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

2 (1:37 p.m.)

3 ADMIN. JUDGE KARLIN: This is Alex Karlin,
4 Chairman of the Atomic Safety and Licensing Board.
5 This matter, which is the Entergy Nuclear Vermont
6 Yankee, LLC, and Energy Nuclear Operations, Inc.,
7 application for an uprate for their Vermont Yankee
8 Nuclear Power Station, and it is ASLBP Number
9 04832020LA is the proceeding.

10 First, I would introduce -- I want
11 everyone to introduce themselves on this call. Here,
12 in Rockville, we have with us Karen Valloch,
13 administrative assistant, Judge Baratta sitting here
14 with me, as well as two of our lawyers, law clerks
15 Marcia Carpentier and Jonathan Rund.

16 Out in Tucson, Judge Rubenstein will
17 introduce himself.

18 ADMIN. JUDGE RUBENSTEIN: This is Judge
19 Rubenstein.

20 ADMIN. JUDGE KARLIN: Okay, good. So the
21 board is here, and if we could ask each person to go
22 around the room, as it were, and introduce themselves
23 and all the people who are with them on the call,
24 starting with, let's say, Entergy, please.

25 MR. SILBERG: This is Jay Silberg at

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1 Pillsbury Winthrop Shaw Pittman, counsel for Entergy.

2 MR. TRAVIESO-DIAZ: I am Matias Travieso-
3 Diaz, also counsel for Entergy.

4 ADMIN. JUDGE KARLIN: Anyone else from
5 Entergy on the line?

6 MR. SILBERG: We have several of the
7 technical people and company people calling in from
8 Vermont. I don't anticipate they would be
9 participating on the call, but they are on the call,
10 and if you would identify yourselves.

11 MR. DEVINCENTIS: This is Jim DeVincentis,
12 the licensing manager at Vermont Yankee.

13 MR. McELWEE: And Dave McElwee, senior
14 liaison engineer.

15 MR. NICHOLS: This is Craig Nichols,
16 project manager for the power uprate.

17 ADMIN. JUDGE KARLIN: Great, and welcome.

18 MR. NICHOLS: Thank you, sir.

19 ADMIN. JUDGE KARLIN: Anyone else?

20 MR. SILBERG: I believe that's it for the
21 applicants.

22 ADMIN. JUDGE KARLIN: Okay. Mr. Turk,
23 perhaps you could introduce the staff people?

24 MR. TURK: Thank you, Your Honor. This is
25 Sherwin Turk. With me is Steven Hamrich, and our

1 project manager, Richard Ennis.

2 ADMIN. JUDGE KARLIN: Welcome. Welcome.
3 Let's see, the state, I guess?

4 MS. HOFMANN: Sarah Hofmann for the
5 Department of Public Service in the State of Vermont.
6 With me here at this site is William Sherman, the
7 State Nuclear Engineer.

8 ADMIN. JUDGE KARLIN: Okay.

9 MR. ROISMAN: And this is Anthony Roisman
10 at a remote site.

11 ADMIN. JUDGE KARLIN: Okay, Mr. Roisman.
12 And Mr. Shadis? Are you and Dr. Hopenfeld on the
13 line?

14 MR. SHADIS: That's correct, Your Honor.
15 Raymond Shadis for New England Coalition, and with me
16 on a separate line is Dr. Joram Hopenfeld.

17 MR. HOPENFELD: Yes, this is Joram
18 Hopenfeld. I'm here in Rockville, Maryland.

19 ADMIN. JUDGE KARLIN: Welcome, welcome.
20 Now, is anyone else on the line?

21 (No answer.)

22 ADMIN. JUDGE KARLIN: Okay, then we won't
23 do our normal spiel about members of the public
24 welcome to listen in. I appreciate everyone
25 participating in this call on such short notice. I

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1 think it should be a relatively short call, and we
2 really wanted to react to and talk briefly about the
3 proposed notice of withdrawal, I guess, is how you
4 captioned it and request for dismissal of the
5 contention.

6 That's really the only topic subject we
7 have in mind for this impromptu call. As the court
8 reporter has indicated, could each of you, as you
9 speak, and we will try to do the same, introduce or
10 say our names before we start.

11 We -- the board has talked briefly amongst
12 ourselves about the notice of withdrawal by the state,
13 and Entergy, I guess, participating in the agreement
14 in MOU. We welcome the staff -- I'm sorry.

15 The commission encourages settlement of
16 matters, and so we welcome this proposed settlement in
17 that vein, but we have some regulations we have to
18 grapple with and deal with, and those include, as I
19 believe Ms. Carpentier has already mentioned to each
20 of you when we were convening this call, 10 CFR 2.338,
21 and that includes in it a provision that deals with
22 the form of settlements, certain regulations that are
23 -- certain content requirements for settlements, and
24 certain approval requirements for settlement.

25 We note that the document in question is

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1 not entitled a settlement agreement but does, indeed,
2 appear to be an agreement, a quid pro quo, between two
3 of the parties, part of which would then involve the
4 withdrawal or dismissal, with prejudice, of the
5 state's claims.

6 Did -- may I ask of the state and of
7 Entergy, were you aware of 2.338 when you drafted
8 this, and if so, how -- what is your thinking about
9 that?

10 MR. SILBERG: This is Mr. Silberg. Yes,
11 we are aware of 2.338, although we were not, to my
12 knowledge, notified about the board's interest in that
13 before this call, but that provision has two parts.

14 First is the introductory paragraph, which
15 is, as you said, the commission's encouragement of
16 settlement of parties. The second part, and in fact
17 the specifics of that provision, really go to
18 alternative dispute resolution, and the opportunity
19 for the parties to invite the participation on some or
20 all issues, a settlement of some or all issues by the
21 commission or a presiding officer.

22 We are not operating under that mechanism.
23 We have not -- we are fortunately not in need of
24 assistance by the presiding officer of the board or
25 the commission in order to reach a settlement, and

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1 therefore, we did not request participation or seek to
2 comply with those provisions, which we do not see as
3 applicable to a settlement privately reached by the
4 parties.

5 Those provisions, I think, rightly
6 encourage the board and the parties to cooperate where
7 necessary to reach a settlement, but in this case, the
8 parties were able to reach that settlement and reach
9 that agreement without participation of the board.

10 ADMIN. JUDGE KARLIN: And so, you are
11 thinking that the requirement of 2.338(h), as to
12 content of settlement agreements -- well, why don't we
13 start with (g). (G) says form. A settlement must be
14 in the form of -- and then it goes on to address that,
15 and then it spoke to the content of the settlement
16 agreement. You are suggesting it's not applicable
17 because this settlement was reached without the
18 assistance of a third-party neutral?

19 MR. SILBERG: That's correct, and
20 certainly, we have had, over the years, many cases in
21 which the parties have reached settlements without the
22 intercession of the board. There have been other
23 cases where the board did participate, but certainly
24 in those cases where the parties reached settlement on
25 their own, these types of provisions were not thought

1 to be necessary, and boards have dismissed contentions
2 and, in some cases where the intervener was the only
3 party, have dismissed proceedings without compliance
4 with these particular formalities, which is our --
5 item, do not believe are applicable.

6 ADMIN. JUDGE KARLIN: Okay.

7 ADMIN. JUDGE BARATTA: And your beliefs --
8 this is Judge Baratta. Your belief is based upon the
9 fact that it really wasn't done under an ADR type of
10 format?

11 MR. SILBERG: That's correct.

12 ADMIN. JUDGE KARLIN: Okay. Any other
13 questions? Judge Rubenstein? What I thought we would
14 do is ask them, the state, to address this issue, and
15 then the staff, and Mr. Shadis.

16 MS. HOFMANN: Thank you very much. This
17 is Sarah Hofmann from the State of Vermont. I have to
18 regret, Your Honor, that I was not aware of 2.338, and
19 the -- your law clerk did not tell us that that's what
20 it was about.

21 However, I believe when Mr. Roisman, when
22 we were trying to figure it out, we were looking
23 through it and noticed this section. We can somewhat
24 agree with Mr. Silberg's painting of the situation,
25 and we think this is not so much a settlement -- by

1 the state that we don't need to continue to pursue
2 this claim rather than a quid pro quo for dropping a
3 contention.

4 We don't think this compromises safety.
5 We are at the point of just believing that through all
6 the processes that are mentioned at the beginning of
7 our notice of withdrawal, and I believe also in the
8 MOU that we are willing to -- we believe that our
9 contention has been resolved.

10 ADMIN. JUDGE KARLIN: Okay. Mr. Turk,
11 from the staff?

12 MR. TURK: Thank you, Your Honor --

13 ADMIN. JUDGE KARLIN: I -- to add. I
14 understand this is all short notice, but the reason
15 for having this call was to avoid, I think one of the
16 reasons, to avoid having people have to file briefs
17 and motions and objections or concerns. I degenerate,
18 if we could just talk about this quickly, we might
19 resolve some of the -- begin to resolve some of the
20 potential questions. So go ahead, Mr. Turk.

21 MR. TURK: Thank you, Your Honor. I look
22 at the regulation in the same manner as Mr. Silberg.
23 As I see it, section 2.338 provides one mechanism by
24 which parties may reach settlement and the party may
25 tender its withdrawal from the proceeding.

1 It does not exclude the possibility that
2 a party would withdraw unilaterally or that it might
3 reach its own agreement with another party and thereby
4 decide to withdraw from the proceeding. The
5 regulation appears to apply only if parties seek the
6 intervention of the licensing board, and then it
7 provides the procedural steps and the content of
8 agreements, which would then -- you would then look
9 for if the board was involved or if a settlement judge
10 was involved.

11 So it's non-exclusive. It's not being
12 followed here. It does not apply.

13 ADMIN. JUDGE KARLIN: Mr. Shadis, do you
14 have any thoughts on this?

15 MR. SHADIS: Yes, I do, Your Honor, thank
16 you. We've been scrambling to look at the regulation
17 and at applicable case law, and we're looking at a
18 Sequoyah Fuels case. Basically, it states that it's
19 appropriate when a party requests to withdraw with a
20 petition pursuant to settlement that the licensing
21 board review the settlement to determine whether it is
22 in the public interest.

23 There is a series of cases in which that
24 point is made that there is a responsibility here for
25 the ASLB to be reviewing this to determine whether or

1 not the settlement is in the public interest. And I
2 might also point out here that, at one point, New
3 England Coalition attempted to adopt this particular
4 contention. However, our attempt was untimely.

5 Nonetheless, we believe that we
6 established overlapping areas of interest with respect
7 to this particular contention. So, you know, we're
8 sharply focused now on the question of whether or not
9 the technical issues, safety issues, raised in the
10 state's contention are satisfied by the MOU, and we
11 believe that that is something that the board needs to
12 formally consider and potentially with the assistance
13 of the parties.

14 ADMIN. JUDGE KARLIN: Okay. Thank you
15 very much. Well, I can't speak for the full board.
16 You know, we haven't fought this thing through or
17 analyzed it. Certainly, it hasn't been briefed, but
18 I think I have some concerns about the positions I
19 just heard articulated.

20 First, as I think all of you would note --
21 know, this regulation is almost promulgated in January
22 of 2004. The statement of considerations at that time
23 indicated it was essentially the same as several prior
24 regs, which require approvals of the board in (1) and
25 in (g)-type proceedings.

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1 But the requirements of (g) and (h) did
2 not appear in any prior regulatory requirement that I
3 am aware of, and they are new, and they do impose both
4 form and content of settlement agreement requirements
5 that may be -- that appear to be new.

6 So, I'm not sure what the prior case law
7 will tell us about the interpretation of these
8 regulations. Second, I'm not sure there is case
9 support or whether the case support is convincing for
10 the proposition that this reg only deals with
11 settlements that are achieved by virtue of the
12 assistance of a third-party neutral.

13 I don't really see that as any part of the
14 literal language of the regulatory provisions we are
15 looking at -- (g), (h), and (I). Approval of
16 settlement agreement. You know, I think we have an
17 obligation to approve settlement agreements, whatever
18 they are, whether it's achieved via a third-party
19 neutral or not.

20 Is this a settlement agreement? This
21 issue may need to be confronted as well. You may call
22 it a withdrawal, you may call it Limburger cheese, but
23 whatever you call it, we need to look at, I guess,
24 what it really is. And it appears to be -- or seems --
25 - for us to look at an agreement between the parties.

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1 An agreement where there is a quid pro quo going on.

2 Party A is giving up something or giving
3 something, and Party B is going the same. If the
4 state just came in here and filed a unilateral
5 withdrawal with no attachment of an agreement to it
6 and no further conditions, we might not have much to
7 say about it. But you submit a proposed agreement to
8 us, and it looks a lot like a settlement agreement to
9 us, whether you call it that way or not.

10 And I wonder if we should be in the
11 business of allowing the label placed at the top of a
12 pleading to determine what our duties are under
13 2.338(g), (h), and (I). I think we should not let the
14 label control what we are obliged to do or not obliged
15 to do under these regs.

16 So, I think we will have to just sort of
17 take this under advisement or, you know, I mean --
18 hold on a second. We're going to go on mute here for
19 a moment. Hold on if you would.

20 MR. TURK: Your Honor, after you come
21 back, I'd like the chance to address your comments, if
22 possible. This is Sherwin Turk.

23 MR. SILBERG: As would I. This is Mr.
24 Silberg.

25 ADMIN. JUDGE KARLIN: Well, why don't we

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1 go ahead and hear from you now. Mr. Turk, let's start
2 with you.

3 MR. TURK: Thank you. I would note, first
4 of all, that it has been the policy of the commission,
5 and it is very well enunciated that the commission
6 encourages settlement.

7 ADMIN. JUDGE KARLIN: So let me just add,
8 I do also note that Louisiana Energy Services, there
9 is a model for you all to study. Perhaps you are
10 aware of it. Of June, July of 2005, where the party,
11 the state, and LES came in with a settlement agreement
12 that was achieved I might note not through the aid of
13 any third-party neutral. It was just something they
14 worked out together in private -- hey, that's great.
15 We encourage that.

16 And they came and requested approval of
17 the settlement agreement by the board. The staff
18 objected for several concerns. The parties worked it
19 out further, and a settlement agreement was submitted
20 and approved, and I believe that was pursuant to this
21 regulation, and so that may be our first model under
22 this regulation. So go ahead, Mr. Turk.

23 MR. TURK: Thank you. I appreciate your
24 giving us the reference for the case. We had not had
25 a chance to research the issue before the phone call.

1 But it is the commission's policy to encourage
2 settlement. The -- in past practice, before the
3 current regulation was adopted in 2004, it was
4 established commission precedent that agreements would
5 be approved subject to any conditions that the board
6 would deem to be appropriate.

7 So the board did have the opportunity
8 previously to determine that there was some condition
9 that might apply to withdraw of a contention. For
10 instance, if the settlement agreement required certain
11 things which put a burden on the staff, the staff
12 might want to object, and perhaps the board would
13 accept the settlement agreement subject to the
14 provision that the staff is not obliged to do certain
15 things as the other parties had agreed that the staff
16 would do without the staff's approval.

17 But to suggest that now, under the new
18 rule, it should be more difficult to withdraw
19 contentions and for a party to withdraw from a
20 proceeding than previously, would be contrary to what
21 the statement's consideration states for the adoption
22 of this rule, in which the commission says,
23 specifically, that the commission intends no change in
24 the bases for accepting a settlement under the new
25 rule. And that's in the statement of consideration

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1 that Your Honor quoted back on January 14, 2004.

2 ADMIN. JUDGE KARLIN: Let me interject
3 with that. They say that, but 2.338(h) is a change.

4 MR. TURK: But then if you look at
5 2.338(a), as in Alpha, you will see that it refers to
6 the further sections as the procedures adopted when
7 this section of the rules is being utilized. But that
8 section of the rules is not the only means by which
9 settlements can be agreed to by parties.

10 As I said before, it is a non-explicit
11 mechanism.

12 ADMIN. JUDGE KARLIN: Right, I just think
13 that (g) says a settlement must be in the form of a
14 proposed settlement agreement. It doesn't say a
15 settlement reached by a third-party neutral. (H) says
16 a settlement agreement must contain the following.
17 Now, that's new.

18 That's not something that you are just
19 reading from the statement of consideration. When it
20 says this is the same as the old rules, it's not the
21 same. That statement of consideration is flat out
22 incorrect because this is a new provision, and we are
23 -- we didn't invent this. We didn't write this. You
24 know, all I'm doing is reading the regs. So, I --
25 continue.

1 MR. TURK: Thank you, Your Honor, I really
2 don't have anything to add except that if you go in
3 that direction, then you would be making litigation
4 the goal of the commission rather than settlement, and
5 that would be very contrary to the whole thrust of the
6 commission's current practice of encouraging
7 settlement.

8 ADMIN. JUDGE KARLIN: I didn't make this
9 regulation. The commission did. And the commission
10 just says there are four provisions that need to be in
11 the settlement agreement. If this is a settlement
12 agreement, I think those four provisions need to be in
13 there. Now, it might be more profitable to talk about
14 is there any objection to anybody putting the four
15 provisions in there.

16 It could be a very simple matter. If you
17 look at what they did back in LES, it was a very
18 simple matter.

19 MR. TURK: Your statement, Your Honor, is
20 an interpretation of the rule that I don't agree with.
21 The rule does not state that all settlements must
22 contain these terminologies. The rule is, as I see it
23 to be read in conjunction with parts (a) and (b) of
24 the rule, which talk about settlement conducted
25 pursuant to this regulation.

1 If settlement is achieved outside of this
2 regulation, then there is no reason to have to go down
3 to the fine details of subsection (h) that you would
4 apparently think apply to any settlement that has ever
5 reached -- in an NRC proceeding, and I don't think
6 that was ever the commission's intent.

7 ADMIN. JUDGE KARLIN: So the board has no
8 authority or responsibility under Sequoyah or anything
9 else. Let's say a settlement is reached outside of
10 the context of ADR, the third-party neutral. Then it
11 can be any form, any substance, and the board has no
12 approval authority? Because this reg does not deal
13 with that. Is that what you are suggesting?

14 MR. TURK: I'm suggesting that when a
15 party files a motion to withdraw from the proceeding,
16 it is up to the boards to approve that withdraw.

17 ADMIN. JUDGE KARLIN: If they wanted to
18 withdraw, they could withdraw, but they withdrew with
19 a long -- it was an agreement. It wasn't just we
20 withdraw, we're out of here. They said they wanted to
21 file with this board a settlement agreement. They
22 called it an MOU, but it was a settlement agreement,
23 and why in the world did they do that? They could
24 just withdraw.

25 MR. TURK: I believe this was in your

1 prerogative, Your Honor, to look at the settlement
2 agreement and to determine whether or not to approve
3 the withdrawal that is based upon that settlement
4 agreement.

5 You may, as in past practice, decide that
6 it is appropriate to insert some condition or some
7 requirement or to deny the request, but to suggest
8 that you have to follow the procedures specified in
9 2.338 is incorrect.

10 ADMIN. JUDGE KARLIN: All right. Mr.
11 Silberg, I guess?

12 MR. SILBERG: Yes, first, I respectfully
13 submit, Your Honor, that I think you are
14 misinterpreting the regulation. If you look at the
15 statement of considerations, and specifically at page
16 2217 of the federal register of January 14, where it
17 gives the cross-reference between the old sections and
18 the new sections, it specifically says, with respect
19 to section 2.338, that this is, "new section on
20 alternative dispute resolution (ADR)."

21 And I think if you look at the detailed
22 description of that section, at pages 2209 and ten,
23 and I unfortunately didn't have the opportunity to
24 review that in detail before this call, I think you
25 will see that this is an ADR section.

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1 Commission has gone to some lengths to
2 encourage the use of ADR, and I think they have been
3 one of the lead agencies in the federal government in
4 that connection, but I think you are vastly expanding
5 the intent of the commission if you say that the ADR
6 provisions, which the commission has now adopted, must
7 necessarily apply to every notice of withdrawal and
8 every agreement between parties.

9 I think that's just flat incorrect. The
10 party certainly has a right to withdraw. I don't
11 think anything the commission or the board or the
12 staff or we can stand in the way of a party that
13 wishes to withdraw.

14 The fact that, for whatever reasons, and
15 I think the state can, if they wish, explain, they
16 chose to attach to the notice of withdrawal the
17 memorandum of understanding does not, in any way,
18 change the nature of the actions that they have taken,
19 and that which they have requested of you.

20 It is still a notice that they are
21 withdrawing and a request that the board dismiss the
22 contentions. I think there is adequate commission
23 case law already applied in this -- I'm sorry, already
24 applied in many cases on the dismissal of contentions
25 on the withdrawal of a party.

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1 I don't think that's implicated at all in
2 section 2.338. What I think 2.338 does is a specific
3 way of applying the ADR provisions, and that says --
4 that's included right in the introductory paragraph of
5 2.338. So I think the board is, frankly, applying
6 procedures intended for one purpose to a totally
7 different purpose, and I would think that would be
8 inconsistent with the commission's encouragement of
9 the parties to settle, to reach agreements amongst
10 themselves and would be, as Mr. Turk said, I think
11 counter-productive.

12 ADMIN. JUDGE KARLIN: Okay. Any questions
13 from the board at this point before we take a break?

14 MS. HOFMANN: Judge Karlin, this is Sarah
15 Hofmann from the Department of Public Service. This
16 may be naive, but, you know, we did file it as a
17 package. We believe it was a resolution of our
18 concerns that the board would want to see. However,
19 if it is creating a problem, we could withdraw the
20 pleading and then just file a very simple withdrawal
21 from the case.

22 ADMIN. JUDGE KARLIN: My initial take is
23 that that would not -- that might be -- that would
24 might be different and more acceptable, but I haven't
25 talked with my fellow board members. I mean, a simple

1 withdrawal is one thing, but a withdrawal with an
2 agreement attached to it is a -- is something
3 different. It sounds like a settlement to me. It
4 smells like a settlement, it walks like a settlement.

5 If you are asking us to look at that or
6 put that in the record in some way, it sounds like a
7 settlement to me. If you withdraw with nothing more,
8 nothing less, I'm not sure we have a whole lot we can
9 say about it.

10 ADMIN. JUDGE BARATTA: This is Judge
11 Baratta. I think the quandary that we are in is that
12 these are somewhat new regulations, and it does appear
13 that despite what the -- considerations refer to, if
14 you go back and you look at the fact that there was no
15 comparable section in the old part to, per se, that
16 dealt with ADR.

17 Also, correct me if I'm wrong, but I
18 thought there was a government-wide effort to adopt
19 ADR as alternative to complex adjudication and that
20 this was the agency's response to this, so these are
21 somewhat new, and we are trying to feel our way. It's
22 not -- we don't want to be leave you with the
23 impression that we don't encourage this.

24 I think we do, and I think our -- to the
25 recent cases anyway has been -- really procedural

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1 questions as to how we are proceeding, and what is the
2 requirement that applies, so we are looking at some
3 thoughts from that.

4 Of course, we do have Mr. Shadis'
5 statement that we do have to be attentive to what is
6 the public interest, of course, and making sure that
7 whatever we do is consistent with that as well, so,
8 with that, I just, you know, want to make sure nobody
9 is left with the impression that we are trying to
10 force this -- for something more.

11 We're looking for thoughts on does it
12 apply, and if so, how do we proceed, so.

13 MR. TURK: Judge Baratta, this is Sherwin
14 Turk. If I might just say one more thing in response
15 to your comment. I've been litigating for 25 years.
16 Personally, I hate litigation. It's what I do, but I
17 think it's very wasteful of resources and time, and I
18 believe in alternative resolution of disputes. But
19 ADR is not intended to preclude parties from settling
20 litigation on their own.

21 The whole concept of ADR is that where
22 parties are deeply embroiled in litigation and there
23 is no other means to settle that appears reasonable or
24 to resolve the dispute in some efficient manner, then
25 parties are encouraged to go to this alternative means

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1 of resolution, which is ADR.

2 It does not substitute for parties who
3 find that they are able to agree on resolving
4 litigation on their own -- it does not preclude them
5 from doing that. It simply provides a mechanism where
6 parties are unable to do that on their own.

7 So if you were to say no, we must follow
8 ADR here, then you would really be defying the whole
9 purpose of ADR, which is to encourage resolution of
10 disputes. Where parties have done that voluntarily on
11 their own, I don't see any basis to say, no, you can't
12 do that, you must be forced into the structures of
13 this regulation that would impose ADR upon you.

14 ADMIN. JUDGE KARLIN: Well, this is Alex
15 Karlin. You know, as a former mediator in
16 environmental disputes, I will not be outdone in my
17 great praise for ADR and its value. I also, having
18 litigated some cases, think that settlement, with or
19 without ADR is to be encouraged, and that is flat out,
20 obviously, what our regulation says in its very first
21 sentence.

22 Fair and reasonable settlement is
23 encouraged. The beginning of this reg deals with
24 settlement of issues. It talks about settlement. It
25 doesn't get into ADR until a bit later, and nor does

1 any of the literal wording of the latter part of this
2 regulation, where it does say that the board has to
3 approve settlements and that settlements have to have
4 certain form and certain content -- I mean, we are
5 certainly not trying to discourage settlements, but I
6 don't see that that is triggered only when the
7 settlement is ADR.

8 The beginning of the reg deals with
9 settlements, the end of the reg deals with
10 settlements. It doesn't say settlements achieved via
11 ADR. So, we have, you know, I mean, we didn't write
12 this reg, and I'm not even sure why it was -- these
13 provisions were added. The statement of consideration
14 gives us no indicia of why these content requirements
15 were added, but there they are.

16 We are -- you know, and maybe Ms. Hofmann
17 has suggested a possible solution, which is simply a
18 unilateral, clean, one-sentence virtually withdrawal.
19 Another solution is to put those four -- let me ask.
20 Is there something, Ms. Hofmann, about those four
21 content requirements that would be problematic that
22 you think of?

23 MS. HOFMANN: No, we actually don't
24 believe they would be problematic. We actually did
25 not intend -- it's my own inexperience practicing in

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1 front of you to invoke 2.338.

2 ADMIN. JUDGE KARLIN: No, I didn't think
3 anybody really intended to invoke it or not invoke it,
4 it just was -- might have been overlooked in some
5 sense, and --

6 MS. HOFMANN: Unfortunately, it was
7 overlooked on my part, but we would be willing to
8 withdraw it.

9 ADMIN. JUDGE KARLIN: Take a look at --
10 what I would urge is for you all to just take a look
11 at it.

12 MS. HOFMANN: Oh, we looked at (h) now,
13 since we've been on this phone call. Obviously, we
14 would also need the people who settled with that to
15 agree to that. We believe that doing the (h)
16 provision is possible, but we did not intend that the
17 ASLB had to approve our settlement. It was attached
18 for a lot of public information reasons.

19 MR. SILBERG: Judge Karlin, this is Mr.
20 Silberg. I assume what you were saying before is that
21 if the state decided to refile a notice that did not
22 attach the MOU that that would obviate your belief
23 that we need to include the four items in (h). Am I
24 reading that correctly?

25 ADMIN. JUDGE KARLIN: That's my individual

1 impression, yes, because it would not be a -- it would
2 not be an agreement reflecting a quid pro quo that was
3 filed with this board on the record.

4 MR. SILBERG: Okay. I would, though,
5 encourage the board, if you haven't, and I suspect you
6 have, but during the call, I have been looking in more
7 detail at the fairly detailed statement of
8 considerations that starts on page 2209 and continues
9 over on page 2210 of the federal register, and that is
10 really a very good explanation of why the commission
11 did what it did in section 228.

12 It was implementing ADR, and it explained,
13 you know, that this is all part of the ADR process
14 that the NRC has been working on, and I think if you
15 read 2238, particularly bearing in mind what the
16 commission has said that is its intent, that these are
17 ADR provisions, and I think that would resolve a lot
18 of your concerns.

19 But it may well be that the easy way out,
20 if the state is willing, is to simply refile the
21 notice of withdrawal and not attach the MOU.

22 ADMIN. JUDGE KARLIN: Okay. We are going
23 to go offline for a moment.

24 MR. SHADIS: Your Honor, I'm sorry to
25 interrupt. This is Ray Shadis. I was hoping to get

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1 an opportunity to comment before the panel took this
2 under consideration.

3 ADMIN. JUDGE KARLIN: We're really not
4 done yet, but we will give you a minute, here, Mr.
5 Shadis. What can you say?

6 MR. SHADIS: Well, only that individual
7 initiatives for settlement appear to us on plain
8 reading here to be encompassed by alternative dispute
9 resolution, that it is part and parcel of it, and if
10 you look at the second paragraph, (a) availability, it
11 reads, "the party shall have an opportunity to submit
12 proposed settlement of some or all issues to the
13 commission and presiding officer."

14 And that presumes that they've done some
15 work on their own in advance. Further, if the state
16 is now permitted to simply file a withdrawal without
17 the attached MOU, then it is a withdrawal under
18 subterfuge. There is a dishonesty build in because we
19 do know that their withdrawal is based on a memorandum
20 of understanding for settlement.

21 MR. ROISMAN: Mr. Chairman, this is Mr.
22 Roisman. Would you indulge me for one minute, because
23 I'm concerned about a couple of things that have
24 happened, and I would like to speak to them, if that's
25 okay.

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1 ADMIN. JUDGE KARLIN: Well, Mr. Roisman,
2 in light of your ancient lineage --

3 (Laughter.)

4 MR. ROISMAN: Right, and having never
5 participated in any settlement in a nuclear power case
6 ever in my life -- two things, really. Number one,
7 Sequoyah. Sequoyah is a case that involves an
8 applicant withdrawing an application. That is covered
9 by a special provision of the regulations, 2.207(a),
10 and there are plenty of good reasons why and there are
11 a whole bunch of rules that are laid out there as to
12 how an applicant can withdraw an application, whether
13 the commission still has to reach decisions on the
14 issues that were raised by the application, et cetera,
15 et cetera.

16 It has no bearing here. The cases that do
17 have bearing are those cases where there is a
18 withdrawal by someone other than the applicant, and it
19 seems to me, and I would note you were one of the
20 members of the board in the matter of inspection
21 services, which is at 60 NRC 663, and decided in 2004,
22 and the withdrawal of a request for a hearing through
23 the authorized representative of the party who had
24 requested that was granted apparently without any
25 procedure going on.

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1 And, in this case, there have already been
2 settlements. They didn't involve the state, they
3 involved NEC and the applicant, or the staff, with
4 regard to scope of contentions. There were some
5 issues that they worked out. In fact, you encouraged
6 them to do that. See if you can work these things
7 out.

8 No one suggested that 2.338 would be
9 applicable, and I think the reason for that is that
10 the real motivation behind all of those provisions in
11 2.338 is that if somebody were to reach a settlement
12 with the applicant or the staff in which somebody was
13 agreeing to do something either not required by the
14 law, on the one hand, or prohibited by the law, on the
15 other, the commission would obviously have an interest
16 in making sure that something wasn't going on that
17 violated its obligations to protect the public health
18 and safety.

19 In this case, as the board can see from
20 looking at the MOU, there is no such thing going on.
21 The applicant has not agreed to do anything that the
22 law doesn't -- that prohibits it from doing or refuse
23 to do something that the law requires it to do. And
24 I think that what we have is a situation in which the
25 state felt that it was important because the board

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1 would be interested in knowing what's gone on.

2 And if this other approach, that is the
3 approach that we withdraw it and then just file the
4 withdraw, which, by the way, involved absolutely no
5 dishonesty, and I'm disappointed to hear Mr. Shadis
6 use that term with regard to the state, it could
7 hardly be called dishonest since it is already well
8 known just a matter of meeting procedure requirement.

9 But that process would discourage parties
10 from letting the board know something that they may,
11 at a minimum, be curious about. Gee, what went on?

12 ADMIN. JUDGE KARLIN: Okay. I think
13 that's very valuable. We will now take a ten-minute
14 break, if you all will stay on the line, we are going
15 to try to consult with Judge Rubenstein. We will call
16 your cell phone. Okay? Thank you, everyone.

17 (Whereupon, the matter went off the record
18 briefly.)

19 ADMIN. JUDGE KARLIN: Okay, great, thank
20 you for your indulgence in giving us a few minutes to
21 talk about this within the board. This has all come
22 up rather quick -- quickly, and we don't have firm
23 conclusions for anyone today, and you may have been
24 hit sort of without a lot of warning on some of the
25 questions we have here.

1 And my board members will, I'm sure --
2 colleagues will correct me immediately if I mistake
3 this, but I think what we would like you to do is we
4 are going to give you seven days from today to submit
5 to us either a revised submission, I will call it, or
6 briefs that would address for us some questions we
7 have -- well, the questions we've asked today.

8 The briefs or the questions we have I
9 think would include, what I have, is I would like you
10 to address is this a settlement agreement. Is what
11 was submitted, the notice of withdrawal with the
12 attached MOU, a settlement agreement? In general.
13 And then, is it subject to 2.338 or not, particularly
14 our question would be are settlement agreements that
15 are not achieved -- or that are achieved without the
16 assistance of a third-party neutral subject to the
17 provisions of 2.338?

18 We would like you to flat out address that
19 question, yes or no. And if the answer is no, that
20 the settlements agreements achieved without the
21 assistance of a third-party neutral are not subject to
22 any of the provisions of 2.338, then does this board
23 or any board have authority over approving or
24 disapproving such settlement agreements, and if so,
25 what is the source of that authority?

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1 Those are questions I am concerned with,
2 and I think that the alternate of submitting a
3 proposal to us would be a settlement agreement or an
4 agreement that would incorporate the provisions of
5 2.338(h).

6 ADMIN. JUDGE BARATTA: This would not be
7 precedent-setting.

8 ADMIN. JUDGE KARLIN: We do not have to
9 set a precedent, but, you know, that -- yes, right.
10 What -- our contemplation is not in seven days to
11 receive a unilateral, one-line withdrawal in lieu of
12 all of the above. We want this issue addressed one
13 way or the other.

14 And if you assert, in your briefs as you
15 have said today, that none of this regulation should
16 apply, it may very well be that at that point, we will
17 be able to deal with this, and maybe a one-liner will
18 suffice. But this board is not convinced that a one-
19 liner will suffice, and so we are not -- we are
20 abjuring you not -- that is not what we are expecting
21 or requiring.

22 This will allow us all to think about it
23 a little bit more and to put it out and writing, and
24 let's limit these to ten pages. It might not even
25 approach that length.

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1 ADMIN. JUDGE BARATTA: This is Judge
2 Baratta. I really want to reiterate that the idea of
3 a one-liner -- I just don't think that that is in the
4 spirit of what we are trying to do with these hearing
5 processes, which is basically provide an opportunity
6 for the public to participate and also to appraise --
7 on what basis the decision or the outcome which would
8 occur.

9 So, it would be better if we could somehow
10 find a vehicle that would allow us to get this
11 agreement on the record, officially and in such a
12 manner that is consistent with past practice, so I'd
13 really encourage people to take this seriously. And
14 we're looking for guidance on this.

15 ADMIN. JUDGE KARLIN: Yes.

16 ADMIN. JUDGE BARATTA: This is a new part,
17 too, and we're the first application of it or one of
18 the first applications.

19 ADMIN. JUDGE KARLIN: Absolutely. We are
20 glad to see the settlement, proposed settlement, here,
21 you know. Without addressing the merits of it in any
22 way, shape, or form, it's great that the parties have
23 been working on this kind of thing, and we want to
24 encourage that.

25 We just feel some compunction to look at

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1 the regs and to see how they apply, and they are new,
2 and we don't -- I'm relatively new in this
3 administrative proceeding, ASLBP, less than two years,
4 so we're all just trying to do it right, and
5 hopefully, it may very well be that the content
6 specifications are of no never mind to anybody at this
7 point, or they may be important to you all and may be
8 a reason to -- but it would be good to have this
9 sorted out, and that's what we're going to try to do.

10 MR. ROISMAN: Mr. Chairman, this is Mr.
11 Roisman. I just want to make sure I understand the
12 options. In -- behind door A is a brief in which the
13 parties who choose that route provide to you what
14 their interpretation is of what the document that is
15 now on file with the board is and whether it does or
16 does not need to meet the requirements of 2.338 and
17 particularly subpart (h).

18 And behind door two is file a new
19 document, essentially withdraw the current one, and
20 comply with the requirements of 2.338(h) and don't
21 brief anything?

22 ADMIN. JUDGE BARATTA: This is Judge
23 Baratta. I think in this -- behind door A, there was
24 a third point dealing with if this is not covered
25 under 2.338(h) or 2.338, where is the authority for

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1 the board to act on this in either the new part or
2 prior practice.

3 ADMIN. JUDGE KARLIN: Right.

4 MR. ROISMAN: Okay. All right.

5 ADMIN. JUDGE KARLIN: And I think you have
6 characterized it generally correct. I would add this
7 caveat, I guess, is that the first question is whether
8 what's been filed is a settlement agreement.

9 MR. ROISMAN: Correct.

10 ADMIN. JUDGE KARLIN: You may very well
11 say no. That's not the end of what I would like to
12 have. If you say no, then none of the later
13 discussions are presumably relevant. You just
14 dismissed them. But I want you to say what if it is
15 a settlement agreement?

16 Assuming it is a settlement agreement, is
17 it subject to 2.338, or more particularly, are
18 settlement agreements that are not achieved through
19 the assistance of an ADR or third-party neutral not
20 subject to 338. I mean, does 338 just deal with ones
21 that are achieved through ADR.

22 MR. ROISMAN: But all that analysis is
23 only if the two parties, Entergy and the state, don't
24 choose instead to, without waiving any positions they
25 may have on it, if they choose instead to just file

1 something that complies with (h), then providing
2 analysis is not required?

3 ADMIN. JUDGE KARLIN: Right.

4 MR. ROISMAN: Right.

5 ADMIN. JUDGE BARATTA: And that, of
6 course, would not result into order -- we just talked
7 about preference.

8 ADMIN. JUDGE KARLIN: What would happen,
9 presumably, is there would be an order, and it would
10 just simply say -- it would probably say approved.
11 Settlement agreement or notice of withdrawal, whatever
12 it is, approved, but you know, we are not going to
13 establish any precedent that we would say, oh, you
14 know -- we are not going to address that one way or
15 the other.

16 MR. SILBERG: Mr. Silberg. The one point
17 I would like to leave with you is -- and this is an
18 analogy to something that we talked about in a
19 proceeding with respect to a license, where we said
20 what we are receiving is a license to operate, not a
21 sentence to operate.

22 And I think with respect to an
23 intervention, when an intervener joins a proceeding,
24 it's a ULA license to participate and not a sentence
25 to participate, and I don't want this board to go away

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1 thinking that, somehow, it can compel interveners, or
2 applicants for that matter, to participate when they
3 choose, for whatever reason, to withdraw from a
4 proceeding.

5 ADMIN. JUDGE KARLIN: I agree. We have
6 some question about what our sanctions might be to
7 force someone -- I mean, yes, we understand that. My
8 point is, there's a reg. There's a reg that says
9 settlement agreements must contain the following four
10 elements.

11 We didn't write this reg. We don't even
12 know why it's there. If you can help us figure it
13 out, that would be great.

14 ADMIN. JUDGE BARATTA: We're trying to
15 find the procedure under which you withdraw in this
16 case, and what is the applicable process to accomplish
17 what, you know, you want to do, assuming it is --

18 MS. HOFMANN: Well, from the state's
19 perspective, we are having some resource difficulties.
20 It felt like it was very hard to get into this case,
21 and now it feels like it's very hard to get out.

22 (Laughter.)

23 MS. HOFMANN: That said --

24 ADMIN. JUDGE KARLIN: Well, would you
25 prefer to submit your initial testimony on May 17?

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1 MS. HOFMANN: Thank you, Judge Karlin, but
2 we'll pass on that.

3 (Laughter.)

4 MS. HOFMANN: What I would suggest is --
5 so you really don't like the idea of just withdrawing
6 the pleading and leaving this issue to another day
7 when you have a truly contentious settlement of some
8 kind?

9 ADMIN. JUDGE KARLIN: Yes, correct. We
10 would either like to see -- you know, the two options,
11 the two doors. Please brief us and help us think this
12 issue through. If you want to stand whatever ground
13 you have here, or if you feel that it's a no, never
14 mind, anyway, then we would suggest that you just come
15 up with an agreement that incorporates three to four
16 provisions that, you know, that -- you might look at
17 the LES settlement agreement of July of 2005.

18 You see it seems to be relatively
19 innocuous, and it does seem to be required, or at
20 least some of us think that. So seven days from
21 today, please submit those. Either some sort of
22 option one or option two.

23 And I -- and if you want to discuss it
24 amongst yourselves, we would encourage that as well,
25 because ultimately, we can just sort this out in

1 relatively short order.

2 MR. TURK: Just for clarification, Your
3 Honor, this is Sherwin Turk. I assume you are
4 allowing all parties to file in response to your
5 questions, not just the people who have -- the parties
6 who have signed the settlement agreement?

7 ADMIN. JUDGE KARLIN: That's right, Mr.
8 Turk, although I suspect that if the state and Entergy
9 say that they are just going to, you know, incorporate
10 the two or three provisions in there with no
11 precedent, then hopefully, they would tell you that so
12 you would be -- avoid the necessity of filing briefs.

13 MR. TURK: I thank you. And by the way,
14 when I look at the provisions you mentioned in
15 2.338(h), they seem fairly innocuous, fairly simple to
16 agree upon, and perhaps that is just the easy way to
17 find ourselves out of the box.

18 ADMIN. JUDGE KARLIN: Yes. Perhaps so.
19 I hope so.

20 MR. TURK: I certainly am not a party to
21 the agreement, and I would leave it to those parties
22 to decide whether that is something that they could
23 agree upon. I would ask that just as a fallback
24 position --

25 (Whereupon, Mr. Turk's microphone cut

1 out.)

2 ADMIN. JUDGE KARLIN: Yes, hello?

3 MR. ROISMAN: I think he fell way back.

4 (Laughter.)

5 ADMIN. JUDGE KARLIN: Yes.

6 MR. ROISMAN: He may have been kicked
7 under the table.

8 (Laughter.)

9 MR. SHADIS: Your Honor, this is Ray
10 Shadis.

11 ADMIN. JUDGE KARLIN: Well, wait a second,
12 Mr. Shadis, let's see if Mr. Turk -- Marcia, could you
13 go try to call him and let him know he seems to have
14 fallen off the call?

15 MS. CARPENTIER: Okay. Check one more
16 time to make sure he's off?

17 ADMIN. JUDGE KARLIN: Mr. Turk?

18 (No response.)

19 ADMIN. JUDGE KARLIN: Okay, yes, please
20 give him a call. So we are going to try to get him
21 back online. Go ahead, Mr. Shadis.

22 MR. SHADIS: I'm just a little confused as
23 to what role New England Coalition might play in
24 working through the issues here, and I am wondering if
25 it might be acceptable if we, rather than to file a

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1 brief, if we were to file a simple memorandum with our
2 take on what the, you know, applicable case law an
3 regulation might be.

4 ADMIN. JUDGE KARLIN: I think that's
5 probably all right. We're not concerned about the
6 title of what it would be. I mean --

7 MR. SHADIS: Sure.

8 ADMIN. JUDGE KARLIN: -- quite frankly, if
9 you don't want to file anything, I don't think you are
10 obliged to.

11 MR. SILBERG: Well, it seems to me -- this
12 is Mr. Silberg. If, and I don't know whether this
13 will be the case, if Entergy and the state simply file
14 a document that includes the four items, then there
15 are no briefs, and at that point, I think -- well, I
16 guess any seat can file anything it would like, the
17 other parties presumably wouldn't file anything, and
18 the board wouldn't be looking at it because it
19 wouldn't need to.

20 ADMIN. JUDGE KARLIN: I think that's
21 right. So I would --

22 MR. TURK: Hello?

23 ADMIN. JUDGE KARLIN: Mr. Turk?

24 MR. TURK: Now I know what it feels like
25 to have someone's microphone turned off when they are

1 mid-sentence.

2 ADMIN. JUDGE KARLIN: Oh, okay, good.
3 You're --

4 MR. TURK: Yes, I apologize. My phone
5 became disconnected.

6 ADMIN. JUDGE KARLIN: All right, fine. I
7 know you were speaking, but let us finish up with --
8 I was just --

9 MR. TURK: The only thought I had, Your
10 Honor, was that I hope that you will allow those two
11 parties, if they determine that the other way they
12 would like to proceed is to risk filing a simple
13 withdrawal and then leaving it to your discretion
14 whether to grant the motion for withdrawal or not that
15 that's the one option that they would have, if they
16 choose that.

17 MR. SHADIS: I think the board told us
18 that they didn't like that option.

19 MR. TURK: I know that.

20 ADMIN. JUDGE KARLIN: Yes, and no. I
21 think that is not one of the options that we are
22 putting out on the table. Meanwhile, while you were
23 gone, Mr. Silberg was just speaking that if the
24 Entergy and state find it within their hearts to
25 adjust their agreement to incorporate the four

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1 provisions that seem to be required by or may be
2 required by 2.338(h), then that moots out and makes
3 it, I think, irrelevant and unnecessary for briefs to
4 be filed by the staff or Mr. Shadis for NEC, and so I
5 would ask -- I am answering, I think, your question,
6 Mr. Silberg, in the affirmative and am then going to
7 ask you and the state to notify everyone else, or the
8 staff and Mr. Shadis, six days from now. Could you do
9 that?

10 MR. TURK: Okay, we will try to do that
11 before.

12 ADMIN. JUDGE KARLIN: Yes, I mean, if you
13 have got some -- if you've got to work it out, and you
14 think you've got it worked out, please let them know
15 as soon as possible, and, you know, no later than,
16 presumably, the prior day, and hopefully earlier than
17 that, if that is your conceptual agreement.

18 MR. SHADIS: Your Honor, this is Ray
19 Shadis, and we have this concern. The issues raised
20 in the state's contention have significant safety
21 implications, and our reading of this is that the
22 board, if this settlement is submitted for the board's
23 approval, must review it with those public interests.

24 In other words, the safety implications,
25 in mind. And we've -- at the onset of this

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1 conference, we heard the other parties in a sense
2 brush away those safety considerations, or at least to
3 indicate that they had, you know, been dealt with in
4 the settlement.

5 ADMIN. JUDGE KARLIN: No, I don't think
6 so. I don't -- my colleagues will correct me, but I
7 think our take is right now we are focusing on,
8 essentially, a procedural issue, not the substantive
9 validity -- you know, whether or not the settlement is
10 in the public interest or not.

11 MR. SHADIS: I see.

12 ADMIN. JUDGE KARLIN: That's a different
13 issue. We are troubled, simply, by the fact or what
14 initially troubled me was this regulatory requirement
15 that seems to say that you've got to have these four
16 clauses in a settlement, and if they are willing to
17 put those four clauses in the settlement agreement or
18 whatever they want to call it, agreement, essentially,
19 that's great.

20 That'll moot out the procedural questions
21 and concerns we have. That doesn't mean anything
22 good, bad, or indifferent in terms of any substantive
23 approval or disapproval of the agreement.

24 MR. SHADIS: I understand, Your Honor.
25 Thank you. But I guess what I am wondering is if

1 there will be any opportunity for New England
2 Coalition to address the quality of the memorandum of
3 understanding or the settlements.

4 ADMIN. JUDGE RUBENSTEIN: Excuse me, this
5 is Judge Rubenstein. On February 16 of last year, we
6 promulgated a memorandum in order dealing with the
7 subject of your ability to incorporate the DPS
8 contentions, and I think it speaks with great clarity,
9 and I refer you to it, and I suggest you read it.

10 ADMIN. JUDGE KARLIN: Yes, I think that
11 does address one issue. All we are looking for now is
12 seven days from now, either they submit a revised
13 settlement agreement or agreement, whatever they want
14 to call it, with those four clauses, or everybody
15 submits briefs on the issues we have identified.

16 At that point, we go on as if it was any
17 other settlement agreement that was submitted for
18 approval or not.

19 MS. HOFMANN: Judge Karlin, this is Sarah
20 Hofmann from the state, and I need to get off this
21 phone call because I have to go to another meeting,
22 but Mr. Roisman will maintain the state's position.

23 ADMIN. JUDGE KARLIN: I think we're done.
24 I think that is all we need to cover at this point.
25 I appreciate your -- everyone's participation on this

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1 very short notice. The call has gone longer than we
2 expected. I apologize for that.

3 MS. HOFMANN: Thank you very much.

4 ADMIN. JUDGE KARLIN: Thank you for that,
5 and we will look forward to submissions in a week, or
6 seven days from today.

7 (Whereupon, at 2:55 p.m., the foregoing
8 matter was 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: Entergy Nuclear Vermont
Yankee, LLC and Entergy
Nuclear Operations, Inc.

Pre-hearing Conference

Docket Number: 50-271-OLA and

ASLBP No.04-832-02-OLA

Location: Via teleconference

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



Lindsey Barnes
Official Reporter
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