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UNITED STATES OF AMERICA

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BEFORE THE NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

+ + + + +

NUCLEAR MANAGEMENT COMPANY
PALISADES NUCLEAR GENERATING STATION

Regarding the Renewal of Facility Operating
License No. DPR-20 for a 20-Year Period

Docket No. 50-255-LR
ASLB No. 05-842-03-LR

FRIDAY

NOVEMBER 4, 2005

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1555 PHOENIX ROAD
SOUTH HAVEN, MICHIGAN

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The above-entitled matter commenced pursuant to
Notice before Ann Marshall Young, Dr. Anthony Baratta, Dr.
Nicholas Trikouros, Administrative Judges.

NEAL R. GROSS (202) 234-4433

PRESENT:

For the Office of Commission Appellate:

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P R O C E E D I N G S

(8:58 A.M.)

1
2
3 ADMIN. LAW JUDGE YOUNG: All right. Let's go
4 on the record.

5 Mr. Lodge, you were going to provide some
6 additional information on contentions one and?

7 MR. LODGE: Seven.

8 ADMIN. LAW JUDGE YOUNG: Seven.

9 MR. LODGE: I believe we had just finished what
10 I would call, sir, the first round on the dry cask pad
11 contingent.

12 ADMIN. LAW JUDGE YOUNG: We hadn't started
13 seven yet I don't think.

14 MR. LODGE: I'm sorry.

15 ADMIN. LAW JUDGE YOUNG: Was it three you were
16 going to provide some additional information on, in
17 addition to one?

18 MR. LODGE: I can't remember the, pardon me. I
19 don't think I had the number right. Yes.

20 ADMIN. LAW JUDGE YOUNG: Do you want to go
21 ahead and do that and then we'll go into seven.

22 MR. LODGE: Just erase three.

23 Okay. There's a few housekeeping matters, if I
24 may approach.

25 ADMIN. LAW JUDGE YOUNG: Thanks. Yes. Thank you.

1 MR. LODGE: The first item, if I may, for
2 marking would be the April 10, 1992, it's the interim
3 safety evaluation that I made reference to yesterday.
4 Thank you, sir.

5 The first item would be, I don't know how the
6 panel would mark it. Would it be Exhibit 3?

7 (Whereupon Exhibit No. 3 was marked
8 for identification.)

9 ADMIN. LAW JUDGE YOUNG: It'll be Exhibit 3 to
10 this oral argument. Right.

11 MR. LODGE: Very good. And it's the cover
12 letter and the interim safety evaluation by the Office of
13 Nuclear Reactor Regulation.

14 The second thing is a February 25, 1997 Harold
15 Palladium newspaper article wherein Mr. Finnich of the
16 Palisades plant, the Vice President of Nuclear Operations
17 for Consumers Energy, indicates that the company has for
18 the time being abandoned a staff review of the prospects of
19 annealing the reactor vessel. Which we proffer for the
20 record. I presume that would be marked Exhibit 4.

21 (Whereupon Exhibit No. 4 was marked
22 for identification.)

23 ADMIN. LAW JUDGE YOUNG: All right.

24 MR. LODGE: All right. Then there's one other
25 thing. I'm sorry.

1 ADMIN. LAW JUDGE YOUNG: We'll mark this as
2 Exhibit 5.

3 MR. LODGE: Okay. Exhibit 5 is a December 18,
4 1995 letter from Consumers Power to the Nuclear Regulatory
5 Commission. In particular, on page four in a series of
6 questions and answers, there is reference, and I understand
7 this is 1995. But there's reference to an intention by the
8 utility to remove the remaining original surveillance
9 capsules from the reactor vessel during the core unloading,
10 and to anneal them in parallel with the reactor vessel
11 anneal.

12 This, in our estimation, poses an additional
13 fact of confusion as to the precise status, whereabouts,
14 and/or existence of reactor surveillance capsules. As I
15 may, and I can't recall for sure if I referenced it on the
16 record.

17 Mr. Lewis had indicated yesterday that there
18 were original surveillance materials in the reactor. We're
19 very curious to know if those, and one of the items we
20 would certainly want to explore, were there to be an
21 adjudication, is the existence, the origins, the length of
22 time that such materials have been in the reactor. To
23 determine if they are actual original metal.

24 You know, obviously the composition of the
25 samples would also be a matter of fact. But it appears

1 that the company may have had intentions, which we don't
2 know at this point were abandoned, to anneal samples and
3 see what the aging affects, the embrittlement affects of
4 those annealed samples was.

5 There was also, as I recall, the pending issue
6 with respect to contention number one about what I'll call
7 the 2011 hearing option. And I would like to just make a
8 little further response on that point by saying that under
9 the current regulations, as I understand them, if there
10 were a three year notice of intent, whatever it would be
11 called by the utility, presumably if there were some staff
12 recommended action, the presumption in our discussions was
13 that there would be some sort of triggering of a license
14 modification. As I look at 10CFR2.103 and 104, I assume
15 that those are the provisions were this to happen today
16 that would govern.

17 We have two principle objections to the Board
18 giving consideration to this as sort of a solution.
19 Objection number one is that if this matter were to happen
20 today, if that rule is still in effect in 2011 or at
21 whatever point in the future, the Commission reserves to
22 itself, of course, the discretion to determine time, place
23 and nature of the hearing and related proceedings. It also
24 reserves discretion to determine in its notice of hearing
25 the parameters at 2.104(a) subsection three, the matters of

1 fact and law to be considered. And this panel cannot
2 provide any assurance that there would be an opportunity to
3 get to the merits of this embrittlement mystery in a
4 prospective hearing. That's objection number one.

5 The second one we already had verbalized, but I
6 simply want to restate and summarize. That is that the
7 presumption also is that in this hypothetical that there
8 will have been a license extension granted. The utility
9 will be, even if they express their intention under 50.61
10 in 2011, the utility will obviously be saying we intend to
11 do this in or by or around 2014, three years into the
12 license extension period.

13 While I believe that there's a possible legal
14 res judicata collateral stopple kind of argument that the
15 staff and/or the utility might be able to assert, I also
16 think in practical terms that there will be enormous
17 pressure on the NRC to approve whatever plan the utility
18 comes up with. Because, after all, they have been granted
19 a 20 year extension, the presumption is that they should be
20 allowed to operation for the full 20 year period.

21 So our second objection is that this is not a
22 feasible set of facts because of the realities of the
23 circumstance in the distant future. If the utility is not
24 required to provide a much firmer basis for their
25 presumptions and calculations about annealment now, it is

1 very unlikely in our estimation, legally and practically,
2 that the merits of this matter could ever be addressed
3 again.

4 I think that that's all of the lingering
5 matters we had on contention one. And I thank the panel.

6 ADMIN. LAW JUDGE YOUNG: Mr. Lewis, do you have
7 any response to that?

8 MR. LEWIS: Just a couple points on these
9 documents. First, I would object that these documents are
10 now being offered as basis for contention. It's far too
11 late in the process to be offering additional documents as
12 basis.

13 I would say, however, that the article on
14 annealing and the December 18, 1995 letter on annealing
15 really are irrelevant. There was a time in the past when
16 the company was looking at annealing in order to address
17 whether it would be able to operate during the current
18 licensing term, and eventually it decided it was
19 unnecessary because it was able to stay below the screening
20 criteria for the entire current licensing term. So it
21 decided it did not need to pursue annealing in the current
22 term. That in no way has ever taken the issue off the
23 table for the future.

24 In the December 18, 1995 letter it was saying
25 if we anneal we'll have to take the specimens out. It also

1 says after we anneal, we'll put them back in. Obviously,
2 since we didn't anneal, none of that happened.

3 I guess on the argument about whether they'll
4 have a sufficient opportunity in 2011 or 2014, I would
5 simply say, what I believe the Petitioner said is you can't
6 count on the staff to fulfill their responsibilities. And
7 I would submit that that cannot be a basis for a contention
8 to the proceeding.

9 ADMIN. LAW JUDGE YOUNG: Anything further?

10 MR LEWIS: No.

11 ADMIN. LAW JUDGE YOUNG: All right. Ms. Uttal?

12 MS. UTTAL: Yes. I have a few things.

13 I also object to the entry of these documents
14 into the record at this late date.

15 ADMIN. LAW JUDGE YOUNG: Let me just say.
16 We've made these exhibits to the record. I think probably
17 our previous ruling on all things submitted at a later time
18 would continue in effect, and we'll take all your arguments
19 into account on all these things.

20 MS. UTTAL: And the statement that the staff
21 might allow this licensing to operate in violations of
22 regulations -- operating.

23 Are you having trouble hearing that?

24 ADMIN. LAW JUDGE YOUNG: Just let me pull it
25 closer.

1 MS. UTTAL: If there's a safety issue, they
2 will not be permitted to operate.

3 ADMIN. LAW JUDGE YOUNG: Is your mike on?

4 MS. UTTAL: I wouldn't know. I turned it on.

5 ADMIN. LAW JUDGE YOUNG: No, it's not. Tap it
6 again. Tap it again. It's not coming in here.

7 Did you get any of what she said? Okay.

8 MS. UTTAL: Finally, yesterday the Board asked
9 me some questions regarding Turkey Point and I was
10 wondering whether this was an appropriate time.

11 ADMIN. LAW JUDGE YOUNG: Sure. Go ahead.

12 MS. UTTAL: To provide that answer.

13 Okay. The purpose of part 54 is to ensure that
14 aging affects are managed and mitigated as necessary.
15 There are other regs that may be sufficient to manage
16 aging, so part 54 focused on those actions and regulations
17 that may not be sufficient to manage the affects of aging
18 in the period of extended operating.

19 But because there are some regulations that
20 will manage aging effectively and because the Agency has
21 these regulations that address and maintain the ongoing
22 Agency oversight review and enforcement, and such
23 regulations can be reasonably expected to fulfill their
24 function during their renewal period, they are not, they do
25 not have to be addressed during renewal proceedings.

1 Staff's position at 50.61 is one of these
2 regulatory programs. That it manages the detrimental
3 affects of aging. That is why the staff's position is that
4 compliance with 50.61 is sufficient to meet part 54. It is
5 sufficient to say that we will comply with 50.61. We have
6 a program complying with 50.61 to manage the affects of
7 embrittlement as a TLAA. And because 50.61, as Judge
8 Baratta pointed out yesterday, is prescriptive, it is a
9 stringent program that advises the licensee what must be
10 done. And because it covers the aging affects, it is
11 sufficient on its own to meet part 54.

12 ADMIN. LAW JUDGE YOUNG: I have a question for
13 you about this. Well, a couple of questions actually.

14 I think you were referring to the text in
15 Turkey Point, right before the footnote two reference.

16 MS. UTTAL: Just -- starts in some?

17 ADMIN. LAW JUDGE YOUNG: Yes. And there's
18 emphasis on the words may not in the sentence. It starts
19 to that effect, our rules focus the renewal review on plant
20 systems structures and components for which current
21 regulatory activities and requirements may not be
22 sufficient to manage the affects of aging in the period of
23 extended operation. I read that as not being so black and
24 white as you seem to be reading it.

25 MS. UTTAL: No. What I'm saying is that there

1 are, that part 54 focuses on those programs that may not be
2 sufficient. It's the staff's position that 50.61 is
3 sufficient; therefore, it's out of scope for this
4 proceeding. Because on its own, without any additions,
5 compliance with the strictures in 50.61 manages aging
6 sufficiently for renewal purposes.

7 ADMIN. LAW JUDGE YOUNG: So, your view is that
8 the indication of intent to later provide information
9 satisfies the requirement for identifying actions that will
10 be taken to provide reasonable assurance that the affects
11 of aging will be managed during the period of the extended
12 term.

13 MS. UTTAL: Indication that you will follow the
14 programs as laid out in 50.61, that you will do all that
15 50.61 requires, and that you put that program into your
16 TLAA, is sufficient to meet part 54. So I'm saying it
17 slightly different than you are.

18 ADMIN. LAW JUDGE YOUNG: Okay. The next
19 question I have is --

20 ADMIN. LAW JUDGE BARATTA: Could I?

21 ADMIN. LAW JUDGE YOUNG: Go ahead.

22 ADMIN. LAW JUDGE BARATTA: A related
23 question --

24 ADMIN. LAW JUDGE YOUNG: Okay.

25 ADMIN. LAW JUDGE BARATTA: I wanted to change

1 the question a little bit from what you were just asked.

2 The statement concerning whether or not the
3 regulations are adequate, are you saying that 50.61,
4 because of its prescriptive nature, is adequate to manage
5 the affect of aging? And, therefore, puts it outside of
6 part 54?

7 MS. UTTAL: What I'm saying is that it's
8 adequate to manage aging on its own, and so it's broadened.
9 But I don't, what's out of scope is attacking what they're
10 doing in response to 50.61. If one was to say, perhaps,
11 50.61 is not enough, that more has to be done, then that
12 would be within scope. But to say that 50.61 is, to say
13 that what they're doing under 50.61, that meets 50.61,
14 would be out of scope.

15 ADMIN. LAW JUDGE YOUNG: Say that again. If
16 they were to say that 50.61 was inadequate?

17 MS. UTTAL: Is not enough. That you have to do
18 X, Y and Z extra. More than 50.61. Because it's the
19 staff's position that if you comply with 50.61 and you
20 follow the program laid out in there, and do your SE or
21 anneal or whatever the choice is, and it meets with the
22 approval of the staff, that is sufficient under part 54.
23 If someone were to come in and say but it's not sufficient,
24 you have to do something else, there's something else
25 required by part 54, then that would be within scope. But

1 the program --

2 ADMIN. LAW JUDGE YOUNG: You wouldn't -- an
3 attack on the legitimacy of 50.61? That sounds like the
4 kind of thing that you would object to on that basis.

5 MS. UTTAL: We were asked, you know, what other
6 kind of contention could there be, and I'm not a contention
7 writer. So that's what I came up with as.

8 ADMIN. LAW JUDGE YOUNG: But don't you think
9 that one needs to, anyone needs to, and any lawyer should
10 be able to read the rules in a way such that it's possible
11 to have an admissible contention? I guess what I'm not
12 understanding from what your saying is, well, can you give
13 me an example of an aging issue that's not dealt with by
14 some regulation, that would be sufficient to address the
15 aging issues?

16 MS. UTTAL: Apparently there are some areas
17 that the staff looks into regarding concrete, new formation
18 of concrete structures and supports that are not covered by
19 regulation, but are covered apparently by the Code.

20 ADMIN. LAW JUDGE YOUNG: They're covered in
21 54.4? They're listed in 54.4? Which section of 54.4?

22 MR. LEWIS: Judge, may I offer something on
23 this point?

24 ADMIN. LAW JUDGE YOUNG: Can you tell me where
25 it falls under 54.4?

1 MR. LEWIS: 54.4 defines the scope of treatment
2 that has to be examined.

3 ADMIN. LAW JUDGE YOUNG: Right.

4 MR. LEWIS: And it includes non-safe related
5 equipment. I wanted to address your issue about whether --

6 ADMIN. LAW JUDGE YOUNG: Well, I want to get an
7 answer to this question --

8 MR. LEWIS: Okay.

9 ADMIN. LAW JUDGE YOUNG: -- before we go on.
10 You're saying concrete pads?

11 MS. UTTAL: Or concrete foundations.

12 ADMIN. LAW JUDGE YOUNG: Now, assuming they're
13 not listed under 54.4, wouldn't there be an argument made
14 that they're not within the scope?

15 MS. UTTAL: Well, they could be 54.4(a)2, non-
16 safety related structures. I would think that it would fit
17 under there.

18 ADMIN. LAW JUDGE YOUNG: And so that would
19 relate back to (a)1, 2 or 3.

20 MS. UTTAL: It depends on what it's holding up
21 I would guess.

22 ADMIN. LAW JUDGE YOUNG: Well, what I'd like to
23 get from you is an idea of in what areas does the staff
24 think that there could be an admissible contention in a
25 license renewal proceeding. And so I ask what areas, what

1 structures, components, systems, et cetera, are subject to
2 aging which is not governed by some regulation?

3 MS. UTTAL: And I think we responded by saying
4 the concrete support.

5 ADMIN. LAW JUDGE YOUNG: Concrete foundations.
6 And so then I ask you which, where does that fall, and you
7 said under 54.4(a)2.

8 MS. UTTAL: I believe it would fall under (a)2.

9 ADMIN. LAW JUDGE YOUNG: Which refers back to
10 paragraphs (a)1, small Roman numeral one, two or three.
11 And your answer is it would depend on what it supports.

12 MS. UTTAL: I would assume. I don't --

13 ADMIN. LAW JUDGE YOUNG: Can you give, I mean
14 can you give me another example? Because, I mean surely
15 the license renewal process is such that it would allow a
16 contention on something other than concrete foundations.
17 Otherwise, why have it?

18 MS. UTTAL: No. But there are contentions that
19 are permitted within the limits of part 54. ADMIN. LAW JUDGE
20 YOUNG: That's what I'm trying to understand from you, what
21 they would be. And the reason I'm asking you this is
22 because your argument is that if there is a regulation that
23 tells a licensee how to handle aging of X, Y or Z, then
24 that is sufficient to handle it and there would be no
25 admissible contention challenging how they handle it under

1 that regulation. And so what I'm trying to understand from
2 you is, what things could be the subject of an admissible
3 contention.

4 MS. UTTAL: But I'm not talking, I'm not making
5 a generality that that is true in every case. We're
6 talking about a specific thing.

7 ADMIN. LAW JUDGE YOUNG: What I'm asking you to
8 do is extend your reasoning to more generally. Because
9 obviously the type of reasoning that you're offering here
10 could be applied to any, any aging matter that's governed
11 by some regulation. And logically, carried to its logical
12 conclusion would mean that any aging issue that's covered
13 by regulation, you could make the same exact argument.

14 MS. UTTAL: Well, in limited circumstances you
15 could if it had the same kind of program.

16 ADMIN. LAW JUDGE YOUNG: What I'm asking you to
17 give me guidance on is how limited are those circumstances.
18 What are they limited by. Give me some guidance on what
19 the staff's position is on what could be an area that it
20 would be within the scope of license renewal, in a license
21 renewal adjudication proceeding.

22 MS. UTTAL: I'm not prepared to give the Board
23 my interpretation of what would be a good contention.

24 ADMIN. LAW JUDGE YOUNG: Well, you represent
25 the staff and you're making an argument which, if carried

1 to its logical conclusion, would result in what I'm saying.
2 And what I'm asking you to do is tell me where I'm wrong
3 there, and you're saying you can't do that.

4 MS. UTTAL: I'm not saying, I'm not saying
5 that. I'm saying you're asking me to make a general
6 argument regarding the entire scheme of renewal. I'm
7 talking about a specific section, how 50.61 applies to the
8 license renewal regulation.

9 ADMIN. LAW JUDGE YOUNG: I understand that, and
10 I'm going to make one more stab at this. And if you can't
11 do it, just say you can't do it.

12 The question is this: Your argument on 50.61
13 is that it adequately handles aging of the reactor vessel,
14 and so therefore the contention is admissible out of scope
15 because there is a regulatory process that adequately deals
16 with that aging issue.

17 My question to you is, that type of argument
18 would seem to be a type of argument that could be made with
19 regard to just about any aging issue. The only exception
20 to that you gave me was concrete foundations. And when I
21 tried to have a better understanding of how that would fall
22 under 54.4, which is what 54.21 and 54.29 refer back to,
23 you were unable to tell me which section it fell under
24 because you said it would depend on what it supported.

25 You're making an argument that if created as a

1 precedent could be far reaching. And as far as I can see,
2 pretty much wipe out any aging area that's governed by
3 regulation from being an area that could be the subject of
4 an admissible contention in a license renewal proceeding.
5 And that to me seems rather serious, and I would expect
6 that if you're making that argument you would be able to
7 expand upon it and carry it out to its logical conclusion
8 and tell me where it would apply and where it might not
9 apply. And if you can't do that, just say you can't. But
10 I'm asking you to make an attempt to do that.

11 MS. UTTAL: Well, just let me say this. If you
12 look at 50.61, it is a regulation that is meant to control
13 embrittlement or manage embrittlement in the reactor
14 vessel. Now, that's an affect of aging. And what the NRC
15 has done --

16 ADMIN. LAW JUDGE YOUNG: Let me interrupt for a
17 second. Let me interrupt for a second.

18 It's probably the most serious affect of aging,
19 isn't it, in a nuclear reactor? Isn't it among the most
20 serious at least?

21 MS. UTTAL: It's a serious affect, but I don't
22 know where it fits in the hierarchy of serious affects.

23 ADMIN. LAW JUDGE YOUNG: Okay. Pardon me for
24 interrupting. Go ahead.

25 MS. UTTAL: Okay. So that the regulation

1 already deals with the affects of aging, and you pull it
2 into part 54 at whole clothe because of that. I don't know
3 if there, and this fits in with the language that the
4 Commission used in Turkey Point, when it talks about
5 regulations that effectively, other regulations that
6 effectively handle the mitigate and the managing of aging
7 affects. They don't have to be part of the license, of the
8 license renewal proceeding.

9 ADMIN. LAW JUDGE YOUNG: Right. And the
10 examples that they give in footnote two are structures and
11 components that already must be replaced at mandated
12 specified time periods, which is a very cut and dried issue
13 compared to what we're talking about here.

14 And what you seem to be doing is wanting to
15 bring virtually any aging issue that has some regulation
16 governing it which, frankly, I would be surprised if there
17 weren't regulations governing most aging issues. And you
18 seem to be wanting to bring any aging issue that's covered
19 by any some regulation within the scope of footnote two,
20 and thereby take it out of the scope of license renewal.

21 MS. UTTAL: I'm not discussing anything other
22 than this particular regulation because --

23 ADMIN. LAW JUDGE YOUNG: I understand that.
24 What I've asked you to, to analyze that on a broader scale,
25 to address the concern that I'm raising. Can you do that?

1 MS. UTTAL: No.

2 ADMIN. LAW JUDGE YOUNG: Okay. Do you have
3 anything further you'd like to say?

4 MS. UTTAL: No

5 ADMIN. LAW JUDGE BARATTA: I'd like to follow
6 up a little bit on that discussion and come at it from a
7 little different perspective.

8 Footnote two says some aging related issues are
9 adequately dealt with by regulatory process and need not be
10 the subject of further review during a license renewal
11 proceeding. And example might be structures and compounds
12 that really must be replaced by mandated specified --

13 In other words, that's a very prescriptive
14 language there, am I correct?

15 MS. UTTAL: Yes.

16 ADMIN. LAW JUDGE BARATTA: In your
17 interpretation. And I believe we've already talked about
18 the prescriptive nature of this particular 50.61, right?
19 So if we were to draw an analogy to an example of a rule
20 which might place it outside the scope, it would only be
21 those rules that are prescriptive. And I think the only
22 one I could come up with yesterday was appendix K, as
23 prescriptive as this one were. And that tells you
24 precisely what equations to use and that sort of thing.

25 So rather than say that other regulations would

1 be outside the scope, maybe there's a finite number which
2 when they're very prescriptive, such as ones that mandate
3 specified time periods and such, or one that mandates
4 specific analyses and types of analyses. Would those be
5 the type that footnote two might be contemplating?

6 MS. UTTAL: I believe that you're right in
7 that, and I think that the SRP may have a list of such
8 regulations. But I'm not sure. I'd have to look at the
9 SRP. But yes, it would have to be ones that are tightly
10 controlled.

11 ADMIN. LAW JUDGE BARATTA: So as a result, one
12 could not draw a logical conclusion that anything that's
13 governed in the regulations would therefore be outside the
14 scope. It would only be those that are very specific in
15 nature and very well defined. Now, of course, that's in
16 the eyes of the beholder, but nonetheless. I think in this
17 case we all do agree that this is very specific in this
18 particular case, is that not true?

19 MS. UTTAL: Yes. I'll agree with you on that
20 point, Judge Baratta.

21 ADMIN. LAW JUDGE YOUNG: After oral argument,
22 could you provide a list of some of the rules addressing
23 aging issues that would fall within this prescriptive
24 category, and those that would be in another category that
25 would be within the scope of license renewal?

1 MS. UTTAL: Only if they're listed in the SRP
2 in that fashion, yes. If you're asking me to come up with
3 them, I'm not sure that I can. But I understand that
4 there's a section of the SRP that's new reg 1800 section
5 four, that lists some and I will look at that during a
6 break.

7 ADMIN. LAW JUDGE YOUNG: Okay. It would be
8 also helpful, I mean it would be helpful to get some
9 guidance from the staff, and any other party that would
10 like to provide any, on under this argument what aging
11 issues would fall within the scope of license renewal.

12 Another question comes to mind and that is, I
13 think the Commission in Turkey Point said that, well, they
14 said it right after what we read before. Adjudicatory
15 hearings and individual license renewal proceedings will
16 share the same scope of issues as our NRC staff review for
17 our hearing process. Does the staff not review
18 embrittlement in its license renewal review?

19 MS. UTTAL: It reviews what the program is and
20 I guess what the history is. What the history of the
21 particular licensee is and what their program is, and
22 whether it meets 50.61.

23 ADMIN. LAW JUDGE YOUNG: Whether it meeting
24 50.61. And so that gets you back to your argument that a
25 stated intent to comply in the future with 50.61 is

1 sufficient for the staff's purposes?

2 MS. UTTAL: Well, it's more than that. I mean
3 they have to produce support for what they're saying, where
4 they are now and what they intend to do. It's not a one
5 page program. It's more details than that. I don't know
6 the exact --

7 ADMIN. LAW JUDGE YOUNG: The detailed part
8 would be the part that has occurred up to the present time.
9 And then the future part would be the part where they say
10 that they intend to submit necessary information to the NRC
11 in 2011, to address exceeding the PTS criterion in 2014 as
12 now projected.

13 MS. UTTAL: Okay. What they have to submit is
14 covered again in the SRP -- which we can provide for you.
15 But they would have to, well, perhaps Mr. Lewis can discuss
16 what they did submit in this case.

17 ADMIN. LAW JUDGE YOUNG: Section 4.2 or --

18 MS. UTTAL: Two.

19 ADMIN. LAW JUDGE YOUNG: -- three of that
20 application?

21 MS. UTTAL: 4.2.

22 MR. LEWIS: And there's an additional section
23 in appendix B, which is the reactor vessel surveillance
24 program, as well.

25 ADMIN. LAW JUDGE YOUNG: Right. I think I've

1 got all those sections here.

2 MR. LEWIS: I would like to address the
3 section.

4 ADMIN. LAW JUDGE YOUNG: Yes. I want to hear
5 from you, too.

6 Did you have anything to add?

7 MS. UTTAL: No.

8 ADMIN. LAW JUDGE YOUNG: So you will provide
9 after, after this you'll provide to us --

10 MS. UTTAL: I'll provide the sections of the
11 SRP.

12 ADMIN. LAW JUDGE YOUNG: Okay. Thank you.

13 Mr. Lewis, why don't you go ahead.

14 MR. LEWIS: I'll try and address what I believe
15 the Commission's footnote means in footnote two of the
16 Turkey Point decision.

17 The Commission had established the license
18 renewal regulations excluded two large classes of
19 components, short lived components and active components.
20 It eliminated --

21 ADMIN. LAW JUDGE YOUNG: Short lived and
22 active?

23 MR. LEWIS: Yes.

24 ADMIN. LAW JUDGE YOUNG: Okay.

25 MR. LEWIS: Active components it decided were

1 adequately addressed by the maintenance rule. The
2 maintenance rule does not establish specific maintenance
3 activities, but it requires a program to monitor the
4 effectiveness of maintenance by looking for failures. And
5 if there are failures, then taking corrective actions.

6 And the Commission decided that that
7 maintenance rule was sufficient for active components in
8 the license renewal term because there was a large amount
9 of information and monitoring. And they thought it would
10 be sufficient to predict if there was a concern.

11 And for short lived components, those are
12 components that are basically --

13 ADMIN. LAW JUDGE YOUNG: Replaced.

14 MR. LEWIS: -- replaced based on a qualified
15 life and there was nothing unique to the renewal term. An
16 example of the former would be, let's say steam generators.
17 A steam generator, no, that would not be.

18 ADMIN. LAW JUDGE YOUNG: Active.

19 MR. LEWIS: That would a long lived, portions
20 of steam generators would be long lived passive components.
21 They would be within the scope of the rule.

22 Examples of components that are replaced based
23 on qualified life, what's a?

24 ADMIN. LAW JUDGE BARATTA: What about like
25 rubber components?

1 MR. LEWIS: Yes. Gaskets and valve packings.

2 ADMIN. LAW JUDGE YOUNG: Right.

3 MR. LEWIS: And portions that wear. The
4 chamfering parts of valves that are replaced. Things like
5 that are qualified.

6 ADMIN. LAW JUDGE YOUNG: What about active?
7 Active is the harder one for me to get a handle on.

8 MR. LEWIS: Components that are actually, you
9 know, moving up and down.

10 ADMIN. LAW JUDGE YOUNG: That move.

11 MR. LEWIS: Portions of pumps that move, or the
12 portions of valves that are moved up and down by the
13 strokes.

14 ADMIN. LAW JUDGE YOUNG: Okay.

15 MR. LEWIS: Which are subject to a lot of
16 maintenance.

17 ADMIN. LAW JUDGE YOUNG: So then the reactor
18 vessel would seem like it would be a passive.

19 MR. LEWIS: It is. It is a long lived passive
20 component. It doesn't have any active moving parts and it
21 doesn't get replaced, you know, based on a qualified life.
22 It's basically there for the life of the plant.

23 ADMIN. LAW JUDGE YOUNG: So you disagree with
24 the staff?

25 MR. LEWIS: I do not believe that the footnote

1 in this Turkey Point case was trying to say that anything
2 that's addressed by the regulation is outside the scope. I
3 think this footnote was simply saying certain components we
4 have already eliminated from the rule, and when you read
5 54.4 you'll see it only applies to long lived passive
6 components. I think what this footnote simply meant was
7 that short live of that components don't need to be looked
8 at, we've already taken them out of the rules.

9 But I do believe, though, I mean I think you
10 have to address long lived passive components. I think
11 that the PTS rule was unique in that it's so prescriptive
12 that if you have a program that meets those elements,
13 that's good enough. And I would say that I believe that is
14 unique. I can think of really no other rules that say
15 exactly what you have to do to address an aging mechanism
16 in that deal, level of prescriptiveness.

17 There are many long lived passive components
18 that don't have specific regulatory requirements saying
19 here's how you'll maintain them. And, you know, pipe wall
20 fitting for many pipes. You know, cracking. Concrete
21 monitoring. It's not just the foundations. It's any
22 concrete within the scope of the rule, which is any safety
23 related concrete or concrete that's relied on to support
24 safety related equipment from failing, which is another
25 class there.

1 You look at those programs not just for, you
2 look at them for erosion. And you look at them for
3 cracking. There aren't regulations that say here's what
4 you do with those mechanisms. Therefore, you have to
5 establish in your license renewal what is the specific
6 program you're going to do.

7 ADMIN. LAW JUDGE YOUNG: Well, if I could get a
8 little follow up of what you're saying. You refer to the
9 same prescriptive aspect of the rule that Judge Baratta
10 referred to, and as Ms. Uttal discussed. Looking at it
11 from that point of view, obviously there are parts of 50.61
12 that are very prescriptive. I guess, looking at it from
13 the point of view of the portion that you're relying on,
14 which is that you don't have to under 50.61 tell the NRC
15 what you're going to do until three years before you're
16 projected to exceed the PTS criterion, and then you have
17 options.

18 That portion of it doesn't seem, just from a
19 general understanding of what the word prescriptive means,
20 doesn't seem to be very prescriptive in the sense that it
21 leaves it fairly open when you're in the context of license
22 renewal. It may not necessarily be viewed that way once
23 you're already licensed, but when it's being relied upon in
24 the context of license renewal, it comes across as somewhat
25 open ended and not prescriptive.

1 MR. LEWIS: Well, I would say it's prescriptive
2 because it's coupled with a, I'll call it a hard cap, in
3 that you can't operate past the screening criterion until
4 you provide these, until they're approved. And I rely very
5 much on the fact that the rules prohibit you from operating
6 beyond the screening criterion to say there is no safety
7 issue here. And that is why this regulatory scheme really
8 is sufficient, even though it does not require at this
9 point that you explain what your solution will be a number
10 of years down the road.

11 ADMIN. LAW JUDGE YOUNG: Right. And I guess
12 that's where the logical conundrum comes in because the
13 license renewal rules talk about managing the affects of
14 aging and showing reasonable assurance, identifying actions
15 that you'll manage those affects for the entire term of the
16 extended license. And that's where the logic of what you
17 and the staff are saying sort of breaks down for me. It
18 doesn't follow.

19 MR. LEWIS: Well, I would submit that if that
20 view that you're expressing were right, then you would be
21 reading out of existence the difference between 54.21(c)2
22 and (c)3, Roman numeral two.

23 ADMIN. LAW JUDGE YOUNG: Otherwise, the word
24 otherwise?

25 MR. LEWIS: Well, there's one provision that

1 says show that your analyses is good for the entire
2 extended period, and the other one is have a set of actions
3 to manage the issue. The rules do not require you to show
4 that your analyses is good for the entire extension period.
5 It's just one of the options.

6 ADMIN. LAW JUDGE YOUNG: (c)1, three? (c)1 and
7 then Roman number one through three?

8 MR. LEWIS: Excuse me. 54.21(c)2 and three.
9 Two says the analyses have been projected at the end of the
10 period of operation. Three is the affects will be
11 adequately managed.

12 I think what you're suggesting is would you
13 have to show the solution now, means that you can only do
14 two.

15 ADMIN. LAW JUDGE YOUNG: Well, now, what I'm
16 saying is that when you have a situation where the analyses
17 have not been projected to the end of the period of
18 extended operation, what (c)3 says is that you have to
19 demonstrate that the affects of aging will be adequately
20 managed for the period of extended operation.

21 MR. LEWIS: And I would say --

22 ADMIN. LAW JUDGE YOUNG: And managed. And what
23 I'm trying to get at is that the word managed to me
24 suggests, it just logically suggests more than, and the way
25 the Petitioner's put it, it suggest more than maybe a plan

1 to make a plan is a shorthand way of saying it. But it
2 suggests more than saying later on we'll tell you what
3 we're going to do. Manage to me suggests more than that.

4 MR. LEWIS: Well, it is more than that because
5 the upfront part of that is you have a screening criterion.
6 You copulate your reference temperature, PTS, for your
7 vessel. You make sure it's below the screening criterion,
8 and if it's above the screening criterion you have to cease
9 operation. And you can't go above that without getting
10 approval based on a further submittal. That whole scheme
11 is the program.

12 ADMIN. LAW JUDGE YOUNG: But managed goes after
13 all those things have taken place, though.MR. LEWIS: No.
14 I respectfully disagree, Judge Young. I believe that
15 managing is that entire program.

16 ADMIN. LAW JUDGE YOUNG: But what you're saying
17 is, that if you can't show that you can safely operate, if
18 you can't show that you can reduce the fluents, if you
19 can't show that the projected date is wrong, you may have
20 to quit operating. So that in itself suggests that you're
21 not showing that you're going to manage the affects for the
22 entire, for the period of extended operation, doesn't it?

23 MR. LEWIS: Well, I guess we had this dialogue
24 yesterday, too.

25 ADMIN. LAW JUDGE YOUNG: Right.

1 MR. LEWIS: I would submit that is managing the
2 affects of aging, that whole approach of --

3 ADMIN. LAW JUDGE YOUNG: During the period of
4 extended operation?

5 MR. LEWIS: Yes. Yes.

6 ADMIN. LAW JUDGE YOUNG: Okay. Go ahead. I'm
7 sorry.

8 ADMIN. LAW JUDGE TRIKOUROS: I just want to ask
9 a specific question to clarify what I'm hearing.

10 Do you consider approved safety analyses after
11 you've exceeded the screening criterion, the managing
12 pressurized thermal shock issue?

13 MR. LEWIS: I'm sorry. I didn't understand the
14 question.

15 ADMIN. LAW JUDGE TRIKOUROS: Assuming that in
16 2014 you reach the criterion, the screening the criterion,
17 which is the pass that we're on here. A safety analysis
18 will be submitted to the Commission. The Commission may or
19 may not approve it. But if they approve it, then you're
20 operating beyond the screening criterion and you consider
21 yourself having managed the pressurized thermal shock issue
22 at that point?

23 MR. LEWIS: Yes. I think it would be more than
24 that. I believe that if you want to operate past the
25 screening criterion, you'll have to come up with more than

1 just an analysis that says we can keep going. I mean,
2 you'll have to demonstrate what are the new appropriate
3 limits and how are you making sure you stay below them.
4 And then I could not imagine that there would not still be
5 a surveillance program that remains in effect to maintain
6 compliance with whatever the new limits are.

7 ADMIN. LAW JUDGE TRIKOUROS: Yes. Isn't it
8 true that in the statement of considerations for the rule
9 that there were some statements to that effect? That, for
10 example, the staff recommended the value of RT and ET be
11 established as a screening criteria that would determine
12 the need for and timing of further plant specific
13 evaluations.

14 MR. LEWIS: That's right. And what the
15 Commission said is the screening criterion is a level that
16 we're confident if you're below it you're safe. You may be
17 safe above it.

18 ADMIN. LAW JUDGE TRIKOUROS: Well, you're
19 referring to the fact that they said the risk of vessels
20 with higher values or TNDP may also be shown to be
21 acceptable. But the demonstration would require detail
22 plant specific evaluations.

23 MR. LEWIS: That's correct. And what that
24 would mean is that you would have a new screening criterion
25 based on a plant's specific analysis. But you would then

1 need a whole surveillance program still designed to show
2 that you're still below whatever the -- is. It's not at
3 that point you do analysis and you're over with. I mean I
4 can't imagine that. I mean how would you then know that
5 you're below the --

6 ADMIN. LAW JUDGE TRIKOUROS: That's fine. I
7 want to clarify what this all means, given the path that
8 we're on.

9 The other question that I have is regarding,
10 which I still don't have an answer for, is regarding the
11 reasonably practicable issue and who makes the
12 determination in this application that the modifications
13 that you decided are too costly, that that is an acceptable
14 outcome of this evaluation.

15 MR. LEWIS: We've identified what it is that we
16 believe we've done because it is reasonably practicable.
17 We've identified those additional actions that we don't
18 think are. And the staff is meant to review it and can ask
19 questions in their RAI's. And presumably in the end we'll
20 address the adequacy of our program in their safety
21 evaluation report. So they certainly have the ability to
22 probe and question.

23 ADMIN. LAW JUDGE TRIKOUROS: Has anybody looked
24 at the cost of the neutron flux shields, compared to say
25 thermal anneal?

1 MR. LEWIS: I believe it was looked at a number
2 of years ago. It's above 10 million. What is that, I said
3 eight figure modification.

4 ADMIN. LAW JUDGE YOUNG: The difference is 10
5 million or the cost?

6 MR. LEWIS: I haven't seen the analysis. I've
7 heard anecdotedly that it's that order of magnitude. And
8 that was looked at a number of years ago. And, in fact,
9 you know, when it was looked at the flux reduction measures
10 that were implemented and the thermal annealing program
11 that the company started to go down were preferable actions
12 to that modification.

13 ADMIN. LAW JUDGE TRIKOUROS: So, backed
14 historically, when the screening criterion was thought to
15 be met earlier, thermal annealing was the option that was
16 chosen. A thermal annealing report was prepared. I assume
17 it was submitted to the Commission.

18 MR. LEWIS: It was submitted. Yes.

19 ADMIN. LAW JUDGE TRIKOUROS: So the decision at
20 that point was made to go thermal annealing because the
21 time line was such that that was the only viable option
22 apparently.

23 MR. LEWIS: I mean the flux reduction measures
24 are still being looked at. They were still trying to see
25 whether they could improve the methods for calculating

1 fluents. So there were a lot of things that were going on
2 in parallel as a prudent utility would proceed.

3 ADMIN. LAW JUDGE TRIKOUROS: Well, given the
4 schedule, flux reduction by its very nature requires time
5 that wasn't available back then. But thermal annealing
6 didn't require that time line.

7 MR. LEWIS: I mean flux reduction does reduce
8 the fluents that you're expecting in your remaining, you
9 know, lifetime. So there is some advantage in that.

10 ADMIN. LAW JUDGE TRIKOUROS: Right. But it
11 would have to have given you time --

12 MR. LEWIS: Yes.

13 ADMIN. LAW JUDGE TRIKOUROS: -- from 1995 on.
14 So it follows for me that I would be interested in
15 understanding if a mitigative technique such as neutron
16 flux shields were less costly than annealing and could
17 mitigate the problem. It would be interesting to
18 understand that. And so this reasonably practicable
19 argument that's made is still an open issue and I still
20 don't understand who makes the determination as to what is
21 reasonably practicable. Is it the utility or is it the
22 Commission or is it some sort of a back and forth
23 discussion with RAI's.

24 MR. LEWIS: It's the licensee's obligation in
25 the first instance to comply with the regulation, and so

1 it's certainly the licensee's responsibility in the first
2 instance to, you know, look at and determine what measures
3 are reasonably practicable. And these are meant to be
4 measures that are reasonably practicable to avoid meeting
5 the, exceeding the screening criterion before the end of
6 the period of extended operation, so that --

7 ADMIN. LAW JUDGE TRIKOUROS: Okay. Let me
8 repeat my logic again because if there's a flaw in it you
9 could point it out.

10 If the company were willing to do thermal
11 annealing at one point, then I assume that meant it was
12 reasonably practicable. If neutron flux shield
13 modifications which mitigate this problem cost less than
14 thermal annealing, or equal to thermal annealing, or
15 approximately equal to thermal annealing, wouldn't that
16 make them reasonably practicable?

17 MR. LEWIS: There's other factors besides
18 economics. I mean if you start installing additional
19 shielding, you have to worry about monitoring and
20 surveillance and loose parts. You know, what's going to
21 happen with this shield. Are pieces going to fall off.
22 You know, there's the other technical aspects as well.

23 ADMIN. LAW JUDGE TRIKOUROS: And I'm not
24 disagreeing with that. I might have opinions regarding
25 that. But I wonder if that's a documented evaluation that

1 was done.

2 MR. LEWIS: I'm sure it's not an evaluation
3 that's on the docket.

4 ADMIN. LAW JUDGE TRIKOUROS: I understand that.
5 But the company has done that evaluation?

6 MR. LEWIS: I guess I can't answer your
7 question, Judge Trikouros. I know there was consideration
8 of this issue. I don't know what documented form it's in.
9 I don't know whether there's something that pulls it all
10 together as opposed to a number of discussions in the past
11 that you might have to piece together. In discussing it, I
12 do understand that this was something that was considered
13 in the past and was not pursued. But I've never seen a
14 document that puts it all together and I do not know
15 whether that exists.

16 ADMIN. LAW JUDGE YOUNG: Anything further on
17 contention one?

18
19 MR. LODGE: I would like, on behalf of the
20 Petitioner, simply to point out this: That if you step
21 back from this and examine the nature of this discussion,
22 in 2005 the argument is the Petitioners are too early.
23 Likely in 2011 the argument will be that Petitioners are
24 too late. It's impossible to be on time in terms of a
25 filing.

1 Regulatorally speaking, it's not the
2 destination, and a results-oriented policy that is being
3 enumerated by the staff seems very inappropriate. It is
4 not the destination. It is indeed the journey. The NRC
5 staff is a safety regulator and we believe that safety is
6 therefore the paramount consideration. And safety analysis
7 with that in mind is the paramount value.

8 This discussion speaks to the level of
9 confidence that the panel and the public should have on the
10 issue of embrittlement. Thank you.

11 ADMIN. LAW JUDGE YOUNG: All right. Can we go
12 straight into, well, actually you said you had something
13 short to say about contention three, that you wanted to
14 follow up on?

15 MR. LODGE: Yes. Yes. May I have a minute to
16 organize my thoughts.

17 We had raised the prospects of erosion
18 yesterday. We believe that within the wording of the
19 contention itself, as stated in the August 8 filing,
20 there's reference to liquefaction, which we believe
21 sufficiently embraces the possibility of erosion.

22 I would further point out that in the
23 application, at page D21, which is a table that discusses
24 compliance with the Michigan Coastal Zone Management
25 Program, there is down toward the bottom of that page

1 specific reference to the fact that, quote, "part of the
2 Palisades site is in a designated high risk erosion area",
3 which is referenced to a Holt article, 2004. And, as I
4 say, we believe that liquefaction certainly embraces the
5 concept of, or the potential for erosion.

6 Furthermore, as our final argument, respecting
7 the connectedness of this issue to the time aging analysis
8 that is --

9 ADMIN. LAW JUDGE YOUNG: Or, since it's an
10 environmental one --

11 MR. LODGE: Right.

12 ADMIN. LAW JUDGE YOUNG: -- to be in a category
13 two.

14 MR. LODGE: Right. And we believe it's very
15 tight specific. But I would point out that, somewhere,
16 that 10-CFR-54-4(a)1, subsection three, discusses the
17 capability to prevent or mitigate the consequences of
18 accidents which could result in offsite exposures. We
19 believe accidents resulting from any activity originating
20 at the plant site is within the contemplation of that
21 particular regulation.

22 ADMIN. LAW JUDGE YOUNG: What about, did you
23 ever give us a reference to any category two subject --

24 MR. LODGE: For this?

25 ADMIN. LAW JUDGE YOUNG: -- of Appendix B?

1 MR. LODGE: No, I did not. If we may take a
2 break, I could provide that. If I could have several
3 moments, or if I could do it at a break whenever the
4 Board --

5 ADMIN. LAW JUDGE YOUNG: Well, let's take five
6 minutes and come back and quickly give us that. And then
7 let's go through seven and eight.

8 MR. LODGE: Very good.

9 ADMIN. LAW JUDGE YOUNG: Okay. Off the record.

10 (Off the record.)

11 ADMIN. LAW JUDGE YOUNG: On the record.

12 MR. LODGE: Well, the Petitioner's response is
13 that, looking through subpart A, Appendix B of part 51,
14 that severe accidents on page 51 of the grey version of the
15 CFR is possibly the only category it fits under.

16 As I indicated yesterday, I think I will try to
17 perfect the record when I return to my office. We will
18 file a formal 10-CFR-2.335 motion for a waiver. Also, I
19 understand that the generic objection to Turkey Point
20 ruling, as to dry cask storage issues, but we maintain that
21 this is not so much directly about the dry cask storage.
22 It is about the concrete pad underneath them. So, yes,
23 it's intertwined, but there's at least prima facie
24 information available by way of our contention, as well as
25 Dr. Landsman's later declaration.

1 I would also like to make a, I guess I would
2 call it a conditional argument respecting the Landsman
3 declaration, just so that it is addressed in the record on
4 behalf of the Petitioners. I have reviewed the statute
5 that the Nuclear Regulatory Commission staff has mentioned
6 as being, as governing or controlling Dr. Landsman's
7 declaration. We believe two things to be true.

8 ADMIN. LAW JUDGE YOUNG: You referred to a
9 statute?

10 MR. LODGE: Yes. That is 18, pardon me, Your
11 Honor. 18-USC-216?

12 ADMIN. LAW JUDGE YOUNG: 207.

13 MR. LODGE: 207, okay.

14 ADMIN. LAW JUDGE YOUNG: Regarding his --

15 MR. LODGE: Admissibility.

16 ADMIN. LAW JUDGE YOUNG: -- ability to --

17 MR. LODGE: Correct.

18 ADMIN. LAW JUDGE YOUNG: -- provide
19 information.

20 MR. LODGE: Our position, first of all, the
21 interpretation that was offered by the NRC attorney
22 yesterday was that, that fact statements are admissible
23 expert opinions or conclusions, or not. Upon a reading of
24 the declaration, it is pretty clear that Dr. Landsman is an
25 usually informed fact witness who is reviewing in his

1 declaration the history and nature of his objections made
2 when he was at the Nuclear Regulatory Commission about an
3 issue that he believed constituted a violation of
4 regulations. Which he stated that supervision over him at
5 the NRC characterized as an unresolved issue.

6 We believe it's still an unresolved issue, but
7 we believe that any expert computations, things like that
8 that are related by Dr. Landsman, are his narrative of what
9 he had done while in his professional capacity as a Nuclear
10 Regulatory Commission staff member. Therefore, we believe
11 the entire declaration is factual when read from that
12 perspective. Furthermore --

13 ADMIN. LAW JUDGE BARATTA: So you would
14 actually view the declaration as more of a historical
15 document --

16 MR. LODGE: That is correct.

17 ADMIN. LAW JUDGE BARATTA: -- as opposed to,
18 you know.

19 MR. LODGE: Correct. Thank you. That's
20 exactly right.

21 Furthermore, under 18-USC Section 207,
22 subsection J, delineates exceptions to the rule, which is
23 thou shalt not testify as an expert once you've left the
24 Federal government.

25 One of the exceptions is subsection four,

1 entitled Special Knowledge. It indicates that the
2 restrictions contained in subsections C, D, and E shall not
3 prevent an individual from making or providing a statement
4 which is based on the individual's own special knowledge in
5 the particular area that is the subject of the statement,
6 if no compensation is thereby received. And I would
7 represent on behalf of the interveners that we have not nor
8 had we any plans in place to compensate Dr. Landsman for
9 his declaration.

10 Anyway, I'm just asking that the Board please,
11 if it considers the declaration, if it gets to that issue,
12 that it also consider our arguments that it is, should be
13 fully considered.

14 ADMIN. LAW JUDGE YOUNG: I think really, and
15 this is probably a good time to say this, your part of
16 burden is to show us why we should consider things like
17 this, since they weren't provided at the outset, in light
18 of the new rule and the Commission's statement on how that
19 should be interpreted. And what I understood you to say
20 yesterday was that it was a committee or group effort at
21 producing the original petition.

22 But at this point, I mean I think we're all
23 reserving judgment, but we did state at the beginning
24 yesterday what our approach would be on things that were
25 submitted later, that would not, couldn't, would not

1 reasonably be characterized as focused on the issues raised
2 in the answers. Now, you could read that broadly to say if
3 the answer says you didn't provide something, providing it
4 is focusing on that. But I think that's not what the
5 Commission has meant by that, and I think that's your
6 toughest burden with regard to this and similar documents.

7 Before we move on, do you want to take a minute
8 and really briefly address that any further?

9 MR. LODGE: Yes.

10 ADMIN. LAW JUDGE YOUNG: Okay.

11 MR. LODGE: Thank you. May I just have a
12 moment.

13 MS. UTTAL: Judge, while we're on this topic, I
14 just wanted to give a citation to the regulations that
15 cover that ethics statute, five --

16 ADMIN. LAW JUDGE YOUNG: The ethics statute
17 related to 18?

18 MS. UTTAL: 18-USC-207.

19 ADMIN. LAW JUDGE YOUNG: Okay.

20 MS. UTTAL: It's 5-CFR part 2637.

21 ADMIN. LAW JUDGE YOUNG: 2637?

22 MS. UTTAL: 2637.

23 ADMIN. LAW JUDGE YOUNG: Is there a decimal in
24 there or not?

25 MS. UTTAL: No.

1 ADMIN. LAW JUDGE YOUNG: Okay.

2 MS. UTTAL: And also there was a proposed rule
3 making because the statute was apparently amended at some
4 point. The proposed rule making is found at 68 Federal
5 Register 7844. That's from 2003. I don't know what's
6 happened since then.

7 ADMIN. LAW JUDGE YOUNG: Okay. Thank you. Did
8 you get that, Mr. Lodge?

9 MR. LODGE: No. I'm sorry.

10 ADMIN. LAW JUDGE YOUNG: Ms. Uttal just gave
11 citations to two, well, to one regulation and one proposed
12 regulation relating to 18-USC-207. And they are 5-CFR-2637
13 and 68 Federal Register 7844.

14 MR. LODGE: Thank you.

15 ADMIN. LAW JUDGE BARATTA: Just as a point of
16 clarification, I don't know, I'm not prepared to cite the
17 regulations and maybe you can help me on this. But I
18 thought there was an obligation on the part of NRC
19 employees to bring to the attention any safety issues that
20 they may have observed and become knowledgeable of. And
21 failure to do so could result in disciplinary action. Is
22 that not correct?

23 MS. UTTAL: It sounds right, but I don't know
24 for sure.

25 ADMIN. LAW JUDGE BARATTA: And, as such, since

1 we're reviewing this as a historical, or could be viewed as
2 a historical document, if Dr. Landsman failed to do so he
3 would be in violation of that?

4 MS. UTTAL: Well, I'm not suggesting that the
5 entire declaration be stricken. I'm suggesting that under
6 the Federal statute that his opinion has to be stricken.

7 ADMIN. LAW JUDGE BARATTA: I understand. I
8 don't want to get into that. I just want to make sure that
9 we're aware that people that have safety concerns are in
10 fact obligated to bring them to the attention of the
11 appropriate group.

12 ADMIN. LAW JUDGE YOUNG: Okay. Anything
13 further on that?

14 MR. LODGE: Yes. Thank you very much.

15 Whatever other perceived problems there are
16 with the contention as stated, we believe frankly it is one
17 of the better drafted contentions that we raised, in terms
18 of its conclusiveness. We believe that the declaration
19 merely flushes out or amplifies that, and I understand that
20 there's considerable argument about that. But as the chair
21 of the panel point out yesterday, the regulations are not
22 meant to constitute a fortress to simply protect the
23 process. But they are not to prevent substantive
24 discussion.

25 As Dr. Baratta has just noted, I think by

1 implication these allegations, these very authoritative
2 credible allegations, have been out there since 1993. And,
3 honestly, as interveners we have had some trouble
4 understanding why, in effect, we have to raise them. Why,
5 in effect, the NRC staff is not sitting in our position on
6 this particular issue. We do not understand that. It is a
7 mystery.

8 This remains an unresolved issue and, as the
9 chair noted yesterday, it may be a very troublesome issue.
10 A very troubling, unresolved issue. And that is why we
11 will be applying for the waiver so that it might be
12 considered within the constraints of this proceeding.

13 ADMIN. LAW JUDGE YOUNG: And when you do that,
14 make sure you look at the Millstone decision.

15 MR. LODGE: Yes, I have. And thank you. And
16 we'll argue that at that point.

17 We do not consider the 2206 process to be a
18 particularly viable or credible one, but I'll make that
19 argument a little bit more later, in writing.

20 ADMIN. LAW JUDGE YOUNG: I think the Millstone
21 decision also addresses that, so you might want to look at
22 that.

23 MR. LODGE: Yes. Thank you. That's all we
24 have.

25 ADMIN. LAW JUDGE YOUNG: Okay. Do you want to

1 move on to contention seven?

2 MR. LODGE: Yes.

3 ADMIN. LAW JUDGE YOUNG: And I think some of
4 the comments that we've made earlier about category one and
5 category two, and as well the Turkey Point decision address
6 this, and so if you could just sort of focus your --

7 MR. LODGE: Right.

8 ADMIN. LAW JUDGE YOUNG: -- arguments on that.

9 MR. LODGE: If I may have just one moment.

10 ADMIN. LAW JUDGE YOUNG: The contention in
11 Turkey Point involved not only radio active, allegations
12 regarding radio active material, but also chemical wastes
13 and herbicides.

14 MR. LODGE: This, of course, is the contention
15 wherein the Petitioners maintain that, for reasons that are
16 not well understood, it appears that the utility has not
17 been filing information under their NTPTS permit related to
18 the use of biocides to keep the water intakes clear.

19 First of all, under Appendix B, we believe that
20 this falls, this is a category two based upon impingement
21 on fish and shell fish, which is at page 48 of the CFR
22 volume. Furthermore, we believe under part 54.4 it
23 addresses a plant system structure component, which is non-
24 safety related but whose failure, the failure of which
25 might prevent accomplishment of the functioning in a

1 literal way, the plant. We believe that unclogged water
2 intakes at Palisades are definitely something that can,
3 should be considered in the scope.

4 ADMIN. LAW JUDGE YOUNG: Which section of 54.4?
5 I'm sorry.

6 MR. LODGE: I'm sorry.

7 ADMIN. LAW JUDGE YOUNG: You said --

8 MR. LODGE: It's on page 48 and it is --

9 ADMIN. LAW JUDGE YOUNG: No. 54.4.

10 MR. LODGE: My apology. Subsection (a)2 I
11 believe.

12 ADMIN. LAW JUDGE YOUNG: And then that refers
13 back to (a)1, and then three sections under that,
14 subsections?

15 MR. LODGE: Yes. That's correct. Capability
16 to shut down the reactor. Yes.

17 ADMIN. LAW JUDGE YOUNG: Capability to shut
18 down. How --

19 MR. LODGE: Or --

20 ADMIN. LAW JUDGE YOUNG: How does that --

21 MR. LODGE: -- maintain it in a safe shutdown
22 condition. The use of cooling water.

23 Yes. May I have one moment, please?

24 ADMIN. LAW JUDGE YOUNG: 54.4(a)2 and then,
25 which then refers back to (a)1, so Roman numeral one

1 through three.

2 If you could also address how that relates to
3 aging, as set forth in 5429, which is the standard for
4 issuance of a renewed license. Because the reference back
5 to 54.4 comes through 54.21, but the overarching
6 categories, the matters that 5429 directs us to look at are
7 managing the affects of aging and time limited aging
8 analyses under 5429(a)1 and 2.

9 MR. LODGE: I think that there's an argument to
10 be made. We believe that the near part of the lake to the
11 Palisades reactor is effectively part of the cooling
12 system. That it's the receiving waters for thermal
13 pollution as well as clam-trol. Clam-trol's of course a
14 biocide that has bio-cumulative affects over time. And we
15 believe that an additional 20 years of accumulation in
16 organisms, as well as the lake bottom and lake plants, is
17 going to be a detrimental environmental impact.

18 ADMIN. LAW JUDGE YOUNG: So basically you're
19 relying on the environmental. Because it's hard to --

20 MR. LODGE: Correct.

21 ADMIN. LAW JUDGE YOUNG: -- argue that it has
22 any aging --

23 MR. LODGE: Well, they're --

24 ADMIN. LAW JUDGE YOUNG: -- relationship, isn't
25 it?

1 MR. LODGE: Correct, Your Honor. I think, I'm
2 certainly not a structural engineer, but we do believe that
3 some of the components of the intake system, intake and
4 exhaust systems, out take systems, would possibly over time
5 develop pitting, which might require the actually increased
6 uses of clam-trol. We don't even know that.

7 What you have before you in a prima facie
8 fashion is evidence that the utility is not making, not
9 even making public reports. It is very difficult to gauge
10 what the environmental affect is, but we suspect that there
11 is one. In fact, I think it is almost beyond caville that
12 there is one.

13 That's all we have.

14 ADMIN. LAW JUDGE YOUNG: Okay. Mr. Lewis?

15 MR. LEWIS: Yes. Thank you, Judge Young.

16 Two points. First of all, this is squarely
17 within a category one issue. Mr. Lodge has it by CFR, but
18 there is a category one issue listed in Table B1 that
19 includes discharge of biocides as a category one issue.
20 And determinations in the Journack environmental impact
21 statement that the impaction of destoraged biocides are
22 small. So this is not a permissible issue.

23 Mr. Lodge suggested that perhaps this was
24 related to impingement. The affect of impingement is when
25 fish are drawn in through the intake onto a screen and are

1 trapped there and perish. It has absolutely nothing to do
2 with discharge of biocides.

3 Finally, I heard --

4 ADMIN. LAW JUDGE YOUNG: Just for my own
5 knowledge, I was thinking that that was entrainment. I
6 didn't --

7 MR. LEWIS: Entrainment is when larva and fish
8 eggs are drawn all the way through the plant.

9 ADMIN. LAW JUDGE YOUNG: All the way through.

10 MR. LEWIS: So they're not impinged. They're
11 not stuck on this --

12 ADMIN. LAW JUDGE YOUNG: Okay.

13 MR. LEWIS: -- screen. In fact, they're drawn
14 all the way through the cooling system.

15 ADMIN. LAW JUDGE YOUNG: And impingement's when
16 they're caught?

17 MR. LEWIS: Yes.

18 ADMIN. LAW JUDGE YOUNG: Okay.

19 ADMIN. LAW JUDGE BARATTA: All right. So the
20 one that says discharge of chlorine or other biocides,
21 that's the one that you --

22 MR. LEWIS: Yes.

23 ADMIN. LAW JUDGE BARATTA: -- think this comes
24 under?

25 MR. LEWIS: Finally, I believe Petitioner has

1 referred a couple of times to the company not even making
2 public reports. I would like to explain the situation. I
3 think it really doesn't go to the admissibility.

4 But the company submits daily and monthly
5 discharge reports, and how entries are made on those
6 reports has changed over time. If a substance wasn't used,
7 like a biocide, at one point in time the entries for that
8 substance were simply left blank. Later there was a change
9 where those entries would be zeroes, and then even later on
10 there was a time when the proper entry became not used.
11 And there was a point in time where we went from blanks to
12 zeroes.

13 These reports go to the state and the state
14 fills in a quarterly non-compliance report. Our
15 understanding is the clerk who had the reports at the time
16 didn't understand what zeroes meant and left it blank in
17 their report. It then goes to the EPA, which has been
18 entering these into an enforcement and compliance history
19 online database. And when they saw the blank in the state
20 report, they put it as a non-compliance. And it's just a
21 flat out goof, not on our part.

22 But the admissibility issue is this is a
23 category one issue that is not admissible in this
24 proceeding.

25 ADMIN. LAW JUDGE BARATTA: Well, except for the

1 fact that it affects the explanation as based upon the
2 affects are not a concern among regulatory and resource
3 agencies. And if, I don't doubt what you're saying, but
4 we're not here to receive testimony I guess is the --

5 MR. LEWIS: No. I just want to put in
6 perspective, really, for the benefit of everybody.

7 ADMIN. LAW JUDGE BARATTA: And if somebody says
8 it's non-compliance, I guess, you know, it might be a
9 concern amongst regulatory resource agency. I would -- on
10 that one.

11 ADMIN. LAW JUDGE YOUNG: That's interesting.

12 MR. LODGE: Judge Baratta, what were you
13 referring to?

14 ADMIN. LAW JUDGE BARATTA: In the third column
15 over, where it says small and it gives a rationale, it says
16 small affects are not a concern among regulatory and
17 resource agencies. They are not expected to be a problem
18 during the license renewal term. But if somebody is saying
19 it's non-compliance, does that mean that it is a concern
20 amongst regulatory and resource agencies, and therefore it
21 is not small, and could be argued.

22 MR. LODGE: The issue is that it's a category
23 one issue and is therefore not permitted to be introduced
24 in this proceeding, absent a waiver. The waivers, you
25 know, can address, you know, the rationale for making a

1 category one issue was addressed or not. But there's not
2 been a request for waiver in this proceeding.

3 ADMIN. LAW JUDGE YOUNG: But I think what he's,
4 what we're trying to get at is, after the description,
5 after discharge of chlorine and other biocides, if we're
6 reading the right one, it says affects are not a concern
7 among regulatory and resource agencies and are not expected
8 to be a problem during the license renewal term. That sort
9 of suggests that where the affects are a concern among
10 regulatory and resource agencies, it might be category two.
11 I'm not sure that there is a category --

12 ADMIN. LAW JUDGE BARATTA: Might be --

13 MR. LODGE: All I'm saying is that that's not
14 correct. The discharge of biocides is a category one
15 issue. The category two issues are the ones that are
16 listed explicitly, and they are addressed in 5153(c)3,
17 small I, A through L.

18 ADMIN. LAW JUDGE YOUNG: That's category two?

19 MR. LODGE: Those are the category two issues.
20 Those 5153(c)3i A through L is the regulation that defines
21 what we have to address and what's within the scope of the
22 staff's review.

23 ADMIN. LAW JUDGE YOUNG: How do you explain the
24 sentence there in the findings?

25 MR. LODGE: In the findings column is the

1 attempt to summarize in very short form a section of the
2 general environmental impact statement that addressed this
3 issue and was the basis for explaining why it was a
4 category one issue.

5 ADMIN. LAW JUDGE YOUNG: So the GEIS explains
6 it in more detail, you're saying?

7 MR. LODGE: Yes. That's correct. There will
8 be a section of the generic environmental impact statement
9 that addresses biocides. I think it's, although I'm not
10 sure, I think it's maybe section 4.4.2.2 but I don't have
11 it here. I have a reference and I think that's it.

12 ADMIN. LAW JUDGE YOUNG: That reminds me of a
13 joke of an IRS lawyer, but we won't get into that.

14 ADMIN. LAW JUDGE BARATTA: Better watch out.
15 They're going to have more of those audits this year, so
16 watch out what you say on the record.

17 MS. UTTAL: And my husband's an IRS lawyer.

18 ADMIN. LAW JUDGE YOUNG: Well, it involved
19 fooling other lawyers by giving a long citation, and then
20 intimidating them into not disputing it because they
21 couldn't possibly dispute Section 4.4.3.2.subpoint Roman
22 number three. Anyway.

23 MS. UTTAL: I had a law professor tell me that
24 you had a read the regulations and the tax code backwards
25 in order to understand it.

1 ADMIN. LAW JUDGE YOUNG: Okay. Ms. Uttal?

2 MS. UTTAL: Okay. Mr. Lodge, in discussing the
3 entrainment or the impingement, cites to the section
4 regarding once through a cooling pond heat dissipation
5 systems. I don't think that's the correct system here.

6 Even if it was applicable, and I agree with Mr.
7 Lewis that the discharge of chlorine or other biocides is
8 the applicable section in the appendix. But even if it was
9 the correct section, I believe that Palisades is an open
10 system, cooling tower based heat dissipation system. And
11 those are all category one.

12 And the only other thing I want to say is that
13 we believe that the Millstone case from last December, 60-
14 NRC-631, which I believe is cited in our brief, controls
15 here. That's where the Commission affirmed the Board's
16 decision rejecting a contention regarding the lack of an
17 NPDES permit, saying that it was out of scope. And
18 dismissing it. I don't believe that that's on --

19 ADMIN. LAW JUDGE YOUNG: You've cited that in
20 your --

21 MS. UTTAL: Yes. Cited in the brief. I
22 believe that that controls.

23 ADMIN. LAW JUDGE YOUNG: Anything further on
24 contention seven?

25 MR. LODGE: One moment, please.

1 Two points: Literally thousands of larvae come
2 in in the cubic foot or cubic yard of water, and if clam-
3 trol is not routinely and probably in large amounts used,
4 they quickly perform an encrustation, or comprise an
5 encrustation problem in major parts of the cooling system.
6 If indeed the operative word that makes this a generic
7 consideration is small, the panel is not in the position
8 where it can quantify what the affect is without the
9 reports, without the actual data. And that is --

10 ADMIN. LAW JUDGE YOUNG: I'm sorry. We can or
11 cannot --

12 MR. LODGE: The panel cannot, the panel can't
13 make a determination as to whether there's a small impact
14 without the data. And our contention is, you know, this is
15 not, if indeed there's a duty on the Petitioners to rely on
16 publicly available information, we have attempted to rely
17 on publicly available information and find a paucity of it.
18 And we believe that the matter should be adjudicated or at
19 least discovery allowed, so we can actually get the real
20 statistics, the real discharges, or uses of clam-trol.

21 That's all we have. Thank you.

22 ADMIN. LAW JUDGE YOUNG: Okay. On contention
23 eight, environment justice, it would be helpful if you
24 could focus your arguments on the NRC's policy statement.
25 And then I think there are two cases, I think they've been

1 cited. In any event, the PFS-CLI-02-20 and Louisiana
2 Energy Services, CLI-98-3. And the NRC reporter cites are
3 56-NRC-147 and 47-NRC-77.

4 Basically, the Commission has said that the
5 environmental justice issues that are admissible in NRC
6 proceedings would be those where there's an allegation of
7 disparate harm to the environment. Sort of in summary,
8 there's a lot more, disproportionately significant and
9 adverse environmental impacts on minority and low income
10 populations that may be different from the impacts on the
11 general population. But that it comes under NEPA.

12 MR. LODGE: Right. We believe it comes under
13 NEPA, on Appendix B under historic and archeological
14 resources, which is a category two.

15 What we postulated is a circumstance where the
16 state historic preservation office has indicated to the
17 interveners that they do not have adequate information on
18 the resources. That effectively the record that is
19 referenced in the application is comprised of sort of an
20 echo process between the utility and the state historic
21 preservation office.

22 We believe that an understanding culturally of
23 the spiritual value and impact of burial sites is that
24 they, the Palisades site is, of course, on the eastern
25 shore of Lake Michigan, effectively facing west. That is

1 significant in much North American Native culture and lore
2 because that is the way that one departs into the
3 afterlife, is by heading west. We believe that the
4 documentation, the application is deficient in documenting
5 and measuring the existence, location of the site. The
6 possibility for significant archeological resources on the
7 Palisades site is quite real. One moment, please.

8 Immediately offsite is the Palisades Park
9 community, which sits on the banks of a creek. Those were
10 often, creeks and waterways were often the locations of
11 Native American sites.

12 ADMIN. LAW JUDGE YOUNG: Let me just interject
13 here. Your contention here, in comparison for example to
14 contention one, doesn't say there's a failure to address
15 these things. It challenges the adequacy of addressing the
16 issues that you raised. And you raised some serious
17 issues.

18 The question is whether they fall under what's
19 admissible in an NRC proceeding. And there are parts of
20 the application which do address some of the issues you
21 raise. And since here you're not alleging a failure, but
22 an inadequacy, I guess when I read this and then I read the
23 application, I'm not seeing real clearly what problems
24 you're alleging with the application, other than the
25 statement that it's inadequate.

1 MR. LODGE: Thank you. Please, one moment.

2 There has never been a comprehensive site
3 survey performed, so far as we can determine. Yet the
4 utility proposes to operate at the site for an additional
5 20 years. It is certainly within the contemplation of
6 things that there might be additional structures erected,
7 certainly including potentially dry cask storage pads,
8 which in the absence of an adequate survey could actually
9 be built atop burial sites.

10 Again, I would remind the panel this is a high
11 erosion risk location, which long before Palisades was
12 built there, was subjected to a lot of sand movement.
13 And --

14 ADMIN. LAW JUDGE YOUNG: Well, I want to
15 interject again. The NMC says that, in contract to what
16 you're saying in this contention, that 11 tribes were
17 contacted. And I'm not sure, I'm not getting a good sense
18 of what type of survey should be done that would bring to
19 light any of the kinds of issues that would be admissible
20 under environmental justice that wouldn't, for example, be
21 gleamed from information provided by the 11 tribes that
22 were contacted.

23 For example, I'm looking here to see what
24 specific adverse environmental impact would
25 disproportionately affect a minority group. And I'm

1 looking for something that, I mean, obviously, like your
2 first paragraph, you talk about African American employees.
3 And you make some allegations of really horrible things.
4 No doubt about that. I'm not sure how that would fall into
5 the category of environmental harm. I mean it sounds more
6 like an employment discrimination, harassment type of
7 claim, which though, certainly as I said a horrible
8 allegation, the jurisdiction wouldn't lie with us.

9 And when you reference the survey and
10 uncovering impacts to burial grounds, could you respond to
11 the NMC argument that they have invited 11 tribes, compared
12 to the three tribes that you, well, you make reference to
13 the NRC, who with the NRC contact. But what do you say in
14 response to NMC's, well, NMC says that 11 tribes were
15 invited, not by NMC but by NRC.

16 Is that right, Mr. Lewis?

17 MR. LEWIS: Yes. That's correct.

18 ADMIN. LAW JUDGE YOUNG: Okay.

19 MR. LEWIS: We just gave the citations. The
20 letters are on the docket.

21 ADMIN. LAW JUDGE YOUNG: Right.

22 MR. LODGE: May I have just a moment, please?

23 ADMIN. LAW JUDGE YOUNG: Okay. And then I
24 guess in the Appendix B. I was looking for the, let's see.
25 There's a cite to the Appendix B that societal and economic

1 impacts from severe accidents are small for all plants.

2 Where is that located?

3 Mr. Lewis?

4 MR. LEWIS: Judge Young, you were asking about
5 where environmental justice is on the table?

6 MS. UTTAL: It's the last one.

7 ADMIN. LAW JUDGE YOUNG: Well, no. Let me find
8 this in your, on page 31 of your answer you say that both
9 environmental and societal and economic impacts from severe
10 accidents are small for all plants. And you refer to
11 Appendix B. The severe accidents being --

12 MR. LEWIS: Yes. That's on page 51. It's
13 under the subheading Postulated Accidents. The left-hand
14 column is Severe Accidents, and the right-hand column
15 explains --

16 ADMIN. LAW JUDGE BARATTA: But that's listed as
17 category two, though, isn't it? The one I have, Severe
18 Accidents, says two and then small, and it goes on to say
19 the probability weighted consequence of adverse atmospheric
20 release, et cetera, and societal and economic impact from
21 severe accidents are small for all plants.

22 MR. LEWIS: Well, what the Commission did is it
23 determined that the risk of these impacts was small. And
24 there is not a requirement that you address the risk, but
25 the Commission decided that there was still need to address

1 mitigation measures. So in 5153(c)1, there is a provision
2 that says you have to do a SAMA analysis. And the scope of
3 that issue is that the mitigation portion on SAMA analysis
4 is a category two issue.

5 ADMIN. LAW JUDGE YOUNG: Okay. So basically
6 you're saying that the category two portion of the
7 reference to severe accidents is limited to SAMA's.

8 MR. LEWIS: Yes. And the specific issue that
9 has to be addressed in each of these cases, in the
10 5153(c)3, little one, and then there's a list of issues
11 after that. That defines what the real issue is that has
12 to be addressed. It is hard sometimes with these tabular
13 forms --

14 ADMIN. LAW JUDGE YOUNG: Right. Right.

15 MR. LEWIS: -- to identify the issue.

16 ADMIN. LAW JUDGE YOUNG: Pardon me for
17 interrupting, Mr. Lodge. I guess I just wanted you to
18 focus on some of these issues that I've raised and the
19 issues raised in the responses. Because, here again, I
20 think you, I need a little help from you on how the
21 allegations that you're making fall within what the
22 Commission has said would be within the scope of an NRC
23 adjudicatory proceeding. And how you address the arguments
24 made by NMC and the staff which have to do with specificity
25 and the other examples that I gave you.

1 MR. LODGE: Our Petitioner, the Nuclear
2 Information Resource Service, actually on the record
3 opposed the environmental justice rule change that the NRC
4 had promulgated, without success.

5 As to the context with Native tribes, from what
6 we understand there were simply letters sent with no follow
7 up, no follow-up contact. A number of these tribes are
8 small bands who are rather poverty stricken, do not have
9 significant institutional resources to make some type of
10 authoritative response. And we don't believe that the
11 effort shown is, complies with the spirit of the
12 regulations.

13 Furthermore, it's almost a given that burial
14 sites are a major cultural facet among most Native American
15 tribes. By comparison, for instance, to European
16 Americans, Native Americans don't move cemeteries to build
17 highways. They don't perform that sort of ghastly
18 excavation that can have some shocking affect.

19 We believe that a comprehensive site survey
20 could be accomplished, even absent any input from Native
21 tribes. But, first, of course, we don't believe that there
22 was adequate, there were adequate steps taken to secure
23 that input. But even if there were not, there certainly
24 are archeological excavation and other techniques available
25 to try to perform a survey. A survey does not exist.

1 One moment, please.

2 ADMIN. LAW JUDGE YOUNG: I'm trying to connect
3 your arguments to what the application does say.

4 MR. LODGE: Where in the application are you
5 looking, please?

6 ADMIN. LAW JUDGE YOUNG: In the demographics
7 section. I think there are specific sections listed in
8 NMC's response.

9 I guess what I'd like for you to address is, I
10 think what you're focusing on is the second paragraph of
11 the basis of your --

12 MR. LODGE: Correct.

13 ADMIN. LAW JUDGE YOUNG: -- of your contention.
14 And as I said before, you haven't alleged a failure to
15 address. You've alleged an inadequacy to address these
16 things. And nothing, although as I said before, you're
17 raising serious issues, nothing stands out as raising a
18 problem about the application that would seem to bring it,
19 obviously, anyway, into what we have jurisdiction to
20 address here. In a specific enough way that I can get a
21 handle on what you're challenging.

22 So if you could help me in that regard, rather
23 than sort of general statements, which I think we would
24 agree are of concern. It's not a situation where you're
25 alleging a failure. You're alleging inadequacy.

1 MR. LODGE: Correct.

2 ADMIN. LAW JUDGE YOUNG: And so I look at your
3 contention and I look at the application, and nothing jumps
4 out at me that says here's an issue that we have
5 jurisdiction to address. You've made general statements
6 which concern serious matters, but it needs to be, it needs
7 to raise a material dispute about something that's either
8 in the application or that you're alleging is not in the
9 application. And you're not alleging a failure here.

10 MR. LODGE: I wonder if the panel would indulge
11 us with what I think might be one final five minute
12 interval to organize our thoughts.

13 ADMIN. LAW JUDGE YOUNG: Okay. Five minutes.

14 MR. LODGE: Thank you.

15 ADMIN. LAW JUDGE YOUNG: Off the record.

16 (Off the record.)

17 ADMIN. LAW JUDGE YOUNG: On the record.

18 MR. LODGE: We all come to depend on the
19 Internet and when it fails us, it's a horrific failing we
20 think. As of August 8, 2005 our information from the ADAMS
21 Library, if you will, online showed only three letters
22 having gone out to Native tribes. And, of course, we had
23 to file and we were relying as best we could on public
24 domain information.

25 If, indeed, we haven't verified this, but

1 certainly I'm not going to contest that a total of 11
2 Native tribes were contacted. However, the record so far
3 as we understand it, and I guess what I'm saying is there
4 may have been delays in inputting documents that may have
5 been months old into the system. But the application
6 contains no evidence of any responses from any of the
7 tribes. And we look upon that, and maybe it was an
8 unfortunate choice of words. It may not be a deficiency.
9 It may be a failing that we are talking about here.

10 At page 2-48 in the application, pardon me, 46,
11 that echo chamber affect I referenced is sort of played
12 out. There's a recounting of historic and archeological
13 resources that talks of various historic resources in Van
14 Buren County, none of which are denoted as being Native
15 American, either by their name or by any other descriptive
16 information. Which of course underscores our point that
17 there's never been a comprehensive site survey. Because we
18 believe that there's some likelihood, maybe a very
19 significant likelihood, that there will be resources.

20 The utility relies on a 1972 Department of the
21 Interior Federal government assertions that they see
22 nothing of great historical consequence on the site. This,
23 of course, predates, and this 33 year old information
24 predates the Federal legislation respecting Native burial
25 site protections. And as we've indicated, our own

1 communications with contemporaneous, or contemporary
2 communications with the state historic preservation office
3 in 2005 indicate that that office has had quite minimal
4 inclusion in this consultative process.

5 And, of course, as I've previously stated,
6 burial sites are of great significance culturally to Native
7 tribes. This is, as the panel's already suggested,
8 potentially a very serious issue.

9 ADMIN. LAW JUDGE YOUNG: So, am I understanding
10 you correctly, I may well not be. Your argument seems to
11 be focusing on, and sort of limiting the portion of your
12 contention that you're putting forward at this time, to the
13 failure to contact and identify communities that might be
14 overlooked; namely, the Indian tribes. Is that the,
15 because it sounds as though, you haven't really made any
16 argument about the employees which, as I said before, would
17 seem to be an employment discrimination related claim that
18 we don't have jurisdiction over.

19 The severe accident reference in the third
20 paragraph --

21 MR. LODGE: No. We are not abandoning that
22 particular portion.

23 ADMIN. LAW JUDGE YOUNG: Okay.

24 MR. LODGE: The third paragraph. We do believe
25 that, if there were, I think that the experience from the

1 New Orleans debacle suggests that when poor people are
2 driven from their places of habitation they perhaps have
3 less of a tendency to be able to return to them.

4 And we believe that, similarly, if there were a
5 major radiation release from Palisades, that migrant worker
6 populations and settled out migrant populations may be
7 disproportionately affected insofar as they would not, for
8 one reason or another, be in a position or circumstance to
9 return to the Palisades area. And that would have a
10 significant affect, of course, on the agricultural
11 enterprises in this region, which are significant economic
12 activity.

13 ADMIN. LAW JUDGE BARATTA: The problem comes,
14 though, that how do you tie this into the aging question.

15 ADMIN. LAW JUDGE YOUNG: Well, the
16 environmental, the site specific environmental issues.
17 And, I guess associated with that, what's the authority for
18 our jurisdiction to be, to look at it under the
19 environmental portion of the proceeding. In other words,
20 the 5153 and Appendix B listing of generic and site
21 specific issues.

22 I guess the allegation that a severe accident
23 would have disparate impact, it sort of seems to me to be a
24 rather general allegation. How would you have NMC or the
25 NRC address that? With regard to the Indian tribes, you're

1 saying that a more complete survey should've been done.

2 MR. LODGE: Right. There's a certain
3 interrelationship between this contention and the
4 contention on embrittlement. We believe that if there were
5 a severe accident as a result of the unresolved and undealt
6 with embrittlement problems, that it would have
7 disproportionate impact.

8 ADMIN. LAW JUDGE YOUNG: Well, assuming that
9 the portion of severe accidents that are admissible in this
10 type of proceeding are SAMA's --

11 MR. LODGE: Right.

12 ADMIN. LAW JUDGE YOUNG: -- what mitigation,
13 severe accident mitigation alternative. What mitigation
14 alternative is at issue here?

15 MR. LODGE: To make the safety improvements
16 that we believe are clearly indicated within the
17 embrittlement contention, as well as dealing with the dry
18 cask storage issues.

19 Those issues, incidently, include the promise
20 that never accomplished unloading of cask number four,
21 which the utility had promised to unload in 1994 I believe
22 and never did.

23 ADMIN. LAW JUDGE YOUNG: Well, now, you don't
24 mention the casks here, do you?

25 MR. LODGE: No.

1 ADMIN. LAW JUDGE BARATTA: You do mention the
2 embrittlement I think someplace. Yes.

3 ADMIN. LAW JUDGE YOUNG: Anything further on
4 this one?

5 MR. LODGE: No.

6 ADMIN. LAW JUDGE YOUNG: Okay. Mr. Lewis?

7 MR. LEWIS: Yes. A number of points, Your
8 Honor.

9 First, we don't believe that the assertion that
10 there was a need for a comprehensive survey or that there
11 were unidentified archeological resources was in the scope
12 of the original contention. Therefore, this is an area
13 where we think that their reply is attempted to essentially
14 rewrite it and refocus it of an environmental -- make
15 contention into something else.

16 ADMIN. LAW JUDGE YOUNG: Well, I might agree
17 with you on the site survey. There's no mention of that.

18 But talking about how many tribes were
19 contacted could be taken to imply not identifying --

20 MR. LEWIS: I think it just is that, their
21 assertions that there wasn't enough contacts. And that's
22 the only issue that I see raised in the original petition,
23 that there haven't been sufficient communication. I don't
24 see any indication that there was unidentified resources or
25 a need for a comprehensive survey, and so I think that's a

1 brand new assertion that's simply beyond the scope of the
2 original contention.

3 I would say that I think that the new
4 contention is speculation based on speculation.

5 ADMIN. LAW JUDGE YOUNG: You mean the reply
6 information?

7 MR. LEWIS: Yes. The assertion that there
8 needs to be a survey. The Petitioner has just asserted
9 that our sole basis was a Department of Interior
10 consultation set in 1972. And, in fact, the application
11 indicates not only a consultation with the Department of
12 Interior, but also with the state historic preservation
13 officer at that time, in connection with the original
14 construction of the plant. And then further consultations
15 in 1979, as well as using an ecological survey to be
16 piggyback, just to see if there were any resources seen at
17 that time, also.

18 And, further, we've made it, the real
19 consultation is done by the Agency, not by the applicant.
20 The obligation to consult with this historic site, the
21 state historic preservation officer, is NRC obligation.
22 But to be proactive before we submitted our application, we
23 also contacted the state historic preservation officer to
24 see if there were concerns.

25 We have, in fact, addressed those concerns in

1 the letter of act. Is there, I think, unidentified. We
2 went through the consultation process that was done in the
3 past. We identified that, in fact, there is no land
4 disturbing activities proposed in the proposed action.
5 And, therefore, there should be no impact on anything in
6 the future. In addition, we discussed the controls that
7 are in place. So that is, if there is a significant new
8 disturbance of previously undisturbed land, the proper
9 environmental review of consultations would be performed.
10 None of that is disputed, therefore there's no basis to
11 suggest that there would be an impact.

12 Further, if this is still an environmental
13 justice contention, and it's hard to make the relation, the
14 showing that the interveners have to make is that there's a
15 significantly high added verse to disproportionate impact.
16 It has to be a high impact and there's been no showing
17 whatsoever that this is a significant environmental impact.

18 Finally, I would say that, you know, this is
19 raised generally as somehow culturally significant to
20 tribes, but that's the vaguest of allegations. I mean
21 there is no specific identification of a real minority
22 population that would be highly impacted by the continued
23 operation of this plant.

24 ADMIN. LAW JUDGE YOUNG: Thank you. Ms. Uttal?

25 MS. UTTAL: Staff agrees with what Mr. Lewis

1 has argued. In fact, I just want to add that we did
2 contact 11 tribes. I have a list of who we contacted. And
3 the obligation is upon the staff to make further contact.
4 And in the course of doing the review for the environmental
5 EIS, those letters were sent and contact has been made
6 pursuant to our obligations.

7 ADMIN. LAW JUDGE YOUNG: Anything further, Mr.
8 Lodge?

9 MR. LODGE: We wonder if there's any proof of
10 receipt of those letters and by whom. But our larger
11 response is that we believe the contention as worded as of
12 August 8 certainly encompasses the discussions that we've
13 had, as well as the matters that we've touched upon.

14 I'd like to make the point that with a number
15 of these Native tribes, there are actually treaty
16 arrangements in existence. And, in effect, the NRC in
17 contact with them is not just discharging some regulatory
18 requirement. They are making a government to government
19 type of communication. Perhaps to a much smaller and
20 weaker governmental structure, but there's, the obligation
21 is a strongly legally grounded one.

22 ADMIN. LAW JUDGE YOUNG: Okay. Are you saying
23 that there are more than 11 tribes that should've been
24 contacted?

25 MR. LODGE: No. No.

1 ADMIN. LAW JUDGE YOUNG: Well, if you're not,
2 then where would, I mean you're saying there should be
3 proof of receipt. But what specific harm, disproportionate
4 harm, would you be alleging? You're saying that they
5 haven't contacted enough, but you don't know of any others.
6 And I don't know how much longer we need to spend on this,
7 but is there anything else you can say before we conclude
8 for today?

9 MR. LODGE: Even the mere participation in a
10 process such as we have been engaged in, the petitioning
11 and contention filing and litigation up to this point, is
12 something that is unimaginably burdensome on a very poor
13 tribal organization. And we believe that the record has to
14 show considerably more than it does insofar as addressing
15 the environmental justice concern insofar as Natives are
16 concerned.

17 ADMIN. LAW JUDGE YOUNG: Well, let me ask you.
18 Did you contact any of the Indian tribes and see whether
19 there were any specific concerns that they would've wanted
20 you to raise on their behalf? There are quite a number of
21 organizations that got together.

22 MR. LODGE: We also performed a, NEARS, I
23 should say, performed a mailing to all the tribes, but
24 Kevin Camps tells me that he had specific discussion with
25 Mike Tenenbaum of the Gun Lake Tribe. Mike is the

1 environmental director for the tribe. They did express
2 concerns about burial sites potentially being on the
3 Palisades site. He could not specify exactly where, but
4 believed that the likelihood was strong.

5 ADMIN. LAW JUDGE YOUNG: Anything further?

6 MR. LODGE: No.

7 ADMIN. LAW JUDGE YOUNG: From anyone else?

8 (No response.)

9 ADMIN. LAW JUDGE YOUNG: Well, we've enjoyed
10 being here with you this day-and-a-half. And we will be
11 issuing our rulings as soon as possible.

12 Are there any other matters that we need to
13 address before we adjourn today?

14 MS. UTTAL: Judge, you asked the staff for a
15 list of other --

16 ADMIN. LAW JUDGE YOUNG: Right.

17 MS. UTTAL: -- regulatory requirements, that
18 are just licensees have to show compliance with
19 regulatory --

20 ADMIN. LAW JUDGE YOUNG: Right.

21 MS. UTTAL: -- requirements to meet part 54.

22 And the only one, other than the 50.61, we could come up
23 with in this time is portions of 50.55(a) having to do with
24 the concrete liner plate.

25 ADMIN. LAW JUDGE YOUNG: Could you get any

1 others to us by Tuesday?

2 MS. UTTAL: If we can find them, yes.

3 ADMIN. LAW JUDGE YOUNG: Okay. All right. We
4 will adjourn and everyone have a good trip back to wherever
5 you're going. Off the record.

6 (Whereupon, at 11:33 a.m. on Friday,
7 November 4, 2005, the meeting was
8 adjourned.)

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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: Palisades Nuclear Generating
Station

Oral Argument

Docket Number: 50-255-LR

ASLBP No.: 05-842-03-LR

Location: South Haven, MI

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.



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