate as a state? I guess that's the question
5 we ask.
6 MR. SILBERG: I think it's a fish or fowl
7 situation. Clearly, the requirements, the statutory
8 requirements under which 2.315(c) are based, Section
9 274.L, require that the NRC provide a reasonable
10 opportunity. It's not full opportunity and the
11 Commission clearly has the discretion to define what
12 is meant by a reasonable opportunity to participate
13 and they've done that in the regulations.
14 JUDGE KARLIN: Is this analogous to the
15 State's problem with the Staff that on the one hand
16 they want to be sort of a broad-ranging kibitzer, and
17 on the other hand they want to be a party and
18 participate with regard to specific issues?
19 MR. SILBERG: I think that's a good
20 analogy. It's also perhaps the cherry picker analogy
21 that the Department has used in some of its
22 contentions. I think you have to make an election.
23 I don't think there's any provision that says you can
24 be an Intervenor and an interested state at the same
25 time. It would be as if the Applicant wanted to be an

1 Applicant and an Intervenor at the same time. Or if
2 the licensee happened to be a state agency that you
3 could be the Applicant and an interested state at the
4 same time. You are a party one way or the other, but
5 not both.
6 JUDGE KARLIN: All right. Could you
7 address this problem I have or issue with regard to
8 contentions and this is not a Motion for Summary
9 Disposition.
10 MR. SILBERG: Correct.
11 JUDGE KARLIN: This is not an issue on the
12 merits.
13 MR. SILBERG: Correct.
14 JUDGE KARLIN: This is not notice pleading
15 like under the Federal Rules of Civil Procedure.
16 MR. SILBERG: That too is correct.
17 JUDGE KARLIN: But the closest analogy I
18 come up with is, you know, a Motion to Dismiss under
19 12(b)(6), for example.
20 Isn't there law to support what we have to
21 -- pleadings need to be construed in favor of the
22 Petitioner/Intervenor at this point, if there are any
23 inferences to be made?
24 MR. SILBERG: I think the Commission in
25 adopting the restated Part 2 in 1989 made it clear --

1 JUDGE KARLIN: The strict by design?

2 MR. SILBERG: That is correct. And I

3 think while one can lean over in a variety of

4 directions in evaluating, I don't necessarily believe

5 that any party gets the benefit of the doubt. I think

6 the tests are set forth in the regulations. I think

7 the tests are set forth in decisions that interpret

8 the regulations. And I think that's what needs to be

9 applied.

10 I have no further comment.

11 JUDGE KARLIN: Any questions?

12 JUDGE RUBENSTEIN: No.

13 JUDGE KARLIN: Thank you. Thank you, Mr.

14 Silberg.

15 MR. ROISMAN: Excuse me. I've gotten a

16 note from someone in the audience that indicates that

17 people in the audience are having a hard time hearing.

18 I had a little trouble hearing Mr. Silberg, but he's

19 fairly clear.

20 (Applause.)

21 I think it has to do with the fact that no

22 sound is coming out of this speaker over here.

23 JUDGE KARLIN: I appreciate that. I think

24 one thing we can all do is perhaps bring the mics a

25 little closer. I think that might help.

1 Is sound coming out of this speaker? Yes.
2 It's on.
3 (Pause.)
4 We're going to try to take a break in a
5 minute, but I'd like to have the Staff be able to
6 address this issue.
7 That's on. Okay, great. I appreciate --
8 let us know if the sound is not sufficient and we'll
9 all try to address that. Thank you. And the
10 audience, too.
11 We'll proceed and try to get the Staff to
12 address this issue in the time it has and any reply
13 and then we'll take a break at the end of this
14 section.
15 Ms. Poole?
16 MS. POOLE: Thank you, Your Honor. I
17 think first, we'd like to address the role of the
18 Staff in this proceeding since that issue has been
19 raised. I'll try to be louder.
20 The Department states that pursuant to
21 Section 2.309(h), the Staff is deemed to be a party
22 and the Staff's right to file an answer in this
23 proceeding is dependent upon its having party status.
24 The Staff has read and understands the language of
25 Section 2.309(h)(1), but we nonetheless take the

1 position that there are no parties to this particular
2 proceeding, unless and until the Licensing Board
3 grants a hearing on this matter. At that time,
4 pursuant to 10 CFR Section 2.1202(b)(2), the Staff
5 shall notify the Licensing Board and the parties
6 whether it desires to participate as a party and will
7 identify the contentions --
8 JUDGE KARLIN: May I ask what section was
9 that?
10 MS. POOLE: That's Section 2.1202(b)(2).
11 It's in subpart L of the Rules of Practice.
12 JUDGE KARLIN: So that presumes it will be
13 under subpart L?
14 MS. POOLE: It does presume it will be
15 under subpart L.
16 JUDGE KARLIN: Well, okay.
17 MS. POOLE: I understand that that's an
18 issue, but that's what we're presuming.
19 I'd also say that the Department cites to
20 the Statements of Consideration for the recent
21 revisions to the Commission's Rules of Practice for
22 the proposition that the Staff should not set forth a
23 position on or otherwise assume an advocacy position
24 with respect to the contested matter in the
25 adjudication before the Licensing Board.

1 In fact, the quoted discussion refers to
2 a subpart L provision, Section 2.1202(a) which
3 requires the Staff to provide notice to the Licensing
4 Board of its action on the application for which a
5 hearing has been provided. That provision, of course,
6 is not at issue in this proceeding.
7 As stated elsewhere in the Statements of
8 Consideration, and here I'm referencing 69 Federal
9 Register at page 2187, it is true that in proceedings
10 where the Staff is a party, the Staff may not be in a
11 position to provide testimony or take a position on
12 some issues until the Safety Evaluation Report and
13 environmental review documents have been finalized.
14 In the event a hearing is granted and the Staff elects
15 to participate as a party, and it is true that in
16 saying this I'm assuming a subpart L proceeding. The
17 Staff -- but in any event this is true -- the Staff
18 will not take a final position on the merits of any
19 contested matters until the Safety Review has been
20 completed in the areas that are relevant to contested
21 matters that are at issue.
22 The governing regulation is 10 CFR Section
23 2.337(g)(2). If we're not a party to the proceeding,
24 we'll provide the Safety Evaluation and the relevant
25 ACRS report pursuant to Section 2.337(g)(3).

1 I want to clarify that in our answer the
2 Staff did not take a position on the merits of the
3 contentions themselves, but rather made legal
4 arguments as to admissability. I'd like to say also
5 to clarify a couple of points raised by the Department
6 and the Coalition in their oral arguments this
7 morning, it's not quite correct to say that we didn't
8 take a position in the phone call last week with
9 respect to admissability of contentions. We certainly
10 did do that. I think our papers are clear.
11 I believe what Mr. Roisman references was
12 a statement I made that we didn't object to, as
13 opposed to supported admission of a contention. That
14 was all that was.
15 I also wanted to address that we don't
16 feel we're adversaries to the public at all. We want
17 to put that on the record. We feel at this stage of
18 the proceeding that the Staff is in a way a keeper of
19 the regulations and when we address admissability of
20 contentions, we're really, we feel that we're
21 dispassionately considering whether the regulations
22 have been complied with in this proceeding and that's
23 what our pleadings refer to.
24 JUDGE KARLIN: We like to think that's
25 what we're doing too.

1 MS. POOLE: Yes. And if we do participate
2 later, our advocacy position that we would take would
3 be to represent positions the Staff has taken with
4 respect to the safety evaluation performed on this
5 matter.
6 I'd like also to speak briefly on the
7 matter of admissability of contentions. We do think
8 that the contention and admissability standards have
9 been well briefed and we won't discuss what's in our
10 papers. The only additional point that we would make
11 in which the Department has stated the Licensing Board
12 lacks the authority to rule on a basis, the Staff
13 takes the position that was recently articulated in
14 the Catawba proceeding that when determining the scope
15 of a contention, one looks not only to the contention
16 itself, but also to the bases provided for the
17 contention. We believe the bases clarify and limit
18 and define the scope of a contention. That's the way
19 we formulated our answers.
20 JUDGE KARLIN: So if there's a contention
21 admitted on basis A and later they seek to bring in
22 basis B and C, under any circumstances would that be
23 admissible?
24 MS. POOLE: If it satisfied -- the Staff
25 takes the position that that would be subject to the

1 late filing rules and it could be admissible if late
2 filing --
3 JUDGE KARLIN: So it could only be
4 admissible if it's a late-filed contention?
5 MS. POOLE: No, we think a late-filed
6 amendment to the contention would also, to an admitted
7 contention would also be subject to the late filing
8 rules.
9 JUDGE KARLIN: Where is that in the regs?
10 Why do you take that? I mean all that is required
11 that a contention be filed. There's a number of
12 requirements, obviously, and that there be a basis,
13 the basis stated for it. It's different from a
14 contention. Basis and contention aren't the same. So
15 late-filed contentions are not the issue.
16 MS. POOLE: No, I understand. We look at
17 Section 2.309(f)(2), we note -- it states the
18 contentions must be based on documents available at
19 the time, etcetera. But we note there's a sentence
20 here and here I'm reading, "otherwise, contentions may
21 be amended or new contentions filed", only if the
22 late-filed standards are fulfilled.
23 So we believe that 2.309(f)(2) references
24 amendments and covers amendments as well as entirely
25 new contentions.

1 JUDGE BARATTA: So it's your position then
2 that additional bases would be an amendment to the
3 existing contention.
4 Suppose it doesn't change the scope of the
5 contention?
6 MS. POOLE: We still think there would
7 need to be a reason why those bases were not preferred
8 in a timely manner.
9 I think we'd still seek to apply the
10 2.309(f)(2).
11 I'd like also to speak briefly to the
12 question that you posed to the Applicant regarding the
13 scope of the State's participation, that is, whether
14 there is a regulation which would preclude a 2.309
15 party from also participating under Section 2.315(c).
16 That is actually addressed in Section 2.315(c) and it
17 was the subject of a recent order by the Licensing
18 Board in the on-going Louisiana Energy Services
19 proceeding.
20 I'm referring specifically to an
21 unnumbered order dated September 14, 2004. In that
22 proceeding a state agency which has been admitted as
23 a party, was also seeking to participate as an
24 interested state on certain matters. The Licensing
25 Board in that case noted and they cited 2.315(c) and

1 that section states, in part, "the presiding officer
2 will afford an interested state which has not been
3 admitted as a party, under Section 2.309, a reasonable
4 opportunity to participate in a hearing."
5 Therefore, the Licensing Board stated in
6 that proceeding, "on its face, this new language" and
7 I would there refer to the clause "which has not been
8 admitted as a party under Section 2.309, precludes
9 participation under Section 2.315(c) by an interested
10 governmental entity that has been admitted as a
11 Section 2.309 party to the proceeding, regardless of
12 the fact that its interested governmental entity
13 participation would involve another party's admitted
14 contentions."
15 JUDGE KARLIN: I'm familiar with that case
16 and I read it. That is not binding precedent from the
17 Commission or any regulation.
18 MS. POOLE: That's correct.
19 JUDGE KARLIN: And I think -- I don't have
20 the command of it right now, I think there are some
21 issues about that. So okay, I'm aware of that
22 decision. Thank you.
23 But what's the reason for that? I mean it
24 seems to me the statute and the regs say that a state,
25 because it's a state, has an opportunity to

1 participate in the hearing without raising contentions
2 or being a party. Then the state has the right, just
3 like anyone else to raise contentions. Why does the
4 fact that it raises contentions suddenly vitiate the
5 statutory and other rights it might have to
6 participate on the other parts of the proceeding?
7 It's sort of a Hobson's choice. You can do one or the
8 other, but why? What's wrong with it because of some
9 difficulty in the ultimately evidentiary hearing that
10 would make it unadministratable or difficult to
11 handle?
12 MS. POOLE: Well, I think the Staff takes
13 the position that Section 2.309 itself provides for
14 equivalent participation rights. Obviously, Section
15 2.309(f) provides for adoption of contentions of other
16 parties which we think the State would be free to do
17 in this proceeding.
18 In addition, since this is not a mandatory
19 hearing, the scope of the hearing will be limited by
20 the admitted contentions and there's nothing barring
21 the State from adopting every single admitted
22 contention, provided any are admitted, that would
23 enable it to participate in a plenary fashion on all
24 issues that we would be addressing.
25 JUDGE KARLIN: So you're saying there's no

1 practical benefit to its retaining its state status?

2 MS. POOLE: We don't think it's necessary

3 of the failure to do so would abridge the right of the

4 State in any way?

5 JUDGE BARATTA: Well, what about the

6 language that's in the Atomic Energy Act which would

7 allow the State to call witnesses and to cross

8 examine? That goes considerably beyond what the

9 parties in the type of proceeding we're looking at

10 would do.

11 MS. POOLE: I think our position is that

12 2.315(c) is the Commission's reasonable interpretation

13 of what the Atomic Energy Act would permit and if

14 you'll give me a moment while I look at Section

15 2.315(c) --

16 JUDGE KARLIN: Well, that's a key point

17 and perhaps that's where this discussion starts to

18 move over into the type of hearing. That's exactly

19 the question.

20 MS. POOLE: I can't address that, but I

21 can do it later if you would prefer to take it up

22 later in the day.

23 JUDGE BARATTA: We can take it up later,

24 if you like.

25 JUDGE KARLIN: That's fine. So that's the

1 practical, one of the key practical differences
2 perhaps.
3 MS. POOLE: I think that the regulation
4 addresses that, but we can address it at the later
5 time. The only other thought that I think we'd like
6 to add is respect to sua sponte contentions. I just
7 want to point out, of course, we agree as is set forth
8 in the Commission policy statement on the conduct of
9 adjudicatory proceedings, CLI 98-12, "a Licensing
10 Board may consider matters on its motion where it
11 finds that a serious safety environmental or common
12 defense and security matter exists."
13 The Commission policy statement indicates
14 that such authority would be exercised in
15 extraordinary circumstances and we just wanted to make
16 note of that.
17 JUDGE RUBENSTEIN: Well, could this
18 question be addressed by certification say of the
19 issue?
20 MS. POOLE: Certainly, certainly, it
21 could. And that's all we have on these matters.
22 JUDGE KARLIN: Thank you. Mr. Roisman, I
23 think you reserved four minutes.
24 MR. ROISMAN: Yes, thank you. I just want
25 to touch on a couple of points. Number one, Entergy

1 makes the argue that the case law imposes an ironclad
2 obligation on the Intervenor and there's some
3 controversy about what that ironclad obligation is.
4 If you read the case, it says it's an ironclad
5 obligation to look at all the relevant material that's
6 available to us. There's no ironclad obligation for
7 us to discuss it all. Our expert was careful to read
8 everything that was readily available to us. Some of
9 it he found useless. He didn't mention it at all.
10 The Applicant and Staff thought that some of that
11 other stuff was relevant. That's why we think this is
12 a disputed issue and why we should have hearing.
13 We'll get down to that when we get down to the
14 hearing.
15 I want to be clear about what the ironclad
16 obligation is. It would absurd to believe that the
17 Commission said that every intervention petition had
18 to include a discussion of every conceivably relevant
19 document. I shudder to think what your file would
20 look like if somebody attempted to do that.
21 Secondly and related to that is this
22 question about whether or not a document should be
23 read in its entirety. Of course, it should be. And
24 there are several documents that are in controversy in
25 this case. What does the document say and what does

1 it stand for? Probably the best example is the Reg.
2 Guide 1.82, Revision 3. And we'll get into the merits
3 of that argument, but I want to point out here that
4 that's precisely the kind of disputes that are why we
5 have hearings, not that you hold a hearing to decide
6 how that dispute comes out. That doesn't mean that if
7 we say well, on the first page of the document it says
8 X and on the last page of the document it says not X,
9 that that's not a relevant way to say the document
10 doesn't support what we say. But I think in every
11 instance you'll see that there's controversy about
12 just how far you can carry this document and whose
13 side does it support.
14 Third, what is the goal of this process?
15 The goal of the process and the Commission has made
16 this clear in its Statement of Considerations that
17 went along with the adoption of the regulations that
18 we're now operating under and this is at page --
19 Federal Register 69, page 2202. "The requirement to
20 have specific contentions with the supporting
21 statement of the facts alleged or expert opinion that
22 provides the bases for them in all hearings should
23 focus litigation on concrete issues and result in a
24 clear and more focused record for the decision."
25 So the real test and when we get to the

1 contentions we'll talk about that is is it clear?
2 Have we made clear what we're talking about? A lot of
3 this argument that we've been having about whether we
4 can amend the bases, we can't amend the bases are
5 abstract arguments. I submit when we get to the
6 contentions there's nothing abstract about it. It's
7 very concrete about what we're saying and maybe some
8 of these controversies are best left to the time when
9 we try to do something, if we do, that the other side
10 thinks we shouldn't do.
11 I'm sorry?
12 JUDGE RUBENSTEIN: I have a question.
13 MR. ROISMAN: Yes.
14 JUDGE RUBENSTEIN: Regarding the ironclad
15 obligation to be aware of all of the available
16 information at the time of formulating a contention,
17 say a word or two on does this obtain for the issuance
18 of a new contention or a change in the scope of an
19 existing contention?
20 MR. ROISMAN: I would think that if a
21 party were going to submit a new contention or seek to
22 amend the test, one of the tests that they would have
23 to meet would be to show that they hadn't had
24 available to them or it wasn't reasonable for them to
25 have available to them other information.

1 Now the body of information here is
2 massive.
3 JUDGE RUBENSTEIN: So the standard is it
4 has to be clearly new information and this would then
5 be subject to the late filing requirements?
6 MR. ROISMAN: I think the standard if it
7 were a new filed contention or an amendment to an
8 existing contention, not a new basis, I think the
9 standard would be that you'd have to demonstrate that
10 it wasn't reasonable for you to have had that
11 information available to you earlier. There could be
12 a lot of reasons for that. It might still be that the
13 information was out there, but for whatever reason,
14 for instance, you heard NEC today talk about the fact
15 that there are RAI amendments that are coming into
16 this application almost daily, but they don't get up
17 on the Adams extension for a much later time.
18 Now the State gets them served on us and
19 so we have them more timely. But NEC does not. So
20 there you have an instance where the information is in
21 existence, but it wouldn't necessarily be reasonable
22 to expect NEC to have relied on it.
23 JUDGE RUBENSTEIN: Thank you.
24 MR. ROISMAN: I want to talk about lastly
25 this question, just very briefly. I know we're going

1 to come back to it, about the state having to make its
2 choice.
3 Section 2.315(c) definitely says the words
4 the Staff counsel cited. What is missing, however,
5 both in the section and in the Statement of
6 Considerations and I made some effort to go back to
7 look at its original history as well, is any statement
8 by the NRC that says this represents our entire effort
9 to identify the way in which a state may participate
10 as an interested party.
11 What we have is not just a regulation.
12 What we're saying is that there's a broader right
13 established by statute. The NRC has carved out in its
14 regulations a subset of that and specified certain
15 provisions that apply to certain states under certain
16 conditions. Well, that doesn't affect all the rights
17 that are given by 274. And we've discussed at length
18 in our reply why we think that the rights that we're
19 talking about apply.
20 Again, I want to stress this may turn out
21 to be moot. It may not be that there is anything else
22 that the State wishes to raise. But by the same
23 token, we didn't want our filing of contentions to
24 abrogate our rights.
25 JUDGE KARLIN: Time is up. Thank you.

1 MR. ROISMAN: Thank you.

2 JUDGE KARLIN: I didn't ask you, Mr.
3 Block, before you began whether you sought to reserve
4 any of your time for rebuttal, so I thought that -- I
5 think you took less than the 20 minutes, so I would
6 give you say four minutes, if you have anything you
7 want to say? If you don't, we can take a break.

8 MR. BLOCK: I don't want to hold up that
9 break, but I think I only have one or two points that
10 I wanted to address here.

11 I note that the Staff had cited 2.1202(a)
12 which is under subpart L and mentioning that they have
13 an obligation to notify the Board when it takes
14 actions of various kinds. And I wonder about the
15 documents that have been withheld in this case that
16 are not available in Adams, that are in their hands,
17 but they're holding the release date on them.

18 I also think that Mr. Roisman's statement
19 is only partly correct, that there are -- in addition
20 to RAIs, other information that's being used to
21 supplement the license and these license supplements
22 when you look at what's available in Adams up until I
23 believe it's the 18th or the 19th of this month, just
24 the other day, and on the website where it has the
25 application laid out, it goes supplements 1 through 13

1 and 15; 14, 16; 17, 18, 19, 20, all waiting to be
2 released, 16 having been released the other day.
3 So it really is an interesting question as
4 to where the Staff's obligations lie in terms of
5 keeping the Board informed. I realized when they
6 cited that, it's subpart L, so maybe it's not in play
7 yet, but then what is their role exactly? I mean you
8 can take the obverse of that position and say well, if
9 we haven't made a decision there's a proceeding, what
10 exactly would their role be at this point and I don't
11 think that the fine legal argument point that they put
12 on their comments about the contentions actually
13 removes them from having provided strong argumentation
14 for accepting this one or dismissing that one and oh,
15 we'll go with this one. So it really does cross a
16 line and I think that it really raises the question of
17 what their proper role is here.
18 Can I just confer with Mr. Shadis a
19 moment?
20 JUDGE KARLIN: Sure.
21 (Pause.)
22 MR. BLOCK: I think that's all at this
23 point. Thank you very much for the opportunity to
24 rebut. Next time I will be careful to ask for the
25 reply time.

1 JUDGE KARLIN: Okay, thank you, Mr. Block.
2 All right, why don't we take a recess. I
3 have about 16 of the hour. Let's reconvene about 5
4 of. If we could take a 10 to 12 minute recess. So 5
5 of or 12 minutes from now.
6 (Off the record.)
7 JUDGE KARLIN: Thank you. We'll go back
8 on the record now.
9 I think at this point we proceed to
10 contention 2 which is State's contention 2 and Mr.
11 Roisman, you have 20 minutes.
12 MR. ROISMAN: Yes.
13 JUDGE KARLIN: How would you allocate your
14 time?
15 MR. ROISMAN: About three minutes to
16 summarize what I want to say about the contention,
17 maybe four and I think the most efficient thing is for
18 me to answer questions as long as the Board has to ask
19 them. And if there's any time left after the Board
20 has finished asking me questions, then I'll reserve
21 that for rebuttal. I don't want to stop answering, in
22 fact, I won't stop answering your questions just
23 because I've run out of my pre-allotted time.
24 JUDGE KARLIN: All right, but tell me how
25 much will you reserve, 5 minutes then?

1 You get 20 minutes worth of time.

2 MR. ROISMAN: Right, and I'm saying I'm

3 going to take five minutes of things that I want to

4 say excluding any answers I give to you and I'll take

5 whatever is left of my 20 minutes for rebuttal after

6 I've answered all your questions. I don't know what

7 that will be.

8 I want you to do for me what you did for

9 Mr. Block, acknowledge that he didn't use up all his

10 time and just tell you, I'm going to reserve the rest

11 of my time for rebuttal. I think there will be a lot

12 that I will want to say in rebuttal, I can't predict

13 how much of my time you all will take with questions.

14 JUDGE BARATTA: I think our intent was

15 that the 20 minutes would include our questions. Is

16 that correct?

17 JUDGE KARLIN: Yes, and I think that's

18 what Mr. Roisman is acknowledging. All right, we'll

19 try it that way and if we exhaust our questions and

20 use up the full 20 minutes, then you'll get no

21 rebuttal.

22 MR. ROISMAN: That's correct.

23 JUDGE KARLIN: And if there's any time

24 remaining, then we can allocate that, if there's any

25 rebuttal.

1 MR. ROISMAN: Yes, I won't use the
2 rebuttal just because it's there.
3 JUDGE KARLIN: We will ask Mr. Wachter to
4 at least give us a 10 minute warning once it's 10
5 minutes into this thing. Okay?
6 All right, thank you, Mr. Roisman. Please
7 proceed.
8 MR. ROISMAN: The essence of the second
9 contention is that the Applicant's proposal to take
10 credit for containment over pressure represents a
11 licensing basis change that has never previously been
12 evaluated for this plant.
13 In order to make the evaluations that are
14 necessary to see whether or not containment over
15 pressure, if utilized, would meet the safety
16 requirements which we've specified in the contention,
17 its necessary to determine two things. Number one,
18 how much the NPSH is going to be impacted by blockage,
19 flow blockage inside the reactor in the event of the
20 initiating event, in this case the loss of coolant
21 accident.
22 Our contention is that that determination
23 is fraught with a high degree of uncertainty and we've
24 gone to some great effort in our petition at pages 21
25 to 23 and in the reply brief at pages 26, 29 and 30 to

1 31, to lay out the types of uncertainties that we are
2 talking about and to identify the sources, that is,
3 the evidentiary base for our belief that those items
4 are uncertain.
5 Now I could, but I suspect that it would
6 not be fruitful for me to sort of read off to you what
7 we've already written down there, so I'm not going to
8 do that.
9 The point is that on that side of the over
10 pressurization question, in other words, how much NPSH
11 is going to be lost and therefore how much over
12 pressurization is going to be needed, there is a great
13 deal of uncertainty, so much uncertainty that it would
14 be irresponsible and not adequate protection for the
15 public health and safety to deal with the NPSH
16 deficiency problem by using over pressurization to
17 meet the problem, that over pressurization, that is
18 the reality that in the event of an accident the
19 inside of the containment is going to have more than
20 atmospheric pressure in it, has always been there as
21 a safety margin, that we knew might help out for NPSH
22 in the event of an accident, but we didn't allow an
23 Applicant to take credit for it because we didn't have
24 enough confidence in the certainty with which we could
25 say how much of that credit you needed. We wanted the

1 Applicant to prove that it could meet its NPSH
2 requirements without taking credit. So that's one
3 half of the uncertainty.
4 The other half of the uncertainty is that
5 there's uncertainty about how much containment over
6 pressure will actually exist in the event of loss of
7 coolant accident. We pointed out, for instance, that
8 with regard to this particular plant, there is a
9 history of containment isolation valve leakage. You
10 remember, this was one of those issues on which we got
11 into this argument that Mr. Silberg raised where he
12 said well, that's just one of those assertions by an
13 expert that the Board shouldn't take any account of.
14 We pointed out in our reply brief and I
15 want to re-emphasize here how significant that
16 statement is from Entergy. Number one, this isn't
17 just any old expert. This is a man whose job and
18 responsibility is to watch what's going on at Entergy.
19 So he knows not perhaps as well as the Entergy people,
20 but very well when Entergy runs tests and when they
21 have failures or when the tests show that they aren't
22 performing at the level that they should perform at.
23 So when he made that statement in the initial
24 petition, he was offering an opinion based upon his
25 own experience, not speculation, based upon his own

1 experience.

2 But beyond that, as we point out at the

3 reply on page 25, there was, in fact, an actual

4 document, well known to Entergy, that demonstrated

5 that, in fact, they've had a problem, a recurring

6 problem that when they do isolation valve testing,

7 they are having more leakage than they had expected.

8 That's the basis.

9 Now that will be relevant and we'll come

10 back to it when we later at the end of the day today

11 or tomorrow when we get to it, talk about why we ought

12 to have an evidentiary hearing in this case in which

13 we have the right to cross examine Entergy's

14 witnesses.

15 There are other uncertainties associated

16 with the containment over pressure problem as well.

17 The calculations of pressure and temperature that are

18 to be present in the containment remain subject to

19 substantial uncertainty. We discuss this in our reply

20 on page 29.

21 We point out that these calculations of

22 the extent to which over pressure will be available

23 and will be used to offset NPSH deficiencies --

24 JUDGE KARLIN: May I stop you there? On

25 page 28 of your reply brief you list, there's a long

1 list of uncertainties you've put in there. I think
2 that list is significantly longer than the list you
3 had in your original request for hearing.
4 I also understand that the Staff position
5 was it did not object to some of those listed, you had
6 in your original request for hearing, but one of the
7 questions I will have for the Staff and for you is
8 well, are we now talking about admitting all of these
9 uncertainties as part of the bases or just the ones
10 that were in your original request for hearing?
11 MR. ROISMAN: Good question and thank you.
12 Our position is that the uncertainties are not the
13 bases, they're the evidence. The basis is that there
14 are uncertainties which make it inappropriate to use
15 containment over pressure to compensate for NPSH.
16 JUDGE RUBENSTEIN: And did your opinion of
17 the uncertainties arise from an examination of the
18 calculation and one can say going to the calculation
19 in the SAR, these specific deficiencies arise?
20 MR. ROISMAN: It arises --
21 JUDGE RUBENSTEIN: Excuse me, are these a
22 matter of omission or deficiency in the analysis?
23 MR. ROISMAN: They are primarily a matter
24 of omission, but keep in mind, at least as I
25 understand it, the way the calculation works is that

1 there are assumptions that go into the calculation.
2 So what we're saying is that those assumptions are
3 based upon uncertainties that -- I mean somebody had
4 to make a resolution. They had to say well, it could
5 be this high. It could be that low? And we're going
6 to make the assumption that -- and they pick some
7 number.
8 Our position is that that matter is so
9 uncertain, that there's no adequate basis to bound the
10 magnitude of the uncertainty and therefore any
11 assumption that's made and used in the calculation is
12 inherently unreliable.
13 JUDGE RUBENSTEIN: And if this contention
14 were admitted, you would make an argument, a technical
15 argument on the pros and cons of the uncertainty and
16 the assumption?
17 MR. ROISMAN: I'm not sure I know what you
18 mean by the pros and cons. We would make an argument
19 that identified what aspects of the underlying
20 calculations or the underlying test results left doubt
21 as to whether or not you could reliably draw a number
22 out and use it in a calculation.
23 JUDGE RUBENSTEIN: And to the significance
24 of it.
25 MR. ROISMAN: You mean as to what the --

1 JUDGE RUBENSTEIN: Yes.

2 MR. ROISMAN: I'm not sure that we're

3 going to be able -- I think what you're asking is can

4 we run a sensitivity analysis on the calculation.

5 JUDGE RUBENSTEIN: No, I'm asking you do

6 you have some sort of a technical basis to add to the

7 record, so to speak, on the difference between what

8 you think a value should be and what Entergy perhaps

9 thinks.

10 MR. ROISMAN: I need to be clear on this.

11 Our position is not that we know what the value should

12 be. Our position is that there's not enough

13 information to reliably come up with a value such that

14 it would be appropriate to use containment over

15 pressure to compensate for NPSH deficiency.

16 JUDGE RUBENSTEIN: But specifically in

17 addressing the uncertainties, are these uncertainties

18 which are in the existing calculation for containment

19 pressure or are these related specifically, the

20 calculation and methodology is what I'm talking about,

21 are these related specifically to something that

22 arises from the need for over pressure?

23 Are you basically challenging their

24 ability to calculate temperature and pressure in the

25 suppression pool as it exists today in their

1 methodology?

2 MR. ROISMAN: We're attacking on both

3 halves. We're both saying that the amount of over

4 pressure that's needed, in other words, the

5 calculation of the loss of NPSH in a LOCA is

6 uncertain. And we're attack that we don't know how

7 much, we don't know reliably enough how much over

8 pressure there's going to be and its duration

9 sufficient to say we can meet whatever that NPSH

10 deficiency is with this over pressure number.

11 JUDGE BARATTA: I think the point that's

12 being made here though is that -- sounds like you're

13 attacking the current licensing basis as well as the

14 basis used to support the uprate.

15 MR. ROISMAN: No, because our position is

16 that with regard to the current licensee, no attempt

17 is made to take credit for containment over pressure.

18 Therefore, there is a margin of safety that says we

19 realize we have some uncertainties here, but we're not

20 going to try to take credit to deal with that

21 uncertainty from something that itself is uncertain.

22 We're going to deal with the NPSH deficiency in a

23 different way which Vermont Yankee does when it

24 operates without uprate. It's only when it gets to

25 uprate that over pressure or something has to be done.

1 JUDGE BARATTA: But isn't it true that in
2 the current license basis one has to determine the
3 core's pressure during a variety of different
4 accidents and it's exactly that issue that you seem to
5 be questioning as to whether or not the uncertainties
6 have been adequately quantified.
7 MR. ROISMAN: Let me see if I can explain
8 it like this. You have an automobile. You know that
9 there's a question about just how good the brakes are,
10 but you feel pretty comfortable that as long as you
11 drive it 55 miles or less, any accident that might
12 come up you'll be able to stop it in time. But you
13 want to now get permission from the Vermont State
14 Police to operate that car at 75 miles an hour. Same
15 brakes.
16 Now the question is how are you going to
17 deal with the problems that might arise with the same
18 set of brakes if the car is going 75 miles an hour?
19 Someone comes in and says well, when the cars goes 75
20 miles an hour, there's a risk that if you step on the
21 brakes, you could blow out the rear tires. And
22 someone says well, you know, we always thought that
23 this car could operate safely with only front tires
24 and no rear tires. And now we're going to take credit
25 for that concept and allow you to run your car at 75

1 miles an hour.

2 So we're not saying that it wasn't safe

3 and isn't safe to run the car at 55 miles an hour.

4 We're saying that when you run it at 75, you're now

5 taking credit for something which we always had in the

6 background and didn't have enough confidence in what

7 you used before and you shouldn't be allowed to use it

8 now, given the magnitude of the uncertainty.

9 So it's only related to the consequences

10 if the plant is uprated. It's not an attempt to say

11 that the plant, as currently operated, without uprate,

12 isn't safe or that these uncertainties cause you to

13 have to shut it down or reduce its power or any other

14 thing. That's not what we're saying.

15 JUDGE RUBENSTEIN: So one would look at

16 assumptions that don't arise from the extended power

17 uprate in the modeling, in the calculation that they

18 do and if they're not affected by the change, those

19 uncertainties would be or would not be in question?

20 MR. ROISMAN: They would still be in

21 question. The point is that the level of uncertainty

22 associated, I know you're focusing on the containment

23 side of this, so I'll stay on that side. The level of

24 uncertainty in determining temperature and pressure in

25 the containment is a reality. There's nothing that

1 we're arguing about the uprate that's making that more
2 uncertain. What we are saying is that because it's
3 uncertain, the NRC has traditionally said don't count
4 on over pressure to solve some other problem in the
5 plant.
6 JUDGE RUBENSTEIN: So you're evolving into
7 the margin argument and the defense-in-depth because
8 of that? That's where that takes you.
9 MR. ROISMAN: Precisely.
10 JUDGE RUBENSTEIN: In regard to defense-
11 in-depth, for the general public, on the website, the
12 NRC maintains a glossary of technical terms and I
13 would like your comment how this obtains with your
14 approach. Defense-in-depth, they say, is a design and
15 operational philosophy with regard to nuclear
16 facilities that calls for multiple layers of
17 protection to prevent and mitigate accidents and
18 includes the use of controls, multiple physical
19 barriers to prevent release of radiation, redundant
20 and diverse key safety functions and emergency
21 response measures.
22 And in your exhibit 12, and this is sort
23 of a general question which goes to the thrust of your
24 talking about margin and defense-in-depth, how do you
25 see defense-in-depth in this particular focused

1 instance? Are you saying every little piece is
2 unalterable or is this a dynamic thing that one can do
3 in terms of balancing prevention and mitigation and
4 the evolution over the last 40 years and methodology
5 says I was excessively conservative here, when I
6 originally did the calculation, but now in doing some
7 other calculations I can give us this margin? You're
8 saying one can never give up margin?
9 MR. ROISMAN: No, not at all. In fact,
10 the example you give illustrates our point exactly.
11 The knowledge about NPSH uncertainty, in particular,
12 has been greater in recent years. It wasn't until the
13 Spanish reactor had its experience that it even sort
14 of came on the view screen, I'm sorry, Swedish -- I
15 get all these foreign countries mixed up. They're
16 part of the coalition.
17 Anyway, the fact is that this is an
18 example where previous assumptions about we don't need
19 to worry about this turn out to have been wrong and
20 previous conservatism now turn out not to have been
21 conservative enough, perhaps. And this is the issue
22 that the ACRS has been struggling with and the NRC has
23 been struggling with. But in general, it's not our
24 position that more knowledge that gives you a basis to
25 say gee, this car really could run at 60 miles an hour

1 and be just as safe as it was when it ran at 55,
2 aren't perfectly appropriate to do. Containment over
3 pressure, used as a way to deal with NPSH isn't one of
4 those examples.
5 JUDGE RUBENSTEIN: The last, recognizing
6 I'm limited by time too --
7 MR. ROISMAN: That's not my ruling.
8 JUDGE RUBENSTEIN: No, it's ours.
9 (Laughter.)
10 JUDGE RUBENSTEIN: How do you see defense-
11 in-depth, via-a-vis a regulation or requirement as
12 opposed to a philosophy? This is key to a lot of the
13 underlying thinking on your contentions.
14 MR. ROISMAN: If the question is do I
15 think that you can have a defense-in-depth requirement
16 that goes beyond a regulatory requirement, if that's
17 the question you're asking --
18 JUDGE RUBENSTEIN: That's not the
19 question, the question is what is the regulatory
20 authority of a philosophy such as defense-in-depth?
21 MR. ROISMAN: All right, I'm going to
22 invoke, if I may -- I'd like to answer that, but I
23 think that that is outside the scope of this hearing
24 and if we challenged it or if Entergy challenged it it
25 would be rejected as bringing in a Commission policy

1 which is generic.

2 I happen to think that the concept of

3 defense-in-depth is a bargain that was made with the

4 American public when they decided to do civilian

5 nuclear reactors and that its standing has the status

6 of a regulation from its duration of existence.

7 JUDGE RUBENSTEIN: Interesting opinion.

8 JUDGE KARLIN: Any other questions?

9 JUDGE BARATTA: You continually say this

10 is not conservative, is that based upon your expert's

11 opinion at this point or can you point to some very

12 specific places where you know that the number should

13 be this and it's that at this point. I'm trying to go

14 to the merits, I'm trying to understand.

15 MR. ROISMAN: I understand that. I think

16 when we see that it's not conservative, our position

17 is that it's never conservative to set any number when

18 you don't have the ability to bound the measure of the

19 uncertainty. In other words, if we don't know what

20 the upper number is and we don't know what the lower

21 number is, any number that's picked is apparently not

22 conservative because the concept of conservative

23 starts with bounding the uncertainty. If you can

24 bound the uncertainty, then you can say I'm going to

25 bias towards the number that will give me the greatest

1 amount of safety. That would be conservative from
2 that perspective. Or if you were trying to give the
3 reactor as much leeway, you might call it conservative
4 the other way.
5 So our position is that these
6 uncertainties defy the ability to create an adequate
7 boundary. So we're not trying to criticize a number
8 and say well, the number was 6, it should have been 8.
9 We're saying that this is not a topic on which a
10 number should have been used at all and when you say
11 "this" we mean try and take containment over pressure
12 as a credit that deal with the NPSH problem.
13 JUDGE BARATTA: So than you don't put much
14 faith in the role of anything in determining whether
15 a number is conservative or not? Is that correct?
16 MR. ROISMAN: Can you just wait a second?
17 (Mr. Roisman confers.)
18 MR. ROISMAN: If I may, I would like to
19 modify my answer to more accurately reflect the
20 technical position that we're taking. We think that
21 today without uprate and without taking containment
22 over pressure, there is sufficient conservatism
23 because we have the --
24 MR. WACHTER: Time.
25 MR. ROISMAN: May I finish?

1 JUDGE KARLIN: Finish your sentence.
2 Time.
3 MR. ROISMAN: Because we have this safety
4 margin that's there, provided by the fact that there
5 will be some containment over pressure without taking
6 credit for it. Uncertainties are something entirely
7 different. Uncertainties have to do with the
8 uncertainty with whether or not we know how much the
9 containment over pressure will be and uncertainty with
10 knowing how much NPSH will be degraded.
11 JUDGE KARLIN: Thank you, Mr. Roisman.
12 Mr. Silberg, 15 minutes?
13 MR. SILBERG: Thank you. Let me work
14 backwards a little bit. I think the Department has
15 said it's never conservative to set any number if you
16 can't bound the uncertainties and in their petition
17 they said that the calculation 0808 which is kind of
18 the centerpiece here was not conservative. They never
19 really said why it wasn't conservative, but in our
20 response we identified exactly where we set forth the
21 conservatism. On page 27 of our brief, we cite to an
22 RAI response which identifies all of the conservatism.
23 Those conservatism, Your Honor, bound the uncertainty.
24 The only response that the Department gave to that
25 citation was in footnote 13 on page 27 of the reply

1 which they said we don't think the Board should give
2 any weight or should give reduced weight to that
3 because the information is proprietary.
4 Well, the fact is the Department had
5 access to that information. If they don't like the
6 fact of proprietary treatment of information they're
7 challenging the Commission's regulations to 2.790 and
8 now 3.390. So the issue is we have, in fact, on the
9 record with information that they have in their
10 possession identified why the uncertainties, if there
11 are any, are bounded.
12 So I believe that their basic premise is
13 completely undercut by the information on the record.
14 The idea that they have an ironclad obligation to look
15 at the information, but can then disregard that
16 information in their response and put in something
17 which is out of date, irrelevant or wrong, is simply
18 turning the licensing process on its head.
19 With respect to defense-in-depth, defense-
20 in-depth is --
21 JUDGE KARLIN: May I ask with regard to
22 that proprietary issue in the footnote, I seem to
23 remember that and I thought they were concerned
24 because there were some redactions that were
25 proprietary, somehow made it difficult for them to

1 deal with it or confront it.

2 MR. SILBERG: The redactions are in the

3 information which is in the public record. They,

4 however, have access to the unredacted versions. They

5 have always had that. They have full access to every

6 document in the plant under existing policies.

7 JUDGE KARLIN: But are they able to -- I

8 mean unless it's perhaps under protected order,

9 they're able to use that or assert that in the

10 proceeding?

11 MR. SILBERG: Yes, they are and they have

12 full right to assert that. Obviously, they can't put

13 it out in the public format, but they could make

14 proprietary filings to this Board, the same as people

15 do in any other proceeding.

16 JUDGE KARLIN: Right.

17 MR. SILBERG: With respect to defense-in-

18 depth, it is a regulatory philosophy. I don't believe

19 it is enshrined in the regulation. To that extent, it

20 is different than another regulatory philosophy as low

21 as reasonably achievable which is enshrined in the

22 regulation.

23 So I think to raise defense-in-depth to

24 this high pedestal that you can never change, you can

25 never remove margin that's put in is simply without

1 either legal or policy basis. To say you can't reduce
2 margin that once it's in there, it's sacrosanct really
3 would be counter productive. Then you would have
4 people saying I'm not going to put that margin in
5 there because if I do, then I'll never be able to use
6 it down the road. It just isn't what the law says.
7 With respect to --
8 JUDGE KARLIN: Mr. Silberg, on that point,
9 I looked for the words defense-in-depth in the regs
10 and I didn't find it, but they reference in contention
11 1, part 50, appendix A, 35 and 38, which talk about
12 redundancies and single failures and that's also
13 referenced in some of the other general design
14 criteria. Is that where defense-in-depth could be
15 alleged to be part of the reg?
16 MR. SILBERG: Well, the term which is --
17 seems to have taken on a life of its own is not. I
18 was going to note that while the contention itself
19 refers to the GDC -- although that actually may be
20 contended --
21 JUDGE KARLIN: The first contention.
22 JUDGE RUBENSTEIN: The GDC is 35 and 38 in
23 the first.
24 MR. SILBERG: Right, and I will discuss
25 that in the context of contention 1, but they didn't

1 raise that in this contention. They do in this
2 contention talk about significant hazards
3 consideration in this contention, but that obviously
4 is not a basis for a contention as the Commission said
5 in the Harris decision which we cite in our brief.
6 But the idea that the analogy to the car
7 running at 75 miles an hour, we in fact, have a
8 methodology that we have used for many, many years
9 that is part of the current licensing basis. That
10 methodology is set forth in the calculation which they
11 now attack. To the extent that they're attacking the
12 assumptions in the calculation, they never set forth
13 in their document what it is they're attacking. If
14 you look at the list of uncertainties that they start
15 with on page 24 of their pleading and then they
16 restate and add other items to it in their reply, none
17 of those relate to the calculation.
18 To the extent that there are statements
19 that they take from the calculation, they say, for
20 instance, in criticizing some of the tests of the
21 pump, and what they do there is they take a snippet
22 from that document, the calculation, the appendix to
23 the calculation, and say you haven't considered pump
24 flow. You haven't considered head drop, the original
25 data don't show. But what they ignore is the fact

1 that the very document that they cite develops that
2 data, not from the original test data which goes back
3 to the 1960s, but from everything that's happened
4 since then. This again is one of those examples of
5 ironclad obligation. You can't take a snippet out of
6 a document and ignore the document's conclusion.
7 So in many cases, what they're citing to
8 are statements in this document which are true
9 statements, but which reflect the starting part of the
10 analysis and they simply don't reflect the end part of
11 the analysis which is the pumps are acceptable.
12 JUDGE RUBENSTEIN: So it's your view that
13 VY 080 contains data and it's an analysis so that any
14 contentions which deals with an omission, you're
15 saying that the data is not omitted?
16 MR. SILBERG: That's correct, and it may
17 not all be in that particular document, but in RAIs
18 where we have developed and provided additional
19 information to the staff, we're not aware of any
20 information which has been omitted.
21 There are cases in their reply where they
22 list a series of the uncertainties and they simply
23 don't identify what it is that's missing. And I think
24 we'll get into that on some of the other contentions.
25 Let me go back to the contention itself.

1 The contention, if you read it, I think is really so
2 uncertain and so amorphous as to defy a precise issue,
3 unless one reads it in connection with the bases. And
4 when you read it in connection with the bases, it
5 doesn't -- it is not an admissible issue. For
6 instance, basis one says there's no reliable evidence
7 of the magnitude of the impact of strainer and debris
8 losses on pressure at ECCS pumps in the post-LOCA
9 world. We have provided, as we said before, the
10 bounding uncertainties which we think expressly show
11 that whatever uncertainties there are have been
12 conservatively bounded.
13 DPS says that the calculation is not
14 conservative. Then they say in their reply at page 31
15 and 32 that they didn't argue that the calculation was
16 nonconservative. We're not exactly sure what it is
17 that they're arguing at what point, but it's clear
18 that the calculation, together with the other
19 information on the docket, explains why what we are
20 doing bounds all the conditions.
21 The second basis says without information
22 to bound the uncertainties, no reliable basis, there's
23 no reliable basis to justify using containment over
24 pressure or unquantifiable pressure losses. That
25 statement purports to be based on excerpts from

1 transcripts of the Advisory Committee on Reactor
2 Safeguards, but those transcripts don't support this
3 point either.
4 If one looks at the transcript, you can
5 easily discern that these are pressurized water
6 reactor issues and not boiling water reactor issues.
7 If you look on transcript page 344, their Exhibit 10,
8 says this was an issue for PWRs and this hearing is to
9 resolve this issue. There's a statement at transcript
10 381 that says there is already a BWR solution. There
11 are also several statements that say this is a plant-
12 specific issue.
13 So you can't take this ACRS excerpt that
14 they've put it in, not read it in connection with the
15 entire transcript and come up with the conclusion that
16 in this situation or BWRs, in general, or Vermont
17 Yankee, in particular, there is an issue. There are
18 other statements that are totally taken out of context
19 that we think inappropriate. For instance, in their
20 petition at page 22, he says that the model that was
21 used was discredited by the Swedish reactor. There's
22 no indication that Vermont Yankee uses that model. We
23 don't.
24 And strangely enough, the Department when
25 they quote, omits the portion of the transcript the

1 very next line where the speaker says that there have
2 been improvements in the model Barsebeck and "we have
3 compared our model against the Barsebeck model and
4 shown that it's adequately conservative." They simply
5 don't reflect the closure of the events where all they
6 do is pick out the problems. This isn't a question of
7 weighing. We don't need a hearing to decide these
8 events. You look at the very documents and they don't
9 support their contentions.
10 Another example is the Barsebeck event was
11 based on a particular type of insulation which the
12 transcript says it's not typically used in the United
13 States. So they're taking a lot of statements out of
14 context which in the documents themselves don't apply.
15 JUDGE BARATTA: But let me interrupt you
16 here. Is it not true that the NRC put forth as a
17 generic safety issue for BWRs the question of strainer
18 clog?
19 MR. SILBERG: I'm sorry, I didn't hear.
20 JUDGE BARATTA: Is it not true though that
21 the NRC put forth as a generic safety issue the issue
22 of strainer clogging for BWRs?
23 MR. SILBERG: Yes, and we have made
24 modifications to that which are on the record and we
25 believe that we have adequately addressed that issue.

1 We have probably the largest strayers in the world in
2 the torus at Vermont Yankee, comparable to the size of
3 the torus. We don't think that there is an issue for
4 us.
5 There may be generic issues. We think we
6 have resolved them on our docket.
7 JUDGE BARATTA: My point in raising that
8 was that you seem to be saying that the points that
9 were brought forth while not specifically applicable
10 because they are PWR issues that were raised in the
11 transcript, but the question of strainer clogging is
12 applicable to both or at that time was applicable to
13 both BWRs and PWRs.
14 MR. SILBERG: Right, but they were citing
15 that transcript for the principle that the models are
16 no good. And what I'm doing by quoting the rest of
17 the transcript is to say that support just isn't
18 there. And if you look at other things that they're
19 alleging, they're either unsupported or dealt with in
20 the very document that they cite.
21 They cite, for instance, that the pump
22 tests, again this is going back to the calculation,
23 and they cite attachment 5 that they were only tested
24 to a limited flow rate. They never say what an
25 appropriate flow rate was or why that was limited or

1 how that limit has any effect at all on the
2 calculation.
3 They say that there were no head drop
4 specifications on the original curves, but they ignore
5 the rest of the report which provides that very
6 information. So it's not a question again of weighing
7 the evidence or having a hearing to determine the
8 evidence, but if one looks at their own documents it
9 simply doesn't support the quote uncertainties that
10 they say are there. And it certainly doesn't address
11 the conservatism which we have put on the record which
12 we believe have bounded those uncertainties.
13 I would also note that in the reply
14 they've introduced an entirely new set of documents
15 which they claim to support their charges. There's a
16 question as to the timeliness. We think also that
17 those documents don't support the kinds of things that
18 they allege they are supporting. For instance, they
19 talk about calculations of clogging. They refer to
20 documents on paint chips and they say they were
21 ignored, but they ignore a letter on the docket which
22 specifically deals with that. They talk about generic
23 studies which are PWR studies. Obviously, this is a
24 BWR. They talk about chemical reactions and this is
25 calcium silicate with boron, but don't note the

1 difference in water chemistry between PWRs and BWRs or
2 the presence of calcium silicate in our reactor. They
3 talk about a zinc reaction, but they again ignore the
4 fact that it's a PWR issue because it's a reaction
5 between boron which we don't use as opposed to sodium
6 borate.
7 They talk about concrete dust and it's
8 clogging up the strainer in a reaction with boric
9 acid. Again, not reflecting the fact that this is not
10 something that we use.
11 The issue here really is is there a basis?
12 And we believe that there isn't. The additional
13 design margin, we're not taking anything away. We
14 still have defense-in-depth, if that were a
15 regulation, which it isn't, we still have particularly
16 in the LOCA situation where you always have over
17 pressure at the beginning of event, it's not a
18 question of having to generate it, simply are concerns
19 which are dealt with with the information that's on
20 the record and we would suggest that there is not a
21 specific contention, not a supported contention and
22 not a contention with basis.
23 MR. WACHTER: Time is up.
24 JUDGE KARLIN: Thank you, Mr. Silberg.
25 Ms. Poole, how can you help us here?

1 MS. POOLE: Well, the Staff wanted to
2 raise an issue that's raised with respect to --
3 JUDGE KARLIN: I think you have to put
4 your microphone on top of your 3-ring binder to get it
5 close enough.
6 MS. POOLE: I'll lean over my binder.
7 How's that?
8 JUDGE KARLIN: Okay.
9 MS. POOLE: We'd like to raise an issue
10 first that is brought up with respect to this
11 contention, also some others involving the no
12 significant hazards consideration determination. If
13 it's all right with the Board, we'd like to discuss
14 that briefly.
15 Particularly, in its reply, the State
16 argues that the Atomic Energy Act requires a hearing
17 whenever a proposed amendment involves a significant
18 hazards consideration. This is not a correct
19 statement of the law. What the Atomic Energy Act says
20 in Section 189(a)(2)(a) is "in relevant part, the
21 Commission may issue and make immediately effective
22 any amendment to an operating license upon a
23 determination by the Commission that such amendment
24 involves no significant hazards consideration.
25 Notwithstanding the pendency before the Commission of

1 a request for hearing from any person. Such amendment
2 may be issued and made immediately effective in
3 advance of the holding and completion of any required
4 hearing."
5 As stated in our answer, the Staff has not
6 made a proposed or final no significant hazards
7 consideration determination which means that we have
8 not made the findings necessary to issue any amendment
9 during the pendency of any hearing granted in
10 connection with this amendment request.
11 In the absence of such a determination,
12 the Commission would not issue any license amendment
13 until the completion of any prior hearing.
14 In addition, the Department misapprehends
15 the cases cited by and on this point. In St. Luis
16 Obispo Mothers for Peace, the Court found that the NRC
17 failed to comply with its regulations in denying
18 Petitioners a hearing prior to making the license
19 amendments at issue effective. The Court noted that
20 a hearing would have been granted in that case. The
21 error lay in issuing the amendment prior to holding a
22 hearing. The Staff doesn't propose to do such a thing
23 in this case.
24 In addition, the Three Mile Island case
25 referenced by the State is inapposite to the issue.

1 The Petitioners in that case argued that the restart
2 proceeding at issue was a proceeding for amending the
3 license within the Atomic Energy Act, within the
4 meaning of the Atomic Energy Act, Section 189(a) and
5 that they were persons whose interests stood to be
6 affected by that proceeding.
7 The Court, however, held that because the
8 order at issue did not purport to affect the license
9 amendment it did not and would not reach the issue of
10 compliance with Section 189(a).
11 The Kelly v. Selin case is also off point.
12 The Court in that case held that there was no
13 licensing decision being made subject to Section
14 189(a). Therefore, none of these three cases stands
15 for the proposition put forth by the Applicant.
16 So I just wanted to reiterate that point
17 to note that the no significant hazards issue cannot
18 form a basis for a contention in this proceeding.
19 JUDGE KARLIN: Could you address the issue
20 I spoke with with the State a bit? The Staff took the
21 position that you did not object to admissability of
22 contention 2, basis 3 and on page 16, I guess of your
23 brief you have these bullets of uncertainties, I think
24 it is. Now we have an additional set of
25 uncertainties. If we were to admit this contention

1 and to follow your advice, what would your advice be
2 with regard to these additional uncertainties that
3 have now been identified.
4 JUDGE RUBENSTEIN: And perhaps what the
5 contention itself would be in terms of scope.
6 JUDGE KARLIN: Yes.
7 MS. POOLE: Absolutely. As we noted in
8 our pleadings, the eight uncertainties set forth in
9 basis 3 in the Staff's view, limit and define the
10 scope of this contention. As I stated earlier, it's
11 the Staff's view that the long-standing Commission
12 case law holds that the reach of a contention
13 necessarily hinges upon its terms coupled with its
14 bases. That's the Seabrook proceeding.
15 With respect to the additional exhibits
16 and the additional uncertainties that are set forth in
17 the reply, including Exhibit 30 and 31, DPS provides
18 a list of uncertainties which have not been addressed
19 by the Applicant, it contends. In addition to the
20 eight uncertainties set forth in its petition, the
21 admission of which the Staff does not oppose, these
22 number of additional uncertainties which rely heavily
23 on Exhibit 30 we feel constitute a late-filed revision
24 to the petition.
25 The Department hasn't addressed the late

1 filing criteria of Section 2.309(f)(2) or discussed
2 why these new exhibits and these associated arguments
3 were not raised at the time of the initial petition.
4 We think that these additional issues would broaden
5 the scope of the contention as the Staff would accept
6 its admission. And therefore, we think that the
7 Licensing Board shouldn't accept those --
8 JUDGE KARLIN: So it's sort of fairness,
9 late filed issue which is to say the other parties
10 have not had a chance to respond and it was not in the
11 initial contention?
12 MS. POOLE: That's correct.
13 JUDGE KARLIN: Well, that's kind of why I
14 was asking for a response here, although -- and the
15 other thing, the point of the contention rule is it
16 not, is to give us a focused issue that we -- a
17 concrete issue, not to play technical "gotcha" but to
18 really make sure that the proceeding is ultimately
19 focused and doesn't go off on a wild goose chase
20 somewhere. Do you think that -- in a substantive
21 matter, have you had a chance to look at those
22 additional bullets?
23 MS. POOLE: No, as a substantive matter,
24 we have not.
25 JUDGE RUBENSTEIN: On the material you had

1 available, let's go back to the clarity of your not
2 challenge to the admissability of the contention and
3 give us a little insight into what you think the
4 genuine issue is.
5 MS. POOLE: I think that we thought that
6 the uncertainties cited in the petition in this case,
7 the eight uncertainties cited went to the
8 acceptability of the NPSH calculation in the
9 application and as such they constituted a
10 sufficiently particularized basis with respect to a
11 challenge to the calculation.
12 JUDGE BARATTA: In that regard, I may be
13 recollecting this wrong and maybe I could ask you a
14 little bit about the history, but for some reason I
15 thought that the question of strainer clogging in BWRs
16 had been resolved, that that no longer was an issue.
17 Am I remembering that wrong?
18 MS. POOLE: That is correct. If you give
19 me one moment to consult with my expert here.
20 JUDGE BARATTA: Okay.
21 (Pause.)
22 MS. POOLE: In response to your question,
23 Bulletin 9606 addressed the strainer clogging issue
24 for BWRs and in response to that there is a December
25 1999 letter and I don't have it with me to provide to

1 the parties or the Board in which Vermont Yankee
2 informed the Staff of its closure of the issues raised
3 in the bulletin. That was when we learned of the
4 large, the strainer --
5 JUDGE RUBENSTEIN: However, not to talk
6 about the merits, Ms. Poole, but the contribution from
7 the debris strainer blockage, does the Staff have a
8 position on the methodology that the licensee uses?
9 In other words, have they integrated the resolution of
10 the generic safety issue into it? I take it that you
11 believe that the uncertainties have either not been
12 addressed or addressed inadequately as derived from
13 the debris strainer problem?
14 This goes to the heart of --
15 MS. POOLE: I think our position is that
16 the Applicant used approved methods to resolve the
17 uncertainties that were raised in the generic issue.
18 JUDGE BARATTA: That's what I was trying
19 to get at that the issue was resolved and you've
20 already accepted the method by which they address that
21 resolution.
22 MS. POOLE: That's correct.
23 JUDGE BARATTA: Are these additional
24 uncertainties that go beyond that? That's where I'm
25 having trouble understanding, if it's a resolved

1 issue, why are these uncertainties not quantified?
2 And if you have an uncertainty, as long as you
3 quantify them, bound them in some way or something
4 like that. But could you maybe go into a little bit
5 of that explanation?
6 MS. POOLE: Let me take one moment,
7 please.
8 (Pause.)
9 MS. POOLE: In answer to your question, in
10 looking back at the bases, they don't involve the
11 strainer issue, they involve pumps and available
12 NPSHs. We think it's two different beasts.
13 JUDGE BARATTA: Okay, thank you.
14 JUDGE KARLIN: Anything else?
15 MS. POOLE: No, nothing further for us on
16 this contention. Thank you.
17 JUDGE KARLIN: Thank you. We're going to
18 proceed with the next contention. The New England
19 Coalition did not present this contention, so they do
20 not argue on it. They will argue certainly on their
21 contentions and they have seven of them, so we're
22 looking forward to that. But in the meantime, we'll
23 proceed to the next contention 4 by the State.
24 Again, with regard to reserving rebuttal,
25 just keep on going. No rebuttal if we run out.

1 MR. ROISMAN: Unless I get a rebuttal, if
2 I ask for it even if I do run out which I assume isn't
3 the case, so -- I have lots to say.
4 All right, with regard to contention 4 --
5 MS. POOLE: I'm sorry, I'm very sorry. We
6 wanted to raise an issue. We weren't sure if we were
7 going to break before lunch and I apologize for
8 interrupting you. We had a question, a procedural
9 issue regarding presentation of arguments. We
10 discussed the matter with both Coalition and the
11 State, as well as the Applicant and in certain
12 contentions certain attorneys prepared response to the
13 contentions and we wanted to know a clarification.
14 You had advised that you preferred a single attorney
15 speak for each participant and we had a couple of
16 situations where a different attorney prepared a
17 response to a contention. We understand the concern
18 about double teaming and we don't want to do that,
19 obviously. But we wondered if it would be acceptable
20 to the Licensing Board, provided that one attorney
21 presented a presentation on one contention, if we
22 could have multiple attorneys participate to the
23 extent that one attorney would participate as to one
24 contention. It might not be the same one every time.
25 None of the participants objected to our

1 request in that regard.

2 MR. ROISMAN: Mr. Chairman, may I just say

3 one thing. It's correct the State does not object to

4 what the Staff has asked for, but we do wish to state

5 that we believe that this would be a precedent that

6 would be used throughout the hearing.

1 ADMINISTRATIVE JUDGE KARLIN: -- which is

2 Contention 4 by the State.

3 MR. ROISMAN: I just want to emphasize --

4 ADMINISTRATIVE JUDGE KARLIN: And, again,

5 with regard to reserving a rebuttal, just keep on

6 going. No rebuttal if we run out.

7 MR. ROISMAN: Well, unless I get a

8 rebuttal if I ask for it even if I do run out, which

9 I assume isn't the case. I mean I got lots to say.

10 All right. With regard to Contention 4 --

11 MS. POOLE: I'm sorry. I'm very sorry.

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13 were going to break before lunch, and I apologize for

14 interrupting you. We had a question, a procedural

15 issue regarding presentation of arguments. We

16 discussed the matter with both the Coalition and the

17 State as well as the Applicant. In certain

18 contentions, certain attorneys prepared responses to

19 the contentions and we wanted to know a clarification.

1 You had advised that you preferred a single attorney
2 speak for each participant, and we had a couple of
3 situations where a different attorney prepared a
4 response to a contention.
5 We understand the concern about double
6 teaming and we don't want to do that, obviously, but
7 we wondered if it would be acceptable to the Licensing
8 Board provided that one attorney presented a
9 presentation on one contention if we could have
10 multiple attorneys participate to the extent that one
11 attorney would participate as to one contention and
12 that would be all, but it might not be the same one
13 every time. And none of the participants objected to
14 our request in that regard.
15 (Pause.)
16 MR. ROISMAN: Mr. Chairman, may I just say
17 one thing? It's correct the State does not object to
18 what the Staff has asked for, but we do wish to state
19 that we believe that this would be a precedent that
20 would be used throughout the hearing should there be
21 further hearings in that if a witness were called to
22 be cross examined, that one attorney could do that
23 cross examination and another witness could be called
24 and a different attorney could do that cross
25 examination. In other words --

1 ADMINISTRATIVE JUDGE KARLIN: Right.
2 Right.
3 MR. ROISMAN: -- that as long as there's
4 no redundancy --
5 ADMINISTRATIVE JUDGE KARLIN: No, I
6 understand.
7 MR. ROISMAN: -- and as long as that's
8 understood that we think that it would set a
9 precedent, which we think is an okay precedent, we
10 don't have any problem.
11 ADMINISTRATIVE JUDGE KARLIN: All right.
12 I appreciate that distinction. What I don't want to
13 have is three attorneys jumping one contention, two
14 contention, three contention and having other
15 participants, particularly the Coalition, having only
16 one attorney who can somehow be exhausted by a triple
17 team. For today I think we'll have -- we'll let one
18 attorney speak on one issue -- this is essentially
19 what Mr. Silberg raised before, but it's certainly not
20 a precedent with regard to any evidentiary hearing
21 where we would just really have one lawyer be handling
22 pretty much the whole thing. So, yes.
23 MS. POOLE: Thank you, Your Honor.
24 ADMINISTRATIVE JUDGE KARLIN: All right.
25 So now we're now on Contention 4.

1 MR. ROISMAN: Could you advise me when
2 you're considering breaking for lunch?
3 ADMINISTRATIVE JUDGE KARLIN: After
4 everyone gets finished with Contention 4.
5 MR. ROISMAN: Great.
6 ADMINISTRATIVE JUDGE KARLIN: So that
7 should be 45 minutes from now.
8 MR. ROISMAN: That's fine. Okay. I
9 didn't want to do my thing and give them an hour to
10 think about it.
11 With regard to this contention and the
12 other contentions, I heard what the Board said when we
13 had the telephone conference, so I have not taken the
14 Board back to portions of our pleadings, but many of
15 the issues that have been raised have been addressed
16 in our pleadings at different places, and so I hope
17 that sort of in rebuttal that the Board will go back
18 and look at particularly our reply with regard to
19 these issues. And that will apply here with regard to
20 Contention 4 as well.
21 The essence of Contention 4 is the human
22 factors, a generic problem, raised and made a central
23 issue in NRC lore by the TMI accident. Obviously, we
24 are not making any contention that says that what
25 happened at TMI is somehow or another substantively

1 what we're concerned about happening here, but what we
2 are saying is that what TMI alerted the NRC and its
3 licensees to was the danger that's presented when you
4 create problems that are inherently difficult for
5 humans to solve.
6 And our contention is that in this
7 particular example, namely the use of containment
8 over-pressure in the event of an accident, that the
9 Applicant currently has not addressed in its emergency
10 operating procedures any guidance to its operators on
11 how they are supposed to meet two conflicting goals.
12 One of those goals is to reduce containment pressure
13 to 2.5 PSIG as a way of reducing the ability of any
14 radiation that's inside containment from being pushed
15 outside containment by the pressure. So it reduces
16 the effect of any leaks that may be present. And at
17 the same time telling the same operator that for a
18 fairly long period of time, roughly 50 hours, the
19 operator is supposed to keep containment pressure up,
20 over 2.5, at varying degrees and varying amounts.
21 And there is -- this over pressure table
22 -- chart, I guess it is, that the Applicant has in its
23 application, it's since been modified, but it gives
24 you an idea that the containment over-pressure is not
25 a constant number. It's a number that is going to

1 vary over time and the need, which is shown on this
2 chart in a series of steps, the need for containment
3 over-pressure to meet NPSH requirements is also
4 varying with time. So it's a fairly complicated --
5 ADMINISTRATIVE JUDGE KARLIN: Is that
6 document you're referring to your Exhibit 18? Seven
7 pages, Figure 4.6, over-pressure required for NPSH DBA
8 LOCA long-term? It's Exhibit to your --
9 MR. ROISMAN: Yes. Yes, it is. Yes.
10 This one that I'm holding up may not -- as I said, one
11 of the things that has happened is that this VY 0808n
12 calculation has already been amended four times since
13 the application was filed. So this one may not be the
14 current version of what it's supposed to look like.
15 Conceptually, what it illustrates is that this is not
16 a simple task.
17 ADMINISTRATIVE JUDGE KARLIN: Well,
18 Entergy has responded to that, I think, by saying,
19 "Well, wait a second, there's this step-wise chart
20 that you referred to, but that's not an instruction to
21 the operators. It's not going to confuse the
22 operators at all, because in fact the operators --
23 this is not something for instructing the operators."
24 ADMINISTRATIVE JUDGE RUBENSTEIN: Yes.
25 Let me add to that. Is it your contention that this

1 is a situation which is abnormal or not similar to
2 what an operator does through simulator training at
3 the Vermont Yankee simulator?
4 MR. ROISMAN: Well, when we look at the
5 EOP, and you'll notice I think it's in the Staff
6 answer that they give you the EOP, there's nothing in
7 there to instruct the operator about. So the operator
8 doesn't have any instructions. If he went to
9 training, if we had an operator in here today and
10 showed him this chart and showed him the provision in
11 the EOP that says you're supposed to get containment
12 pressure down to 2.5 PSIG, he doesn't have any more
13 guidance beyond that to know, "How do I go about doing
14 that? How do I keep track of this and make sure that
15 I'm meeting two conflicting goals at the same time?"
16 ADMINISTRATIVE JUDGE RUBENSTEIN: I think
17 Entergy said something about that it's really not an
18 EOP item, that it's an operating item. And, again, is
19 it your contention that the nature of the beast of the
20 manipulation that an operator has to go through is
21 exceptional and can't be, for example, programmed into
22 the simulator and their training cannot be effectual?
23 I don't want to get into the merits, but I'm trying to
24 understand --
25 MR. ROISMAN: Right.

1 ADMINISTRATIVE JUDGE RUBENSTEIN: -- if
2 this is something exceptional in terms of change which
3 cannot be addressed through training or
4 administratively.
5 MR. ROISMAN: Yes. The short answer is
6 yes, that is correct. And part of the reason for that
7 is -- you've seen it illustrated in this room this
8 morning. Look how difficult it was to just get the
9 speakers in this room calibrated so that everybody
10 could hear and all the microphones were working. This
11 is not simple stuff, and you're talking about an
12 operator who's operating under extreme stress. An
13 accident has happened that's causing all of these
14 events to have to take place.
15 Our position is you need -- they're called
16 emergency operating procedures. They don't have them.
17 There's no way for anybody, certainly not for the
18 State, to do any oversight to see whether or not if
19 they were confronted with this problem, now that they
20 have added to the operator's burden, the need to
21 retain containment over-pressure at discrete levels
22 for discrete periods of time, measured in minutes
23 sometimes, sometimes even in an hour or so, that they
24 need an EOP. And then if they produce an EOP, then
25 they would need to demonstrate that an operator could

1 actually be trained to follow that procedure and
2 effectively do what this chart says has to happen.
3 ADMINISTRATIVE JUDGE RUBENSTEIN: Did you
4 just describe the relief you are seeking under this
5 contention?
6 MR. ROISMAN: I'm sorry?
7 ADMINISTRATIVE JUDGE RUBENSTEIN: Did you
8 just describe the relief you're seeking under this
9 contention?
10 MR. ROISMAN: Well, yes, except that we
11 don't know whether or not if at the end of the day
12 they made the changes necessary to the EOP and then
13 trained operators they would discover that they could
14 do this or not. I mean if they told the operator in
15 the middle of the accident he had to also juggle five
16 balls in the air, I think we could all conclude he
17 probably can't do everything else he's got to do and
18 also keep five balls in the air. So we don't know
19 whether this exceeds the capacity. That's why it's a
20 human factors problem. And right now they're telling
21 us, "We're going to start taking credit for
22 containment over-pressure and we don't know that that
23 containment over-pressure can be maintained in a way
24 that it's required to be maintained." And if it
25 doesn't work, the ECCS pumps might fail, and we're

1 talking about something more than just an
2 inconvenience.
3 ADMINISTRATIVE JUDGE RUBENSTEIN: Again,
4 it's the opinion of your technical counselor that this
5 is an extraordinary change in terms of procedures?
6 MR. ROISMAN: Judge Rubenstein, I think
7 what's extraordinary is having the operator control
8 the pressure in the way that the chart we're talking
9 about expects him to do it. And Entergy appears to
10 have answered us with regard to this contention by
11 saying they don't intend to have anything special in
12 their EOP, that they're not amending their EOPs to
13 address the issue. That's the problem.
14 ADMINISTRATIVE JUDGE KARLIN: And that's
15 my question. Maybe we're using the wrong word.
16 They're not going to amend their EOP, but they're
17 going to amend something else. It does seem like what
18 is being asked for here is a change, that now they're
19 requesting to have credit for over-pressure, for the
20 maintenance of over-pressure. So up to this point,
21 historically, operators have not dealt with over-
22 pressure. Now they're going to be asked to deal with
23 over-pressure. Presumably, there's a document which
24 will reflect that in some way, but it's apparently not
25 going to be an EOP.

1 MR. ROISMAN: The point we make is that it
2 should be in the EOP. If it's not in the EOP, it
3 should be here in front of the Board for review. The
4 contention is there's a human problem here.
5 ADMINISTRATIVE JUDGE KARLIN: Well, you're
6 saying there would be confusion created when they --
7 MR. ROISMAN: Correct.
8 ADMINISTRATIVE JUDGE KARLIN: -- have to
9 both relieve the pressure and maintain pressure.
10 MR. ROISMAN: Right. And if Entergy has
11 a substantive answer to that --
12 MR. WACHTER: Ten minutes.
13 MR. ROISMAN: -- then we would take a look
14 at that, we would evaluate it. At this moment, I mean
15 another way to look at it -- if the point that you're
16 making is, well, maybe they didn't do it in the EOP
17 but they might do it someplace else, then another way
18 to look at the contention is the application's
19 incomplete because they haven't submitted anything
20 that tells us how they're going to deal with this
21 problem that the operator's going to face.
22 ADMINISTRATIVE JUDGE KARLIN: Well, I
23 expect they're going to address that. I just want to
24 make sure you address it.
25 MR. ROISMAN: Okay. All right. And if

1 there are no more questions, I'll reserve.

2 ADMINISTRATIVE JUDGE KARLIN: Okay. Fine.

3 Thank you.

4 MR. ROSINSKI: My name is Doug Rosinski,

5 and I'll represent Entergy on this contention.

6 ADMINISTRATIVE JUDGE KARLIN: Rosinski?

7 MR. ROSINSKI: Rosinski, yes.

8 ADMINISTRATIVE JUDGE KARLIN: Okay. Thank

9 you.

10 MR. ROSINSKI: As a former certified

11 senior reactor operator on BWR plants of similar

12 vintage to Vermont Yankee, I'm pleased to inform Mr.

13 Roisman that the current emergency operating

14 procedures for Vermont Yankee do contain a chart of

15 containment over-pressure. The Vermont Yankee

16 operators are currently trained to use these charts,

17 and I will describe how they're trained to use these

18 charts. And there are no changes needed to the

19 emergency operating procedures to maintain the

20 necessary containment over-pressure that Entergy has

21 proposed. And I will use this as a demonstration.

22 I just want to be clear, Mr. Roisman has

23 said that we do not have this information. It is in

24 the current emergency operating procedures. Let me

25 describe these graphs, and I do have copies if the

1 Board would like me to provide it with copies.

2 ADMINISTRATIVE JUDGE KARLIN: Are you

3 proposing to enter this as some sort of exhibit or

4 just for demonstrative purposes?

5 MR. ROSINSKI: No. These are just

6 demonstrative to make it easier to follow the

7 discussion.

8 ADMINISTRATIVE JUDGE KARLIN: Did you

9 attach this to your response, to your answer to the

10 contentions?

11 MR. ROSINSKI: No, we did not.

12 ADMINISTRATIVE JUDGE KARLIN: Well, no

13 objections. Yes, we'll use it as demonstrative

14 information.

15 MR. ROISMAN: Excuse me. I didn't say

16 there was no objection.

17 ADMINISTRATIVE JUDGE KARLIN: Any

18 objections?

19 MR. ROISMAN: Yes. We pointed out in our

20 reply there is no evidence in this record, other than

21 the evidence that was submitted by Entergy, and we

22 object to any reference to any document that we didn't

23 submit as being evidentiary relevant in any way to the

24 questions that are before us. Because they had an

25 opportunity, they could have -- now, if they would

1 like to file a later filed request, they can do that.
2 But right now what we have is a record in which a
3 bunch of lawyers -- and now we have another lawyer who
4 used to be an operator at a nuclear reactor, he's
5 still just a lawyer in this hearing -- telling us a
6 bunch of facts versus I've got an expert who tells you
7 what the facts are and then he supports it with
8 documents that he attaches. I don't think it's fair
9 or appropriate.
10 ADMINISTRATIVE JUDGE KARLIN: Well,
11 certainly, the attorney speaking for Entergy is not
12 here to testify, and he's speaking as an attorney and
13 we don't want to hear anything about his personal
14 experience and he's not, I don't think, offering that
15 at the moment. What we try to focus on is the
16 document itself. Was that document in the record,
17 publicly available?
18 MR. ROSINSKI: The document is the current
19 emergency operating procedures at the Plant that are
20 available to the State at any time on a permanent
21 basis. They have access to these documents. It is,
22 in our opinion, part of the documents that they had
23 their iron clad obligation to review before they made
24 allegations that information was not available to the
25 operators. Again, this is just a demonstrative. I

1 can provide the information without the demonstrative
2 if it's easier for the Board.
3 ADMINISTRATIVE JUDGE KARLIN: I think
4 we'll just go without the document. Again, you're not
5 to testify to anything, but as an attorney you can
6 make representations as an attorney, but they're not
7 going to be evidence in this case.
8 MR. ROSINSKI: Yes, Your Honor, of course,
9 And I just want to clarify, we did cite the emergency
10 operating procedures in our answers, and, again, they
11 are available and part of the documentation of the
12 operators' training and what the operators have
13 currently available to them, which is the point of
14 what I heard Mr. Roisman talking about earlier.
15 MR. ROISMAN: Mr. Chairman, I just want to
16 be clear on this point, though. The fact that they
17 may have cited a bunch of documents and didn't attach
18 them is legally irrelevant to whether or not the -- I
19 mean you've heard today, and I think you're about to
20 hear from this lawyer, you've heard from other lawyers
21 in the room, their view of what documents that you
22 don't have in front of you say. And if they thought
23 that they were important, I think they needed to show
24 you. We've given some instances here where they told
25 you things were so, and when we showed you what it

1 was, it turned out it wasn't quite the way they
2 pictured it. So I don't think there's any evidentiary
3 basis to do this absent an applicant, which they're
4 free to have done, coming in and saying, "Okay, here's
5 our application or here's the stuff that we say shows
6 that what you asserted was wrong." But absent that,
7 I don't think that there's an evidentiary basis for
8 it, and I just want to be clear that that's our
9 position with regard to that.
10 ADMINISTRATIVE JUDGE BARETTA: But, Mr.
11 Roisman, you also have that iron clad obligation that
12 anything that's available in the public record that
13 you are assumed to have looked at. And, apparently,
14 this is available in the public record.
15 MR. ROISMAN: This is not a public record
16 document. It is available in the sense that you go
17 down to the Plant if you're Mr. Sherman and take a
18 look at it, but my point is not that we didn't look at
19 it --
20 ADMINISTRATIVE JUDGE BARETTA: But you
21 allege that it was not in the EOPs and apparently it
22 is.
23 MR. ROISMAN: No. That's exactly the
24 problem, Doctor.
25 ADMINISTRATIVE JUDGE BARETTA: That seems

1 to be a deficiency.

2 MR. ROISMAN: If the EOP were here and

3 they had submitted it, we could then argue about

4 whether or not what they say in there is or is not in

5 there. I can cite you to an RAI, which we did attach

6 --

7 ADMINISTRATIVE JUDGE KARLIN: Wait a

8 second. The question I'm getting from this is this is

9 not part of the licensing application. It's not in

10 that record. It's available down at the Plant, or is

11 it?

12 MR. ROSINSKI: Your Honor, first of all,

13 DPS has raised the issue of what's in the EOPs. More

14 importantly, the EOPs and whether they need to be

15 changed or not are the subject of the RAI, which is

16 publicly available and was cited specifically by DPS

17 in this contention. And it's on the record, and I

18 guess I find it difficult to understand the argument

19 that we've raised an issue that something is not in a

20 document and then we point out it is, it's not --

21 ADMINISTRATIVE JUDGE KARLIN: Well, I

22 think the issue is that you've raised many allegations

23 of what the State has presented or bold allegations

24 and this sort of thing, and in your answer you made

25 sort of a bold statement that you're not going to have

1 to change the EOP. And I was quite curious about
2 that, but you didn't really provide us much help as to
3 why not. And now all of a sudden you're presenting
4 this document and speaking as a former operator and we
5 don't get into evidence or testimony. You're an
6 attorney representing the party and you make
7 representations, and we won't count them as evidence
8 in any way, shape or form.
9 MR. ROSINSKI: I have no intention of
10 offering any evidence. This is a legal argument to
11 demonstrate only that there is insufficient basis for
12 admission of this contention.
13 ADMINISTRATIVE JUDGE KARLIN: All right.
14 Then let's proceed. I don't know where we are in our
15 calculation of time, but --
16 MR. WACHTER: Do you want me to include
17 that?
18 ADMINISTRATIVE JUDGE KARLIN: Not the
19 entire colloquy, but go ahead.
20 MR. ROSINSKI: Agreed.
21 ADMINISTRATIVE JUDGE KARLIN: Okay. Go
22 ahead.
23 MR. ROSINSKI: DPS has raised several
24 issues, one of which is operator confusion. Today,
25 operators are highly trained on off-normal and

1 emergency operating procedures, including evolutions
2 of beyond design basis scenarios. One of those beyond
3 design basis scenarios is to deal with pressure in the
4 containment, containment over-pressure. Therefore,
5 the assertion that operators have not been trained on
6 how to deal with pressure in the containment while
7 attempting to operate RHR or core spray pumps, the
8 emergency cooling system pumps, is wrong. DPS has not
9 challenged the current training of the operators, and
10 that is part of their current training.
11 ADMINISTRATIVE JUDGE KARLIN: But isn't
12 their training to control, in a sense, of reduced
13 pressure, not to add to it or create credit for it?
14 MR. ROSINSKI: No, Your Honor, they do
15 both. They are trained for beyond design basis
16 events, which there is no way that they just assume
17 they're in a position. That is why the emergency
18 operating procedure Number 1 has a chart with
19 containment over-pressure in it. There are scenarios
20 in the training where they get to a condition where
21 they have pressure in the containment and they're
22 required to run the pumps at question here and they
23 know how to determine whether they have appropriate
24 pressure to run those pumps or what the pressure is
25 when they're running those pumps, and that is what the

1 purpose of these charts are.

2 I can summarize what operators will do

3 today and what operators will be expected to do in EPU

4 conditions as best as we know today to demonstrate

5 that there are no changes necessary. And that is the

6 point. This is not arguing about what change is

7 necessary. We believe this is a black and white

8 issue. We can demonstrate right here that today when

9 emergency operating procedures are in effect,

10 operators at Vermont Yankee use the procedure, the

11 emergency operating procedure, to determine what

12 source of water is available to inject to maintain the

13 core level or restore core level.

14 In that same emergency operating

15 procedure. it sends them to the chart where the

16 untreated conditions are torus water temperature and

17 the flow rate that the underlying operating procedure

18 directs. That chart is the one that we were referring

19 to. Operators cross those two parameters and it tells

20 them what pressure or over-pressure is necessary to

21 maintain that flow per our design calculations.

22 Today, the operators will never determine

23 that more than zero pressure in the containment is

24 necessary because that is our design basis, no

25 containment over-pressure. The reason for that is

1 that there is not enough heat at the current licensed
2 power level to heat the torus water above a certain
3 point. That point never crosses the zero pressure in
4 the containment line. At EPU conditions, there will
5 be more energy available. It is possible under
6 certain circumstances that the torus water will be at
7 a higher temperature. If you go across the graph for
8 the same flow conditions, you may require some over-
9 pressure in the containment. That over-pressure is
10 what has been calculated in the submittals, in the
11 application.
12 MR. BLOCK: I want to put an objection in
13 the record. I mean this sounds an awful lot like
14 testimony to me just by what he said. And I hope the
15 Board will strike all of it where none of it is
16 referenced to any material in the application, and he
17 goes on and on relating information that is not before
18 the Board, except through this attorney's mouth right
19 now.
20 ADMINISTRATIVE JUDGE KARLIN: Any response
21 to that?
22 MR. ROSINSKI: I was answering the Board's
23 question as to why there is no need to change the
24 EOPs.
25 ADMINISTRATIVE JUDGE BARETTA: I have a

1 very simple question I'd like to ask.

2 ADMINISTRATIVE JUDGE KARLIN: Well, let me

3 rule on this first. I mean I think we're going to --

4 ADMINISTRATIVE JUDGE BARETTA: Well, I

5 think it will clarify this.

6 ADMINISTRATIVE JUDGE KARLIN: Okay. Maybe

7 this will clarify.

8 ADMINISTRATIVE JUDGE BARETTA: That's why.

9 It says in your response, and this is where I'm

10 confused because of what Mr. Roisman has just said,

11 that these actions are set out in charts and they are

12 part of the existing EOPs to which the operators refer

13 for instruction. Now, are you referring in our

14 discussion now to that statement?

15 MR. ROSINSKI: Exactly that, sir. Yes,

16 sir.

17 ADMINISTRATIVE JUDGE BARETTA: So you're

18 clarifying that point; is that correct?

19 MR. ROSINSKI: I am trying not to repeat

20 our filings but to clarify what that means.

21 ADMINISTRATIVE JUDGE BARETTA: And under

22 EPU operations, EOPs --

23 ADMINISTRATIVE JUDGE KARLIN: What page?

24 ADMINISTRATIVE JUDGE BARETTA: I'm

25 referring to Page 36 of the Entergy response to the

1 DPS Notice of Intention to Participate Petition, dated
2 September 29. And I can also refer to Mr. Roisman's
3 citation of the same EOPs, which suggest that these
4 were available. And that's what's bothering, that
5 this material seems to have been available and should
6 have been reviewed properly.
7 MR. ROSINSKI: Just to be clear, if I may,
8 I lumped together many events in my description, but,
9 as discussed in this paragraph, that is how the
10 operators will respond in a verbal -- I described it
11 verbally what is represented in this paragraph.
12 ADMINISTRATIVE JUDGE BARETTA: I just
13 wanted to clarify that point.
14 ADMINISTRATIVE JUDGE KARLIN: Right. So
15 these statements were made in the pleadings. We are
16 not allowing, nor did you attach in your pleading,
17 those documents that you were referring to. So those
18 are not in evidence here, and we won't consider them.
19 In this discussion, counsel have made numerous
20 representations and statements about things, and I'm
21 going to let them answer the questions we've got here.
22 So I'll not sustain that objection, Mr. Block.
23 MR. BLOCK: Thank you.
24 ADMINISTRATIVE JUDGE KARLIN: Thank you.
25 I think it is important for us to understand a bit of

1 this. We're not going to have evidence here, but I
2 would like to understand how they can answer the
3 State's point as they have.
4 MR. ROSINSKI: Just to be clear and to put
5 a point on this, what I was trying to attempt here,
6 the question before us, I believe, or before you is
7 whether there are any -- whether the EOPs contain
8 information or do not. It is not about the quality of
9 the information or about the clarify of the
10 information. The statement in the contention is that
11 the EOPs do not address containment over-pressure and
12 that operators will be confused by a change that is
13 required to put that information in. What I have
14 attempted to describe and what I'm representing is
15 that neither one of those has a basis. Now, it is not
16 an evidentiary issue of a shade of gray; this is a
17 black and white issue. It is in there, the operators
18 are trained on it, there is no change necessary.
19 Therefore, to go to the second point that they will be
20 confused by some change, which is unidentified yet, is
21 pure speculation.
22 ADMINISTRATIVE JUDGE KARLIN: Well, let me
23 ask you, I mean the State has put forward this
24 exhibit, Number 18, and they have this chart in the
25 number of seconds. And at 1.26001 second, the over-

1 pressure is 2.4, and at 2000 it's 2.4; 2001, it's 3.4.
2 And it goes on for 50 hours of different pressures
3 that have to be maintained. And it's all nicely
4 displayed in a chart with these steps of pressure.
5 And somehow it seems to me you're asking the credit in
6 your application that -- that Entergy get credit for
7 doing this, over-pressure credit. And I guess what
8 you're telling me is you're doing this already. This
9 exact chart, that's exactly what you're doing right
10 now.
11 MR. ROSINSKI: The existing charts, the
12 existing information --
13 ADMINISTRATIVE JUDGE KARLIN: No, this.
14 You're doing this now.
15 MR. ROSINSKI: If I may, the existing
16 charts in the current EOPs allow for that. They bound
17 that over-pressure because the fundamental physical
18 parameters remain the same. Torus water temperature
19 gets higher, you need more NPSH. That is all we're
20 saying. We didn't credit it in our design basis
21 before. Essentially, the lines, wherever we are, at
22 0 PSIG or 5 PSIG, approximately where we would be at
23 EPU, defines the line between design basis and beyond
24 design basis. All we're doing is shifting that line.
25 It's transparent to the operators.

1 And really that's the source of my comment
2 about my operations background. I'm aware that
3 Vermont's expert is an engineer, and maybe that is the
4 example. That is an engineering chart. Operators
5 don't operate off of that. Operators operate off the
6 current EOP, which are smooth and bounding and allow
7 for the events, and the way that those procedures are
8 used during those events is precisely why they are
9 smoothed out and simple to use because there are a lot
10 of things going on.
11 If I may continue, operators are trained
12 to balance flow, balance pressure, balance temperature
13 all the time. That's what their job is, in a
14 nutshell. Today, if they didn't balance flows,
15 temperatures or pressures, the Plant would be either
16 be too -- it wouldn't be in balance. That's what they
17 do every minute that they're on watch and that's what
18 they're trained to do. This is not the
19 extraordinarily different, more difficult aspect of
20 their job than any other part of a difficult but not
21 untenable job is.
22 ADMINISTRATIVE JUDGE BARETTA: Could I ask
23 you, is that either of the EOPs that are cited by the
24 State, EOP-1 or EOP-3, that would contain that?
25 MR. ROSINSKI: EOP-1 is the reactor

1 pressure vessel level control. That is where the --
2 that is the priority of the EOPs, is to go there, keep
3 the core covered. That is where the information I am
4 talking about lies.
5 ADMINISTRATIVE JUDGE BARETTA: Okay. So
6 that curve that you mentioned would be in EOP-1.
7 MR. ROSINSKI: Yes. There are charts for
8 both the RHR and core spray and numerous others for
9 different situations. We must also keep in mind that
10 EOPs are not event-driven. You don't go through an
11 EOP based on LOCA or based on what you think the event
12 is. That's lessons learned.
13 What they are is symptom-based. You run
14 many of these in parallel. You're constantly
15 balancing efforts to maintain maybe a pressure in one
16 place higher and a pressure in another place lower.
17 There's nothing extraordinary about balancing and
18 maintaining pressures and temperatures and flows in
19 the scenario that DPS has raised here. And they
20 haven't been able to point to what is different about
21 this.
22 MR. WACHTER: Two minutes.
23 MR. ROSINSKI: To continue, we want to
24 make the point that we stated in our answer that the
25 EOPs establish the measures the operators need to

1 maintain containment pressure during an event without
2 the need to refer to the small pressure steps
3 predicted by the calculation. DPS did not respond to
4 that and does not challenge that. They get to hold up
5 their sign with the little pressure steps on it. We
6 made it clear in our answer that that was not the
7 appropriate document to use, that it was an
8 engineering document, it was not the operators'
9 document, it was not the operators' guidance.
10 ADMINISTRATIVE JUDGE KARLIN: Well, let me
11 ask, I mean even though that might not be the document
12 to use, it just seems to me that there's a change
13 occurring, that you're requesting now credit for over-
14 pressure, that you will affirmatively maintain
15 additional pressure, and that somehow is different
16 that what was going on before, because that's why
17 you're asking for it. But you're saying in reality
18 nobody's going to do anything different.
19 MR. ROSINSKI: It's different for the
20 engineers because --
21 ADMINISTRATIVE JUDGE KARLIN: I mean I
22 don't care what the piece of paper is that they're
23 going to refer to.
24 MR. ROSINSKI: They will not perform as
25 any different steps. The results of the chart will

1 show that potentially in certain circumstances they
2 will need to maintain a small amount of positive
3 pressure, but the chart will tell them what it is --
4 three pounds, two pounds, whatever -- and they will
5 have that information to continue to monitor like they
6 do all the other parameters when they pull a number
7 off of any of those charts. They will maintain that,
8 and they are trained to maintain it, and other steps
9 and other procedures are accounted in the training
10 that may cause them to have to balance some of these
11 things, but they know they have to have that pressure
12 to maintain their first priority which is to cover the
13 core. And DPS has not challenged any of that. They
14 have made a blanket statement that this does not
15 exist, the operators are not trained and that any
16 change would confuse the operators.
17 ADMINISTRATIVE JUDGE KARLIN: Well, I
18 think they're suggesting there would be confusion.
19 Okay. Time. Thank you. Ms. Poole?
20 MS. POOLE: Thank you. The Staff --
21 ADMINISTRATIVE JUDGE KARLIN: Ten minutes.
22 Ten minutes?
23 MS. POOLE: Pardon?
24 ADMINISTRATIVE JUDGE KARLIN: I believe
25 it's ten minutes.

1 MS. POOLE: Yes. We don't have a great
2 deal to add to what's in our papers. The Staff just
3 wanted to address something that was raised in the
4 Department's reply. The Department states that the
5 Staff uncritically replies on the Applicant's RAI
6 response that states that no EOP changes are involved
7 in the request at issue here. Thus, the State
8 characterizes the Staff answer as being that because
9 Applicant says no EOP changes are required, it must
10 follow that none are needed.
11 I want to clarify that this
12 characterization of the Staff's reply is not correct.
13 The Staff in fact has not reached the merits at all as
14 to whether any changes are necessary to the EOPs or
15 the guidance. We cited the RAI response for the
16 proposition that the Staff questioned whether the
17 Petitioner had shown a factual dispute on the issue of
18 the changes, or none, as the case may be, to the EOPs.
19 It was simply as a reference to show the dispute.
20 We're not taking any position on the merits. And
21 that's all we have to add unless the Board has any
22 questions.
23 ADMINISTRATIVE JUDGE KARLIN: All right.
24 Questions? Thank you.
25 ADMINISTRATIVE JUDGE BARETTA: Could I ask

1 just a technical question? The curve that we saw
2 there a moment ago and is in the exhibit, is that
3 fairly typical of most BWR containments, do you know
4 off hand?
5 MS. POOLE: It is typical of those that
6 take containment for credit over-pressure -- for
7 containment over-pressure, but it would not be in
8 something that we would typically understand to be in
9 the EOPs.
10 ADMINISTRATIVE JUDGE BARETTA: Okay.
11 Thank you.
12 MR. ROISMAN: A little reply?
13 ADMINISTRATIVE JUDGE KARLIN: Is there
14 some time left.
15 MR. WACHTER: Nine minutes.
16 ADMINISTRATIVE JUDGE KARLIN: I'm sorry,
17 you have nine minutes for a reply, Mr. Roisman.
18 MR. ROISMAN: Well, not only is there a
19 problem with confusion of the operators, I think
20 there's a problem with confusion in the room. Let me
21 see if I can try to clarify that.
22 This -- and what Staff counsel just
23 answered is important -- this is something new that
24 applies only if you're going to take credit for
25 containment over-pressure. Normally, and that's our

1 point, normally, currently, the operator is told, "Get
2 the containment pressure down." That's the rule.
3 There's nothing in the EOP that tells him how am I
4 supposed to balance that responsibility with this new
5 responsibility to not get it down but to keep it up
6 and for very discrete portions?
7 If you go and look at what we said in the
8 initial contention, this is in our Petition beginning
9 at Page 35, we identify all the different steps that
10 the operator is required to try to meet in order to
11 get the pressure just right. So that's the first
12 point. Our first point is that it is inherently
13 confusing. The Applicant's answer is, "We tell him to
14 do both of those things." That's not an answer to
15 explaining why it isn't confusing and therefore
16 fraught with the risk that he may get it wrong without
17 more guidance on how he's supposed to simultaneously
18 do these two things that are inherently inconsistent
19 and how he manages to get and hit those marks in this
20 50-hour period, keeping in mind that the consequence
21 of missing the mark is that an ECCS pump may fail and
22 we have a much, much more serious accident as a
23 result. So that's the first point.
24 The second point is, and I want to talk
25 about this specifically, we do have and we put into

1 evidence and it's Exhibit 29 to our pleading, the RAI
2 response, the one that the Staff was just referring to
3 that we said they accepted what the Applicant said at
4 face value. I think it's significant that you didn't
5 hear the Staff say, yes, and they're okay. The Staff
6 said, "All we said was that's what the Applicant said.
7 We're still looking at it."
8 So this isn't quite shut an open and shut
9 issue. I don't meant to suggest that we should wait
10 for the Staff, but the fact that they think it's worth
11 looking at suggests it's not quite as simple as the
12 Entergy counsel would have you believe.
13 So let's look at Exhibit 29, and there was
14 an RAI SPSBC-22, and the question was, "What are you
15 doing to change your emergency operating procedures to
16 deal with containment over-pressure?" The short
17 answer is, "The VY NPS emergency operating procedures
18 do not require revision." And then dealing with
19 emergency operating procedure Number 1, which Entergy
20 counsel says is the critical one, this is what the
21 document says. "In accordance with EOP-1, when using
22 RHR," that's one of the pumps, "for an injection
23 system, operators are directed to inject through the
24 heat exchanger as soon as possible and to control and
25 maintain pump flow below the RHR NPSH limit." But

1 this chart is about pressure, not about flow.

2 Our point is now for the first time, as

3 counsel for Entergy conceded, the line in which the

4 temperature and the torus gets to the point where you

5 have to worry about NPSH had never been reached

6 before, because you don't reach it if you don't uprate

7 this Plant by 20 percent. Now you've uprated it by 20

8 percent. Now there's a new problem because you

9 decided to deal with NPSH problems with containment

10 over-pressure.

11 ADMINISTRATIVE JUDGE BARETTA: I'm a

12 little confused there, though, because you're taking

13 that paragraph and the two succeeding paragraphs in

14 that RAI response. In fact, in the second paragraph,

15 it says, "In accordance with EOP-3, drywall sprays are

16 initiated before containment temperature reaches 280

17 degrees fahrenheit or when torus pressure exceeds 10

18 psi. Containment sprays should isolate automatically

19 when drywall pressure decreases to 2.5 psi. Both of

20 these steps in EOP-3 provide reference to Caution

21 Number 5 and emphasize the relationship between

22 primary containment pressure and available NPSH."

23 So these EOPs, as we've heard, are not

24 taken in isolation. They're symptom-based, and you

25 work with them as a series in parallel because you

1 really don't -- and that was a lesson that came out of
2 TMI is that you can't have a -- you don't want the
3 operators trying to identify the accident. You want
4 them to keep the core covered, and therefore you work
5 with them based on a systematic-based issue and you
6 may have two or three of these in play at any given
7 time. And you seem to be taking a portion of one
8 without taking credit for portions of the other, and
9 I'm confused about that.
10 MR. ROISMAN: Let me be clear. The issue,
11 brand new for this Plant, keep in mind until and
12 unless uprate is approved, this Plant doesn't pay any
13 attention to trying to keep containment over-pressure
14 up. That's not their goal. Their goal is exactly the
15 opposite: Get containment over-pressure down. So
16 that's what the Plant is today. That's what the
17 operators are told: This is job one.
18 Now, something new has happened. We've
19 got an uprate. Now we have to find a way to deal with
20 the NPSH problem that we wouldn't have had to deal
21 with if we didn't have uprate. So the question is how
22 do you deal with it?
23 Now, common sense would say if you've now
24 changed something as fundamental as this, that you
25 would want your operating procedures to alert the

1 operator to the fact that you're going to have to now
2 do something that you weren't doing before. We don't
3 want you to always be dropping containment pressure.
4 We want you instead to be controlling containment
5 pressure to a chart, a table, whatever, whatever is in
6 that instruction, but no guidance to how the operator
7 is able to do that in conjunction with his other
8 function. We're saying that when they try to spell
9 that out -- and I think the reason they've not spelled
10 it out is that they can't figure it out. How do you
11 tell the guy, "Drop it as fast as you can, keep it up
12 as much as necessary." That's just an inherently
13 confusing problem.
14 Now, what this RAI does is it tells you
15 that the only thing they now do is direct the operator
16 to take control and maintain pump flow. So they're
17 not even directing him to the critical question, which
18 is pressure. Nothing in here says keep the
19 containment pressure up.
20 ADMINISTRATIVE JUDGE BARETTA: I mean I
21 guess I don't see that, because I thought that's what
22 that statement was I just read, but go ahead.
23 MR. ROISMAN: Well, I mean, I guess at
24 root we're arguing about what it is that's going
25 happen. We want an opportunity to have someone come

1 up who's under oath and tell us how he's going to
2 handle or she's going to handle the containment over-
3 pressure requirement in the event of a loss of coolant
4 accident operating off of these EOPs. Where do these
5 EOPs provide the guidance? We submit they do not.
6 They say, without submitting anything more than what
7 we've submitted, "Oh, yes, they do." But with due
8 respect, the Board is being asked to speculate about
9 what those EOPs said. All we have and what we've
10 submitted is the RAI answering the specific question
11 we've asked when the Staff asked it, which we thought
12 was adequate for purposes of making a contention and
13 showing that we have a basis for the contention.
14 ADMINISTRATIVE JUDGE RUBENSTEIN: So your
15 contention is basically two parts. There's a need for
16 an EOP change, and in examining the EOPs, you find
17 it's an omission.
18 MR. ROISMAN: Yes.
19 ADMINISTRATIVE JUDGE RUBENSTEIN: And the
20 second part is if there's a need for an EOP change,
21 potentially this change could be confusing, and it's
22 a little -- I don't want to use the word,
23 "extraordinary" -- but a little out of what an
24 operator normally sees on a simulator in its training.
25 MR. ROISMAN: Yes, but even beyond that is

1 the question of whether or not this is not inherently
2 --
3 ADMINISTRATIVE JUDGE RUBENSTEIN: It's not
4 the issue of whether there should be a COP. We're now
5 dealing with the issue of if there is a COP change,
6 how should we address it. That's the way I read your
7 contention.
8 MR. ROISMAN: Did you say, "COP?"
9 ADMINISTRATIVE JUDGE RUBENSTEIN:
10 Containment over-pressure.
11 MR. ROISMAN: I'm sorry.
12 MR. WACHTER: Two minutes.
13 ADMINISTRATIVE JUDGE RUBENSTEIN: Your
14 shorthand terminology.
15 MR. ROISMAN: I'm sorry. It was that I
16 couldn't tell whether you were saying COP or EOP and
17 we're talking about both here.
18 ADMINISTRATIVE JUDGE RUBENSTEIN: Good
19 point.
20 MR. ROISMAN: Yes, I think that that's
21 correct, but I think if all we said was, "Because
22 you're going to have to now have containment over-
23 pressure, you need to make changes," we probably would
24 flunk the contention specificity requirement. So
25 we've gone beyond that, and, frankly, I think that the

1 exchange that's taken place, not face-to-face, between
2 myself and counsel for Applicant is illustrative of
3 the fact that we have a dispute and that's why you
4 hold hearings, to resolve those disputes. And we hope
5 that you'll agree with us that this is a contention
6 that warrants having a full hearing and having it
7 resolved.
8 ADMINISTRATIVE JUDGE RUBENSTEIN: Well, in
9 the basis, I'll have to go back and read it, but would
10 you say something about the need for it, other than
11 confusing? In other words, if you put it in, it's
12 confusing, but why do you need it? Why do you need it
13 in the EOP?
14 MR. ROISMAN: Well, because -- you need it
15 someplace. If they want to come up with another place
16 that they think they can put it and demonstrate that
17 it will solve the problem, that's their option to make
18 --
19 ADMINISTRATIVE JUDGE RUBENSTEIN: But I
20 think I heard them say they don't need it.
21 MR. ROISMAN: Right. And we say -- I mean
22 looking at bases now, not supporting evidence, and
23 that's a really important distinction for us, although
24 not one that the Staff and the Applicant want to focus
25 on, supporting evidence doesn't -- nobody suggests

1 that we have to have admissibility of supporting
2 evidence. But the basis says the response by the
3 Plant operator at an event which increases containment
4 pressure is to reduce containment pressure. That's
5 the normal. But the proposed design basis change to
6 credit set levels of containment over-pressure, the
7 operators will be placed in the confused position of
8 both needing to reduce containment pressure and to
9 maintain containment pressure. I submit nothing we've
10 heard this morning and nothing in any of the pleadings
11 says that's not true, that the operator will be faced
12 with that.
13 And then we say the Applicant's proposal
14 related to emergency operating procedures would create
15 the same unacceptable human factors paradigm for
16 operators that was found by the task force which
17 investigated Three-Mile Island. In other words, it
18 would create -- and then we cite to the Three-Mile
19 Island to show the kind of paradigm that they said in
20 their lessons learned we don't want to create. And
21 we're saying they're creating it here.
22 So we are saying that maybe we're from
23 Missouri, technically we're from Vermont, but show me,
24 show us how. Merely asserting that we have another
25 chart that they hold up that shows the operator can

1 look at the chart without ever telling us how he's
2 supposed to obey that chart and obey your other
3 obligation to keep containment pressure down as
4 quickly as you can after an accident, you haven't
5 addressed that.
6 ADMINISTRATIVE JUDGE RUBENSTEIN:
7 Alternatively, you're also asserting that it's
8 confusing and that's the second issue.
9 MR. ROISMAN: Yes, that's correct.
10 ADMINISTRATIVE JUDGE RUBENSTEIN: I'm
11 done.
12 ADMINISTRATIVE JUDGE KARLIN: Okay. Thank
13 you. Okay. Thank you, Mr. Roisman. I think that
14 concludes our discussion on State Contention 4. So I
15 appreciate -- I think the argument has gone well and
16 been conducted well. We will adjourn at this point.
17 ADMINISTRATIVE JUDGE RUBENSTEIN: Are we
18 going to lock this? Is this place secure?
19 ADMINISTRATIVE JUDGE KARLIN: I'm not
20 sure. Do we know what the security situation is? You
21 will stay here? Okay.
22 MR. ROSINSKI: We will leave someone here.
23 ADMINISTRATIVE JUDGE KARLIN: All right.
24 So you can leave your stuff here or at least we'll
25 have guards here so you can leave your materials. So

1 let's reconvene at two o'clock, about an hour and 15
2 minutes from now, and we'd like to get through at
3 least four or possibly five of the contentions this
4 evening, additional contentions this evening.
5 (Whereupon, the proceedings went off the
6 record at 12:42 p.m. and went back on the record at
7 2:02 p.m.)
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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 2:02 p.m.

3 MR. BLOCK: May we take up a procedural

4 question briefly?

5 ADMINISTRATIVE JUDGE KARLIN: Yes.

6 MR. BLOCK: It just deals with the

7 schedule. I was wondering if you could indicate when

8 you intended to adjourn today or on what basis --

9 ADMINISTRATIVE JUDGE KARLIN: I'm sorry,

10 I couldn't hear you.

11 MR. BLOCK: I'm sorry, when you intend to

12 adjourn today, what time?

13 ADMINISTRATIVE JUDGE KARLIN: I think

14 we're going to try to get through four contentions

15 this afternoon. At 45 minutes apiece, that's three

16 hours, maybe a break in there. So 5:30, maybe 5:30.

17 Certainly by six I think we'll adjourn.

18 MR. BLOCK: Thank you very much. I

19 appreciate it.

20 ADMINISTRATIVE JUDGE KARLIN: That's what

21 we're going to shoot for anyway. Okay. I think we

22 will reconvene, go back on the record. And, Mr.

23 Roisman, I think you proceed with State Contention

24 Number 1 at this point?

25 MR. ROISMAN: Yes, Mr. Chairman. The

1 essence of this contention, which arises out of many
2 of the same considerations --
3 ADMINISTRATIVE JUDGE KARLIN: Let me ask,
4 anything with rebuttal or the same general rule, no
5 rebuttals?
6 MR. ROISMAN: I'll keep answering your
7 questions as long as you want to ask them.
8 ADMINISTRATIVE JUDGE KARLIN: All right.
9 MR. ROISMAN: The same factors in a
10 certain way influence Contention 1 as influenced
11 Contention 2. The difference here is that what we
12 have focused on is the potential effect of the use of
13 containment over-pressure for the first time at this
14 Plant on the barriers that are set for protecting the
15 public health and safety in the event of an accident.
16 And a principal argument is that once you
17 make containment over-pressure something that is a
18 credit for an entirely different system, namely ECCS
19 system, if there is a failure of containment to
20 maintain the necessary pressure, it not only affects
21 the containment, which it of course always would have,
22 but it will now also have the effect of potentially
23 disabling the ECCS system.
24 So if you don't take credit for
25 containment over-pressure, then should there be a

1 failure in containment, the consequences are limited
2 to whatever happens when containment fails, and the
3 NPSH problem is being dealt with without counting or
4 getting credit for the containment over-pressure. So
5 that is the sort of source of the issue. Now --
6 ADMINISTRATIVE JUDGE RUBENSTEIN: So the
7 initiating event is a large-break or a small-break
8 LOCA.
9 MR. ROISMAN: Right.
10 ADMINISTRATIVE JUDGE RUBENSTEIN: And a
11 simultaneous containment failure?
12 MR. ROISMAN: No. No, we're not --
13 ADMINISTRATIVE JUDGE RUBENSTEIN: It's a
14 consequential containment failure?
15 MR. ROISMAN: What happens is is that the
16 containment fails to achieve the levels of pressure
17 because of things which we've identified -- this goes
18 back to some of our discussions about uncertainties --
19 but things like the valve leakage, that if that
20 containment doesn't maintain that level in light of
21 problems with the containment isolation valves, then
22 the containment pressure --
23 ADMINISTRATIVE JUDGE RUBENSTEIN: Will
24 drop and the NPSH would be insufficient, and then you
25 would have temperature and pressure in the suppression

1 pool and that would go up. So these are compound
2 events?
3 MR. ROISMAN: Correct, if you're counting
4 containment pressure. If you're not counting
5 containment pressure, then you're able to meet NPSH
6 requirements because you've done something else.
7 You've either not raised the power level up as much as
8 the uprate -- because right now this Plant doesn't
9 need containment over-pressure to make sure that NPSH
10 requirements are met.
11 ADMINISTRATIVE JUDGE RUBENSTEIN: But if
12 you're meeting the required NPSH, what is challenge to
13 the containment, if you're not overheating?
14 MR. ROISMAN: The challenge is -- and I
15 want to make sure that I -- my expert here will
16 correct me if I get this wrong. The challenge is
17 this: In the event of the loss of coolant accident,
18 if NPSH-R is being met without regard to containment
19 over-pressure, in other words it's met because you've
20 got a better quality pump there or you have somehow or
21 another created -- you don't have so much power in the
22 Plant that NPSH is influenced the way it would be in
23 this uprate, in other words if you stayed with the
24 status quo, then if containment over-pressure doesn't
25 achieve the expected levels, nothing is adversely

1 affected outside the containment as a result of that.
2 The containment has more leakage, you don't get the
3 little chart I showed you that shows where containment
4 over-pressure is expected to be, you fall below that
5 level. There's no system in the Plant that was
6 counting on you to be above that level. So no
7 problem.
8 But if instead you make containment over-
9 pressure something that is required to deal with a
10 different system, in this case ECCS pumps and NPSH-R,
11 then when that containment over-pressure doesn't
12 achieve what you had expected or wanted, now we have
13 an effect on the ECCS and that makes it influence two
14 of the barriers that are supposed to not be influenced
15 by a single event. That's the problem.
16 Now, let me say in further support of
17 that, as we pointed out in our pleading, if you look
18 at the history of the NPSH issue, the 1996
19 recognition, the investigation, the resolution, even
20 the letter that was sent to Vermont Yankee in 1999,
21 throughout that nobody said, "Let's allow containment
22 over-pressure to be used to meet NPSH deficiencies."
23 In other words, they continued to treat the
24 uncertainties that we talked about before as important
25 enough that you wouldn't now be allowed to use

1 containment over-pressure.

2 And then what happened, and this is

3 explained in the documents, some of which we've

4 attached, then what happened was that a few plants

5 came back to the NRC and said, "Hey, if we have to fix

6 the debris blockage problem the way you're proposing,

7 we're going to have a problem that we can't meet NPSH

8 requirements, and we need to take containment over-

9 pressure credit." And so you then had the agency, the

10 ACRS and then the NRC staff, eventually, memorialized

11 in 1.82 Rev. 3, saying, "Okay. When it's necessary

12 and impracticable to do anything else, we'll let you

13 take credit." And what they were doing, what we

14 believe they were doing, is they were recognizing that

15 essentially a backfitting obligation imposed by the

16 agency in the form of, "Deal with this debris blockage

17 problem," was creating a problem for a sum of

18 reactors, and they were going to let them take a fix.

19 Now what we have is a plant that's not in

20 that category. This is not a plant which operating at

21 its regular licensed basis needs any containment over-

22 pressure credit. So they're now stepping up and

23 they're saying, "No, we want containment over-pressure

24 credit in order to be able to uprate." And because

25 that's a voluntary act, not the result of a

1 backfitting or a change in requirements imposed by the
2 NRC Staff, we think that falls into a different
3 category.
4 And what we want to do, and what we've
5 done in Contention 1 is, to point out that the people
6 who were approving the fix for NPSH problems created
7 by the strainer were saying all along, "You know,
8 there are a lot of problems here, but we think" -- in
9 fact, I think one of the ACRS statements was, "Let's
10 put this on the street, let's get it out there."
11 Because there was no doubt that the fix, that is
12 putting in, as Applicant has indicated here was done
13 at this Plant, putting in these much larger strainers
14 did help to deal with the debris problem.
15 But what the documents that we've cited in
16 the Contention say is that even though they did that
17 there were still questions, there were still doubts,
18 and there was still a belief expressed in ACRS
19 documents and elsewhere that we ought to be concerned
20 that we don't completely have our hands around this
21 issue. There was no doubt that the bigger strainers
22 was a good first step and everybody had to do that,
23 but this is something different.
24 And if I may, I just want to point out --
25 ADMINISTRATIVE JUDGE KARLIN: Mr. Roisman?

1 MR. ROISMAN: Yes.

2 ADMINISTRATIVE JUDGE KARLIN: Maybe I
3 could ask, on the credit for containment over-
4 pressure, the Staff seems to say in its answer that
5 this is not that unusual. They've done it 20 times or
6 something like that. What's the answer to that? Are
7 you distinguishing the time, whether they're uprates
8 versus not an uprate situation?

9 MR. ROISMAN: Well, I think there are two
10 answers. First of all, this is not a situation in
11 which we have a generic rulemaking resolution of this
12 problem which now is being applied to a new plant.
13 This plant has to be taken on its own, and I believe
14 that most of those plants have been of a different age
15 than this one, but even if not, the question still has
16 to be what about this one? I don't dispute the fact
17 that the Staff -- and I assume that they decided to
18 come in as a party will want to offer evidence as to
19 why they think that containment over-pressure can be
20 safely used even in a plant like Vermont Yankee. And
21 we're not saying that there's no evidence that that's
22 true.

23 ADMINISTRATIVE JUDGE KARLIN: Right.

24 MR. ROISMAN: We're saying that there's
25 other evidence that says that it's not very wise. The

1 most important part of that evidence is the history
2 reflected in the evolution of what now is Rev. Guide
3 1.82 Revision 3. And that history shows a very much
4 more reluctant willingness to allow containment over-
5 pressure to be used to deal with NPSH-R requirements,
6 that there have been other plants where that has been
7 allowed anyway. That's a fact, but I don't think it
8 is a dispositive fact.
9 I did want to mention --
10 ADMINISTRATIVE JUDGE BARETTA: Before you
11 go on to your next point, could I ask a couple of
12 questions?
13 MR. ROISMAN: Yes, of course.
14 ADMINISTRATIVE JUDGE BARETTA: It seems
15 one of your basis tenets on this with respect to
16 compromising ECCS performance and coupling the
17 containment to ECCS performance, that that's
18 undesirable, yet I'm curious as to are you familiar
19 with like the advanced reactor concepts, like the AP-
20 600 and such?
21 MR. ROISMAN: Familiar would be a gross
22 overstatement.
23 ADMINISTRATIVE JUDGE BARETTA: Because in
24 those the containment actually forms part of the
25 emergency core cooling system and actually provides a

1 source of water for the primary system in a way -- and
2 that was considered to be desirable because it was a
3 passive capability, and this containment over-pressure
4 is a passive feature in a way. Do you follow what I'm
5 saying?
6 MR. ROISMAN: Yes, I do.
7 ADMINISTRATIVE JUDGE BARETTA: Could you
8 comment on that, because that was one of the things
9 that was troubling me?
10 MR. ROISMAN: Well, I think, first of all,
11 that the question isn't whether or not we could come
12 up with a plant design in which the use of containment
13 over-pressure as a way of dealing with one of the
14 other issues is a good idea. The narrow question,
15 only question that we really want to raise and the
16 only one that we're really permitted to raise here is,
17 is it a good idea for this plant, given what we know
18 about this plant? And I think the answer to that is
19 that with regard to this plant, there is no evidence
20 that we have found that persuades us that the NPSH-R
21 should be met by taking a credit for containment over-
22 pressure, given that historically that the agency from
23 the ACRS have been reluctant to do that because of
24 problems in the way in which that analysis is done
25 that continue to this day.

1 Now, I want to be clear that we're not
2 talking here about calculations. We believe that
3 Entergy has run its calculations, the VY 0808, as well
4 as they can with what they've got. Our point is that
5 the calculations that they've run have essentially
6 glossed over these uncertainty issues and that they
7 wouldn't make a difference if we weren't in an uprate
8 mode where the purpose was now to use the calculations
9 to get some containment over-pressure credit. That's
10 where the problem arises.
11 ADMINISTRATIVE JUDGE RUBENSTEIN: We're
12 sort of back to one of your contentions we addressed
13 this morning.
14 MR. ROISMAN: Well, I think the two are --
15 ADMINISTRATIVE JUDGE RUBENSTEIN: Yes.
16 MR. ROISMAN: -- are interrelated because
17 either there's a problem with using containment over-
18 pressure or there's not, and we go back to the same
19 fundamental problem.
20 ADMINISTRATIVE JUDGE RUBENSTEIN: I'm
21 having a little trouble with following you in a sense
22 of when you went through your sequence of events which
23 would bring this about, I'm sitting here thinking in
24 a flow chart sequence rather than getting into your
25 basis for why the containment pressure would fall. So

1 one has -- if I was doing an event, one would start
2 with a LOCA, a loss of coolant accident where a pipe
3 breaks, ECCS would work. Now your hypothesizing that
4 the containment over-pressure, EOP sequence,
5 management operation fails. Is that correct? In
6 sequence. We have a LOCA, we're now talking about a
7 failure in containment over-pressure management, which
8 gives rise to a loss of heat removal, a rise in the
9 temperature of the suppression pool and an increase in
10 the containment pressure or are you talking about some
11 other failure mechanism for the containment?
12 So I'm trying to get a hint of how you --
13 if you just -- rather than get into your basis or into
14 the merits saying, "We think the containment has
15 leakage," then one would have to ask if you got into
16 the merits the extent of the leakage, is that likely
17 to compromise the containment integrity? So just
18 going down the sequence of events, I'm trying to look
19 for what -- later on we talk about single failures,
20 and I'm trying to see how that fits in with the
21 regulations.
22 MR. ROISMAN: Give me a second.
23 (Pause.)
24 MR. ROISMAN: Okay. I'm going to try to
25 say this. Conceptually, we have a single failure as

1 the analysis criteria that's used by the NRC. In the
2 real world, we see lots of instances where when there
3 is an emergency shutdown, not a LOCA, an emergency
4 shutdown, that actually there are often more than one
5 failure. We're not nervous about that. We don't then
6 say, "We'd better shut down all the nuclear power
7 plants because they're all designed to single
8 failure." Rather, we say, "Well, defense-in-depth is
9 what gives us our confidence; that is, the ability to
10 know that we have these other defenses that we've been
11 maybe very conservative about will compensate for the
12 possibility that we might actually have more than one
13 failure when something happens." That concept can be
14 departed from when, and we talked about this earlier,
15 when there is sufficient basis to believe that some
16 component of defense-in-depth is no longer necessary.
17 Our argument, both here and in Contention
18 2, is that that point has not been reached with regard
19 to the long-standing NRC policy of never letting
20 containment over-pressure be used as a credit; rather,
21 we use the fact that we think there will be
22 containment over-pressure as a justification for going
23 ahead with the plant even though we're worried about
24 some other potential --
25 ADMINISTRATIVE JUDGE RUBENSTEIN: I

1 understand your concern with giving up margin in the
2 defense-in-depth or approaching the safety limit in
3 giving up margin from the operating envelope of the
4 plant, and I'm trying to focus in on the sequence of
5 events that we visualize, going back to the sequence
6 that I had postulated as the containment pressure got
7 too high because the NPSH went down when in fact the
8 containment sprays come into play and then suppress
9 the pressure a little bit to take into account
10 containment integrity.
11 So, on the one hand, it's a more abstract
12 argument. On the other hand, it's a very specific
13 argument about a sequence of events within the way
14 that, a, the PRA would look at it and the way the
15 regulations would look at it and the way you're sort
16 of presenting it, which is if this happens, if that
17 happens, these are the likely consequences. But one
18 has to have a disciplined mental approach to this, and
19 I'm not blaming on you about that --
20 MR. ROISMAN: No, no, no, no.
21 ADMINISTRATIVE JUDGE RUBENSTEIN: You're
22 doing great. But I want to clearly understand it.
23 MR. ROISMAN: Okay. First of all, we put
24 as part of this contention and cited the ACRS on this
25 point that it would be inappropriate to apply PRA to

1 this issue, because it's not at the point where PRA is
2 an appropriate step. We don't just use PRA all the
3 time. There has to be some level of improvement in
4 our knowledge before that happens. We've said we
5 don't have that.
6 Secondly -- give me one second.
7 (Pause.)
8 MR. ROISMAN: This really will get us back
9 or move us forward to a contention that we'll be
10 talking about in another few minutes, but --
11 ADMINISTRATIVE JUDGE RUBENSTEIN: That's
12 sort of okay. We did group them because these are
13 common elements.
14 MR. ROISMAN: Right. Okay. But our
15 Contention Number 3, which deals with the earthquake,
16 this would be an example of where the earthquake,
17 which can occur in conjunction with a LOCA, that's one
18 of the design basis analysis, the earthquake could
19 cause failure in the isolation valves, and we pointed
20 that out in that contention. So here would be an
21 example --
22 ADMINISTRATIVE JUDGE RUBENSTEIN:
23 Simultaneously with the ECCS failure.
24 MR. ROISMAN: I'm sorry?
25 ADMINISTRATIVE JUDGE RUBENSTEIN:

1 Simultaneously with an ECCS failure.

2 MR. ROISMAN: No, no. No. ECCS -- that's

3 our whole point. The ECCS is working fine as long as

4 we can keep the NPSH-R up, but if we are losing NPSH-R

5 and the only place we can go to get it back is to

6 containment over-pressure, then without having planned

7 on having a multiple failure, we're having a multiple

8 failure. We're having a loss of coolant accident,

9 we're having the earthquake causing these isolation

10 valves to leak more than necessary, pressure in the

11 containment is going down, temperature in the torus is

12 going up, and we've got a need for more NPSH than

13 we've got, and the only way the Applicant is proposing

14 to meet that is take credit for containment over-

15 pressure, which now in this hypothesis isn't there.

16 MR. WACHTER: Time.

17 ADMINISTRATIVE JUDGE RUBENSTEIN: I would

18 like someone -- I'm going to be cut off with you, but

19 I'd like an answer to the question. The sequence

20 you've just described shows that the core is still

21 getting flow and you're not relying on the ECCS

22 system.

23 ADMINISTRATIVE JUDGE KARLIN: Can we

24 perhaps raise that in another contention that you

25 have?

1 MR. ROISMAN: Yes.

2 ADMINISTRATIVE JUDGE KARLIN: It may come

3 up. It may come up again. Sounds like it will.

4 Thank you. Mr. Silberg?

5 MR. SILBERG: Yes. I think we've just

6 heard in the colloquy between Judge Rubenstein and

7 counsel for the Department the most obvious reason why

8 this contention is not acceptable. Basically, what

9 the State is saying is that, "We don't like the single

10 failure rule because there are circumstances where

11 that might erode defense-in-depth. The single failure

12 rule is, as it says, a rule. We meet the single

13 failure rule.

14 The State can postulate multiple lines of

15 failures, as can anyone, and at some point a plant

16 will get into trouble. That's why you have

17 regulations which tell you how far to go. What we

18 have done is meet the single failure rule. What the

19 Department is postulating is a containment failure.

20 In and of itself, that doesn't cause a problem. So

21 they simultaneously postulate a loss of coolant

22 accident. That together with a containment failure

23 also doesn't pose a problem because you have multiple

24 RHR heat exchanges, and so you're cooling the

25 temperature down. You don't need over-pressure.

1 You can never get into the situation which
2 the State is postulating without getting into multiple
3 failure land, and that simply is beyond the rules that
4 we have to deal with in this case. And it may be that
5 the State would like to use different rules, but that
6 is not what we are here to deal with today.
7 ADMINISTRATIVE JUDGE KARLIN: Mr. Silberg?
8 I'm sorry. The single failure rule, is there a reg
9 we're talking about?
10 MR. SILBERG: Yes. Appendix A, Part 50.
11 ADMINISTRATIVE JUDGE KARLIN: Part 50, 35
12 and --
13 MR. SILBERG: No, Part 50, Appendix A in
14 the definitions of the design criteria.
15 ADMINISTRATIVE JUDGE KARLIN: In the
16 general design criteria?
17 MR. SILBERG: That's correct.
18 ADMINISTRATIVE JUDGE KARLIN: Thirty-five
19 and 38, which they cite, I think, in Contention 1 --
20 MR. SILBERG: Well, I'll get to that.
21 ADMINISTRATIVE JUDGE KARLIN: Yes, okay.
22 I mean is that the single failure rule you're
23 referring to?
24 MR. SILBERG: Yes. It's in the definition
25 section.

1 ADMINISTRATIVE JUDGE KARLIN: Yes.

2 ADMINISTRATIVE JUDGE BARETTA: Are you,
3 though, taking the issue with the idea of defense-in-
4 depth? Am I hearing that?

5 MR. SILBERG: No, we're not, and we think
6 we have defense-in-depth. What I'm trying to say is
7 you can have defense-in-depth and you can have
8 defense-in-depth. If we had built this plant with
9 walls with ten-foot thick instead of walls which are
10 however thick they are or put in three times the
11 number of pumps, we would have defense-in-depth. The
12 question is, once you do that, are you stuck with that
13 defense? Can you never erode the margins that you've
14 built into the plant? That would be counterintuitive,
15 it would be improper, it would be unsafe, because then
16 you're encouraging people not to build in margin. We
17 have margin. We are taking advantage of a very
18 limited amount of that margin with containment over-
19 pressure. And to say that you can never give up
20 margin, which I think is the State's position, is
21 simply not consistent with the Commission's rules.

22 We have here -- aside from what may be the
23 merits of the issue that the State wants to raise, we
24 have the issue that the State has raised, and let me
25 get back because I think ultimately the Board has to

1 decide whether this contention meets the test for
2 contention. If you read it, it says, "Containment
3 over-pressure credit violates General Design Criteria
4 35 and 38." Well, we're not subject to that, and
5 there's a footnote in two of their pleadings that
6 says, yes, but we're subject to the proposed general
7 design criteria. But nowhere else are the general
8 design criteria mentioned anywhere in their pleadings.
9 So what is it that supports that allegation? Nothing.
10 That in itself ought to be enough to warrant its
11 dismissal.
12 Then they go on to say and, therefore,
13 because we violated the GDC, we haven't demonstrated
14 that we won't create a significant hazard, as required
15 50.92. Well, we already talked about in the first
16 contention we discussed this morning, that no
17 significant hazards determinations are not issues for
18 a hearing. So that has to go aside.
19 So we really can't find any supporting
20 evidence that supports this contention if you look at
21 what they have written as opposed to what this
22 philosophical discussion is. And since the bases and
23 the supporting evidence don't support the allegation
24 that we've violated the general design criteria or the
25 draft general design criteria, the "therefore" part of

1 the contention which says no significant hazards or
2 providing adequate safety, there's nothing to build
3 on, there is no "there" there.
4 ADMINISTRATIVE JUDGE KARLIN: Are you
5 saying that you did not violate the general design
6 criteria because, among other things, they don't apply
7 to Entergy because Entergy was built before they were
8 promulgated?
9 MR. SILBERG: That's kind of a detail.
10 What I'm saying is the contention is not supported
11 because there's nothing in the contention that talks
12 about the general design criteria.
13 ADMINISTRATIVE JUDGE KARLIN: That's a
14 different -- okay.
15 MR. SILBERG: And we're not subject to
16 them. There is the footnote that says, but we are
17 subject to others.
18 ADMINISTRATIVE JUDGE KARLIN: Right.
19 MR. SILBERG: There are three bases that
20 the contention has, and none of those are appropriate
21 either. The first basis says that the portion of the
22 Reg Guide that purports to authorize containment over-
23 pressure was not properly evaluated or approved the
24 ACRS, and that violates Section 29 of the Atomic
25 Energy Act. That's clearly incorrect. First of all,

1 Section 29 only requires reviews by the ACRS if the
2 Commission requests, and there's no suggestion here
3 that the Commission requested a review of Reg Guide
4 192. So whether or not the ACRS reviewed it or not is
5 really irrelevant.
6 Second, the ACRS is advisory only, and if
7 the Staff review is not an appropriate topic for
8 litigation, the basis for a contention in a
9 proceeding, then certainly not the views of an
10 Advisory Committee. And in any event, that doesn't
11 relate -- the reply argues that we should draw an
12 inference that ACRS are concerned about containment
13 over-pressure, but that simply doesn't support the
14 basis, which is the ACRS evaluation and approval, and
15 what individual members may have stated doesn't match
16 up with the basis. And in any event, if the Staff
17 review, as I said, isn't a basis, then ACRS isn't a
18 basis.
19 The ACRS report also has no evidentiary
20 weight in the case, and we cited in our answer at
21 Footnote 14 the decisions that establish that
22 principle.
23 The argument that the ACRS was not fully
24 aware of what they were doing simply is pure
25 speculation on the Department's part.

1 ADMINISTRATIVE JUDGE KARLIN: Well, let me
2 jump ahead a little bit. I mean I understand their
3 argument seems to be, well, somebody snuck one by the
4 ACRS and so their approval really shouldn't count as
5 approval because they missed it. I'm not sure how
6 enthusiastic I am about that theory, but setting it
7 aside for a minute, I mean the question -- a couple
8 questions sort of come up is, as I understand it,
9 there was a situation where no credit was given for
10 containment over-pressure, and at some point the reg
11 guides, which are not regulations or requirements,
12 were changed to allow in certain circumstances credit
13 to be given for over-pressure. And that's what this
14 Reg Guide 1.82 Rev. 3 represents, and that's what
15 we're having all this argument about. But at some
16 point, this was changed so that credit is given for
17 over-pressure.
18 But reg guides are not requirements, and
19 you point that out and the Staff points that out. But
20 they then reply and say, "Yes, but Entergy is relying
21 on this reg guide in some way or using this reg guide
22 to justify what it's doing," and therefore while we're
23 not imposing that reg guide on you, if you are using
24 it and the Staff is using it, then cannot we not then
25 ask you to comply with it?

1 MR. SILBERG: Well, we are not relying on
2 the reg guide. We have an application. We have filed
3 it, it contains the technical information which we
4 believe supports the validity of using containment
5 over-pressure. So the issue of whether we rely on the
6 reg guide to me is a red herring. The reg guide has
7 no legal status in this hearing.
8 ADMINISTRATIVE JUDGE KARLIN: Are you
9 using it? I mean the State says in its reply brief,
10 "If the Applicant and Staff stipulate they will not
11 use the existence of the reg guide essentially as
12 evidence to support their view on uncertainties, then
13 the whole issue becomes moot and we drop it out.
14 MR. SILBERG: Well, I can't state how the
15 Staff will use anything. All I can say is what --
16 ADMINISTRATIVE JUDGE KARLIN: What Entergy
17 might do.
18 ADMINISTRATIVE JUDGE RUBENSTEIN: The reg
19 guide, of course, states that here is a method or a
20 methodology that if one uses gets an expeditious,
21 prompt staff review. When you did your calculations,
22 did you follow the guidelines of the reg guide or did
23 you do some sort of an independent calculation which
24 would be comparable and equally acceptable to the
25 Staff in arriving at its conclusion?

1 MR. SILBERG: I think we provided the
2 information that the Staff wanted, which I think in
3 most instances matches what's in the reg guide, and
4 then we answered their questions. And if they asked
5 questions based on the reg guide, we really had no
6 choice but --
7 ADMINISTRATIVE JUDGE RUBENSTEIN: I'm just
8 trying to get a sense that if you used the reg guide
9 calculation or did you use an equivalent calculation?
10 MR. SILBERG: I don't know that there is
11 a, quote, "reg guide calculation."
12 ADMINISTRATIVE JUDGE RUBENSTEIN: Or the
13 outline.
14 MR. SILBERG: As I understand it, there is
15 no reg guide calculation to follow. I think there is
16 guidance in there, and I think we tried --
17 ADMINISTRATIVE JUDGE RUBENSTEIN: You
18 followed the guidance.
19 MR. SILBERG: I think that's correct.
20 ADMINISTRATIVE JUDGE RUBENSTEIN: Okay.
21 So Judge Karlin's --
22 MR. SILBERG: And if the Department wishes
23 to challenge our application, that's what this
24 proceeding is intended to do, not to challenge whether
25 a guidance document was reviewed by the ACRS or

1 whether its members were snookered or whether --

2 ADMINISTRATIVE JUDGE KARLIN: No. Right.

3 I mean I agree with that one, but the proposition

4 that, well, we're not here to impose or reg guides are

5 not regulations, they can't be imposed, but if you're

6 using it, if you're following it, then I think it

7 provides some criterion by which we can assess what

8 was being done. For example, if the reg guide, you're

9 using it or following it and it has prerequisites

10 which you don't meet or Entergy doesn't meet, then we

11 could say, well, wait a second, there may be an issue

12 here that they have raised, that they have tried to

13 raise, such as necessity and practically --

14 MR. SILBERG: Frankly, I don't think that

15 would be any more of an issue than the fact that we

16 did meet the guidance, because by definition it's

17 guidance. But the key thing you have to do is look

18 back at the basis. What they said in Basis 2 was that

19 the reg guide is substantially indefensible because it

20 wasn't appropriately reviewed and because --

21 ADMINISTRATIVE JUDGE KARLIN: Number 2 is

22 more contravene the State's requirements of defense-

23 in-depth, aren't they?

24 MR. SILBERG: Right.

25 ADMINISTRATIVE JUDGE KARLIN: Number 1 has

1 never been properly evaluated, and Number 3, or C, is
2 that the Applicant has failed to demonstrate that it's
3 necessary --
4 MR. SILBERG: That's the necessary and
5 practical --
6 ADMINISTRATIVE JUDGE KARLIN: -- and
7 that's the one I was focusing on.
8 MR. SILBERG: And as to that, we think
9 that, again, it's a compliance with guidance, if
10 there's any compliance at all. We answered their
11 questions. We think that they have ignored our
12 answers in what was necessary and whether it was
13 practical.
14 ADMINISTRATIVE JUDGE KARLIN: Well, I
15 think the answer you propose is sort of a totalogy, as
16 they characterize it, which is what does it mean when
17 the reg guide says it can only -- it should only be --
18 containment over-pressure credits should only be
19 allowed when it's necessary. What does that mean? As
20 I understand what you all say, well, it's necessary
21 when we needed it. Well, that's a totalogy. And I'm
22 loathe that we should be getting into the economic
23 necessity, but what does necessary mean?
24 MR. SILBERG: Well, that answer was
25 addressed and we provided that information to the

1 Staff as to why we were adding it. Now, you can argue
2 that any of those questions ultimately are economic.
3 I think that's a faulty analysis.
4 ADMINISTRATIVE JUDGE KARLIN: Yes. No,
5 I'm not trying to --
6 MR. SILBERG: Because you could solve any
7 problem by building another unit. But we did
8 specifically address in answer to the Staff's
9 questions why it was necessary and why we felt
10 obligated to use it. And the State has basically
11 ignored that response. We cited to that in our
12 answers, the State did not come back and challenge
13 what we said.
14 With respect to the defense-in-depth
15 issue, it is, I think, an interesting philosophical
16 problem, but it is not, I believe, a problem which
17 overturns the NRC's regulatory structure. If the
18 State believes that we should design the plant for
19 more than a single failure, it is, we think, a clear
20 challenge to the rule, and there are ways that they
21 can raise that as a challenge to the rule but not in
22 this context. We think that even in the situation
23 that they postulate, you cannot cause containment
24 failure and containment failure will cause everything
25 else just by saying it's so. And, basically, what

1 they say is there will be -- I'm sorry.

2 ADMINISTRATIVE JUDGE KARLIN: He said two

3 minutes.

4 MR. SILBERG: Okay. There will be

5 containment failure. But if you postulate that, you

6 don't postulate everything else cascading from it

7 where those cascades don't follow. Failure of other

8 pieces of independent equipment, which they have not

9 recognized and which are discussed in the application

10 and would show that there is no problem with NPSH or

11 with containment over-pressure.

12 ADMINISTRATIVE JUDGE KARLIN: Well, if I

13 may, I mean we've only got a minute or so left, but

14 I'm looking at the reg guide at Section 2.111 and it

15 was cited in the briefs, and it talks about net

16 positive suction head and ECCS and containment heat

17 removal pumps. It states a general rule that, "ECC

18 and containment heat removal systems should be

19 designed so that adequate available NPSH is provided

20 and no increase in containment pressure would occur."

21 Then it says, "For certain operating BWRs for which

22 the design cannot be practically altered, conformance

23 with the previously stated general rule, no credit,

24 may not be possible. And in these cases, no

25 additional containment pressure should be included in

1 the determination of available than is necessary to
2 preclude."
3 So it sounds like there's a general rule,
4 no credit for containment over-pressure, but in
5 certain circumstances where the design cannot be
6 practically altered and it's not possible to do it any
7 other way, then some small amount may be warranted.
8 And I guess they're saying there's an issue here as to
9 whether anyone has made any effort to demonstrate or
10 show that this cannot be practically altered.
11 MR. SILBERG: Well, they have filed an
12 exhibit which shows that we have done feasibility
13 analyses to show whether there were ways to accomplish
14 this.
15 ADMINISTRATIVE JUDGE KARLIN: Okay.
16 MR. SILBERG: They attached one of those.
17 It only was a part of the -- it was only one sequence.
18 They took that and extrapolated it as saying, "Well,
19 see it's feasible to go without containment over-
20 pressure" --
21 ADMINISTRATIVE JUDGE KARLIN: Right.
22 Right.
23 MR. SILBERG: -- ignoring the fact that
24 there were lots of other accident sequences that they
25 didn't address. We addressed this specifically in our

1 brief, and we referenced the RAI responses where we
2 addressed the answers to these questions.
3 ADMINISTRATIVE JUDGE KARLIN: Okay. Is
4 that it? All right. Thank you. Thank you, Mr.
5 Silberg. Ms. Poole?
6 MS. POOLE: Thank you. I think we only
7 have one thing to add to what's in our papers, and
8 that is a comment in response to the State's reply and
9 a few things said here today in which we've gone back
10 and forth over what the ACRS did or didn't do with
11 respect to Basis 1. And I think while the Staff does
12 believe, as we stated in our pleadings, that the
13 discussions quoted related to the generic issue
14 ongoing with pressurized water reactors, I think,
15 though, I want to make the point that even if we take
16 as true that everything the ACRS said pertained also
17 to boiling water reactors, that's still not sufficient
18 to demonstrate a problem as to this application, at
19 this facility. And I think that's all we have to say
20 on that matter. We'll answer any questions the
21 Licensing Board may have.
22 ADMINISTRATIVE JUDGE KARLIN: Well, I
23 guess I have the same questions I was asking of
24 Entergy about the reg guide and use and reliance of
25 it. I mean the brief sort of hammered the point that

1 reg guides are not regulations, they're not
2 requirements, they can't be mandated, certainly not by
3 this Board out of the blue, but if in fact they are
4 being -- a reg guide is being followed and relied
5 upon, as it appears it is in this application, is it
6 not fair and legitimate for us to understand and for
7 the State or Intervenor to raise a contention, well,
8 there's a problem that doesn't apply, it hasn't been
9 applied correctly, we didn't start using this reg
10 guide, apparently Entergy did, and now we're asking
11 whether it's properly applied, or they're asking that.
12 So having relied upon or used a reg guide,
13 is it then not legitimate legally for the Board to say
14 some sort of compliance with that is appropriate to
15 inquire into?
16 MS. POOLE: As a general matter, I think
17 that's correct. I would note that the Staff is not,
18 as a matter of fact, using the reg guide in its
19 review. We do refer to some criteria that are in the
20 reg guide, but the safety review that we're doing is
21 actually more or less the same basic review we
22 performed in connection with Generic Letter 9704,
23 assuring a sufficient net positive suction head. So
24 while we do look at the reg guide I think some, we're
25 not relying on its terms specifically for this

1 application.

2 ADMINISTRATIVE JUDGE KARLIN: Well, you're

3 not relying on it but Entergy seems to me, and of

4 course we don't know what the Staff is doing at this

5 point. You're still conducting your review, I guess.

6 MS. POOLE: That's correct.

7 ADMINISTRATIVE JUDGE KARLIN: But we do

8 know it appears that in Entergy the Applicant has

9 relied upon it or followed it or used it in some way.

10 MS. POOLE: I have brought to my attention

11 here a response to a request for additional

12 information. It's RAI SPSBC21. The question that was

13 asked was, "Verify that the proposed EPU amendment is

14 consistent with the guidance of Regulatory Guide 1.82

15 Revision 3. In addition, confirm that Reg Guide 1.82

16 Revision 3, or at least Section 2.1, will become part

17 of the VY NPS licensing basis if the proposed

18 amendment is approved."

19 In response to that RAI, and this is

20 Supplement 8, which was dated July 2, 2004, that's the

21 RAI response that I'm reading now, the Applicant

22 stated that -- I'm looking here -- that it is not

23 Entergy's intention that Reg Guide 1.82 Revision 3

24 will become part of the licensing basis. The

25 Applicant did say in that RAI response that it met the

1 intent of Reg Guide 1.82 Revision 3, Section 2.1, and
2 we're still in the process of reviewing and
3 considering that response.
4 ADMINISTRATIVE JUDGE KARLIN: Okay. And
5 with regard to that Reg Guide and it talks about, as
6 I raised with Entergy, certain reluctance to use
7 containment over-pressure except in circumstances
8 where the design cannot practicably be altered. Has
9 there been any effort by the Applicant or by the Staff
10 to evaluate that?
11 MS. POOLE: No. We've not asked that
12 question of the Applicant.
13 ADMINISTRATIVE JUDGE KARLIN: Don't you
14 think it's relevant? If the Reg Guide itself says
15 it's not to be used except in circumstances where the
16 facility cannot be altered, then don't you think it's
17 some responsibility to look into that or do you just
18 apply it blindly without even thinking about that
19 prerequisite?
20 MS. POOLE: Well, since we're not relying
21 on every element of the Reg Guide, we haven't asked
22 the question yet. I think that we would not permit
23 use of containment over-pressure unless we were able
24 to find that the request met the requirements of
25 50.57(a)(3), that it was in the public health and

1 safety.

2 ADMINISTRATIVE JUDGE KARLIN: I'm sorry?

3 MS. POOLE: We would make the safety

4 findings regardless.

5 ADMINISTRATIVE JUDGE RUBENSTEIN: So you

6 don't look to the motivation. You look pretty

7 directly to is the calculation acceptable?

8 MS. POOLE: I think that's correct.

9 ADMINISTRATIVE JUDGE KARLIN: So you look

10 to the ultimate safety question without looking into

11 the reg guide itself as to whether or not it

12 qualifies? It sounds like someone was saying this

13 really shouldn't be done except in these limited

14 circumstances, and you're saying, "I don't care about

15 the limited circumstances I just want to look at the

16 bottom line of safety."

17 ADMINISTRATIVE JUDGE RUBENSTEIN: Or an

18 alternative way of saying it is you find the

19 calculation acceptable within the regulations. But

20 what thoughts do you have in terms of giving up the

21 margin on the safety limit?

22 MS. POOLE: Okay. If I could take a

23 moment to consult.

24 (Pause.)

25 MS. POOLE: Okay. We are still evaluating

1 the application. I don't think we can really answer
2 your question directly, but I can give you something
3 that we have prepared that's a little statement on
4 when we would permit containment credit to be taken
5 for containment over-pressure. Would that help you?
6 ADMINISTRATIVE JUDGE RUBENSTEIN: Sure.
7 MS. POOLE: This is taken out of a letter
8 that was sent to the State on June 29, 2004. It's
9 publicly available.
10 ADMINISTRATIVE JUDGE KARLIN: Is it an
11 exhibit or something?
12 MS. POOLE: I don't believe that it is.
13 ADMINISTRATIVE JUDGE KARLIN: Okay.
14 MS. POOLE: It states, "The NRC Staff
15 allows such credit, that is credit for containment
16 over-pressure, to be taken only when the licensees'
17 analyses and justification for the proposed licensing
18 basis change demonstrate that there is reasonable
19 assurance that the credited pressure will exist for
20 the events, e.g., postulated design basis accidents,
21 station blackout, Appendix R, postulated fires,
22 anticipated transients without scram and a time period
23 for which the credit is required. Ensuring
24 containment integrity and devoiding overcooling of the
25 containment due to excessive use of containment sprays

1 are key considerations in determining whether the
2 credited pressure will be available during the
3 required time period."
4 ADMINISTRATIVE JUDGE KARLIN: So you
5 ignore the "cannot practicably be altered" criteria in
6 the Reg Guide.
7 MS. POOLE: We have. We have in the past.
8 ADMINISTRATIVE JUDGE KARLIN: The answer
9 is yes?
10 MS. POOLE: The answer is yes.
11 ADMINISTRATIVE JUDGE KARLIN: You ignore
12 that. Okay. Any other questions? Then I think we're
13 done on that contention. Thank you, Ms. Poole.
14 We're ready to proceed with the New
15 England Coalition's Contention Number 6, I believe, at
16 this point. Mr. Block, are you ready to proceed?
17 MR. BLOCK: Yes.
18 ADMINISTRATIVE JUDGE KARLIN: Okay.
19 Great. How much time do you think you want to reserve
20 for rebuttal? Twenty minutes?
21 MR. BLOCK: I'd like to do the same thing
22 Mr. Roisman did with whatever the bulk is that's left.
23 ADMINISTRATIVE JUDGE KARLIN: Okay. Fine.
24 MR. BLOCK: I'm sorry, I'm afraid Mr.
25 Shadis would like to do this, so we're going to --

1 ADMINISTRATIVE JUDGE KARLIN: Mr. Shadis
2 is going to do the argument on this one?
3 MR. SHADIS: Yes.
4 ADMINISTRATIVE JUDGE KARLIN: All right.
5 That's fine. Just so long as basically one of you do
6 the argument on one of them. Thank you, Mr. Shadis.
7 MR. SHADIS: Thank you. I appreciate the
8 fact that the panel arranged presentation on these two
9 contentions given the similarity of the issues.
10 With respect to NRC's position, guidance,
11 regulation on net positive suction head and on taking
12 credit for containment over-pressure, we're confronted
13 here with a moving target and with no single position
14 emanating from NRC Staff. We just received a few days
15 ago a FOIA response dated October 7, and I can't enter
16 it into evidence except to say that it is voluminous
17 and the entirety of this voluminous document is a
18 discussion among NRC Staff as to how to answer the
19 State's letter of December 8 on the question of net
20 positive suction head and containment -- taking credit
21 for containment over-pressure.
22 What I found in review of it is that in
23 one draft version of the letter, the Staff had
24 included a legal position, and in the final letter the
25 legal position was eliminated. And it wasn't a case

1 of substituting another legal position. It was simply
2 eliminated. And I'd have to guess that the motive was
3 that they didn't want to make a commitment on it. But
4 in any case, we would much appreciate the opportunity,
5 perhaps even tomorrow if it could be scheduled, to
6 present to this Panel on the contents of that FOIA
7 response, and if not, to be able at least at some
8 future point to submit it and then the other parties
9 of course can have review and comment. But we think
10 it's relevant and it's essential to an understanding
11 of what NRC's position, regulatory position is and how
12 it has evolved on this particular point.
13 With that, I would like to --
14 ADMINISTRATIVE JUDGE RUBENSTEIN: By NRC
15 position, do you mean the safety evaluation report or
16 their regulations or their GDC or --
17 MR. SHADIS: Yes.
18 ADMINISTRATIVE JUDGE RUBENSTEIN: -- or
19 their approval of the current licensing basis?
20 MR. SHADIS: Pick one of the above. Let
21 me try to explain what I intend by that, and I think
22 we go back to the discussion that you were having
23 earlier as to whether or not the regulatory guide is
24 binding or not and it seemed to concurrence that it
25 was not binding; it was, after all, guidance. But

1 then what part of the regulation is it guidance to
2 perform under? We're looking at the general design
3 criteria for an answer.
4 And what we're finding, by the way, as was
5 pointed out by Entergy's attorney, is that Vermont
6 Yankee was licensed before I think even the draft
7 general design criteria were completed. And it was
8 licensed based on best assessment at that time that it
9 was safely designed and constructed. Now, our problem
10 is trying to find out what criteria, what regulation
11 governs, what specifically regulations and criteria
12 must this plant be in compliance with?
13 So far in our search to get this
14 information, we've been given what I could only term
15 a grand runaround by NRC. We have not been able to
16 nail down what this plant's design basis is in terms
17 of its conformance with what's standard. We can't
18 find it. Now, that's essentially where we're coming
19 from now.
20 Mr. Blanch, in his initial declaration --
21 and by the way, we agree very strongly that the
22 declarations and the contentions need to be taken
23 together when considering basis. That statement, I
24 think, was made earlier from a couple of these tables.
25 We're there, we agree with that. In Mr. Blanch's

1 statement, he has cited not only NRC regulations and
2 the design criteria, he has also cited Vermont Yankee
3 documents. I think, broadly, I must -- we're not
4 going to get ourselves bogged in minutia, I hope -- I
5 think, broadly, we dispute that allowing for
6 containment over-pressure will maintain -- well, will
7 allow for assurance of public health and safety. And
8 this is, in essence, the underlying support statement
9 for Vermont Yankee's entire license amendment
10 application. And, flatly, we dispute that. It's
11 evidence throughout Mr. Blanch's testimony, throughout
12 his declaration, both the initial declaration and the
13 one filed in support of our reply.
14 So I think, and I'm just going to point
15 out to you, that all of the criteria for acceptance of
16 our contention, all of the requirements that are
17 contained in the Code of Federal Regulations have been
18 met. I'm going to shut up, I think, at this point,
19 but I'd like to reserve a few minutes for a response
20 later on. Thank you.
21 ADMINISTRATIVE JUDGE KARLIN: All right.
22 Fine.
23 MR. SHADIS: And I'd also be glad to
24 answer any of your questions.
25 ADMINISTRATIVE JUDGE KARLIN: Any

1 questions? No? Go ahead.

2 ADMINISTRATIVE JUDGE RUBENSTEIN: I'm

3 trying to understand for help with the record you're

4 having difficulty with the fact that their licensing

5 basis is not up to date.

6 MR. SHADIS: Not only is it not up to date

7 but it's not up to date in terms of 10 CFR 50.54 or

8 any of the other reporting requirements, 50.71 I think

9 there's a reporting requirement.

10 ADMINISTRATIVE JUDGE RUBENSTEIN: And you

11 tried to have --

12 MR. SHADIS: We can't find it.

13 ADMINISTRATIVE JUDGE RUBENSTEIN: And you

14 tried -- okay. My next question was, and it's not

15 exactly what the licensing basis is to you,

16 transparent.

17 MR. SHADIS: Pardon me?

18 ADMINISTRATIVE JUDGE RUBENSTEIN: It's not

19 transparent to you or obvious to you what the

20 licensing basis is, because you can't find it.

21 MR. SHADIS: That's correct. It's not

22 transparent nor is it coherent, nor is it together in

23 any one place where it can be readily accessed.

24 ADMINISTRATIVE JUDGE RUBENSTEIN: And

25 you've tried to have this dialogue by reading the NRC

1 documents to see if you could see in the specific
2 instance of the Entergy power uprate you've tried to
3 see what the old licensing basis is and compare it to
4 the new licensing basis or you just don't like the old
5 licensing basis?
6 MR. SHADIS: We're trying to find out what
7 the licensing basis is today and what regulations or
8 criteria the Plant is supposed to be in conformance
9 with today. And that is not accessible now. Our
10 experts, Mr. Blanch and Mr. Gundersen, filed a 2206
11 Petition and Mr. Dyer, who is Executive Director of
12 Operations, I believe --
13 ADMINISTRATIVE JUDGE RUBENSTEIN: I think
14 he's Director of Nuclear Reactor Regulations.
15 MR. SHADIS: Pardon me?
16 ADMINISTRATIVE JUDGE RUBENSTEIN: I think
17 he's Director of Nuclear Reactor Regulations.
18 MR. SHADIS: Fine. Thank you. I
19 appreciate that. He answered, I guess it's the
20 Director's decision really, but he answered with a
21 letter that said, "As long as there is another venue
22 for this, that's where you should take it," and he
23 gave us a letter ten days or less before the -- excuse
24 me, he gave Mr. Blanch and Mr. Gundersen a letter
25 approximately ten days, I think -- dated approximately

1 ten days before the close of the period of Notice of
2 Opportunity before contentions were due and said, in
3 essence, "Take it to the Atomic Safety and Licensing
4 Board, and if they don't like it, then we'll take it
5 up at some future point." This is just part of what
6 I would offer as an example of being given the
7 runaround.
8 ADMINISTRATIVE JUDGE RUBENSTEIN: In
9 regard to the content of your contention, you're
10 basically saying, "I haven't been able to look at the
11 documentation for this specific licensing action at
12 issue, and I find it -- or I've looked at it and I
13 find it to be inadequate." What is your position on
14 the specific licensing issue?
15 MR. SHADIS: That goes really to two of
16 our other contentions --
17 ADMINISTRATIVE JUDGE RUBENSTEIN: Okay.
18 You're going to get to them later. Okay.
19 MR. SHADIS: -- that have to do with the
20 documentation of design basis, with the availability
21 of information, specifically with recordkeeping. This
22 particular contention really has to do with the
23 failure to preserve defense-in-depth and the ignoring
24 single failure criteria.
25 You know, we understand and appreciate

1 fully the conversation here that defense-in-depth was
2 a philosophical approach, but I can attest from having
3 attended licensing hearings and pre-licensing hearings
4 and public meetings conducted by NRC going back to the
5 licensing era of this plant. I didn't attend any for
6 Vermont Yankee but I was certainly there for the ones
7 at Maine Yankee. And defense-in-depth was the notion
8 that the NRC Staff trotted out in each and every one
9 of those proceedings to assure the public that there
10 would be adequate protection of the public health and
11 safety, and they always, always, always talked about
12 the redundancy and defense-in-depth. And from our
13 point of view, if nothing else, it certainly is a
14 social contract with the people who had no choice but
15 to allow the licensing of Vermont Yankee. They were
16 told defense-in-depth was the basis.
17 ADMINISTRATIVE JUDGE KARLIN: May I ask
18 this, and coming at this from a legal perspective --
19 MR. SHADIS: Certainly.
20 ADMINISTRATIVE JUDGE KARLIN: -- maybe
21 it's harder for you to help us answer this question,
22 but my question, I think I've talked with Entergy
23 about it also, was your contention ignores the --
24 Contention 6 said, "Entergy ignores single failure
25 criteria and violates the basic tenets of reactor

1 safety." As a legal approach, where is it written?
2 Point me to a regulation that's binding on them that
3 you can say they violated and help me out here.
4 Because if it's something someone said or is repeated,
5 certainly that's something the engineers and the
6 technical people will talk about, and it's a social
7 contract perhaps. But if it's a legal matter, I'd
8 like to cite chapter or verse and understand that.
9 MR. SHADIS: Thank you. I'd have to go
10 back to --
11 ADMINISTRATIVE JUDGE KARLIN: Yes. And
12 you're not a lawyer, so I'm asking the wrong question.
13 MR. SHADIS: No, no, no. I like that
14 question. I'd have to go back through Mr. Blanch's
15 declarations, but he does cite the general design
16 criteria. And --
17 ADMINISTRATIVE JUDGE KARLIN: Well, I see
18 the General Design Criteria 21, as was mentioned here,
19 has a definition of single failure.
20 MR. SHADIS: Yes.
21 ADMINISTRATIVE JUDGE KARLIN: The
22 definition is not a legal requirement; it's just a
23 definition.
24 MR. SHADIS: Yes. And I think that in the
25 conversation earlier Criterion 34, 35 were mentioned

1 as the location for these definitions.

2 ADMINISTRATIVE JUDGE KARLIN: Thirty-five

3 and 38, yes.

4 MR. SHADIS: And I don't know what law is

5 if it isn't definitions and principles.

6 ADMINISTRATIVE JUDGE KARLIN: Okay, 35 and

7 38. Yes, that's --

8 MR. SHADIS: No, no. I'm sorry. It's 34

9 and --

10 ADMINISTRATIVE JUDGE KARLIN: Well,

11 actually, the --

12 MR. SHADIS: -- 34, 35 and 41.

13 ADMINISTRATIVE JUDGE KARLIN: And 41.

14 Okay.

15 MR. SHADIS: And, again, there it depends

16 on whether we're talking the new criteria or the draft

17 criteria.

18 ADMINISTRATIVE JUDGE KARLIN: Right.

19 Okay. Thank you. Any more questions?

20 ADMINISTRATIVE JUDGE RUBENSTEIN: No.

21 Thank you.

22 ADMINISTRATIVE JUDGE KARLIN: Okay.

23 Whatever time is left for him we'll reserve that for

24 rebuttal.

25 MR. SHADIS: Thank you.

1 ADMINISTRATIVE JUDGE KARLIN: Mr. Rosinski
2 for Entergy?
3 MR. ROSINSKI: Thank you, Mr. Chairman.
4 In Coalition Contention 6, they make several
5 allegations or assertions when their contention is
6 coupled with the basis and the declarence statements.
7 ADMINISTRATIVE JUDGE KARLIN: Would you
8 please speak up a little bit?
9 MR. ROSINSKI: I'm sorry, I'll bring you
10 closer. The first allegation that the Coalition makes
11 is that the calculation VYC 808, the same calculation
12 we were discussing earlier, failed to analyze the
13 consequences of additional dose to control room and
14 site boundary -- people in the control room to site
15 boundary. That is demonstrably incorrect, and, again,
16 without repeating what we've said in our briefs, I'd
17 just point the Board to the application which
18 explicitly states that the doses at EPU remain, quote,
19 "below established regulatory limits," end quote. In
20 fact, the application or the safety analysis attached
21 to the application contains two tables of the current
22 and EPU calculated doses and the applicable federal
23 limits, including the doses in the control room and at
24 the site boundary.
25 The Coalition also asserts that VYC 808

1 failed to address the ability to cool the reactor
2 core. Indeed, the application specifically states
3 that the ability to maintain -- core geometry for
4 cooling is maintained in that the requirements of 10
5 CFR 50.46, which explicitly includes maintaining a
6 core geometry amenable to cooling will continue to be
7 met.
8 The Coalition also asserts that any single
9 active or passive failures of the containment or torus
10 are not addressed in VYC 808. And I guess to
11 highlight the contradiction to that assertion, if we
12 look specifically at the Coalition's assertion that
13 Applicant can show only one example of a single
14 failure in the application, which is in their reply at
15 41, it contradicts its own declaration in its original
16 petition that, quote, "Many single failures of ECCS
17 components, paren, pumps, diesel generators, valves,
18 motors, et cetera, have been addressed." And that's
19 at the declaration on Page 2. And they cite VYC 808
20 for the reference to that quote.
21 ADMINISTRATIVE JUDGE KARLIN: Now, where
22 is that declaration? Is this the Gundersen
23 declaration we're talking about?
24 MR. ROSINSKI: I believe this is Mr.
25 Blanch's declaration.

1 ADMINISTRATIVE JUDGE KARLIN: Oh,
2 Blanch's, I'm sorry. Thanks.
3 MR. ROSINSKI: So right there is a
4 contradiction within their own paperwork about what
5 was performed for single failure.
6 I'll also point out that there is in fact
7 no requirement to provide an exhaustive narrative of
8 every possible single failure for plant equipment.
9 Vermont Yankee properly identified and analyzed in the
10 application the effects of the most limiting single
11 failure, which is loss of an entire RHR train under
12 the conditions postulated in the analysis, because it
13 reduces the heat removal from the containment by 50
14 percent, which is the root of what we've been talking
15 about all morning.
16 Again, for purposes of this hearing, it is
17 significant that the Coalition has not challenged that
18 this is the most limiting single failure or proposed
19 another more limiting single failure.
20 The Coalition also has alleged that VYC
21 808 has failed to address recent failures of BWR
22 containment valves and has cited a single license
23 event report from a plant in Georgia without
24 explaining at all any connection between that plant
25 and Vermont Yankee, the particular failure discussed

1 in that LER and any applicability to Vermont Yankee or
2 how that failure would impact, if at all, the power
3 uprate at Vermont Yankee.
4 And, finally, the Coalition asserted that
5 VYC 808 fails to show compliance with Reg Guide 1.174.
6 I think we covered that pretty well about how reg
7 guides are not regulations and therefore compliance
8 with a reg guide is not a legal basis for a
9 contention.
10 ADMINISTRATIVE JUDGE KARLIN: Right, but
11 we have the same issue as before, that if you're
12 relying upon it or using it in somehow your
13 application, can it not be said that you need to try
14 to follow it or if not follow it, explain why you
15 shouldn't have to?
16 MR. ROSINSKI: I think the right answer to
17 that question is that there is a time when compliance
18 with a reg guide becomes legally enforceable and that
19 was alluded to in the Staff's answer to your previous
20 question when it is incorporated into the licensing
21 basis. Up until this time, Entergy, Vermont Yankee
22 and I believe all licensees are working with the
23 Staff, negotiating positions, demonstrating bases and
24 acceptability and methods. Whether it fully follows
25 every nit and twittle in a reg guide or not is

1 immaterial until the point at which it's accepted and
2 put into the licensing basis. If it's made a
3 commitment in a licensing --
4 ADMINISTRATIVE JUDGE KARLIN: Well, I
5 understand that if you put something into a license,
6 then it becomes legally enforceable, if you put it
7 into their license. But at this point, you are
8 applying for a license or an amendment to the license
9 and you're applying perhaps based on a particular reg
10 guide, in this case we're talking about 1.174, I
11 guess. And all we have or all the State and the
12 public has is the application and you've relied upon
13 a particular reg guide to achieve some relaxation of
14 a standard, let's say, for the moment or credit for
15 containment over-pressure and they raise questions
16 that you don't qualify for that reg.
17 Now, I understand this is not that reg
18 guide. This is the defense-in-depth reg guide instead
19 of 1.182 Rev 3, but principally it's the same, a
20 reliance in an application. That's all the public has
21 to look at. They seek or someone seeks to raise an
22 issue in a contention that you don't qualify for that
23 particular requirement, and you're saying, "Well, we
24 can't look at it until somebody puts it into a filed
25 license, which we are maybe part of the process, and

1 then and only then does it become enforceable."

2 MR. ROSINSKI: No.

3 ADMINISTRATIVE JUDGE KARLIN: We have to

4 ignore it until then?

5 MR. ROSINSKI: No, sir. That's precisely

6 not what I meant to say. It becomes enforceable

7 similar to a regulation at that point. It should be

8 considered. I believe in your question I heard what

9 I was trying to say, except I would take issue with

10 the word, "reliance," on a reg guide. We are not

11 relying on the reg guide. We are using the work that

12 went into the reg guide and using the methodologies

13 that have been determined to be appropriate when we

14 concur that they appropriate for our plant.

15 These are reg guides for the entire

16 industry, so I don't believe it is unusual at all that

17 you will use a reg guide where you believe it is the

18 best thing to do for public safety at your facility

19 and then the application contains the explanations of

20 why we used certain portions, why we did not use

21 certain portions, and that is the appropriate

22 balancing that the public as well as the Board should

23 make. It is not a commitment from a user of a reg

24 guide as all or nothing. If the explanations aren't

25 sufficient, I believe that's the issue before the

1 Board.

2 ADMINISTRATIVE JUDGE KARLIN: Is the kind

3 of cherry-picking of the reg guides for those portions

4 that you like versus those that you don't like?

5 MR. ROSINSKI: I don't believe it's an

6 issue of like. I believe it's an issue is it the best

7 way for a particular licensee to ensure a safe and

8 efficient use of the reg guide for their facility.

9 ADMINISTRATIVE JUDGE KARLIN: Okay. Thank

10 you. Any questions?

11 MR. ROSINSKI: And I would just like to

12 point out, as I believe we have in our brief, that the

13 particular reg guide referenced here, 1.174, is not

14 applicable to EPU. It is a completely different reg

15 guide, although just to put that on the record that

16 this explanation that we've been talking about is more

17 general because this particular reg guide, we submit,

18 is completely not applicable to this issue.

19 ADMINISTRATIVE JUDGE KARLIN: Okay. Thank

20 you. Ms. Poole?

21 MS. POOLE: Thank you. Just one thing or

22 a few things to add, responding to Mr. Blanch's

23 supplemental affidavit on this contention.

24 First of all, in this affidavit, Mr.

25 Blanch states that in their answer, the staff has

1 concluded that Entergy analyzed one single failure,
2 that is sufficient.
3 I want to repeat again, just for the
4 record, that we didn't take any positions on the
5 merits of this application. And we will not do so
6 until the appropriate time. It was merely as part of
7 a legal argument.
8 I want to say also that this affidavit is
9 in error, we think, as a matter a law. Mr. Blanche
10 cites General Design Criteria 34 and 35, which as we
11 discussed earlier, aren't directly applicable to the
12 facility at issue.
13 The relevant criteria in this Draft GDC
14 41, which can be found at 32 Federal Register 10,213 -
15 - that's an old one, July 11, 1967 -- that criterion
16 states Engineered Safety Features Performance
17 Capability. That's the title.
18 Engineered safety features such as
19 emergency core cooling and containment heat removal
20 systems shall provide sufficient performance
21 capability to accommodate partial loss of installed
22 capacity and still fulfill the required safety
23 functions.
24 At a minimum, each engineered safety
25 feature shall provide this required safety function

1 assuming a failure of a single active component.

2 It's clear from the language of the

3 criterion that the --

4 ADMIN. JUDGE KARLIN: Can you give me the

5 Fed Reg cite on that?

6 MS. POOLE: Oh, sure. It's 32 Fed Reg

7 10,213, July 11, 1967.

8 ADMIN. JUDGE KARLIN: Okay. It goes

9 before Lexus-Nexus, I think even --

10 MS. POOLE: I brought one copy. And if we

11 can find a copy machine --

12 ADMIN. JUDGE KARLIN: No, that's fine, I

13 can get it.

14 MS. POOLE: -- I can make copies.

15 But that criterion on its face doesn't

16 support an argument that all single failures must be

17 addressed. Therefore, this supplement doesn't cure

18 the defect of the contention in our view.

19 Also, I was going to make the same point

20 that Reg Guide 1.174 does apply here because this is

21 not a risk-informed submittal.

22 I think the only other thing we would say

23 is I think that the staff would oppose any

24 presentation with respect to the FOIA request in the

25 context of this pre-hearing conference only because

1 the FOIA request material doesn't pertain to the
2 issues we're discussing here, the admissibility of the
3 contentions in this proceeding. So perhaps at another
4 time.
5 That's all we have. We'll answer any
6 questions that you might have.
7 ADMIN. JUDGE KARLIN: Thank you. All
8 right. I don't think we have any questions.
9 Five minutes' rebuttal, Mr. Block?
10 Anything you want -- oh, I'm sorry, Mr. Shadis?
11 MR. SHADIS: Thank you, thank you, I
12 appreciate that.
13 Yes, I appreciate the comments of Ms.
14 Poole with respect to the question on Mr. Blanche's
15 citing one single failure in one declaration and
16 multiple single failures in another declaration. And
17 what happened there, I think, was that counsel for
18 Entergy didn't quite quote all that directly.
19 What Mr. Blanche says in his declaration
20 on page 2 of the October 11th declaration is that in
21 their answer, staff or its counsel concluded that
22 because Entergy analyzed one single failure, that is
23 sufficient. And that is a -- in our view, a
24 legitimate reading of the staff's reply.
25 The staff has now asserted that that is

1 not correct but it certainly, on reading it, one could
2 get that. So it is a valid statement from Mr.
3 Blanche. And as our --
4 ADMIN. JUDGE KARLIN: By valid, you mean
5 honest mistake?
6 MR. SHADIS: Well, if it is a mistake.
7 ADMIN. JUDGE KARLIN: Yes.
8 MR. SHADIS: I mean it's open to
9 interpretation, I think.
10 ADMIN. JUDGE RUBENSTEIN: Is it confusion
11 related to a single failure in a given engineered
12 safety feature as opposed to wanting to look at
13 multiple engineered safety features or systems? Is
14 that where it is coming out?
15 MR. SHADIS: I can't answer that question.
16 And if you'll give me a moment to speak with my
17 expert, perhaps we can. Mr. Blanche is in the same
18 place I am. I don't think we understood your
19 question.
20 ADMIN. JUDGE RUBENSTEIN: Well, in reading
21 your paper, I sort of got the impression that while
22 the regulation requires examination of a single
23 failure which could defeat the purpose of an
24 engineered safety feature, you were concerned that
25 they didn't look at many systems, multiple systems so

1 to speak, each one postulating a single failure in all
2 the different systems.
3 MR. SHADIS: I think the question was
4 raised earlier by Entergy's counsel as to whether or
5 not each and every possible single failure needs to be
6 looked at. And our reading of the regulation says
7 that loosely all possible single failures need to be
8 looked at.
9 And I don't know about the each and every
10 aspect of that. But certainly more than one and more
11 than two or three. You know the most limiting
12 situations need to be looked at so -- and we don't
13 agree either that the RHR scenario that was presented
14 earlier, the residual heat removal scenario that was
15 presented earlier by Entergy's counsel, is the most
16 limiting failure to be considered.
17 For example, a more limiting failure would
18 be failure of the containment with a single train of
19 the RHR out of service. And it is our belief that
20 this is allowed by the tech specs. So, you know, that
21 would be an example of one that should be looked at
22 certainly. And would be a more limiting one.
23 MR. WACHTER: Two minutes.
24 ADMIN. JUDGE KARLIN: Two minutes, okay.
25 ADMIN. JUDGE RUBENSTEIN: So you are

1 hypothesizing that one train is out for maintenance?
2 MR. SHADIS: Pardon me?
3 ADMIN. JUDGE RUBENSTEIN: You are
4 hypothesizing that one train of the RHR is out for
5 maintenance? Or down?
6 MR. SHADIS: It could be out for
7 maintenance or for some other reason non-functional,
8 sure.
9 ADMIN. JUDGE RUBENSTEIN: So then the
10 single failure criteria would be applied to the
11 remaining train?
12 MR. SHADIS: Pardon me?
13 ADMIN. JUDGE RUBENSTEIN: The single
14 failure criteria would be applied to the analysis of
15 the second train? But one has to assume that one
16 train is out --
17 MR. SHADIS: Yes, of the containment?
18 ADMIN. JUDGE RUBENSTEIN: -- of the RHR
19 system is what we're talking about.
20 MR. SHADIS: Well, excuse me just a
21 minute. Let me see if we can get you an answer to
22 that.
23 My understanding of it is that the last
24 failure in this train of events would be the torus
25 failure.

1 ADMIN. JUDGE RUBENSTEIN: Okay. Thank
2 you.
3 MR. SHADIS: Or possibly an isolation
4 value.
5 ADMIN. JUDGE RUBENSTEIN: Thank you.
6 MR. SHADIS: Yes, I think that basically
7 concludes -- except to say that, again, that the
8 single failure question is mentioned specifically in
9 Criterions 34 and 35 very directly. It's plain
10 English, plain reading.
11 And I guess we're going to get to one of
12 our other contentions sooner or later but, you know,
13 if Vermont Yankee is not obliged to comply with that,
14 what are they obliged to comply with? We can't find
15 it.
16 Thank you.
17 ADMIN. JUDGE KARLIN: Okay. Thank you.
18 I think we're at a reasonable breaking point. I
19 appreciate the efficiency with which we've been able
20 to get those two contentions.
21 I guess we'll be starting on State
22 Contention 5 --
23 MR. ROISMAN: No, 3.
24 ADMIN. JUDGE KARLIN: Oh, I'm sorry, 3,
25 yes -- 5 is -- that's -- when we return. Let's take

1 a --

2 MR. ROISMAN: Five won't take long.

3 ADMIN. JUDGE KARLIN: Five won't take

4 long. Okay. If necessary, we have down here. I was

5 moving too quickly.

6 So let's return in about ten minutes and

7 continue with that.

8 Thank you.

9 (Whereupon, the foregoing matter went off

10 the record at 3:27 p.m. for a brief recess.)

11 JUDGE KARLIN: Thank you. Back on the

12 record. I think we're at State Contention 3?

13 MR. ROISMAN: Yes, Mr. Chairman, and I'll

14 follow the protocol which you might note has failed

15 totally to get me any rebuttal, but I've been

16 answering questions that are of interest to the Board.

17 In some ways, contention 3 pulls together

18 several threads of things that we've been talking

19 about in the other contentions, but let me start by

20 identifying the things that we don't have any

21 disagreement about, at least judging by what the

22 answers say. There's no disagreement that using

23 contention over-pressure to meet NPSH requirements is

24 a design basis change or sometimes called a licensing

25 basis change. And number two, there is no doubt that

1 it is a change which is voluntarily implemented by the
2 Applicant. This is not a case of a back fit where the
3 Staff has required the Applicant to do something and
4 when the Applicant does it, it turns out that they
5 have a problem and they need to take containment over-
6 pressure which is the way we think that word "need" or
7 "necessary" was intended in the Reg. Guide.
8 The essence of the position here and I
9 want to be very clear because I think the Applicant
10 appears to misunderstand what we're saying. The
11 essence of our reference to the source term Reg. Guide
12 that the Staff put out is obviously not to say that
13 the source term is an issue here in the uprate. It is
14 to use it as authority for the proposition that it
15 does not require a violation or change in NRC
16 regulations to require a company to have to conform to
17 new design criteria when they voluntarily change
18 something in their design or licensing basis. It's an
19 authority for a proposition.
20 Now there is no regulation, no statute and
21 as far as we can tell no case law in front of the NRC
22 that says either that when you make a change
23 voluntarily and you implicate systems which would be
24 looked at differently today than they were looked at
25 in the past, you may not be required to look at them

1 or you may look at them. It's an open issue. It's an
2 issue of first impression.
3 JUDGE KARLIN: But isn't there -- is this
4 the first time in history that an Applicant has
5 voluntarily sought a change in this licensing basis?
6 I suspect not. But it would seem to undermine the
7 entire backfit rule that every time an Applicant
8 voluntarily requested a change in its licensing basis,
9 all of a sudden all of the new regulations would
10 suddenly apply to it.
11 MR. ROISMAN: The backfit rule --
12 JUDGE KARLIN: My question is although
13 there may be no case law one way or the other, isn't
14 there sort of a practical precedent that this is not
15 the way it's been done for the last 3 years?
16 MR. ROISMAN: Let me answer that in two
17 ways. The backfit rule, when you read the rule and
18 when you look at the history had led up to that rule,
19 is a rule that was put in place to deal with something
20 that at least in the old days we used to call
21 ratcheting and ratcheting was considered to be really
22 evil. And what it meant was is that the Staff would
23 give you permission to do something and then on second
24 thought would come back and say you know, we want you
25 to do it differently. We learned something new and

1 we're going to tighten it up a little bit on you. So
2 the backfit --
3 JUDGE KARLIN: EPA does that all the time.
4 MR. ROISMAN: Absolutely. EPA does it all
5 the time without a backfit rule. And NRC adopted the
6 backfit rule to say okay, we understand sometimes the
7 Staff is going to feel that this is necessary, but
8 you're going to have to go over some hurdles before
9 you get to force one of these backfit on people and
10 when you do, you're not going to be able to force them
11 to now comply with all the current new stuff that
12 you've got. You're forcing this on them. That's how
13 we got, we believe, and we've submitted some basis to
14 believe this. That's how we got to Reg. Guide 1.A2
15 Rev. 3, was because that recognition became obvious
16 when the NPSH fixes that people have been talking
17 about here were imposed by the Staff on Applicants and
18 people had to do certain things to meet them.
19 That's different than when an Applicant
20 comes in and says, and particularly, I don't want to
21 have to answer the generic question would ever design
22 basis require this? Certainly every design basis that
23 changes the operating level of the reactor to a
24 substantial degree, 20 percent certainly a substantial
25 degree. That's done voluntarily, not because the

1 Staff imposed something on you that forced you to do
2 that. Under that circumstance there's good reason, if
3 there's a linkage between that uprate and the design
4 criteria that you think the newer ones should be used,
5 why you should have to comply with the new design
6 criteria.
7 JUDGE KARLIN: Has that happened in the
8 other uprates? I mean there's been quite a number of
9 uprates that have been approved.
10 MR. ROISMAN: That's right, and I am not
11 aware that that has happened.
12 JUDGE BARATTA: Could you specify what
13 that good reason is?
14 MR. ROISMAN: Yes, okay. First of all, I
15 think the Staff does it to some extent in the Reg.
16 Guide that we cite 1.18, 1.182. It's unfortunate that
17 we have two Reg. Guides that are only .100 apart.
18 Anyway, the good reason is this, that now that this
19 plant is going to operate at a higher power level, 20
20 percent higher, if there are aspects of this new
21 operation which call into question compliance with
22 design criteria, it's as though we are starting again
23 with the plant. I mean this is as though you heard
24 Mr. Silberg say well, one option would have been we
25 could have built another plant right next to this one

1 and gotten the additional power. Well, in a way
2 that's what they've done. They're building a new
3 plant in the place where the existing plant is to
4 operate 20 percent more power than the old one did.
5 Today, we would require, if a company came
6 in and for the first time said we want to have a plant
7 that's roughly 625 megawatts of power, the plant would
8 have to meet today's standards. So if this utility is
9 bringing this in and if we can show and we can see we
10 must demonstrate that to you, at least show that
11 there's a basis to believe that, that this new uprated
12 level implicates systems for whom new valuation
13 standards should be used, then it's appropriate to use
14 it in this case.
15 JUDGE KARLIN: When this happens in the
16 environmental field there would be the grandfathering
17 or specific thresholds like the bubble rule that was
18 for the air area and to determine when you can backfit
19 and when you can't. What regulation do we cite if we
20 write an opinion in favor of your position that will
21 withstand scrutiny and appeal? And what case?
22 MR. ROISMAN: Well, I think the Board has
23 the power to decide the question is there adequate
24 protection for the public health and safety with new
25 criteria, provided that they're not in conflict with

1 some existing rules.

2 There's no existing rule that says that

3 Vermont Yankee is automatically grandfathered to the

4 criteria that it met in 1967. There's nothing that

5 says that. What the Staff has said when they look at

6 the radiation source term number was we don't think,

7 we the Staff, don't think that the fact that radiation

8 source terms are voluntarily changed gives these

9 Applicants who want to use that a free pass to keep

10 using the old evaluations that they used. And so in

11 those limited cases where there's a linkage, we think

12 they should have to meet these new ones.

13 Now will that be a controversial decision?

14 Sure. Could you expect that when it goes up to the

15 Commission on appeal that there will be a lot of

16 amici, filing briefs? Sure. But I don't think that

17 means that the Board lacks the power if you agree with

18 us that the new design standard or the new criteria

19 are appropriate. I mean perhaps the flip side, Dr.

20 Baratta, of your question is, what is it that should

21 say that a plant that's over 30 years old should be

22 able to continue to be evaluated for its earthquake on

23 the basis of earthquake standards which have evolved

24 in those 30 years and are much more stringent today

25 than they were then? The plant i snot safer just

1 because the standards were set under an old earthquake
2 standard 30 years ago. It's presumably just as safe
3 or unsafe, based upon what the real world of those
4 standards are today. But we -- the NRC and the public
5 have essentially said okay, you get the free pass.
6 Even though the things have gotten more stringent, you
7 don't have to reevaluate your plant every 10 years
8 when these new standards come out.
9 Here, we have an Applicant that
10 voluntarily says I want to step into the next
11 dimension and all we're saying is if you do that, you
12 have to carry the burdens that go with that new
13 dimension and we've identified two specific items that
14 we believe are directly related to the steps that the
15 Applicant is proposing to take with regard to the use
16 of containment over pressure. And they are first the
17 question of the earthquake.
18 Now I want to -- we've had some discussion
19 here about the single failure. And single failure is
20 relevant here. In the design basis analysis for this
21 plant for which we do not quarrel, what is to happen
22 is that the Applicant is to postulate both a loss of
23 coolant accident and an earthquake occurring at the
24 same time. The single failure is the failure of one
25 train of the removal of the residual heat removal,

1 okay? So that's our single failure.

2 Now the question is under that scenario

3 will containment pressure remain sufficiently high so

4 that the NPSH is met? Our claim is that depends in

5 this contention on whether or not you're using the

6 proper earthquake analysis because an earthquake can

7 impact on the ability of the containment isolation

8 valves to hold containment pressure. We believe that

9 the newer understanding of what earthquakes can cause

10 in the way of vibrations needs to applied to determine

11 that question, to rerun the single failure analysis in

12 that scenario. That's the contention. That's the

13 basis number one.

14 Number two, the single failure analysis

15 itself has been modified from the early criteria, the

16 ones in 1967 that Staff counsel referred to to the

17 current ones. And the most important changes there

18 have been that single failures used to include only

19 single active failures. And this Applicant had

20 classified a variety of things as not being active

21 failures. Check valves, for instance, were treated as

22 not being active failures. And so-called spurious

23 movement, that is, valves, for example, or pumps that

24 were not supposed to be used at all were assumed not

25 to do anything in the event of an accident, so you

1 didn't look at that failure.

2 Now in today's world, that's been changed

3 and now the requirement is look at single, active

4 failures and single, passive failures long term. And

5 so there are a new group of events that relate

6 directly to contention integrity following the

7 accident and therefore containment pressure that this

8 Applicant has never evaluated for purposes of

9 determining whether or not they meet the single

10 failure criteria. So we argue and we cite what -- we

11 give some examples of what these are. We don't say

12 that it's the entire area, but there are some specific

13 single failures which didn't get evaluated before, but

14 if this plant were being licensed for the first time

15 today would have to be evaluated and they relate to

16 containment integrity and to post-accident containment

17 pressure which again goes directly to the question of

18 whether or not in an accident you will have sufficient

19 containment pressure.

20 JUDGE BARATTA: But it would seem from the

21 Staff's comment on your basis there that they feel

22 that the Applicant has done a bounding analysis which

23 demonstrates the degree of conservatism that exists

24 and therefore while what you say is hard to argue

25 against from a strictly motherhood type of standpoint,

1 if you do the bounding analysis and it says hey, I've
2 still got so much conservatism, I don't have to go
3 through and do all this detailed analysis, that's one
4 of approaching it.
5 MR. ROISMAN: Yes, but the problem with
6 what they have done is that the single failure that
7 they have bounded is the universe of single failures
8 that exclude all the single failures that now are
9 required to be included.
10 JUDGE BARATTA: My point is that if I take
11 a worse case single failure, you don't have to do that
12 universe. And that's what I'm having trouble
13 understanding. You just told me that the single train
14 failure was probably the worse case failure, coupled
15 with an earthquake. And that seems to be what they
16 did and they showed that you were well below boiling
17 in the pool which is the critical criteria that you
18 have to meet.
19 MR. ROISMAN: I'm sorry, I didn't hear
20 that.
21 JUDGE BARATTA: That they were well below
22 boiling in the pool which is the critical criteria
23 that you have to meet for that type of transient.
24 MR. ROISMAN: Our concern is what they
25 have done is to run that same single failure and use

1 the earthquake analysis that we believe they should
2 use which we think may -- we don't know, I mean that's
3 why we're saying it's a deficiency.
4 JUDGE RUBENSTEIN: So you're questioning
5 if the new forcing function is or is not within the
6 bounds of that umbrella calculation that they run?
7 MR. ROISMAN: Yes. Yes, that is correct.
8 JUDGE BARATTA: So it's not with the
9 bounding analysis, it's the input to the bounding
10 analysis?
11 MR. ROISMAN: Yes, that's --
12 JUDGE BARATTA: I guess in that regard
13 there seems to be this issue of whether or not the
14 State has adopted that earthquake as the referenced
15 earthquake or not. I may not be using the correct
16 terminology. I apologize for that. But could you
17 talk to that a little bit?
18 MR. ROISMAN: Yes. We cited that and we
19 cited other -- we also cited the fact that a more
20 stringent or a higher ground acceleration was used for
21 more recently licensed facilities, nuclear facilities
22 in the New England area, only to show that there is
23 evidence out there that a more stringent earthquake
24 standard should be used.
25 We are not arguing that there is one that

1 has been adopted and that must be used here. That
2 would be an issue on which we would join, I'm sure the
3 Applicant and perhaps the Staff, if they become a
4 party, will have a disagreement with us and our
5 grounding acceleration earthquake specialist will
6 offer his opinion as to what he thinks is the right
7 number to use and they will offer their opinion as to
8 what they think it is.
9 We're not trying to argue that there's a
10 standard that the company has to meet. We're trying
11 to argue that the standard which they have chosen to
12 meet is not a current standard and that they should
13 have to meet the current one.
14 JUDGE BARATTA: I understand that, but we
15 have to work within the bounds of what the
16 requirements are and I'm having trouble making that
17 transition to this new ground movement that you
18 suggest should be used. Where are they required that
19 they be used?
20 MR. ROISMAN: Well, Millstone. Millstone
21 meets a higher earthquake --
22 JUDGE BARATTA: That's not the question I
23 asked. The question I asked is where is Vermont
24 Yankee required to meet those by the regulations?
25 JUDGE RUBENSTEIN: Or let me add to it.

1 In establishing your basis, for example, at Millstone,
2 when they used a new forcing function, ground motion,
3 was it -- did it change the outcome? Was their
4 bounding calculation still valid?
5 MR. ROISMAN: This was when they initially
6 licensed it.
7 When it was initially licensed they were
8 using a more -- my understanding of what has gone on
9 in the earthquake field is that the NRC used to define
10 a geographic area and say the relevant earthquakes are
11 the earthquakes that are within this geographic area.
12 Within that area, Vermont Yankee met what was the, if
13 you will, the design basis earthquake, the sort of
14 worse case.
15 Subsequent to that time, the U.S.
16 Geological Survey and experts in the field and the NRC
17 eventually agreed, think that the geographic area that
18 ought to be included, in other words, the tectonic
19 plates that are interrelated enough to include both
20 areas is bigger. When you make the area bigger, you
21 bring in some earthquakes that were larger than any
22 earthquake that was in the smaller area. So today,
23 the best judgment is the size of the design basis
24 earthquake has to be a larger one because it is now
25 more plausible.

1 JUDGE RUBENSTEIN: In looking at your
2 basis for admissability is the safe shutdown
3 earthquake bounding calculation as it is now likely to
4 be negated by using the new forcing function? Do you
5 have anything to support these hypotheses and we'll --
6 I'll ask pretty similar question to Entergy and then
7 the Staff.
8 MR. ROISMAN: Well, we've not rerun the
9 calculation using a different number, but obviously
10 ground acceleration is an input value. If you put
11 ground acceleration up by 70 or 80 percent, you're
12 going to change movement. We know that the isolation
13 valves are already vulnerable to leakage and we know
14 that it's important that the isolation valves get
15 seated properly and that they seal in order to deal
16 with containment isolation. So we believe it's a
17 reasonable inference that if we increase the amount of
18 movement that's going to happen after an earthquake,
19 the isolation valves are vulnerable.
20 JUDGE RUBENSTEIN: Okay, so your argument
21 is based sort of on inference or logic as opposed to
22 saying gee, here's an example where the old forcing
23 function on this plant which did a recalculation was
24 penetrated by the bounding value, was penetrated by
25 using a new input. You don't have that kind of

1 information?

2 MR. ROISMAN: No, but --

3 JUDGE RUBENSTEIN: Even from say

4 petrochemical plants or anywhere, it's sort of a

5 passing through you to your geologist, has there been

6 evidence that using the new values have changed the

7 situation anywhere?

8 MR. ROISMAN: Well, I mean we can take

9 official notice of it, that after the big earthquake

10 in San Francisco 10 or 12 years ago, the people in San

11 Francisco and the engineers out there realized that

12 the buildings that were designed to the older

13 standards didn't hold up so well and the ones that

14 were designed to the newer standards did. So there's

15 some empirical evidence of that.

16 But it's important to understand that our

17 contention is also based upon the fact that the

18 Applicant has not done the analysis. Remember, it's

19 not our burden to show that they have -- that the

20 application is wrong if they fail to do the analysis

21 that we think they're required to do. They may do it

22 and it may be satisfactory and we may say --

23 JUDGE BARATTA: But what we're looking for

24 is what is the bridge that takes your contention from

25 a mere allegation to a contention? That's where I'm

1 having the trouble making the connection.

2 MR. ROISMAN: The obligation in the

3 regulations that the Applicant must design the plant

4 to meet the safe shutdown earthquake.

5 JUDGE BARATTA: But on that, I just am

6 troubled by the backfit rule and Entergy and the Staff

7 and Entergy has raised it, but how do we get over

8 that? It basically says 50.109. But basically, it

9 says we can only require backfitting a more stringent

10 standard when a substantial increase in overall

11 protection of public health and safety can be found

12 and costs are justified and blah, blah, blah and the

13 Commission is consulted. I don't see where we have,

14 you know, are you arguing that this is what we fit the

15 criteria of the backfit rule?

16 MR. ROISMAN: No. What I'm saying is that

17 there isn't a backfit issue when an Applicant is

18 voluntarily doing some. No one is forcing them to ask

19 for 20 percent more power.

20 JUDGE BARATTA: I see. As opposed to

21 involuntary.

22 JUDGE BARATTA: I'd like to change your

23 subject slightly because you brought it up and it's a

24 question --

25 JUDGE KARLIN: Time is up. You can

1 finish.

2 JUDGE BARATTA: You mentioned the linkage

3 on an isolation valve and there was a point of

4 clarification I wanted to get and I'm not sure --

5 maybe it would be better to have Entergy respond to

6 this, but the testing that's done to determine leakage

7 is not done with the actual accident delta P that

8 would be present, is it? As a result, is that leakage

9 -- that leakage is expected to be higher than it would

10 be during an accident condition. Is that not the

11 case?

12 MR. ROISMAN: My understanding, we

13 submitted the document so the Board can look at it

14 itself. My understanding is that it was found that

15 the tests show that the valve failed the test. So in

16 that sense it is not what it was supposed to be. I

17 can't answer your question, the technical question

18 about the delta P issue and that, but it wasn't a

19 pass. It was a not pass. And just so we're clear,

20 we're talking about the fact that -- not -- it's not

21 that it's 20 percent more power, it's that they're

22 linking two multiple fission barriers which is the

23 design basis change that justifies them having to now

24 review those in light of relevant current criteria.

25 JUDGE BARATTA: Okay, thank you.

1 JUDGE KARLIN: Thank you. Mr. Silberg.

2 MR. SILBERG: Yes, this is a contention

3 where there are so many problems with it, I'm not sure

4 I know where to start, but I will say that we have

5 done the analysis that the State says we haven't done

6 and it's in the application. It's in the -- what we

7 call the PUSAR which is part of our uprate application

8 and it says that we can take a .3G earthquake, not

9 1.4G earthquake. Our design basis is .14G earthquake,

10 but we said in the application that we can take a .3G

11 which I think answers your question.

12 JUDGE BARATTA: Could you be more specific

13 where it is in the FSR?

14 MR. SILBERG: Page 10-17 of NEGC-33090PB-

15 29/5-2003. And it's part of, as I understand, part of

16 the original application.

17 Second, the allegations that somehow the

18 seismic change in seismic information has undermined

19 the design basis of this plant is simply wrong. The

20 letter by the State geologist shows several things.

21 It compares the peak ground acceleration that they

22 take from the USGS 1996 ground motions and compare

23 that with the peak ground accelerations for the

24 Vermont Yankee plant. And the numbers for the USGS is

25 12.33, the number that is used in the application is

1 14. So we, in fact, use a higher peak ground
2 acceleration. And they don't question that the peak
3 ground acceleration numbers for Vermont Yankee are
4 different than the peak ground acceleration numbers
5 that USGS uses.
6 What they do argue is that the predicted
7 short period accelerations for certain short period
8 waves are higher than the .14G peak ground
9 acceleration at Vermont Yankee. But technically,
10 that's comparing apples and oranges. You simply
11 cannot say that a spectral acceleration, which is the
12 .2 and the .3 and the 1.0 second acceleration numbers
13 are comparable to peak ground acceleration. I'm told
14 by our geologist and seismologist that any engineering
15 will know you don't compare peak ground acceleration
16 against spectral acceleration because they're
17 different.
18 The argument that the State is making that
19 says there is evidence out there of new stringent
20 standards including the IBC and therefore we need to
21 reevaluate seismic design is also simply incorrect.
22 The IBC has been looked at by one Licensing Board in
23 the Private Fuel Storage case which we cite and
24 rejected. There's no comparison between the values in
25 the IBC compared with the ones they use and that was

1 one of the reasons that the Board in Private Fuel
2 Storage rejected it.
3 And if it's not good enough for the State
4 of Vermont, I would think it would not be good enough
5 for the State of Vermont to tell other people in the
6 State of Vermont that they have used.
7 As far as different seismic values used in
8 other plants, there's no indication here that Seabrook
9 and Vermont Yankee are in the same seismic zone. We
10 heard what I think can be characterized as evidence by
11 Mr. Roisman as to the change in seismic design. Now
12 there's nothing that I recall that talked about change
13 in the areas that we must use in picking the
14 earthquakes, but be that as it may, the evidence
15 simply on this issue, taken in its narrowest form,
16 doesn't support the idea that we ought to look at a
17 new seismic design because indeed if we did that here,
18 then every time anyone filed any license amendment,
19 one would have to redo the seismic design, any time
20 there was an allegation that there was some new
21 information out there about seismicity because I would
22 guarantee that virtually every plant license amendment
23 somehow affects containment. So the same nexus that
24 is postulated here between the power uprate and
25 containment could also be postulated for any other

1 license amendment. It just doesn't make sense.

2 This argument will turn the backfit rule

3 on its head. And the backfit rule is something that

4 shouldn't be lightly discarded. The Commission went

5 through a lot of angst to decide how properly it ought

6 to treat the original design bases of plants and we

7 believe that that's appropriate for a variety of

8 policy reasons.

9 JUDGE BARATTA: Could you talk to the

10 point that was raised by DPS concerning the fact that

11 this is voluntary versus required by Staff.

12 MR. SILBERG: Well, any license amendment

13 is voluntary, but what State is asking for is to make

14 a backfit a change in our design basis which we're not

15 volunteering for. The fact that we have asked for EPU

16 is indeed voluntary. We have not asked for a seismic

17 upgrade and we don't need one.

18 JUDGE BARATTA: What I'm saying is that

19 the backfit rule doesn't apply because you're

20 requesting a voluntary change. In other words, to say

21 the backfit rule applies is inappropriate is what

22 they're saying.

23 MR. SILBERG: But the backfit rule doesn't

24 apply to EPU. And we're not arguing that anything

25 that is related to EPU somehow can't be changed.

1 JUDGE BARATTA: Then why doesn't it open
2 up the criteria, these new criteria that come into
3 play? Because you're arguing the backfit rule says
4 they don't, but you just said the backfit rule doesn't
5 apply.
6 MR. SILBERG: Because we're not doing
7 anything to containment that would require a change in
8 containment. We have not made any containment changes
9 as part of the EPU application, so there's no reason
10 to reopen containment any more than if we were
11 changing an electrical circuit inside containment and
12 yet you would worry that if there was a containment
13 failure, maybe that electrical conduit might break
14 more easily or be subject to more environmental
15 impacts. Everything you do in the plant, arguably,
16 would be -- would trigger a review of the containment
17 design. It simply doesn't make sense to re-review the
18 whole plant just because we're making a change in one
19 area.
20 Let me get back to --
21 JUDGE BARATTA: I'd like to explore that
22 a little further. You are making a change the way the
23 containment is utilized and the isolation valves form
24 part of boundary that involves the containment and
25 therefore it would seem as though that should cause

1 those issues to come into question.

2 Could you comment on that?

3 MR. SILBERG: There are two separate

4 issues. First, we're not changing the way in which

5 containment is used. Containment is a pressure-

6 retaining component. That's the way it was before.

7 It is now and it retains pressure after a local, far

8 in excess of any pressure that we would need to retain

9 for power uprate purposes.

10 With respect to the check valves, our

11 design basis does not require that we postulate a

12 failure of those. The argument the State has made by

13 looking at tests don't in any way show that those

14 check valves won't perform their safety functions. In

15 fact, the very document they cite states that there's

16 nothing in those tests that indicate that the valves

17 won't perform their safety functions when called upon.

18 The test is run in the backwards way so that where a

19 check valve would seat if pressure was coming out,

20 which is when you want it to seat, MSIV, it's not

21 necessarily the same as if pressure were going in the

22 other direction.

23 So we're really, again, trying to, I

24 think, grasping at straws, looking for things that

25 they might latch on to that really aren't related to

1 the application --

2 JUDGE BARATTA: Wait. Before we go to the

3 next point, what about the claim that the State has

4 made with respect to the fact that there are criteria

5 for accepting the test results, regardless of how the

6 test mimics the real behavior of the valve during an

7 accident situation? And that those criteria were not

8 met? Is that true?

9 MR. SILBERG: The individual tests when

10 you run the tests there sometimes you meet criteria

11 and sometimes you don't. That test report shows that

12 in certain cases, that in some cases the valves did

13 not, those valves were rebuilt, retested and put back

14 in service.

15 JUDGE BARATTA: In other words, they

16 didn't pass.

17 MR. SILBERG: That particular test. And

18 therefore, they were rebuilt. That's why you test

19 things.

20 JUDGE BARATTA: I understand that. I just

21 wanted to clarify did they or did they not pass.

22 MR. SILBERG: Yes, I think there were

23 certain cases where individual valves --

24 JUDGE BARATTA: Could I ask the --

25 MR. SILBERG: Let me just finish the

1 record. I'm told the total allowance as shown in that
2 report for all the valves did not exceed the allowance
3 although --
4 JUDGE BARATTA: Okay, so when you combine
5 all -- okay, I understand now.
6 The question that I asked of State counsel
7 was in terms of the -- and I think he answered this in
8 terms of an accident condition, the actual flow would
9 be such that it would tend to seat the valves more
10 than in terms of the way it was tested.
11 Could you just maybe give a two-second
12 explanation of that?
13 MR. SILBERG: That, I think, is correct.
14 When I talked about the reverse flow, the valves are
15 intended to close against an outward flow. So the
16 pressure trying to leave containment would seat the
17 valves. The test has the pressure coming in the
18 opposite direction, as I understand it, so you're
19 testing something that -- it's a way to test the
20 valve, but it's not testing it as it would operate.
21 In an accident situation, it's a much, much more
22 conservative test. In an accident situation, all the
23 tendency would be to seat the valve.
24 JUDGE RUBENSTEIN: You're testing the
25 pressure or force you need to open it to a certain

1 level and how the valve would close and then you test
2 the amount of leakage which is related to the seating
3 capability of the valve.
4 MR. SILBERG: Technically, I'm told that
5 there is a physical restriction in the design that
6 does not permit you to test it in the direction of
7 accident flow, so you'd have to test it in the other
8 direction.
9 JUDGE BARATTA: I'd like to change the
10 subject and go back to the question of seismology a
11 minute. You made a point before that peak ground
12 accelerations are not the same as spectral
13 accelerations. Could you in layman's terms explain
14 that, because I'm not a seismologist.
15 MR. SILBERG: I could yesterday afternoon.
16 I'm not sure that I can today. If I take a break, I
17 can probably get smart enough to answer it.
18 Peak ground acceleration, as I understand
19 it, is if a block of marble was sitting on the
20 surface, how it would accelerate. The spectral
21 acceleration, I believe, you assume elevated in a
22 building, for instance, above the ground surface and
23 I think the timing of whether it's .2.3 or 1.0 has to
24 do with how high above the surface you are. It deals
25 with the natural frequencies and that's governed by,

1 if you're in a structure, where you are in that
2 structure. Peak ground is also, as I recall, known as
3 EPA or zero period acceleration.
4 Let me get back to some simpler issues.
5 The contention itself, and let's get back to the
6 wording the contention talks about, because we're
7 seeking a voluntary change in basis, we should comply
8 with more restricted practices. Again, they're not
9 saying we must and as I think you heard there is no
10 regulatory basis. That in itself ought to be enough
11 to throw the issue out. There are three bases. The
12 first one is we both agree there is no issue that we
13 do take credit for NPSH.
14 The second is that where changes are
15 voluntary, we should meet the more restrictive
16 standards and that we think is simply inconsistent.
17 First focus contention and this basis fail to state
18 that we're required, even the basis says we're should
19 meet. There's nothing in here that says we're
20 required to meet and if we're not required, I don't
21 know how this Board could say well, should is a nice
22 thing to do, but they don't have to do it, even if it
23 were something we ought to do which we don't think it
24 is, then it's not the right thing to do.
25 Second, DPS's only support of what we

1 should do is in the Reg. Guide 1.183 and we've agreed
2 that the regulation and Reg. Guide are different. We
3 agree the Reg. Guide is not a basis for contention,
4 but they don't even use this Reg. Guide correctly.
5 What they say in there, they quoted on page 30 of
6 their petition is the characteristics of the AST, the
7 alternate source term and the revised dose calculation
8 methodology may be incompatible with many of the
9 analysis assumptions and methods currently reflected
10 in the facilities design basis. That's what they're
11 saying here. Some seismic stuff, some single failure
12 interpretations may be inconsistent.
13 What this document that they rely on would
14 have you do is not to change the design basis. It
15 goes on to say the NRC Staff may find that new or
16 unreviewed issues are created by a particular site-
17 specific implementation of the ASG, warranting review
18 of Staff positions approved subsequent to the initial
19 issuance in a license. So they're not talking about
20 a change in the initial license. They're not talking
21 about a change in the licensing basis. They're
22 talking about a review of Staff position. So it
23 simply doesn't stand for the proposition that they
24 want it to stand for. And as we said, that Reg.
25 Guide, that language is not found in the Reg. Guide

1 that we're using here. We're not using that Reg.
2 Guide in this proceeding. To take that as authority
3 again is picking out something that exists for a
4 different purpose that doesn't say what they say it
5 does and try to impose it in this proceeding.
6 The third basis is where they cherry pick,
7 and I think that's their terminology, the two issues.
8 One is seismic design and the second is in the failure
9 rule and the check valve. They really haven't
10 identified what the current criteria are that they're
11 relying on. They fail to cite to our application.
12 They fail to cite how this issue is related to EPU.
13 It's not created by a particular site-specific
14 implementation which is the words of their Reg. Guide
15 that they would have us follow.
16 And they've also failed to reflect
17 information that's in the record, particularly on
18 check valve failures where we showed that we don't
19 need, even if we were to fail that check valve because
20 water temperatures below the key value of 180 degrees,
21 you still don't need containment over-pressure and you
22 still can't get into that situation without
23 postulating multiple failures.
24 So here again, the State is asking us to
25 get into single failure after single failure. We're

1 well beyond the Commission's rules as to what we need
2 to design the plant to. We can always postulate
3 enough failures so that we're in trouble. But that's
4 not what the Commission's regulatory structure has
5 been set up. It's not a sensible approach and we
6 wouldn't run society that way.
7 JUDGE KARLIN: Any questions? Is that all,
8 Mr. Silberg? I think that's the end of the time
9 anyway.
10 MR. SILBERG: Thank you, Mr. Chairman.
11 MR. ROISMAN: I'd like to make amotion to
12 strike two portions of Mr. Silberg's answer.
13 JUDGE KARLIN: Can you speak up a little
14 bit?
15 MR. ROISMAN: Yes. I'd like to move to
16 strike two portions of Mr. Silberg's answer. The
17 first is his reference to the calculations that he
18 made reference to that showed that this plant could
19 lead a .3G event. That was never cited in the answer.
20 In short, what he's done is amended his answer without
21 giving good cause. I don't see any reason why
22 amendments -- and of course, we've had no opportunity
23 to respond to it.
24 I have the documents here in front of me.
25 At least a portion of it that deals with that, but I

1 don't think that it's appropriate for the Board to
2 rely upon that.
3 The second relates to the same issue. Is
4 that he gave us an extended discussion, lawyer,
5 discussion, of what he believes are the relationship
6 between peak acceleration and spectral analysis. It
7 was interesting to hear that. My geologist tells me,
8 mostly wrong. But the point is it was never put into
9 the answer. There's no evidence to that and we would
10 move that that be stricken as well.
11 Both of those not being appropriate since
12 they were not previously raised.
13 MR. SILBERG: May I respond?
14 JUDGE KARLIN: Yes, please.
15 MR. SILBERG: First of all, we're citing
16 to the application in our first reference to .3G. We
17 certainly referenced our application throughout and in
18 our answer our ability to respond to seismic events.
19 Second, I'm calling attention to what I
20 think and the Board Members can correct me, technical
21 understanding amongst those who are knowledgeable
22 about what is and isn't comparable and that was
23 responding to a Board question.
24 I think if we're going to move to strike
25 I would also move to strike Mr. Roisman's comments

1 about changes in how people do seismic evaluations.
2 I think all lawyers have probably been making
3 statements as to their understanding of what the
4 technical issues are. And I think in this context
5 where we're not -- you know, this is not a testimonial
6 presentation, it's by and large appropriate. But I
7 think if we're going to start striking, there's a lot
8 of -- striking the kettle to go --
9 JUDGE KARLIN: I appreciate the motion.
10 I think that you, -- counsel -- all counsel here have
11 made some statements concerning factual matters. This
12 is not an evidentiary hearing and we understand that.
13 But in light of Entergy's response and I
14 think you have also referred to certain factual
15 matters such as the peak ground acceleration changes
16 and I'm going to deny the motion and allow it.
17 MR. ROISMAN: May I just say with regard
18 to the specific document that they reference, I double
19 checked. There is no reference in the discussion of
20 the seismic issue in their answer to the application
21 at all, much less the idea that my referencing a
22 document that is in itself thousands of pages long and
23 changes almost weekly they have automatically brought
24 the entire document in here without ever filing it or
25 identifying with specificity what particular portion

1 of it they're relying on.

2 MR. SILBERG: I'll be happy to make a copy

3 of it. I gave the citation.

4 MR. ROISMAN: I'll oppose the motion to

5 amend their answer.

6 JUDGE KARLIN: Well, it sounds like your

7 objection is that they can't refer to simply a huge

8 document without giving us specific citation to the

9 page and chapter and verse that they're referring to.

10 MR. ROISMAN: They assert that rule to the

11 Petitioner and the Intervenor and you assert it --

12 their answer seems to be we'll give you the chapter

13 and verse.

14 MR. SILBERG: And I did on the record.

15 JUDGE KARLIN: And I think that's

16 sufficient so I'll deny that motion.

17 MR. SILBERG: May I then at the hearing

18 tomorrow give the answer which I never had a chance to

19 reply to because I never knew that they were going to

20 make that reference?

21 JUDGE KARLIN: Well, within the time

22 available, if we have some time at the end, yes. I

23 think we probably can accommodate you. But I think

24 that's one reason that it might be advisable for you

25 to retain some rebuttal time. That's your call. It's

1 how you want to do that. If you use up all your time.
2 Then there's no rebuttal time.
3 MR. ROISMAN: I wouldn't try to rebut the
4 reference as technical as that in rebuttal anyway.
5 that would be unfair.
6 JUDGE KARLIN: All right, thank you. Ms.
7 Poole, 10 minutes, please.
8 MS. POOLE: Thank you. I just wanted to
9 answer a question that Judge Baratta asked with
10 respect to leakage rate testing. Appendix J at part
11 50 requires leakage rate testing to be done at the
12 predictive accident pressure.
13 JUDGE KARLIN: Thank you.
14 MS. POOLE: We weren't going to add
15 anything further to our papers, but we'll be happy to
16 respond to any questions the Licensing Board has.
17 JUDGE RUBENSTEIN: I'd like to understand
18 your reasoning on the adequacy of the current seismic
19 analysis in supporting admission. What is the basis
20 to help you come to that decision?
21 MS. POOLE: The part of the basis that we
22 didn't challenge was with respect to the seismic --
23 was the part that referenced the letter from the
24 Vermont State Geologist.
25 I think it's fair to say we thought this

1 was a close call and just decided to err on the side
2 of not objecting. I think we thought the letter from
3 the State Geologist raised the question as to whether
4 the uprate -- the way I thought about it,it was sort
5 of the question of whether any changes to the system,
6 structures and components with respect to the uprate,
7 would have an effect on the seismic analysis and I
8 think we just looked at the State Geologist'
9 s letter and went at that.
10 JUDGE KARLIN: What bothers me about that
11 is that basically with the peak acceleration dealing
12 with spectral response and you have to do a 408
13 analysis of your structure to be able to determine
14 that. I'm concerned that there is an apples and
15 oranges type of approach being taken here and that's
16 what I was trying to get at.
17 But I wondered if someone could explain
18 that in layman's terms for the record. I don't have
19 that.
20 MS. POOLE: I'm afraid we can't explain
21 that in layman's terms today, but I think it's fair to
22 say that the Staff thinks that although we don't
23 change our formal position, that the Applicant has
24 provided a sufficient rebuttal to the contentions that
25 the Board could find inadmissable on that basis.

1 JUDGE KARLIN: I have a more legalistic
2 question which is how do we deal with the backfit
3 rule. Does this run afoul of it or is there a problem
4 here in that the -- as I understand it, the advocating
5 a more stringent standard be applied and then we have
6 confronted with the backfit rule. Is that a problem?
7 Is this a problem for this?
8 MS. POOLE: I'm sorry, I don't fully
9 understand your question?
10 JUDGE KARLIN: Well, maybe I don't
11 understand the issue, but it seems to me that the
12 State is advocating that more stringent seismic
13 standards should be applied since the Entergy is
14 voluntarily requesting some changes here and that
15 rather than being grandfathered, the more stringent
16 standards should apply.
17 The Staff seems to have said they don't
18 object to that or haven't raised an objection. Does
19 this raise a problem on the rule or am I off the mark?
20 MS. POOLE: Well, I do think that we would
21 review the license amendment request against the plant
22 specific licensing basis and if we come up against a
23 situation where we find that safety cannot be --
24 adequate protection of safety can't be assured, then
25 we would have to perform the backfit analysis. It

1 really doesn't answer your question.

2 JUDGE KARLIN: Why don't you answer that

3 Entergy does, oh, violates the backfit rule. Just

4 because you think we should consider it, doesn't mean

5 we are allowed to.

6 MS. POOLE: I think we would agree with

7 that. I think we would agree with the Applicant. I

8 think that's responsive to your question.

9 JUDGE KARLIN: But your position is that

10 you don't object to its admission.

11 MS. POOLE: Well, as I said, I think we

12 thought it was close and that the Applicant has

13 provided a basis to not admit the contention.

14 JUDGE RUBENSTEIN: Close in what respect?

15 I mean in the sense you see there's a linkage?

16 MS. POOLE: Yes, the linkage between the

17 seismic issue and the EPU.

18 JUDGE RUBENSTEIN: Okay.

19 JUDGE KARLIN: Any other questions?

20 JUDGE BARATTA: Could you expand on that,

21 what that linkage is?

22 MS. POOLE: I think we weren't

23 sufficiently sure, so we thought -- what the linkage

24 would be, so we thought we would err on the side -- so

25 we didn't object.

1 JUDGE KARLIN: You probably can't answer
2 this, but was the Staff was the same position as the
3 Petitioner in not having to -- not having looked at
4 the full record itself and looked back to the --
5 MS. POOLE: I think we did not look back
6 to the original seismic analysis in looking at this.
7 JUDGE KARLIN: Okay. Thank you, Ms.
8 Poole. Let's move ahead to NEC -- where are we. NEC
9 contention 4, are we not there?
10 Mr. Block, Mr. Shadis, who will argue this
11 one?
12 MR. BLOCK: I will be arguing this one.
13 This is Mr. Block.
14 JUDGE KARLIN: Twenty minutes. Do you
15 have any reserve rebuttal time?
16 MR. BLOCK: We'd like to reserve whatever
17 the balance of the time is after I've made the
18 statement and you've questioned me. If there's
19 something left that will be fine.
20 JUDGE KARLIN: That will be fine.
21 MR. BLOCK: I would just reserve whatever
22 balance is left after we've had our go-round here.
23 As we see it, this is a well-supported
24 contention. In fact, the NRC Staff, if we understand
25 them correctly doesn't object to this contention. We

1 hop[e that when they get a chance to speak on it,
2 they'll address how they define the basis of their
3 acceptance of it. But we do have an issue with the
4 Applicant who seems to be asserting that Mr.
5 Gundersen's contention concerning the seismic and
6 structural qualifications of the cooling tower be
7 outside of the scope of the proceeding.
8 It is an interesting coincidence that we
9 move from discussing seismic qualification because of
10 course there is NUREG as a matter of public record
11 that took Vermont Yankee as an example of a vulnerable
12 plant. And that's NUREG 1738 which I believe is
13 January 2001 in which Dr. Robert P. Kennedy described
14 its vulnerability and the potential for the spent fuel
15 pool to drop out, the bottom to drop out in an
16 earthquake.
17 Mr. Gundersen was dealing with the lack of
18 proper analysis and qualification of the cooling
19 towers which under operating conditions will be relied
20 upon more heavily, will bear an extra burden.
21 I've reviewed his declaration at pages 5
22 through 7 and we believe that it provides adequate
23 support for the contention. We think that it's
24 adequately based upon the documents and the lack of
25 qualification that's provided within this application.

1 The Applicant's arguments, seems to me,
2 come down to in saying that it's outside of the scope,
3 that they're somehow not going to be relying on the
4 system which involved here is the ultimate cooling
5 system.
6 In fact, it will be relied upon and it
7 will be more heavily relied as the need arises under
8 conditions of greater heating, particularly the summer
9 to reduce the stress on the Connecticut River in order
10 to avoid cooking the fish in the river.
11 So that's essentially our position on this
12 and I hope the Board has some questions.
13 JUDGE RUBENSTEIN: I'm looking at the part
14 where you say your expert believes that the alternate
15 cooling system -- wanted a dedicated cooling path
16 carousel will bear an extra burden on the uprate
17 condition.
18 MR. BLOCK: Correct.
19 JUDGE RUBENSTEIN: Can you amplify that a
20 little bit?
21 MR. BLOCK: Well --
22 JUDGE RUBENSTEIN: What the basis of your
23 belief again?
24 MR. BLOCK: With greater heating bits
25 involved there will be a need when the system is

1 relied upon to do more work than it's doing now and in
2 the period of time since the last attempt to qualify
3 the system which was 1986, there's been no additional
4 work done to structurally or seismically qualify it.
5 And so in the higher stress conditions
6 that will exist when the uprate is implemented, there
7 isn't adequate assurance that the system will be able
8 to bear it.
9 And as he points out, this is a system
10 that it's been recognized and this is at page 6 of his
11 declaration. The alternate cooling system isn't
12 engineered as a safeguard system and isn't relied on
13 for design accidents. And in addition to a loss of
14 divert and dam, the system is credited for two other
15 special events, an Appendix R fire in the intake
16 structure and 100-year flood of the intake structure.
17 So it's a special heat removal system used in the
18 special event to achieve and maintain safe shutdown
19 when the normal surface system pumping from the river
20 isn't available or I should say is lost would be the
21 quote and that's at page 6 where he's citing internal
22 Entergy memoranda. And so under the uprate
23 conditions, this system when it's called upon would be
24 dealing with a greater load, more volume, more weight
25 and therefore would be under greater stress and it

1 remains to be properly qualified.

2 JUDGE RUBENSTEIN: Thank you.

3 MR. BLOCK: Thank you.

4 JUDGE KARLIN: Any more questions?

5 JUDGE BARATTA: No.

6 MR. BLOCK: Thank you.

7 JUDGE KARLIN: Thank you, Mr. Block. Mr.

8 Silberg.

9 MR. SILBERG: It will be Mr. Traviesco-

10 Diaz.

11 MR. TRAVIESCO-DIAZ: Mr. Chairman and

12 Members of the Board. My name is Matias Traviesco-

13 Diaz. Good afternoon. I'm counsel for Entergy. I'm

14 going to talk about contention 4 which deals with the

15 current status of and the need to perform seismic

16 analysis of one cell or one portion of one of the

17 cooling towers.

18 Before I turn to the discussion of the

19 contention, I need to respond to two things that

20 counsel said. First, he made a reference to NUREG

21 1738 which he describes as having to do with dropping

22 spent fuel pool. I don't know what he's talking

23 about. He was not talking at all about the contention

24 and it does not have anything to do with cooling

25 towers.

1 The second thing that I would like to make
2 clear is that even though this is a contention, it has
3 nothing to do with DPS contention 3. Seismic is just
4 a common word from both which deal with totally
5 different issues.
6 Now this contention is supported by the
7 declaration of Mr. Gundersen that was referred to a
8 moment ago and that's actually what I'm going to be
9 talking about because I believe that in that
10 declaration there are at least three or four reasons
11 why this contention cannot be admitted, and should be
12 excluded.
13 First, the declaration says clearly, page
14 7, that nowhere in the application for the EPU there
15 is a reference to the ACS which is the safety system
16 in the one cell in the cooling tower that is of
17 interest here.
18 JUDGE KARLIN: Where is that? I'm on page
19 7, which paragraph.
20 MR. TRAVIESCO-DIAZ: One second.
21 JUDGE KARLIN: I'm just trying to follow
22 you here.
23 MR. TRAVIESCO-DIAZ: In the last paragraph
24 of 6.
25 JUDGE KARLIN: Last paragraph of 6?

1 MR. TRAVIESCO-DIAZ: Page 7. This may be
2 why we couldn't find a discussion of the safety
3 related uprate activity in the EPU license amendment
4 application. There is no discussion, the last
5 paragraph.
6 JUDGE KARLIN: The last paragraph on page
7 7?
8 MR. TRAVIESCO-DIAZ: Yes.
9 JUDGE KARLIN: Okay.
10 MR. TRAVIESCO-DIAZ: In fact, he's
11 correct, there is nowhere in the application for EPU.
12 There's a mention made of this system. There is no
13 proposed change to the system which deals or talks
14 about the declaration. No changes are going to made
15 of this system. No changes are going to be made to
16 the analysis of this system. Some motors have been
17 added to other parts of the cooling tower which are
18 not safety-related. No motors have been changed or
19 added to the system. So this system is not being
20 modified at all.
21 JUDGE KARLIN: When you say it's not being
22 changed, do you mean it's not being changed in this
23 request for modification, application for modification
24 and amendment?
25 MR. TRAVIESCO-DIAZ: No. It's not been

1 changed period.

2 JUDGE KARLIN: It's not been changed

3 period since the beginning of time, since the

4 beginning of this facility's license?

5 MR. TRAVIESCO-DIAZ: Not only that, but

6 there is no intent to make any changes to it.

7 JUDGE KARLIN: Okay.

8 MR. TRAVIESCO-DIAZ: Okay? There were

9 some structural modifications made in 1986. The

10 structure from a seismic standpoint has not been

11 changed and there is no intention to change, subject

12 to something that I'm going to talk about.

13 JUDGE KARLIN: But isn't one of the

14 concerns here that there's an ambiguity or a lack of

15 a clear current licensing basis against which to judge

16 the delta, the change that would be caused by the EPU?

17 MR. TRAVIESCO-DIAZ: I was going to talk

18 about that in a minute, but I can talk about that now.

19 JUDGE RUBENSTEIN: While you're on the

20 ACS. There's really discussion of potential

21 additional loads due to the EPU in terms of heat load

22 which -- or the average core discharge temperature of

23 the coolant water in increased, I assume and you're

24 going to have a larger load and so vis-a-vis that and

25 the ACS or the cooling towers, have you done such that

1 (a) is there a load; (b) have you done some analysis;
2 (c) is there an analysis that shows acceptability?
3 MR. TRAVIESCO-DIAZ: My understanding is
4 that the only thing that is changed as a result of the
5 uprate is the heat load. The design of the system is
6 not proposed to be changed. The configuration of the
7 system is not proposed to be changed. And moreover,
8 whereas in other elements of the cooling towers they
9 were adding bigger sized motors. Those additions were
10 done for environmental reasons as a result of the
11 State making the requirement. There is no proposal or
12 intention to change the design of the motors of that
13 particular --
14 JUDGE RUBENSTEIN: But there has been a
15 change in the input value due to the heat. How has
16 that been accommodated?
17 MR. TRAVIESCO-DIAZ: There was an analysis
18 that showed that the capacity of the ACS did not need
19 to be changed.
20 So from the system operation component,
21 there has been no change done or proposed, has been
22 analyzed. Doesn't need to be changed. It's not part
23 of the elements that are being applied for the uprate.
24 JUDGE RUBENSTEIN: You're now giving up a
25 little margin. Is that fair to say?

1 MR. TRAVIESCO-DIAZ: I suppose so. The
2 contention here, however, doesn't deal with the
3 capacity of the system. I believe some margin may be
4 left behind because they are taking more load with the
5 system and with the extra margin you have the loss.
6 But that's not having to do anything with the
7 contention. The contention --
8 JUDGE RUBENSTEIN: I want you to
9 understand --
10 MR. TRAVIESCO-DIAZ: Let me just go back
11 to where we are on this first point. No change in the
12 application, nor referred to. No change in the
13 configuration. So there is no basis to have a
14 contention on this issue because it's not been
15 modified.
16 JUDGE BARATTA: You're relying on that
17 system. You would be relying on that system to
18 operate at the increased power, yes or no?
19 MR. TRAVIESCO-DIAZ: Yes.
20 JUDGE BARATTA: Therefore, doesn't it come
21 into question as part of these power uprates, even if
22 there are no changes to it, you have to demonstrate
23 the adequacy of that system under the operating
24 conditions at which you would be operating at at the
25 increased power.

1 MR. TRAVIESCO-DIAZ: It has been analyzed.
2 It is -- let me cite to you the documents. It's NEDC
3 330-90-P. It's a document dated September 5, 2003,
4 and in fact it does, in the application and it is
5 exactly what you asked. Is the system adequate? The
6 answer is yes. That's why there are no modifications
7 being proposed.
8 The contention doesn't deal with that,
9 however. The contention deals with the seismic
10 capability of the seismic analysis of that particular
11 system, the cells in that particular system.
12 I would be pleased to tell you two things,
13 however. Number one is that in this, we're not making
14 any structural changes to the system, therefore, the
15 only reason why we will make a seismic analysis is if
16 all those things are changed would cause an analysis
17 to be made.
18 Mr. Gundersen and industry say an analysis
19 should be made. I'm representing to you here today
20 that that analysis is being performed. It will be
21 finished by the end of the year. So again, there is
22 no basis to have this contention. What they are
23 asking Entergy to do, Entergy is doing. The reason
24 this has been done is because even though there are no
25 critical changes to the system some conduits are

1 bigger, heavier and other parts of the cooling towers
2 have been changed and because there is a physical
3 change in the weight of --
4 JUDGE KARLIN: May I ask a question. I
5 guess one of your points is well, NEC is asking for
6 something that we are already doing. We're doing this
7 analysis as we speak. The analysis is not in the
8 application though.
9 MR. TRAVIESCO-DIAZ: It's still being
10 done.
11 JUDGE KARLIN: I know and maybe this
12 represents that there is a -- they've raised a
13 problem. You identified that it's an issue in the
14 sense that you are already doing an analysis on that.
15 What if you were to stop doing an analysis the day
16 after we denied their contentions and say we're not
17 going to do that any more, we'll just throw it in the
18 trash.
19 MR. TRAVIESCO-DIAZ: Well, first of all
20 that's not going to happen. The analysis is on-going.
21 And will be made available if desired to the parties
22 so they can look at it and see if there are new
23 contentions then that arise out of that analysis. But
24 the fact that you're saying we should be doing
25 something that we propose to do does not raise a

1 contention.

2 JUDGE KARLIN: So if you stop doing the

3 analysis or if the analysis report is completed, it

4 might be the basis for a new contention at that point?

5 MR. TRAVIESCO-DIAZ: Correct. But let's

6 continue with this contention that we have here now,

7 because as I said there are many reasons why it should

8 0be thrown out. First one is it doesn't challenge the

9 application, but there are no changes to be made.

10 Second, it asks for something to be done

11 that is being done.

12 But the third reason is that all the

13 concerns that they are raising with respect to the

14 analysis that is in place now which they in the

15 declaration admit is in the analysis of record,

16 performed in 1986, which has not been changed, which

17 is still in place. The concerns they're raising in

18 this contention dealt with information that was in the

19 memorandum that talked about somebody is trying to

20 review the files of modifications that were made

21 before 1986 and the person who wrote the memorandum

22 that is referenced here says that he couldn't find the

23 analysis. It's a question of whether those analyses

24 exist or not, but the answer is whatever problems we

25 had then were cured in 1986 when the analysis which is

1 of record now was made. It's referenced in the
2 declaration as being the current analysis, so there's
3 no contention either, no issue either here.
4 So in that respect, we don't have anything
5 to debate because there is no claim that the analysis
6 that was done in 1986 is defective. That analysis is
7 in place, has been approved by the NRC and in fact,
8 there is no contention that erases that. They are
9 talking of historical things that they infer from the
10 document that they are saying is correlated to things
11 that happened before 1986.
12 So my position is a clear one is that
13 whatever merit there is to those claims, they're
14 irrelevant because they were superseded by analysis
15 that was all-encompassing that analyzed the structure
16 as it was in 1986 and as it is today. So on that
17 basis also there is no reason to have this contention.
18 JUDGE KARLIN: May I ask a question? Ten
19 minutes. Thank you. 50.71 requires each licensee to
20 maintain the current licensing basis and to update it
21 every 24 months, I think it is. And that's a
22 requirement of the existing license. That's not an
23 issue we get into here today. But I think it is an
24 issue to understand that in order to evaluate the
25 uprate, the 20 percent increase from whatever the

1 current basis is, we have to understand what the
2 current basis is.
3 So my question is does Entergy have a
4 current licensing basis documentation set that meets
5 50.71(e)?
6 MR. TRAVIESCO-DIAZ: Absolutely. It is
7 the analysis that was performed in 1986.
8 JUDGE KARLIN: Okay.
9 MR. TRAVIESCO-DIAZ: The declaration
10 admits that that is the analysis of record and it's
11 not a question that they haven't seen it before it was
12 provided to NEC in discovery. They have had it. In
13 fact, it was referred to in the declaration.
14 JUDGE KARLIN: What's your position of
15 having spent $20 million recently to update the
16 current licensing basis? Did I misread something
17 here?
18 MR. TRAVIESCO-DIAZ: I don't understand
19 what you are asking.
20 Anyway, let me make one more point.
21 Assume for the sake of the argument that, in fact,
22 there were irregularities in 1983 and 1985 on those
23 seismic analyses that the person couldn't find which
24 I say is not a problem in any way. It didn't happen.
25 But if it had happened it was cured in 1986. That has

1 nothing to do with the uprate here. That could be the
2 basis for a 2.206 Petition that your records are not
3 up to snuff, but it has nothing to do with whether
4 this uprate should be approved or not.
5 So for all those reasons this contention
6 has absolutely no basis and should be dismissed.
7 JUDGE KARLIN: Okay, I think time is up.
8 Thank you, Mr. Diaz. Any questions? Okay.
9 Ms. Poole?
10 MS. POOLE: Thank you. I'm going to
11 anticipate the Licensing Board's question in view of
12 the last contention that perhaps, one, you'd like us
13 to further explain our basis with respect to why we do
14 not object to this contention.
15 Looking at the reference provided by NEC
16 what we saw was a document that addressed some of the
17 equipment that might be installed to support the EPU,
18 specifically looking at fans, motors and associated
19 gear boxes that would potentially be placed in a
20 cooling tower. And we were under the assumption of
21 the Staff that those fans, motors and gear boxes would
22 be replaced at some point.
23 Therefore, looking at the document which
24 sets forth the proposition that an analysis ought to
25 be done with respect to those fans, motors and gear

1 boxes, not taking any position on the adequacy of any
2 analysis that would be performed, looking at the
3 contention admissability requirements, we thought that
4 that was sufficient to form the basis for a
5 contention.
6 JUDGE KARLIN: Okay. Any other argument?
7 MS. POOLE: No other comments.
8 JUDGE KARLIN: Any questions?
9 JUDGE RUBENSTEIN: No.
10 JUDGE KARLIN: Okay. Mr. Block, any
11 rebuttal?
12 MR. BLOCK: Yes. Could I just take a
13 second to confer with Mr. Shadis?
14 JUDGE KARLIN: Yes.
15 (Pause.)
16 MR. BLOCK: A couple of points, if I
17 might. From page 7 of the Gundersen declaration, we
18 note in citing to an e-mail from Mr. Yasi, he's not
19 able to locate the analysis associated with the
20 modifications to determine what force would be
21 required to cause the ties to break. And the ties
22 referred to are steel rods connecting the tower cells.
23 So since there is also in the same records
24 documentation of previous failures in the tower and
25 some efforts to replace pieces there, I believe those

1 are in 1996 and 1997, the question becomes since
2 they're all bolted together, if the tower that's
3 relied on for the extra cooling capacity ends up
4 falling into the river, is there going to be less
5 capacity available?
6 All of these towers are bolted together
7 and the fact is that the changes that are made, the
8 new fans in the towers that are not included are
9 providing additional stress for those towers and there
10 isn't -- they do not know what the sheer strengths are
11 of the rods that tie the towers together. They don't
12 know what the sheer strengths are of the bolts that
13 are used either.
14 Excuse me, Mr. Shadis has one more point
15 he wanted me to add.
16 (Pause.)
17 I'm sorry, I misspoke, not the river, the
18 cooling basin is what was meant. But since they're
19 all bolted together and they've put fans in a group of
20 them, the fact that they don't have adequate
21 qualification, that this is clearly admitted in a
22 couple of points in the record raises a serious issue
23 because they are going to end up relying on this group
24 of systems with one other tower on the side in order
25 to provide necessary cooling.

1 The hotter the water, the greater the
2 flow, the greater the load and they've made changes to
3 the fill of the towers and they haven't done proper
4 qualifications on those changes and that's in the
5 record as well. With the larger motors that are there
6 in the other towers, there's going to be greater
7 stress through the towers because they're all bolted
8 together and the same would apply if there's some kind
9 of seismic event.
10 I think that addresses our points.
11 JUDGE KARLIN: Any questions?
12 JUDGE RUBENSTEIN: Is this an omission of
13 analysis issue?
14 MR. BLOCK: Yes.
15 JUDGE RUBENSTEIN: Okay.
16 MR. BLOCK: Yes. And Mr. Gundersen's
17 point is that this should have been done. One of the
18 points he made on the fill is there's not been -- this
19 is citing from their own records. There hasn't been
20 an analysis of the Class 2 structure to account for
21 the additional fill that was added in the mid-1980s.
22 He makes the point that they've been operating with an
23 unanalyzed condition here for quite some time. I
24 think he says 18 years. So this is a fairly serious
25 thing and I think that's why the Staff probably felt

1 the same way.

2 JUDGE KARLIN: But our issue is not

3 compliance with the existing permit or license.

4 That's a matter for the Staff and for enforcement.

5 Our issues, the scope here are the delta of the EPU

6 and only that. So the adequacy or inadequacy of the

7 current licensing basis seems only relevant in

8 evaluating where do we measure the 20 percent change

9 from.

10 MR. BLOCK: We wouldn't disagree with

11 that, but we would just point out that this system is

12 a system they're relying on in the uprate and will

13 rely on even more heavily and since it has these

14 defects that are clearly described --

15 JUDGE RUBENSTEIN: How long has this

16 situation been such that you've been aware of it? Is

17 this something that you've known for quite some time

18 and have you tried a 2.206 on it?

19 MR. BLOCK: Excuse me.

20 (Pause.)

21 Mr. Shadis has pointed out to me that

22 there's a reliance on the fact that the cooling basin

23 must have a 7-day capacity and that's an issue. Mr.

24 Gundersen did file an allegation on this after he

25 found -- went through these documents and found this

1 issue. He filed an allegation with the NRC about the
2 unanalyzed condition.
3 JUDGE RUBENSTEIN: Thank you.
4 MR. BLOCK: Seismic condition.
5 JUDGE KARLIN: All right, I think that
6 completes this one. It's now 5 o'clock. I think we
7 have the opportunity if counsel has no objection and
8 my brethren here have no objections, try to complete
9 contention 5 that Mr. Roisman has indicated might not
10 take that long from his perspective, but with no
11 objections and everyone physically is able, let's go
12 on to 5, with the thought that after that we will then
13 adjourn for the evening.
14 MR. ROISMAN: And to facilitate that, I'm
15 going to reserve 15 minutes for rebuttal.
16 (Laughter.)
17 Just joking.
18 JUDGE RUBENSTEIN: Tomorrow morning.
19 MR. ROISMAN: There was an earlier
20 question --
21 JUDGE KARLIN: Do you want to -- we'll
22 take you seriously here.
23 MR. ROISMAN: I will reserve five minutes
24 for rebuttal.
25 JUDGE KARLIN: Okay.

1 MR. ROISMAN: I think there's no danger of
2 this going on, but there was an earlier question I
3 think, Mr. Chairman, you asked about and we're trying
4 to get the references for the original design criteria
5 and the Staff had referenced them. They are Exhibit
6 1 to the petition filed by DPS.
7 JUDGE KARLIN: All right.
8 MR. ROISMAN: And I would just note that
9 they aren't criteria. They are interim guidance. So
10 this plant was built and conformed to interim
11 guidance, something less significant than Reg. Guide
12 1.82 rev. 3 which we'll get to here in a second.
13 All right, so -- and the other was a
14 reference that I tried to give you and couldn't
15 remember. I think one of the Members asked where were
16 the criteria for the safe shutdown earthquake design
17 criteria too in Appendix A and reads virtually the
18 same from the old draft guidance to the current
19 version.
20 So I must say before today and before the
21 hearing, I thought that contention 5 was kind of a no
22 brainer. You're not supposed to think about economics
23 or need for power when you make safety decisions. And
24 we put it in there to make sure that there was no risk
25 that the Applicant would attempt to defend its use of

1 containment over-pressure on the basis that well, this
2 was the cheapest or the most economical or try to say
3 that it was economically impracticable to come up with
4 anything else.
5 And in a way, the answers that we got back
6 said of course, of course, we don't take economic
7 considerations into account. But as the argument has
8 evolved today, it really goes back to what is this Reg.
9 Guide 1.82 about? And I want to be clear because it
10 is the premise behind which this contention and
11 admittedly contention 1 are based. Reg. Guide 1.82
12 represents the expert opinion of a group of experts,
13 regulatory staff experts and to some extent because
14 they signed off on it, the ACRS. And what those
15 experts said was that the calculations that we outline
16 in here which the Applicant told you they used, the
17 calculations that now appear as VY 0808 revision 5 now
18 or 4 that we're into. These calculations have
19 limitations and we're concerned, but we think they're
20 the best we can do right now and we're going to put
21 them out. Now we've made the containment in this
22 hearing that says that raises a question about whether
23 or not the underlying assumptions that go into those
24 calculations are sufficiently certain to be
25 appropriate, not challenging the calculation. That's

1 why we don't specify a particular calculation. We
2 know that the calculation follows the basic outline
3 that the Reg. Guide provides and we're not suggesting
4 that it does not.
5 But what we're saying on top of that is
6 that if you're going to use that as your analysis, if
7 that's going to be what you're going to do with your
8 calculation, then we offer our expert opinion that you
9 can't do that unless you take the bitter with the
10 sweet. You can't have the calculation without
11 recognizing what those wise people who wrote that said
12 was the restriction on that. And one of the
13 restrictions they said was you may not use containment
14 over pressure to meet NPSH requirements. And then
15 they said however, in very limited circumstances you
16 may when it's necessary and impracticable to do
17 otherwise.
18 Now what we've done in this contention 5
19 is we've given you two instances in which there is an
20 alternative. One, don't get the uprate as high as
21 you're proposing, thus reducing the temperatures in
22 the torus and the accident scenario, thus reducing the
23 need for containment over-pressure to deal with NPSH.
24 That's Option 1.
25 Option 2, we cited to an example that the

1 Applicant had in its feasibility study, keeping in
2 mind that a feasibility study is not a technological
3 feasibility, but it's also an economic feasibility.
4 Mr. Silberg didn't disavow that. In fact, he said oh
5 sure, we could spend even more money and we could
6 avoid the need for a lot of these things that people
7 are arguing about and he talked about some things,
8 three more pumps or five more whatever. Okay.
9 So I think that this contention is not
10 only valid, but is reaffirmed that this Applicant has
11 to some extent, consciously or unconsciously,
12 deliberately or negligently, put into the back of his
13 head we need this containment over-pressure, because
14 we need to uprate this plant, because we want the
15 extra money that it will bring to us.
16 Now, I agree they haven't written that in
17 so many words. I agree it has to be an inference at
18 this point from what we've seen. It is an example of
19 where very good, hopefully cross examination would
20 help expose that there is no other explanation for
21 need, but our point is that we have expert evidence in
22 the form of the positions taken in 1.82, not
23 conclusive, not because it's a binding thing, but
24 expert evidence that says you're not to use these
25 calculations and consider them to be adequate to deal

1 with NPSH, unless you take the bitter with that sweet
2 that we're giving you which is a fix to a problem that
3 at the moment when they did it, they didn't have a fix
4 for it. Unless you accept the limitation that you're
5 not going to get to use containment over-pressure to
6 meet NPSH requirements or that you can only use it in
7 very limited cases.
8 JUDGE KARLIN: What do we do with the
9 Staff that say they ignore these prerequisites to
10 1.82, necessity. That's what I thought I heard them
11 say. They don't pay any attention to that. They
12 evaluate on the bottom line safety issue.
13 MR. ROISMAN: The short answer to that is
14 that as you know what the Staff does is irrelevant in
15 this hearing. If they came out and said this plant
16 should be denied a license, the Applicant would have
17 a perfect right to come to you and say we're entitled
18 to one and they're just one opinion.
19 JUDGE KARLIN: All right.
20 MR. ROISMAN: So the fact that they that
21 they don't consider it, has nothing to do with the
22 question of whether or not the only way the Applicant
23 is able to justify it, the only way the Applicant is
24 able to say these calculations are acceptable evidence
25 of compliance with the NPSH issue, is to show us how

1 containment over-pressure meets what those wise people
2 who wrote that Reg. Guide had in mind.
3 So far, we have a disagreement with what
4 these words mean, need and impracticable. And this
5 contention says and it's there -- if you will, it's a
6 safety net contention. It says if they can't come up
7 with a non-economic justification in which they can
8 defend those calculations, not because they're in
9 1.82, but independently, and we have the authors of
10 1.82 who say these calculations are very iffy and not
11 strong enough to justify using containment over-
12 pressure, if they can't do that, then this says well,
13 they can't come back and say hey, we've already got
14 $60 million sunk into uprate. You've got let us go
15 ahead.
16 JUDGE KARLIN: If we posit the economic
17 considerations and costs can't come into play, do you
18 have any definitions of need or no practical
19 alternative which you would proffer here?
20 MR. ROISMAN: Yes, the need would be and
21 it goes back to our discussion about the backfit rule
22 and with the Board's indulgence if you look at the
23 backfit rule, 50.109(a)(1), it's very clear that what
24 is being talked about is the imposition of a
25 requirement by the Staff for the Commission in a

1 situation in which the Applicant has done nothing but
2 just sit there. That's what that statement is saying.
3 It's not covering the situation where the Applicant
4 comes forward and asks for something new and you in
5 your best judgment think that well before they can do
6 that something new they have to meet this requirement.
7 That's not what it says.
8 JUDGE KARLIN: Is that to say every time
9 an Applicant comes forward with any modification
10 request and maybe there are quite a few of them over
11 the years that might be minor, that it's a gotcha and
12 at that point they have voluntarily requested some
13 change and therefore the Staff can impose every new
14 requirement that's been promulgated in the interim?
15 MR. ROISMAN: No, because --
16 JUDGE KARLIN: You're saying there's a
17 linkage?
18 MR. ROISMAN: Well, first there's the
19 linkage issue, but more fundamentally, only when
20 there's a design basis change. In other words, if
21 this were to change -- remember, I mentioned this
22 before. We're not trying to argue anything other than
23 when you want to change your design basis to raise
24 your power level by 20 percent, then -- and you do it
25 voluntarily, then that's not a backfit situation and

1 if there's a linkage between that and one of these
2 new, improved evaluations, you should have to go
3 through one of these.
4 JUDGE KARLIN: My question again and we
5 talked about this before, there's probably been
6 hundreds if not thousands of voluntary requests for
7 changes, amendments to licenses over the history of
8 the Nuclear Regulatory Program, voluntary requests.
9 Can you cite me any of them where additional
10 requirements have been imposed?
11 MR. ROISMAN: Well, first of all, the vast
12 majority of those are no significant hazards
13 considerations.
14 JUDGE KARLIN: Well, I'm not sure how
15 that's relevant.
16 MR. ROISMAN: Well, it is relevant in this
17 respect, that if it's a no significant hazards
18 consideration, it's a way of saying you're not making
19 a design basis change here.
20 JUDGE KARLIN: You don't need to have a
21 permit, a license -- a right to a hearing when a
22 chance occurs?
23 MR. ROISMAN: All we're saying is if it's
24 a design basis change, that's when -- and as a
25 voluntary one, that's when this would come in,

1 replacing pump A with a new version of pump A or
2 reseating your valves or even changing the form of the
3 strainer that you're using in your torus are not those
4 kinds of changes.
5 JUDGE RUBENSTEIN: What I hear is an
6 argument which says analogous to NEPA that they
7 haven't given it a hard look. Is that sort of what
8 you're saying?
9 MR. ROISMAN: Frankly, I think what it
10 says is that at this point they have not come up with
11 a valid reason why they should disregard the judgment
12 of the people who wrote Reg. Guide 1.82 which we
13 embrace. So my expert agrees with those experts that
14 you shouldn't use containment over-pressure to meet
15 NPSH.
16 JUDGE RUBENSTEIN: Okay, so when I look at
17 this contention for admissability, I'm going to narrow
18 it down to that argument that here are some
19 knowledgeable people who said don't use it unless you
20 need it and you're not talking to any criteria or help
21 to us on how to evaluate that need. So I reject
22 economic considerations or I reject help in looking at
23 criteria for capability of alternatives. What am I
24 left with? I'm left with my interpretation of the
25 Reg. Guide.

1 MR. ROISMAN: That's what I tried to
2 finish and I'm sorry, I got a little distracted
3 myself. My point and the reason i was talking about
4 the backfit is under this circumstance, we believe
5 that the only thing that meant need and impracticable
6 was that where the Staff was imposing on the Applicant
7 a condition which then made its NPSH calculation fail
8 unless it could take containment over-pressure, that
9 in those limited cases, not uprates, not voluntary
10 movements. That was the kind of need. In other
11 words, a need which was generated by an action taken
12 by the Staff and that in fact, happened. After this,
13 in its earlier iterations, after this guide came out,
14 before the rev. 3 came out, the Staff was allowing
15 containment over-pressure to companies that were
16 coming in not with an uprate, but coming in just
17 because at our present power level, if we do what you
18 tell us to do for NPSH, we're falling short.
19 JUDGE RUBENSTEIN: But you also spoke to
20 motivation that they want more power to make more
21 money, but one can alternatively say it's a national
22 goal to go to energy independence. Electrons are not
23 fungible. They're easily transferred over the grid to
24 anywhere in the country. I don't want to get into
25 that. I'm not proposing that as an argument. I'm

1 just saying we can't get pulled into that kind of an
2 argument.
3 MR. ROISMAN: And I agree. I agree that
4 the way this should be decided is that you should
5 decide whether or not the calculation, the assumptions
6 underlying the calculations that are in VY0808 have
7 sufficient certainty that you're willing in the face
8 of the evidence that we'll present, which will include
9 the Reg. Guide backups and the ACRS transcripts and
10 whatever and Mr. Sherman's testimony, that this plant
11 needs to use containment over-pressure without
12 considering at all energy independence, need for
13 power, economic costs to the Applicant. And we think
14 that the definition of need is this narrow one that
15 says the Applicant is being forced to uprate by
16 something the Staff is doing. We think they're not,
17 but that's the thrust of the contention.
18 JUDGE RUBENSTEIN: If you go back to the
19 explicit language of your contention, you say that
20 containment over-pressure has a credit to meet NPSH,
21 is necessary in failure, to use it is impracticable
22 because of economic or need for power consideration.
23 And I guess we'll try Entergy and the Staff on how do
24 evaluate the practicable.
25 JUDGE KARLIN: Okay. Any other questions?

1 Anything else, Mr. Roisman, at the moment?

2 MR. ROISMAN: No.

3 JUDGE KARLIN: Mr. Wachter, can you call

4 the time? That's a five-minute -- you have five

5 minutes retained.

6 MR. ROISMAN: Thank you.

7 JUDGE KARLIN: Okay, Mr. Silberg.

8 MR. SILBERG: We talked a little bit

9 earlier about moving targets and I think this

10 contention is probably the greatest example of a

11 moving target. It's morphed about five times just

12 within the last 15 minutes.

13 But let me point out that we did evaluate

14 the need for power and the need for the uprate and

15 it's in the application, because the application is

16 required to include an environmental assessment

17 report. We did that. We said what the needs were.

18 We said why we were doing it. We said what the

19 benefits were. We said what the costs were.

20 There is no contention relating to the

21 environmental assessment. Therefore, need for power,

22 cost benefit, I mean that's where those issues belong.

23 That's not what we're here today for. What we have is

24 the DPS making a mountain out of a regulatory guide

25 molehill. I think we've established that Reg. Guides

1 are not regulations. They're not requirements.

2 Mr. Roisman said that we used the

3 calculations outlined in the Reg. Guide. I think what

4 we said is we used the Reg. Guide as guidance in

5 developing our calculations. There are no, as far as

6 I know, calculations outlined in the Reg. Guide.

7 In fact, what DPS would have us do is put

8 us in a position where we really needed to make -- to

9 use containment over-pressure in order to keep the

10 plant running and we could have done that. How could

11 we have done that? We could have put in very small

12 strainers in the torus so that we would have had a lot

13 of blockage. We didn't do that. We went to the

14 maximum size strainer so we would minimize the impact

15 of blockage and have the most NPSH, but the direction

16 that they would like to drive us is make this a

17 necessary change. So design the plant as

18 unconservatively as you possibly can. That's not what

19 we did and the idea that we consciously,

20 unconsciously, deliberately or negligently decided we

21 were doing this to make money, of course, the purpose

22 of any change to the plant is to keep the plant

23 running, improve performance, make it safer.

24 The idea that we should only do these

25 things if forced to, that we should only do these

1 things in order not to make more money is just
2 ludicrous. The purpose of any project by a private
3 entity is for that entity's benefit. In this case,
4 generating power for the needs of the citizens of
5 Vermont and those --
6 JUDGE KARLIN: I understand that point,
7 but going back to the necessity, I just -- we had this
8 dialogue earlier today. I'm struggling with a
9 definition or concept for it. It seems like there is
10 a regulatory or there is a general rule, no credit for
11 containment over-pressure. Now there is a Reg. Guide,
12 not regulation, that says we should get credit for
13 containment over-pressure when it's necessary.
14 MR. SILBERG: And also, there's no
15 regulation prohibiting it.
16 JUDGE KARLIN: There's no regulation.
17 Okay, but I mean okay, we cited this Reg. Guide.
18 We're going to use it. We're going to apply it and we
19 think it's necessary. Well, what does necessary mean?
20 Necessary means well, we can't comply unless you cut
21 us the slack. I mean that's really not a very good
22 definition, it seems to me.
23 MR. SILBERG: I think you have to ask the
24 Staff what the definition was, but I think this gets
25 back into the whole problem of litigating a Reg.

1 Guide. The purpose here is to litigate the
2 application. Our application doesn't depend on
3 necessary or practicably alter -- the State would like
4 to move it in that direction, but that's not what the
5 application is. That's not what the Staff has
6 reviewed.
7 The Staff is going to evaluate our
8 application to see whether it's safe. That's the only
9 issue that's involved here. Yes, they might have
10 raised a NEPA issue if they chose to do so. They
11 didn't. It's too late to do that now. That could
12 have gotten into cost and benefit. Those issues are
13 not on the table here.
14 What we're talking about here is a safety
15 issue. It's not a question of disregarding or
16 regarding the judgment of the authors of a Reg. Guide.
17 The purpose is to regard or disregard the content of
18 our application and that's where the focus should be.
19 Should the Board decide that the
20 calculations are sufficiently certain, well, if they
21 admit a contention that says that that's what's
22 involved, then obviously that's something the Board
23 should do. We think that as discussed in our briefs
24 and earlier, we've shown that the calculations are not
25 uncertain, that we have bounded them with lots and

1 lots of conservatism. But if that's an issue that the
2 Board admits, then that's what we will litigate. But
3 the idea of litigating necessity and feasibility are
4 really outside the scope of the Atomic Energy Act.
5 That may be something that internally the Staff wants
6 to consider. They have expressed a preference not to
7 use containment over-pressure. That's in a document
8 which is now several years old. They have approved a
9 number of license amendments that use containment
10 over-pressure. They are obviously evaluating the
11 safety of that as they move along.
12 To take a non-regulation and turn it into
13 a Licensing Board requirement really turns the system
14 on its head. If you were to find that we haven't
15 proved it was necessary, would you deny the
16 application, notwithstanding the fact that we have
17 demonstrated to the Staff and we think to the Board
18 that this is safe. It's simply outside the scope of
19 the proceeding. I think, respectfully, it's outside
20 the scope of the Board and we ought to stick with the
21 safety issues.
22 JUDGE BARATTA: This pertains to the
23 approach that he used for obtaining the results that
24 you've got in VY 0808. First off, to do a containment
25 analysis you need to have the input that's coming in

1 from the reactor to do the break.

2 Could you be very specific as to did you

3 do an Appendix K analysis and if so, did you do the

4 new Appendix K, i.e., a best estimate analysis or was

5 it just simply based on decay heat curve or what?

6 Could you be specific with respect to that?

7 MR. SILBERG: I'll try.

8 JUDGE BARATTA: And there's a second part

9 to the question too, so I don't know whether I should

10 state that now or --

11 MR. SILBERG: Let me be a translator. We

12 used an Appendix K analysis, using 1979 standards for

13 decay heat with uncertainties. And I swear that

14 that's the correct answer, Your Honor.

15 JUDGE BARATTA: Okay, all right, that

16 means something to me. Okay. Now the next question

17 I have is that I assume based upon that response that

18 you did not do a couple primary system containment

19 analysis, that you did a stand-alone containment

20 analysis where the reactor input was dependent upon

21 time probably, but there was no feedback from the

22 containment to the reactor.

23 MR. SILBERG: That is correct. The mass

24 and energy was taken from a primary system LOCA

25 analysis.

1 JUDGE BARATTA: Okay --

2 MR. SILBERG: And input into the

3 containment analysis.

4 JUDGE BARATTA: Now continuing with that

5 train of thought, that's an older methodology and

6 there are new methodologies called best estimate LOCA

7 analysis with quantification of uncertainties that are

8 allowed by the regulations. If you go into Appendix

9 K, well, not actually Appendix K, the reference where

10 Appendix K is reference, one will find that and those

11 are construed to be less conservative than the

12 conservative Appendix K by most people. And that, I

13 think, is fairly well known.

14 Now if you were to comply with what I

15 think I've heard that the State would like, that is to

16 re-analyze the system, one could then go back and do

17 that analysis and obtain a less conservative result

18 which may or may not give you the same answer, but

19 will give us conservative -- is that true?

20 MR. SILBERG: We believe that's true and

21 I think that's probably true in a number of areas.

22 For instance, if you were to redo your seismic

23 analysis and you used probabilistic seismic hazard

24 analysis methodologies, you might well come up with a

25 --

1 JUDGE BARATTA: That was my next question,
2 too.
3 MR. SILBERG: We have submitted an
4 analysis in the RAI, doing a best estimate analysis
5 under Appendix K and comparing it to the conservative
6 analysis that we've used.
7 JUDGE BARATTA: Was that done using the
8 best estimate methodology?
9 MR. SILBERG: It was done in-house using
10 their Gothic code.
11 JUDGE BARATTA: Okay, Gothic for
12 containment analysis.
13 Thank you.
14 MR. SILBERG: And I'm told that this is
15 all laid out in our response to NRC's RAI.
16 We can give you that reference. It's in
17 RAI Response 10 which is July 2nd of this year.
18 JUDGE KARLIN: Anything else, Mr. Silberg?
19 MR. SILBERG: None, unless you have other
20 questions that I can translate.
21 JUDGE KARLIN: No. I think that's fine.
22 Thank you.
23 Ms. Poole.
24 MS. POOLE: Thank you. I want to say
25 again, first of all, that the NRC Staff makes no

1 judgment on whether a proposed license amendment such
2 as the power uprate request is necessary from a cost
3 benefit or economic standpoint as long as the proposed
4 changes satisfy NRC requirements and ensure safe
5 operation of the facility.
6 Now with respect to your practicability
7 question that I imagine we're going to be asked, the
8 NRC has allowed credit for containment over accident
9 pressure in calculating the available NPSH of the ECCS
10 and containment heat removal pump in some BWRs and in
11 fewer cases, PWRs.
12 Some licensees, we have accepted analysis
13 in which some licensees have credited containment
14 accident pressure for NPSH calculations when the
15 existing plant design cannot be practicably altered,
16 e.g., replacement of ECCS pumps, in order to maintain
17 the calculated available NPSH greater than the
18 required NPSH. And we stated publicly that the
19 licensees' determination --
20 JUDGE KARLIN: May I -- are you reading
21 from your brief?
22 MS. POOLE: No, I'm not. I'm reading from
23 a letter that's -- this is a letter I quoted earlier.
24 It's to the Vermont Department of Public Service.
25 JUDGE KARLIN: I see. Is this this huge

1 letter that they're pointing to that's 500 pages long?
2 MS. POOLE: I don't believe so, no.
3 That's a FOIA response. This is something different.
4 JUDGE KARLIN: Oh, that's a FOIA response.
5 MS. POOLE: This is a June 29th letter.
6 In any event, we have stated that the licensee's
7 determination that he design cannot be practicably
8 altered is what was intended by the statement that
9 credit for containment accident pressure may be
10 necessary.
11 Now we understand that that's a tautology
12 in a way and my expert advises me that the Staff has
13 made a decision not to use this criterion for this
14 application. It's been a pure safety analysis and we
15 wouldn't grant permission to utilize containment over-
16 pressure unless the safety evaluation supported it.
17 Now that will have to be verified, of
18 course, in the final SER, at the time that it is
19 completed. Perhaps that answers your question about
20 practicable, perhaps not.
21 JUDGE KARLIN: That's helpful.
22 MS. POOLE: I have nothing further, unless
23 the Board has questions.
24 JUDGE KARLIN: Questions?
25 JUDGE BARATTA: No thank you.

1 JUDGE KARLIN: Mr. Block, I think you have
2 five minutes reserved on rebuttal? Mr. Roisman. You
3 can argue for him.
4 MR. ROISMAN: I'm sure he could do a great
5 job at it too.
6 Okay, let's talk about these. The
7 Applicant now tells us, well, we did take need for
8 power and economic considerations into account, but we
9 did it in a NEPA analysis. And then they say what
10 difference does it make, no one is challenging the
11 NEPA analysis.
12 We don't see that that's even relevant
13 until the Staff has completed its NEPA analysis, but
14 let's put that to the side because everyone agreed
15 that if you passed a NEPA analysis and you're not
16 safe, you don't get a license anyway, even if NEPA
17 says wow, this would have been a great idea, but the
18 safety side says yeah, but it's not safe. So that
19 doesn't matter.
20 The second thing is is that the Applicant
21 says well, you know, we actually used the larger than
22 necessary strainer here. If we used a much smaller
23 strainer, then we would have needed a lot more
24 containment over-pressure. So I looked at the letter
25 that they sent to the NRC which they cited a number of

1 times, dated December 29, 1999 to see where did they
2 say in here that they're using a larger strainer than
3 they need to, or that they've built in any
4 conservatism or they've minimized containment over-
5 pressure. And there's, of course, not a single word
6 about that in the document. So this is a fiction
7 created by Mr. Silberg for purposes of oral argument
8 today. There's nothing to say that.
9 JUDGE KARLIN: I think he was saying that
10 they could have used a smaller strainer and this would
11 have increased the necessity in some way. I'm not
12 sure whether I heard him saying they intentionally
13 used a larger one.
14 MR. ROISMAN: What it says here and I'll
15 quote from the beginning of the letter, "in accordance
16 with the requested actions, Vermont Yankee is
17 informing the Staff of the completion of our actions."
18 So it sounds like they were requested to do something
19 and they then did it. I'm just saying that on the
20 face of the document and we're not here arguing
21 whether or not at the end of the day what the evidence
22 is going to show. What we're saying is and this gets
23 finally to the last point that I want to make which is
24 that Mr. Silberg says well, we've got all these
25 conservatisms built in that already take account of

1 all these things. All the conservatisms that he's
2 talking about are conservatisms that are built into
3 the calculation of post-accident containment,
4 temperature and pressure, but the uncertainties which
5 are the core of what produced Reg. Guide 1.82
6 prohibition on using containment over-pressure were
7 the uncertainties associated with debris blockage.
8 Those are the uncertainties that we believe make the
9 calculation that has been run by the Applicant
10 insufficiently conservative to justify doing this
11 double count, if you will, of bringing in containment
12 over-pressure to deal with a problem.
13 Now if they had to deal with it because
14 the Staff's obligations which this December letter
15 says we're now meeting had forced them to have to take
16 containment over-pressure, then they would have had a
17 quote need and it would have been impracticable
18 whenever the Staff has done in those other cases would
19 have been applicable.
20 In this case, that's not what's happened.
21 This wouldn't be necessary if this uprate application
22 were not before you and that's evident by the fact
23 that between December 1999 and now the Applicant has
24 never asked for any containment over-pressure credit.
25 Our point is that is not safe enough and our basis for

1 that is that there are uncertainties. And our
2 articulation of what the uncertainties are is
3 supported by one, what Mr. Sherman says; two, what the
4 ACRS said in commenting on Reg. Guide 1.82; three,
5 what the Staff wrote in Reg. Guide 1.82. That's the
6 evidence that we're now offering. That's not all our
7 evidence. There will be more evidence, but that's, we
8 believe, sufficient amount of evidence to one,
9 demonstrate that the contention number two which is
10 based upon the uncertainty question should be
11 admissible and that contention 5 which says you can't
12 solve the uncertainty problem by using containment
13 over-pressure just because it's cheaper, is not a
14 satisfactory answer.
15 JUDGE KARLIN: Thank you. Any questions?
16 I think we're done for the day.
17 JUDGE BARATTA: Before we go off the
18 record, I have a request. It doesn't pertain to the
19 contention, but you, I think in one of your earlier e-
20 mails said that you could provide an electronic copy
21 of the attachments because I didn't get those at some
22 point and I would like it if you have those.
23 MS. HOFMAN: I will get those.
24 MR. ROISMAN: Our electronic expert.
25 JUDGE BARATTA: If you have them on CD or

1 something like that, I would appreciate it.

2 MR. ROISMAN: You're not talking about

3 between now and tomorrow?

4 JUDGE BARATTA: No, no, no, no. At your

5 convenience. I like to be able to put everything on

6 a little chip.

7 MR. SILBERG: If we could put ourselves on

8 that same mailing list for an electronic copy.

9 JUDGE KARLIN: I'm sorry, what is this?

10 JUDGE BARATTA: The e-mail that goes back

11 --

12 MR. SILBERG: To the initial petition.

13 JUDGE BARATTA: Right.

14 MR. SILBERG: The exhibits were only

15 transferred in hard copy, not electronically.

16 JUDGE BARATTA: When it's convenient and

17 you have it, it would be appreciated.

18 MS. HOFMAN: We have all of it.

19 JUDGE BARATTA: Whenever you have it. I

20 don't want to put you out.

21 JUDGE RUBENSTEIN: And thank you for

22 second them in three loads. My computer fell off the

23 table.

24 JUDGE KARLIN: This is not a secure

25 facility. Other people will be here tonight. Take

1 your risks if you want to leave it or take it home.

2 With regard to tomorrow, first I'd like to

3 thank the parties for a very effective and I think

4 efficient argument today. I think it's been very

5 helpful and moved reasonably well. I'd like to

6 convene tomorrow at 8:30 in the morning, so that we

7 can move ahead crisply. There's no reason to wait

8 until 9. I believe most of us usually start work

9 before 9 o'clock around, so we'll start at 8:30 and

10 look forward to it.

11 Thank you very much.

12 (Whereupon, at 5:40 p.m., the pre-hearing

13 conference was adjourned, to reconvene tomorrow,

14 Friday, October 22, 2004 at 8:30 a.m.)

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CERTIFICATE

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

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

Docket Number: 50-271-OLA and ASLBP No.04-832-02-OLA

Location: Brattleboro, VT

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

Peter Holland
Official Reporter
Neal R. Gross & Co., Inc.